Democratic Representation and Non-Majoritarian Actors in Constitutional Orders

ORIGINAL ARTICLE

Democratic representation and non-majoritarian actors in constitutional orders: a systemic analysis

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Abstract

A systemic analysis of constitutional democratic orders can shed light on two important aspects of political representation (PR): first, the complexity of PR as a plural endeavour involving various actors that perform different activities within a common framework; and second, the diachronic dimension of such an endeavour, which takes shape over time. The article elucidates both aspects with a focus on adjudicative bodies, to point out their representative status and potential as part of a systemic continuum that unfolds over time.

1 INTRODUCTION

The democratic legitimacy of non-majoritarian institutions – such as regulatory agencies, central banks, public service providers, bodies of oversight, and adjudicative bodies – is controversial.[1] These entities can be defined as institutional bodies that '(a) possess and exercise some specialized public authority, separate from that of other institutions, but (b) are neither directly elected nor directly managed by the people, nor directly managed by elected officials'.[2] They are non-majoritarian in the sense that 'the legitimacy of their power is not based on a majority of the votes of the electorate, either directly or via a representative body'.[3] Ultimately, they 'derive their legitimacy from expert decision-making at arm's length of elected politicians'.[4]

These entities retain significant political power and play a crucial role at a transnational level. Nonetheless, they are not subject to direct political authorization and/or control, which raises four significant concerns about their democratic legitimacy in terms of political representativeness.

First, non-majoritarian entities do not have an electoral input legitimation, but rather rely on a 'throughput legitimacy' that they derive from the 'impartiality, legality and technical soundness of their operations'.[5]

Second, and relatedly, these entities are not responsive to majorities and yet can counteract their political will, which raises a 'counter-majoritarian' difficulty. This is the widely debated difficulty that arises when courts contradict and/or nullify the decisions of political majorities through the judicial review of the laws.[6]

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[1] For a deep and comprehensive overview of the concerns raised by non-majoritarian entities with regard to political representation, see M. Bovens and T. Schillemans, 'Non-Majoritarian Institutions and Representation' in *The Oxford Handbook of Political Representation in Liberal Democracies*, eds R. Rohrschneider and J. Thomassen (2020) 510. On normative concerns about political representation beyond the state, see R. Bellamy, 'Globalization and Representative Democracy: Normative Challenges' in *The Oxford Handbook of Political Representation in Liberal Democracies*, id., 655.

[2] M. Thatcher and A. S. Sweet, 'Theory and Practice of Delegation to Non-Majoritarian Institutions' (2002) 25 *West European Politics* 1, at 2.

[3] Bovens and Schillemans, op. cit., n. 1, p. 513.

[4] Id., pp. 513–514, drawing on F. Vibert, *The Rise of the Unelected: Democracy and the New Separation of Powers* (2007).

[5] Bovens and Schillemans, id., p. 513. On majority and a comparative analysis of the different terms in which it serves as a standard of legitimacy in constitutional settings, see C. Caruso, 'Majority' in *Max Planck Encyclopedia of Comparative Constitutional Law*, eds R. Grote et al. (2022) 1.

[6] A. M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (1986).

Third, non-majoritarian entities usually lack 'descriptive' representativeness. They are composed of experts who do not share the same educational level and socio-cultural background as the 'general population'.

Fourth, these entities lack political accountability through mechanisms of re-election that citizens could use to remove non-majoritarian officials who cannot adequately account for their actions.

For all of these reasons, non-majoritarian entities do not comply with the traditional paradigm of political representation (PR). In this paradigm, PR is based on a 'responsive' relation between representatives and representees, in which the former 'act for' the latter. As delegates, representatives are directed by representees. As trustees, they exercise their own judgment, being accountable to representatives but not subject to their instructions.[7] The basis of the responsive relation is electoral, since representatives are both electorally appointed and electorally accountable. There are, however, other forms of PR, based on different types of relations between representatives and representees and lacking an electoral basis. More precisely, PR is essentially a relation between representatives and representees in which the former do not 'act for' the latter, but rather 'stand for' them.[8] This relation can be descriptive, when representatives 'resemble' representees, or indicative, when representatives serve as 'indicators', taking the actions or decisions that representees would take if they were in the position to do so.[9] In both cases, the representative relation may lack an electoral basis; representatives can be selected on the basis of their characteristics or merits and can be accountable in non-electoral terms, through mechanisms of reason giving.[10] Furthermore, PR can be based on *plural* relations,[11] rather than dyadic relations between representative bodies and representees. According to the systemic understanding that is

[7] H. F. Pitkin, *The Concept of Representation* (1967); P. Pettit, 'Varieties of Public Representation' in *Representation and Popular Rule*, eds I. Shapiro et al. (2008) 61.
[8] Pitkin, id.
[9] P. Pettit, 'Representation, Responsive and Indicative' (2010) 17 *Constellations* 426.
[10] J. Mansbridge, 'A Selection Model of Political Representation' (2009) 17 *J. of Political Philosophy* 369.
[11] F. Rey, 'The Representative System' (2020) *Critical Rev. of International Social and Political Philosophy* 1.

currently emerging from contemporary theoretical work on PR,[12] some forms of representation depend on others, in the sense that some bodies are representative only insofar as they interact with other representative bodies of a certain kind. More precisely, non-electoral bodies can be representative only insofar as they are part of a system in which they interact with electoral bodies.[13]

This article builds on this view to inquire into the representative status and potential of non-majoritarian entities, with a focus on adjudicative bodies. The contribution is twofold. On the one hand, the article sheds light on three different strands of systemic analysis in contemporary constitutional and political theory to highlight that, though disconnected, they share a theoretical perspective on constitutional democratic orders and PR. Second, the article makes use of this perspective to account for the ways in which non-majoritarian entities can contribute to establishing and maintaining a system of representation.

