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Decision-Making in Collegiate Courts - ‚Group Choice‘ in European Judicial Traditions

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Introduction

[1] When judges in collegiate courts disagree, establishing the collective decision poses particular methodological problems. What is the result if judges disagree as to the quantitative or qualitative aspects of their decision? How can they fuse their individual legal reasoning into a joint opinion, if that is what the several judges are expected to deliver? These problems are not addressed by contemporary methodology, which focusses on the intellectual ratiocinations to be performed by an individual person. Yet, throughout the European development of collegiate judiciaries, these problems have challenged jurists and philosophers alike. Can a group of persons apply the law with an authoritative, meaningful group voice? This book seeks to describe the **European legal history of judicial majoritarianism**. It analyses the concepts of collegiate decision-making as advanced by legal scholars at key points in that history, and also shows the aggregation techniques actually employed by judiciaries in a number of legal systems. We are inspecting, so to speak, a laboratory of ideas and solutions that may contribute to theories of plural decision-making, aggregated and collective will and choice, and theories of group preference and identity.

[2] The operation of collegiate courts can be viewed from a number of angles, e.g. relating to the judges’ appointments (the professional and social qualifications of candidates; politically motivated ‘stacking of the court’), cost-efficiency, or duration

of proceedings. These matters are not addressed in this study unless they have had an obvious impact on the group choice issue. Moreover, the overarching question ‘Why have collegiate courts at all?’ is not tackled as such, although the difficulties which become apparent when one looks more closely at the internal decision-making processes would probably have to be taken into account when lining up arguments pro and contra. Some attention will be given to the design of collegiate bodies, since aspects of chamber formation (e.g. even vs. uneven numbers of judges) have an impact on the voting problem, which is also true of aspects of the respective appeal systems. This report includes issues of multi-arbiter decisions while the decision-making processes of juries are only touched upon, mainly because no collective reasoning accompanies the jury verdict. There is no ambition to come up with the definite voting process or to engage in a discussion with jurisprudential or choice-theory authors. Instead, the following is an exercise in taking stock of what legal scholarship has come up with so far.

Chapter 1: Roman Law

[2] If multiple judges (or arbiters) had to decide a case, they decided *seriatim*, each on his own, though giving their co-judges a fair hearing. For cases in which they disagreed, the Roman lawyers without much ado subscribed to the concept of judicial majoritarianism, both for judges and for arbiters. The following details emerged:

[3] In the case of **qualitative divergences**, three judges granting the plaintiff sums of 5, 10, and 15 respectively, the overall judgment was taken to go for the lowest sum (Julian, as reported in D. 42,1,38,1 Paul 17 ed.). During the second life of the Roman law, this decision was not seen as convincing, but it was a result of the decisions being given *seriatim* with the overall result to be extracted from the three actual decisions, which had to be accorded equal weight. The Roman understanding of majority-building did not include the use of hypothetical secondary preferences, which would have allowed to turn the vote for 15 into a vote for 10. A majority had to be found by uniting actually identical votes, and if the three votes did not allow this, the proceeding ended without result. This explains Julian’s startling solution.

[4] Much attention was given to the **judicial tie**. A standard instrument was the introduction of specific biases: rules on specific issues which give preference to one outcome over the other, and do so for substantive reasons (*favor causae*). For example, if the validity of a last will was challenged, an evenly divided court was to uphold rather than avoid the will (*favor testamenti*). The preference for declaring a man free rather than a slave (*favor libertatis*), in play in many contexts, also worked as the tie-breaker if the same number of judges supported and refused a claim to be

free. It seems that for this kind of bias the Roman lawyers expected a statutory basis. Roman lawyers recognized that these value-laden biases had to be applied regardless of the roles of plaintiff and defendant.

[5] A more general tie-breaker required that the defendant/accused should prevail. This tie-breaker was dependent on which party took the role of plaintiff. Whether and why this preference should be given to the defendant was a matter of debate, as reflected in deliberations attributed to Aristotle (Probl. XXIX 13). We find the principle followed in Roman court procedures. It seems a statutory regulation to this effect was welcome, which may indicate that the *pro reo*-bias was not taken as a natural given. One may note that the *in dubio pro reo*-principle did not begin as an evidentiary principle ('presumed innocent') but as a solution for a tied judicial vote. In theory, one can neatly distinguish tie-breaker-rules (needed in collegiate courts only) from evidentiary rules pertaining to a situation of doubt on the facts of the case; the latter are to be applied by the *iudex unicus* as well. In the course of later legal development, however, both types of rules came to be seen as interchangeable. Thus, *in dubio pro reo*, in addition to serving as a tie-breaker, became (and is now generally known as) an evidentiary rule, whereas the rule that in disputes over an uncertain dowry the decision should be in favor of the dowry had started as an evidentiary rule, but was later also used as a tie-breaker.

[6] One mechanism which was mostly absent was the decisive vote of the president of the court. When Augustus let himself be given a well-composed bundle of powers in the year 30 BC, he was also given the power to cast the vote of Athena. The term 'Calculus Minervae' refers to the intervention of Minerva in the proceedings against Orestes (Aischylos, Eumen. 742/3). It has long been under dispute whether the tale is a poetic rendering of the preference which should be given to the accused in a case of a judicial tie (there was a tie and it was the goddess who turned it into an absolution) or whether the preference for the accused was already taken as understood, in which case the stone dropped by Minerva produced the tie, the judges having given one more vote against than for Orestes. – We do not learn about specific exercises of this power by any of the Roman emperors, and the requirements and effects of an imperial intervention in the situation of a tied vote cannot be reliably reconstructed. It was not a decisive vote which could have been used either way. It may even have been no more than the power to pardon *post sententiam* without interfering at all with the process of the judicial decision.

[7] Cases of **quantitative divergences** were discussed by rhetors, for example by Gellius (Noct. Att. 9,15). He set out the hypothetical that out of seven judges three were in favor of capital punishment, two were for banishment and two for a monetary fine. No definite solution was suggested, the case being an 'aporia' to be used for mooted exercises (the '*disputare in utramque partem*'). A real-life situation is reported by Pliny (Epist. 8, 14), but Farquharson and others have tried in vain to

find a fully-fledged group choice theory in Pliny's story (Farquharson, *Theory of Voting*, 1969).

