Deciding without deliberating

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

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

1. Introduction

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

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[1] Jon Elster, *Introduction*, *in* Deliberative Democracy 13 (Jon Elster ed., 1998).

for the legitimacy of the judicial review. The most important (or at least the most frequently cited) arguments are surely those related to the protection of minority rights[2] and to the general acceptance, within a given society, of the constitutional court as legitimate.[3]

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

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

In this context, the role of deliberation in courts is decisive.[8] However, the premise that constitutional or supreme courts are the *locus* of the public reason and rational deliberation is usually accepted (or rejected) in a very undifferentiated way. The advocates of judicial review usually take for granted the deliberative potential of courts, whereas the critics of judicial review argue that deliberation in courts, if relevant at all, tends to be very poor. It is always a clear-cut either/or dispute.

2. Not all courts are alike (and neither are legislatures)

This debate is typically framed by a monolithic view of courts (as well as of legislatures). Accordingly, *all* courts are either legitimate or illegitimate to exercise judicial

[2] *See, e.g.*, Dieter Grimm, *Constitutional Adjudication and Democracy*, *in* Judicial Review in International Perspective 107 (Mads Andenas ed., Kluwer 2000); *see also* Ronald Dworkin, Taking Rights Seriously 131–149 (1977). This source of legitimacy will not be analyzed here. For an account of the main issues involved in this debate, *see, e.g.*, Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 Oxford J. Legal Stud. 275 (2002).

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

[4] *See* John Rawls, Political Liberalism 231 (1993).

[5] *Id.* at 235.

[6] *Id.* In a similar sense, *see* Ronald Dworkin, A Matter of Principle 25 (1985).

[7] Rawls, *supra* note 4, at 216.

[8] There are several other versions of a defense of judicial review grounded on some deliberative attributes of supreme or constitutional courts. Those put forward by Dworkin are probably the best known (*see, e.g.*, Ronald Dworkin, Freedom's Law 1–38 (1996); and Dworkin, *supra* note 6, at 33–71), but *see also* Christopher L. Eisgruber, Constitutional Self-Government (2001).

review. No differentiation is usually made between courts; no attention is usually paid to different institutional arrangements or to different internal court practices which may foster or hinder deliberation.

For those who believe that the decisions made by the worst, the most corrupt, and the least accountable legislator elected by the most unfair electoral system, are more legitimate even than those made by the best, most honest, reasonable, deliberative, judicious court, there is admittedly no need to differentiate among courts and among legislatures. Since hardly anyone holds such belief, it is possible to insist on the necessity of differentiating types of courts and of parliaments before arriving at general conclusions in the legitimacy debate.

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

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

This article does not aim to draw a comprehensive comparison of all variables that may affect the deliberative potential of courts. As already mentioned above, I will show—using a case study—how and to what extent deliberation may be strongly hindered in a supreme court which, at first sight (i.e. according to the mainstream classifications), is *exactly like any other court* that exercises judicial review of legislation. What I attempt to show is how internal rules and practices—variables which are almost never taken into consideration in the debate on judicial review—may, by hindering deliberation, strongly affect the legitimacy of a court. The subject of this case study will be the Brazilian Supreme Court.

This article is divided into two parts. The first part consists of Sections 2 to 5 in which I establish the theoretical framework of the analysis, especially in regard to the concept of deliberation. The second part consists of Sections 6 to 8 in which I carry out the above-mentioned case study on the deliberative practice of the Brazilian Supreme Court.

3. The key idea: Deliberation

Deliberation is surely not an unequivocal term. It is polemical whether deliberation is superior to other forms of decision making. In this article, I take for granted that the better the deliberative performance of a court exercising judicial review, the better is the court itself. The reason for taking this for granted is rather simple and has already been sketched above. The defense of judicial review presupposes that the legitimacy of judicial review is grounded (at least in part) in the argumentative quality of courts.

It is no coincidence that those who are against judicial review are also those who distrust either the deliberative potential of courts[9] or the superiority of deliberation *vis-à-vis* aggregation, or both.

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

> [i]nternal deliberation by a group is the effort to use persuasion and reasoning to get the group to decide on some common course of action. External deliberation is the effort to use persuasion and reasoning to affect actions taken outside the group. Internal deliberation involves giving and listening to reasons from others inside the group. External deliberation involves the group, or its members, giving and listening to reasons coming from outside the group.[11]

Although almost any collegiate body commonly engages in both types of deliberation,[12] it will be shown that only the internal type of deliberation can fulfill the demands of legitimacy conceived in deliberative terms. It can thus be argued from the outset that a court engaging only or mainly in an external type of deliberation may be considered less legitimate[13] for striking down legislation by means of judicial review than a court whose deliberative practices correspond mainly to the internal type.

4. Why deliberate?

Are decisions made after deliberation any different from decisions made solely by voting? Are decisions made after deliberation *better* than those made by mere aggregation?[14] Presumably, there is no single and universally valid answer to these questions. In any event, the title question of this section—"Why deliberate?"—does not demand an answer of this kind. In the next subsections, I am concerned with the goals of the deliberation process, i.e., with what one seeks to achieve through deliberation that could not be achieved (or would be more difficult to achieve) by aggregative methods alone. A good summary of these goals can be found in Fearon's attempt to answer a similar question:

[9] *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 Yale L.J. 1346, 1382–1386 (2006); and Jeremy Waldron, Law and Disagreement (1999).

[10] *See* John Ferejohn & Pasquale Pasquino, *Constitutional Courts as Deliberative Institutions*, *in* Constitutional Justice, East and West 35 (Wojciech Sadurski ed., 2002); John Ferejohn & Pasquale Pasquino, *Constitutional Adjudication: Lessons from Europe*, 82 Texas L. Rev. 1671, 1692 (2004).

