

# Integrating or Polarising? How to Promote Integrative Decision-Making in Constitutional Courts

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## Abstract

For constitutional courts to be able to activate the integrative function of the constitution they have to interpret and apply, and to avoid the risk of fostering polarization, they must work in a collegial, consensus-oriented, deliberative way. Some courts do better on that score than others. Why is that so? The article draws attention to institutional frameworks explaining the differences in underlying cultures of deliberation. A fundamental difference between courts in common law countries with their historical roots in the tradition of *seriatim* decision-making, and courts outside the common law world with their less individualist decision-making traditions is that the former need a majority only for the outcome of a decision, whereas the latter need a majority for the reasons, as well. Many other institutional features, mentioned in the final section of the article, also matter. The differences with respect to majority requirements, however, provide a particularly telling example of how institutional frameworks shape judicial behavior in unnoticed ways.

## 1. *Integrative courts and polarising courts*

The most fundamental function of a constitution is integration, i.e. the creation and maintenance of political unity and peace among citizens. Modern constitutions do so not just by legally establishing (“constituting”) the political entity for which they provide the basic legal framework, but also by the way that framework is designed. They provide for democratic structures designed to channel conflict, provide for the production of rules, prevent disruptive violence, protect minorities, restrict the arbitrary use of power and convince people that it is in their enlightened interest to play by the rules rather than overthrow the system, secede, or engage in civil war or genocide, to name just the most atrocious types of disinte-

gration. Constitutions guarantee fundamental liberties and equality rights designed to make coexistence and cooperation of people of different origins, roles, beliefs, convictions, etc. work. They may institutionalise social elements, such as social security systems or financial transfers between regions, designed to mitigate potentially disruptive social cleavages within a society; and they create institutions designed to secure the rule of law with respect to all of this. The integrative function of constitutions thus goes far beyond what has been contemplated in traditional constitutional theories of integration such as *Rudolf Smend's*, which have tended to concentrate on symbolic expressions of political unity like flags, national anthems, festivities, etc.<sup>1</sup>

If constitutions are to integrate, that purpose should be considered and promoted in interpreting them. However, just as Constitutions differ in their integrative potential, so do Constitutional Courts (in the broader sense, including the non-specialised ones). Some seem pretty well able to activate the integrative potential of the constitution of which they are the guardian. One of them is the German Federal Constitutional Court (FCC). Nobody in Germany is ever perfectly satisfied with the case-law of that court; sometimes, even politicians voice discontent. Well, constitutional courts are inherently frustrating. They would be useless if they weren't. Nevertheless, the FCC has, so far, managed to distribute frustration evenly across the political spectrum. It has managed to produce even most of its decisions on highly sensitive subjects unanimously, almost never to split exactly along the lines of the political nomination background of the judges, to avoid going to extremes (and, consequently, to avoid frequent overruling of its own decisions), to often find some viable middle ground, and to usually frame its reasoning in such a way that even the party that does not win will feel that it has been understood and that its concerns have been taken seriously. It is therefore highly respected as an impartial arbiter and, what is more, it has secured rather good knowledge of, high

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1 For more detail on the the integrative function of constitutions see Gertrude Lübbe-Wolff, "Verfassung als Integrationsprogramm." *Aus Politik und Zeitgeschichte* 69, 2019: 16–17 and 43–48; Gertrude Lübbe-Wolff, "Integration durch Verfassung." *Zeitschrift des Deutschen Juristinnenbundes* 12, 2009: 174–180 (both available online). On Smend's theory cf. also Peter C. Caldwell, *Popular Sovereignty and the Crisis of German Constitutional Law: The Theory & Practice of Weimar Constitutionalism*. Duke University Press 1999: 120 et seq.; Werner S. Landecker, "Smend's Theory of Integration." *Social Forces* 29, 1950/1951: 39–48.

respect for, and high loyalty to the Constitution among the citizenry.<sup>2</sup> In other words: It has done an integrative job.

Other courts have performed less well on that score in recent decades. The best known example is the US Supreme Court. Constantly busy overruling previous, often overly extreme case-law, or defending it against attempts of members at doing so,<sup>3</sup> repeatedly split 5:4, with the dividing

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- 2 Germans also know the FCC better than citizens in probably any other country in the world know their apex court, see – based on a comparison of 20 states, including the USA – James L. Gibson, Gregory A. Caldeira and Vanessa A. Baird, “On the Legitimacy of National High Courts.” *American Political Science Review* 92, 1998: 343–358 (347 f.). This is due to the FCC’s extensive competences and easy accessibility (individual constitutional complaints against any infringement of fundamental rights admissible, no fees, no requirement to be represented by a lawyer), see Gertrude Lübke-Wolff, “The German Federal Constitutional Court from the Point of View of Complainants in Search of their Constitutional Rights” In: *La giustizia costituzionale ed i suoi utenti*, edited by P. Pasquino and B. Randazzo. Milano: Giuffrè, 2006: 61–88.
- 3 The US Supreme Court is said to have reversed 223 of its own precedents in the period from 1801 to 2004, i.e. more than 1 per year (Melvin I. Urofsky, *Dissent and the Supreme Court. Its Role in the Court’s History and the Nation’s Constitutional Dialogue*, Pantheon Books, 2015: 408). A list of “Supreme Court Decisions Overruled by Subsequent Decision” issued by the US Government Publishing Office <https://www.govinfo.gov/content/pkg/GPO-CONAN-2014/pdf/GPO-CONAN-2014-13.pdf> contains 233 overruling cases (and a greater number of overruled ones) up to 2010. In the 2018/19 term alone, at least two precedents were overruled, see Adam Liptak and Alicia Parlapiano, *A Supreme Court Term Marked by Shifting Alliances and Surprise Votes*, New York Times, 9 June 2019. <https://www.nytimes.com/2019/06/29/us/supreme-court-decisions.html%20Gerjath%2018/19>. I do not know of any statistics on decisions on FCC reversals of its own precedents, but they definitely occur less frequently, and when they have occurred in recent years, the reason was in most cases external, i.e. the FCC departed from previous doctrine in order to adapt to transnational case-law; see, for recent adaptations to case-law of the European Court of Human Rights, *Judgment of 4 May 2011 – 2 BvR 2365/09*, *2 BvR 740/10*, *2 BvR 2333/08*, *2 BvR 1152/10*, *2 BvR 571/10 – Bundesverfassungsgerichtsentscheidung* (Collection of decisions of the Federal Constitutional Court) 128, 326 (translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/05/rs20110504\\_2bvr236509.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2011/05/rs20110504_2bvr236509.html)), concerning preventive detention, and *Judgment of 17 January 2017 – 2 BvB 1/13 – Bundesverfassungsgerichtsentscheidung* 144, 20 (translation available at [https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117\\_2bvB000113en.html](https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2017/01/bs20170117_2bvB000113en.html)), concerning party ban. Another potential source of overrulings which has no equivalent in the US lies in the structure of the FCC as a twin court with two panels (senates). To secure coherence of the case-law, § 16 of the Act on the FCC (*Bundesverfassungsgerichtsgesetz, BVerfGG*) provides that if one of the panels wishes to depart from the *ratio decidendi*, it must refer the relevant constitutional