[8] Since judgments were not accompanied by any supporting reasoning, the case of judges agreeing on the result but not on the reasoning was not addressed.

Chapter 2: *Ius Commune*

[9] When the Roman law was revived in the late middle ages, judicial majoritarianism was and remained a given. Later authors added that the majority rule was founded in natural law as well. Authors seldom addressed the issue of whether a weighing of opinions might not be preferable. **Antonius Faber** (1557 – 1624) countered this approach with the argument that mechanisms allowing an assessment of the substantial quality of an argument were lacking. Hence the weighing model would only lead to fruitless disputes over the quality of arguments, which in turn would undermine the court's authority. Later authors supported this line of thought.

[10] There was a general awareness that the issue of a judicial tie could be avoided if it was ensured that an **uneven number of judges** decided the case. Throughout the historical developments, systems which effectively secured an uneven number of decision-makers are surprisingly rare. If one turns to the medieval and modern arrangements, the basic notion seemed to be that every judge, by virtue of his status, had equal power to co-decide whichever case he wanted to turn his attention to. A mechanism which came into play early was to ensure that the judges who first came to deal with a case were the ones who had to see it through to the decision. Frequently, minimum numbers of judges were (and are still today) fixed, with additional judges sometimes entitled to join in if they so wished. Even advanced systems aiming in principle for uneven numbered panels cannot avoid the occasional even number of judges if they allow the withdrawal of a judge (for whatever reason) without replacement. It can be notoriously difficult to find replacements owing to a variety of objections based on due process.

[11] Doubts were raised concerning Julian's solution for quantitative divergence (cf. [3]): Was it acceptable that one judge could push down the sum to be awarded at will, even to near-zero? This quasi-veto position seemed especially questionable in settings where two out of three arbiters (or *arbitrators*, the medieval equivalent of the *amiable compositeur*) were appointed by the parties. Arguments were advanced for and against Julian's solution, which was expressly supported, however, by a canon law decretal dealing with three arbiter problems (VI. 1,22,1). Despite the criticisms

levelled at it, the solution provided in the Digest prevailed so far, as it was the law of the land. Lawyers came up with the new hypothetical outcome that two judges decided to award 10, one to award 5. While most civilians opted for 5, the canon law in this case upheld the majority decision. This difference in outcomes alone showed how brittle the traditional answer was.

[12] A specific issue arose when there was a tie between two arbiters. As suggested in Justinian's Digest, a third person was to be called in to give guidance to both arbiters. The relevant text was understood to deal with the appointment of a third arbiter, the so-called **superarbiter**. This reading – in fact a misunderstanding of the classical text (D. 4,8,17,6 Ulp. 13 ed.) – clashed with the preceding passage which stated that parties could not, in their arbitration agreement, provide for the later addition of an as-yet unnamed third arbiter. Throughout the ensuing doctrinal development, the legal basis of the superarbiter, as well as specific issues of his appointment and competences, remained contentious.

[13] The Roman authors Gellius and (Pseudo-)Quintilian who had expressly addressed the intricate question of quantitative divergences had not been included in any part of Justinian's Codification. It took a while before early modern authors with a broader interest in the cultures of the antiquity returned to these texts in the 16th century (**Andreas Alciat** et al.). With regard to the example introduced by Gellius (above [7]), it was asked whether in the absence of a simple majority, the adherents of two different punishments could be automatically merged into a 'coalition' on the basis that they are closer to one another than to the third opinion (***coniunctio sententiarum***): Did the judges for banishment and those for a monetary fine have a common ground in that they did not want to see the accused put to death? Many authors answered in the positive (although more precise criteria for establishing the substantive 'closeness' were not given). As to which punishment should ultimately be administered, the tendency was to go for the 'middle' one (*media sententia*) – an interesting divergence from the Roman law tradition which had shown a preference, in the case of quantitative divergences, for the least far-reaching award. Those who rejected the *coniunctio sententiarum* either felt that a relative majority should be sufficient (which in Gellius' hypothetical meant the death penalty) or that, due to the disagreement, the proceedings had to end without a result. Only gradually did the idea emerge that the problem could perhaps be tackled by eliminating options in a sequence of votes.

[14] In early modern times, a new rationale for the tiebreaker-rule *pro reo*, unknown in antiquity, emerged in a sort of inertia-principle: If there was no majority to affirmatively do something, matters had to remain in their present state (*novatio non facienda sine potiore numero*). The idea rested upon a quasi-mechanical understanding of the voting process: Votes given for or against cancelled each other out and hence an equal number of votes made the body 'mute, and incapable of

action' (Hobbes). This system of voting-mechanics was value-neutral, without any link to ideas of mercy or leniency. It therefore worked for the *negans* whatever procedural role the *negans* should find himself in (*semper praesumitur pro negante*). Thus, a court of appeal would dismiss an appeal if an equal number of judges dismissed and granted the appeal; here the party profiting from the tie would be the initial plaintiff, if the defendant was the appellant.