2 THE SYSTEMIC VIEW

Different strands in contemporary constitutional and political theory promote a systemic analysis of constitutional democratic regimes.

One strand has emerged within deliberative democratic theory.[14] Two other strands have emerged within constitutional theory, one promoting the view of constitutional orders as 'systems of systems'[15] and the other drawing on Luhmann's systems theory.[16] Though disconnected, these

[12] J. W. Kuyper, 'Systemic Representation: Democracy, Deliberation, and Nonelectoral Representatives' (2016) 110 *The Am. Political Science Rev.* 308; id.
[13] P. Pettit, 'Meritocratic Representation' in *The East Asian Challenge for Democracy: Political Meritocracy in Comparative Perspective*, eds D. A. Bell and C. Li (2013) 138.
[14] J. Parkinson, 'Deliberative Systems' in *The Oxford Handbook of Deliberative Democracy*, eds A. Bächtiger et al. (2018) 432; D. Owen and G. Smith, 'Survey Article: Deliberation, Democracy, and the Systemic Turn' (2015) *J. of Political Philosophy* 213; J. Parkinson and J. Mansbridge (eds) *Deliberative Systems: Deliberative Democracy at the Large Scale* (2012).
[15] A. Vermeule, *The System of the Constitution* (2011).
[16] Based on N. Luhmann, 'Verfassung als evolutionäre Errungenschaft' (1991) 9 *Rechtshistorisches J.* 176, according to the reading of C. Thornhill, 'Niklas Luhmann and the Sociology of the Constitution' (2010) 10 *J. of Classical Sociology* 315.

different strands share a theoretical attitude towards the analysis of constitutional democratic orders. They shift the focus of such analysis from single institutional and non-institutional actors and activities to the broader complex that they form through those interactions. Let me first outline these different strands of systemic analysis and then build on the perspective that they share.

According to the first, deliberative, strand of systemic analysis, we should account for constitutional democratic regimes as systems of deliberation – that is, complex sets of entities sharing the deliberative work and transmitting to each other aspects of deliberative capacity, understood as the capacity to accommodate an 'authentic, inclusive, and consequential' deliberation.[17] These entities are majoritarian electoral institutions as well as non-majoritarian non-electoral institutions, political networks, foundations, schools, and so on.[18] Each of them contributes to democratic deliberation in different ways, and to a different extent, by exercising its own deliberative capacity and by borrowing aspects of this capacity from, and transmitting aspects to, other entities. In fact, the deliberative system integrates a public space[19] and an empowered space, in which courts, 'legislatures, political parties, cabinets, intergovernmental organizations, and so forth' make binding collective decisions.[20] Among these spaces, there are mechanisms of transmission through which the various entities that operate in each space can exchange aspects of deliberative capacity.[21] Such transmission is essentially a dynamic of cross-fertilization through which the different components of the system can mutually compensate for possible deliberative deficiencies.[22] The result is an overall deliberative capacity that exceeds, and differs from, the capacities of single entities and their mere aggregation.

This systemic capacity is the basis on which deliberative accounts build standards of democratic legitimacy. More precisely, such legitimacy depends on the deliberative capacity of

[17] J. Dryzek, 'Democratization as Deliberative Capacity Building' (2009) 42 *Comparative Political Studies* 1379, at 1399.
[18] Kuyper, op. cit., n. 12.
[19] Dryzek, op. cit., n. 17, p. 1379, p. 1385.
[20] Kuyper, op. cit., n. 12, p. 308.
[21] Id., p. 312.
[22] Id.; Rey, op. cit., n. 11.

the *whole* set of entities that, together, form a system of deliberation. The application of these standards, therefore, goes beyond agent-level evaluations centred on single entities to engage in system-level evaluations addressing the whole set of entities that interact in a constitutional democratic order.[23] The objective of system-level evaluations is to capture the overall deliberative capacity resulting from the interactions among the various components of the order, taking into due account the position and role of each component *in relation to* the other components.[24] In systemic terms, for instance, an inquiry into the legitimacy of the legislature's actions does not concern only the deliberative capacity of the legislature and the terms in which it exercises such capacity; this inquiry must also address the position and role of the legislature in relation to courts performing the judicial review of the laws as well as in relation to the executive entrusted with the task of applying those laws, and so on.[25] Through their interactions, these entities produce an overall deliberative capacity that may fulfil systemic, holistic standards of legitimacy that each entity, on its own, may not.

