Big Brother is Watching the Court: Effects of TV Broadcasting on Judicial Deliberation

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Abstract: How much of the work of judges is known by the public varies considerably from country to country and even from court to court, in the same country. Institutional designs are highly diverse. Perhaps the most extreme case of publicity in courts is the public being allowed to watch judges debating. Few courts allow such publicity of the most sensitive moments of their decision-making process. Even fewer broadcast their deliberations live on TV. The Brazilian Supreme Court is one of them. This article does not intend to take sides in this debate. It does not intend to argue for or against the model of deliberation adopted by the Brazilian Supreme Court or the TV broadcasting of judicial deliberation in general. Rather, it aims to present a point of view that is sometimes neglected in academic studies on deliberation in constitutional courts or supreme courts: the view of the justices themselves.

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A. Introduction

The debate over publicity in courts is not new. How much of the work of judges (and attorneys) is and should be known by the public varies considerably from country to country and even from court to court, in the same country. The institutional designs are highly diverse. In some courts, nothing is public: hearings, deliberations, decisions, everything is done privately. Other courts allow the presence of the public during the hearings, but do not allow photos or videos. Some courts publish written records of the judges' deliberation,

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others do not even allow the deliberation to be documented, whereas others, while not allowing the contents of debates between the judges to be immediately known, allow the records of these debates to be published many years later.

Perhaps the most extreme case of publicity in courts is the public being allowed to watch judges debating. This extreme case has two basic variants: (i) deliberation among judges is conducted in a plenary session with the presence of an audience; and (ii) deliberation is not only watched by an audience in the plenary session, it is also broadcast live on TV. Few courts allow such publicity of the most sensitive moments of their decision-making process, i.e. how judges deliberate and reach a final decision. Even fewer are the courts that broadcast their deliberations live on TV. The Brazilian Supreme Court is one of them.[2]

Since 2003, the Brazilian Supreme Court plenary sessions have been broadcasted live on a TV channel owned by the Judiciary Branch – TV Justiça.[3] Apart from a few critical voices, the TV broadcasting is usually perceived as highly positive. And the fact that important decisions in cases involving government corruption have been closely watched by the media and by the general public has only strengthened those positive assessments. Luís Roberto Barroso, one of the most influential constitutional scholars in Brazil, now serving as a Supreme Court Justice, stated: "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".[4] And this also seems to be the institutional stance of the Supreme Court itself. In an official document, the Court expresses the following opinion about broadcasting plenary sessions on TV: "Wide publicity and the unique organization of its plenary sessions make the Brazilian Supreme Court a forum of argumentation and deliberation, with echoes in society and in the democratic institutions".[5]

I do not intend to argue for or against the model of deliberation adopted by the Brazilian Supreme Court.[6] Rather, this article aims to present a point of view that is sometimes

2 The Brazilian Supreme Court was supposedly the first supreme or constitutional court in the world to decide to broadcast its deliberations live on TV. Virtually no other court followed. One exception is the Mexican Supreme Court (on the Mexican experience, see *Francisca Pou Giménez*, Changing the Channel: Broadcasting Deliberations in the Mexican Supreme Court, in: Richard Davis / David Taras (eds.), Justices and Journalists, Cambridge 2017).

3 TV Justiça also broadcasts sessions of other Courts and offers a 24/7 lineup addressing legal issues, with programs produced by a wide range of institutions, such as the Brazilian Bar Association, the Prosecution Office, and the Judiciary Branch itself.

4 *Luís Roberto Barroso*, Judicialização, ativismo judicial e legitimidade democrática, Revista de Direito do Estado 13 (2009), p. 72.

5 *Supremo Tribunal Federal*, República Federativa do Brasil, in: Suprema Corte de Justicia de México (ed.), Estrutura y atribuciones de los tribunales y salas constitucionales de Iberoamérica, México 2009, p. 167.

6 I already did it elsewhere. See *Virgílio Afonso da Silva*, Deciding Without Deliberating, International Journal of Constitutional Law 11 (2013). In that article, I also describe in detail the deliberation and decision making-process of the Brazilian Supreme Court.

neglected in academic studies on deliberation in constitutional courts or supreme courts: the view of the justices themselves. This article presents some results of a broad study on the Brazilian Supreme Court's deliberative practices. This study was primarily based on interviews with the Supreme Court justices. Among other things, the interviews aimed to understand how the justices assess the extreme publicity to which they are exposed.

In addition to this introduction and to the final conclusion, this article is divided into four main sections. Section B presents the research in the context of which this article is embedded, particularly its more general objectives and its methodology.[7] Section C presents the justices' opinions on publicity in general. This section explores especially the Justices' views on the practice of deliberating by reading written opinions as well as the effects of publicity on the justices' individual willingness to change their opinions when confronted with good counterarguments. Section D and its subsections specifically focus on the live broadcasting of the plenary sessions. Finally, section E explores the justices' opinions on a recent proposal to create private meetings for deliberating – that is, with no publicity at all – in the Brazilian Supreme Court.