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

[12] *Id.*

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

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

What is the point or value of discussing things before making decisions?[15] According to Fearon, people may discuss matters before making a collective decision in order to:

> 1. Reveal private information; 2. Lessen or overcome the impact of bounded rationality; 3. Force or encourage a particular mode of justifying demands or claims; 4. Help render the ultimate choice legitimate in the eyes of the group …; 5. Improve the moral or intellectual qualities of the participants; 6. Do the "right thing," independent of the consequences of discussion.[16]

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

4.1. Sharing previously unshared information

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

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

If a well-informed decision tends to be a better decision than a decision made in the dark, then we should surely prefer the second situation described above. And if this is true, there hardly seems to be a better way to achieve such a better informed decision than through deliberation. As Manin puts it,

> [i]n the real world, when individuals make a decision concerning society, they can never avail themselves of all necessary information. They certainly have some information, but it is fragmentary and incomplete … . In the process of exchanging evidence related to proposed solutions, individuals discover information they did not previously have.[18]

[15] James D. Fearon, *Deliberation as Discussion*, *in* Deliberative Democracy, *supra* note 1, 44. Although Fearon's focus lies in *political* decisions, his considerations are also valid for deliberations in the judicial arena.

[16] *Id.* at 45.

[17] Emmanuel Joseph Sieyès, *Discours (7 Sept. 1789)*, *in* Archives parlementaires—Première Série (1789–1799), vol. 8, at 595 (M. J. Madival, E. Laurent, & E. Clavel eds., 1875).

[18] Bernard Manin, *On Legitimacy and Political Deliberation*, 15 Political Theory 338, 349 (1987).

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

4.2. Attenuating the effects of bounded rationality

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

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

5. Deliberation in courts: Some preliminaries

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

5.1. Collegiality

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

Collegiality implies, among other things, (i) the disposition to work as a team; (ii) the absence of hierarchy among the judges (at least in the sense that the arguments of any and all judges have the same value); (iii) the willingness to listen to arguments advanced by other judges (i.e. being open to being convinced by good arguments of

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

[20] Manin, *supra* note 18, at 349.

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

[22] *See* Dieter Grimm, *To be a Constitutional Court Judge*, *in* Distinguished Fellow Lecture Series 9 (J.H.H. Weiler ed., 2003): "In the United States when I get a chance, I always say that the United States Supreme Court wastes this *source of illumination* by not deliberating enough. This may be a big fault." (emphasis added).

other judges);[23] (iv) a cooperativeness in the decision-making process;[24] (v) mutual respect among judges; (vi) the disposition to speak, whenever possible, not as a sum of individuals but as an institution (consensus seeking deliberation).

It is not difficult to understand why it is argued that collegiality is a condition of deliberation in courts. It suffices to compare the six elements stated above with the "conditions for deliberation" that are usually mentioned by the literature on deliberative democracy.[25] The similarities are no coincidence. Even though collegiality is not a concept that this literature usually deals with, this is only because the debate on deliberative democracy is usually not concerned with deliberation within small collegiate bodies and especially not within courts. What I argue is simply that shifting the focus of this debate to the courts necessarily leads to the concept of collegiality. If this is true, a direct relationship between collegiality and deliberation may be established: the more the elements of collegiality are present, the greater the deliberative potential of a court.

5.2. Deliberation: Winning or deciding?

In the literature on judicial review, when it comes to discussing deliberative performance of courts, the most common strategy is to compare how courts and legislatures deliberate. In the end, the advocates of judicial review argue that courts deliberate better, whereas its critics argue that the quality of deliberation in parliaments is higher. This strategy is usually characterized by each side in the dispute using only the examples that support their argument. The best known example is Waldron's comparison between the debate over abortion rights in the US Supreme Court and in the British House of Commons.[26] As Kumm puts it,

> Waldron has chosen his examples well. First he focuses on a case, in which the judicial reasoning by the US Supreme Court is particularly poor … . Second, he describes a political process in the UK that worked as well as one might hope for … . But to establish his case it would have been helpful to choose the debates that typically informed state laws prohibiting abortion in the United States as a point of comparison, rather than debates in the UK.[27]

[23] *See* Dieter Grimm, *Politikdistanz als Voraussetzung von Politikkontrolle* [Distance from Politics as a Precondition for Controlling Politics], 27 Europäische Grundrechte-Zeitschrift 1, 2 (2000).

[24] Benjamin Alarie & Andrew Green, *Should They All Just Get Along?* 58 U New Brunswick L.J. 73, 79 (2008).

[25] *See, e.g.*, Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* The Good Polity 17, 22–23 (Alan Hamlin & Philip Pettit eds., 1989); Jürgen Habermas, Faktizität und Geltung [Translation] 369–371 (1992); Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, *in* Democracy and Difference (Seyla Benhabib ed., 1996). *See also* Marco R. Steenbergen et al., *Measuring Political Deliberation*, 1 Comp. Eur. Polit. 21, 21 (2003): deliberation is "a process in which political actors listen to each other, reasonably justify their positions, show mutual respect, and are willing to re-evaluate and eventually revise their initial preferences." Similar conditions are also usually mentioned by the literature on discourse theories of law. *See, e.g.*, Robert Alexy, *Discourse Theory and Human Rights*, 9 Ratio Juris 209 (1996).

[26] Waldron, *The Core of the Case*, *supra* note 9, at 1384–1385. *See also* Richard Bellamy, Political Constitutionalism 253–254 (2007).