line frequently running precisely between the Republican and Democratic nominees, and hopelessly polarised in itself,<sup>4</sup> the Court has fuelled societal polarisation rather than preventing or mitigating it, and produced not only abundant cynical scholarship, but also loss of confidence among varying great parts of the US-American society.<sup>5</sup>

The reason for these striking differences – all the more striking since it is the court which does *not* operate under a legal principle of *stare decisis* that exhibits more constancy – is simply that the German FCC is better at rational consensus-building. By *rational* consensus-building, I refer to the use of rational techniques to overcome differences of opinion by way of discussion, such as listening to each other carefully, trying to understand each other, evaluating arguments regardless of who forwards them, and being ready to change one's mind in response to the better argument – as opposed to consensus-building by expectations that juniors will defer to seniors, or expectations that members will give in at some point just because dissensus is disapproved of, or the like. Rational consensus building is about activating the powers of rational argument, not about proscribing disagreement.

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question to the plenary court, which may then overrule the doctrine from which the referring panel wishes to depart. Plenary decisions are, however, extremely rare.

4 For data see Cass Sunstein, “Unanimity and Disagreement on the Supreme Court.” *Cornell Law Review* 100, 2015: 769–823; Adam Liptak and Alicia Parlapiano, “Conservatives in Charge, the Supreme Court Moved Right”, *New York Times*, 28 June 2018. <https://www.nytimes.com/interactive/2018/06/28/us/politics/supreme-court-2017-term-moved-right.html>. For some surprises (considering gloomiest expectations of partisanship, which turned out correct in fewer cases than the year before), but still high levels of close calls, including partisan splits, in the 2018/2019 term see Adam Liptak and Alicia Parlapiano 2019 (fn. 3). Sharp internal polarization is apparent not only in the voting record data, but also in extremely uncollegial behaviour, see, for a case of voting down a minority's wish that a decision be taken only after further deliberation, Adam Liptak, “Supreme Court Won't Stay Alabama Execution After Bitter Clash”, *New York Times* of 30 May 2019 <https://www.nytimes.com/2019/05/30/us/politics/supreme-court-alabama-death-penalty.html>.

5 The problem with popular confidence in the US Court is not so much general decline but *partisan patterns* of rise and decline. According to polls, overall confidence is even higher now than it was in 2015, due to better satisfaction of Republican voters. Failure to integrate is manifest, however, in that the court has been able to secure (more) confidence only with *either* Liberals *or* Conservatives, one at the expense of the other, see Claire Brockway and Bradley Jones, “Partisan gap widens in views of the Supreme Court”, <<https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/>>.

The FCC operates in a much more collegial, deliberative, and, in the sense just explained, consensus-oriented way than the US Supreme Court does<sup>6</sup>. How is that, in turn, to be explained?

## 2. *Cultures of deliberation and the institutional frameworks that shape them*

Where institutions behave differently, one explanation is always culture. Culture, however, is itself shaped by the framework conditions under which people operate: rules, resources, institutional settings – in short, anything that may influence the tendency of humans to behave in one way or another.

With respect to cultures of deliberation, there is a most influential difference between the rules of decision-making in common-law and civil-law traditions. That difference is, however, usually misunderstood. To understand the relevant difference and the reasons why it generally escapes attention, we must go back to history.

### 2.1. *Common-law and civil-law rules of decision-making*<sup>7</sup>

#### 2.1.1. *Two historical models: *seriatim* and *per curiam* decision-making*

Two different historical models of judicial decision-making in composite courts can be distinguished that shape judicial practices to this day.

The first one, historically the older one, is the *seriatim* model. In the pure, original version of this model, each and every judge produces his own opinion, and each of these opinions is part of *the judgment* of the court. One might even say: In the pure version, there *is* no judgment of “the court” as such. There are just individual judgments by the individual

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6 For a more detailed comparison see Gertrude Lübke-Wolff, “Cultures of Deliberation in Constitutional Courts.” In: *Justicia Constitucional. La Justicia constitucional en los diferentes ámbitos del derecho y sus nuevas tendencias*, Vol. 1, edited by Patricio Maraniello. Resistencia, Chaco: Contexto, 2016: 37-52 (37–42).

7 Subsections 2.1.1. to 2.1.3. of this section are an expanded and updated version of Lübke-Wolff (fn. 6): 42 et seq.

members of the court.<sup>8</sup> What happens with the case at hand is determined either by consensus or by majority.<sup>9</sup>

This was the traditional type of decision-making in common law courts as they have evolved in England.<sup>10</sup> The original procedure of the King's Bench, for instance (a court that operated from the early 13th century until 1875), is reported to have been that at the close of oral argument, without any interruption by deliberation in camera, each judge on the Bench was called upon to deliver his judgment orally<sup>11</sup>. The *seriatim* model in this historical form was, in other words, absolutely non-deliberative, as far as argument among the judges is concerned.

