ABSTRACT: We lack analyses of the judiciary after the systemic turn in deliberative democracy. During early stages of the theory, authors saw the courtroom as an ideal locus where the conditions of deliberation could be best met. Present-day deliberative democratic theory does not provide us with any image of that sort. This paper assesses what the role of the judiciary ought to be if deliberative systems’ theory is embraced and argues for a less idealised image of the capacities of judges to engage in deliberation. To do so, it evaluates accounts of the judiciary during the normative and empirical stages of deliberative democracy. It then critically examines what a deliberative system is, showing that the judiciary should be seen with less idealistic lenses. It finally suggests avenues for future research. Overall, the paper advances the literature by discussing the relationship between courts and deliberation from a systemic perspective, and improves the understanding of deliberative systems by critically engaging with their definition. This is necessary for the theory is still under construction, and because the concept has not been fully developed.

KEYWORDS: Courts, Deliberative Democracy, Systemic Turn, Judiciary
I. Introduction

Present-day deliberative democracy is silent regarding the role of the judiciary in a deliberative system. I thus examine the opinion some scholars have held concerning the deliberative capacity of judges during earlier stages of the theory and argue that their understanding of the courtroom as an ideal deliberative site is not the proper approach to follow after the systemic turn in deliberative democracy. I show that endorsing a systemic approach entails a rejection of a privileged treatment of judges in terms of their deliberative capacities.

The paper runs as follows: section II describes the role Rawls, Eisgruber, Habermas, and Alexy have ascribed to the judiciary during the first stages of deliberative democracy. They praise the deliberative capacities of courts on the basis of their alleged ability to engage in rational discourse, provide parties with a hearing, and/or act as argumentative representatives of the people, among other arguments. Others have also underscored the deliberative capacities of judges, but I focus on these authors as their arguments cover most of the defences of such idealistic view. I criticise their opinions in order to reject a division of labour that places courts as ideal sites for deliberation.

Section III defines the deliberative system and highlights the features of the transition from the first stages of deliberative democracy to its systemic phase.

Section IV reflects on these changes and argues that the accounts described in section II are incompatible with current developments in deliberative democratic theory. To do this, I single out three elements common to systemic approaches: an extensive conception of deliberation, an interaction-dependent understanding of legitimacy, and a holistic orientation in terms of the evaluative tests of the system. Against the
background of these elements I argue that one cannot maintain a high regard for the judiciary in deliberative terms.

Section V concludes that the image of the judiciary portrayed the scholars considered in section II should be rejected and courts reconsidered as one element among others forming a system of deliberation. I then offer suggestions for further research: First, scholars should determine when and to what extent systemic considerations merit priority over individual ones in processes of systemic decision making. Second, empirical research should remain pressing and undertaken from a systemic perspective. Third, researchers should theorise about the role of courts as part of a system of deliberation.

The paper advances the literature by examining the relationship between courts and deliberation, which has been neglected after the systemic turn. It also improves the understanding of deliberative systems by engaging with their definition, something necessary provided that the theory is under development and that the concept has not been fully confronted (Mendonça, 2013, p. 19).

II. Deliberative Democracy and the Judiciary

Deliberative democracy is a theory whose core claims are that collective decisions be adopted via a method of deliberation, with the inclusion of all potentially affected by the decisions (Elster, 1998, p. 8). Accordingly, deliberation operates as a justification as well as a condition for the legitimacy of the decisions adopted.\(^1\) Additionally, it has the nature of a regulative ideal — a horizon decision-making processes should strive to attain (Kant, 1996: A569-B597; Mansbridge, 2010 p. 65. FN 2). This explains, for example, the ideal character of Cohen’s deliberative procedure
Deliberative democracy has experienced three phases, which overlap to some extent: theoretical, empirical, and systemic.\(^2\) The first established its distinctiveness with respect to other strands of political theory.\(^3\) Its proponents showed interest in moving beyond the limits of alternative democratic theories, emphasising the epistemic, educational and/or moral benefits of employing processes of deliberation (Chambers, 2003, p. 307).

Deliberation became the distinctive feature of the model, differentiating it from other perspectives that highlighted the market rather than the forum (Elster, 1986). Manin emphasised the importance of deliberation for the legitimacy of political decisions (1987, p. 359), and Cohen defined deliberative democracy as ‘an association whose affairs are governed by the public deliberation of its members’ (1997, p. 67). Bohman claimed that in early formulations of the deliberative ideal ‘deliberation was always opposed to aggregation and to the strategic behaviour encouraged by voting and bargaining’ (1998, p. 400). Also fundamental was Habermas’ contribution to the model, first in discourse ethics (1981), and then in law and politics.\(^4\)

Deliberative democracy then moved to its empirical phase,\(^5\) during which the ideal informed disciplines such as public law, international relations, policy studies, identity politics, political talk, social psychology, and led researchers to conduct experiments on areas as varied as focus groups, town meetings, school desegregation, deliberative polls, online deliberation, citizen summits, community policy programs, participatory designing of health systems and city’s budgeting, etc..\(^6\) Authors thus showed interest in institutional problems by ‘pointing out empirical problems and
obstacles that cannot always be anticipated by conceptual argument alone’ (Bohman, 1998, p. 401).