[27] Mattias Kumm, *Institutionalising Socratic Contestation*, 1 Eur. J. Legal Stud. 1, 18 (2007). *See also* Andreas Follesdal, *The Legitimacy of International Human Rights Review*, 40 Journal of Social Philosophy 595, 604 (2007).

The assumption that underlies this article (at least in what concerns "who deliberates better?") is quite trivial: there is no doubt that one can find examples of high-quality deliberation in parliaments around the world as well as very poor debates in constitutional courts in many countries, and vice-versa. This is not what really matters. What matters are the conditions under which the full deliberative potential of an institution can be attained. As has been stressed above, if the goal of deliberation is, among other things, sharing information and attenuating the effects of bounded rationality in order to create ideal conditions for deciding cases in the best possible manner, and if, therefore, participants of deliberation should, among other things, be able to work as a team, be willing to listen and take seriously arguments advanced by the other participants, and be open to being convinced by good arguments, to be cooperative in the decision-making process, and want to achieve, whenever possible, a consensual decision—then we have the following abstract institutional scenario: in a necessarily adversarial institution such as a legislature, deliberation seldom, if ever, aims (not even as a regulative idea) to achieve consensus, but only aims to garner a majority of votes. In parliaments, the final goal is to win, because winning is the only way of implementing what a given group thinks to be the right policy. Apart from very exceptional cases, members of a political party will seldom be convinced by the arguments advanced by their adversaries.

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

If the very nature of an institution (parliament) fosters external deliberation and weakens the value of internal deliberation—because the primary goal of participants is to win[29]—then deliberation in legislative bodies will always tend to be of a different kind compared with deliberation that may occur in constitutional and supreme courts.[30] It is not a question of being better or worse. This would be a very crude simplification. The crucial issue is rather the following: when it is argued that courts are legitimate in exercising judicial review of legislation because of their distinctive

[28] *See supra* Section 3.

[29] As Grimm puts it: "The legal method is the same for politicians and judges. But the circumstances under which constitutional questions are answered differ. And the circumstances of the political sphere are not particularly favourable to unbiased constitutional answers" (Grimm, *supra* note 2, at 110). As Johnson argues, one of the main features of political discussion is that parties "seek to challenge one another at a quite 'fundamental,' even 'existential,' level" (James Johnson, *Arguing for Deliberation: Some Skeptical Considerations*, *in* Deliberative Democracy, *supra* note 1, 165).

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

deliberative potential, one is thinking of a deliberation in which information is freely shared; whose participants work as a team, trying to establish some kind of synergy in order to attenuate the effects of bounded rationality, are open to new arguments and willing to change their minds if confronted with better arguments;[31] and, above all, a type of deliberation with an (at least underlying, as a regulative idea) goal of reaching consensus.

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

5.3. Deliberation and aggregation, consensus and majority

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

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

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

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

Waldron's reasoning is flawed because it necessarily presupposes: (i) that in courts, just as in legislative bodies, winning at any cost is the primary goal, or, in other words, that judges only want to win; (ii) that judges "produce reasons and everything" only as cheap talk, or at best, for external audiences, since they already believe they cannot

[31] *See, e.g.*, Dieter Grimm, *Constitutions, Constitutional Courts and Constitutional Interpretation at the Interface of Law and Politics*, *in* The Law / Politics Distinction in Contemporary Public Law Adjudication 31 (Bogdan Iancu ed., 2009).

[32] *See* Elster, *supra* note 1, at 5.

convince anybody inside the court; (iii) that only the final, binary (constitutional/unconstitutional) result counts; (iv) that the "winners" inside the court have no reasons to keep deliberating as soon as they realize they have already attained a majority; (v) that the arguments put forward by the judges on the minority side, just because they lost the binary battle (constitutional/unconstitutional), are meaningless for the purposes of the final decision; and (vi) that court's opinion is synonymous with majority opinion.

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

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

Before moving on to the case study, I want to stress again that, considering the Brazilian case, a paradigmatic case of non-deliberative decision-making, does not run counter to the judicial review thesis as such. It simply points to the necessity of a differentiated approach. In other words, at the concrete level, both advocates and critics of the judicial review should avoid arguments that presuppose that courts always deliberate and decide in the same manner. If deliberative performance is a source of legitimacy, and if this performance varies considerably among courts around the world, then it is necessary to differentiate. Arguments like "courts are the locus of deliberation and public reason" or "courts deliberate worse than legislatures" are too

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

general to be useful. This debate is already mature enough to go beyond such generalizations. It is astonishing how few studies there are on the deliberative performance of *concrete* courts and legislative bodies.[34]

Since I assume that picking only those examples that fit the argument is not a fair strategy, the case study that follows definitely does not follow this pattern. Indeed, although I am convinced that courts can be an attractive deliberative body, the case of the Brazilian Supreme Court shows how internal organization and deliberative practices may affect the institutional unity, the quality of reasoning, and the overall deliberative potential of a court. As a result—at least as I see it—the legitimacy of judicial review is also affected.

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

6. Judicial review in Brazil: A short introduction

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

In Brazil, judicial review and the Supreme Court (*Supremo Tribunal Federal*) were born together. Unlike the American experience, in which the doctrine of judicial review was laid down by the Supreme Court, in Brazil, shortly after the Republic was proclaimed (1889), Decree 848 (1890) determined the creation of a Supreme Court and expressly prescribed that this court had the prerogative of judging, as a last instance court, cases involving judicial review of legislation. Since then, every Brazilian judge, in any lawsuit, may refrain from applying a given statute if she is convinced that the statute is unconstitutional; the last instance of appeal in such cases is the Supreme Court. This institutional arrangement was maintained by the first republican constitution (1891).

