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pasqualepasquino NYU-CNRS

0. The topic of my talk is the voting procedure in a very specific setting : the Constitutional/ Supreme Courts (but it may be of interest for those who work more generally about small committees making collective decisions)[1]. The reason of this choice is quite simple: not only am I familiar with some of these institutions, but moreover in the *summa* on our topic – the volume by Hubertus Buchstein on *Öffentliche und geheime Stimmabgabe* – the question I'm going to discuss is not taken explicitly into account.

1. Now to speak with a minimum of analytical clarity of my topic I need to introduce a couple of very simple stipulative definitions. I will deviate from the dichotomy public/secret vote and distinguish between 1) *disclosed* (nominal), 2) *undisclosed* (unrevealed, unidentified) and 3) *secret* vote. I'll consider also another difference, the one between *sovereign* and *justified* vote. Notice that these expressions have no intrinsic meaning, I just hope to give a clear and simple definition of them.

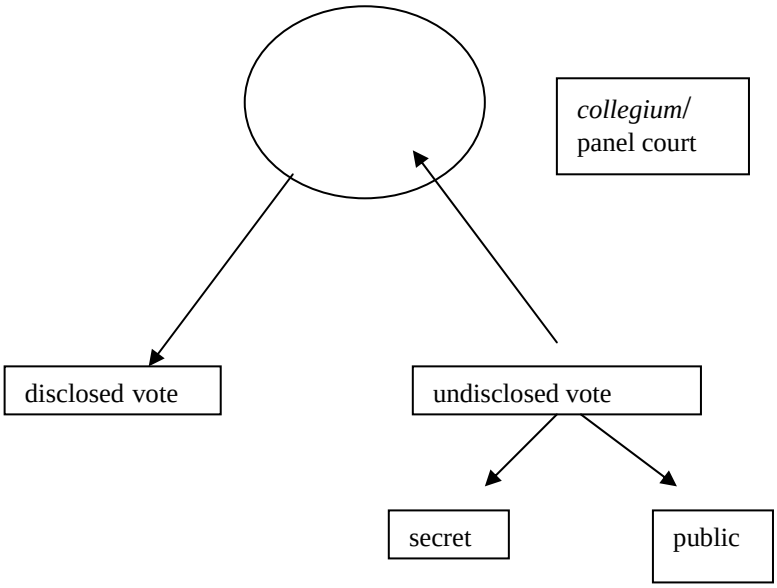
First about my trilogy. In the context of Constitutional/Supreme Courts it is not possible indeed to stick to the conceptual couple public/secret vote. In the functioning of really existing institutions we need to distinguish the vote disclosed to the public – this is the case of the American Supreme Court and of many others that can be considered embodiments of the English common law tradition – from the vote of a college that is not disclosed and appears like a decision "one voice", the decision of the collegial body as a single agency – like in the long-lasting tradition of the French panel courts. This is a crucial difference that I will discuss in details. To begin with I want to draw the attention on the circumstance that a vote taking place in a *collegium*, *inside* the collective body that has to make the decision can be either secret or public. For instance, in the Italian Constitutional Court the 15 members of the *collegium* normally vote openly (even though the vote is not disclosed and even if there are no records of the vote [this is not the case of the FrCC[2]]); for the appointment of the President of the Court, chosen by the justices among themselves, they use instead secret ballot papers that, by the way, are destroyed/burned at the end of the voting procedure. You can see

[1] I'm speaking here of committees making decisions that have an impact on the action of other people outside the members of the decision making body. That is not only the case of panel Courts, but also of the type of small bodies analyzed in P. Urfalino's paper.

[2] See *Les grandes délibérations du Conseil Constitutionnel, 1958-1983*, Paris, Dalloz, 2009.

why I want to distinguish secret vote (usual nowadays, but not in the past,[3] in political elections and referendum) from disclosed or nominal, on one hand, and from undisclosed and collegial vote, on the other. The members of the It. CC and the Fr. CC vote openly among them but outside the body making the decision the public doesn't know if the vote was unanimous or divided nor how each member of the college voted.