B. Methodology

Since the Brazilian Supreme Court has been adopting the same deliberation and decision-making process for many decades, each new justice is somehow constrained to follow the practices dictated by tradition and by the Court's rules of procedure. Yet, that does not mean that all justices share the same view of their individual role in the Supreme Court as a collective institution. In other words, the information available through the extreme publicity of the work of the Brazilian Supreme Court justices is not enough to grasp the role that the justices themselves want to play or to tell us what each justice thinks of the current decision-making process of that Court. It would not be sound to assume that all justices share the same views on the value of collegiality or dissenting opinions, on the role of the justice rapporteur, or on the effects of extreme publicity of the deliberation and decision-making process in the Brazilian Supreme Court.

While one has access to an increasing amount of information – on online databases, through TV Justiça, or on YouTube[8] – we do not always know what those who provide this information (the justices) think about the way it is produced. The interviews were intended

7 The text of section B, which summarizes the methodology and goals of the research on deliberation on the Brazilian Supreme Court, is repeated in all the articles that present the results of this research. See *Virgílio Afonso da Silva*, Do We Deliberate? If So, How?, European Journal of Legal Studies 9 (2017), pp. 213-16. See also *Virgílio Afonso da Silva*, De quem divergem os divergentes: Os votos vencidos no Supremo Tribunal Federal, Direito, Estado e Sociedade 45 (2015); and *Virgílio Afonso da Silva*, Um voto qualquer? O papel do ministro relator na deliberação no Supremo Tribunal Federal, Revista Estudos Institucionais 1 (2015).

8 See http://www.youtube.com/user/stf (last accessed on 25 January 2019).

to provide input to better understand the Brazilian Supreme Court's deliberation practices from material hitherto not available.[9]

From September 2011 to August 2013, 17 justices (incumbent and retired) were interviewed. The interviews were structured (i.e., the same for all justices) and consisted of 36 questions, some with sub-questions, on the following subjects: the role of the justice rapporteur, concurrent and dissenting opinions, deliberation dynamics, deliberation and legitimacy of judicial review, agenda setting and deliberation, methods of constitutional interpretation, the value of consensus, interruptions during the deliberation process,[10] collegiality, publicity and TV broadcasting, deliberation and binding precedents, and deliberation and public opinion. Each interview took on average 1 hour and 15 minutes. The longest interview took 2 hours and 45 minutes and the shortest, 45 minutes. The questions had not been sent in advance and all interviews were conducted face-to-face. Every interview was recorded and subsequently transcribed.

Before each interview, the justices were informed that all information would be treated confidentially. Since the purpose of the research is not to merely present the individual views of the justices, but to attempt to compose a collective picture based on individual points of view, confidentiality does not compromise the results. On the contrary, confidentiality might have helped put the justices at ease in expressing their opinions more sincerely.[11]

To ensure confidentiality, the names of the justices were replaced by letters. Although there is no recognizable order in these letters, a clear division was made: letters A through I represent the justices who were incumbent at the time of the interview, and letters N through U represent those who, at the time of the interview, were already retired. In the

9 After this research was concluded, the Getulio Vargas Foundation Law School in Rio de Janeiro started a project called "História Oral do Supremo Tribunal Federal" (Oral History of the Brazilian Supreme Court), within which several justices of the Brazilian Supreme Court have been interviewed. Although thematically wider in scope, these interviews also contain questions related to the deliberative process in the Court.

10 The possibility of interrupting the judgment session and requesting to view the case files ("pedir vista") is established by the Brazilian Civil Procedure Code (Article 940): "The judge rapporteur or any other judge, if he considers himself unable to reach a decision at the given moment, may interrupt the judgment session". These requests are sometimes also used to postpone the decision.

11 This methodology was inspired by the methodology Kranenpohl used in his study about the German Constitutional Court (see *Uwe Kranenpohl*, Hinter dem Schleier des Beratungsgeheimnisses, Wiesbaden 2010). There is no consensus in the literature on the effects of confidentiality assurances on the quality of responses. Still, as Krumpal argues, "data protection assurances seem to reduce respondents' concerns and to improve response quality" (*Ivar Krumpal*, Determinants of Social Desirability Bias in Sensitive Surveys: a literature review, Quality & Quantity 47 (2011), p. 2036). Additionally, even if there are cases in which an emphasis on confidentiality may increase the respondents' perception of the sensitivity of the data, whether the content of the interview is sensitive or not (see, for instance, *Eleanor Singer* / *Hans-Jürgen Hippler* / *Norbert Schwarz*, Confidentiality Assurances in Surveys: Reassurance or Threat?, International Journal of Public Opinion Research 4 (1992)), these cases can barely be compared with interviews with Supreme Court justices, who are from the outset aware of which opinion or data is sensitive and which are not.

text, I do not distinguish between incumbent justices and retired justices, except in those cases in which this distinction would be helpful to make clearer contrasts between their views. In any case, the letters will always tell whether it is an incumbent or a retired justice.