Chapter 3: Late Enlightenment Authors

[15] Late enlightenment authors took up the subject for two reasons. They believed that concepts of probability could be employed to find a rational optimization of the composition of courts and their procedure in order to avoid miscarriages of justice. This was linked to a strongly felt resentment against the outdated criminal justice systems of the day, when the death penalty was dealt out in a highly arbitrary manner. Could one not prevent cruel miscarriages of justice by redesigning court operations? It was a new idea that, on the strength of probability considerations, larger chambers would lead to qualitatively better judgments. For the medieval and early modern period, a different line of the historical development suggests itself: Courts mostly grew because the case-load continuously increased; court regulations which ensured that judges had to come together as a bench had the main purpose, it seems, of avoiding doctrinal disagreement within the overall body of the court's judges. The same rationale lay behind the emergence of continental meta-benches, installed to ensure that different chambers of the same court did not proclaim different versions of the law. Due to the concept of the court as a *personne morale*, which can be found fully developed before 1800, the civilian judiciaries were most anxious to uphold the idea that the whole court subscribed to one and the same view of the law. Courts went to great lengths to ensure this *unité de doctrine*, be it real or apparent. Another observation points in the same direction: in the working of a collegiate court there was often a willingness to let one judge of a chamber do the fact-finding on his own. It was the legal side for which a broader agreement was sought, and in this regard it seemed more pressing to agree on abstract rules than on their application to the individual case at hand. The procedure of the Rota Romana provides a good example. – From early on, there had also been a general suspicion that a single judge, not compelled to support his decision with a reasoning, could act quite arbitrarily (*juge unique, juge inique*), whereas teaming him up with a colleague made sure that at least some deliberations were required and thus brought an accountability of sorts which was otherwise (mostly) lacking. From this angle, adding more justices might have well looked desirable, but the really decisive step in this regard was only that from the single judge to a bench consisting of two judges.

Nicolas de Condorcet

[16] Nicolas de Condorcet (1743 – 1794) aimed at reducing the risk of miscarriages of justice by designing an optimum body of judges, equipped with a thought-through majority requirement. He set a standard of negligible risk of miscarriage of justice which a citizen would be likely to accept as an unwelcome side-effect of a criminal justice system; he arrived at $1/144768$. He then employed a model of decision, based on two variables, the number of decision-makers and the probability of each decision-maker getting the decision 'right'. This probability was taken to be the same for all decision-makers. The models assumed that all individual decisions were given separately, not taking into account the co-judges' decisions. For this model, Condorcet looked into the effects of the size of the judicial body and of the majority or supermajority requirement. Assuming that a single decision-maker was more likely to get it right than to get it wrong, increasing the number of judges would obviously decrease the probability of incorrect judgements, as would the move to ever stricter supermajorities. To give one example, if individual judges had an equal 0.9 probability of getting it 'right', a decision made by thirty judges and achieving a majority of 18 to 12 would secure that the risk of an overall 'wrong' verdict could be seen as negligible. Condorcet's model was closer to the reality of juries' decision-making (hence 'Jury theorem') and has been found to be less helpful for layered judicial decision-making, especially if the latter entails the exchange of arguments in a sort of conference.

Joseph von Sonnenfels

[17] In 1801 Joseph von Sonnenfels (1732/3 – 1817), who had previously launched a successful campaign to outlaw torture in Austria, published a pamphlet on judicial majoritarianism in criminal law proceedings. The book is a forceful plea for the unanimity requirement for criminal punishments. Its core reasoning is simple yet compelling: The *in dubio pro reo*-principle required the single judge to refrain from finding the accused guilty. If in a collegiate court there was at least one judge unwilling to find the defendant guilty, there was a doubt. The collegiate court operated under the same maxim of *in dubio pro reo* and thus could not find the accused guilty, because the disagreement meant that 'the court' was in doubt. To support this argument, the concept of the collegiate court forming a *personne morale* came in useful. We find the *in dubio pro reo*-principle, which had long become a principle of the law of evidence, turned back into a group choice rule: while the *pro reo*-bias had begun its career as a judicial tie-breaker rule, albeit for Roman courts deciding cases on a simple majority basis (above [4]), the *pro reo*-bias was now used by von Sonnenfels to advocate the principle of unanimity. The unanimity

requirement, being grounded in the *in dubio*-principle, was in his view restricted to the finding of guilt; other decisions which the court had to take, including disputes over the law, should be arrived at on the basis of a simple majority. von Sonnenfels applied the principle that prevailing doubt, as evidenced by a minority position, stood in the way of an affirmative judgment also to the reverse result: finding the accused 'not guilty' required unanimity as well. For all divided courts, von Sonnenfels thus needed to come up with a third outcome, which he saw in the decision to let the proceedings hang in a balance. The concept of the 'hung jury' comes to mind.

[18] Thus von Sonnenfels also advocated a clear sequence of decisions, which the court needed to take step-by-step. He identified the following steps: 'Guilt' / 'aggravating resp. mitigating Circumstances' / 'Punishment'. Other authors would suggest more and/or different stages of decision-making. It should be noted that for criminal law proceedings under the earlier system of 'absolute' penalties (a fixed penalty linked to a specific crime) the finding of guilt implied the sentence; so only one decision was needed.

[19] In order to counter the concept of a unified 'will' of the court (to be established based on majority rule), von Sonnenfels declined to see the individual judge's view as a 'vote' which could be cancelled out by another judge's contrary vote. The judges' reasoning was not to be seen as comparable units but as substantial contributions to the overall finding of the ultimate decision. We already saw the quasi-mechanical understanding of voting, here rejected, set out by Hobbes (cf. [14]). von Sonnenfels had already dealt with the 'mechanics for determining the relevant will' in his ground-breaking work on administrative law. This was the most profound criticism of judicial majoritarianism voiced so far.

[20] von Sonnenfels' pamphlet triggered an intense international debate. Most authors took an apologetic stance. Among these, **Paul Johann Anselm Feuerbach** (1775 – 1833) stood out. He stressed the lawmaker's unrestricted power to set up collegiate courts and their procedure in the manner which seemed, in his view, to serve justice best. There was no need, Feuerbach found, to limit oneself to von Sonnenfels' model. Feuerbach also reasserted the concept of the court as a *personne morale* creating the need for a unified judgment, which could only not be reached by a majority decision.

[21] von Sonnenfels countered his critics in a second edition, published in Vienna in 1808. He slightly enlarged the area in which he felt decisions could only be taken unanimously.

Francesco Vigilio Barbacovi

[22] One of the most creative contributions to the field came from Francesco Vigilio Barbacovi (1738 – 1821). Barbacovi radically challenged the idea of judicial majoritarianism. He advocated a system designed to give all judges of a collegiate court the same proportional impact on the ultimate decision. He criticized the concept of the collegiate court as a *personne morale* from whom the decision was fictitiously taken to originate.