The pure *seriatim* model is not a common law invention. It was a typical model of composite courts in early societies where the law was non-complex and thought to be voiced rather than developed in adjudication, where judges were usually illiterate, and where orality was therefore without alternative. The specific relationship between the *seriatim* model and

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8 Wolfgang Ernst, Abstimmen über Rechtserkenntnis, *Juristen Zeitung* 2012: 637–648 (638). In the common law tradition, this is still reflected in a terminology using “judgment” as synonym of (judicial) “opinion”, for instance in terms such as “first judgment” or “lead judgment”, see, e.g., Alan Paterson, *Final Judgment: The Last Law Lords and the Supreme Court*, Oxford and Portland, Oregon: Hart Publishing, 2013: 93 and passim, while, on the other hand, “opinion” is used for the “opinion of the court”, if any, as well as for dissents and concurrences. By contrast, in Germany, for instance, only a court's *per curiam* decision is called “judgment” (in German: *Urteil*) or “order” (in German: *Beschluss*; this term is used if no public hearing has been held in the case), whereas “opinion” (*Meinung*) is reserved for dissenting and concurring opinions (in German: *abweichende Meinung*, usually translated as “separate opinion”; literally, “abweichend” means “diverging”).

9 According to Chris Young, “The history of judicial dissent in England: What relevance does it have for modern common law legal systems.” *Australian Bar Review* 32, 2009: 96–111 (101et seq., with further references), up to about 1450, the norm, based on the idea that the law was to be found in “common learning”, was consensus, with adjournment to the Exchequer Chamber, and indecision if no consensus was found there; in the period from 1450–1600, majority decision became the rule.

10 For the historical exception of the Privy Council see Karl M. ZoBell, “Division of Opinion in the Supreme Court. A History of Judicial Disintegration.” *Cornell Law Review* 44, 1959: 186–331 (187 et seq.); Michael D. Kirby, “Judicial Dissent: Common Law and Civil Law Traditions.” *Law Quarterly Review* 123, 2007: 379–400 (386); Julia Laffranque, “Dissenting Opinions and Legislative Drafting.” *Juridica International* VIII/2003, 162–172 (163, with fn. 9).

11 Ernst (fn. 8): 639. In criminal cases, however, the *jury* retired for consultation before pronouncing its verdict, see André Krischer, *Die Macht des Verfahrens. Englische Hochverratsprozesse, ca. 1550–1850* (forthcoming), 66 et seqq.

the common law, which developed along with legal professionalisation and relied on literate judges<sup>12</sup>, is therefore not one of origin, but rather one of a higher degree of conservation.

The second model is the *per curiam* model. Here, the court decides as a collegium. In the original, pure version of this model, only the court as such renders a judgment. Individual judges do not appear with their votes or opinions, nor will voting results be communicated to the public. A *per curiam* decision therefore needs to be prepared *in camera*. Historical examples of courts working in this manner, which has been dominant on the European continent from the late middle ages on, are the courts of the Holy Roman Empire – the Imperial Chamber Court (Reichskammergericht, founded in 1495), and the Court Council of the Empire or Aulic Council (Reichshofrat, founded 1497/98). Once the decision was made *in camera*, it would be published by a court official.

*Per curiam* decision-making is not automatically associated with internal deliberation. As long as *per curiam* judgments are given without reasons, there is no necessity to deliberate in conference. The Courts of the Holy Roman Empire, for instance, never gave reasons for their judgments up to the very end of the Empire in 1806<sup>13</sup>; their *internal* (*in camera*) procedure pretty much – although not perfectly – resembled the *seriatim* decision-making in a common law court, the only important difference being that the internal *seriatim* voting would be preceded by a report, or a report and a co-report, drawn up in writing and read in conference by a reporting judge and, in some cases, a co-reporting judge.<sup>14</sup> In the literature of the time, there were discussions about whether or not courts ought to give reasons, but the majority of treatises on the matter found it would be silly to publish reasons, since that would only give the parties reasons to complain, and expose judges to the risk of being criticised, or

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12 John P. Dawson, *The Oracles of the Law*, Ann Arbor: University of Michigan Law School, 1968, *passim*. The earliest royal judges were clerics, i.e. they were literate, *ibid.* 5.

13 Wolfgang Sellert, “Zur Geschichte der rationalen Urteilsbegründung gegenüber den Parteien insbesondere am Beispiel des Reichshofrats und des Reichskammergerichts.” In: *Recht, Gericht, Genossenschaft und Policy*, edited by G. Dilcher and B. Diestelkamp. Berlin: Erich Schmidt, 1986: 97 et seq. ( 101); for an exception concerning certain interlocutory decisions see Wolfgang Sellert, “Prozessgrundsätze und Stilus Curiae am Reichshofrat.” *Aalen (Scientia)* 1973: 360.

14 For the Aulic Council see Sellert (fn. 13): 342; for the Imperial Chamber Court Heinrich Wiggenhorn, *Der Reichskammergerichtsprozeß am Ende des Alten Reiches*, doctoral thesis, Münster 1966: 139 et seq.



even exposed to damage claims<sup>15</sup>. On the continent, rules demanding that collegial courts give reasons for their judgments only emerged during the 18th century; the movement in that direction gained momentum from the late 18th century on, and it was not before the late 19th century that reasoned decisions became the rule all over the continent<sup>16</sup>. It is with the emergence of a duty to give reasons that an inescapable need for internal deliberation arose. I will come back to that point.

### 2.1.2. *Mutual approximation of seriatim and per curiam proceedings*

Meanwhile, the traditions have approximated to some extent.