Despite their busy schedules, the justices were in general extremely welcoming to the goals of the research. In many cases, they were willing to schedule more than one appointment to make sure the interviews would be done at the ideal pace. Since only a few justices refused to talk, it can be assumed that the results have a good explanatory potential about the deliberative practices in the Brazilian Supreme Court.[12] This and the other articles that present the results of the research do not have the typical structure of a law journal article.[13] As stated above, it does not aim to defend a thesis on the Brazilian Supreme Court's deliberative process or to describe this process from a purely external perspective, let alone to offer a comprehensive review of literature on the matter at hand. As a matter of fact, a body of literature on broadcasting judicial deliberation does not even exist,[14] but even if it did, the goal of this article is different, namely to deliver something that could be called an *internal description*. Just as the Supreme Court's decisions are the result of 11 different individual opinions which somehow have to fit into a final document, this attempt to provide an internal description of the Supreme Court's deliberative practices also tries to compose a picture of an institutional practice from a myriad of individual points of view of its members. The only difference is that, in this research, it does not take only 11 justices to compose this picture, but 17.[15] It is however important to stress that, although this article aims mainly at presenting the opinions of the Brazilian Supreme Court justices on issues related

12 Only four incumbent justices refused to be interviewed even though many attempts were made to get them interested: Celso de Mello, Joaquim Barbosa, Cármen Lúcia Antunes Rocha and Rosa Weber. Since these two latter justices refused to talk and retired Justice Ellen Gracie Northfleet has never answered several invitations sent to her, unfortunately no women were interviewed for this research.

13 Even articles which include interviews do not usually have the structure this article has. Kranenpohl's research is, again, an exception. In addition to the above mentioned book (*Kranenpohl*, note 11), see also *Uwe Kranenpohl*, Die Bedeutung von Interpretationsmethoden und Dogmatik in der Entscheidungspraxis des Bundesverfassungsgerichts, Der Staat 48 (2009); *Uwe Kranenpohl*, Die gesellschaftlichen Legitimationsgrundlagen der Verfassungsrechtsprechung oder: Darum lieben die Deutschen Karlsruhe, Zeitschrift für Politik 56 (2009); and *Uwe Kranenpohl*, Herr des Verfahrens oder nur Einer unter Acht? Der Einfluss des Berichterstatters in der Rechtsprechungspraxis des Bundesverfassungsgerichts, Zeitschrift für Rechtssoziologie 30 (2009).

14 Although much has already been published on the subject "cameras in the courtroom", this is quite a different issue, since it deals above all with the impact of the cameras on jurors, witnesses, or on the parties and attorneys. Not even the literature on the broadcasting of oral arguments in supreme or constitutional courts or that on the relation between courts and the media deals with the subject of this article. For an analysis of relationship between the Brazilian Supreme Court and the media, see *Matthew C Ingram*, Uncommon Transparency: The Supreme Court, Media Relations, and Public Opinion in Brazil, in: Richard Davis / David Taras (eds.), Justices and Journalists, Cambridge 2017.

15 The following incumbent (at the time of the interview) and retired justices were interviewed. Incumbents: Ayres Britto, Cézar Peluso, Dias Toffoli, Enrique Lewandowski, Gilmar Mendes, Luiz

to the deliberative practices of this Court, it is not a mere collage of points of view. On the one hand, because those points of view have been sorted out and systematized; on the other hand, although I do not intend to take sides on the issues at stake, at times it was necessary to point out some contradictions in the justices' statements or to highlight some factual inconsistencies related to them.

A final clarification concerning the goals of the research and interviews is that the main subject of the talks was not the justices' attitude on the tens of thousands of decisions taken every year by the Court. Special focus was placed on the most important, politically and morally controversial decisions. Since many statements about, for instance, the role of the justice rapporteur, the amount of dissenting and concurring opinions, or the dynamics of the deliberation process, only apply to those controversial cases. An example related to the role of the justice rapporteur may illustrate the importance of this clarification: while it is true that in the vast majority of decisions the justices tend to vote along with the justice rapporteur without further inquiry, this is not true in those more politically and morally controversial decisions, which are also the decisions that draw more attention of the public outside the Court. The same applies to the practice of bringing and reading lengthy written opinions to the plenary sessions: this usually happens only in those major decisions.

In other words, a strictly quantitative study would perhaps show a different scenario from that which served as the backdrop for my research. Still, I think that the choice of focusing on a rather small set of decisions is justified. If one wants to analyze the Brazilian Supreme Court as a constitutional court, then it does not make any sense to take into account how justices deliberate when deciding the tens of thousands of interlocutory appeals every year. What really matters here is the justices' attitude in the decisions on those politically and morally controversial cases that constitutional courts usually decide, such as those on political reform, campaign financing, abortion, stem cell research, same-sex marriage, affirmative action, drugs, etc.[16]

Fux, Marco Aurélio Mello, Luís Roberto Barroso and Teori Zavascki. Retired: Carlos Velloso, Eros Grau, Francisco Rezek, Ilmar Galvão, Moreira Alves, Nelson Jobim, Sepúlveda Pertence and Sydney Sanches.

16 The concept of a controversial case is far from clearcut. It is not possible to state, for instance, that all plenary decisions (in opposition to panel decisions) or all non-unanimous decisions are controversial. There are both panel decisions and unanimous decisions that may be considered controversial. Maybe the best example of the latter is the decision on same-sex civil unions, from 2011 (ADI 4277). Although it was a unanimous decision, its subject-matter is quite controversial. This is the reason why, instead of trying to provide a clear concept of a controversial decision, I decided to deliver many examples of recent decisions that should be, at least for the goals of this research, considered controversial. Not coincidentally, even though unanimous, the decisions used as examples have many concurrent opinions.