In recent years we have witnessed a turn towards a systemic stage, which seeks ‘to develop a comprehensive account of deliberative democracy as a large-scale system’ (Kuyper, 2015, p. 54). It assumes that none of the sites accomplishing political work possesses enough representativeness or deliberative quality as to legitimate all the decisions adopted in a polity. A deliberative system thus includes every individual and site of deliberation and attempts to make use of their advantages and strengths while avoiding their weaknesses and shortcomings.

Some scholars indicate that although the empirical turn suggested innovative proposals for turning the ideal into something feasible, they were often motivated by divergent views on micro and macro sites of deliberation. Micro deliberation, the one that takes place in mini publics like citizen juries, consensus conferences, deliberative polls, etc., emphasises deliberation in small-scale sites, where the theoretical requirements of deliberative democracy may be tested while coping with the practicalities of experimenting at large-scale-societal levels. Conversely, macro deliberation is concerned with participation and inclusion in large societal scale rather than with the quality of the deliberative process or with the engagement of citizens in the resolution of local problems (Lafont, 2015, pp. 40-41).

The relations between these levels is complex, since the quality of deliberation fostered by micro accounts and the amount of public participation demanded by macro accounts are in tension; increasing one may come at cost of the other: ‘social complexity and scale limit the extent to which modern polities can be both deliberative and participatory’ (Cohen, 2009, p. 257). Hence, deliberative democrats are somehow
forced to choose between two essential criteria, namely, the inclusion of those potentially affected by the decisions adopted and the reason-giving nature of the deliberative process, whose success ought to be measured by the rationality of the arguments wielded (Habermas, 1996, p. 107; Bohman, 1998, p. 400). Favouring the former view, Young (1999) and Lafont (2015, p. 15) argue for more inclusion and improved mass deliberation. As a sample of the latter, Fishkin defines deliberative democracy ‘as explicitly affirming political equality and deliberation but agnostic about participation’ (2009, p. 191).

One solution proposed to deal with this has been a division of labour that ensures that both elements be simultaneously taken into account. Accordingly, institutions like legislatures, citizens review boards and executives would embody the participatory and inclusive pole, while judicial institutions, staffed by judges trained in practical and legal reasoning, would be ideal candidates for the reason-giving, argumentative side of the tension (Zurn, 2007, p. 166; Papadopoulos, 2012, p. 142; Sen, 2013, p. 308).

To different extents, with different normative commitments and via different strategies, John Rawls, Christopher Eisgruber, Jürgen Habermas and Robert Alexy are authors concerned with deliberation who have supported the aforementioned division of labour between participatory and expert deliberative institutions that would ‘satisfy the dualistic deliberative criterion for democratic legitimacy’ (Zurn, 2007, p. 166-184). These writers are sympathetic to the view that ‘if … we are trying to locate the institutions where reasoning and deliberation play an important role in public life, it is apt to begin with courts and especially with courts dealing with constitutional issues’ (Ferejohn & Pasquino 2002, p. 22).
Before I discuss their accounts, I must clarify that my question is whether the court-room is the ideal forum for *deliberation*. I emphasise this because the aforementioned authors do not distinguish between this method of decision-making and other distinct category, namely, *adjudication*. Both terms can be mistakenly used without distinction, and this may be one of the reasons why some regard the court-room as ideal for deliberation.¹²

This confusion is present in, for example, Fuller’s account of adjudication. He distinguishes between different forms of decision-making or forms of social ordering, as he calls them: contract, elections, and adjudication. The taxonomy is analogous to that of political theorists who distinguish between aggregation, bargaining, and deliberation.

For Fuller, those forms of decision-making are connected to different modes of participation. Hence, negotiation is the way in which parties who contract decide, voting the way in which elections are decided, and ‘presentation of proofs and reasoned argument’ (1978, p. 363), the way adjudication is exercised. Courts become the place where proofs and arguments are presented and wielded. Adjudication, Fuller claims, gives ‘formal and institutional expression to the influence of reasoned argument in human affairs’ and ‘as such [...] it assumes a burden of rationality not borne by any other form of social ordering’ (1978, p. 367).

But adjudication and deliberation are different concepts. The term *adjudication* answers how *judges* should decide cases, which in turn is ambiguous between reasoning to establish the content of the law, on the one hand, and reasoning from the content of the law to the decision a court should reach in a specific case, on the other (Dickson, 2015, pp. 3-4). This concept does not exhaust the uses of the term deliberation, which is neither limited to the vocabulary of legality nor to the jargon of jurists, as it can be
exercised through different non-coercive forms. It is not true either, as I show here, that adjudication is the only device giving ‘formal and institutional expression to the influence of reasoned argument in human affairs’ (Fuller, 1978, p. 366).  

Deliberation and adjudication are not, then, the same, and my concern is with how citizens and judges deliberate, and not with how they adjudicate. Judges may adjudicate better, but that is a different matter. With this clarified, I now move to the examination of scholars who seem to be trapped in confusions of this sort.

Rawls saw the US Supreme Court as the exemplar of public reason and its discourse as the best instance of the language deliberators should use given the expected neutrality of public reason, ‘carefully eschewing reference to citizens’ diverse comprehensive worldviews, while nevertheless rendering decisions based on fundamental political values shared by all reasonable citizens. Courts are democratic because they exemplify how to speak in the political language shared by citizens’ (Zurn, 2007, p. 167. Emphasis in the original; Rawls, 1996, pp. 231-240).

