

Comment on Matias Kumm's

"Rights-Based Proportionality as the Test of Public Reason"

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1. Overview

In his interesting paper, Prof. Kumm makes a descriptive claim, shows that it raises a normative question, answers it, shows that his answer gives rise to another, explanatory question, and proceeds to (somewhat tentatively) answer *it*.

The descriptive point is one that may not need emphasizing in the context of this conference: It is that the legal discussion of most constitutional rights (in the States as well as in Europe, and we can happily add that in Israel as well) is now dominated by considerations of proportionality and balancing. Kumm supports this claim partly by drawing on a detailed discussion of an example, the European Court of Human Rights' discussion in *Lustig-Prean and Beckett vs. United Kingdom* (a case dealing with the practice of not allowing homosexuals to serve in the military, and conducting privacy-invading investigations of sexual practices in order to implement this policy), where Kumm shows that really, when push comes to shove, it all pretty much comes down to proportionality. Furthermore, the proportionality test itself has little precise content, and so a limited force of guiding judicial decisions, as it "merely provides a structure for the justification of an act in terms of public reason" (12).

The normative question is one about the legitimacy of judicial review. The question is a member of a family of familiar worries about judicial review. But it is not *merely* a rehearsal of the most familiar objections of this sort, because of the significance of the descriptive point: For given that the legal discussion of constitutional rights now comes down to proportionality, and given the nature and

open-endedness of such considerations, it is *exceedingly* hard to defend the claim that judges have some epistemic or institutional advantage over legislators (or others) in deciding such cases. Thus, given the dominance – as a matter of current legal practices – of proportionality, the question of the legitimacy of judicial review becomes especially urgent.

Kumm steps up to this normative plate, defending judicial review on a number of related grounds. We can divide them into instrumental and intrinsic considerations. In attempting to justify judicial review instrumentally, Kumm draws attention to several reasons why it is plausible to speculate that a roughly democratic system with judicial review – even with one that is up to its neck in considerations of proportionality – is likely to lead to better decisions in rights-related issues (and perhaps in general) than a democratic system without a judicial review mechanism. But such instrumental considerations do not exhaust the advantages of judicial review. For judicial review "serves as an institutionalized reminder that any coercive act in a liberal democracy has to be conceivable as *a collective judgment of reason* about what justice and good policy requires" (19). Indeed, "every judgment handed down and opinion written applying something like the RHRP [Rationalist Human Rights Paradigm] is a ritualistic affirmation of this idea" (19). Here Kumm draws an interesting analogy with Socrates's way of doing philosophy. Socrates's constant doubts and reflection on such things as justice and the good is, of course, instrumentally useful, but this usefulness does not exhaust its value: For it is plausibly considered to have intrinsic value, to be a constitutive part of what it is to live a good life.

Indeed, with these points in mind, it becomes clear that the entitlement to a judicial process that examines whether my constitutional rights have been violated is

no less a part of democracy than the entitlement to an equal vote. Furthermore, once we've shown the willingness to compromise participation by moving from direct to representative democracy, there is no *further* problem about judicial review. True, the judges are not exactly "we the people". But nor are the members of the legislature. And granting authority to the former is not in principle harder to justify or to reconcile with the deep justifications of democracy than granting authority to the latter.

But this now raises an explanatory puzzle. The solution to the normative problem of reconciling democracy with judicial review is, if Kumm is right, that there was no problem there to begin with (here I think he strongly differs from the position put forward by Stephen Gardbaum in his paper yesterday). If so, what explains the wide controversy over, suspicion of, and literature discussing the counter-majoritarian difficulty and related issues? Kumm addresses a comparative relative of this question: What explains the fact that there is much *more* suspicion of this kind in the US than in Europe? He tentatively answers this explanatory question offering a host of relevant differences – sociological or cultural ones, historical ones, and also more narrowly legal considerations regarding the nature of the relevant legal systems and the institutional setups in which the relevant courts work.

## 2. An Autobiographical Disclaimer

Because of my own limitations – I am *really* not a comparative constitutional law person – my critical comments are going to concentrate on the normative part. But my critique is going to be somewhat annoying – I agree with Kumm (in outline, at least) that the arguments against judicial review are highly unconvincing. So I won't be arguing with him on that front. What I will attempt to argue, rather, is that some of Kumm's ways of arguing *for* judicial review are not more convincing.