[23] Barbacovi expanded this idea into a full-fledged system. For lawsuits with a divisible subject matter, the plaintiff should ideally be awarded the fraction of the claim which corresponded to the fraction of the court who decided in his favour. For reasons of practicability, the plaintiff should be awarded his claim in full once a 2/3 supermajority was achieved; for any lower success rate, the standard split should be 1/3 for the claimant against 2/3 for the defendant. If decisions had to be taken sequentially, the decision taken first, if not unanimous, should retain its comparative 'weakness' in a lasting impact on the later decision(s): if a minority of judges declined to find the accused guilty, the remaining majority should have a proportionally decreased sentencing power. If a judgment was appealed against, votes taken both by the court of first instance and by the court of appeal should have an equal impact on the final decision. Thus, one could avoid the somewhat odd occurrence that a lawsuit ended in a result supported only by a minority of all the judicial votes cast during the progress of the case through the judicial system. This was indeed an occasional effect of having a succession of binary decisions in the court of first instance and then again on the appellate level(s), each taken by the respective court's simple majority. Again, Barbacovi tried to give every judge an equal impact on the overall decision. Barbacovi's concept, which is not set out here in full, did not catch on.

Pierre Simon Laplace

[24] **Pierre-Simon Laplace** (1749 – 1827) sought to refine and improve Condorcet's calculations. He increased the number of variables and in general tried to take in more aspects of the complex reality. He found that a 9 out of 12 majority could be seen as acceptable. Later, the French legislator in fact used this fraction for the verdict of the jury.

Chapter 4: Developments in France

[25] Various issues of judicial majorities were addressed in royal ordonnances from 1454 onwards. A striking difference from the traditional solutions of the *lus Commune* lay in the willingness to look for procedural ways in overcoming a voting deadlock, a viewpoint that required that the initial votes given by the judges should not already be taken as the ultimate point of no return. Rather, the proceedings were seen as continuing past the first vote, which had failed to produce a clear majority decision. Regarding the judicial tie (the *partage*), a judge from each camp was to present his view in front of another chamber which then decided on the view to adopt. It was presumed that this decision was confined to picking what seemed the more convincing judgment. The chamber entrusted with overcoming the *partage* could not come up with new deliberations of its own. In a way, the first chamber had to produce two alternative judgments, one of which would then be picked as deciding the case.

[26] After 1510 there was also a royal regulation applying to the situation where the judges of a chamber were split into more than two camps: the adherents of the camp with the lowest number of followers had to join one of the other camps. This mechanism was to become a very successful export to other judiciaries.

[27] A noticeable innovation was the **two votes-majority** requirement (1498). With variations, it remained a central feature of the French judicial voting designs. For criminal convictions, five out of seven judges were required from 1670 onwards. The two-votes-majority requirement was lauded by **Montesquieu** who saw it as a progress compared with the simple sentencing majority sufficient in the legal systems of Roman antiquity. **Voltaire** derided Montesquieu's praise, demanding that the unanimity requirement of the English jury should be taken as the benchmark: it was incredibly cruel to let the accused go to the gallows because of a mere two-votes-majority.

[28] When the revolutionary *Assemblée nationale* discussed reforms of the judiciary, the process of decision-making by chambers came into focus. **Adrien Duport** (1759 – 1798) criticized the traditional procedure, which called on judges to give but one collective vote on the overall case. It was necessary, he found, to vote separately on the factual and on the legal side of a case. Duport supported his position with examples showing that a 'coalition' of judges opposed to a claim on the factual side with those who took an unfavourable view on the legal side could mean a loss for a plaintiff. The plaintiff would, by contrast, prevail if both aspects were made the subject of separate votes. The model for his proposed division was of course the English jury. To introduce the jury was a core political objective; agreeing on the theoretical need to have separate decisions on the facts and on the law could be seen

as furthering the cause of the jury in the political debate. Duport deserves credit for setting out logically how the internal decision-making processes could crucially influence the result of the collegiate court's dealing with a case. Duport's examples turn on the somewhat problematic fact/law divide, and they have indeed been criticized in this regard (by Tronchet, for example). His realization, however, that the decisive impact of 'sequential decisions as opposed to integral voting' could easily be mobilized when one asked whether the general question (should the plaintiff be awarded what he/she is claiming?) should rather be broken up into a sequence of sub-questions (was the contract made? / had the claimant fulfilled his part of the bargain? / were there no defences like prescription?). While the jury was indeed introduced, albeit only for criminal law proceedings, the revolutionary and post-revolutionary French legislator did not take up Duport's voting concept. Duport's concept resurfaced, however, in the Geneva Civil Procedure Act of 1819, which proved, in turn, to become an important source of inspiration for reform activities in the German states of the later 19th century (below [34]).

[29] In 1806 the Code de procédure civile introduced detailed mechanisms for collegiate courts' decision-making. While chambers were stringently established in uneven numbers, for various reasons the possibility of a tie still remained. In the case of a *partage* between two equally strong camps, an additional judge was to be brought in to supplement the chamber. This was the model that had long been in play to overcome the tie between arbiters (the superarbiter, cf. [12]). There was a detailed mechanism determining the supplementary judge to prevent him being picked in a manipulative manner. Both controversial views were set out before him. If the chamber thus enlarged still could not reach a decision (which did not have to be identical with one of the two opposing opinions), it fell to the new additional judge to choose between the two. This procedure made a renewed hearing necessary.

[30] In case the chamber was split into more than two camps, none of which had a controlling majority, the judges who supported the weakest opinion needed to join one of the other opinions. They were left with the choice, unlike in the system of the *coniunctio sententiarum* (above [13]), which let votes go automatically over to what was presumably the closest alternative. French legal doctrine was quick to point out that this rule alone did not really resolve the problem for all configurations. If one took, for example, the case that two out of four judges agreed, but the other two advanced two different solutions: which of these two now had to cede to the others?