Rawls advanced three arguments in support of this idea. First, building on Ackerman’s dualistic democracy (1991, pp. 3-33), he thought that in applying public reason, courts ‘prevent[ed] the law from being eroded by the legislation of transient majorities, or more likely, by organised and well-situated narrow interests skilled at getting their way’ (1996, p. 233). Second, ‘public reason is the sole reason the court exercises’ (1996, p. 235). Neither citizens nor legislators need be guided by public reason, as they may prefer to deliberate from and vote for their own comprehensive views when matters of justice are not at stake. Judges, on the other hand, do not have recourse to any specific comprehensive view (1996, p. 235-236). In addition, the court’s status as a deliberative institution ‘is further buttressed by its ability to invigorate and
galvanize public discussion, even at times when the court’s own reasoning might itself fall short’ (Sen, 2013, pp. 26-27). Third, the court is exemplar as a result of its members’ capacity to give public reason vividness and vitality in the public forum, by authoritatively and reasonably adjudicating on fundamental political questions (1996, p. 237). It is important, however, to stress that these remarks do not imply that Rawls was advocating a form of judicial supremacy, something which he explicitly rejects (1996, pp. 237, 240).

In turn, Eisgruber seeks to justify the Supreme Court’s prominent place in US politics by interpreting the Constitution as a ‘practical device that launches and maintains a sophisticated set of institutions which, in combination, are well suited to implement self-government’ (2001, p. 3). He thinks the reviewing powers of the court should be regarded as practical mechanisms implementing a ‘subtle form of democratic rule’. The court itself ought to be understood as a kind of representative institution ‘well-shaped to speak on behalf of the people about questions of moral and political principle’ (2001, pp. 3, 5), not because judges have some special capacity to engage in moral reasoning, but because of the institutional incentives from which they are free vis-à-vis elected legislators (Zurn, 2007, p. 172).

Here the division of labour appears not as a result of the justices’ insulation from the political process guaranteed by their lifetime tenure, which allows them to speak on behalf of the people and remain faithful to principled reasoning even in the face of political and social pressure.

According to Eisgruber, a good government must take into account that representatives have myriad incentives to desire things they should not have. Judges, on the other hand, represent the people’s convictions about what is right and wrong, and make feasible the aspiration that values should take priority over interests. He thinks
that because elected representatives must please voters to get re-elected, they are likely to represent the people’s interest. Conversely, politically insulated justices’ distinct contribution lies in their position ‘to represent the people’s convictions about what is right’ (2001, p. 5).

Rawls and Eisgruber fail to consider evidence that questions the neutrality or the ‘principled’ approaches of judges when it comes to decide matters of constitutional salience. But their idealisation should be tempered, for the reasons on which judges decide are in part principled, in part attitudinal, and in part strategic. They are conditioned by institutional design, case salience, ideological preferences of other actors of the political system, norms and procedural rules, among other constrains. Both scholars omit these findings and come up with an overly idealised image of the judiciary.

Turning now to Habermas, I should express the caveat that his main concern is with constitutional review rather than with judicial constitutional review. The latter is instrumental to the former, as for Habermas whatever institutional arrangement ultimately adopted must serve the purpose of securing the constitutional conditions of deliberative politics (1996, pp. 279-280). Courts are better instruments for meeting those conditions, again for reasons of distribution of labour.

Habermas’ claim hinges on a distinction between discourses of application and discourses of justification. Accordingly, he sees constitutional review as the application of already justified constitutional norms to ordinary legislation. The adjudicator assumes the role of an impartial referee between citizens and their representatives; it ensures that public opinion is channelled without obstructions into the legally structured public sphere by keeping open the channels of political change, guaranteeing respect for
the individuals’ legal, social, and political rights. It does this by ‘scrutinizing the constitutional quality and property of the reasons justifying governmental action, and ensuring that the channels of influence from independent, civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers’ (Zurn, 2007, pp. xiii-xiv).

However, Habermas does not give a compelling argument for championing the courtroom as the best institutional forum to perform these tasks. He briefly considers alternative institutional arrangements like special legislative committees staffed by legal experts which would have the function of inducing legislators to ‘keep the normative content of constitutional principles in mind from the very start of their deliberations’ (1996, p. 242). Yet, he discards them as he thinks ordinary legislative assemblies do not have a special disposition to consider the content of constitutional rights compared to the disposition they have toward ordinary statutory content. He then engages in a long discussion on the interpretive approaches and methodological issues raised by the practices of the US Supreme Court and the German Constitutional Court, leaving a gap in terms of the justification of their constitutional reviewing faculties.

I can only infer that Habermas’ confidence about judges, hinges on their capacity to engage in constitutional principled deliberation. This is supported by Zurn, who notes that ‘these arguments about how a constitutional court should adjudicate already presuppose that the institutionalisation question is settled. Perhaps the richness of the German and American jurisprudential debates simply distracts Habermas from a more wide-ranging consideration of issues concerning the separation of powers and institutional design’ (2007, p. xv). It is also consistent with his Dworkinian premises (1996, pp. 204-224).
Alexy follows an analogous approach. He recognises that constitutional review
does not merely consist in asserting the constitutionality of a piece of legislation but that
typically courts have the power to invalidate provisions they consider unconstitutional,
so he takes pains to justify such power.

