

Deciding without Deliberating

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ABSTRACT: Advocates of judicial review often take for granted the deliberative potential of courts and their role as representatives of public reason, whereas the critics of judicial review usually argue that deliberation in courts, if relevant at all, tends to be very poor. This debate is characterized by a monolithic view of courts (as well as of legislators). I argue that internal rules and practices - variables that are almost never taken into consideration in the debate on judicial review - may, by fostering or hindering deliberation, strongly affect, positively or negatively, the legitimacy of a court. Based on a case-study (on the Brazilian Supreme Court), I show how these variables work. Despite using as example a court with poor deliberative performance, I argue that this should not lead to the conclusion that the thesis of courts as institutions with a distinctive deliberative potential must be rejected. What I argue is rather that each disincentive for a true deliberation is caused by a particular rule or by a particular practice. Other rules and other practices may lead to completely different outcomes.

"[...] where people do not have to fear that admission of ignorance on one issue will be taken as a sign of general ignorance, deliberation is more likely to occur".¹

INTRODUCTION

Advocates of judicial review usually argue that, in order to compensate for the lack of democratic legitimacy of institutions that exercise judicial review of legislation, its sources of legitimacy are different from those of legislatures. One of these sources of legitimacy is namely the *quality of deliberation* within the courts. This is of course not the only, and sometimes not even considered as the most important, argument for the legitimacy of the

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¹ Jon Elster, *Introduction*, in DELIBERATIVE DEMOCRACY 13 (Jon Elster ed., Cambridge University Press 1998).

judicial review. The most important (or at least the most frequently mentioned) arguments are surely those related to the protection of minority rights² and to the general acceptance, within a given society, of the constitutional court as legitimate.³

An example of an argument grounded on the quality of deliberation in courts can be found in Rawls' account of the Supreme Court as exemplar of public reason.⁴ According to him, the court is "the only branch of government that is visibly on its face the creature of that reason and of that reason alone".⁵ Legislators (as well as the citizens) do not need to justify their votes by public reason, nor "make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions".⁶ Therefore, the ideal of public reason applies

in a special way to the judiciary and *above all to a supreme court in a constitutional democracy with judicial review*. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. Since acts of the legislative and the executive need not to be justified in this way, the court's special role makes it the exemplar of public reason.⁷

In this context, the role of deliberation in courts is decisive.⁸ However, the premise that constitutional or supreme courts are the *locus* of the public reason and rational deliberation is usually accepted (or rejected) in a very undifferentiated way. The advocates of judicial review usually take for granted the deliberative potential of courts, whereas the critics of judicial

² See, for instance, Dieter Grimm, *Constitutional Adjudication and Democracy*, in JUDICIAL REVIEW IN INTERNATIONAL PERSPECTIVE 107 (Mads Andenas ed., Kluwer 2000); see also RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 131-149 (Harvard University Press 1977). This source of legitimacy will not be analyzed here. For an account of the main issues involved in this debate, see, for instance, Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights* 22 OJLS 275-299 (2002).

³ These two sources of legitimacy (protection of rights and acceptance by the society) are clearly result-oriented and of empirical nature, whereas the source of legitimacy I will discuss in this article (quality of deliberation) is above all normatively grounded. Nevertheless, I will also advance arguments that are result-oriented and empirically, rather than normatively, grounded. I will argue, for instance, that higher standards of deliberation tend to lead to better decisions, and, conversely, that poor deliberation may lead to low quality decisions (see, for instance, note 64).

⁴ See JOHN RAWLS, POLITICAL LIBERALISM 231 (Columbia University Press 1993).

⁵ *Id.* at 235.

⁶ *Id.* In a similar sense, see RONALD DWORKIN, A MATTER OF PRINCIPLE 25 (Harvard University Press 1985).

⁷ RAWLS, *supra* note 4, at 216.

⁸ There are several other versions of a defense of judicial review grounded on some deliberative attributes of supreme or constitutional courts. Those put forward by Dworkin are probably the most well-known (see, for instance, RONALD DWORKIN, FREEDOM'S LAW 1-38 (Oxford University Press 1996); and DWORKIN, *supra* note 6, at 33-71), but see also CHRISTOPHER L. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT (Harvard University Press 2001).

review argue that deliberation in courts, if relevant at all, tends to be very poor. It is always a clear-cut either/or dispute.

1. Not all courts are alike (legislatures neither)

This debate is typically framed by a monolithic view of courts (as well as of legislatures). Accordingly, *all* courts are either legitimate or illegitimate to exercise judicial review. No differentiation is usually made between courts; no attention is usually paid to different institutional arrangements or to different internal practices in courts, which may foster or hinder deliberation.

For those who wish to argue that even the decisions made by the worst, more corrupt, elected by the most unfair electoral system, less accountable legislator are more legitimate than those made by the best, most honest, reasonable, deliberative, judicious court, there is no need, concededly, to differentiate among courts and among legislatures. Since this claim is hardly adopted by anyone, it is possible to insist on the necessity of differentiating types of courts and of parliaments before devising general conclusions on the legitimacy debate.

I argue that if the legitimacy of judicial review depends, among many other things, on the potential of courts of being a locus of rational deliberation, then the German Constitutional Court and the American Supreme Court - to name only two paradigmatic courts in this debate - are far more different than may be supposed at first sight. And, of course, this difference holds not only between these paradigmatic courts. It applies to the comparison of *any* other courts and may be generalized by means of the following formula:

The more the internal organizational rules and customary practices of a given court may function as incentives for rational deliberation, the more legitimate the judicial review exercised by this court.

This article does not aim to make a comprehensive comparison of all variables that may affect the deliberative potential of courts. As already mentioned above, I will show - based on a case-study - how and to what extent deliberation may be strongly hindered in a supreme court which, at first sight (i.e. according to the mainstream classifications), is *exactly like any other court* that exercises judicial review of legislation. What I attempt to show is how internal

rules and practices - variables that are almost never taken into consideration in the debate on judicial review - may, by hindering deliberation, strongly affect the legitimacy of a court. The object of this case-study will be the Brazilian Supreme Court.

This article is divided into two main parts. The first part consists of sections 1 to 4. In these sections I will establish the theoretical framework of the analysis, especially in regard to the concept of deliberation. The second part consists of sections 5 to 7. In these sections I will carry out the above-mentioned case-study on the deliberative practice of the Brazilian Supreme Court.

2. The key idea: deliberation

Deliberation is surely not an unequivocal term. It is also surely polemical whether deliberation is superior to other forms of decision making. In this article, I take for granted that the better the deliberative performance of a court exercising judicial review, the better is the court itself. The reason for taking this for granted is rather simple and has already been sketched above. The defense of judicial review presupposes that the legitimacy of judicial review is grounded (at least in part) on the argumentative quality of courts. It is no coincidence that those who are against judicial review are also those who distrust either the deliberative potential of courts⁹ or the superiority of deliberation vis-à-vis aggregation, or both.

Before moving further, it is important to stress an initial conceptual clarification concerning the term deliberation. This clarification is based on the distinction Ferejohn and Pasquino established between *internal* and *external* deliberation.¹⁰ According to them:

Internal deliberation by a group is the effort to use persuasion and reasoning to get the group to decide on some common course of action. External deliberation is the effort to use persuasion and reasoning to affect actions taken outside the group. Internal deliberation involves giving and listening to reasons from others inside the group.

⁹ See, for instance, Jeremy Waldron, *The Core of the Case Against Judicial Review* 115 YALE L.J. 1346-1406, 1382-1386 (2006); and JEREMY WALDRON, LAW AND DISAGREEMENT (Clarendon Press 1999).

¹⁰ See John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions*, in CONSTITUTIONAL JUSTICE, EAST AND WEST 35 (Wojciech Sadurski ed., Kluwer 2002); See John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe* 82 TEXAS L. REV. 1671-1704, 1692 (2004).

External deliberation involves the group, or its members, giving and listening to reasons coming from outside the group.¹¹

Although almost any collegiate body commonly engage in both types of deliberation,¹² it will be shown below that only the internal type of deliberation can fulfill the demands of a legitimacy conceived in deliberative terms. It can be thus argued from the outset that a court engaging only or mainly in an external type of deliberation may be considered less legitimate¹³ for striking down legislation by means of judicial review than a court whose deliberative practices corresponds mainly to the internal type.

3. Why deliberate?

Are decisions taken after deliberation any different from decisions taken only by voting? Are decisions taken after deliberation *better* than those taken by mere aggregation?¹⁴ Presumably, there is no single and universally valid answer to these questions. In any event, the question in the title of this section - "why deliberate?" - does not demand an answer of this kind. In the next subsections, I am concerned with the goals of the deliberation process, i.e., with what one seeks to achieve through deliberation that could not be (or would be more difficult to be) achieved only by aggregative methods. A good summary of these goals can be found in Fearon's attempt to answer a similar question: what is the point or value of discussing things before making decisions?¹⁵ According to him, people may discuss matters before making a collective decision in order to: "1. Reveal private information; 2. Lessen or overcome the impact of bounded rationality; 3. Force or encourage a particular mode of justifying demands or claims; 4. Help render the ultimate choice legitimate in the eyes of the

¹¹ Ferejohn & Pasquino, *Constitutional Adjudication*, *supra* note 10, at 1692.