Fig. I



2. Consider that we have to distinguish moreover, between *sovereign* and justified or *non-sovereign* vote. Here what I mean. The voters in contemporary elections of representatives or in referendums have to choose among alternative parties, candidates or options and they have the absolute right of giving no reason at all of their choice. I call that *sovereign vote* since this mechanism is an instantiation of the principle expressed by the sentence *sic volo, sic jubeo, stat pro ratione voluntas* (Thus I will, thus I command, my pleasure stands for a reason), which characterizes the decision of the absolute sovereign (the point was made both by C. Schmitt and by W. Benjamin in his *Ursprung des deutschen Trauerspiels*, 1925). The voter like the absolute king doesn't need to give a reason, she has a will, a "preference" and makes her choice according to it. She doesn't need to justify her preference to anyone, since she has the right to impose her will. Evidently the difference between an absolute king and an absolute voter is that the impact of the decision of the last

[3] Polling booths were introduced in 1857 in Australia, 1872 in the UK, 1892 in the US for presidential elections, 1914 in France.

one is practically null (if the number of voters is very large), where the decision of the king makes normally a crucial difference vis-à-vis the *status quo*.[4] Nonetheless the rule is the same: no need of a justification. And, in order to protect the contemporary voter, secrecy.

In the case of a *panel court* a vote doesn't go without *internal* and *external* justification. The latter point is clear. Courts, even and notably the so called sovereign courts (courts whose decisions can not be appealed) have to produce a public justification of their decisions. This obligation has a double rationale. On one side, they have to explain the reasons of a decision since no court is a sovereign in the sense of the king [5], the people or possibly their representatives. On the other one, the justification of a judicial decision will become the content of the *precedent* binding the future decisions of the Court (*both* in the so called civil law and common law cultures). Neither the king nor the voter is bound by previous decisions.

3. Before considering what I call the *internal* justification, it may be worth saying a few words about the concept of justification that I'm using here. The case of the sovereign decider is nowadays quite rare [6] with the important exception of the voter in a liberal-democratic society (whose impact as I said is very very small, if she has any!). Every actor or agency making decisions which have an impact on other people has somehow to justify the imposition of X upon the individual or the group A. Only a person with a gun can impose me his will threatening me of death (something that Hobbes seems to consider an argument! I would prefer to say a threat explained: "If you do not give me your money, I'll kill you). The *judicial* justification takes a special form, as Hamilton already stated in *Federalist* # 78, it cannot be the bare and naked expression of a WILL, it has to emerge from a special set of rules and procedures, the most important is probably that it results from a norm that the judges have to refer to (a *statute* for the ordinary judge, the *constitution* for the members of a constitutional court) and that they have to interpret. [7] Sometimes [8] the decision is made after an adversarial procedure based on the old principle *audiatur et altera pars*. It follows that the decision of a court is open to public scrutiny and it cannot be without detriment for the court if the decision is supported by arguments that are weak or absurd to the majority of the

[4] Moreover the voters cannot normally choose the options but only select one of the options offered to them.
[5] Who could say: "C'est mon plaisir".
[6] It may even be a fiction, since even God in the best theologies (I think of Thomas Aquinas) doesn't act in a totally arbitrary way, and no human agent can act politically under no constraint! Absence of constraints is a old human dream and a myth.
[7] It may be interesting and worth exploring the following difference: the elected majority claims that its decision is the result of its interpretation of the popular will – actually a synecdoche for the will of the majority/plurality of the voters; the constitutional courts instead interpret the constitution.
[8] In European Constitutional Courts hearings are not mandatory and mostly rare. [data will be added]

addresses of it. A judicial justification takes moreover place inside a series of decisions according to a process that we may call *integrity* by reference to the precedents the courts has to take into account binding up to a point its choice. I cannot discuss here the strange doctrine claiming that the judicial interpreter could do whatever he wants. But it is self-evident that judges are limited in their decisions and this in a variety of forms, by other political actors (see Ferejohn)[9] and by procedural constraints (some French authors speak of *contraintes juridiques*)[10].

A point that deserves to be taken into account in this perspective (the one I suggested to call the internal justification) is that the members of panel courts (unlike the voters) have to *justify their vote to the other members of the decision making body* – at least if they do not agree with the draft produced by the *juge rapporteur*.[11]

There are very significant differences between the rules and conventions for decision making inside the US Supreme Court and the Constitutional Courts of countries like France, Italy and Germany. In order to understand my argument it is important to give some basic information (sorry for those of you who know all that).

In the USSC (probably the best known institution among those I'm discussing here, and Adrian will correct me if I misunderstood it)[12], after the public hearing of the parties, the justices get together and after a vote (probably without too many arguments) either the chief justice, if he is in the majority, or the oldest member of the court, if the chief is in the minority, assigns to one of the judges the task of writing a draft of the decision. Most of the time this text will be the draft of the opinion of the majority of the court, a member of the minority will write a dissenting opinion and the other justices will sign one or the other text appending possibly other arguments in the form of concurring opinions. This is evidently a simplified story. It is not impossible that there are unanimous decisions (very rare right now in cases of constitutional litigation) and sometimes there is more than one dissenting opinion (see *Korematsu v. United States*, 323 U.S. 214; 1944), exceptionally there may be just no majority !