Generally, judges ‘have no direct legitimacy and people have, as a whole, no
possibility of control by denying them re-election’. Alexy thus asks how this is
compatible with democratic government (2005, p. 579) The answer rests on how he
understands representation, namely as a relation between a repraesentandum and a
repraesentans that can be exercised through elections, but also and complementarily via
argumentation. Alexy considers that in modern democracies there are two types of
representation, one decisional justified by elections, and one argumentative or
discursive.16 Under this scheme, democracies ought not to be purely justified by the
existence of an elected government, but they should be deliberative as well, justified by
the rationality of the procedures by which correct rules and principles are identified and
applied to individuals (2005, p. 579).

I will not fully elaborate Alexy’s idea of discursive representation. I will say,
however, that it is not clear why he calls it representation at all, specially considering
that for him, it is important that the constitutional court ‘not only claim that its
arguments are arguments of the people; a sufficient number of people must, at least in
the long run, accept these arguments for reasons of correctness’ (2005, p. 580). This
recourse to ex post social acceptance may have an appeal in terms of legitimacy, but it is
not representation. All the same, and with that caveat in mind, I treat Alexy’s account
on its own terms.
What Alexy calls discursive democracy (Cf Dryzek, 2000, p. 3) is thus linked to the conditions of argumentative representation, which connects legal and political practices to an ideal dimension of correctness in discursive terms. In turn, argumentation ought to be exercised by balancing constitutional principles, a practice judges are well-suited to perform. It follows that the domain of constitutional rationality is the domain of constitutional courts entrusted with the task of balancing rights, understood as requirements of optimisation. Legislatures, on the other hand, are not burdened with the demanding requirements of justification in terms of proportionality and balancing.17

Summing up, these scholars share the view that supreme or constitutional courts occupy a distinctive place in the political system because of their capacity to engage in principled deliberation, a view that is consistent with accounts of deliberative democracy predating the systemic turn. A systemic approach, however, poses difficulties to this position. Instead, I will show that a systemic approach pulls in the opposite direction, leading to the conclusion that constitutional debate in courts is one special type of discourse, albeit one insufficient to justify the prominent place these scholars give to the judiciary. But before doing so, in section III, I describe the systemic turn and examine what is a deliberative system.

III. The Systemic Turn

Scholars embracing systemic approaches to deliberative democracy acknowledge that democracies are complex entities in which a wide variety of institutions, associations, and sites of contestation accomplish political work; that there are no single fora, irrespective of their competence or composition, with enough capacity to legitimate decisions simultaneously at the individual and at the societal
level. What it should be designed instead is a system that combine different perspectives and their virtues, avoiding their weaknesses and taking advantage of their strengths not just considered individually, but in relation to other parts of the system. This eludes the fixation with placing all the virtues of deliberation in a single site.\textsuperscript{18}

In light of this, deliberative democrats have advocated a deliberative system. For them, a system is a ‘set of distinguishable, differentiated, but to some degree interdependent parts, often with distributed functions and a division of labour, connected in such a way as to form a complex whole’ (Mansbridge, et al., 2012, p. 5).\textsuperscript{19} Hence, a deliberative system is ‘one that encompasses a talk-based approach to political conflict and problem-solving – through arguing, demonstrating, expressing, and persuading’ (Mansbridge, et al., 2012, p. 5). These authors further clarify the notion when they claim that ‘[t]he ideal of a deliberative system … is a loosely coupled group of institutions and practices that together perform the three functions … [of] seeking truth, establishing mutual respect, and generating inclusive, egalitarian decision-making’ (Mansbridge, et al., 2012, p. 22).

These lines provide enough elements for a concept. My following definition of the ideal attempts to capture its elements and desiderata:

A deliberative system consists of a group of diverse and interrelated individuals, civil associations and formal political institutions gathered in a political unit, linked in such a way as to form a complex whole, and engaged in the production, transformation and expression of considered political emotions, preferences, discourses and arguments, in the context of solving conflicts and adopting legitimate, respectful, inclusive and egalitarian collective decisions in an ongoing fashion.
The definition covers both poles of a continuum ranging from individual and micro to macro deliberative sites, including all sort of political actors regardless of their institutionalisation, discursive capacity or influence.

Additionally, these subjects are interrelated. What distinguishes a system from a group of independent parts, is that individual sites are studied not in a vacuum, but in light of their contribution to the overall decision-making process in the polity they are part of, bolstering the capacities of some parts, and potentially reducing the influence of others.

Third, subjects are related with the aim of producing, transforming and expressing political emotions, preferences, discourses and arguments. As part of deliberative democratic theory, the systemic approach accentuates the importance of reason-giving in processes of decision-making. Now, what characterises the reason-giving aspect in a deliberative system, is the inclusion of non-coercive forms of talk, justification and argument potentially accepted as deliberative, including rhetoric, bargaining and emotions (Dryzek, 2000, pp. 1-2). This is consistent with the ample range of deliberative sites considered as relevant for the system, as individuals and institutions differ in their argumentative capacity, experience, epistemic competence, etc., vis-à-vis other more educated and better articulated individuals who may justify their preferences in more rational ways. Ignoring less rational forms of argument and expression of preferences may result in a direct exclusion of individuals from the fora where collective decisions are adopted, and systemic approaches take that into account.