¹² *Id.*

¹³ It is not amiss to stress again that when I speak of "less legitimate" without any other qualification, I refer to the legitimacy derived exclusively from the deliberative performance of courts (see note 2). Therefore, a court whose deliberative practices are rather (or only) external may be considered - from the point of view of minority rights protection, for instance - exactly as legitimate as a court whose deliberative practices are rather (or only) internal.

¹⁴ In this article, I will use voting and aggregation synonymously.

¹⁵ James D. Fearon, *Deliberation as Discussion*, in DELIBERATIVE DEMOCRACY 44 (Jon Elster ed., Cambridge University Press 1998). Although Fearon's focus lies in *political* decisions, his considerations are also valid for deliberations in the judicial arena.

group [...]; 5. Improve the moral or intellectual qualities of the participants; 6. Do the 'right thing', independent of the consequences of discussion".¹⁶

For the goals of this article, it is enough to discuss the first two of these reasons (though, instead of "revealing private information", I will call the first reason "sharing previously unshared information", in order to avoid a connotation of "revealing secrets"). Both goals may be summed up by a brief excerpt of a speech Sieyès delivered before the revolutionary French National Assembly in 1789: "When we get together, it is to deliberate, to know the opinions of each other, to benefit from reciprocal enlightenment, to confront the personal wills, to modify them, to harmonize them, and ultimately to reach a result which is common to the plurality".¹⁷

3.1. Sharing previously unshared information

It is plausible to assume that in almost every decisional situation, the better a person is informed, the greater is the likelihood that she will make a wiser decision. Even if it is true that the greater the amount of information, the more complex the decision-making process may turn out to be, it is also true that ignoring crucial information may lead, to say the least, to suboptimal decisions.

Within a collective body, we can imagine two opposite decisional situations: it may be the case that the members have to cast their votes on a given issue knowing only the data each one has collected individually and without knowing the opinions of the other members on the subject, or it may be the case that, before casting their votes, the members of the group have not only the opportunity to know what pieces of information the other members have had access to, but also what the opinion is of each member on the subject to be decided.

If a well-informed decision tends to be a better decision than a decision taken in the dark, then we should surely prefer the second situation described above. And if this is true, there hardly seems to be a better way to achieve such a better informed decision than through deliberation. As Manin puts it, "[i]n the real world, when individuals make a decision

¹⁶ *Id.* at 45.

¹⁷ Emmanuel Joseph Sieyès, *Discours (7.Sept.1789)*, in ARCHIVES PARLEMENTAIRES - PREMIÈRE SÉRIE (1789-1799), vol., 8 595 (M. J. Madival, E. Laurent, & E. Clavel eds., Paul Dupont 1875).

concerning society, they can never avail themselves of all necessary information. They certainly have some information, but it is fragmentary and incomplete. [...] In the process of exchanging evidence related to proposed solutions, individuals discover information they did not previously have".¹⁸

In the already quoted excerpt from Sieyès, the goal of sharing unshared information is stated at the outset: "When we get together, it is to deliberate, *to know the opinions of each other* [...]"¹⁹. Deliberation is thus, first of all, a procedure for becoming informed.²⁰

3.2. Attenuating the effects of bounded rationality

In order to understand how deliberation may attenuate the effects of bounded rationality, the same excerpt from Sieyès may again be useful, but with the emphasis added in a different place: "When we get together, it is to deliberate, to know the opinions of each other, *to benefit from reciprocal enlightenment* [...]"²¹.

When problems are complex, individual ideas, even if shared, may not lead to an optimal decision. What is needed is an intense exchange of arguments, a "reciprocal enlightenment",²² so that new ideas may arise. Any person who at any point of her life had to solve complex problems together with other persons surely knows the benefits and the creative power of "brainstorming". In purely aggregative voting procedures, there is no room for brainstorming. Only deliberative procedures can foster the creativity for new, collective constructed, solutions.

4. Deliberation in courts: some preliminaries

In the previous sections, the idea of deliberation and its main goals have been analyzed in very general terms. In the following sections, I will focus on the conditions of deliberation *within courts*.

¹⁸ Bernard Manin, *On Legitimacy and Political Deliberation* 15 POLITICAL THEORY 338-368, 349 (1987).

¹⁹ Sieyès, *supra* note 17, at 595 (emphasis added).

²⁰ Manin, *supra* note 18, at 349.

²¹ See Sieyès, *supra* note 17, at 595 (emphasis added).

²² See Dieter Grimm, *To be a Constitutional Court Judge*, in DISTINGUISHED FELLOW LECTURE SERIES 9 (J.H.H. Weiler ed., NYU School of Law 2003: "In the United States when I get a chance, I always say that the United State Supreme Court wastes this *source of illumination* by not deliberating enough. This may be a big fault." (emphasis added)).

4.1. Collegiality

Supreme or constitutional courts are always collegiate, in the sense that decisions are taken by a group of persons, but this does not mean that collegiality is also a cogent feature of these courts. The first misunderstanding that should be avoided is the idea that collegiality has something to do with friendship or the absence of disagreements. Judges do not need to go to the opera or play golf together, not even to have coffee together in the court's cafeteria to achieve collegiality. Moreover, judges disagree all the time with each other. Disagreement underlies the very need of deliberating (where there is no disagreement, deliberation is hardly needed).

Collegiality implies, among other things, (i) the disposition to work as a team; (ii) the absence of hierarchy among the judges (at least in the sense that the arguments of any and all judges have the same value); (iii) the willingness to listen to arguments advanced by other judges (i.e. being open to be convinced by good arguments from other judges);²³ (iv) a cooperativeness in the decision-making process;²⁴ (v) mutual respect among judges; (vi) the disposition to speak, whenever possible, not as a sum of individuals but as an institution (consensus seeking deliberation).

It is not difficult to understand why it is argued that collegiality is a condition of deliberation in courts. It suffices to compare the six elements stated above with the "conditions for deliberation" that are usually mentioned by the literature on deliberative democracy.²⁵ The similarities are no coincidence. Even though collegiality is not a concept that this literature usually deals with, this is only because the debate on deliberative democracy is usually not concerned with deliberation within small collegiate bodies and

²³ See Dieter Grimm, *Politikdistanz als Voraussetzung von Politikkontrolle* 27 EuGRZ 1-3, 2 (2000).

²⁴ Benjamin Alarie & Andrew Green, *Should They All Just Get Along?* 58 UNIVERSITY OF NEW BRUNSWICK LAW JOURNAL 73-91, 79 (2008).

²⁵ See, for instance, Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY 22-23 (Alan Hamlin & Philip Pettit eds., Blackwell 1989), JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 369 ff. (Suhrkamp 1992), Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE (Seyla Benhabib ed., Princeton University Press 1996). See also Marco R. Steenbergen et al., *Measuring Political Deliberation* 1 COMP EUR POLIT 21-48, 21 (2003): deliberation is "a process in which political actors listen to each other, reasonably justify their positions, show mutual respect, and are willing to re-evaluate and eventually revise their initial preferences". Similar conditions are also usually mentioned by the literature on discourse theories of law. See, for instance, Robert Alexy, *Discourse Theory and Human Rights* 9 RATIO JURIS 209-235 (1996).

especially not within courts. What I argue is simply that shifting the focus of this debate to the courts necessarily leads to the concept of collegiality. If this is true, a direct relationship between collegiality and deliberation may be established: the more the elements of collegiality are present, the greater the deliberative potential of a court.

4.2. Deliberation: winning or deciding?

In the literature on judicial review, when it comes to discussing deliberative performance of courts, the most common strategy is to compare how courts and legislatures deliberate. In the end, the advocates of judicial review argue that courts deliberate better, whereas its critics argue that the quality of deliberation in parliaments is higher. This strategy is usually characterized by each side in the dispute using only the examples that perfectly compliment their argument. The best known example is Waldron's comparison between the debate over abortion rights in the U.S. Supreme Court and in the British House of Commons.²⁶ As Kumm puts it, "Waldron has chosen his examples well. First he focuses on a case, in which the judicial reasoning by the US Supreme Court is particularly poor [...]. Second, he describes a political process in the UK that worked as well as one might hope for [...]. But to establish his case it would have been helpful to choose the debates that typically informed state laws prohibiting abortion in the United States as a point of comparison, rather than debates in the UK."²⁷

The assumption that underlies this article (at least in what concerns "who deliberates better?") is quite trivial: there is no doubt that one can find examples of high quality deliberation in parliaments all over the world as well as very poor debates in constitutional courts in many countries, and vice-versa. This is not what really matters. What matters are the conditions under which the full deliberative potential of an institution can be achieved. As has been stressed above, if the goal of deliberation is, among other things, to share information and attenuate the effects of bounded rationality in order to create ideal

²⁶ Waldron, *The Core of the Case*, *supra* note 9, at 1384-1385. See also RICHARD BELLAMY, POLITICAL CONSTITUTIONALISM 253-254 (Cambridge University Press 2007).