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[9] [quote]

[10] [quote, M. Troper, *Les contraintes juridiques*]

[11] This may not be systematically the case in the French Constitutional Council since it has to make decisions under strict time constraints [quote Dutheillet], which may oblige the members of the Council to vote without giving articulated reasons for their choice.

[12] Needless to say: the USSC is not a specialized constitutional court but the last appellate court of the federal judiciary deciding cases and controversies, in French we would say that it is a *juge du fond*. Moreover because of the rule of the *certiorari*, we have to be aware that most of the constitutional adjudication is in the hands of the Circuit or even lower courts.

The procedure is pretty much different in Courts like the French Constitutional Council and the Italian Constitutional Courts. Here the President has a quasi-discretionary power to assign the case to a judge who is going to prepare the draft of the decision (in Germany at the beginning of the judicial year a division of labor is established distributing the cases *ratione materiae* among the 16 members of the *Bundesverfassungsgericht* – in that sense the discretionary power of the presidents of the two Senate, the two distinct panels of the BVG, is almost nil). Both the Italian and the French Court discuss always in the plenum the draft. Again the differences are significant. Here I do not need to enter into detail (I'll do it in the final version of the paper and if asked in the discussion), but it cannot be under evaluated that Fr. Constitutional Council, as already hinted, operates under extreme time constraints (when the *juge rapporteur* enter in the room for the deliberation, the Council has just a couple of hours to make a final decision), where the It. Constitutional Court knows no such temporal constraints and important decisions may take days or even weeks before the justices get to a final pronouncement.

I needed to introduce these scanty elements of information in order to bring in two points that matters to my argument. 1) The justices who do not agree with the draft proposed by the *juge rapporteur* or a specific argument of it, in the Italian, French and German CC, cannot just disagree, they have to suggest a counterargument and try to persuade their colleagues, and at least the majority of them. 2) Consider moreover that unlike the case of competitive elections, the justices of these Courts cannot choose normally among two options, but have to propose alternative arguments in the form of amendments to the draft presented by the *juge rapporteur*. For sure, once alternative arguments are presented by different members of the *collegium*, the other judges may just accept one or the other of them. But the alternatives do not preexist like in competitive elections, they have to be produced by the members of the deliberative body, and that under an important number of argumentative (rhetorical) constraints (for instance the reference in the decision to constitutional provisions, principles or values, the consistence vis-à-vis recent precedents, and so on).

4. As it is well known we do not know much about the deliberative process inside the Courts of European countries since the deliberation is secret (but see now, for the Fr.CC, the publication of the debates that are available after 25 years), we know nonetheless at the least that the decision has to be *one voice* and that dissent is forbidden. Now, this difference attracted great attention and produced a significant literature that in my opinion tend to ignore what seems to be the crucial difference in the two cases: the American and the French/Italian.

I'd like to come back to this *vexata questio* of dissent from the point of view of disclosed and undisclosed vote.

One could claim that there is indeed no difference between the two cases since, in both cases, members of the Court vote and use majority rule, but this opinion completely underestimate the role and the effect of procedures that – like the convener of this conference – I tend to take seriously.

If the vote is public, in the sense of disclosed, if in other terms every body outside the court knows who voted for which opinion, there are important consequences that have to be taken into account, and that are absent in the case where the vote is concealed.

Transparency/publicity is notoriously one of the mantra of the democratic ideology. But it may be argued, like Jon Elster did, that for a Constituent Assembly closed doors (Philadelphia) may do better, may be able to produce wiser decisions, than open debates (Versailles/Paris). The point that I want to stress is a bit different. Under disclosed vote justices have an incentive in keeping a consistent public image rather than looking for a compromise. Now the function of judges in a panel court may be conceived of as a different one: as the strenuous endeavor by a small group of people to find a common decision, the decision which is for most of the members of the panel not unfair.

Dissent in itself is something different from the fact that the members of the USSC have a public persona, and that they are identified by the public opinion with some positions on a political/partisan spectrum– almost everybody describes the American justices as liberal or conservative or median (there are even many sometimes extravagant[13] numbers to codify them). This visible personal identity doesn't exist for the members of the Italian, French and also German Constitutional Court[14], who have no public persona. Dissent as such, meaning an opinion different from the one that was shared by the majority of the members of a collective decision-making body, can perfectly be made public *without disclosing* the vote. Justice Valerio Onida, the president emeritus of the It. CC, proposed (unsuccessfully) some years ago to introduce in his Court the rule of the *anonymous dissent*. We care, so I believe, about arguments, not about the authors of them. Judges are not elected, accountable officials of whom we need to know who did what, in order to confirm them in office or get rid of them. It

[13] This is the claim of my colleague Anna Harvey of the Politics dept. at NYU, who is working on this topic [quote].