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

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

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

Decisions on the unconstitutionality of a statute demand the participation of at least eight of the eleven justices of the Supreme Court[35] and the support of the absolute majority of the court (i.e., at least six justices, even in cases in which less than eleven justices take part in the judgment).[36] The chief justice always takes part in these decisions (i.e., not only in tied cases).

The plenary sessions[37] of the Brazilian Supreme Court are public. Since 2002, this has meant not only that there may be an audience in the plenary room, but also that the whole session (i.e. not only the oral hearings or the pronouncement of the judgment) are recorded and broadcast (often live) on TV. There is no previous official and secret meeting among justices.

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

This is of course a very short description of the judicial review in Brazil and of the decision-making process in the Brazilian Supreme Court. For the goals of this article,

35 *See* art. 143 of the court's rules of procedures: "The quorum for deciding constitutional issues … is eight Justices."

36 *See* Constituição Federal [C.F.] [Constitution] art. 97 (Braz.).

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

this description is nevertheless sufficient. In the following sections I will explore in greater detail some of the variables I have just described and show how they create obstacles to a free deliberative praxis in this court.

7. Judicial procedures as obstacles to deliberation

In the Brazilian Supreme Court, many procedural rules have remained almost unchanged since their creation. The establishment of these rules, more than a hundred years ago, has created a path dependence condition that hampers developing a deliberative culture in this court. In the last century, these decisions of the past have never been seriously questioned, nor have their effects on deliberation. In subsections 7.1 to 7.3, I will explain and analyze the rules that I deem to have the most deep (negative) effect on the deliberative performance of the Brazilian Supreme Court: (i) the almost irrelevant role of the justice rapporteur; (ii) the way in which the Brazilian justices communicate with each other (through subsequent opinion reading); and (iii) the possibility of interrupting a plenary session before every justice has had the opportunity of expressing their views on a given case. Subsections 7.4 and 7.5 are dedicated to the analysis of the more general effects these rules have on the two main goals of deliberation I mentioned before:[38] sharing previously unshared information and attenuating the effects of bounded rationality.

7.1 Non-deliberative from the outset: The role of the justice rapporteur

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

Up to this point, nothing seems really peculiar about this process. In other supreme or constitutional courts, the opinion of the rapporteur is also usually the basis for the court's deliberation, a kind of draft for the final decision. In the Brazilian Supreme

[38] *See supra* Sections 4.1 and 4.2.

Court, the opinion of the justice rapporteur does not (and cannot) fulfill this task, and the reason is very simple: before the judgment session, the other ten justices receive only a copy of the report, that is, only a mere summary of the case. Since this report only systematizes the arguments that are already public, it does not provide anything new. The rapporteur's opinion, on the other hand, is *not* distributed beforehand. In other words: the opinion of the justice most familiar with the case is "revealed" only in the plenary session.

This fact alone could be considered extremely anti-deliberative, since the other justices cannot prepare themselves for a debate if they do not even know the opinion of the rapporteur. But this is not all. As previously mentioned, the plenary session means "opinion-reading session" rather than "deliberation session." This means that all eleven opinions usually have already been written when the session begins. In other words: the other ten justices write their own opinions without knowing the rapporteur's (or any other colleague's) opinion. The outcome could not be more at odds with deliberation: the individual justices do not share their opinions in a dialogue with one another, nor is there any direct confrontation of arguments. At most, justices may support or reject the arguments of those bringing the case before the court or the arguments of public officials responsible for defending the constitutionality of the statute (as these arguments were already public); but they can hardly support or reject, at least directly, the arguments of the justice rapporteur or the arguments of the other justices, since they do not know and cannot access these arguments at the time they write their opinions.

7.2. Opinion reading and equality in the deliberation

In the courts of several common law countries—including the British House of Lords, the High Court of Australia, and the US Supreme Court in its early years—the *seriatim* model of individual opinions has been adopted or used to be in use as a procedure of judicial decision making. In civil law countries, by contrast, courts usually deliver *per curiam* decisions, made after secret deliberation. In many cases, like the Italian and the Lithuanian Constitutional Courts or the German Constitutional Court in its early years, dissenting opinions are not or were not allowed; in other cases, such as the German Constitutional Court since the early 1970s, though dissenting opinions are allowed, they are rare.[39]

Brazil is a civil law country. If the divide sketched above is plausible, and if it is true that "[i]n contrast to British tradition of opinions separately rendered by each judge as an individual … according to civil law custom, disagreement is not disclosed,"[40] one should expect cases to be decided with a single, *per curiam* opinion in Brazil. As previously mentioned, this is not the case. Decision-making in the Brazilian Supreme Court consists in opinions rendered separately by each judge as an individual. These

[39] For statistics concerning the (heavily decreasing) number of dissenting opinions in the German Constitutional Court see Christoph Hönnige, Verfassungsgericht, Regierung und Opposition [Constitutional Court, Government and Opposition] 51 (2007).

[40] Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 Wash. L. Rev. 133, 136 (1990)

opinions are not only written and published, they are also read out loud during the court's plenary sessions. The order of these "opinion readings" is prescribed: the first to read is the justice rapporteur and the last to read is the chief justice; the order of readings for the other nine justices is based on the seniority in office, beginning with the junior justice and ending with the justice longest in office.[41] All opinions are read and later published. The form of decision and publication is thus *seriatim*. As mentioned above, even if a decision is made unanimously, all written opinions are subsequently read and published. I argue that the *seriatim* model of opinion reading,[42] when associated with certain procedural constraints in the Brazilian Supreme Court, may in some cases lead to unequal participation in the process of judicial decision-making.