C. Publicity, opinion reading and opinion changing

The plenary sessions in the Brazilian Supreme Court are public sessions in which its justices read their previously written opinion. Thus, it is perceived as a moment in which the most important judges in the country read a fully articulated, long and carefully written document expressing their points of view on the matter under judgment. Some studies argue that the willingness to change one's opinion is reduced when this opinion has already been publicly announced,[17] and that the public commitment to a particular viewpoint tends to make it resistant to future counterarguments.[18] The justices were asked to comment upon these hypotheses: firstly, in very general terms; subsequently, specifically about the possible effects of the TV broadcasting on this issue. In this section, I will present the more general comments. The justices' points of view on the influence of the TV will be presented in the next section.

In general, the justices clearly argued that they find it hard to change an opinion publicly expressed. And those who said they are open to changing their minds in some situations usually suggested that the other justices would not be open to change their opinions so easily. It is important to emphasize that the justices' views about the odds of changing their minds is not necessarily dependent on their views about the publicity of the sessions in general. Of course, those few justices who are against deliberation in public necessarily argue that changing one's opinion in public is virtually impossible. But the converse is not true: many of those who support the current model with public deliberation also argue that it is hard to change their opinions. "Human nature" is often mentioned as the reason for such difficulty. Justices G and H and former Justice S, stated:

> *It is [difficult]. Human beings are complex, very complex, and in our area, especially when you are a scholar […], you unconsciously believe or tend to believe you alone have the final say. So, it is not easy [to change one's opinion].*[19]
> *I will give my most honest opinion. It's quite impossible to reconsider an opinion, and not only because a lot of time has been spent on studying the issue, and this may have created some degree of self-persuasion. We cannot overlook the fact that a judge is a human being. It is very difficult to change one's point of view, especially in an area […] where there is nothing completely right or completely wrong.*[20]
> *This may be the downside of the model that the Court has adopted of writing opinions [before the deliberation session]. What I have noticed is that it is becoming less common for someone to reconsider his opinion […].*

17 See, for instance, *Milton E Rosenbaum* / *Isabel Madry Zimmerman*, The Effect of External Commitment on Response to an Attempt to Change Opinions, Public Opinion Quarterly 23 (1959).

18 See *Stuart Oskamp*, Attitudes and Opinions, Englewood Cliffs 1977, pp. 206-207.

19 Justice H.

20 Justice G.

Justice C, who holds clear views against the current model, also mentions – albeit indirectly – the "human nature":

> *Justices do not go back on their word. It would be different with no public watching and hence without the risk of a reconsideration being seen as an embarrassing backtracking. Because this is what is actually at stake, a stance of self-defense "hey, I am not going back on my word because it won't sound right." […] In some cases, I realized that if a given issue would have been discussed beforehand [privately], the justice could have changed their opinion.*

As mentioned above, even those justices who argue that it is not so hard to go back on an opinion given in public rarely argue that straightaway. They always mention some sort of difficulty, even if it is one that can be overcome:

> *I may find it hard to go back on some opinions. But when it comes to minor changes, we do it. I have already made minor adjustments even in cases in which I was the justice rapporteur. I edited my written opinion after an oral argument.*[21]
> *I would say it is not [hard to go back on an opinion]. But of course, the fact that you have publicly presented your opinion makes it a little harder to reconsider. If you want to know if in an informal conversation it is easier to reconsider, the answer is yes. However, it is not unusual for me or for other justices to go back and edit our written opinions.*[22]
> *Confident justices will reconsider and acknowledge they were wrong, whereas justices who are not very confident and are most often concerned with their image [would not].*[23]

Some justices, however, do not see the issue in a monolithic manner and make some distinctions: either between ordinary cases and controversial cases, or between panel sessions and plenary sessions. Justice I, for example, stated:

> *If a justice was completely wrong, what is he supposed to do? He elegantly asks for adjournment, then come back and humbly acknowledge the mistake; alternatively, he may study the case more deeply in order to show that the other justice was wrong. [But since in controversial cases] nobody or hardly anyone is ever one hundred percent wrong or one hundred percent right, the tendency is to stick to one's point of view.*

21 Justice B.
22 Justice E.
23 Justice A.

Also, Justice T says:

> *I am not able to recall it now, but I've done that [going back after reading my written opinion]. I do not know in which case, but I've done that, but not in a plenary session. [In a plenary session] this doesn't look good...*[24]

Finally, some Justices distinguish themselves from others. Not surprisingly, they say that others find it harder than themselves:

> *It depends on who we are talking about! Some wouldn't go back! They don't even listen to the other justices. I often reconsidered, I had no problem with that.*[25]
> *I have no problems with that. But I cannot answer for my colleagues.*[26]

This distinction between their own attitudes and that of their colleagues as well as some difficulties in critically assessing their own attitudes are even clearer when it comes to the live broadcasting of the plenary sessions, as will be presented below.

D. Deliberation and publicity

Concerning the extreme publicity given to the Brazilian Supreme Court, there seems to be a general feeling among the justices that the Court may have gone too far when deciding to broadcast the plenary sessions live on TV.