²⁷ Mattias Kumm, *Institutionalising Socratic Contestation* 1 EUROPEAN JOURNAL OF LEGAL STUDIES 1-32, 18 (2009) See also Andreas Follesdal, *The Legitimacy of International Human Rights Review* 40 JOURNAL OF SOCIAL PHILOSOPHY 595-607, 604 (2009).

conditions for deciding cases in the best possible way, and therefore the participants of deliberation should, among other things, be able to work as a team, be willing to listen and take seriously arguments advanced by the other participants and be open to being convinced by good arguments, to be cooperative in the decision-making process, and want to achieve, whenever possible, a consensual decision, then we have the following abstract institutional scenario: in a necessarily adversarial institution such as a legislature, deliberation seldom, if ever, aims (not even as a regulative idea) to achieve consensus, but only aims to garner the majority of votes. In parliaments, the final goal is to win, because winning is the only way of implementing what a given group thinks to be the right policy. Apart from very exceptional cases, members of a political party will seldom be convinced by the arguments advanced by their adversaries.

It goes without saying that I am not suggesting that legislative deliberation is meaningless. On the contrary, it is fundamental for the democratic process. But the deliberation that takes place in parliaments is above all an *external* deliberation.²⁸ In parliamentary democracies, it would be naive to suppose that the members of opposition parties hope to convince government of having the best answers for the issues they have to decide. The most important role of opposition is to convince the society, the voters, and the media channels (i.e., an external audience), and not the government (i.e., the internal audience) that they are right.

If the very nature of an institution (parliament) fosters external deliberation and weakens the value of internal deliberation - because the primary goal of participants is to win²⁹ - then the deliberation in legislative bodies will always tend to be of a different kind compared with deliberation that may occur in constitutional and supreme courts.³⁰ It is not a question of

²⁸ See section 2, above.

²⁹ As Grimm puts it: "The legal method is the same for politicians and judges. But the circumstances under which constitutional questions are answered differ. And the circumstances of the political sphere are not particularly favourable to unbiased constitutional answers" (Grimm, *supra* note 2, at 110). As Johnson argues, one of the main features of political discussion is that parties "seek to challenge one another at a quite 'fundamental,' even 'existential,' level" (James Johnson, *Arguing for Deliberation: Some Skeptical Considerations, in DELIBERATIVE DEMOCRACY* 165 (Jon Elster ed., Cambridge University Press 1998)).

³⁰ See again Grimm: "Politicians act in a competitive environment. What counts here is political success and ultimately electoral victory. [...] In contrast, courts operate *under a different code*" (Grimm, *supra* note 2, at 110 - emphasis added).

being better or worse. This would be a very crude simplification. The crucial issue is rather the following: when it is argued that courts are legitimate in exercising judicial review of legislation because of their distinctive deliberative potential, one is thinking of a deliberation in which information is freely shared, whose participants work as a team, trying to establish some kind of synergy in order to attenuate the effects of bounded rationality, are open to new arguments and willing to change their minds if confronted with better arguments,³¹ and, above all, a type of deliberation with a (at least underlying, as a regulative idea) goal of reaching consensus.

Admittedly, sometimes courts act like legislatures, i.e., sometimes courts deliberate (and vote) like legislatures (external deliberation). When they do this, it is possible to state (at least under the assumptions I have just specified above) that these courts are less legitimate to exercise judicial review of legislation. When courts decide this way - through external deliberation and vote counting - they add very few (sometimes nothing) to the work already done by the legislator. However, one should not conclude, simply because some concrete experiences show that both courts and parliaments deliberate and decide through very similar procedures, that these similarities are unavoidable.

4.3. Deliberation and aggregation, consensus and majority

A collective decision may be taken by three main procedures: deliberating, bargaining and voting.³² In this article, what interests the most is the relation between deliberating and voting (aggregating). Many collegiate bodies combine deliberation and aggregation. When unanimity is not required, the members of a group may deliberate extensively and, if opinions fall short of consensus, and if bargaining is not an option, voting is unavoidable.

In courts, decisions must not be unanimous. In most constitutional and supreme courts, decisions are usually made by the majority. Waldron uses this fact to mitigate the deliberative character of courts. He argues:

³¹ See, for instance, Dieter Grimm, *Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics*, in THE LAW / POLITICS DISTINCTION IN CONTEMPORARY PUBLIC LAW ADJUDICATION 31 (Bogdan Iancu ed., Eleven 2009).

³² See Elster, *supra* note 1, at 5.

I have always been intrigued by the fact that courts make their decisions by voting, applying the MD [majority decision] principle to their meager numbers. I know they produce reasons and everything [...]. But in the end it comes down to head-counting: five votes defeat four in the U.S. Supreme Court, irrespective of the arguments that the Justices have concocted.

In other words, what Waldron argues is that legislatures and courts decide in the same manner: first, their members "produce reasons and everything", then they cast their votes and the majority wins. Even though it may be so, one cannot conclude that this must necessarily be so.

Waldron's reasoning is flawed because it necessarily presupposes: (i) that in courts, just as in legislative bodies, winning at any cost is the primary goal, or, in other words, that judges only want to win; (ii) that judges "produce reasons and everything" only as cheap talk, or at best, for external audiences, since they already believe they cannot convince anybody inside the court; (iii) that only the final, binary (constitutional/unconstitutional) result counts; (iv) that the "winners" inside the court have no reasons to keep deliberating as soon as they realize they have already attained a majority; (v) that the arguments put forward by the judges on the minority side, just because they lost the binary battle (constitutional/unconstitutional), are meaningless for the final decision; and (vi) that court's opinion is synonymous with majority opinion.

Admittedly, several of these six presuppositions may be true in several concrete experiences of judicial review. The case study I will carry out in this article - the case of judicial review in the Brazilian Supreme Court - was not chosen at random. As a matter of fact, I will attempt to show that, in the deliberation and in the decision-making process in this particular court, *all* of these six presuppositions hold. But contrary to what one may rashly suppose, this finding does not run counter to the idea of judicial review. What the Brazilian case shows is solely that we cannot defend or reject the idea of judicial review as a whole, without paying due attention to the variety of possible institutional arrangements and institutional practices. It is exactly this variety of institutional arrangements and institutional practices that tells us to what extent the abstract promises made by the advocates of judicial review may be realized in the real world of constitutional courts.

Just as the ideal of a legislator that well represents the popular sovereignty may be affected by multiple variables, such as electoral systems with high levels of disproportionality, or the organization of the legislative body in a way that may affect the fairness in the legislative process, there are several institutional variables that may compromise the deliberative performance of a court. At the extreme - and it is possible to state that this extreme would be the cases in which the six assumptions mentioned above turn out to be true - it is possible to argue that certain courts, or certain institutional arrangements behind them, are not able to carry out some of the promises that the pro-judicial review literature makes. This is the case of the Brazilian Supreme Court.³³

Before moving on to the case study, I want to stress again that considering the Brazilian case a paradigmatic case of non-deliberative decision-making does not run counter to the judicial review thesis as such. It simply points to the necessity of a differentiated approach. In other words, at the concrete level, both advocates and critics of the judicial review should avoid arguments that presuppose that courts always deliberate and decide in the same manner. If deliberative performance is a source of legitimacy, and if this performance varies considerably among courts all over the world, then it is necessary to differentiate. Arguments like "courts are the locus of deliberation and public reason" or "courts deliberate worse than legislatures" are too general to be useful. This debate is already mature enough to go beyond these generalizations. It is astonishing how few studies on the deliberative performance of *concrete* courts and legislative bodies are out there.³⁴

Since I assume that picking only those examples that fit in the argument is not a fair strategy, the case-study that follows definitely does not follow this pattern. Indeed, although I am convinced that courts can be an attractive deliberative body, the case of the Brazilian Supreme Court shows how internal organization and deliberative practices may affect the

³³ It is important to stress that this statement bears only on the legitimacy grounded in the deliberative performance. I do not intend to analyze other sources of legitimacy adduced by the advocates of judicial review, i.e., it is not at stake whether the Brazilian Supreme Court is legitimate because it protects citizens' fundamental rights, or because it consists of members who are nominated and confirmed by elected officials (thus with at least an indirect democratic legitimacy) etc.

³⁴ This also applies (at least partially) to the American case. Despite the huge literature on judicial behavior, very few of its findings are discussed in the debate on the legitimacy of judicial review.

institutional unity, the quality of reasoning, and the overall deliberative potential of a court. As a result - at least as I see it - the legitimacy of judicial review is also affected.

Analyzing a court with poor deliberative performance may seem to be an odd strategy for someone who deems that courts can be an attractive deliberative body and legitimate to exercise constitutional review. However, this case-study on the Brazilian Court is not only strategically sound in that it avoids picking only the examples that fit into a given argument, it also presents a sound means of testing some of the attributes of deliberativeness mentioned above and of showing how internal rules and customary practices may affect the quality of deliberation. Only a simplistic approach would conclude that the Brazilian case is a proof of the failure of courts as deliberative institutions. Another, more interesting, result of the analysis is the possibility of highlighting variables that contribute to and variables that hamper deliberation in courts. Improving the deliberative performance of courts is only possible if one knows what works and does not work.

THE CASE-STUDY

The second part of this article is dedicated to the analysis of the deliberative practice of the Brazilian Supreme Court. In section 7, I will briefly explain the system of judicial review of legislation in Brazil and the main procedural rules within the Brazilian Supreme Court. In the two following sections, I analyze what I called the impact of *rules* (section 8) and the impact of *practices* (section 9) on deliberative performance.