[14] In Germany the possibility *only* for the BVG (and for no other panel court) to publish dissenting opinions was introduced by the legislator, under pressure of the academic community, in 1969. But this possibility is used hardly ever. This is a point that deserve discussion since it shows that same rules may produce different effects in different context. This fact shows also that comparative analysis based only on consideration of legal norms is pretty superficial and it tells us not enough about the real functioning of (even purely legal) institutions.

follows that from the point of view of the comparative analysis the difference is in principle – this my thesis – not between courts allowing dissent and courts forbidding it, but between different culture and procedures of decision making where a *crucial role* is played by the fact that the vote of the court is disclosed or not.

5. When we speak of panel courts, I believe that we should distinguish – and this suggestion follows from the previous point – between *pluralistic* courts and *collegial* courts. To grasp the difference I want to emphasize we need to look back at the historical origins of the two types, going back to the English and French Early Modern period.

The difference has to do with the historical roots of the two systems: English medieval law on the one hand, and traditions of French monarchy preserved by the Revolution [15] on the other. In England, every judicial panel (if I understand correctly the complex history of the English courts of justice) used a mechanism of decision *seriatim* (which is still used, apparently, in India). A *seriatim* opinion "describes an opinion delivered by a court with multiple judges, in which each judge reads his or her own opinion rather than a single judge writing an opinion on behalf of the entire court" [Wikipedia –cf. Law Dictionary]**. This system was used originally by the American Supreme Court until Chief Justice Marshall was able to impose for a while unanimous decisions[16].

Unlike in the English context, it is easier to reconstruct the origin of the French model thanks, as we shall see, to the *ordonnances royales* by François I^{er} and Louis the14th . In France, judicial power was in the Middle Ages the essential and sovereign prerogative of the King; the monarch being first of all a *roi de justice* and a *roi de guerre*. In reality, more and more power to settle disputes among the subjects of the king was delegated to judicial panel courts [17] that, at least since the *grandes ordonnances royales* of François I^{er} at the beginning of the 16th century, had to speak *one voice*. Since the judges decided in the place of the King,

[15] *Lois* of August 1790. ** Note on Tocqueville.

[16] See: S.D. Gerber (ed.), *The Supreme Court before John Marshall*, New York University Press, 1998. Moreover: M. Todd Henderson "From seriatim to consensus and back again: a theory of dissent", in 2007 The Supreme Court Review, edited by D.J. Hutchinson, D.A. Strauss, G. R. Stone, The University of Chicago Press, 2008, pp. 283-344; Sabino Cassese, "Lezione sulla cosiddetta opinione dissenziente", (forthcoming); Henry G. Schermers & Denis F. Waelbroeck, "Dissenting Opinions", in *Judicial Protection in the European Union*, (6th ed., 2001), p. 736; K.M. Stack, "The Practice of Dissent in the Supreme Court", *The Yale Law Journal*, vol. 105, No. 8 (June 1996), pp. 2235-2259.

[17] Traditionally, we speak for France of *justice délégué* and *justice retenue*, the King was in principle the supreme judge, the last instance for the adjudication of conflicts among his subjects, and he never lost the prerogative of exercising the judicial power, the most important of all – the one that can be exercised ultimately only by the sovereign and that is exercised in name of the *people* after the Revolution.

they weren't allowed to dissent, since the King could have only one will. I do not know exactly how to make sense of the English *seriatim* rule, but it seems to have something to do with the aristocratic character of English courts of common law[18], where each member had equal status and spoke for himself. In any event, it is difficult to see in both these mechanisms anything properly "democratic." Popular juries have no dissent – as far as I know. It is a fact in any event that the French Revolution substituted the name of the King with that of the People and upheld the same system of unanimous (= one voice) decision for judicial panels. Dissent in France was a misdeed and it is still strictly forbidden. The same rule, as I said, exists in Italy. Germany introduced the possibility of dissent in 1969, but the practice remains highly atypical – Dieter Grimm wrote two dissents during the 12 years his tenure at the German Constitutional Court. Recently, instead, almost 80% of the decisions of the U.S. Supreme Court concerning constitutional litigation were not unanimous. The U.S. Supreme Court has been since some time notoriously and sometimes bitterly divided, and 5-to-4 decisions are frequent, specially in relevant questions. This is something that Chief Justice Roberts seems to regret, but he is unable for the time being to bring greater consensus to his Court.