Finally, the examination of the parts accomplishing political work is made with the aim of analysing the extent to which they are part of a process of decision-making in a societal scale. The study of individual sites is then oriented to understanding how they
influence the production of norms affecting the political community as a whole, something consistent with the traditional idea that ‘[w]ith a few exceptions, the task of a political assembly is to choose among policy proposals’ (Elster, 1998, p. 100; pp. 7-8).

This, however, should not be mistaken for the hypothetical claim that all that matters in a deliberative system are those sites expressly designed for adopting decisions. What it means is that different individuals and sites become subjects of study to the extent they can influence decisions within a system. That explains why, for example, university debates, radio and television shows, informal talk in private and public spaces become relevant even though they are not primarily oriented towards adopting decisions (Mansbridge, 1999, p. 212). Behind these considerations lies Mansbridge’s notion of the ‘political’, namely ‘that which the public ought to discuss’, when that discussion forms part of some, perhaps highly informal, version of a collective decision’ (1999, p. 214).

Incorporating the contributions different sites of deliberation and understanding how they relate to each other allows to think in terms of large-scale implications, (Chambers, 2013, pp. 201-202). The Habermasian two-track model of deliberative politics that distinguishes between informal public spheres and will formation in formal politics on the one hand, and representative institutions on the other, is thus expanded as part of a reassessment of the kind of talk deliberativists consider as embodiments of the deliberative ideal. This re-evaluation becomes possible by broadening the forms of communication falling under our idea of deliberation, including all the varieties of everyday talk, and by moving the field of deliberative democracy beyond its perceived obsession with formal political fora and processes (Mansbridge et al., 2012, p. 2).20

A deliberative system is also the result of a change of theoretical perspective. Those who embrace it ask questions different from the ones asked in stages predating
the systemic turn. Instead of asking which is the best deliberative forum, they would ask how the deliberative contributions of all the sites in a given community can together improve the decision-making process. Instead of enquiring who meets the conditions of ideal deliberation, they would now examine what is the epistemic competence of all the relevant actors in a polity and how their capacities can be used to make better and more legitimate decisions. Rather than striving for accomplishing decisions of great justificatory quality and placing the entire burden of legitimacy on them, they identify all the potential sites of deliberation, \textit{prima facie} accepting their capacity, improving them when necessary, but making use of their contributions as limited as they may be, so the legitimacy of the ultimate decision be distributed across the board. Finally, instead of exclusively focusing on macro analysis of the whole community of deliberation, they make that assessment from the study of the parts involved in the process of deliberation. A systemic approach is then an ongoing top-down and bottom-up process of analysis of the deliberative capacities and contributions of the multiplicity of political actors.

Finally, the deliberative system serves a variety of epistemic, ethical and democratic functions.\textsuperscript{21} It produces preferences and decisions grounded in relevant reasons, tested against others who potentially have a stake in the results of the process who, in turn, offer their own perspectives, arguments and preferences in order to reach considered and fair agreements (Mansbridge et al., 2012, p. 11). Adding to these epistemic desiderata, an ethical function implies that a deliberative system must be designed to work in ways that promote mutual respect and take individuals as ends and not as means, as self-authoring sources of reasons and claims. The democratic function, finally supposes the inclusion of all claims, viewpoints, preferences and interests in
egalitarian terms, and is perhaps the most central function of a deliberative system (Mansbridge et al., 2012, pp. 11-13).

IV. Deliberative Systems and Courts

The preceding sections provide a scheme against which the role of the judiciary within a deliberative system can be assessed. Those discussions allow me to single out three elements common to systemic approaches: (1) an extensive conception of deliberation, (2) an interaction-dependent understanding of legitimacy, and (3) a holistic orientation.

This section critically expounds those elements. They are then applied to the problem of courts as deliberative agents within a deliberative system, questioning the extent to which scholarly accounts of section II can maintain their high regard for the judiciary. Overall, I conclude that the features of a deliberative system are incompatible with imagining judges as privileged deliberators.

1) An extensive conception of deliberation

Systemic approaches highlight the expansion of the traditional understandings of deliberation to incorporate everyday talk, which anchors ‘one end of a spectrum at whose other end lies the public decision-making assembly’ (Mansbridge, 1999, p. 212). That includes ‘talk among both formal and informal representatives in politically oriented organisations, talk in the media, talk among political activists, and everyday talk in formally private spaces about things the public ought to discuss’ (Mansbridge, 1999, p. 211). Indeed, these ‘loosening of what it might mean to “reason together” is
one of the critical intellectual moves that have allowed the deliberative systems approach to re-emerge’ (Parkinson, 2012, pp. 153-154).

This opening towards new sorts of talk is incompatible with the division of labour elaborated by the accounts considered in section II. For a start, the Rawlsian exemplarity of the Supreme Court relegates public reason to one aspect of the full array of available forms of talk, limiting the deliberative public sphere to those who access the court and articulate their claims in the jargon of constitutional and legal experts. More importantly, it relies too heavily on a neutral conception of public reason, leaving little room for alternative forms of discourse, such as bargaining, rhetoric and emotions.