5. Judicial review in Brazil: a short introduction

In Brazil, judicial review and the Supreme Court (*Supremo Tribunal Federal*) were born together. Unlike the American experience, in which the doctrine of judicial review was laid down by the Supreme Court, in Brazil, shortly after the Republic was proclaimed (1889), decree 848 (1890) determined the creation of a Supreme Court and expressly prescribed that this court had the prerogative of judging, as a last instance court, cases involving judicial review of legislation. Since then, every Brazilian judge, in any lawsuit, may refrain from applying a given statute if she is convinced that the statute is unconstitutional and the last

instance of appeal in such cases is the Supreme Court. This institutional arrangement was maintained by the first republican constitution (1891).

Although this diffuse judicial review, clearly influenced by the American model, still exists, it now co-exists with different forms of abstract and concentrated review. Especially since 1988, when the current Brazilian constitution was adopted, different types of constitutional actions have been introduced in the Brazilian system of judicial review. When such constitutional actions are filed, the Supreme Court decides as the first and only instance and these decisions have binding effects on all courts.

Thus, a decision of the Brazilian Supreme Court on the constitutionality or unconstitutionality of a statute may be rendered within two distinct judicial contexts: either it is the last of a chain of decisions that began with a concrete lawsuit filed before a trial court, or it is the first and only decision on an abstract constitutional action that was filed directly before the Supreme Court. In both case, however, the decision making process is very similar and both forms of judicial review will therefore be treated indistinctly herein.

Decisions on the unconstitutionality of a statute demand the participation of at least 8 of the 11 justices of the Supreme Court³⁵ and the support of the absolute majority of the court (i.e., at least 6 justices, even in cases in which less than 11 justices take part in the judgment).³⁶ The chief-justice always takes part in these decisions (i.e., not only in tied cases).

The plenary sessions³⁷ of the Brazilian Supreme Court are public. Since 2002, this has meant not only that there may be an audience in the plenary room, but also that the whole session (i.e. not only the oral hearings or the pronouncement of the judgment) are recorded and broadcast (often live) on TV. There is no previous official and secret meeting among justices.

³⁵ See article 143 of the court's rules of procedures.

³⁶ See Brazilian Constitution, article 97.

³⁷ In the Brazilian Supreme Court, there is no clear distinction between public hearings, deliberation session and judgment. These three steps occurs within a single session, which I call here "plenary session". Even though the plenary session may be interrupted in some occasions (due to time issues, for instance), this does not alter the fact that, in the Brazilian Supreme Court, those three steps (public hearings, deliberation session, and judgment) are merged into one single moment.

The decision-making process is purely aggregative. Every justice writes her own opinion and all opinions are published. The form of publication is thus *seriatim*. Even if a decision was made unanimously, all written opinions are published. This means that a concurrent opinion may, but must not, adduce different reasons for the decision. Strictly speaking, there is no opinion of the court, but only a series of eleven written opinions. The only two collective products of this decision-making process are the headnotes (*ementa*) and the operative provisions (*acórdão*). The first is a summary of the decision (usually not more than a few sentences) and the latter is a kind of "final score", a very short text (usually one or two paragraphs) stating whether the decision was unanimous or not and whether the statute was considered constitutional or unconstitutional, either fully or partially.

This is of course a very short description of the judicial review in Brazil and of the decision-making process in the Brazilian Supreme Court. For the goals of this article, this description is nevertheless sufficient. In the following sections I will explore in greater detail some of the variables I have just described and show how they create obstacles for a free deliberative praxis in this court.

6. Judicial procedures as obstacles to deliberation

In the Brazilian Supreme Court, many procedural rules have been kept almost unchanged since its creation. The establishment of these rules, more than a hundred years ago, has created a path dependence condition that hampers developing a deliberative culture in this court. In the last century, these decisions of the past have never been seriously questioned, nor have their effects on deliberation. In the following subsections (6.1 to 6.3) I will explain and analyze the rules that I deem to have the most deep (negative) effect on the deliberative performance of the Brazilian Supreme Court: (i) the almost irrelevant role of the justice rapporteur, (ii) the way in which the Brazilian justices communicate with each other (through subsequent opinion reading), and (iii) the possibility of interrupting the plenary session before every justice has had the opportunity of expressing their views on a given case. The last two subsections (6.4 and 6.5) are dedicated to the analysis of the more general effects

these rules have on the two main goals of deliberation I mentioned before:³⁸ sharing previously unshared information and attenuating the effects of bounded rationality.

6.1 Non-deliberative from the outset: the role of the justice rapporteur

Like several other courts in the world, the decision-making process in the Brazilian Supreme Court begins with the definition of a justice rapporteur for each case. Unlike the case of several constitutional or supreme courts, in Brazil the justice rapporteur is neither chosen on the basis of her expertise nor discretionarily assigned by the chief-justice, but drawn by lot. The rapporteur writes two documents at the same time: the report and her opinion. The report constitutes a condensed description or synopsis of the case. When the Supreme Court decides as the last instance of a concrete case, this report usually describes the arguments of the litigants and how the lower courts decided the case before it arrived at the Supreme Court. In the case of abstract review, i.e., when the Supreme Court is the first and last instance, the report basically describes the arguments of those bringing the case before the court, the arguments of public officials responsible for defending the constitutionality of the statute, and, in some cases, the arguments of other actors who may take part in the process (like *amici curiae*, for instance). The second document, the opinion or rapporteur's vote, is the solution the rapporteur proposes for the case, i.e., if the statute shall be considered constitutional or unconstitutional and on which grounds.

Until this point, nothing seems really peculiar about this process. In other supreme or constitutional courts, the vote of the rapporteur is also usually the basis for the court's deliberation, a kind of draft for the final decision. In the Brazilian Supreme Court, the vote of the justice rapporteur does not (and cannot) fulfill this task, and the reason is very simple: before the judgment session, the other ten justices receive only a copy of the report, i.e., only a mere summary of the case. Since this report only systematizes the arguments that are already public, it does not provide anything new. The rapporteur's vote, on the other hand, is *not* distributed beforehand. In other words: the opinion of the justice most familiar with the case is "revealed" only in the plenary session.

³⁸ See 3.1 and 3.2.

This fact alone could be considered extremely anti-deliberative, since the other justices cannot prepare themselves for a debate if they do not even know the opinion of the rapporteur. But this is not all. As previously mentioned, the plenary session means "opinion reading session" rather than "deliberation session". This means that all eleven opinions usually have already been written when the session begins. In other words: the other ten justices write their opinions without knowing the rapporteur's (or any other colleague's) opinion. The results and outcome could not be more at odds with deliberation: the individual justices share neither their votes nor opinions in a dialogue with each other, nor is there direct confronting of arguments. At the most, justices may strengthen or reject the arguments of those bringing the case before the court or the arguments of those public officials responsible for defending the constitutionality of the statute (as these arguments were already public), but they can hardly strengthen or reject, at least directly, the arguments of the justice rapporteur or the arguments of the other justices, since they do not know and cannot access these arguments at the time they write their opinions.

6.2. Opinion reading and equality in the deliberation

In courts of several common law countries - among others, the British House of Lords, the High Court of Australia, and the U.S. Supreme Court in its very first years - the *seriatim* model of individual opinions are or have been adopted as the procedure of judicial decision making. In civil law countries, in contrast, courts usually deliver *per curiam* decisions, taken after secret deliberation. In many cases, like the Italian and the Lithuanian Constitutional Courts and the German Constitutional Court in its initial years, dissenting opinions are not or were not allowed; in other cases, such as the German Constitutional Court since the beginning of the 1970s, though dissenting opinions are allowed, they are rare.³⁹

Brazil is a civil law country. If the divide sketched above is plausible, and if it is true that "[i]n contrast to British tradition of opinions separately rendered by each judge as an individual [...] according to civil law custom, disagreement is not disclosed",⁴⁰ one should

³⁹ For statistics concerning the (strongly decreasing) number of dissenting opinions in the German Constitutional Court see CHRISTOPH HÖNNIGE, VERFASSUNGSGERICHT, REGIERUNG UND OPPOSITION 51 (Verlag für Sozialwissenschaften 2007).

⁴⁰ Ruth Bader Ginsburg, *Remarks on Writing Separately* 65 WASH. L. REV. 133-150, 136 (1990)

expect cases to be decided with a single, *per curiam* opinion in Brazil. As previously mentioned, this is not the case. The form of decision in the Brazilian Supreme Court consists of opinions separately rendered by each judge as an individual. These opinions are not only written and published, they are also read in the court's plenary sessions. The order of these "opinion readings" is prescribed: the first to read is the justice rapporteur and the last to read is the chief-justice; the order of readings for the further nine justices is based on the seniority in office, beginning with the junior justice and ending with the oldest justice in office.⁴¹ All opinions are read and later published. The form of decision and publication is thus *seriatim*. As mentioned above, even if a decision is taken unanimously, all written opinions are read and published. I argue that the *seriatim* model of opinion reading,⁴² when associated with certain procedural constraints in the Brazilian Supreme Court, may in some cases lead to unequal participation in the process of judicial decision-making.

One of the preconditions of fair deliberation and one of the previously mentioned elements of collegiality is equality among justices within a court. Even if some justices (the chief-justice, for instance) may have some special prerogatives, justices in a supreme or constitutional court are to be considered equal if their arguments have the same weight and deserve the same respect. As already explained above, article 135 of the court's rules of procedures defines the order in which the written opinions are read in the plenary session (and therefore the order for casting votes). Depending on the course of the opinion readings, this rule may create an imbalance among the justices. This may occur in two different, and opposite, ways, which may be illustrated through the two hypothetical situations below.