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

Situation 1. The first six (of eleven) justices to read their opinions voted in the same manner (say, in favor of declaring a given statute unconstitutional). The last five justices to read their opinions (the seniors in office and the chief justice) have much less influence on the final decision. When it is their turn to read, the case has been virtually decided, since the majority (6 of 11) has already voted on the unconstitutionality of the statute. Admittedly, it is formally an option for any justice to change her decision before the judgment is concluded. Nevertheless, given the procedural constrains to a free debate, and given the effects of the extreme publicity on the likelihood of opinion changes, once a justice has already read her opinion, it is less than plausible that such "6 to 0 score" may be overturned. Thus, in such situations, it is possible to state that not all arguments (or not all votes) have the same weight.

Situation 2. The first eight (of eleven) justices are divided. Four voted for the constitutionality and four voted for the unconstitutionality of a given statute.[43] The last three justices are then in a privileged position, since they may vote strategically. As will be shown below,[44] maybe the ninth (or tenth, or eleventh) justice to vote has a third, intermediate solution for the case being decided. She can chose whether to vote exactly as she wants, that is, to deliver a written opinion that reflects her original

[41] *See* art. 135 of the court's rules of procedure: "Finished the oral debate, the Chief Justice will take the opinions of the Rapporteur … and the other Justices, in reverse order of seniority."

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

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

[44] *See infra* Section 7.4.

preference, or she may vote "sophisticatedly," that is, not according to her original preference, but according to her secondary preference, in order not to waste her vote, if her original preference has no chance of winning.[45] This and other similar and not very improbable situations frequently lead to unintended and counter-productive strategic behavior that hampers the free flow of argument, which is a condition for a good deliberative practice.

7.3. Time to think, but alone: Interrupting the plenary session

Another internal procedural rule, which illustrates how anti-deliberative the entire decision-making process is, consists in the possibility, granted to any justice, of interrupting the plenary session if she needs more time to reflect upon some issue of a given case.[46] This rule is particularly telling of how the procedure is not designed to facilitate true deliberation. When a justice requests the interruption, she is clearly acknowledging that her fellow justices cannot contribute in any way to her reflection upon the case. This is especially the case if the justice requesting an interruption of the plenary session is one of the first to vote. If one bears in mind that justices may choose to interrupt the plenary session in almost every important judgment, one can only conclude that the disposition to work as a team, mentioned above as a condition for deliberation, is completely absent.

7.4. Keeping previously unshared information private

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

First of all, the justices (and their clerks) may have had access to the most varied pieces of information about the case to be decided. A concrete example may illustrate this situation. In 2003, the Brazilian Supreme Court decided one of its most polemical cases to date. This case, known as the *Ellwanger* case,[47] involved a journalist and publisher who published his own books as well as those of other authors, most of them allegedly with anti-Semitic content. His publishing house had published dozens of books, and it would have been impossible for any individual justice, even with the help of her clerks, to read every single one. As a result, some justices quoted excerpts from some books, other justices

[45] I am borrowing the concept of sophisticated voting from the literature on democracy and elections. *See, e.g.*, Anthony Downs, An Economic Theory of Democracy 48 (1957).

[46] The possibility of interrupting the judgment session is established by the Brazilian Civil Procedure Code and applies therefore to all courts in Brazil (*see* art. 555, § 2, of the Brazilian Civil Procedure Code: "Every judge may interrupt a judgment session if he considers himself unable to reach a decision at the given moment."

[47] STF, HC 82.424, Rapporteur: Justice Moreira Alves, Sept. 17, 2003, Diário da Justiça [DJ] Mar. 19, 2004, at 17.

quoted excerpts from other books; some excerpts were more clearly anti-Semitic, others less so.[48] What one justice quoted and read could not help or influence other justices in their reasoning, since all justices prepare their votes simultaneously and independently. Previously unshared information was thus either not shared or shared too late.

Second, each justice has a different theoretical and professional background, and consequently interprets the same facts and arguments presented by the litigants in a different way. Knowing the points of view of the other justices before forming her own opinion is something that would contribute to the robustness of deliberation. One justice may have read a relevant work on the topic at hand, but this information will never be shared with her colleagues, who will come to know it only after they have already written their own opinions.

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

Decision	**Justices**	**Total**
For constitutionality	J1, J2, J3, J4, J9, J11	6 justices
Against constitutionality	J5, J6, J7, J8, J10	5 justices

There seems to be nothing wrong with such a "final score." In a binary decision, one alternative obtains the majority, whereas the other obtains the minority of votes. However, this premise holds only where there are only two possible choices: "constitutional" or "unconstitutional." Yet this binary pattern hardly describes the plethora of possibilities of decision-making in most constitutional courts. The continuation of our example illustrates a situation in which decisions go beyond the binary pattern of "constitutional, therefore valid" / "unconstitutional, therefore void."[49] Initially, it

[48] However, this is only partially caused by unshared information. As will be analyzed below (*see infra* Section 8.1), the difference in the excerpts quoted is also explained by the fact that justices use their information very strategically.

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

will be disclosed why each justice decided the way she decided. Subsequently, it will be shown how justices may have decided without the deliberative constraints they face within the Brazilian Supreme Court, that is, in case they had had previous access to information regarding the preferences of their colleagues.