[31] As regards the handling of sub-questions to be taken along the way to the ultimate decision, the modern Cour de Cassation uses a procedure which differs from that of other countries. According to German theory, the judges in their conference should arrive at their ultimate decision step-by-step (below [34]). The decision emerges by taking a decision-path unknown at the beginning. At that stage, when the first steps are taken, it is still unclear which ultimate result they will lead to, since the

outcome of the votes to follow is still open. (In practice, however, the proposal of the rapporteur is likely to be followed and the preceding debate will have shown where the judges are heading). By contrast, the rapporteur of a chamber of the Cour de Cassation has to offer his/her colleagues a choice of paths, making it transparent from the outset what the overall shape of the judgment is going to be if one option or the other were to be chosen. One could say that, in theory, the German system aims for an open-ended sequence of decision modules rather like individual dishes on a menu: It picks the next course only after the last has been eaten, while the French system lets the court choose from a variety of menus, each of which consists in an already well-composed sequence of courses.

Chapter 5: Developments in Germany

[32] A remarkable change in the internal workings of chambers occurred in early modern times, and not only in Germany. In the traditional system, each judge had given his 'speech' which consisted in his overall decision with reasoning. While judges further down in the voting order could take into account the views expressed in the earlier votes (including the option of simply joining one of them), judges who had already voted could not come back to their declared decision. For this one-round concept, the **voting order** was of great importance and all courts had fixed systems determining who voted first. In the 18th century the traditional precedence of the highest ranking judge or judges made way for a preference of the youngest and lowest-ranked judge who should thus be encouraged to take an independent stance. The more modern systems then split the conference into two parts: A judicial debate during which every judge could make a point (often leaving it to the judge's initiative whether he wanted to join in or not) and a formal voting process, compulsory for all members, which resulted in the decision of the chamber. In between there were systems allowing a repeat of the vote, which gave everyone a chance to take into account all statements voiced in the first round.

[33] Allowing individual judges to make a point regarding the case (or some of its aspects) or, alternatively, not to engage in the debate at all, strengthened the position of the one judge who operated as **rappporteur** (*referens, ponens*). For the functioning of continental collegiate courts, which were compelled to issue a unitary judgment of the court, a rapporteur was indispensable; it was impossible to collectivize the complete judicial process. (The internal division of labour may well have reinforced tendencies to replace oral proceedings by the circulation of documents and contributed to the overall bureaucratic character of civilian collegiate courts.) The internal balance between presiding judge, the rapporteur and the other members of a chamber varied from jurisdiction to jurisdiction. As a rule of thumb,

however, there was a tendency that the presiding judge and rapporteur emerged together as the actual decision-makers, while the other judges lapsed into a more passive role, unless a specific point of interest engaged their activity.

[34] The understanding of the judicial voting process was fundamentally challenged once it was linked to the issue of motivating judgments. If judicial decisions were seen as coming from the collegiate court, taken as a *personne morale*, did this not require also a unified motivation, which, moreover, had to be supported – just as the decision as such – by the court’s majority? Was it good enough that judges agreed on the result and thus came to a judicial decision, while disagreeing on the reasons? This new problem was driven by the requirement of accompanying judgments with a motivation; throughout the 18th century the parties’ and the public’s desire to learn the judges’ motivation had become ever more pressing. The issue was brought to a wider attention around 1820, both in Geneva (cf. [28]) and in Prussia. The Prussian Ministry of Justice issued a decree that separate votes were needed for all individual elements of a decision; the motivation could then be given simply by linking all majority-supported sub-decisions. It was no longer necessary, the ministry found, to conclude the process by ultimately voting on the end-result: once all sub-questions had been decided, it was obvious what the overall result would be. It was in this manner alone, it was decreed, that judgments could be produced which were logically as consistent as judgments issued and motivated by a single judge.

[35] The Prussian regulations triggered a passionate debate all over Germany. The two opposing views were labelled ‘sequential voting on each element’ vs ‘one integral voting on the end result’, with a number of intermediate solutions advanced as well. The discussion brought out what seemed (and indeed still is) an alarming discovery: the court’s decision depended on the voting design. If the judges voted on the result only they could arrive at one decision, but if they broke up the decision into some elements upon which they voted successively, a different decision might emerge. To make matters worse, breaking up the decision process into even more minute elements might reverse the result once again. And who was to say into which fine degree of micro-steps the decision process was to be broken down? It was also pointed out that there was the risk of arriving at an end-result for which there would not have been a majority if the members had gone straight to an integral vote upon the overall merits of the case. The advocates of step-by-step voting argued that it was impossible to reach a consistent motivation if the decision had in fact been agreed upon for wildly divergent reasons. The doctrinal dispute could not be settled. Occasionally legislators, when remodelling the procedural laws, felt compelled to address the issue. In this case, they opted for the model of step-by-step voting processes, which by and large had also found increasingly weighty support among legal scholars.

[36] A distinctive feature of a judicial decision-making process in the sequentialist manner is the duty of every judge to proceed on the basis of the majority decision(s) already taken, even if he/she had voted the other way. Beginning in the late 18th century, we find the express directive to continue **voting *stante concluso*** in many court regulations. It remained (and remains) an issue, however, whether the outvoted judge had to continue on an ‘as if’ basis or whether he could maintain his reservations and let them guide his voting conduct in the next stages of the decision-making process. To give one example, could a judge who had voted ‘not guilty’ then vote for a more lenient sentence since he held (and as an individual continued to hold) the accused to be innocent, or did he have to join the sentencing process taking the accused to be guilty as found by the majority? For criminal law proceedings, the Austrian law allows a judge to excuse himself in such a situation; his ‘missing’ vote was construed as having been given for the most lenient punishment advocated by one of the remaining judges. This regulation is quite exceptional, but it has occasionally been treated as exemplary by writers in other jurisdictions as well. In any case, a judge who continues to participate on the strength of the *stante concluso*-principle is called upon to provide his legal expertise for what – to him – are issues of a hypothetical nature, since according to his own opinion regarding the case at hand he would not have to address that specific point of the decision path at all. He acts as a legal expert, not as a judge deciding the case at hand (as he sees it). His voting input, however, counts just as much as that of every judge of the majority who outvoted him before.