This does not mean that all justices are against this model. The most common arguments for publicity are often the transparency in the decision-making process, an educational effect on the general public and an alleged democratic character of showing the Court's decision-making process to the public outside the Court. In this sense, Justices H and A argue:

> *I believe that the broadcasting of our sessions is deeply democratic and contributes to the principle of efficiency, […] because everyone knows exactly when the Supreme Court works. I am for broadcasting. I know you will say that this does not exist anywhere else in the world. It doesn't matter, this is our reality.*[27]
> *I believe that, after carefully weighing it, broadcasting has more pros than cons, including in terms of citizenship, of educating those who watch the work done at the Supreme Court.*[28]

The Justices often stated they did not even realize the cameras are there, recording everything:

24 In this case, one of the reasons is TV broadcasting, which will be discussed below (see section D).
25 Justice R.
26 Justice F.
27 Justice H.
28 Justice A.

> *I don't catch myself paying attention to the cameras. I completely forget about them. I'm so focused on the discussions that they [the cameras] don't have any influence on me.*[29]
>
> *Considering my personal experience, I would say I don't even remember that TV Justiça exists.*[30]
>
> *I'll tell you something that may sound unlikely: I've never, ever, got into that Court knowing where the TV cameras are.*[31]

None of the justices seem to assume that the effects of broadcasting the plenary sessions may play out not only when they speak out to the cameras, but also – and perhaps most importantly – before that, when they write their opinions. When writing an opinion, they consciously or unconsciously know it will be read live, to the cameras, and commented upon straight after.

Just as some justices said that they do not find it hard to change their opinions in public, even though they realize that it is a hassle for some of their colleagues to do so, some justices also said that they are not influenced by the TV, even though their colleagues seem to be:

> *I simply forget about the TV. For other justices, we notice that the TV is a major distraction. They believe they have to behave differently or even unnaturally, because they are being viewed live on TV.*[32]
>
> *I don't catch myself paying attention to the cameras. […] If a justice is performance- and media-centered, the cameras will obviously influence his behavior.*[33]
>
> *Speaking for myself, it's impressive: I've never taken a blind bit of notice of that thing [the TV cameras]. I have never felt I was on air. [Other justices, in contrast] are there to show off.*[34]
>
> *My [behavior] doesn't [change] with the television. I cannot answer for my colleagues, but my behavior does not change.*[35]
>
> *That depends on one's character. I've never bothered to worry about [the TV]. But some justices decide one way or another following the views of the public opinion.*[36]

It is not the purpose of this paper – and this would not even be possible – to assess how sincere the justices were in their self-assessments. But some answers clearly show that it is not easy to do self-assessment. Some justices said that it is impossible not to be influenced

29 Justice H.
30 Justice B.
31 Justice G.
32 Justice C.
33 Justice H.
34 Justice T.
35 Justice F.
36 Justice U.

by the public and, at the same time, that they themselves are not influenced. Justice C, for instance, said he is not influenced by the TV, but, at the same time, said that, "this [the TV] influences behavior because this belongs to human nature."

Justice F drew an example from physics: "In physics, when an atom is under observation, it behaves differently compared to when it is not observed, doesn't it? So, what else should I say?" At the same time, the same Justice F stated that he is not influenced by the TV cameras.

The only one who seems to have realized that it is not very plausible to assume that TV influences everyone, except for the respondent concerned, was Justice P:

> *I don't think my behavior is [influenced by the TV]. But everyone will probably think the same, right?*

I. Oh my God, the TV!

In general, most justices recognize the impact of TV Justiça (although many justices see some influence only on their counterparts, as shown above). Some justices simply recognize this influence, with no clear judgment about it, like Justice E: "There is some impact on behavior, from the physical to the verbal level. Yet, television does not change the personality or the character of anyone."

In most cases, however, the impact is believed to be negative. It is worth transcribing a few opinions:

> *Firstly, the discussions get too long. They tend to be more academic. The justices just want to read their previously written opinion. Nobody wants to be outperformed in the deliberation. If someone is the target of a harsh counterargument, he tends to be even harsher in his reply and eventually we end up discussing only one or two cases, even if we could have decided at least ten.*[37]
>
> *It does [have an impact]. And, in my opinion, it is not positive. The justices are not angels, they are men, and human vanity is there. I think it leads to unnecessarily lengthy written opinions. No wonder that the U.S. Supreme Court does not even allow taking photos in the plenary session.*[38]
>
> *It is undoubtedly true that the live broadcasting of the plenary session makes one's love for his own image prevail over his love for the Court's image. There is no doubt at all.*[39]

37 Justice I. Unlike what occurs in many courts, the Brazilian Supreme Court often decides several cases in one day (or, to be more precise, in one afternoon).