Situation 1 - The first six (of eleven) justices to read their opinions voted in the same manner (say, in favor of declaring a given statute unconstitutional). The last five justices to read their opinions (the oldest in office and the chief-justice) have much less influence in the final decision. When it is their turn to read, the case is virtually decided, since the majority (6 of 11) has already voted for the unconstitutionality of the statute. Concededly, it is formally an option to any justice to change her decision until the judgment is finished. Nevertheless,

⁴¹ See article 135 of the court's rules of procedure.

⁴² Here I am expressly concerned only with the *seriatim* model of opinion reading, not with the *seriatim* model of opinion publication in general.

given the procedural constraints to a free debate and given the effects of the extreme publicity on the likelihood of opinion changes, after a justice has already read her vote, it is less than plausible that such "6 to 0 score" may be overturned. Thus, in such (or in similar) situations, it is possible to state that not all arguments (or not all votes) have the same weight.

Situation 2 - The first eight (of eleven) justices are divided. Four voted for the constitutionality and four voted for the unconstitutionality of a given statute.⁴³ The last three justices are then in a privileged position, since they may vote strategically. As will be shown below,⁴⁴ maybe the ninth (or tenth, or eleventh) justice to vote has a third, intermediate solution for the case being decided. She can choose whether to vote exactly as she wants, i.e., to deliver a written opinion that reflects her first preference, or she may vote "sophisticatedly", i.e., she may vote not according to her first preference, but according to her second preference, in order not to waste her vote, if her first preference has no chance of winning.⁴⁵ This and other similar and not very improbable situations frequently lead to unintended and counter-productive strategic behavior that hampers the free flow of argument, which is a condition for a good deliberative practice.

6.3. Time to think, but alone: interrupting the plenary session

Another internal procedural rule that illustrates how anti-deliberative the entire decision-making process is, consists of the possibility, granted to any justice, of interrupting the plenary session if she needs more time to reflect upon some issue of a given case.⁴⁶ This rule is particularly telling of how the procedure is not designed for true deliberation to occur. When a justice requests the interruption, she is clearly acknowledging that her fellow justices cannot contribute in any way to her reflection upon the case. This is especially the case if the justice requesting an interruption of the plenary session is one of the firsts to vote. If one bears in mind that justices may choose to interrupt the plenary session in almost every

⁴³ As already stressed, this binary outcome does not exhaust the decisional possibilities. Yet, for the example presented here, it suffices.

⁴⁴ See 6.4.

⁴⁵ I am borrowing the concept of sophisticated voting from the literature on democracy and elections. See, for instance, ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 48 (Harper Collins 1957).

⁴⁶ See article 134 of the courts' rules of procedure.

important judgment, one can only conclude that the disposition to work as a team, mentioned above as a condition for deliberation, is completely absent.

6.4. Keeping previously unshared information private

As shown in the first part of this article, two of the main reasons in favor of deliberating as a decision-making process are to share previously unshared information and to lessen or overcome the impact of bounded rationality. Knowing the opinions of each participant by sharing previously unshared information is a precondition for free and informed deliberation. The way decisions are taken in the Brazilian Supreme Court does not contribute to this goal for three main reasons.

I.

First of all, the justices (and their clerks) may have had access to the most varied pieces of information about the case to be decided. A concrete example may illustrate this situation. In 2003, the Brazilian Supreme Court decided one of its most polemical cases to date. This case, known as the "Ellwanger Case",⁴⁷ was about a journalist and publisher, who published his own as well as books by other authors, most of them allegedly with anti-Semitic content. His publishing house had published dozens of books, and it would have been impossible for any individual justice, even with the help of her clerks, to read every book. As a result, some justices quoted excerpts from some books, other justices quoted excerpts from other books, some excerpts were more clearly anti-Semitic, others less so.⁴⁸ What one justice quoted and read could not help or influence other justices in their reasoning, since all justices prepare their votes simultaneously and independently. Previously unshared information was thus either not shared or shared too late.

II.

Secondly, each justice has a different theoretical and professional background and consequently interprets in different ways the same facts and arguments presented by the

⁴⁷ Supremo Tribunal Federal, HC 82.424.

⁴⁸ However, this is only partially caused by unshared information. As will be analyzed below (see 7.1), the difference in the excerpts quoted is also explained by the fact that justices use their information very strategically.

litigants. Knowing the points-of-view of the other justices before forming her own opinion is something that may contribute to the robustness of the deliberation. A justice may have read a relevant work on the topic being discussed, but this information will never be shared with her colleagues, who will come to know this only after they have already written their own votes.

III.

Thirdly, and most importantly, is the fact that, in a non-binary decision-making process, mere aggregation usually does not allow the participants to know the second or third preferences of other participants. It may be the case that the decision, which would have been supported by the greatest number of participants (sometimes even by all of them), is not the first preference of the simple majority. A hypothetical example may illustrate this well. In Brazil, except in cases of rape or when the mother's life is at risk, abortion is a felony. The Brazilian constitution has no clause on abortion; instead, like many constitutions in the world, it simply generically guarantees the right to life. Let us suppose that the legislator passes a statute changing the criminal code and permitting the termination of pregnancy within its first 150 days. Let us suppose further that a constitutional action is brought before the Brazilian Supreme Court, contending that this statute is unconstitutional. Let us call the justices J1, J2, J3, ..., J11. The final result of judgment session is the following:

decision	justices	total
for constitutionality	J1, J2, J3, J4, J9, J11	6 justices
against constitutionality	J5, J6, J7, J8, J10	5 justices

There seems to be nothing wrong with such a "final score". In a binary decision, one alternative has the majority of votes, while the other has the minority of them. However, this supposition holds only where there are only two possibilities of decision (constitutional/unconstitutional). Yet, this binary pattern hardly describes the plethora of possibilities of decision-making in most constitutional courts. The continuation of our example may illustrate a situation in which decisions go beyond the binary pattern

"constitutional, therefore valid" / "unconstitutional, therefore void".⁴⁹ Initially, it will be disclosed why each justice decided the way she decided. Subsequently, it will be shown how justices may have decided without the deliberative constraints they face within the Brazilian Supreme Court, i.e., in case they had had previous access to information on the preferences of their colleagues.

J1 and J2 voted for the constitutionality of the statute because they fully agree with the decision taken by the legislator. J3 and J4 voted for the constitutionality of the statute, even though they consider that 150 days are perhaps too much; they actually think that an ideal solution would be to authorize the abortion within the first 90 days of pregnancy, but since both have to deliver their written opinions quite early, they do not want to put forward arguments against the statute and thus help the justices who are against the abortion. J5 and J6 voted against the statute because they argue that the constitution, by guaranteeing the right to life, precludes the possibility of abortion. J7 and J8 actually hold that a statute permitting abortion is not unconstitutional as such. However, they cannot accept a period of 150 days as being compatible with the constitutional protection of life. Their ideal solution would be to permit the termination of pregnancy within its first 60 days. They vote against the statute as it is. Things begin to become complicated when it is J9's turn to vote. She holds that a legislation permitting abortion is compatible with the constitutional protection of the right to life, but, just like J3 and J4, she thinks that 150 days is too long. She thinks that the internationally widespread standard of 90 days is the best solution. However, she has no idea of how J10 and J11 will vote. If both vote for the constitutionality of the statute, the case is decided in favor of the 150-day period; if both vote for the unconstitutionality, the case is decided against the statute and abortion remains a felony. But if J10 and J11 do not share the same opinion, then J9's vote is pivotal. Since she thinks that abortion is not fully incompatible with the constitution, she votes for the constitutionality of the statute, even though 150 days is not her ideal solution for the case.⁵⁰ J10 then votes against the statute for

⁴⁹ The Brazilian Supreme Court frequently calls upon formulas like "the statute is constitutional, provided it is interpreted this or that way..." or "the statute is constitutional, under this or that condition...". In such cases, the Court employs a technique known as "reading down" or "interpretation according to the constitution", which consists of maintaining the constitutionality of a statute by narrowing its scope of application.

⁵⁰ One could object hereto that J9 could not make all these strategic considerations because her vote was already written. Even though this is true (i.e., even though J9 has gone to the plenary session with her vote

the same reason of J5 and J6. It is now 5 to 5 and the vote of J11 decides. J11 shares the same opinion of J9, i.e. she also thinks that the internationally widespread standard of 90 days is the best solution. Of course, she has no idea that J9 shares the same opinion. She votes for the constitutionality of the statute. The final "score" is 6 to 5. Six justices voted for the constitutionality of the statute and five voted against it.

It is easy to observe that the majority of the court held that the termination of pregnancy is compatible with the constitution. Eight of eleven justices think that a statute permitting abortion may be compatible with the constitution. According to their ideal interpretation of the case, abortion should be permitted either within the first 150 days (J1, J2), or within the first 90 days (J3, J4, J9, J11), or only within the first 60 days (J7, J8). This means that, based on the number of justices' first choices, the ideal solution for the case would be: four justices for the possibility of abortion within the first 90 days, three justices contrary to the possibility of abortion, two justices for the possibility of abortion within the first 60 days, and two justices within the first 150 days.

In other words, although the prevailing first choice among the justices was to allow abortions within the first 90 days, this was not the final decision of the court. The final decision (abortion within the first 150 days) was the first option of only two justices.