J1 and J2 voted for the constitutionality of the statute because they fully agree with the decision taken by the legislator. J3 and J4 voted for the constitutionality of the statute, even though they consider that 150 days are perhaps too much; they actually think that an ideal solution would be to authorize the abortion within the first 90 days of pregnancy, but since both have to deliver their written opinions quite early, they do not want to put forward arguments against the statute and thus help the justices who are against the abortion. J5 and J6 voted against the statute because they argue that the constitution, by guaranteeing the right to life, precludes the possibility of abortion. J7 and J8 actually hold that a statute permitting abortion is not unconstitutional as such. However, they cannot accept a period of 150 days as being compatible with the constitutional protection of life. Their ideal solution would be to permit the termination of pregnancy within its first 60 days. They vote against the statute as it is. Things begin to become complicated when it is J9's turn to vote. She holds that a legislation permitting abortion is compatible with the constitutional protection of the right to life, but, just like J3 and J4, she thinks that 150 days is too long. She thinks that the internationally widespread standard of 90 days is the best solution. However, she has no idea of how J10 and J11 will vote. If both vote for the constitutionality of the statute, the case is decided in favor of the 150-day period; if both vote for the unconstitutionality, the case is decided against the statute and abortion remains a felony. But if J10 and J11 do not share the same opinion, then J9's vote is pivotal. Since she thinks that abortion is not fully incompatible with the constitution, she votes for the constitutionality of the statute, even though 150 days is not her ideal solution in the case.[50] J10 then votes against the statute for the same reason as J5 and J6. It is now 5 to 5 and J11's vote is decisive. J11 shares J9's opinion, that is, she also thinks that the internationally widespread standard of 90 days is the best solution. Of course, she has no idea that J9 shares the same opinion. She votes for the constitutionality of the statute. The final "score" is 6 to 5. Six justices voted for the constitutionality of the statute and five voted against it.

It is easy to observe that the majority of the court held that the termination of pregnancy is compatible with the constitution. Eight of eleven justices think that a statute permitting abortion may be compatible with the constitution. According to their ideal interpretation of the case, abortion should be permitted either within the first 150 days (J1, J2), or within the first 90 days (J3, J4, J9, J11), or only within the

[50] One could object that J9 could not make all these strategic considerations because her vote was already written. Even though this is true (i.e., even though J9 has gone to the plenary session with her vote already written), this does not prevent her from changing her vote at the last moment. As explained above, when the justices who are the first to read their votes are divided, the justices last to vote may have a strategic advantage and may vote in a "sophisticated" way (*see supra* note 45). Additionally, if she wants to change her vote strategically, but does not want to do it orally during the session, she can always interrupt the plenary session and rewrite her vote alone "at home" (*see supra* Section 7.3).

first 60 days (J7, J8). This means that, based on the number of justices' first choices, the ideal solution in the case would be: four justices for the possibility of abortion within the first 90 days, three justices against the possibility of abortion, two justices for the possibility of abortion within the first 60 days, and two justices within the first 150 days.

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

If a debate were to take place, the final decision would probably have been to declare that the statute is incompatible with the constitution, but without declaring it void, only by reducing to 90 days the period in which the abortion is permitted. In an open debate, this solution would have eventually been proposed by either J3, J4, J9, or J11, and it could have easily attained the absolute majority of the court: in addition to the four justices who previously defended it as their first option, the two justices who preferred the 60-day thesis would probably have endorsed the 90-day thesis (after all, it is closer to their opinion than the 150-day thesis[51]). In the course of the debate, the first two justices, who initially agreed with the legislator's choice, could have also endorsed the 90-day thesis, since they would have no clear reason to stick to their original opinion.

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

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

7.5. Reinforcing bounded rationality

As mentioned in Section 4 above, besides creating more optimal results through sharing previously unshared information, deliberation in courts also fulfills another task: it lessens or overcomes the impact of bounded rationality.[53] The abortion example has shown how the simple fact of sharing previously unshared information (especially, but not exclusively, the real preferences of each justice) could improve the deliberative

[51] This makes it clear that, though the deliberation is strategically driven, no logrolling or bargaining takes place. Opinion shifts are the outcome of an adjustment to the nearest thesis, and do not involve "unprincipled trade-offs between outcomes in different areas of law" (*see* Alarie & Green, *supra* note 24, at 87).

[52] Fearon, *supra* note 15, at 48.

[53] *See supra* Section 4.2.

outcome and improve the overall results by reflecting more accurately the opinion of the majority of the court. A different type of improvement is at stake when one speaks of lessening or overcoming the impact of bounded rationality.

Constitutional cases often involve very complex issues. Knowing what each justice individually thinks to be the best solution in a given case may not be enough. As already stressed, good collective decisions are often the result of brainstorming, meaning that new ideas (i.e., ideas that had not previously occurred to any of the justices) emerge often through the act of deliberating and of questioning each other premises.

There is simply no place for such brainstorming in the Brazilian Supreme Court. The main reason is again the aggregative procedure of "sequential opinion reading." Admittedly, the justices sometimes discuss some small details of the case, or try to question the premises or conclusions of their colleagues. But since there is no "opinion of the court" put down in writing, there is no incentive whatsoever for engaging in brainstorming that could bring about completely new ideas for a final, common opinion.[54]

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

8. Judicial practices as obstacles to deliberation

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

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

The justices in the Brazilian Supreme Court do not see it as their task to disclose as much information as possible. In order to convince their colleagues (or an external audience) they tend to adopt strategies that are similar to those of lawyers. Among other things, this means that, when advocating for a given thesis or solution in a case, they do not feel compelled to reveal information that runs contrary to their arguments. Just as lawyers often cite only academic works and judicial precedents that

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

corroborate their interests, the justices in the Brazilian Supreme Court frequently do the same.