38 Justice O.

39 Justice Q.

> *I have no doubt that it at least contributes to slow-paced work. Sometimes it takes a whole afternoon to decide something that the Court would decide in an hour – it takes a whole afternoon, an endless discussion.*[40]
> *It is a contest of sophistication and of expertise. It is demonstration of good memory.*[41]
> *Everyone feels as if they were the prima donna.*[42]

More than one justice pinpointed a decline in consensual decisions, a decline in the number of times the justices abstain from reading their long-written opinions if they realize they have the same opinion as the justice rapporteur:

> *Today, there is no such thing as the "I agree with the rapporteur." Not at all! Once, a justice was voting along with the rapporteur and ten minutes had passed; I said "finish it, finish it", and he answered "but I need to present my arguments"; I replied "Just agree with the rapporteur"; then, he turned to the TV and said "no, people out there are listening to me." The greater the publicity, the longer the talk.*[43]
> *When I agreed with the [rapporteur's] opinion, I just stated "Chief Justice, I agree with the rapporteur, that's the way I think"; then the Chief Justice continued: "What about Justice x?", "Agreed!", "Justice y?," "Agreed!" [...] in no time, the hardest of the cases would have been decided. Why is that? Because everyone agreed with the rapporteur's opinion. Today, no one agrees, because each one has to read their written opinion to show to the whole country that they are the experts, and that they serve a purpose in there [...]*[44]

Justice N, as if getting something off his chest, seems to sum up a general feeling about the live TV broadcasts:

> *Oh my God, the TV!*

The effects of TV broadcasting on the cohesion of the Court has been recently studied empirically. The findings of Rosevear, Hartmann and Arguelhes do not confirm the decline in consensual decisions. According to them, "the pre-TV and TV era are statistically indistinguishable".[45] Their conclusion on the level of coherence is based on the dichotomy unanimous/non-unanimous decisions. However, when the justices suggested that "there is no such thing as the 'I agree with the rapporteur'", they were not pointing to a decline in the

40 Justice N.

41 Justice S.

42 Justice U.

43 Justice R.

44 Justice N.

45 *Evan Rosevear* / *Ivar Alberto Hartmann* / *Diego Werneck Arguelhes*, Disagreement on the Brazilian Supreme Court: An Exploratory Analysis, SSRN Scholarly Paper, 31 October 2015, p. 21, https://papers.ssrn.com/abstract=2629329 (last accessed on 31 July 2018).

number of unanimous decisions, but to a decline in the number of decisions in which those justices who agree with the rapporteur decide not to publish a separate opinion.

II. An irreversible change

Despite the widespread dissatisfaction, no justice seems to see any possibility of putting an end to the broadcast of the plenary sessions.[46] "Irreversible" was the word most used in this sense:

> *I find that the [live broadcasting] system is not good, but it is irreversible, it is irreversible.*[47]
> *When I'm asked to give my point of view about it, I say that we must be realistic: it is irreversible! You will never see the Chief Justice of the Brazilian Supreme Court going to the TV to announce that TV Justiça is over, that the sessions will be private from now on. Even the administrative sessions will never be private, they will be open to whoever wishes to watch them and the plenary sessions will always be taken to an extremely wide audience, through TV Justiça.*[48]
> *I think that the broadcast of the plenary sessions is irreversible, it is an irreversible matter. […] No Chief Justice will ever be able to change that. It is Big Brother!*[49]

Yet, even among those who believe it is not possible to abolish the broadcasting of the plenary sessions, there are a few who believe it would be possible to change the dynamics: the sessions could be broadcast, but not necessarily live; instead of broadcasting the sessions from start to finish, they could be edited and shortened:

> *I think they should edit it and broadcast only the most important parts, because the audience does not need to know all those details, like hearing the report, etc. The way it is today, the broadcast is harmful to the smooth progress of our work.*[50]
> *If the sessions are not edited, those fights that are happening now are broadcast. Personal fights! For the institution, this is terrible, simply terrible.*[51]

46 There is a bill in the Brazilian Chamber of Deputies (7004/2013) proposing a ban on broadcasts of the Brazilian Supreme Court deliberation sessions.

47 Justice C.

48 Justice Q.

49 Justice I (who was clearly making reference to the TV reality show, in which a group of persons is permanently recorded by TV cameras, rather than to the character of George Orwell's novel *Nineteen Eighty-Four*; the title of this article is also based on the reference to the show).

50 Justice I.

51 Justice S. The proposal of broadcasting only an edited version of the judgment session have already been made by some justices, usually in interviews or articles for the press. See, for instance, *Carlos Velloso*, A TV Justiça e o seu papel, Folha de S Paulo, 2 May 2009. Although it is true that this could make the broadcasting of the judgment sessions more appealing and, at the same time, prevent that harsh fights between justices reach a wider audience, it seems plausible to

E. Private deliberation sessions

In recent years, especially during the Peluso Court (2010-2012), the idea of a preliminary, non-public meeting among the justices has been considered. Almost all justices are against entirely private deliberation and decision-making sessions. However, some of them are sympathetic to the idea of a preliminary meeting to discuss the dynamics of the plenary session in the most controversial cases. Among those justices, some prefer an informal meeting, while others prefer something like the old "sessions of the council", which were private sessions in which the justices discussed the most controversial cases before the plenary session.[52]

Perhaps the most accepted idea is that of a previous meeting among the justices in which, however, the merits of the case should not be discussed. But even within this general idea, there are some variations. Justice H, for example, emphasizes the need to debate the dynamics of the plenary session:

> *I think if the merits of the case are to be discussed, there shouldn't be any [preliminary meeting]. But if the intent is to shape the meeting, the formal side of things […] the Chief Justice [could say] "I will open a debate before collecting the votes" or "I am thinking of going directly to the votes, without debate, because of this and that" or "a tie is very likely to happen and I want to discuss how to get out of this stalemate". So, […] I think it's worth holding a private debate beforehand. But this debate should not involve discussing the merits of the case, because this would take away all the spontaneity [of the plenary session].*

Setting the agenda was also a reason for holding a preliminary meeting. Two justices expressed very similar opinions in this regard.