### 3. An Intrinsic Justification of Judicial Review

Critics of judicial review<sup>1</sup> typically mount a two-part attack – they question the instrumental payoffs of judicial review, sometimes even arguing it is instrumentally counter-productive; and they also claim that there is something intrinsically problematic with judicial review, that judicial review violates people's rights (for equal participation, usually). The friends of judicial review, however, typically respond with only an instrumental defense – judicial review, they typically argue, helps in protecting rights, or perhaps in achieving some other valuable outcomes. Kumm's defense of judicial review is different. He mounts a *two*-part defense, analogous to the two-part attack. And there is, of course, something nice about this – leveling the playing field, as it were. Despite the attractiveness of this move<sup>2</sup>, I think we should ultimately reject it.

Kumm's discussion here is heavily Rawlsian, relying on some of the major themes of Rawls's *Political Liberalism*, such as the claim that legitimacy depends on the possibility of justifying the state's actions to each person, in terms abstracting from comprehensive doctrines. I think it is fairly clear that if this general Rawlsian stuff fails, this part of Kumm's paper fails with it. And indeed, I think this general Rawlsian stuff is deeply confused, and – given its influence in contemporary Anglo-American political philosophy – very harmful. But let me just note this commitment of Kumm's (and, I would say, liability) here, and proceed on the assumption that this Rawlsian stuff is not particularly objectionable.

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<sup>1</sup> Waldron's "The Core Case..." can serve as an example here.

<sup>2</sup> For another attempt at this move – different in some crucial ways from Kumm's, but still one to which my main objection below seems to apply – see Alon Harel and Yuval Eylon, "The Right to Judicial Review", *Virginia Law Review* 92 (2006).

I think that Kumm is avoiding the really hard question for someone attempting to offer an intrinsic justification of judicial review. The really hard question is not whether there is *something* not completely instrumental to be said for judicial review, but whether we are willing to pay a relevant instrumental price for judicial review. The hard question is, then, the following: Suppose we have reasonably strong empirical evidence that judicial review does not protect rights better than alternatives, indeed, that the majoritarian decision procedure does a *better* job at this than judicial review. *Now* do we still find judicial review justifiable? I find a "yes" answer to this question almost incomprehensible, and anyway utterly unbelievable. Even if Kumm is right about the ritualistic aspect of judicial review, are we willing to pay for rituals of this kind using the hard currency of rights violation? And if you join me in answering "no", then this shows – pretty much<sup>3</sup> – that the justification of judicial review depends entirely on instrumental considerations. So it seems to me that someone like Kumm here faces a dilemma – you either are, or are not, willing to pay a price in the protection of rights for judicial review; if you are, this seems to me like a sufficient reason to reject your theory; if you are not, it's not clear what work is being done in your theory by intrinsic considerations. And it is a dilemma Kumm must, I think, address explicitly<sup>4</sup>.

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As already mentioned, Kumm draws on a charming analogy between judges engaging in proportionality-dominated judicial review and Socrates engaging in, well, Socratic discussion with Athenian authoritative figures. Despite my most general suspicions of such far-reaching analogies, I have to confess that Kumm manages to

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<sup>3</sup> Unless intrinsic considerations are lexically prior to instrumental ones, breaking ties, etc. I don't think this is what Kumm wants.

<sup>4</sup> Harel and Eylon are clear and explicit here – they *are* willing to pay a price in (other) rights in order to respect the right to a hearing, which they think grounds the right to judicial review.

take this analogy further than I would have thought possible. But still, the analogy seems to me at points rather forced (for instance, courts are (roughly) passive, patiently waiting in their chambers for litigants, and Socrates is anything *but* passive in this way; also, on Kumm's Rawlsian picture of political philosophy, the reasons relevant to judicial review are constrained in a way that has no analogue in Socrates' philosophizing.), and in anyway falls short of an argument. Indeed, it seems to me that there's here a very clear *disanalogy*: For while it is at least somewhat plausible to claim that a commitment to Socratic critical reflection and intellectual examination is of intrinsic value, it is – as I've just argued – highly *implausible* to make the analogous claim in the case of judicial review. I am (perhaps) willing to pay a price in other things that make one's life go better in order to live a Socratically reflective life. I am *not* willing to pay a price in people's rights in order to maintain a practice of judicial review.

So I think the defense of judicial review completely depends on its instrumental credentials. You may think this gives rise to other problems – perhaps mostly because there's disagreement about the goodness of whatever outcomes judicial review does secure. But such supposed difficulties can't be discussed here<sup>5</sup>.

#### 4. Judges and Representatives

Kumm argues, you will remember, that at least once we're realistic about representatives not being "the people", judicial review is seen not to be especially problematic.