[37] As a result of the (comparatively short-lived) use of a jury system in Germany (below [44] seq.), where the jurors were restricted to a binary answer on the question of guilt, doctrine assumed that in criminal law proceedings the judges’ overall decision also had to be an integral one. By contrast, it was assumed that the decision for civil law disputes could and should be broken up into ‘elements’ to be voted upon sequentially. It seems difficult to find a cogent theoretical reasoning to defend this distinction; literature occasionally invokes the *in dubio pro reo*-principle.

[38] The German Imperial Act on the Constitution of the Judiciary (1877) provided comprehensive rules for most aspects of collegiate decision-making. These rules may have had little practical influence. Complaints were voiced that in practice most issues were informally settled between the presiding judge and the rapporteur, who between them proposed the lines for a swift building of consensus; this left little room for formal decision-making processes involving the whole bench as a whole.

[39] The guiding principles, which one can of course question, were that (1) all ultimate parameters that made up a complex decision needed to be supported by a (simple) majority (unless a supermajority requirement came into play; cf. below [43] seq.), and (2) all single decisions were to be found in one round of voting.

[40] The legislator also looked into the issue of sequential vs. integral decision-making. While the *travaux préparatoires* expressed a clear preference for making the sequential voting design compulsory, the drafting committee felt that no statutory regulation was called for. It was not possible, the argument ran, to predetermine by statute all eventual questions of voting design. It was decided however, to make the voting design an issue to be agreed upon by the actual chamber, as opposed to a voting design decreed by the presiding judge alone. In devolving the matter to the chamber, it was assumed that situations like the split into more than two camps, each without a simple majority, would be resolved by the chamber itself.

[41] The simple majority requirement also controlled the disagreement over sums. If no sum was supported by a majority, the vote for the highest sum was taken to be a vote for the next lower sum. This so-called 'combination'-mechanism had already been used in a considerable number of older systems; it indeed can be seen as the *coniunctio sententiarum* of the *Ius Commune* (above [14]). These mechanisms have always had the downside that a judge finds a vote attributed to him which is not the vote that he has in fact given, on the ground that the law presumes this 'fictional' vote to be the closest to the one given in fact. – In a three-judge court the result is the median; the amount by which the highest sum surpasses the others has no effect; even an 'outlier' does not shift the result upwards. Since the president votes last, he can in fact choose every value in between an upper and a lower limit as set by the two assisting judges. In a five-judge court the result need not be the median but will rather tend to be a slightly higher number. The result will also not (other than by chance) be the average. Interestingly, for diverging sums found by multiple arbitrational appraisers, the (substantive law) German Civil Code opted for the arithmetic mean. One can argue against going for a mean (of whatever specific type) that the resulting figure quite possibly has not been proposed by any of the judges and that it therefore cannot be seen as the result of a majority vote on a proposal actually made.

[42] Throughout the 19th century, German legislators, following a French model, had required that collegiate courts must always sit in an uneven number, and hence the problem of the judicial tie no longer had to be addressed. Later changes in the 20th century German court system allowed occasionally for an even numbered court, and for these cases there was a return to the decisive vote being exercised by the presiding judge.

Judicial supermajorities

[43] Judicial majoritarianism usually relies on the simple majority. This long held true also for criminal law proceedings. Until the early nineteenth century, just one supermajority occasionally appeared, namely the requirement of a two-votes-majority, sometimes restricted to the death penalty and other severe punishments (cf. also above [27]). (The *Calculus Minervae*, due to its poetic haziness, could also be read as a two-votes-majority requirement; cf. [6].) It is difficult to establish the rationale behind the two-votes-majority idea. In early modern times, reference was made to the principle that one witness was insufficient to find the accused guilty. Another line of thought seemed to be that if a collegiate court was convicting someone, a one-vote majority was not enough because the decision would hang on one person, so one would have no better decision than by a single judge. From the opposite perspective, the aim might have been to protect the conscience of the individual judges: In a system of minimum numbers of decision-makers (as opposed to fixed benches, cf. [10]) every judge who was with the majority could try to sooth his conscience by arguing that, had he stayed away, there would still have been a simple majority among the remaining judges which he had merely reinforced.

[44] The most common fraction, *duae partes* or *duplo maior pars* (2/3), had originated in late antiquity as a *quorum* (for the city *curia*), not as a supermajority. It was employed by the medieval canon lawyers in that a 2/3 majority countermanded the right to challenge a majority decision on the ground that the majority was formed by the members of lesser rank and experience (as opposed to the *sanior pars*). The canon law doctrine of *sanior pars* was occasionally mentioned in the field of judicial majoritarianism, but never actually applied.

[45] The French Revolution introduced the jury, as known in England, to France (above [28]). Other countries followed suit, many only after the 1848 upheavals. For policy reasons, however, there was a reluctance to subscribe to the English unanimity requirement. In quick succession, reform bills tightened and loosened the supermajority requirement, none of which was found entirely convincing. Critics asked why a supermajority had been introduced in the first place; one had, after all, a *gouvernement de majorité*. On the continent, the juries had as their typical counterpart collegiate bodies of judges. So, two majority requirements had to be set: one for the jury and one for the judges. All sorts of combinations became possible. Sometimes the judges were given the power to overturn the juror's guilty/not guilty verdict by their own majority-based decision. Models were tried out which dynamically linked the necessary majority requirement for the college of justices to the specific result of the jurors' voting. Even majority requirements based on the aggregate voting result of jurors and judges on the issue of guilt were used; this was found to obfuscate the division of labour between jury and judges. No model emerged which seemed to fully satisfy everyone. The 2/3, however, came to be the

most frequently used supermajority. By the way, the two-vote-majority for smaller benches not seldom coincides with a 2/3 majority, namely for benches of four, five, six, seven, or nine judges.