> *To deliberate the case as such, I am against. I am absolutely against it. But to discuss the agenda, I am in favor of it.*[53]
> *I am against it. I am in favor of administrative meetings to set the agenda, to outline the agenda, to think the Court strategically. But I like and I am an advocate of an open and public deliberation model.*[54]

assume that it would not change any of the effects that the extreme publicity has on deliberation. Moreover, an additional issue would be created: the definition of who should edit the scenes and under which criteria.

52 The Court's rules of procedure still mentions the "sessions of the council". Art. 151 establishes that secret sessions might take place: (I) when one of the justices provides relevant reasons for it; or (II) by request of the Chief Justice, in order to discuss administrative matters. The first are sessions of the council and the latter the so-called "administrative sessions". Art. 152, sole paragraph, explicitly provides that, in the first case, the judgment session that follows the session of the council must be public.

53 Justice F.

54 Justice E.

Some justices also stressed the impossibility of deliberating on the merits, but nevertheless expressed some willingness to engage in a preliminary substantial conversation in order to learn more about their colleagues' stances:

> *A preliminary conversation wouldn't be intended to deliberate before the plenary session, but for each justice to have an idea of the others' points of view and to be prepared to listen to both supporting and dissenting opinions. It is a good idea because it doesn't make the Court expose its open wounds in public. There would be some sort of earlier settlement and the justices would be more dispassionate before the TV cameras.*[55]
>
> *We used to have this kind of preliminary conversation [when I was in the Court], but informally. It was not exactly a meeting. Sometimes, in an informal conversation before the session, someone would say "look, I'm the rapporteur in a case that is like this or that, what do you think?", and would then present some arguments. It was a casual thing, without any meeting, it was a mere exchange of ideas. Because, sometimes, after listening to the arguments of other justices, you could realize that your view was not right, or at least that your interpretation could be different. That kind of thing was common.*[56]
>
> *I think it's good [a preliminary session]. I used to do that, but not a meeting as if it were a session. I used to do that informally. I talked to some justices, with whom I knew I could have this sort of conversation […] But now there is a problem: the current justices are very individualistic.*[57]
>
> *That would be great, I think. During the years I served on the Court, that never, ever happened, though. Each one would keep their opinion as if safeguarding a precious gem. There was no exchange of ideas.*[58]

Finally, the emphasis on informality could not be any clearer than proposing a chat during a coffee break or while having a meal:

> *No, I'm against deliberating before the session. [But I favor] something less formal, like, "let's go for a coffee, let's discuss your thoughts about this or that?" […] In a case like the Clean Records case*[59] *we should have had a discussion beforehand. This could have avoided that stalemate.*[60]

55 Justice Q.

56 Justice S.

57 Justice R. Justice B expressed a similar opinion: "The atmosphere today is not appropriate for that.".

58 Justice T.

59 In the *Clean Records* decision, the Brazilian Supreme Court decided on the constitutionality of the Clean Records Act (Lei Ficha Limpa), which makes people with criminal convictions ineligible for elective office for eight years.

60 Justice I.

> *Let's take this example: you are voting on a custom-, religion- or philosophy-sensitive issue, such as stem-cell research or same-sex civil union. Then you read your written opinion and the Chief Justice adjourns the session for lunch. The rapporteur has already read his opinion. On this occasion, you ask questions that you wouldn't ask in public, at lunchtime. And this is more than natural. Then you could say to a justice: "Look, in your written opinion, are you arguing for possibility of adoption of children by homosexuals?" You wouldn't do that in public.*[61]

Among the Justices who were against the idea as a whole, the arguments were less diverse. The main objections were either that the Constitution does not allow that:

> *The Constitution mentions secret sessions […] only once.*[62]
> *If the sessions are to be public, this [the proposal for private sessions] is a way of escaping the publicity.*[63]

Or that the Court's tradition calls for public sessions:

> *I believe that, considering the Brazilian tradition of public trial sessions, it [the private meeting] would be generically detrimental to the public image of the Court.*[64]

Or that there would be no changes in the dynamics of the plenary sessions:

> *I have no enthusiasm for it but I do not refute it. I don't see any need for that. I don't think this kind of meeting […] will produce any substantial changes in the individual points of view.*[65]

Or, finally, a certain fear that some justices would be unduly influenced by others:[66]

> *The other [reason] also lies in the Constitution, but implicitly. It's about technical independence: a judge should not, let's say, let other people monitor, manipulate and influence them.*[67]

But even the justices who were against a private session admitted that it could create a diverse deliberative ethos. Interestingly, even those who said that nothing would change, like Justice B mentioned above, ended up expressing a different view at some point in the conversation:

61 Justice H.

62 Justice H.

63 Justice U. This opinion, however, seems to apply only to fully private deliberations, because Justice U declared full support to the old administrative sessions, without any publicity.

64 Justice P.

65 Justice B.

66 This fear also permeates other issues discussed in these conversations.

67 Justice H. It was not clear, however, why this influence could occur in a private informal conversation but not in a public session.