A second strand of systemic analysis is emerging in constitutional theory, focused on the constitutional framework of democratic orders. More specifically, this strand accounts for the constitutional order as a 'system of systems',[26] with its own properties that 'emerge', and differ, from the properties of the different sub-systems. In the same terms, these sub-systems do not have the same properties and features of the constitutional system to which they belong.[27] Indeed, that system unifies the level at which the single components operate, in their own terms, and the level at which those components integrate with each other into a broader practice with its own features.[28] The distinction between these levels is helpful in descriptive terms since it allows us to

[23] Rey distinguishes between a macro-level (that is, the systemic level at which 'representation is practiced by the system') and an individual level (that is, the agent level at which the single 'representatives represent by acting for their constituents'): Rey, id., p. 11.
[24] Owen and Smith argue that this analysis should be complemented by the analysis of systemic virtues and flaws to appreciate how they affect the different components of the system: Owen and Smith, op cit., n. 14, p. 213.
[25] D. Kyritsis, *Where Our Protection Lies: Separation of Powers and Constitutional Review* (2017); C. Valentini, 'Deliberative Constitutionalism and Judicial Review' (2022) 47 *Revus* 1.
[26] Vermeule, op. cit., n. 15, p. 3.
[27] Id., p. 5.
[28] For this distinction, see Rey, op. cit., n. 11.

distinguish between the constitutional order and its components. In normative terms, then, it allows us to appreciate that the legitimacy of constitutional orders may depend on conditions that differ from conditions of legitimacy applying to the single components of that order.[29]

Finally, a third systemic strand is emerging within societal constitutionalism, building on Luhmann's systems theory. According to this strand, constitutional orders integrate the social process of production of fundamental structures that both shape the law and are shaped by it with the legal process of production of secondary norms that organize those social structures. From this perspective, the idea of structural coupling plays a central role.[30] It captures and defines the integration among systems in terms that do not involve the assimilation of one system to another, but their interconnection. In this vision, the constitution is the tool that allows a society to 'describe and objectivize' the structural couplings among systems.[31] More precisely, the constitution is the apparatus of norms that takes shape at the intersection between the political system and the legal system, to allow 'the terms of articulation' between them 'to consolidate and simplify' and therefore to take from each other 'descriptions of their functions through which they can organize their internal communications'.[32] In these terms, the constitution contributes to legitimizing political power by allowing it to represent itself as subject to law and therefore as justified and deserving of obedience. With regards to PR, this societal strand points to a principle of self-contestation that requires political regimes – also transnational political regimes – to be 'responsive to external irritations on the one side and to institutionalize sites of internal dissent on the other'.[33] This principle generalizes, and replaces, the principle of PR.

Indeed, the sociological strand provides us with important resources with which to address the interactions among legal and political systems in the transnational dimension, as systems

[29] Vermeule, op. cit., n. 15, p. 4.
[30] A. Golia and G. Teubner, 'Societal Constitutionalism: Background, Theory, Debates' (2021) 15 *ICL J.* 357.
[31] Thornhill, op. cit., n. 16, p. 326.
[32] Id.
[33] G. Teubner, 'Quod Omnes Tangit: Transnational Constitutions without Democracy?' (2018) 45 *J. of Law and Society* S5, at S7.

characterized by features that differ from the features that those systems display at a national level.[34] In fact, in the transnational dimension there are entities – both private and public – that autonomously produce norms and have their own structure, functions, and operational principles. Furthermore, these entities tend to interact one with the other so as to form overarching, more complex, systems. There is therefore a wide and varied spectrum of systems that operate in the transnational dimension, and the structures that bring them together rely on mechanisms of 'functional synthesis' between law and politics that are different from those that operate in the national dimension. Transnationally, *global* functional constitutions are the instruments that can realize that synthesis. As pointed out by Kjaer, they act 'as complex, structural couplings between the legal system and specific functional systems', which operate by legal means as well as by setting up mechanisms aimed at avoiding asymmetries among systems and stabilizing their interactions.[35] This dynamic bears also on democratic politics in the sense that, at a transnational level, non-legal systems can interact with the legal system in appropriate terms if they have *adequate* structures – that is, structures that produce 'functional equivalents to political decision-making in the nation-state form'.[36] In this sense, we should reconceptualize transnational structural couplings between law and politics as couplings that occur between legal structures and non-legal structures with a distinctive political nature that differs from the political nature of national structures. With an emphasis on this distinctive nature, the sociological strand of the systemic view points to a reconceptualization of the grammar of constitutionalism and democratic politics, also with regard to PR. In this respect, it highlights the absence, at a transnational level, of those representative entities and structures that operate at a national level to highlight that, in the transnational dimension, PR takes its own distinctive form. Ultimately, it is a sort of political 'self-representation': a combination of activities – declarations, programmes, actions – by which those

[34] P. F. Kjaer, 'The Concept of the Political in the Concept of Transnational Constitutionalism: A Sociological Perspective' in *After Globalization: New Patterns of Conflict and Their Sociological and Legal Reconstruction*, eds C. Jorges and T. Ralli (2011) 285.
[35] Id., p. 313.
[36] Id., p. 313.

entities and structures offer an image of themselves that becomes binding on them, providing the environment in which they operate with the coordinates to appreciate and address the ways in which they act and interact with legal entities and systems, serving as their counterparts.[37]

The three strands outlined above, albeit in different ways, share a systemic perspective that can provide us with important insights into constitutional democratic regimes. This perspective captures the complexity of such regimes, drawing our attention to the terms in which they integrate different actors and spaces of institutional and non-institutional action. This complexity, then, has a normative bearing; the legitimacy of constitutional democratic orders depends on a systemic fulfilment of complex standards that take into account different factors, which different actors and forms of action can fulfil in different ways and, also, to a different extent. In this latter respect, in fact, the systemic view points to a 'scalar' account of legitimacy, according to which

> the ideal standard of legitimacy is conceived as a scale that can be used to assess the different degrees of legitimacy that real institutions, decisions, or law-making mechanisms have in the real world. Real legitimacy, for those who adopt this view, comes in degrees.[38]

Accordingly, this view does not demand from *each* actor, and *each* form of agency, the complete fulfilment of that ideal; rather, it requires an 'integrated' fulfilment resulting from interactions among various actors, which activate mechanisms of compensation among the different components of a political regime.