[46] Over the years, the continental jury-systems went into decline and the jury proper survived, if at all, for certain crimes only. The 2/3 requirement, however, was carried over to apply to criminal law proceedings also in collegiate courts which operated without a jury. When an imperial Code of Criminal Procedure was debated in the 1870s by the German parliament, a brave attempt was made by **Eduard Lasker** to establish the unanimity requirement, advanced on the strength of considerations similar to those set out by von Sonnenfels (above [17] seq.). His motion was narrowly defeated and the 2/3 majority requirement prevailed. It remained limited, at first, to the finding of guilt. A simple majority still decided disagreements about the sentencing. Borderline issues arose, because specific circumstances could be seen with equal justice as an element for the issue of guilt or as a parameter to be taken into account for sentencing purposes. Isolated matters of statutory interpretation, once taken to the highest appeal level, were also decided by a simple majority.

[47] Under fiscal pressure the expensive jury system was abolished in 1924 and criminal chambers were composed anew, now mixing professional career judges and laymen – with equal voting power. A new problem surfaced in that now coalitions between lay-judges against the professional judges became a possibility. The risk that the lay-judges could outvote the professional, even on matters such as statutory interpretation, has met with mixed reactions of the judicial establishment.

[48] On the occasion of the 1924 reform, the 2/3 requirement was extended to apply also to the sentencing decision. While borderline issues were done away with, there was no theoretically convincing reason why the sentencing decision should require a supermajority. If of five judges each gave a different number, the chamber would have decided on the second lowest. It seems difficult to justify this result rationally.

[49] If a case reaches the highest appeal level, the review is restricted to the issue whether the law has been applied correctly by the lower court(s), and for this decision a simple majority is still held to be sufficient by most authors. For mid-level courts, an awkward result ensues if a verdict against the accused requiring the 2/3 majority depends on a specific interpretation of the criminal law. If no 2/3 majority can be found for a certain understanding of the law, the court must acquit the accused, and for this decision the necessary reasoning must rely on an understanding of the law which is supported by a minority of the court only. For the public, however, this judgement will state what is supposed to be a reflection of the law of the land. The law as it appears to be is in fact not the law as supported by the majority of the court. Furthermore, the 'group choice' mechanism in place works as hidden bias in favour of that interpretation of the law that is more friendly to the accused. This bias does not concern issues of evidentiary uncertainty, but comes into

play in open matters of interpretation. The traditional maxims of statutory interpretation still have to be aligned with this bias, where it exerts its influence.

[50] Judicial supermajorities were (and are) fraught with difficulties. A specific problem arises if the same supermajority is required for both the positive and the negative outcome (guilty/innocent), since this requires a third result option (e.g. 'not proven guilty'), if problems like that of a 'hung jury' are to be avoided. Overall, there is enough evidence to consider judicial supermajorities a failed model.

Chapter 6: Developments in the Judiciaries of the British Isles

[51] The focal point of judicial majoritarianism in the English judicial system is the order of the court. It is established based on the results of the different judgments. To apply the majority principle, the results of all single judgments are taken together, regardless of differences in the judges' reasons. The process is comparable to the 'voting-on-the-result only' procedure. There is no counterpart to the attempts made on the continent to overcome this in favour of sequential voting procedures on successive layers of the decision (above [34]-[35]). The majority decision as contained in the order of the court can thus be the result of judgments of widely divergent or even contradictory reasons. Apart from cases ending in complex court orders, the majority result is easy to find, especially since one only needs to have a binary decision on whether to grant or to dismiss the appeal. In the case of a tied vote the appeal is dismissed. This is perhaps the only tie-breaker rule needed.

[52] A thought experiment: a civilian and an English collegiate court decide the very same case on the basis of the same substantive law. The three judges differ in their legal views, and these views are perfectly mirrored in the other court. The case in England will be decided on the basis of the three judges' individual end results, whereas the civilian court, if it follows the process of step-by-step votes on the 'elements' of the decision, may ultimately end up with the opposite result. As others have pointed out before, harmonization of substantive law remains a half-baked measure as long as differences in procedure can produce disparate results.

[53] In line with the traditional system of declaring one's judgment *seriatim*, each judge can give a self-contained judgment without regard to the attractiveness of his reasons for his fellow judges. The problem of 'merging' the various judges' different reasons, triggered by the very same case before the court, arises, however, in quite another context. Once the multiple judgments have to be considered as a precedent, the question arises whether and how a common precedent can be extracted from

the multiple judgments. The issues discussed in this regard resemble the questions which a civilian collegiate court will address pre-judgment in conference when searching for a common ground. Voting difficulties in civilian collegiate courts on the one hand, and difficulties in extracting the precedent from multiple judgments on the other hand, reflect the very same intricate nature of any attempt to merge several persons' reasoning into one jointly reasoned decision. It should be noted that the decisions made by the Judicial Committee of the Privy Council were traditionally of a unitary nature (being advice given to the King). Although since 1961 a dissent is formally registered, the overall impression is still that its functioning appears a little closer to that of a continental European collegiate court than that of the UK Supreme Court. – The Criminal Division of the Court of Appeal is compelled to come up with a unitary judgment; from a point of view of group methodology, this distinction is difficult to support.

[54] The rule that a judicial tie results in the appeal being dismissed has an impact on the issue of precedent as well: does the dismissal of the appeal result in the creation of a precedent along the lines of the judges who are in favour of dismissal, in spite of them having no majority for their view? The English doctrine of precedent grapples with the question whether the precedential rank of a Court of Appeal judgment which was unsuccessfully challenged is elevated to that of a Supreme Court decision. The U.S. Supreme Court has an elegant way of avoiding this problem by not giving any reasoning, just stating that the judgment is affirmed by an equally divided court, thus avoiding to create a precedent which would not be supported by a majority of the court.

[55] For a while now the concept of so-called composite judgments has found considerable support, and this concept has met with both approval and criticism. The state of play is reported in Chapter 6 and no summary is needed for this abstract. Even if composite judgments were to become the standard type of judgments delivered by English collegiate courts, this would still be a far cry from the iron one-judgment-rule under which the civilian collegiate courts operate. There is no jurisdictional power vested in a judge in a civilian court; he/she only participates in the jurisdictional power assigned to the chamber of which she/he is a member. His/her position is that of a member of decision-making body and it is only by virtue of that membership (and within its limits) that she/he can influence the way the case is decided.