Few courts still stick to the tradition of delivering judgment *seriatim*. The Brazilian *Supremo Tribunal Federal*, for instance, basically decides *seriatim*, with the dispositive part of the judgment and the presentation of the facts and a sort of summary (*ementa*) followed by individual opinions of each of the judges. Deliberations are to be held in public, with TV coverage. As a consequence, there is, as a rule, practically no deliberation deserving the name. Instead, the justices each read their prepared opinions, usually without any further discussion.<sup>17</sup> Most of the courts which formerly adhered to the common law *seriatim* tradition, however, have

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- 15 Stephan Hocks, *Gerichtsgeheimnis und Begründungszwang. Zur Publizität der Entscheidungsgründe im Ancien Régime und im frühen 19. Jahrhundert*, Frankfurt a.M.: Klostermann, 2002: 18–19. On the risk of damage claims: Steffen Wunderlich, *Über die Begründung von Urteilen am Reichskammergericht im frühen 16. Jahrhundert. Schriftenreihe der Gesellschaft für Reichskammergerichtsforschung* 38. Wetzlar, 2010.
- 16 Sellert (fn.13); Hocks (fn. 15); Tony Sauvel, “Histoire du jugement motivé.” *Revue du droit public et de la science politique en France et à l'étranger* 61, 1955: 5–53.
- 17 On decision-making in the Brazilian *Supremo Tribunal Federal* see Virgílio Alfonso da Silva, “Deciding without deliberating.” *ICON* 11, 2013: 557–584; id., “Do we deliberate? If so, how?” *European Journal of Legal Studies* 9, 2017: 209–240; Carolina Cutrupi Ferreira, Natalia Langenegger and Marina Jacob Lopes da Silva Santos, *Construção de ementas das decisões do Supremo Tribunal Federal. São Paulo Law School of Fundação Getúlio Vargas, Research Paper Series, Legal Studies* 125, June 2015 [https://dadospdf.com/download/construao-de-ementas-das-decisoes-do-supremo-tribunal-federal-elaboration-of-the-syllabus-from-the-brazilian-supreme-courts-decisions-\\_5a4cec0ab7d7bcab672aebf\\_pdf](https://dadospdf.com/download/construao-de-ementas-das-decisoes-do-supremo-tribunal-federal-elaboration-of-the-syllabus-from-the-brazilian-supreme-courts-decisions-_5a4cec0ab7d7bcab672aebf_pdf); André Rufino do Vale, *Argumentação constitucional: um estudo sobre a deliberação nos tribunais constitucionais*, doctoral thesis, Universidad de Alicante and Universidade de Brasília 2015: 222 et seqq. [http://repositorio.unb.br/bitstream/10482/18043/3/2015\\_AndreRufinoVale.pdf](http://repositorio.unb.br/bitstream/10482/18043/3/2015_AndreRufinoVale.pdf).



meanwhile moved towards more collegiality in the production and presentation<sup>18</sup> of their decisions.

In the mother country of the common law *seriatim* tradition, that tradition no longer lives in its original, pure form, either. In the mid-19th century, Lord Mansfield, Chief Justice of the King's Bench, introduced the caucusing method there, i.e. the production, after deliberation *in camera*, of a decision *of the court* instead of a series of individual judicial opinions<sup>19</sup>. This departure from the *seriatim* tradition remained a short interlude. After Lord Mansfield retired, the court returned to the *seriatim* tradition. Even in the UK, however that tradition has not survived unabridged.

The House of Lords Appellate Committee, the highest court of the land until 2009, of course, no longer worked in the way the early King's Bench had. The Lords deliberated *in camera*, and they produced written decisions, but they still produced them in the individualistic manner of the *seriatim* tradition: as opinions of individual judges, writing in the first person singular, which could then be joined, or joined in part, by one or more colleagues. Along with the transformation of the House of Lords Appellate Committee into a Supreme Court (in 2009), discussions within the Court about working towards more consensus intensified and indeed became practical. This is reflected in a gradually increasing percentage of single judgments (judgments without separate opinions; House of Lords Appellate Committee: 20%, Supreme Court: 55% in 2013<sup>20</sup>, well beyond 60% since 2015<sup>21</sup>).

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- 18 Collegiality of Production and collegiality of presentation must be distinguished. They often coincide, but not always. The Supreme Court of Nigeria, for instance, *presents* its decisions *seriatim* because it is required to so by constitutional law (art. 294 par. 2 of the Constitution of Nigeria). In producing their decisions, however, the justices seem to go about more collegially: dissents are reportedly rare, see Solomon Ukhuegbe and Chima Cletus Nweze, "Developments in Nigerian Constitutional Law: The Year 2016 in Review." *I-CONnect Blog*, 3 December 2017. <http://www.iconnectblog.com/2017/12/developments-in-nigerian-constitutional-law-the-year-2016-in-review/>.
- 19 Todd Henderson, "From 'Seriatim' to Consensus and Back Again: A theory of Dissent." *University of Chicago Law School Public Law and Tegal Theory Working Papers*, 2007: 8 et seqq., [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1126&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1126&context=public_law_and_legal_theory); Wolfgang Ernst, *Rechtserkenntnis durch Richtermehrheiten*. Tübingen: Mohr Siebeck, 2016: 275, each with further references.
- 20 Paterson (fn. 8): 94.
- 21 Robert Reed, "Collective Judging in the UK Supreme Court." In: *Collective Judging in Comparative Perspective: Counting Votes and Weighing Opinions*, edited by

Single judgments, although still written by individualised authors, may even come along as a “judgment of the Court”<sup>22</sup>. A judicial assistant surveyed the first 57 decisions of the newly established Supreme Court. According to Justice (now Chief Justice) Brenda Hale, he “„found that in 20, there was a ‘judgment of the court’; and in a further 11, there was either a single judgment (with which all the other Justices agreed), or a single majority judgment (with which all the Justices in the majority agreed), or an “effectively” single or single majority judgment (because separate judgments were simply footnotes or observations).”<sup>23</sup>

In the US Supreme Court, Chief Justice Marshall (1801–1835) abandoned the tradition of *seriatim* decision-making. He made it a rule to produce an “opinion of the court” which he used to write himself (“MR. CHIEF JUSTICE MARSHALL delivered the opinion of the Court.”)<sup>24</sup>. He also rather successfully aimed at consensual decisions. Dissent rates were low during his presidency, and they remained relatively low until Harlan

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Birke Häcker and Wolfgang Ernst. Cambridge et alii: Intersentia, 2020: 21–35 (32, fn. 35).