[37] Id., pp. 318–319.
[38] J. L. Martí, 'Sources and the Legitimate Authority of International Law: Democratic Legitimacy and the Sources of International Law' in *The Oxford Handbook of the Sources of International Law*, eds S. Besson and J. d'Aspremont (2017) 724, at 734. According to Martí, 'the relevant question is not whether an institution or a source of law is legitimate or illegitimate, but how legitimate it is when compared with others and assessed against the ideal standard of legitimacy. This standard, then, is inherently comparative. It allows us to rank existing institutions as well as counterfactual ones and compare them. The standard is also usually conceived as complex: it is seen to be constituted by different factors or criteria that represent all the things we care about in legitimacy': id., p. 734.

This perspective can offer relevant insights into transnational regimes. First, it sheds light on the significant complexity of such regimes, which bring together a multitude of actors and sites of action across different states. Second, it provides important resources with which to account for the different ways in which the various components of those regimes may contribute to their legitimacy. Third, it sheds light on the 'multiplicity' of PR as a framework that, at a transnational level, may bring together a complex set of public and private, majoritarian and non-majoritarian, legitimate representatives.[39]

3 SYSTEMIC REPRESENTATION

From the systemic perspective outlined so far, I now turn to the insights that it provides into PR and non-majoritarian entities. As pointed out by the deliberative strand, a political regime is representative, and democratically legitimate, if we can appraise it as a system of representation – that is, a system in which various actors and activities exercise and exchange aspects of deliberative capacity so as to form a representative whole.

According to Rey, such a system presents the following features: 'representative pluralism, distribution of representative work and different levels of representation' along with popular authorization[40] through the election or selection of representatives.

The first feature – representative pluralism – concerns the multiplicity of actors that can establish a representative relation with the people, comprising majoritarian and non-majoritarian entities. The second feature – distribution of representative work – relates to the performance of

[39] This is the account propounded by Besson and Martí. As they point out, PR, understood in these terms, 'is multiple in at least two ways: in the specific combination of statist and civil society representatives, on the one hand, and in the combination, on each side, of many levels of representation, among both statist and civil society representatives, on the other. Finally, and accordingly, the MRM [multiple representation model] considers that different kinds of actors may be legitimate in different settings, regarding different issues and with different combinations, and that the requirements imposed on them are necessarily context-sensitive': S. Besson and J. L. Martí, 'Legitimate Actors of International Law-Making: Towards a Theory of International Democratic Representation' (2018) 9 *Jurisprudence* 504, at 507.

[40] Rey, op. cit., n. 11, p. 8. Here, I partially build on previous work, in which I outline a systemic account of judicial review in constitutional democratic orders: Valentini, op. cit., n. 25.

different representative activities by different entities. The third feature – the multi-level structure – concerns the distinction between the two levels at which different entities operate in the system: the agent level, at which single entities perform their own activities, and the system level, at which those entities interact so as to form a complex whole.

In addition to these features, I would like to point out a further feature: diachronicity, related to the temporal dimension of PR. Indeed, the systemic perspective sheds light on the fact that PR is an endeavour that involves different entities acting in different *moments*. These moments set the *stages* of a sequence of activities undertaken by the various entities that, altogether, form a system of representation.

By capturing all of these features, a systemic analysis of PR shifts the focus from individual activities and entities to the legitimacy of the system as a whole.[41] Accordingly, the criteria guiding such an inquiry should be 'systemic, rather than dyadic; deliberative, rather than aggregate; *plural*, rather than singular',[42] and, I would add, diachronic, rather than synchronic.

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First, they should be *systemic* so as to assess the representativeness of actors and activities in light of their position within a political order as well as their relations with other components of that order. Second, they should be deliberatively oriented so as to account for the deliberative capacity displayed, by those actors and activities, in different ways. Third, they should be *plural* so as to combine deliberatively-oriented criteria with electoral criteria. Finally, they should be *diachronic* so as to take into account the fact that some agents are representative also, or only, over time; that is, they are representative insofar as their action follows – or precedes – the activities that other agents undertake at a different time, within a systemic sequence. These criteria are especially relevant for adjudicative bodies. As I note later, such bodies can contribute to a system of representation insofar as their actions are embedded in a sequence of actions, along with the actions performed by majoritarian entities. Typically, their actions follow those of political

[41] J. Mansbridge, 'Clarifying the Concept of Representation' (2011) 105 *Am. Political Science Rev.* 621.
[42] J. Mansbridge, 'Rethinking Representation' (2003) 97 *Am. Political Science Rev.* 515.

bodies, consisting of a review of laws or other institutional actions that those bodies thereafter endorse or, at least, accept.[43]