These sorts of speech are now accepted as contributions to deliberative democracy. As Mansbridge and Warren affirm, ‘although sometimes negotiations that end in compromise may reflect failures to find common interests … such failure can occur only when common interests exist and could be found … Because conflicting interests are an ineradicable part of political life in a pluralistic society, negotiation and compromise are essential features of political systems that maximize democratic goods’ (2013, p. 102). Expansions of the deliberative ideal include self-interest and conflict among those interests ‘in order to recognize and celebrate in the ideal itself the diversity of free and equal human beings’, to the extent self-interested claims can be justified deliberatively (Mansbridge et al, 2010, p. 69; Dryzek, 2000, pp. 1-2; 2010). This entails allowing non-coercive forms of negotiation such as convergence, incompletely theorised agreements, integrative negotiations and fully cooperative distributive negotiations, as well as rhetoric, all of which incorporate self-interest and/or non-coercive power (2010, pp. 70-72; Dryzek, 2000, pp. 1-2; 2010). Hence, the court’s neutrality regarding competing conceptions of the good does not seem like a sufficient
argument to see it as the embodiment of the deliberative ideal, which in current developments of democratic theory includes the acceptance of the speakers’ intention to advance their own comprehensive doctrines.

Eisgruber’s account does not seem too promising either. Failing to consider informal and non-judicial talk as conducive to principled decisions is at odds with perspectives seeking to ground political legitimacy on the interaction of the different parts of a system (Chambers, 2012, p. 71). Similarly, Alexy’s distinction of forms of representation based on types of reasoning seems incompatible with these systemic features, for he relegates electoral representation to a decisional sort of legitimacy, leaving argumentative representation to the reasoning performed by the courts. For him, the constitutional discourse embodied by the method of balancing principles justifies the deliberative representative task courts are to perform. Conversely, systemic approaches start from the diametrically opposite assumption that no single forum can by itself legitimate most of the decisions adopted in a polity, let alone all of them (Chambers, 2012, p. 65). They evaluate the legitimacy of decisions considering the full array of available discourses, so that the concept of public reason be enlarged ‘to encompass a “considered” mixture of emotion and reason rather than pure rationality’ (Mansbridge, 1999, p. 213).

Overall, there is little room for accounts of the kind described in section II in a stage of deliberative theory that attempts to simultaneously account for the legitimacy of formal, informal, neutral and self-interested deliberative modes of reasoning.

2) An interaction-dependent understanding of legitimacy
This element is related to the interactions generated by the notion of a system. Deliberative systems are composed of interrelated parts that accomplish political work through different discourses and at different stages of the decision making process.

The resulting division of labour is, however, different from the rather binary one envisioned by Rawls et al., whereby judges decide on matters of principle, leaving matters of policy and expediency to majorities. From a systemic perspective, this is an oversimplified picture of the political fora one can find in modern democracies, which fails to consider the myriad available discourses that generate inputs in matters of policy and principle.

The division of labour in a deliberative system is more complex than this. It aims at including every actor accomplishing political work, including courts and legislatures, but also interest group associations, political parties, media, universities, think tanks, blogs, movies, schools, organised advocacy groups, foundations, private and non-profit institutions, individuals, etc. This generates a community of scattered sites, which means that relying on a single forum to embody every ideal of deliberation places an unnecessary burden on such site, a burden which should be distributed across the board. In the presence of this varied public sphere, it becomes difficult to imagine the court-room as the single ideal forum for deliberation.

Consequently, political decisions result from the combination and interaction of the deliberative exercises made by different actors who contribute in different degrees, regarding different aspects, whose interests are more or less at stake, but who ultimately participate in the adoption of political decisions, to the extent that the system is capable of transforming their preferences into administrative power. The legitimacy
of the decision is not assigned to one individual or forum. It results, instead, from the entire system.

Sequential models show how legitimacy in a deliberative system should be sought in different fora. Goodin’s model of distributed or delegated deliberation envisages representative democracy as proceeding in different stages (2005, p. 189), exploring ‘the possibilities of dividing up the deliberative task, assigning different portions of it to different agents, and holding them to different deliberative standards accordingly’ (2005, p. 182). He presents this an ‘alternative to the ‘unitary’ model of deliberation that presently dominates discussion among deliberative democrats’ (2008, p. 186). Similarly, Hendriks’s proposal of integrated deliberation conceptualises deliberation as occurring in a variety of discursive spheres in which public discourse materialises through the exposition and discussion of different viewpoints where different agents play different roles at different times (2006, p. 499).