> *Of course, it would be a different kind of debate. The reasoning would be different. The construction of the decision would be more plural, much more participatory.*

Justice H, who is also against the idea of a private meeting, sees, nevertheless, some positive aspects in it:

> *You could ask some questions to a fellow justice that you wouldn't ask in public, as these would be a dead giveaway of, let's say, our unawareness, ignorance, or misinformation.*

Among those who have expressed their support for a previous private meeting, there were also some variations. Some believe that it should be an optional preliminary session:

> *It is important that we hold these meetings and that the meeting be open: anyone can join it to discuss, those who don't feel like going – "I don't feel like attending it, hey" – that's alright, just don't attend it and don't participate.*[68]

Others believe it should not be just a mere preliminary session, but a single private session to be of mandatory attendance:

> *This idea is really great. I would even go to extremes. I think this preliminary deliberative session should be the final deliberative session, end of discussion! Then you would publish, announce the results. And I do not think this is detrimental to the transparency of the trial, as long as you can properly publish the results, including the dissenting opinions, if any.*[69]
>
> *I personally think it's a great idea, because the trials would be faster and the Court would deliberate as an institution, rather than as the sum of its individual members. And I think an institutional opinion is important because it maintains the Court's integrity.*[70]

Lastly, many of the former justices expressed very positive views about the old "sessions of the council":

> *I really like it [the idea]. The decisions discussed previously in a session of the council were always better. I know some justices who came to the session of the council with an opinion and came out of it with a different one because of the discussions. I mean, [if there was no council meeting] they would learn about it [the matter] in the plenary session, just by hearing about it.*[71]

68 Justice C.
69 Justice D.
70 Justice G.
71 Justice O.

> *We had [a number of sessions of the council]. The rapporteur presented his views and each one shared their thoughts. When it's time for the plenary session, no one discusses anymore. It's as if everyone agreed or disagreed without any big deal.*[72]

The sessions of the council mentioned by the former justices lost their importance at a given moment and, after some time, they were discontinued. More than one justice mentioned Justice Marco Aurélio Mello as primarily responsible for that loss of importance:

> *When Marco Aurélio Mello joined [the Supreme Court], he refused to participate in the sessions of the council. Then these sessions […] were eventually discontinued.*[73]
> *It [the session of the council] was pretty much dissolved as Justice Marco Aurélio Mello joined the Court. He was adamantly against this preliminary conversation. […] Sometimes he didn't show up or showed up to protest, etc. Since then, the meetings were held very rarely.*[74]

F. Conclusion

As mentioned above, nearly all justices are in favor of public deliberations in the Brazilian Supreme Court. The reasons are diverse and were presented throughout this paper. But as also mentioned in the introduction, publicity can have different meanings, and it may also occur at different moments in a court's decision-making process. The most sensitive moment in the decision-making process in a court is without any doubt the moment when final decisions are taken: the deliberation and the judgment session.

As also stated in the introduction, the publicity of plenary sessions may be greater or smaller, depending on whether such publicity implies only an audience in the courtroom or also TV broadcasting. Drawing on this basic division, it can be said that although public deliberation is championed by nearly all justices, when it comes to the live broadcasting of the plenary sessions, their views turn out to be different. Most justices seem to acknowledge that the Court went too far when it decided to broadcast whole plenary session live on the TV. Very few justices support this model.

It can be argued, therefore, that almost all of the Brazilian Supreme Court Justices participate in an extremely public deliberative process, which they dislike. Although some justices have advanced some reasons supporting the live broadcasting of the sessions – transparency and a supposed educational effect on the general public were the main ones – the general feeling seems to be that the negative effects prevail: the justices' media-oriented performance, exacerbated individualism, lengthy decisions, failure to listen to other opin-

72 Justice N.

73 Justice R.

74 Justice P. The administrative sessions still take place several times a year. In these sessions, however, the justices do not discuss cases that are pending in the Court, but only administrative matters. In some exceptional cases, the administrative sessions may still be used to define some procedural details of the decision-making process of pending cases. But never the merits of a case.

ions with an open mind and to change one's mind if needed, were some of these effects. In the opinion of the justices themselves, collegiality in court is strongly (and adversely) affected by TV broadcasting.

In an exercise conducted at the end of the interviews, called "institutional creativity", in which each justice could define what, in his opinion, would be the best deliberative model for the Brazilian Supreme Court,[75] only four of the 17 justices interviewed said they would design a court with deliberation sessions broadcast live on TV.[76] The other justices, although almost all of them supporters of public sessions, would design a court with no live broadcasting.

Hence, the institutional stance of the Court, extremely laudatory of the live broadcast of the plenary sessions on TV, as mentioned earlier in this paper,[77] seems to be at odds with the opinion of most of its current and former justices. Nevertheless, as presented above, very few justices believe that this model is likely to be changed. *Irreversible* was the most used expression. Thus, it seems that Big Brother will continue to watch the Brazilian Supreme Court for a long time.

75 In the definition of this "ideal model", the justices were not bound by any constitutional, legal or regimental actual provision. In other words, they were at liberty to create the model that they desired.

76 Justices A, E, F and H.

77 See note 5.