These criteria allow us to capture and address forms of PR that go beyond the responsive form and yet contribute to the *overall* legitimacy of a political regime. In particular, they enable us to address forms of PR that involve non-majoritarian entities. As I remarked before, these entities are not representative in responsive terms and therefore do not fulfil the same standards of democratic legitimacy that apply to responsive, electoral PR. Yet, they may contribute to setting up a system of representation and therefore fulfil the systemic criteria of legitimacy.[44] Constitutional courts, state administrative agencies, and central banks can be representative actors insofar as they are constitutive elements of such a system, embedded in a network of relations through which they can transmit, and borrow, aspects or degrees of representativeness from other bodies or subjects. They are not representative per se, but only by virtue of the fact that they interact in certain ways with electoral representative institutions.[45] Of course, this perspective on PR should not lead us to disregard the electoral, dyadic relations that single institutional actors establish with representees and their crucial role in a democratic regime. To this end, the other two strands of systemic analysis can provide important insights. The constitutionalist strand brings to light the relevant role that constitutional law can play in this sense. In fact, it draws our attention to how the constitution is a 'system of systems', providing a framework that integrates different sub-systems. This unifying framework structures and organizes the combination of different forms of PR into a representative order, and then integrates this order with others. The societal strand, then, characterizes this crucial role of constitutions and constitutional norms in terms of structural coupling. They are instruments for the integration among sub-systems – an integration through which different orders (social, political, legal) become interconnected without losing their identity.

[43] See Kyritsis, op. cit., n. 25; M. Kumm, 'On the Representativeness of Constitutional Courts: How to Strengthen the Legitimacy of Rights Adjudicating Courts without Undermining Their Independence' in *Judicial Power: How Constitutional Courts Affect Political Transformations*, ed. C. Landfried (2019) 281.
[44] Parkinson and Mansbridge, op. cit., n. 14.
[45] Pettit, op. cit., n. 13; Mansbridge, op. cit., n. 42; Rey, op. cit., n. 11.

4 SYSTEMIC REPRESENTATION AND ADJUDICATIVE BODIES

Among non-majoritarian entities, adjudicative bodies – those 'with responsibility of hearing and often adjudicating' complaints 'raised directly from the public', including judges – play an especially relevant role in transnational constitutional regimes.[46] They retain the power to adjudicate complaints concerning fundamental rights and public interests, and their decisions contribute to setting transnational standards of legal protection for those rights and interests. Nonetheless, I have pointed out that the democratic legitimacy of these bodies is controversial, given that they can review political acts and counteract the will of political majorities, but their representative status is uncertain. On the one hand, the lack of electoral authorization and accountability counts against the appraisal of adjudicative bodies as representative institutions in responsive terms. Furthermore, their representativeness is conceived as potentially conflicting with the impartiality and independence that we expect from them. On the other hand, there are efforts to reconsider these bodies – and courts in particular – as representative institutions. As I noted earlier, these efforts point to a broad understanding of democratic representation as based on multiple relations – among democratic citizens and different institutional actors – and combining responsive representation with other forms of representation.[47]

The systemic view of PR makes a crucial contribution to these efforts. It provides the resources with which to address adjudicative bodies as representative in virtue of their participation in a plural endeavour, along with majoritarian entities. In what follows, I explore this view to account for adjudicative representation as plural and complex. I then argue that, in virtue of these features, adjudicative representation is also diachronic.

[46] Pettit, id., p. 147.
[47] As pointed out by Rey, '[t]he concept of a system of representation helps us to describe plural forms of representation in which representative and non-representative actors share their individual work to build a new representation at the level of the system. It helps us to recognize the crucial roles that non-representative institutions, such as courts, bureaucrats, the media and the public, can play in representation at the macro level': Rey, id., p. 2.

4.1 Plural

According to the systemic view, adjudicative authorities can be part of the system of representation, and contribute to establishing and maintaining such a system, as long as they interact with majoritarian electoral institutions and these interactions contribute to the overall deliberative capacity of the system. In this sense, they are part of a deliberative endeavour that is plural,[48] involving majoritarian and non-majoritarian entities that are representative in different, but complementary, terms.

More precisely, as pointed out by Pettit, adjudicative authorities 'cannot have an independent representative status because they are more or less bound to conform to the dictates of their masters'.[49] They 'inherit' their representative status from majoritarian representatives. The latter stand in a dyadic relation with the people, based on electoral mechanisms of authorization and accountability, whereas adjudicative bodies stand in a representative relation with the people only indirectly, insofar as they interact with majoritarian entities. Through this interaction, they transmit and receive aspects of deliberative capacity in a dynamic of cross-fertilization that allows them to mutually compensate for representative deficiencies. In this sense, adjudicative bodies participate in the representative system, but their participation is 'weak'.

In fact, we can understand the participation of an entity in a system of representation in strong or in weak terms.[50] An entity participates in strong terms when it is representative per se. At the stage, and level, at which that entity operates, it stands in a representative, dyadic, relation with the constituency. The entity is part of a broader practice through which many different entities transmit and contribute elements of representation, but its representativeness does not solely depend

[48] Mansbidge, op. cit., n. 42, p. 515; Rey, id.
[49] Pettit, op. cit., n. 13, p. 147.
[50] C. Valentini, 'Post-Sovereign Constitution-Making and Stages of Representation: The Representative Continuum' (2020) 41 *Revus*.

on participation in that practice. An entity participates in weak terms when, though not independently representative, it is embedded in a system that is representative as a whole and contributes to the overall representativeness of that system.[51] This is the case for adjudicative bodies.