6. This difference in the existence of disclosed or concealed vote has significant consequences. European CC's are generally perceived by the public as anonymous bodies rather than as small groups of well-known individuals with considerable public profiles and personalities. Where in the States justices are celebrities[19], in Europe their names are barely known by the non specialist public and no justice can care about her image since what she does or thinks or believes remains permanently hidden by the secrecy of deliberations behind close doors[20]. Only final decisions are publicly disclosed and they carry the signature of all members of the court. Justices are mere members of a collective body that must find the best possible solution to the questions that have been brought to its attention. Egocentrism can play a role, but apparently only in the course of secret deliberation – an egocentrism that shall remain unknown outside the court. These are facts. Now it is possible to speculate about the consequences of these different rules on the decision-making process, meaning the process that produces the final decision. Everybody here knows how the American Supreme Court works. Let me tell you what I know about the Italian CC. In principle and largely in fact, we

[18] At the origin (Magna Charta) the members of the English high courts were barons; but the system become soon extremely complex and any attempt of generalization (unlike in the French case) is doomed to be largely incorrect.

[19] I saw 37 biographies of Sandra J. O'Connor.

[20] With the exception, as we know, of France where after 25 years the arguments and votes of the members of the Constitutional Council will be accessible to people interested.

do not know anything about its internal deliberations[21]. But the Italian CC has published an official anonymous and unanimous document describing how the Court works. The document is available in English on the website of this institution[22]. I had, moreover, the chance to become acquainted in the last 15 years with a number of members of the Italian CC. I can tell a few things about what happens in conferences that last eight hours a day for twelve days each month.[23] First of all, as you may understand, collective deliberations of the Court en banc occupy a large portion of the justices' time. The Italian CC is a deliberative body in the strict, and not metaphorical or normative, sense of that abused word. All cases are discussed by the 15 justices together. The tradition is to distinguish between minor and major decisions. In any case, there is a *juge rapporteur* chosen by the president of the court (who is elected by the justices themselves mostly according to seniority). In simple cases, the *juge rapporteur* presents to his colleagues the draft of an opinion which is briefly discussed and, in the absence of opposition, it is approved. In important cases, the discussion may last for a long time. Justices tend to disagree (most of them being academics, this is not surprising). The absence of dissent has apparently an important consequence. If dissenters are a significant minority and if they have ostensibly serious constitutional arguments, their disagreement cannot be simply dismissed and outvoted as in Parliament or a politically accountable body where the majority, under the scrutiny of the voters, may pay for its decision at the next election. The president can ask the *juge rapporteur* to take into account the opinion of the minority and try to integrate it into the draft that will be discussed repeatedly until the court achieves some form of consensus. This system and style of decision-making may seem unusual to Americans, but one must take into account the fact that absence of dissent has been part of the continental legal culture for many centuries. Judges still never publish dissent in ordinary or high panel courts. The predominant idea is that an agreement must be found. Court opinions may be sometimes less legally precise than in the U.S. However, as the court speaks for the people and through decisions which are definitive and not subject to appeal, it seems sensible that the final opinion incorporates different points of view rather than the will

[21] No justice ever published anything (memories, notes, etc.) about his experience on the bench. The only book covering in a very abstract (but very interesting) way the work of the Court is by Gustavo Zagrebelsky, *Princìpi e voti*, Einaudi, Torino, 2005.

[22] http://www.cortecostituzionale.it/documenti/download/pdf/TheItalianConstitutionalCourt_2009.pdf (the new edition of the text specifies that text was produced for the Court by justice Valerio Onida and more recently revised by justice Gaetano Silvestri (both are also prominent constitutional law professors).

[23] One half-day every two weeks is devoted to public hearings of cases (only the 20% of the cases are object of public hearings), and the rest of the time is devoted to writing draft and final versions of the Court's decisions and to studying the cases.

or the beliefs of the majority which, by the way, is not the expression of a popular majority and which cannot legitimately or decently impose its opinion upon dissenting justices.

Note that Italy has an important form of dissent. Decisions of the CC are published in an academic journal: *Giurisprudenza Costituzionale* (constitutional jurisdiction), followed by critical commentaries written by legal scholars and professors. So, the Court's decisions do not appear to those who read them as the edicts of a secular god, but rather as the opinions of judges and law professors which are subject to analysis, investigation and (sometimes sharp) criticism from colleagues and specialists.

Dissent and life appointment Vote on alternative proposals or an a draft to amend! The unanimity vote in the BVG Personhood and accountability

Fig. 1 (from Todd Henderson, article quoted, p. 27)