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<sup>5</sup> It is a central theme of Waldron's *Law and Disagreement* that an instrumental defense of judicial review fails because of such disagreement. I think this line of thought embodies an important confusion about the role of disagreement. I have argued this point in "[Taking Disagreement Seriously: Some Critical Comments on Jeremy Waldron's Law and Disagreement](#)", *The Israel Law Review* 39 (2007), 22-35. As I understand him, Waldron is no longer committed to this argument: It does not appear in his "The Core Case", and if I understand correctly his response to me, he (implicitly) concedes this argument. See Waldron, "Disagreement and Response", *The Israel Law Review* 39 (2007).

Now, thinking comparatively in this way is, of course, a good thing, though I would go pessimistic where Kumm goes optimistic: He seems to think that this comparison shows that because representatives are still democratically kosher, so are judges. I think that such thoughts most naturally lead in the other direction – showing that talk about the democratic kosherness of legislators and judges alike is a myth.

But I still think that Kumm is being too quick here, for there can still be important differences of degree between judges and representatives here. The relevant points here are the obvious ones: election and reelection, the relevant ethos, the relevant pressures, etc. So while it can't be seriously argued that legislators are the people and judges aren't, it *can* be seriously argued that legislators are closer to the people than judges are, perhaps in a way that makes a difference to democratic legitimacy. Indeed, some of these differences are not just differences we *notice*; rather, they are differences we *want*, they play a role in why it is that judicial review is justified (if it is).

Here is a related point: I, as you may have already guessed, am not terribly excited about participation, voting, etc. But it is not entirely implausible to think that the right to vote is of intrinsic importance, something for which we're willing to pay a price in other things. But as I've already said, to me it seems unbelievable that judicial review has such value. So Kumm's symmetry between legislators and judges – and so between the right to vote and the right to judicial review – seems to me to fail here too.

## 5. Reasonable Acceptance and Judicial Review

Kumm suggests that in cases of judicial review judges make sure that the relevant legislation is within the bounds of public reason, that it can be justified in terms that all can reasonably accept, etc. He says:

"When courts apply the proportionality test, they are in fact assessing whether or not legislation can be justified in terms of public reasons, reasons of the kind that every citizen might reasonably accept, even if actually they don't." (30)

Let me again remind you that I don't buy all this Rawlsian stuff, but I'm going along with Kumm here.

How should we understand this claim? If it is meant as a descriptive claim – this is what judges in fact do – then I suspect in a large number of cases this is simply false. Presumably, judges are not expert Rawls-scholars, some of them are stupid, or narrow-minded, or in the grip of some other theory, etc. Indeed, I don't know if *any* judge does precisely that. Sure, judges sometimes talk in terms of reasonableness, especially when discussing proportionality. But "reasonableness" in judges' mouths and in Rawls's does not come down to the same thing. In Rawls's theory, reasonableness is a semi-technical term, that need not be related to reasonableness as it is understood by judges and lawyers (for instance, in Rawls reasonableness is related to the burdens of judgment, and to wanting to cooperate with others, thought of as free and equal; in legal contexts, as far as I know, reasonableness is understood as closeness to the truth).

So perhaps we should understand this claim normatively? Perhaps. But then, there is nothing unique here (within the Rawlsian assumptions) to judges. Legislators too should remain within the bounds of public reason.

Is there some other possible understanding of this claim? Perhaps simply that judges are more likely to play the game according to Rawlsian rules than legislators.

But then, we are again in the vicinity of the instrumental considerations already mentioned. For the question whether judges *are* more likely than legislators to behave is one to be decided on empirical grounds.

#### 6. The Most Likely Way of Making a Difference

Let me conclude with a smaller point. Kumm argues, quite convincingly, that given the minute chances of making a difference by voting, the most likely way for one person to actually make a difference is by petitioning a court that is authorized to engage in judicial review. I think he's right (at least, this is the most likely way for an NYU law professor to make a difference). But I'm not sure this is a good thing.

It's quite possible that the most likely way of getting decent, quick service from some administrative agency is by using the fact that your cousin works there. But this doesn't count in favor of a system that allows public administrators to favor their relatives. For while it is a good thing to get good, quick service, we think that *all* are entitled to *equally* good and quick service from the relevant agency. And this is precisely what the cousin arrangement precludes.

Analogously, then: It is (we're here assuming) a good thing to make a difference. But it is arguably important that all have an equal chance of making a difference. And this is precisely what a judicial review system precludes (because it allows the minority to have its way). Of course, perhaps it is not after all important the political power is divided roughly equally. But to assume as much in a defense of judicial review seems dangerously close to begging the question.