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

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

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

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

[56] *See, e.g.*, Habermas's distinction between communicative and strategic action. According to Habermas, in a communicative action "the participants are not primarily oriented towards their own success" (Jürgen Habermas, Theorie des kommunikativen Handelns [Theory of Communicative Action] 385 (1981)). Steiner argues that when members of a committee share information only when it serves their individual preferences, it is strategic talk in a pure form, not deliberation. *See* Jürg Steiner, *Concept Stretching: The Case of Deliberation*, 7 Eur. Polit. Sci. 186, 188 (2008).

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

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

However, suspicion and distrust of cooperation are probably not sufficient reasons for the uncooperativeness and for the individualism within the Brazilian Supreme Court. This individualism is so strong that even the workload does not help attenuate it. Workload—one of the reasons justices of other courts usually evoke in order to justify not writing separate (especially concurring, but also dissenting) opinions[59]—would be expected to be an even stronger reason in the Brazilian case, since Brazilian justices decide tens of thousands of cases every year.[60] Nevertheless, they continue to write separate opinions in most decisions, and the length of those decisions has been even increasing in the recent years.[61]

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

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

> A—*Unanimous decision*. All justices have previously written individual opinions in a given case; all opinions are extremely similar; after the justice rapporteur has read her report and opinion,

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

[58] *Id.* at 82.

[59] *See, e.g.*, Forrest Maltzman et al., Crafting Law on the Supreme Court 24 (2000); Douglas O. Linder, *How Judges Judge*, 38 Ark. L. Rev. 479, 486 (1985); Ginsburg, *supra* note 40, at 142.

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

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

[62] *See infra* Section 8.4.

all other justices individually note that their opinions are extremely similar to that of the justice rapporteur; why should the remaining justices insist upon reading their opinions?
B—*A six to five decision*. All justices have previously written individual opinions in a given case; after the justice rapporteur has read her report and opinion, the five justices next in line to read their opinions note that they are extremely similar to that of the justice rapporteur; why should these five justices insist on reading their opinions? The seventh justice, however, has a completely different, and opposed, opinion. After she has read her opinion, the last four justices individually note that their opinions are extremely similar to it; why should these four justices insist on reading their opinions?

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

A plausible hypothesis for the extreme individualism within the Brazilian Supreme Court could be based on the idea of *audience*, which has been developed in recent years, in particular by Baum.[65] This approach, though it does not completely set aside

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

[64] Additionally, insisting upon publishing all these extremely lengthy opinions has several side effects. The most important ones are: (i) the decisions of the Brazilian Supreme Court are becoming more and more confusing and difficult to understand; and, as a consequence, (ii) neither the civil society, nor the legal community, nor the parliament, nor the government receive a clear indication from the court on how to act or how to interpret the Constitution in further cases. When the court strikes down a statute as unconstitutional, it is especially difficult to identify the grounds of it decision, since different justices may adduce different reasons (*see supra* Section 7.4).

[65] *See* Lawrence Baum, Judges and Their Audiences (2007).

other possible explanations for judicial behavior, is focused "on judges' relationship with their audiences, people whose esteem they care about."[66] As I understand it, this approach fits quite well into one of the underlying assumptions of this article, namely the distinction between internal and external deliberation.[67] As Baum argues, "[j]udges' audiences usually include colleagues on their own courts, but for the most part these audiences are *outside* the courts."[68] Ferejohn and Pasquino, when explaining the distinction between internal and external deliberation, argue in a very similar way: "[w]e doubt … that it is possible to understand the opinions of American Justices as largely internally aimed at persuading their fellows."[69] They argue further:

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

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

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

8.3. The downside of extreme publicity

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

66 *Id.* at 21.

67 *See supra* Section 3.

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

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

70 *Id.*

71 Baum, *supra* note 65, at 34.

72 If it is true that "large audiences serve as a resonance box for rhetoric"—Jon Elster, *Deliberation and Constitution Making*, *in* Deliberative Democracy, *supra* note 1, 111—then broadcasts of plenary sessions on the radio and TV have a huge potential for increasing this resonance.

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

Admittedly, arguing against publicity in the decision making process of public officials is no easy task. However, it is possible to argue that "live broadcasts … have created a myth of transparency that must be deconstructed."[75] Deliberating in public clearly lessens one's openness to counterarguments and above all the willingness to change one's opinions. Especially in the most polemical cases, after a justice has read her opinion in front of the cameras, it is less than plausible that she, also in front of the cameras, would be willing to recognize that her arguments were not the best and that, in fact, the best interpretation of the constitution and the best solution for the case is exactly the opposite of what she has just proposed. It is not necessary to know much about the dynamics of human relations to perceive how improbable such a situation is. The bigger the audience, the higher the risk of "losing face" when one has to admit that her arguments are untenable.[76]

Reading the opinions not just in public, but also in front of the cameras is clearly a public commitment to a given position. This is a crucial and often neglected variable within this debate. Unlike private commitments, public commitments have a strong effect on an individual's susceptibility to consider changing her opinion and willingness to accept counterarguments. According to several (theoretical and empirical) studies on the psychology of commitments and opinion and attitude changes, deliberation tends to be less sincere when all or even some of the participants have already

[73] Luís Roberto Barroso, *Judicialização, ativismo judicial e legitimidade democrática* [Judicialization, Judicial Activism and Democratic Legitimacy], 13 Revista de Direito do Estado 71, 73 (2009). A similar opinion—but concerning the case of the US—seems to be advocated by Lasser. According to him, the American judicial system "generates its legitimacy primarily by publicly argumentative means," and this publicity leads to more transparency and to more accountability. *See* Mitchel de S.-O.-L'E Lasser, Judicial Deliberations 338 (2004).