- 22 See, e.g., *Manchester City Council v. Pinnock* [2010] UKSC 45, 2 AC 104, [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2009\\_0180\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2009_0180_Judgment.pdf): “This is the judgment of the Court, to which all members have contributed.”
- 23 Brenda Hale, “Judgment Writing in the Supreme Court.” *UKSC blog*, 25 October 2010 (referring to a survey by Richard Reynolds) <http://uksblog.com/judgment-writing-in-the-supreme-court-brenda-hale/>; for developments since then see Alan Paterson, “A Scarcity of Dissents?” *UK Supreme Court Blog* 6, 6 March 2014 <http://uksblog.com/scarcity-dissent/>; id., “Final Judgment revisited.” *European Journal of Current Legal Issues* 21.1, 2015. <http://webjcli.org/article/view/418/531>. Cf. also Lord Reed (Deputy President of the Supreme Court), “The Supreme Court Ten Years On. The Bentham Association Lecture 2019.” 6 March 2019. <https://www.supremecourt.uk/docs/speech-190306.pdf>: 10: “In practice, it has also become increasingly common in recent years for Justices to produce joint judgments.”
- 24 *Talbot v. Seaman*, 5 U.S. 1 (1801), <https://supreme.justia.com/cases/federal/us/5/1/case.html> (the first case decided under Marshall’s presidency). For the change of practice introduced by Marshall see ZoBell (fn. 10); John Schmidhauser, *The Supreme Court: Its Politics, Personalities, and Procedures*. New York et alii: Holt, Rinehart and Winston, 1967: 108 ff; Del Dickson, *The Supreme Court in Conference (1940–1985). The private Discussions behind nearly 300 Supreme Court Decisions*. Oxford et alii: Oxford University Press, 2001: 27 et seq.; Urofsky 2015 (fn. 3): 44 et seq.; Katalin Kelemen, *Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective*. Abingdon and New York: Routledge, 2018: 58 et seq. “Opinions of the court” had occurred earlier, even quite frequently (see John P. Kelsh, “The Opinion Delivery Practices of the United States Supreme Court 1790–1945.” In *Washington University Law Quarterly* 77, 1999: 137–182, but not as a rule. Cf. also Kurt H. Nadelmann, “The Judicial Dissent. Publication v. Secrecy.” *The American Journal of Comparative Law* 8, 1959: 415–432 (418).

Fiske Stone, who was not adherent of the consensus method, became Chief Justice in 1941. Since then, the rate of unanimous decisions was below 40% in most legal years.<sup>25</sup>

Supreme Courts in many other common law countries have also tended towards less individualistic decision-making in recent years or even in recent decades.<sup>26</sup>

An opposite trend can be observed in the civil law tradition. Many Countries with a *per curiam* tradition of judicial decision-making have in recent decades allowed their apex courts to publish separate opinions. Within the European Union, only Austria, Belgium, France, Italy, Luxembourg, Malta and the Netherlands stick to the pure *per curiam* tradition in not allowing their apex courts to publish separate opinions.<sup>27</sup>

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- 25 Sunstein (fn. ): 771 et seqq.; cf. also Pamela C. Corley, Amy Steigerwalt and Artemus Ward, *The Puzzle of Unanimity: Explaining Consensus on the U.S. Supreme Court*. Stanford: Stanford University Press, 2013: 14 et seq.
- 26 See, e.g., for the Supreme Court of Canada, C. L. Ostberg and Matthew E. Wetstein, *Attitudinal decision making in the Supreme Court of Canada*. Vancouver and Toronto: University of British Columbia Press, 2007: 37; Peter McCormick and Marc D. Zaroni, *By the Court: Anonymous Judgments at the Supreme Court of Canada*. Vancouver and Toronto: University of British Columbia Press, 2019; Peter McCormick, Ian Greene, *Beverley McLachlin: The Legacy of a Supreme Court Chief Justice*. Toronto: James Lorimer & Co., 2019: 131 et seq. and passim; for the High Court of Australia see Thomas B. Bennett, Barry Friedman, Andrew D. Martin and Susan Navarro Smelcer, “Divide & Concur: Separate Opinions & Legal Change.” *Cornell Law Review* 103, 2018: 817–877 (829 f.); Matthew Groves and Russell Smyth, “A Century of Judicial Style: Changing Patterns in Judgment Writing on the High Court 1903–2001.” *Federal Law Review* 32, 2004: 255 et seq. (concerning the High Court history of conferencing); Susan Kiefel, “The individual judge, paper presented at the 2014 Sir Richard Blackburn Lecture in Canberra, 13 May 2014.” <https://www.actlawsociety.asn.au/documents/item/944%3E:4> (concerning joint judgments); for current workways of the High Court see id., “An Australian Perspective on Collective Judging.” In: *Counting votes and weighing opinions: Collective judging in comparative perspective*, edited by Birke Häcker and Wolfgang Ernst. Cambridge: Intersentia Publishing: 47–56; Andrew Lynch, “Consensus rules in Kiefel’s first year as Chief Justice.” *University of New South Wales Newsroom*, 23. February 2018, <https://newsroom.unsw.edu.au/news/business-law/consensus-rules-kiefels-first-year-chief-justice> (concerning the incumbent president’s efforts to promote consensus).
- 27 Raffaelli, Rosa, *Dissenting opinions in the Supreme Courts of the Member States*. European Parliament, Directorate General for Internal Policies, 2012: 17 et seqq. <http://www.europarl.europa.eu/document/activities/cont/201304/20130423A TT64963/20130423ATT64963EN.pdf>. Croatia, which joined the EU after publication of Raffaelli’s survey, does allow separate opinions in its Constitutional Court. In Ireland, separate opinions are illicit when the Supreme Court decides

### 2.1.3. *The overlooked remaining difference: Majority requirements*

Thus, the two historical models have undergone a process of mutual approximation. Courts in the common law tradition nowadays mostly deliberate in conference before pronouncing judgment, and often publish opinions “of the court” (or equivalent joint majority judgments), while on the other hand, courts in the civil law tradition are no longer barred from making internal differences public.