If a debate were to have taken place, the final decision would probably have been to declare that the statute is incompatible with the constitution, but without declaring it void, only by reducing to 90 days the period in which the abortion is permitted. In a free debate, this solution would have eventually been proposed by either J3, J4, J9, or J11, and it could have easily attained the absolute majority of the court: in addition to the four justices who previously defended it as their first option, the two justices who preferred the 60-day thesis would probably have endorsed the 90-day thesis (after all it is closer to their opinion than the 150-day thesis⁵¹). In the course of the debate, the first two justices, who initially agreed with

already written), this does not impede her from changing her vote in the last moment. As explained above, when the first justices to read their votes are divided, the last justices to vote may have a strategic advantage and may vote "sophisticatedly" (see note 45). Additionally, if she wants to strategically change her vote, but does not want to do it orally during the session, she can always interrupt the plenary session and rewrite her vote alone "at home" (see 6.3, above).

⁵¹ This makes clear that, though the deliberation is strategically driven, no logrolling or bargaining takes place. Opinion shifts are the outcome of an adjustment to the nearest thesis, and do not involve "unprincipled

the legislator's choice, could have also endorsed the 90-day thesis, since they would have no clear reason to stick to their original opinion.

Summing up: by means of a merely aggregative procedure, the court was clearly divided and the final "score" was 6 to 5 for the constitutionality of the abortion within the first 150 days of pregnancy, a thesis that was supported only by two justices; by means of a deliberative procedure, a clear majority of the court (at least 8 justices) could have decided in favor of upholding the constitutionality of the statute, even though the limit for the termination of pregnancy would have been limited from 150 to 90 days. It seems to be clear that, in such situations, "voting without discussion may lead to dramatically suboptimal results".⁵²

If that were not enough, the lack of communication among justices and the fact that an "opinion of the court" must not be delivered have two further side-effects: the complete exclusion of defeated justices from discussing the justification for the final decision, and the difficulty (in some cases, the impossibility) of identifying the *ratio decidendi* of a given decision.

6.5. Reinforcing bounded rationality

As previously mentioned in the first part of this article, besides leading to more optimal results by sharing previously unshared information, deliberation in courts also fulfills another task: lessening or overcoming the impact of bounded rationality.⁵³ The abortion example has shown how the simple fact of sharing previously unshared information (especially, but not exclusively, in the real preferences of each justice) may improve the deliberative outcome and improve the overall results, by reflecting more accurately the opinion of the majority of the court. A different type of improvement is at stake when one speaks of lessening or overcoming the impact of bounded rationality.

Constitutional cases often involve very complex issues. Knowing what each justice individually thinks to be the best solution for the case may not be enough. As already

⁵² trade-offs between outcomes in different areas of law" (see Alarie & Green, *supra* note 24, at 87).

⁵³ Fearon, *supra* note 15, at 48.

⁵³ See above 3.2.

stressed, good collective decisions are often the result of brainstorming, meaning that new ideas (i.e., ideas that had not occurred to any justice previously) have arisen often through the act of deliberating and of questioning each other premises.

Such brainstorming simply does not occur in the Brazilian Supreme Court. The main reason is again the aggregative procedure of "sequential opinion reading". Admittedly, the justices sometimes discuss some small details of the case, or try to question the premises or conclusions of their colleagues. But since an "opinion of the court" must not be written, there is no incentive whatsoever for engaging in brainstorming that could bring about completely new ideas for a final, common opinion.⁵⁴

The absence of a true exchange of ideas and arguments may also be perceived by the fact that the individual written opinions only very rarely mention the arguments put forward by the other justices. If all justices write their opinions at the same time, an exchange of ideas cannot take place.

7. Judicial practices as obstacles to deliberation

Throughout this article, I argued that not only the organizational rules of the Brazilian Supreme Court, but also some customary practices affect the deliberative performance of the court. I use this very general term ("customary practices", sometimes only "practices") to refer to different things such as judicial behavior, extreme publicity, decision-making strategies etc. What all the elements that will be analyzed in the following sections have in common is the fact that they are not (at least not directly) the outcome of procedural rules, but rather established practices or policies within the court.

7.1. Winning at any cost (or, "acting like a lawyer")

The justices in the Brazilian Supreme Court do not see it as their task to disclose as much information as possible. In order to convince their colleagues (or an external audience) they

⁵⁴ Actually, even where an opinion of the court must be written, as is the case of the U.S. Supreme Court, the incentives for deliberation may also be low. This tends to be the case where the publication of concurrent and dissenting opinions is the rule, not the exception. And what defines when this is the rule and when it is the exception is less the courts' procedural rules but rather the justices' attitude towards the value of consensual decisions.

tend to adopt strategies that are similar to those of lawyers. Among other things, this means that, when advocating for a given thesis or solution for a case, they do not feel compelled to reveal information that runs contrary to their arguments. Just as lawyers often cite only academic works and judicial precedents that corroborate their interests, the justices in the Brazilian Supreme Court frequently do the same.

The previously mentioned "Ellwanger Case" is again a good example of this practice. As I argued before, since Ellwanger's publishing house published dozens of books, it would have been impossible for any individual justice, even with the help of her clerks, to read every book. As a result, I mentioned the fact that some justices quoted excerpts from some books, other justices quoted excerpts from other books, some excerpts were more clearly anti-Semitic, others were less. I argue that this situation is not only a consequence of the decision-making rules, but also of a decision-making practice. The fact that the excerpts quoted by some justices were more clearly anti-Semitic than the excerpts quoted by other justices is not just the outcome of an unreasonable organization of how justices interact with one another. It is also the result of a practice of justices not disclosing information that runs counter to the thesis they advocate. Since not every justice will be able to check the information provided by her colleagues in every case, it should be at least a task of the justice rapporteur to deliver as much information as possible, i.e., not only information that supports, but also information that runs counter her opinion.⁵⁵ Hiding unshared information may have decisive (negative) effects not only on the final decision, but also on the act of deliberating as such. It is even questionable whether it is meaningful to identify as deliberation a meeting in which the participants share their information only when it serves their argumentation strategy.⁵⁶

⁵⁵ As a justice of the German Constitutional Court has stated: "In his vote, the rapporteur could not hide or conceal opposite points of views. [...] That is, I cannot go to the deliberation session and suppress an academic article whose arguments are contrary to my vote. That would be absolutely deadly! Nobody would do that". See Uwe Kranenpohl, *Herr des Verfahrens oder nur Einer unter Acht?* 30 ZEITSCHRIFT FÜR RECHTSZOLOGIE 135-163, 147 (2009).

⁵⁶ See, for instance, Habermas' distinction between communicative and strategic action. According to him, in a communicative action "the participants are not primarily oriented towards their own success" (JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS 385 (Suhrkamp 1981)). Steiner argues that when members of a committee share information only when it serves their individual preferences, it is strategic talk in a pure form, not deliberation. See Jürg Steiner, *Concept Stretching: The Case of Deliberation* 7 EUR POLIT SCI 186-190, 188 (2008).

7.2. Lack of a consensus-oriented interaction and the reasons for the judicial individualism

Deliberation is not simply discussing before voting. There is a regulative idea that necessarily underlies this concept: deliberation implies a consensus-oriented interaction between the participants of a collegiate body. When a court publishes *seriatim* opinions by each member of the bench, there may be less incentive for a consensus-oriented discussion. However, the *seriatim* method of opinion publication adopted by the Brazilian Supreme Court does not demand that every justice publish a fully articulated vote. A justice may, for instance, simply state that she agrees with the arguments and the vote of the justice rapporteur. Hence, the fact that every justice in the Brazilian court writes a fully articulated, and usually very lengthy, vote must be explained by other means.

The Brazilian Supreme Court is an extremely uncooperative and individualistic court. It is a court in which "justices [...] place little or no value on agreeing for agreement's sake".⁵⁷ In the typology developed by Alarie and Green, it fits perfectly well into the category of "ideologically uncommitted and uncooperative courts". The lack of a cooperative interaction among justices in the Brazilian court may therefore be partially described by Alarie's and Green's own words:

Justices [...] may regard cooperation as suspicious, because it would suggest the possibility that a justice is open to compromise her own view of the underlying legal merits of an appeal in order to achieve some extraneous, distinctly non-legal or policy goal. On such courts, suspicion and distrust of cooperation would influence the rate of dissenting or concurrent opinions.⁵⁸

However, suspicion and distrust of cooperation are probably not sufficient reasons for the uncooperativeness and for the individualism within the Brazilian Supreme Court. This individualism is so strong that not even workload attenuates it. Workload - one of the reasons justices of other courts usually refer to in order to justify not writing separate (especially concurring, but also dissenting) opinions⁵⁹ - would be expected to be an even stronger reason

⁵⁷ Alarie & Green, *supra* note 24, at 81.

⁵⁸ *Id.* at 82.