4.2 Complex

In formalistic terms, an adjudicative body, typically a judge, 'is an agent of the state – like all government officials', and therefore judicial decisions are not 'private expressions of opinions', but rather 'official utterances of the state'.[52] In this sense, judges, in a democratic system, are 'servants of the sovereign people' like any other agency of the government.[53] However, they are not electorally appointed and accountable and do not 'act for' the people as delegates or trustees; rather, they can 'stand for' the people and also be a 'symbol' embodying the values that are shared by the people in a particular political community.[54]

This relation with the people points to the indicative form of representation[55] in which representatives *stand for* representees. They neither track nor act on the preferences of representees; rather, they act as indicators of the terms in which representees *would* act if they were in the position to do so.

Following Pettit and Mansbridge,[56] adjudicative bodies can be understood as representative in indicative terms – that is, as proxies that 'stand in for those who determine their selection',[57] accountable to them through reason giving rather than elections. This form of representation is grounded in a relation of identification between representatives and representees that does not rest

[51] On the differentiation of representative levels, see Rey, op. cit., n. 11.
[52] Pitkin, op. cit., n. 7, p. 117.
[53] Id., pp. 116–117.
[54] Id., p. 117.
[55] Pettit, op. cit., n. 9.
[56] Id.; Mansbridge, op. cit., n. 10.
[57] Pettit, op. cit., n. 7, p. 69.

on the resemblance between them, such that the former recognize themselves in the latter by virtue of common features; rather, the identification rests on convergence over a set of common, shared goals.[58] In such terms, adjudicative bodies serve as proxies of a political community, performing different types of representative activities. In fact, adjudicative representation is complex in the sense that it requires and combines different types of actions that are not mutually exclusive, but rather integrate with each other. As noted by Pitkin, this aspect, concerning the 'substance' of representative agency, is 'the most difficult' to specify and account for.[59] Even if, in practical terms, it is easy 'to see that acting for others involves special behavior and obligations', it is extremely hard to find 'the theoretical formulation' for this.

In the case of adjudicative bodies, such a formulation has been outlined – in 'reflexive',[60] 'discursive',[61] and 'principled'[62] terms – by existing accounts of judicial representation. In different ways, these accounts point to the use of appropriate argumentative tools and principled reasoning. They focus, in particular, on the ways in which courts reason on the legitimacy of ordinary laws, in the exercise of judicial review, and then justify their decisions so as to 'make present' the core values of a constitutional order, shared by the people.

However, these accounts offer only limited insight into the types of actions connected to such forms of representative agency. Furthermore, these accounts seem to point in mutually exclusive directions, whereas a systemic analysis brings to light their complementarity. Indeed, adjudicative representation[63] takes different forms that are ultimately complementary ways in which adjudicative bodies can contribute to a system of representation. Let me analyse these accounts in more detail.

[58] On proximity as convergence on shared goals, see id.
[59] Pitkin, op. cit., n. 7, p. 118.
[60] P. Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (2011).
[61] R. Alexy, 'Balancing, Constitutional Review, and Representation' (2005) 4 *International J. of Constitutional Law* 572; Kumm, op. cit., n. 43.
[62] C. L. Eisgruber, *Constitutional Self-Government* (2001).
[63] Id.

4.2.1 The reflexive account

The reflexive account[64] addresses courts – and constitutional courts in particular – as representative institutions insofar as they contribute to 'broaden[ing] and deepen[ing] the representative system'[65] and, furthermore, to creating new forms of PR. From this perspective, not only can judicial bodies correct the shortcomings of the representative system, but they can also improve the practice of democratic governance and the quality of political deliberation, especially in those systems in which the judicial review comes before the enactment of the laws.[66] This representativeness of constitutional courts finds its basis in a 'reflexive democratic concept' of constitutional justice, according to which constitutional justice helps to empower citizens vis-à-vis other institutions – the legislature in particular – by establishing a 'regime of competing expressions of general will'.[67] In other words, constitutional justice allows for the exercise of social control on the legislature,[68] with judicial bodies serving as reflexive actors with a function of social and political representation: 'they attest to the existence of the people as principle'[69] and make the 'gap between the sovereign and the majority palpable so that it has to be taken into account'.[70] To what kind of judicial representative agency does this account point? It is a form of representation concerning the set of values endorsed by a democratic community, which differs from representation understood as the immediate expression of the people's opinions and interests, which has an electoral basis.[71] In this sense, the representative agency of courts is reflexive and allows for the differentiation of 'the people of the ballot box' from 'the people as principle' so as to capture how they relate to each other.[72] This aspect of the reflexive account is especially

[64] As defended by Rosanvallon, op. cit., n. 60.
[65] Id., p. 145.
[66] Id., p. 147. Constitutional justice also makes this contribution by imposing 'a period of delay for reflection'.
[67] Id., p. 139, quoting an expression of D. Rousseau, *Droit du contentieux constitutionnel* (1995) 417.
[68] Id.
[69] Id., p. 140.
[70] Id., p. 141.
[71] Id.
[72] Id.

relevant for our purposes, drawing our attention to the diachronic dimension of PR as a plural endeavour that involves judicial bodies alongside majoritarian entities, over time. In fact, this account relies on a time-based distinction among the different types of 'the people' politically represented in a constitutional system. On the one hand, there are 'the people of the ballot box', to be represented in terms of immediacy; on the other, there are 'the people as principle', to be represented over time, within a broader timeframe.[73]