The prevailing idea seems to be that insofar as such approximation has taken place, institutional differences between the two models have disappeared, and that culturally entrenched differences in the degree of judicial individualism or collegiality are the only remaining traces of the historical schism, but that is a misunderstanding (on related misconceptions, see below, II.1.e).<sup>28</sup> Courts in the two traditions, however much they may have converged towards producing “opinions of the court”, more or less frequently accompanied by smaller or greater numbers of separate opinions, typically continue to differ in the way they answer the following question – a question which is almost routinely overlooked in comparison between common law and civil law traditions of judicial decision-making: What is the object, or the primary object, of judicial voting? In other words - What is it that you need a majority for? How that question is answered is much more consequential than whether or not separate opinions are allowed.

The common law tradition is that judges vote on the outcome of cases, i.e. on the dispositive part of a judgment, and that here, and only here – not with respect to the reasons –, an absolute majority of the votes cast

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in preventive review of legislation proceedings upon a motion by the president of the republic (*Irish Constitution*, art. 26 par. 2); further restrictions reported in some of the literature have been abolished by the 33<sup>rd</sup> Amendment to the Irish Constitution. For overviews concerning permissibility of separate opinions see Kelemen (fn. 24): 82 (list of 21 European countries, concerning constitutional courts and ordinary courts); Venice Commission, *Report on Separate Opinions of Constitutional Courts*, CDL-AD(2018)030: 18 et seq. (constitutional courts in 44 countries) [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2018\)030-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2018)030-e); Caroline Elisabeth Wittig, *The Occurrence of Separate Opinions at the Federal Constitutional Court. An Analysis with a Novel Database*. Berlin: Logos, 2016: 153 et seq. (constitutional courts in 68 countries).

28 For recent clarifications, see Gertrude Lübbe-Wolff, “Why is the German Federal Constitutional Court a deliberative court, and why is that a good thing?” In: Häcker and Ernst (fn. 26): 157–179 (161 et seq.); Wolfgang Ernst, *The Fine-Mechanics of Judicial Majoritarianism*, *ibid.*: 3–17 (4f.).

is requisite.<sup>29</sup> This is in line with the ideal type *seriatim* model where, by definition, there are no reasons for the decision of the court as such but only reasons for the opinions of individual judges. Within the pure historical *seriatim* model, voting on the outcome is obviously the only feasible solution. In just one round of *seriatim* oral voting, with each judge giving just the reasons for the outcome he thinks the right one, there is no way to process the complexity that a systematic determination of majorities concerning each of the relevant questions of law that a case may raise would require.

In theory, the voting protocol might change along with such approximations to the *per curiam* model as I have described above. Where there is deliberation in conference, and where an “opinion of the court” is at least an option, judges may discuss reasons and make out what the reasons of the “opinion of the court” to be drafted will have to look like in order to get majority support. Typically, however, the only mandatory object of voting in common law courts is the outcome of the case at hand and the vote on outcome is the only one for which an absolute majority is needed. This is manifested in the existence of so-called plurality judgments, where the judges in the majority with respect to the outcome are divided about the *rationes decidendi*.<sup>30</sup>

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29 On outcome voting in Common Law Courts see Stearns, Maxwell, *Constitutional Process: A Social Choice Analysis of Supreme Court Decision Making*, Ann Arbor (The University of Michigan Press) 2000: 7 et seq.; for the United States see Saul Levmore, “Ruling Majorities and Reasoning Pluralities.” *Theoretical Inquiries in Law* 3.1, 2002: 87–123.

30 For plurality opinions in the US Supreme Court see Adam S. Hochschild, “The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective.” *Washington University Journal of Law Policy* 4, 2000: 261–287; Levmore (fn. 29); James A. Bloom, “Plurality and Precedence: Judicial Reasoning, Lower Courts, and the Meaning of United States v. Winstar Corp.” *Washington University Law Review* 85, 2008: 1373–1417; Linas E. Ledebur, “Plurality Rule. Concurring Opinions and a Divided Supreme Court.” *Penn State Law Review* 113, 2009: 899–921; Pamela C. Corley, Udi Sommer, Amy Steigerwalt and Artemus Ward, “Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court.” *The Justice System Journal* 31.2, 2010: 1–21; James F. Spriggs II and David R. Stras. “Explaining Plurality Decisions.” *The Georgetown Law Journal* 99, 2011: 515–570; Pamela Corley and Artemus Ward, “Opinion Writing in the U.S. Supreme Court.” In: *Routledge Handbook of Judicial Behavior*, edited by Robert M. Howard and Kirk A. Randazzo. New York: Routledge, 2018: 166–179 (173). On UK House of Lords and UK Supreme Court decisions unsupported by a majoritarian *ratio decidendi*, and on efforts to avert such decisions, Paterson (fn. 8): 136 f.

By contrast, courts in the *per curiam* tradition are equally concerned about the reasons leading to a result. Historically, this has not always been the case. As long as courts in the *per curiam* tradition did not bother to give reasons for their judgments, there was obviously no point in voting about reasons and trying to get majorities for reasons. With the introduction of a duty to give reasons, that changed.<sup>31</sup>

Leaving aside some exceptions, it seems characteristic, at least of apex courts in the European continental *per curiam* tradition, that they vote on *reasons* and need an absolute majority for them.<sup>32</sup> A mere relative majority for the reasons of a decision will not do. In other words - plurality decisions in the sense explained above are illicit.