These models suggest that collective decisions cannot be legitimate if made in a single forum. The judge then becomes one among many actors who are welcome to give inputs, arguments, and solutions to collective problems in different ways, with different degrees of expertise. The idea is captured in Dryzek’s notion of discursive legitimacy, according to which a procedure is legitimate ‘when a collective decision is consistent with the constellation of discourses present in the public sphere, in the degree to which this constellation is subject to the reflective control of competent actors’ (2001, p. 660). The second part of this quote reminds us that a deliberative system does not deny that there are people with different degrees of expertise. That control is not, however, itself the condition of legitimacy, which rather rests on the acceptability of the decision on the grounds of its discursive inclusion. So, even if, arguendo, one accepted
courts as ideal controllers of the political process, the problem of the legitimacy of the decision remains distinct. Such problem in a deliberative system is rather Aristotelian:

\[ \text{[I]t is possible that the many, no one of whom taken singly is a sound man, may yet, taken all together, be better than the few, not individually but collectively, in the same way that a feast to which all contribute is better than one supplied at one man’s expense. For even there are many people, each as some share of virtue and practical wisdom; and when they are brought together, just as in the mass they become as it were one man with many pairs of feet and hands and many sense, so also do they become one in regard to character and intelligence. That is why the many are better judges of works of music and poetry: some judge some parts, some others, but their collective pronouncement is a verdict upon all the parts. (1281a39)} \]

Admittedly, Aristotle’s argument depends upon the epistemic competence of the decisional body. Moreover, this passage values participation instrumentally, something which not all deliberative democrats – me included – are ready to accept unconditionally. However, it illustrates the point of this subsection: a deliberative system cannot place all the burden of a decision and its legitimacy on one agent, courts included.

3) A holistic orientation.

This element looks at the relationships between the parts and the system and at the sort of criteria determining whether the system fares well (Mansbridge, 1999, p. 221). Should systemic or holistic considerations prevail over the individual level or should it be the other way around?

As said, systemic approaches relax the demands of epistemic competence and the standards of deliberation by which individual sites are measured, and underscore that deficiencies in one site may be compensated by other parts. This, together with
Dryzek’s contention that ‘[i]n the end, it is systemic consideration that merit priority’ (2010, p. 335), show there is a tendency in the literature pulling in the direction of holism rather than towards favouring individual sites. In Mansbridge’s wording: ‘the criterion for good deliberation should be not that every interaction in the system exhibit mutual respect, consistency, acknowledgement, openmindedness, and moral economy, but that the larger system reflects those goals’ (1999, p. 224).\(^{25}\)

The balance between both dimensions is determined by the epistemic, ethical and democratic criteria mentioned earlier. However, ‘they give us little purchase in guiding our judgement on either the justification of non-deliberative speech acts and practices or the relative weight to give these particular acts and practices against the deliberative system as a whole’ (Owen & Smith; 2015, p. 225). Given such indeterminacy, it becomes important to develop those criteria so that the evaluation of deliberative quality does not occur only at the systemic level, thus avoiding Mansbridge et al.’s fear of ‘falling into the blind spot of old style functionalism’ (2012, p. 19) from becoming a reality. Yet, they have not been fully developed and one can still observe a tendency pulling in the direction of holism (Owen & Smith, 2015, p. 225).

This tendency raises concerns about hypothetical scenarios where a system that meets those loose epistemic, ethical and democratic conditions, may still show deficiencies at the individual level, with deliberation only taking place between elites or where individual participation be passive or inexistent. In republican terms, the danger of domination emerges insofar as the contributions individuals make to the system are obscured. If what matters is increasing the quality of the system irrespective of a malfunctioning individual sphere, then some individuals may suffer a loss of freedom as
a consequence of being at the mercy of others — they may go unnoticed if analyses show a good performance at the systemic level.

Now, the role of courts gains importance in light of this third element, as their functional orientation toward individual cases may help detecting failures at the level of individuals who may not be receiving the benefits of well-working system. Indeed, judicial procedures exist in virtue of the state’s duty to provide citizens with institutionalised venues where they may resolve their discrepancies, which could work as a way of achieving a deliberative minimum at the individual level. Indeed, courts are especially useful in contexts where self-interest is unlikely to favour the worst-off, like, for instance, in the case of disputes over property rights. In the absence of adjudicators determining what belongs to whom, power relations will probably benefit those better positioned to impose their own preferences. Courts, with the assistance of the state monopoly on the use of violence, can adjudicate on those matters in non-arbitrary fashions, irrespective of the factual power the parties before the tribunal may have, thus providing the necessary conditions for a non-coercive and non-abusive exercise of self-interest among individuals.

I thus agree with Mansbridge and colleagues that non-coercive self-interest can and should be part of the deliberations that eventuate in a democratic society, and that self-interested actions may have complementary rather than antagonistic relation with the deliberative system. However, I also agree that this interplay should be justified deliberatively (2010, pp. 64, 69), and courts can play an important role in that.

Yet, this should not be received with enthusiasm by champions of judicial review, let alone judicial supremacists. The procedural competence needed to address those controversies suggests the necessity of having a system of lower courts taking
care of individual grievances and rights infringements, and a system of higher courts exercising their traditional nomophilactic function of ensuring a uniform application of the law, helping the rest of the parts of the system to detect deliberative failures at the individual level. It does not justify institutions or practices like judicial review or judicial supremacy, whose exercise changes normative statuses of individuals who are not parties at the case decided by the court. It does not imply placing courts in any privileged hierarchy vis-à-vis other political actors.

Moreover, having strong judiciaries might encourage legislators to behave less responsibly than they otherwise would in matters of constitutional salience, because they assume courts will take care of those issues.26 While defective institutions may have beneficial systemic effects, it does not follow that institutions which may appear as deliberatively exemplar, will for that reason produce beneficial systemic outcomes.