Judicial representation, understood in reflexive terms, concerns this second type of 'the people' and therefore takes form diachronically, within a broad timeframe. In fact, as representative actors, judicial bodies keep fundamental values alive, which requires them to act continuously[74] and stand in a bi-directional relation with the legislature, rather than being juxtaposed powers or serving only as checks on each other. Legislative and judicial bodies, from this perspective, form a unified framework, and this framework ultimately structures the democratic order in pluralistic temporal terms – the idea being that the role and significance of those bodies can be grasped only if we take into account the various ways in which they progressively set up a *system*, through interactions that unfold over time.[75] In these terms, the reflexive account sheds light on the 'intertemporal' dimension of democracy and democratic representation as resulting from different forms of political, representative agency that develop within different timeframes.[76]

4.2.2 The discursive account

[73] On this aspect, Rosanvallon recalls Sieyes' idea of the 'enduring' nation as the focus of a political constitution, 'rather than any particular passing generation': id.
[74] Bickel argues that constitutional justice allows for a 'second sober thought' on controversial issues: Bickel, op. cit., n. 6, p. 26.
[75] Rosanvallon, op. cit., n. 60, p. 142.
[76] Id., p. 143.

According to the discursive account, courts are representative insofar as they use appropriate arguments in justifying their decisions. Going beyond the reflexive role, therefore, adjudicatory bodies may establish their own representative relation with the people through argumentation. This account of judicial representation is especially relevant to the view of constitutional democracy as a deliberative system. In fact, 'the inclusion of argument in the concept of democracy' characterizes democracy as deliberative – that is, as a political system that seeks 'to institutionalize discourse as far as possible as a means of public decision making'.[77] In such terms, legitimate PR, in a democracy, is always argumentative. Not only courts and non-majoritarian institutions but also majoritarian electoral institutions represent citizens by argumentative means. The representative relation between citizens and the parliament is based on elections, but also on argument, whereas in the case of courts the relation is purely argumentative.

More precisely, a court is representative insofar as it performs the judicial review in discursive terms so as to meet two conditions. First, the review should be based on sound or correct arguments. Second, it should be addressed to rational persons – that is, 'persons who are able and willing to accept sound or correct arguments for the reason that they are sound or correct'.[78] These are 'constitutional persons', drawing on Rawls' account of the liberal person: 'constitutional review can be successful only if the arguments presented by the constitutional court are sound and only if a sufficient number of members of the community are able and willing to exercise their rational capacities'.[79] If these conditions are met, constitutional courts are representative, in argumentative terms. Such argumentative representation is part of a broader discursive endeavour understood as 'an enterprise of institutionalizing reason and correctness. If there exist sound and correct arguments as well as rational persons, reason and correctness are better institutionalized with constitutional review rather than without it.'[80]

[77] Alexy, op. cit., n. 61, p. 579.
[78] Id., p. 580.
[79] Id.
[80] Id., p. 581.

4.2.3 The principled account

According to the principled account, courts can 'speak on behalf of' the people if they engage in principled argument about moral and political issues: 'the judiciary makes a distinctive contribution to a political system that might otherwise be overly sensitive to the people's desires at the expense of their values'.[81] More specifically, courts should engage in principled deliberation centred on 'discrete' principles rather than comprehensive principles. The latter are principles requiring that 'some system, considered as a whole, should treat people fairly', whereas the former are principles concerning 'particularized side-constraints upon governance'.[82] Both types of principles can concern structural issues as well as issues related to the protection of individual rights, but they have a different scope. Discrete principles centre on particular instances in which side-constraints apply; by contrast, comprehensive principles concern the ways in which an 'entire system of social interactions' should be organized.[83] Courts are better suited to enforcing discrete principles and, in doing so, they represent citizens, in their own terms. Indeed, 'neither "voters" nor "legislators" nor "judges" are the same thing as "the people"; each is a political office, subject to particular incentives, constructed in order to provide a representation of the people'.[84]

All three of the accounts outlined above – reflexive, discursive, and principled – focus on the argumentative dimension of judicial representation, concerning the 'methodology, style, and structure of judicial opinions'[85] – that is, the terms in which courts account for their decisions and make these decisions part of a broader, public, discourse. The different accounts understand those terms in different ways that are not mutually exclusive but rather complementary. In fact,

[81] Eisgruber, op. cit., n. 62, p. 6.
[82] Id., p. 170.
[83] Id., p. 171.
[84] Id., p. 206.
[85] Kumm, op. cit., n. 43, p. 282.

adjudicative representative agency is essentially a combination of different argumentative activities. As deliberative proxies, adjudicative bodies can represent the community along different argumentative lines, depending on the entities with which they interact within a broader democratic order. In reflexive terms, they represent 'the people as principle',[86] which is compatible with the use of arguments centred on discrete principles, as required by the principled account, as well as with the discursive contribution to a broader deliberative practice 'institutionalizing' reason. These different argumentative paths can co-exist in an adjudicative action that can be representative in different terms depending on the entities with which adjudicative bodies interact as well as the timeframe within which they interact. In fact, reflexive representation requires a broad timeframe, whereas representative agency based on the formulation of discrete principles can unfold within a narrower timeframe. Over time, they integrate with each other in a system of representation that takes shape *gradually*.