Where this is the case, an interesting question arises: Is a majority needed for *reasons only*, or for *both reasons and outcome*? That question is interesting because voting on reasons and voting on the outcome do not necessarily yield identical results.

By way of illustration, imagine a case, for the sake of simplicity, where judges A, B and C scrutinize a federal regulation. Judge A thinks the regulation is flawless, judge B thinks it is unconstitutional (only) because there was no federal competence, and judge C thinks it is unconstitutional (only) because it disproportionately interferes with a constitutionally guaranteed right. Where judges have to find a majority on outcome only, it will be decided that the regulation is unconstitutional, because an absolute majority of judges (2 of 3) find it so. Where judges have to find a majority on reasons only, the problem that there is no majority for any of the potential reasons for unconstitutionality can be solved by the so-called “issue voting”, i.e. by voting (only) on each of the reasons separately. This will, in our example, result in a court finding that the regulation is constitutional, precisely because there is no majority for any of the reasons to the contrary, since both lack of federal competence and disproportional interference with a fundamental right have been asserted by only one of three judges. In other words, securing majorities for the reasons of a deci-

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31 On the nexus between duty to give reasons and emergence of the question whether outcome or reasons should be the object of voting (and the corresponding majority requirement) see Ernst (fn. 19): 172, 174 et seq.

32 The term “absolute majority” is used here in the sense of “a majority of more than half ...”, and as *not* carrying any information as to the object of reference of “half” (i.e. as to whether a majority of the votes cast is sufficient or whether the votes of the majority of the regular members on the bench, present or not, is required; difficulties arising from different usages of the term “absolute majority” with respect to the question of reference would deserve a separate article).

sion by voting on reasons only (with the outcome resulting automatically as a consequence of the way the *rationes decidendi* have been answered) may produce outcomes for which there is no majority.<sup>33</sup> There are courts which proceed in this way, at least in certain respects<sup>34</sup>.

Where this is found troubling, the alternative of putting up either with a majority on outcome only or with a majority on reasons only can be avoided by requiring a majority for *both* outcome and reasons (*extensive majority requirement*).

Relatively clear rules in favour of voting (and consequently in favour of a majority requirement) with respect to *both reasons and outcome* can be found in the Rules of Court of the German Federal Constitutional Court<sup>35</sup> and of the Austrian Constitutional Court.<sup>36</sup>

For many European apex courts, explicit procedural rules on this issue are absent. It is obvious, however, that the practices of almost all of these courts are driven by an assumed necessity to find a majority for both the dispositive part and the reasons of each decision. A frequent practice, somewhat different from that of the German FCC, but equally aiming at a majority for both outcome and reasons, is to put draft decisions to a vote *as a whole*, soliciting an affirmative vote covering both outcome and reasons, and, if the requisite majority is failed, to try again with a modified draft designed to avoid the objections that have thwarted the requisite

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33 On that problem, its discussion, and solutions in 19th century Germany see Ernst (fn. 19): 175 et seq.; for discussion in the US see David Post and Steven C. Salop, "Rowing Against the Tidewater: A Theory of Voting by Multi-judge Panels." *Georgetown Law Journal* 80, 1992: 743–774; Jonathan R. Nash, "A Context-Sensitive Voting Protocol Paradigm for Multimember Courts." *Stanford Law Review* 56, 2003: 75–159; Lewis A. Kornhauser and Lawrence G. Sager, "The Many as one: Integrity and Group Choice in Paradoxical Cases." *Philosophy and Public Affairs* 32, 2004: 249–276.

34 See European Court of Human Rights, *Al-Dulimi v Switzerland*, Appl. No. 5809/08 v 26.11.2013 (available online at HUDOC). In this case, the application was successful because four of seven judges held that it was well-founded on the merits. But one of these four had held it inadmissible. Had the judges voted by outcome, the application would have been rejected. It is only on the basis of issue voting (first on admissibility, then on the merits, with a majority in favour of the applicant on each of these issues) that the applicant won his case.

35 Art. 27. From discussions with judges from the German Federal Court of ordinary jurisdiction (Bundesgerichtshof), the German Federal Administrative Court (Bundesverwaltungsgericht), and the Federal Finance Court (Bundesfinanzhof), I have learned that they all proceed on the assumption that majorities for both outcome and reasons are needed.

36 Art. 34 par. 2.



majority. This may be repeated several times until a majority finally agrees with the submitted version.<sup>37</sup>

#### 2.1.4. Hybrid regimes

Where European constitutional courts, or constitutional courts with roots in the European continental tradition, do not follow the rule that an absolute majority is needed for both reasons and outcome, this is because they have adopted common law traditions; Norway is an example. While the Supreme Courts of all other Nordic countries in Europe (Denmark, Sweden, Finland and Iceland) operate under the typical European continental extensive majority requirement, Norwegian Justices, seeing the Norwegian judiciary closer to the common law tradition, vote on outcomes only.<sup>38</sup> Another example is the Constitutional Court of Kosovo. In the English version, its rules of procedure explicitly provide for the possibility of plurality decisions, although the Court is otherwise set up as a constitutional court in the continental European tradition. The explanation is that in the process of institution-building, Kosovo was supported not only by European institutions, but also USAID, and the rules of procedure happened to be drafted by a US-American judge<sup>39</sup>. Random blending of elements of