[74] *See Representantes dos três Poderes debatem transparência na Administração Pública* [Representatives from the Three Branches Discuss the Transparency within the Public Administration], Notícias STF (Apr. 2, 2009), http://www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=105702.

[75] Virgílio Afonso da Silva & Conrado Hübner Mendes, *Entre a transparência e o populismo judicial* [Between Transparency and Judicial Populism], Folha de S. Paulo A3 (May 11, 2009).

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

publicly expressed their opinions. As Rosenbaum and Zimmerman concisely stated some decades ago, "if an individual *publicly* announces his response on an opinion dimension immediately prior to a social influence attempt, his susceptibility to modification of his original response will be reduced."[77] Similarly, Oskamp argues that the public commitment to a particular viewpoint tends to freeze beliefs and make them resistant to future counterarguments. Moreover, he argues that "[w]hen individuals have made a public commitment, they tend to become more extreme in their opinions."[78]

The experience in courts in which deliberation is *not public* seems to reinforce this assumption. According to a former justice of the German Constitutional Court, the protection of the confidentiality of the internal debate is important to guarantee the open-endedness and the creative potential of such a collegiate body.[79] Moreover, "[t]he confidentiality of the deliberation process prevents the external public from registering or commenting on the changes of opinion … that may occur in the course of the deliberation as a 'victory' or a 'defeat' of an individual."[80]

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

The problem here is slightly different from that concerning the public statement as a constraint to opinion changes I have just analyzed, though both share some common characteristics. The extreme publicity of TV broadcasts negatively affects the possibility of "testing the arguments" because justices do not want to be perceived as persons who are not completely sure about the things they are saying, and this for at least two

[77] Milton E. Rosenbaum & Isabel Madry Zimmerman, *The Effect of External Commitment on Response to an Attempt to Change Opinions*, 23 Public Opinion Q. 247, 247 (1959) (emphasis in the original). *See also* Robert M. Bohm, *Death Penalty Opinions*, 60 Sociological Inquiry 285 (1990).

[78] Stuart Oskamp, Attitudes and opinions 206–207 (1977). Regarding the tendency of becoming more extreme in their opinions when people commit themselves to state their positions publicly, *see* Jerald M. Jellison & Judson Mills, *Effect of Public Commitment upon Opinions*, 5 J. Experimental Soc. Psych. 340 (1969).

[79] *See* Wolfgang Hoffmann-Riem, *Die Klugheit der Entscheidung ruht in ihrer Herstellung* [The Wisdom of the Decision Lies in the Process of its Production], *in* Kluges Entscheiden 15 (Arno Scherzberg ed., 2006).

[80] *Id.*

[81] *Id.* at 16.

main reasons: (i) because their legitimacy is, among other things, associated with the assumption that they know better than other people (e.g., the legislator) how to decide the cases they have to decide; (ii) because justices, at least as much as anybody else, care about their self-presentation, and the larger their audience the more careful they have to be about their public image.

8.4. Dissenting and defeated opinions

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

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

However, as it has already been stressed several times, the justices in the Brazilian Supreme Court write their individual opinions at the same time (and read them one after another in public plenary sessions). Therefore, just as there is no real (oral) deliberation, there is no dialogue, no exchange of arguments among the written opinions. In other words, in a 6 to 5 decision, the written opinions of the five justices who do not share the opinion of the majority are *not* dissenting opinions, at least not in the sense that this term is used in the debate on judicial decision-making. They are merely *defeated opinions*. As defeated opinions, they do not challenge the opinion of the court, since at the time they were written there was no opinion of the court yet. Hence, if

[82] *See, e.g.*, Hoffmann-Riem, *supra* note 79, at 14; Michel Rosenfeld, *Comparing Constitutional Review by the European Court of Justice and the U.S. Supreme Court*, *in* The Future of the European Judicial System in a Comparative Perspective 52 (Ingolf Pernice, Juliane Kokott, & Cheryl Saunders eds., 2006); William J. Brennan Jr., *In Defense of Dissents*, 37 Hastings L. J. 427 (1986).

[83] *See, e.g.*, Ruth Bader Ginsburg, *Communicating and Commenting on the Court's Work*, 83 Geo L.J. 2119, 2126 (1995).

these defeated opinions have any value, it is surely not the value the literature attributes to dissenting opinions.

9. Conclusion

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

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

Regarding the case of the Brazilian Supreme Court, it is possible to suggest that a few minor changes to its rules of procedures would strongly improve the court's deliberative performance. Additionally, some customary practices, which originated more than a hundred years ago, are worthy of review. However, rather than concluding with suggestions for changes in a particular court, what is more important is to stress that the analytical categories used in this article could be possibly used to test the deliberative performance of other courts. Only by inquiring what outcomes are produced or facilitated by what rules or practices, we may better understand how the promises made by the advocates of judicial review may be realized in the real world of constitutional courts. In the debate over the legitimacy of judicial review, there is much more to be done than simply comparing the US Supreme Court and the British Parliament. By knowing other experiences, we may find out that, contrary to Waldron's assumptions, deliberation within supreme or constitutional courts can be much more than mere cheap talk before a head count. A personal testimonial by Dieter Grimm, former justice of the German Constitutional Court, is especially telling of how deliberation may be more than counting votes that are already set prior to the act of deliberating:

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

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

[84] Grimm, *supra* note 22, at 9. See also Dieter Grimm, Die Verfassung und die Politik [The Constitution and Politics] 189–191 (2001).