4.3 Diachronic

The systemic perspective sheds light on PR as a plural endeavour that brings together various activities, performed by different actors that operate in different venues. This endeavour takes time. The integration of different deliberative actors, actions, and venues unfolds diachronically, as a *continuum* through which the different components of a representative system assimilate and enhance one another's representativeness over time. PR, from this perspective, is a *process* in which different elements counterbalance each other so as to form a staged sequence.[87]

To illustrate this point, let me draw on the idea of *sequencing* deliberative moments, advanced by Goodin. According to this idea, it might be 'good enough', in terms of deliberative democratic legitimacy, that the deliberative virtues are on display sequentially over the course of a

[86] Rosanvallon, op. cit., n. 60, p. 140.
[87] On this aspect, see Rey, op. cit., n. 11. I introduced the idea of representation as a continuum of representative stages in Valentini, op. cit., n. 50.

staged deliberation, involving various component parts, 'rather than continuously and simultaneously present as they would be in the case of a unitary deliberating actor'.[88] For instance, the law-making process, involving different agents, may be a sequence that is deliberative as a whole, even if some segments, by themselves, do not present all of the deliberative virtues required to fulfil standards of democratic legitimacy. In fact, democratic deliberation is distributed, or delegated, among different agents over time. In non-ideal terms, what we expect from such agents, sharing the deliberative work in a system, is not what we expect from actors that operate in isolation, on their own.[89]

Adjudicative bodies, in particular, are not synchronically representative; rather, they contribute to a representative system of deliberation over time, by performing actions that contribute to set up that system as long as they follow – or precede – the actions performed by majoritarian entities.

More specifically, the accounts of judicial representation outlined above focus on the performance of judicial review in certain terms – reflexive, discursive, and principled – that allow courts to interact with majoritarian entities so as to enhance the representativeness of the system to which they all belong. The performance of judicial review follows the enactment of laws by majoritarian entities such as parliaments. Indeed, the production of laws is a representative *continuum* combining parliamentary actions and actions of review performed by courts, which integrate with each other so as to produce constitutionally valid laws through a process that unfolds over time.[90] This process is representative *as a whole* in that both parliaments *and* courts take part at different moments. Furthermore, the action of courts contributes to setting up a system of deliberation if the review that they perform is followed by the endorsement or acceptance of the

[88] R. E. Goodin, 'Sequencing Deliberative Moments' (2005) 40 *Acta Politica* 182, at 182.
[89] As Goodin notes, 'the larger point is simply that a staged deliberative process, with different deliberative virtues on display at different stages, might add up to a "good enough deliberation". Though not ideal, that is a realistic ambition, perhaps well worth pursuing in its own right': id., p. 194.
[90] On the integration between law making and judicial review, in a version that diverges with respect to the representative role of courts, see Kyritsis, op. cit., n. 25.

results of such a review by the parliament and majoritarian actors involved. In fact, the extent to which adjudicative bodies can be systemically representative depends on the extent to which legislatures can challenge the decisions of adjudicative bodies and, therefore, the extent to which it is possible to assume that, if they do not challenge those decisions, they implicitly endorse them.[91]

This aspect of PR is relevant in a further respect. Empirical studies point out that PR is a dynamic in which different actors respond to the inputs given by the constituency within different timeframes. Indeed, some actors can be faster than others in representing the constituency. More specifically, legislatures tend to be faster than courts,[92] which has a bearing on the type of representative agency that they perform. Reflexive, discursive, and principled types of agency, in fact, take form over time – albeit within different timeframes – and set different stages of a sequence in which they integrate majoritarian actions. Adjudicative bodies *become* representative as long as they act as deliberative proxies (in the ways pointed out by the reflexive, discursive, and principled accounts) in the review of the actions of majoritarian bodies *and* insofar as the results of the review are subject to contestation and/or acceptance by those bodies. Only the cross-fertilization of deliberative capacity that occurs on the basis of this interaction between adjudicative and majoritarian entities allows the former to *become* part of a *plural*, *complex*, and *diachronic* representative endeavour.

5 CONCLUSION

From contemporary constitutional and democratic theory, one can see emerging a systemic view of constitutional democratic orders. In this article, I have identified three different strands that

[91] As remarked by Kumm, there are, however, some limits to the degree of systemic representativeness of adjudicative bodies. Above all, there is the limit posed by the necessity that those bodies provide effective remedies to enforce individual rights. In this sense, it is important that the decisions that follow a judicial review of the laws do not need an explicit endorsement by the legislature. In fact, judicial actors have the task of ensuring 'that all burdens imposed on individuals must ultimately be justifiable to them in terms that they might reasonably accept, and if individuals are to have a right to have the issue determined by independent and impartial institutions, then those institutions must also have the authority to provide an effective remedy': Kumm, op. cit., n. 43, p. 290.
[92] J. A. Stimson et al., 'Dynamic Representation' (1995) 89 *Am. Political Science Rev.* 543.

contribute to this view – and to the associated account of PR – to point out that, though disconnected, they share a systemic perspective that provides important resources with which to address PR in transnational regimes. In particular, I have focused on the idea of non-majoritarian entities as representative insofar as they take part in, alongside majoritarian institutions, a representative endeavour. From this perspective, I have noted that this plural representative endeavour is complex and diachronic. It brings together different actors that perform different types of actions in different moments that set the stages of a representative continuum. Adjudicative bodies, in particular, contribute to this endeavour diachronically, through actions that follow – or precede – the actions of other entities. This view of PR, and of adjudicative entities as representative actors, can contribute to our understanding of transnational PR as an open-ended process, involving non-majoritarian entities that *become* representative over time through their interaction(s) with majoritarian entities.