[56] While courts in **Ireland** and **Scotland** resemble in their collegiate structure the model developed on the continent, they also honour the concept that the individual judge does exercise a jurisdictional power, which is vested in him individually. A one-judgment-rule was introduced under Éamon de Valera in 1941, stressing the need for a definite position of the court; this rule fell in 2013.

Chapter 7: 20th Century Developments

I. Suspending Judicial 'Group Choice' due to the Nazi Ideology 'Fuehrer-Principle'?

[57] A central piece of the Nazi ideology was the 'Fuehrer-principle'. Although tailored to the person of Hitler, it was taken to be a general feature of the new constitutional order. As such, Nazi ideologues argued, it must permeate all branches of the state, including the judiciary. It was then found that judicial majoritarianism violated the 'Fuehrer-principle': you can't have the 'Fuehrer', in this case the presiding judge, outvoted. A new system was sought to protect the presiding judge against being outvoted by his assistant judges. The ensuing debate involved numerous high-ranking representatives of the judiciary and legal scholars of great renown. A patently absurd idea was given a scholarly treatment of the utmost seriousness. The discussion ensued for all the 12 years of the Nazi rule, much to the dismay of the impatient Nazi ideologues who wanted to see their idea implemented in reality. Perhaps due to the professionals' veiled reluctance to go ahead with a reform, no change came about.

II. Collective Decision-Making in the German Constitutional Court

[58] The statutory arrangement for the German Constitutional Court follows the system of a minimum number of judges (six out of eight). A tied vote is possible. The law which set up the court introduced a new *favor causae*, in that a tied vote results in upholding the piece of legislation (or administration) which has been challenged as unconstitutional. The U.S. Supreme Court in such situations, while also dismissing the appeal, declines to give a judgment on the merits because the view which supports the constitutionality, while prevailing for the case at hand, is not supported by a majority of judges (above [51]). The comparison sows doubt whether state actions really deserve to enjoy the bias of presumed constitutionality, with respective judgments thus found becoming part of the law of the land. In 1966, a highly politicized case (DER SPIEGEL) led the German Constitutional Court into a judicial tie. The tied vote meant that the challenged actions of the public prosecutor were to be upheld as constitutional. In line with the traditional handling of value-laden biases, the judgment should have been published without disclosing the voting result, and only with the reasoning given by the judges who supported the constitutionality of the measures under review. The court decided, however, to publish both opinions, thereby also revealing the tie. There was no statutory basis for proceeding in this way, but the German legislator soon changed the law and allowed the constitutional court the publication of dissenting opinions. These dissenting opinions differ greatly from the dissenting opinions of the Common-law tradition. The 'dissenting judge' is

not excused from being involved, until the result is reached, in the senate's decision making process. He/she also has to sign the resulting judgment. It is only in addition to this involvement that he/she would set out his divergent views of the relevant constitutional law in a separate document, which is not a part of the court's judgment and does not qualify as a judgment in its own right.

III. Decision-Making in Collegiate Courts of the Roman Church

[59] The Catholic Church, which was able to build on a stock of legal expertise accumulated over centuries, has in its 1917 Codex Iuris Canonici (revised 1983) perfected its collegiate courts' decision-making. It is an impressive achievement. Perhaps the comparatively low frequency of decisions allows it to largely ignore the issues of costs. While one of the judges acts as *relator*, each and every judge has to submit a written opinion. (In the conference, however, they may deviate from their initial opinion.) The overall decision is taken based on all end-results, but single issues can be made subject of separate votes and the reasoning for the judgment must then keep in line with decisions thus taken. The judgment is a judgment of the court, and a theory of the 'collective act' supports this concept. Since 1983 an outvoted judge has been entitled to submit, at his own discretion, his individual (dissenting) opinion to the superior court if – and only if – an appeal takes the judgment to that court.

IV. Modern Regulations for Multi-Arbitrator Arbitration

[60] Throughout the nineteenth century, in various countries statutory regulations had addressed the issue of awards made by multiple arbitrators. The tie between two (or four) arbitrators remained a sore topic, with solutions ranging from ending the arbitration without a result (thus opening up the way into a state court) to reinforcing the tribunal by an additional arbitrator. The procedure for the appointment and the competence of such a superarbitrator (cf. [14]) remained in dispute, with different legislators opting for different models. Increasingly, legislators tried to steer parties away from setting up even-numbered tribunals.

[61] The ICC-Rules have come up with a new and surprising solution for the situation that no majority award can be issued due to disagreement: the chair decides alone. This is not the decisive vote, giving preference to one opinion or the other. Rather, the tribunal turns into a one-arbitrator arbitration, and this arbitrator is free to issue an award regardless of the positions taken by his (former) co-arbitrators. This model has since been copied, e.g. by the Swiss legislator. If disagreement between arbitrators can end the tribunal's competence and transfer its powers to the presiding judge alone, the appointment of the presiding judge will become even more critical than it already tends to be.

Concluding Remarks

[62] The academic treatment of courts' internal decision-making processes has a distinct smack of *l'art pour l'art*. This is so because most civil law jurisdictions maintain that the court's deliberations are a state 'secret'. The confidentiality typically does not even allow revealing when a judgment is the result of a majority decision. Hence, even where legislators in their respective civil or criminal procedure laws have set out rules for the courts' internal decision-making processes, there is no remedy if courts proceed in contravention of these regulations. Collegiate court judges consequently cannot be held responsible for perverting the course of justice, since the *in dubio*-principle protects a judge who cannot be proven to have been with the majority when the majority set its course towards perverting justice. The parties thus lack protection against distorted decision-making processes, even if the decision was brought about in a clear breach of procedural law. In a time of 'Freedom of Information' acts all this seems outdated, and progress depends on the lifting of the inappropriate veil of secrecy. On a more fundamental level, one must ask whether systems which force judges to come up with seemingly unanimous judgements do give enough credit to the 'inherent controversiality of the law' (James Lee).

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