I draw three conclusions from this subsection: First, systemic approaches do not justify holism. A systemic perspective does not imply favouring the system over the individual when both levels conflict; one thing does not follow directly from the other. Second, courts may have an important role in making individuals visible inside the system and thus help correct distortions at the individual level. Third, that role is more limited than the one Rawls et al. are willing to concede, and it is circumscribed to the resolution of individual cases via the use of a sort of discourse that does not exhaust all the possible alternatives currently qualifying as deliberative. Also, they cannot answer how courts institution may be permeable to all these sorts of talk or represent the arguments of those who are not part of the case sub lite.

V. Conclusions
Systemic approaches are incompatible with Herculean images of judges (*Cf* Dworkin, 1978, p. 105). The authors considered in section II do not provide guidance as to how the distribution of labour they favour would hold in the stage of a deliberative democratic theory that has changed in terms of the number of fora recognised as capable of accomplishing political work. Nor do they offer guidance as to how the idealised picture of judicial discourse would make sense from a systemic perspective, which sets a different threshold in terms of the types of reasoning qualifying as deliberative. It is hard to see how theories like Rawls et al.’s would be sensitive to non-legal, non-expert, non-technical everyday talk. Plus, the insulation argument, embraced in particular by Eisgruber but also by Rawls, Habermas and Alexy, portrays the judiciary as impervious to the political system. Instead, systemic approaches are taking research in the opposite direction, for the deliberative system allows different forms of discourse to emerge and individuals to have a voice, irrespective of their capacities to make contributions to the process, so that different parts may influence each other.

To finish, deliberative scholars should reflect upon three research areas: First, efforts must be made to determine when, and to what extent systemic considerations merit priority. The epistemic, ethical and democratic functions elaborated by Mansbridge and colleagues are insufficient to determine when systemic considerations yield to the correction of distortions at the individual level. As I have argued, courts may be useful in correcting those distortions, but while those criteria are not clear, it remains difficult to draw lines between judicial and political functions and, therefore, to clarify the division of labour between institutions, which is so important for systemic approaches. Researchers should theorise about these criteria and pay attention to the
role individuals occupy in order to avoid the risk of an insensitive and insensible holism.

Second, empirical research should remain pressing and undertaken from systemic perspectives — the division of labour between parts of a deliberative system will be better specified if we acquire more knowledge about the deliberative capacities of different actors. The notion that courts are ideal deliberators bypasses many agents and interactions between them. It is also a contested empirical claim, as evidence shows that under certain institutional conditions, ordinary citizens make good decisions on principled grounds. We are thus in need of comparative studies between deliberative exercises of judges on the one hand, and citizens on the other. Citizens may fare worse than judges, but we should not take for granted something that needs to be scrutinised.

Finally, deliberative democrats must once again consider courts. I have showed that the idealistic image of the judiciary is obsolete, so research is needed to reconsider questions such as: are courts good at deliberating? How does this affect institutions like judicial review of legislation? Is judicial supremacy a justified institutional practice once we no longer see courts as privileged actors in terms of their deliberative capacities?
NOTES


2 Dryzek, 2010, pp. 6-10; Mansbridge et al., 2012, pp. 1-3; Chambers, 2013, pp. 201-20; Owen & Smith, 2015, pp. 213-214; Lafont, 2015, pp. 40-41; Kuyper, 2015, pp. 53-54.


8 For example, Fishkin, 1997; Fung, 2003; Gastil & Levine, 2005; Goodin & Dryzek, 2006; Grönlund, Bächtiger, & Setälä, 2014. Also, see the case-studies available in participedia.net (Fung & Warren, 2011).

9 For example, Habermas, 1996; Rehg & Bohman, 1996; Fishkin, 1997; Elster, 1998; Ackerman & Fishkin, 2004.

11 Portraying Rawls as a deliberative democrat is reasonable, although admittedly contestable. For accounts explicitly in favour of his inclusion, see Freeman, 2000, p. 382; Cohen, 2003; Zurn, 2007, p. 166; Dryzek, 2010, p. 325; Morrel, 2014, p. 159.

12 Some do distinguish both concepts, for example, Mendes (2013, pp. 53-71). I am merely suggesting that conflating both concepts may partly explain the problems evinced by the scholars here examined.


14 Likewise, Doherty & Pevnick, 2013.


16 Likewise, Rosanvallon 2011, pp. 121-168.


18 Mansbridge et al., 2012, p. 2; Bohman, 2012, pp. 72, 73; Chambers, 2013, pp. 201-202; Kuyper, 2015, p. 54; Lafont, 2015, p. 41.

19 For similar descriptions, see Chambers, 2013, pp. 201-202; Lafont, 2015, p. 41; Kuyper, 2015, p. 51; Owen & Smith, 2015, p. 215.


Like, for example, Ely (1980).

Elsewhere, Mansbridge et al. nuance this claim: ‘normatively … the system should be judged as a whole in addition to the parts being judged” (2012, p. 5; my emphasis).

Macedo, 1999, p.3; Tushnet, 1999, p. 57; Whittington, 2007, p. 143; Mansbridge et al., 2012, p.3

See, for example, endnote VIII.

REFERENCES