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- 37 According to information, in conversation, by a former member of the Polish Constitutional Court, decision-making on that court takes off with finding a majority on the outcome, but a majority for the reasons is also needed. In one particularly difficult case, ten successive draft versions of a decision were therefore produced, and discussed in successive conferences, before the required majority for the decision as a whole was reached. A similar example is reported by Dominique Schnapper, former member of the French *Conseil Constitutionnel*: The secretary General of the *Conseil* told her that former president Robert Badinter had once produced no less than fourteen versions of a draft, see Dominique Schnapper, *Une sociologue au Conseil Constitutionnel*. Paris: Éditions Gallimard, 2010: 280.
- 38 Information gathered at a meeting of the presidents and vice-presidents of Nordic Supreme Courts in Finland in August 2015. I am obliged to Pauliine Koskelo, then president of the Supreme Court of Finland, now a judge of the European Court of Human Rights, for having invited me to take part in that meeting, and to all the participants for answering questions on this issue, as well as for their amiable hospitality.
- 39 For this information as to background, I am indebted to Durim Berisha, former clerk to the court. The relevant norm is Rule 62 par. 3, sentence 3 of the court's rules of procedure: "A dissenting opinion may be joined by other Judges and shall state specifically the reasons why the Judge disagrees with the opinion of

civil law and common law traditions with respect to the functioning of courts is also frequent in Latin America. A pertinent example is the Constitutional Court of Colombia. The Court, in many respects, is built upon the model of a European continental, Kelsenian type of court, but as to majority requirements, its *regolamento* follows the common law tradition in providing that for the reasons of a decision, a relative majority will do<sup>40</sup>.

### 2.1.5. Consequences of a majority requirement for reasons

One consequence of a voting protocol demanding that a majority be found for reasons is clear: More discussion will be necessary than if a majority is needed only for the outcome. The persisting difference between courts with a *seriatim* tradition background and courts with *per curiam tradition* with respect to their voting protocol (or, more precisely, with respect to the definition of what must be decided by an absolute majority) is an important factor explaining differences in consensus orientation and deliberativeness. It is obviously not impossible for a court in the common law tradition to develop a culture of intensive deliberation and consensus-oriented decision-making; episodes in the history of many apex courts as well as the more recent moves of a number of Supreme Courts in the common law world testify to that. Nor is it impossible for constitutional courts in the civil law tradition to split into factions of some kind, forget about the purpose of collegial deliberation, and turn to a practice of voting down rather than trying to understand, convince and find solutions that are acceptable to as many as possible. Nevertheless, the requirement that has come to prevail in the *per-curiam*-tradition that not just the dispositive part of a judgment, but also the reasons must be carried by an absolute

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the majority or plurality of the Court.” In the country’s own languages, the rule does not mention “plurality”; according to Durim Berisha, however, the court’s practice is to allow plurality decisions. That is plausible considering the drafting history, according to which the English version of the rules is the Original. For problems with the lack of coordination in the production of legislation concerning the Constitutional Court of Kosovo on one hand and the court’s rules of procedure on the other, due to support from different legal systems, see Durim Berisha, “Internationalized Constitutionality and the Rise of Judicial Despotism: How the International Community Failed to Build a Constitutional Court in Kosovo.” *IACL-AIDC Blog*, 10 April 2019. <https://blog-iacl-aidc.org/2019-posts/2019/4/10/internationalized-constitutionality-and-the-rise-of-judicial-despotism-how-the-international-community-failed-to-build-a-constitutional-court-in-kosovo>.

40 Art. 34, 6a.

majority, is definitely more supportive of a consensus-oriented, integrative culture of decision-making than the focus on outcome which has its roots in the *seriatim* tradition and which common-law jurisdictions have preserved, so far, however much they may otherwise have moved towards more collegiality. A majority for the reasons of a judgment will not always come naturally. The requirement that such a majority be produced therefore implies a necessity to converge, and to use appropriate procedures for that purpose, which is absent where no such majority is required. This is probably the reason why so many moves towards collegial decision-making in the history of common law jurisdictions have remained episodic.

The main reason why no attention is usually paid to the outlined fundamental difference between common law and continental European judicial decision-making traditions is simply unawareness of its existence. I have met even constitutional court judges who did not know this difference existed, or who thought that wherever separate opinions are permitted, this implies that there are no limits to concurrent opinions (i.e. who were unaware that in the European continental tradition, majoritarian support for the reasons of a judgment remains necessary even where the strict *per curiam* rule that the court speaks with one voice only has been abandoned). A related misconception is the widespread general idea – often used as an argument against allowing separate opinions – that concurrent opinions, or at least too many of them, jeopardise the clarity of decisions. This is an exclusive problem of those jurisdictions, typically common law jurisdictions, which do not require that a court's decision have reasons which are supported by an absolute majority. For courts in the *per curiam* tradition, the problem does not exist because in that tradition the majority requirement with respect to reasons makes sure that concurrences can never produce any doubt as to what *the court's* reasons are. Courts in this tradition have an entirely different problem - their problem is to secure the required majority for the reasons of their decisions, and that is what tends to make them deliberative, consensus-oriented and integrative.

## 2.2. Other relevant factors

Many other factors are relevant to whether or not constitutional courts manage to work as integrators rather than polarisers. Judicial independence and integrity, which both depend on complex sets of institutional arrangements, must be mentioned in the first place. Where they are absent, deliberating and seeking consensus on a fair interpretation of

constitutional law will fail their purpose, due to motives at work which are, in the short run, stronger than arguments, reason, and duty. Appointment rules preventing block-building and one-sided dominances are also crucial. A host of other frameworks can foster or impede open, deliberative, collegial decision-making. Caseload and filtering mechanisms, issues of confidentiality and transparency, issues concerning equal status of or inequalities among the judges (including issues of presidential powers and powers of individual associate judges in their capacity as *juge d' instruction* or reporting judge), methods of case assignment, professional support, conferencing premises, conferencing rules, degrees of formalism in voting, and so forth. The German Federal Constitutional Court operates under favourable conditions in all of these respects. If it has managed to play an integrative part, so far, this is not due to some miracle blessing the justices with all the necessary prerequisites, including a character that makes them willing to serve rather than shine individually. It is, like everything in society that works well, due to appropriate institutional frameworks and the internalised ethics that are brought about and stabilised by such frameworks.