⁵⁹ See, for instance, FORREST MALTZMAN ET AL., CRAFTING LAW ON THE SUPREME COURT 24 (Cambridge University Press 2000); Douglas O Linder, *How Judges Judge* 38 ARK. L. REV. 479-560, 486 (1985); Ginsburg, *supra* note 40, at 142.

in the Brazilian case, since Brazilian justices decide tens of thousands of cases every year.⁶⁰ Nevertheless, they continue to write separate opinions in most decisions and their length has even been increasing in recent years.⁶¹

One of the possible justifications for this individualism has been outlined throughout this article: one should not forget the fact that the justices write their votes before even knowing what decision will be proposed by the justice rapporteur, so that justices cannot "just agree" with opinions they do not even know. Therefore, workload can hardly be a reason for not writing a concurrent or a dissenting opinion because when justices write their votes they still do not know whether their votes will be on the majority or minority side.⁶²

However, though this fact may partially explain why justices *write*, it does not explain why they *publicly read* and *publish* so many separate opinions. Let us suppose two completely different scenarios:

(A - unanimous decision) All justices previously write an individual opinion on a given case; they are all extremely similar; after the justice rapporteur has read her report and opinion, all other justices individually note that their opinions are extremely similar to that of the justice rapporteur; why should all further justices insist upon reading their opinions?

(B - six to five decision) All justices previously write an individual opinion on a given case; after the justice rapporteur has read her report and opinion, the five next justices to vote individually note that their opinions are extremely similar to that of the justice rapporteur; why should these five justices insist upon reading their opinions? The seventh justice, however, has a completely different, and opposed, opinion. After she has read her opinion, the last four justices individually note that their opinions are extremely similar to it; why should these four justices insist upon reading their opinion?

Even in an uncooperative court its justices could reach the decision that, in the first case, it would have been enough that only the justice rapporteur read her opinion and that every

⁶⁰ The Brazilian Supreme Court decided 155,808 cases in 2007, 110,542 cases in 2008, 94,921 cases in 2009, and 103,806 in 2010. To be sure, the great majority of them were individual decisions. Still, there were 2,431 plenary decisions only in 2010, and in the previous years this amount was even higher: they add up to 8,034 in 2007; 5,627 in 2008; and 3,310 in 2009 (source: www.stf.jus.br). Compared to other constitutional or supreme courts, and even if one considers only the plenary decisions, these numbers are extremely high.

⁶¹ In some polemical decisions of recent years, the average length of the individual votes were 50 pages (some votes were almost 100 pages length). The decision on the possibility of research involving human stem cells is 526 pages length and the decision on the boundaries of the Indian reservation "Raposa Serra do Sol" is 653 pages length.

⁶² See section 7.4, below.

further justice simply states "I agree with the rapporteur"⁶³ and that, as a consequence, only one opinion (the opinion of the justice rapporteur, signed by all eleven justices) would be published. In the second scenario, it would have been enough that the justice rapporteur read her opinion and that the next five justices state "I agree with the rapporteur"; after that, the seventh justice would read her opposed opinion and the next four justices could state "I agree with the seventh justice". As a consequence, only two opinions would be published (the opinion of the court, signed by six justices, and a dissenting opinion, signed by five justices). Being an uncooperative court, at least as Alarie and Green define it, would not hinder such a strategy, since the justices would not be compromising their views in order to achieve some extraneous, non-legal goal. They have worked in isolation and wrote their uncompromised opinion on the legal issue. It simply turns out to be the case that they have the same views on the matter. Insisting upon reading and publishing all, sometimes extremely lengthy, opinions expresses not only a marked uncooperativeness but also an extreme individualism.⁶⁴

A plausible hypothesis for the extreme individualism within the Brazilian Supreme Court could be based on the idea of *audience*, which has been developed in recent years especially by Baum.⁶⁵ This approach, though it does not completely set aside other possible explanations for judicial behavior, is focused "on judges' relationship with their audiences, people whose esteem they care about".⁶⁶ As I understand it, this approach fits quite well into one of the underlying assumptions of this article, namely the distinction between internal

⁶³ A possible objection hereto could be: since the further ten justices do not know the opinions of each other, it would be strategically wise to reinforce the arguments put forward by the justice rapporteur. For the sake of simplicity, in my example I am assuming that all justices have exactly the same arguments, so that "reinforcing" could only mean "saying the same thing". Admittedly, it is very implausible that all justices have exactly the same arguments. My example is - as examples usually are - a simplification. But let us suppose a slightly more complex scenario: all ten justices agree with the rapporteur, but each one of them has one extra argument. In this case, it would be necessary to change the question formulated above: instead of "why should all further justices insist upon reading their opinions?", one could ask "why should all further justices insist upon reading their entire opinions instead of agreeing with the rapporteur and disclosing only the additional argument?". In any case, the rationale underlying the example does not change.

⁶⁴ Additionally, insisting upon publishing all these extremely lengthy opinions has several side effects. The most important ones are: (i) the decisions of the Brazilian Supreme Court are becoming more and more confusing and difficult to understand; and, as a consequence, (ii) neither the civil society, nor the legal community, nor the parliament, nor the government receive a clear indication from the court on how to act or how to interpret the constitution in further cases. Especially when the court strikes down a statute as unconstitutional, it is sometimes impossible to identify on which grounds this occurred, since different justices may adduce different reasons (see section 6.4).

⁶⁵ See LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES (Princeton University Press 2007).

⁶⁶ *Id.* at 21.

and external deliberation.⁶⁷ As Baum argues, "[j]udges' audiences usually include colleagues on their own courts, but for the most part these audiences are *outside* the courts".⁶⁸ Ferejohn and Pasquino, when explaining the distinction between internal and external deliberation, argue in a very similar way: "[w]e doubt [...] that it is possible to understand the opinions of American Justices as largely internally aimed at persuading their fellows".⁶⁹ They argue further:

Does Justice Scalia, to take an admittedly extreme example, really think, or even hope, the publication of a strident dissent will move one of his fellow Justices to change his or her mind? Or is his target audience elsewhere? Sitting perhaps in Congress or in the Oval office, in courthouses throughout the country, in law schools, or in legal or political interest groups and foundations? [...] And we think that all of the Justices, however modest they may seem personally, to a greater or lesser degree, share in this external or public aim.⁷⁰

The "audience approach" seems to explain much of the individualistic behavior of Brazilian justices. It seems plausible to suppose that they are targeting an external audience when they insist to publicly read their lengthy votes and to publish separate opinions even when this does not add much to the rapporteur's (or other) opinion. It is Baum again who argues: "Announcements of decisions in written opinions are an attractive way for judges to present themselves, because their written form widens their circulation and increases their longevity".⁷¹

In the Brazilian context, almost the same longevity - and surely with much more instant visibility - can be achieved not only through the publication of separate votes but above all through self-presentation before the media. This fact is one of the major incentives for the increasing individualistic performances in the court.⁷² The consequences of this extreme publicity will be analyzed in the next section.

⁶⁷ See section 2.

⁶⁸ BAUM, *supra* note 65, at 21 (emphasis added).

⁶⁹ Ferejohn & Pasquino, *Constitutional Adjudication*, *supra* note 10, at 1697.

⁷⁰ *Id.*

⁷¹ BAUM, *supra* note 65, at 34.

⁷² If it is true that "large audiences serve as a resonance box for rhetoric" - Jon Elster, *Deliberation and Constitution Making*, in DELIBERATIVE DEMOCRACY 111 (Jon Elster ed., Cambridge University Press 1998) - then the broadcast of plenary sessions on radio and TV has a huge potential to increase this resonance.

7.3. The downside of extreme publicity

As already mentioned, the plenary sessions in the Brazilian Supreme Court are not only public in the sense that there is an audience in the courtroom. In the Brazilian Supreme Court, publicity has been pushed to its extreme limits. The Judiciary Branch has its own TV channel in Brazil and the plenary sessions of the Brazilian Supreme Court are transmitted live. A radio station is also partially dedicated to this agenda. The Court also has a channel on YouTube and a Twitter profile.

The live broadcast of plenary sessions is almost unanimously accepted and positively evaluated by Brazilian legal professionals. In Brazil, decisions taken behind closed doors are usually viewed with extreme mistrust. Not surprisingly, the live broadcast of plenary sessions is frequently considered an advantage of the Brazilian Supreme Court vis-à-vis other courts. As a prominent Brazilian constitutional scholar has put it: "Instead of non-public hearings and deliberations behind closed doors, as in almost every court in the world, here the decisions are taken under the relentless gaze of TV cameras. [...] The public visibility contributes to transparency, to social control and, ultimately, to democracy".⁷³ According to the former chief-justice Gilmar Mendes, the Brazilian Supreme Court is, partially due to the live TV broadcast, "one of the most accessible courts in the world".⁷⁴

Admittedly, arguing against publicity in the decision making process of public officials is no easy task. However, it is possible to argue that "live broadcasts [...] have created a myth of transparency that must be deconstructed".⁷⁵ Deliberating in public clearly lessens one's openness to counterarguments and above all the willingness to change one's opinions. Especially in the most polemical cases, after a justice has read her vote in front of the cameras, it is less than plausible that she, also in front of the cameras, will be willing to recognize that her arguments were not the best and that, in fact, the best interpretation of

⁷³ Luís Roberto Barroso, *Judicialização, ativismo judicial e legitimidade democrática* 13 REVISTA DE DIREITO DO ESTADO 71-91, 73 (2009). A similar opinion - but concerning the American case - seems to be advocated by Lasser. According to him, the American judicial system "generates its legitimacy primarily by publicly argumentative means" and this publicity leads to more transparency and to more accountability. See MITCHEL DE S.-O.-L'E LASSE, JUDICIAL DELIBERATIONS 338 (Oxford University Press 2004).

⁷⁴ See <http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=105702>.

⁷⁵ Virgílio Afonso da Silva & Conrado Hübner Mendes, Entre a transparência e o populismo judicial FOLHA DE S. PAULO A3 (May 11, 2009).

the constitution and the best solution for the case is exactly the opposite of what she has just proposed. It is not necessary to know much about the dynamics of human relations to perceive how improbable such a situation is. The bigger the audience, the higher the risk of "losing face" when one has to admit that her arguments are untenable.⁷⁶

Reading the votes not only in public, but also in front of the cameras is clearly a public commitment to a given position. This is a crucial and often neglected variable within this debate. Unlike private commitments, public commitments have a strong effect on an individual's susceptibility to consider changing her opinion and willingness to accept counterarguments. According to several (theoretical and empirical) studies on the psychology of commitments and opinion and attitude changes, deliberation tends to be less sincere when all or even some of the participants have already publicly expressed their opinions. As Rosenbaum and Zimmerman concisely stated some decades ago, "if an individual *publicly* announces his response on an opinion dimension immediately prior to a social influence attempt, his susceptibility to modification of his original response will be reduced".⁷⁷ Similarly, Oskamp argues that the public commitment to a particular viewpoint tends to freeze beliefs and make them resistant to future counterarguments. Moreover, he argues that "[w]hen individuals have made a public commitment, they tend to become more extreme in their opinions".⁷⁸

The experience in courts in which deliberation is *not public* seems to reinforce this assumption. According to a former justice of the German Constitutional Court, the protection of the confidentiality of the internal debate is important to guarantee the open-

⁷⁶ According to Goffman, face is "the positive social value a person effectively claims for himself by the line others assume he has taken during a particular contact. Face is an image of self delineated in terms of approved social attributes - albeit an image that others may share, as when a person makes a good showing of his profession or religion by making a good showing for himself" (ERVING GOFFMAN, INTERACTION RITUAL 5 (Doubleday 1967)).

⁷⁷ Milton E. Rosenbaum & Isabel Madry Zimmerman, *The Effect of External Commitment on Response to an Attempt to Change Opinions* 23 PUBLIC OPINION QUARTERLY 247-254, 247 (1959) - emphasis in the original. See also Robert M. Bohm, *Death Penalty Opinions* 60 SOCIOLOGICAL INQUIRY 285-297 (1990).

⁷⁸ STUART OSKAMP, ATTITUDES AND OPINIONS 206-207 (Prentice-Hall 1977). Concerning the tendency of becoming more extreme in their opinions when people commit themselves to state their positions publicly, see Jerald M. Jellison & Judson Mills, *Effect of Public Commitment upon Opinions* 5 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 340-346 (1969).

endedness and the creative potential of such a collegiate body.⁷⁹ Moreover, "[t]he confidentiality of the deliberation process prevents the external public from registering or commenting on the changes of opinion [...] that may occur in the course of the deliberation as a 'victory' or a 'defeat' of an individual".⁸⁰

The extreme publicity may also inhibit or foreclose what Hofmann-Riem calls "the tentative participation in the deliberation", i.e., a form of structuring the final decision through a process similar to a "trial and error" or "learning by doing" procedure. Without publicity, judges in a constitutional court may feel comfortable to put forward arguments even if they are not absolutely sure about their soundness or suitability. They may advance an argument in the discussion in order to test whether it passes through the "filter of constitutional practicability" from the point of view of their fellow justices.⁸¹ If the deliberation session is broadcast live for hundred of thousands of viewers (and is available at anytime in the future over the Internet), justices may be prone to advance only those arguments they are sure about and whose soundness they are inclined to defend even if other justices raise objection to them. In the case of the Brazilian Supreme Court, it would be hard to imagine the eleven most important judges in the country deciding a case through a kind of "argumentative trial and error procedure" in front of the TV cameras, since this procedure implies that the participants may sometimes have to reject arguments they have just put forward.

The problem here is slightly different from that concerning the public statement as a constraint to opinion changes I have just analyzed, though both share some common characteristics. The extreme publicity of TV broadcasts negatively affects the possibility of "testing arguments" because justices do not want to be perceived as persons who are not completely sure about the things they are saying, and this for at least two main reasons: (i) because their legitimacy is, among other things, associated with the assumption that they know better than other people (e.g., the legislator) how to decide the cases they have to decide; (ii) because justices, at least as much as anybody else, care about their self-

⁷⁹ See Wolfgang Hoffmann-Riem, *Die Klugheit der Entscheidung ruht in ihrer Herstellung*, in KLUGES ENTSCHEIDEN 15 (Arno Scherzberg ed., Mohr Siebeck 2006).

⁸⁰ *Id.*

⁸¹ *Id.* at 16.

presentation, and the larger their audience the more careful they have to be about their public image.

7.4. Dissenting and defeated opinions

Throughout this article, I argued that the institutional rules and practices in the Brazilian Supreme Court foster an extreme individualistic attitude among its justices, an attitude that may be clearly perceived through the enormous amount of dissenting opinions that are published. I argued that this individualistic attitude has a devastating effect on the legitimacy and on the institutional profile of the court. However, I do not ignore the value of dissent in general and the value of dissenting opinions in constitutional or supreme courts.⁸² There is a vast literature on this subject and it is not necessary to analyze the arguments *pro* and *contra* here. Although I think that the effects of dissenting opinions are sometimes overstated - as if there were a causal relation between the publication of good dissenting opinions and the reversing of bad decisions of the past -, their value should not be underestimated either.

However, most (if not all) arguments used in the debate over the importance of dissenting opinions are meaningless for analyzing the Brazilian experience. If dissenting opinions are valuable, it is especially because they challenge the opinion of the court. By doing this, they not only keep the debate alive; this is only their main post-decisional effect. Dissenting opinions may also have a pre-decisional effect. By challenging the opinion of the majority, they may enhance the quality, the soundness and the sharpness of the court's arguments.⁸³ If the majority of the justices want not only to be the majority, but also to have the best arguments, then the opinion of the court will try to demonstrate that the dissenting arguments are wrong. Through this process of mutual challenges, the quality of the decision (and therefore its legitimacy) may in some cases be improved.

However, as it has already been stressed several times, the justices in the Brazilian Supreme Court write their individual opinions at the same time (and read them one after

⁸² See, for instance, Hoffmann-Riem, *supra* note 79, at 14; Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, in THE FUTURE OF THE EUROPEAN JUDICIAL SYSTEM IN A COMPARATIVE PERSPECTIVE 52 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., Nomos 2006); William J. Brennan Jr., *In Defense of Dissents* 37 HASTINGS L.J. 427-438 (1986).

⁸³ See, for instance, Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work* 83 GEO L.J. 2119-2129, 2126 (1995).

another in the public plenary sessions). Therefore, just as there is no real (oral) deliberation, there is no dialogue, no exchange of arguments among the written opinions. In other words, in a 6 to 5 decision, the written opinions of the five justices who do not share the opinion of the majority are *not* dissenting opinions, at least not in the sense that this term is used in the debate on judicial decision-making. They are mere *defeated opinions*. As defeated opinions, they do not challenge the opinion of the court, since at the time they were written there was no opinion of the court yet. Hence, if these defeated opinions have any value, it is surely not the value the literature attributes to dissenting opinions.

CONCLUSION

This article intended to show how a few procedural rules and customary practices may strongly hamper the deliberative performance of a court. If one assumes that good deliberative practices are a source of legitimacy for the judicial review of legislation - as this article assumes - the result of the case-study carried out above is clear: the Brazilian Supreme Court has a legitimacy deficit.

However, the case of the Brazilian Supreme Court as an institution with poor deliberative performance should not lead us to conclude that the thesis of courts as institutions with a distinctive deliberative potential must be rejected. What I tried to argue throughout this article is that each disincentive for a true deliberation in that court is caused by a particular rule or by a particular practice. Other rules and practices may lead to completely different outcomes. Hence my plea for more studies on concrete experiences.

For the case of the Brazilian Supreme Court, it is possible to suggest that a few minor changes in its rules of procedures would strongly improve its deliberative performance. Additionally, some customary practices, whose origins in some cases lie more than one hundred years in the past, are worthy of review. But maybe more important than concluding with suggestions for changes in a particular court is to stress that the analytical categories used in this article could be possibly used to test the deliberative performance of other courts. Only by inquiring which outcomes are caused or facilitated by which rules and practices, we may better understand how the promises made by the advocates of judicial

review may be realized in the real world of constitutional courts. In the debate over the legitimacy of judicial review, there is much more to be done than simply comparing the U.S. Supreme Court and the British Parliament. By knowing other experiences, we may find out that, contrary to Waldron's assumptions, deliberation within supreme or constitutional courts can be much more than mere cheap talk before head counting. A personal testimonial by Dieter Grimm, former justice of the German Constitutional Court, is especially telling of how deliberation may be more than counting opinions that are already defined prior to the act of deliberating:

"[In the German Constitutional Court,] I have seen tremendous changes by deliberation. I have seen them with myself and I have seen others convinced. I've seen cases where the judge rapporteur who makes a proposal how to decide the case said after deliberation that he didn't give enough weight to this or that argument so he would rather say we go the other way around."⁸⁴

There is much to be done in order to understand why deliberation is more prone to occur in some courts and less in others. Hopefully, this can be an important part of the research agenda on judicial review in the coming years.

⁸⁴ Grimm, *supra* note 22, at 9. See also DIETER GRIMM, DIE VERFASSUNG UND DIE POLITIK 189-191 (Beck 2001).