

# **A deliberative style is a moral style**

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## **1. Introduction**

Prominent advocates of judicial review have claimed that constitutional courts are deliberative forums of a distinctive kind and have grappled to show the plausibility and implications of this commonplace.<sup>1</sup> Surprisingly enough, however, they have not entirely come to grips with the sorts of requirements that should be met if courts want to live up to that promise. Constitutional talk is thus deprived of a set of qualitative standards that guides us in assessing how different courts, for better or worse, may do and are actually doing in terms of that presupposed and esteemed decisional virtue.

This assumption needs to be fleshed out. This paper does three things. First, it advances a working notion of deliberation; second, it proposes a measure of deliberative performance of constitutional courts; thirdly, it postulates an ethics of deliberation by enumerating some of the core virtues that constitutional judges have to display in order to meet deliberative expectations that a constitutional should seek to attend under such standard.

## **2. The concept of deliberation**

Democratic theory has recently revived deliberation as a valuable component of collective decision-making. Deliberation features no less than a respectful and inclusive practice of reasoning together while continuously seeking solutions for decisional demands, of forming your position through the give-and-take of reasons in the search of, but not necessarily reaching, consensus about the common good. Thus, participants of deliberation, before counting votes, are open to transform their preferences in the light of well-articulated and persuasive arguments. Despite a range of variations, both conceptual and terminological, within the literature of deliberative democracy, this can plausibly be regarded as its minimal common denominator.<sup>2</sup>

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<sup>1</sup> Ferejohn and Pasquino, 2004

<sup>2</sup> Several recent publications agree on the existence of a consolidated common denominator within the literature and usually announce it at the outset. See Dryzek, 1994 and 2000; Gutmann and Thompson, 1996; Chambers, 2003; Manin, 2005; Goodin, 2003; Bohman, 1998.

The previous paragraph wraps up an intricate set of elements. Let me further depict the several components of that stipulative working definition. It bundles together seven major aspects that make up the deliberative encounter: first, it presupposes the need to take a collective decision that will directly affect those who are deliberating or, indirectly, people who are absent; second, it considers the decision not as the end of the line but as a provisional point of arrival to be succeeded by new deliberative rounds; third, it is a practice of reasoning together and of justifying your position to your fellow deliberators; fourth, it is reason-giving through a particular kind of reason, one that is impartial or at least translatable to the common good; fifth, it assumes that deliberators are open to revise and transform their opinions in the light of arguments and implies an “ethics of consensus”; sixth, it also involves an ethical element of respect; seventh, it comprehends a political commitment of inclusiveness, empathy and responsiveness to all points of view.

Each of these pieces deserves further refinement. I will elaborate one by one a bit more. First, again, the decisional element. We are dealing with political rather than other sorts of deliberation. Politics demands authoritative decisions that command obedience. Decisions compel deliberation with a practical course of action that a group or a political community needs to select. It is a serious choice that faces constraints of time and resources, and hence distinct from other sorts of conversation or inquiry that are not committed to such a drastic burden, like science, philosophy or, less solemnly, everyday cheap talk. Political deliberation has a degree of urgency that faces a peculiar temporal scale. It leads to a closure, provisional as though it may be. Moreover, the effects of such a decision directly impact the lives of the deliberators, and possibly, depending of how the deliberative site is shaped, of people that are outside of it.

Second, political deliberation survives a decision and may be reawakened in new rounds of debate. Deliberators do not ignore that decisions are momentous choices that consummate concrete effects in a community’s life, but neither do they overlook the element of continuity.<sup>3</sup> There is life after decision and the argumentative process goes on. Fresh practices of contestation, therefore, may well call for new collective decisions, which will always have a taint of provisionality. This tension between the need to decide and the ongoing

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<sup>3</sup> Schmitter rightly points out that “provisionality” cannot do the whole work in exempting deliberation from occasional failures: political decisions are marked by some taint of irreversibility and path dependence, and past mistakes are not entirely corrigible. He wants to counter a sort of “feel good view” of deliberation, which relies on the continuity of deliberation to correct its own pitfalls (a position that, allegedly, Gutmann and Thompson adopt). “Keep deliberating”, therefore, is not necessarily a satisfactory answer for its decisional shortcomings. (Schmitter, 2005, at 431)

post-decisional disputes, one could rightly say, is not a singular feature of deliberation, but a fact of politics in general, however way it is practiced and conceived. This observation, acute as it may be, overlooks how continuity has a relevant role to play in explaining the value of deliberation. Continuity, for deliberative theorists, is not just a fact of politics, but an integral part of legitimate politics. It highlights a long run perspective that the justification for other procedures fails to realize. The following five elements help to configure deliberation more meticulously.

Third, deliberation transcends the act of gathering together to take a decision. It requires the participants to display the reasons why they support a particular stand. It comprehends an exercise of mutual justification that allows a thorough type of dialogue before a collective decision is taken. This means that the participants undertake a process of reason-giving and, afterwards, articulate some adequate combination of those reasons as the justificatory ground for the decision. Silence is not acceptable both during and after the process.

Fourth, reasons to decide may be of various types and spring from different sources. Not all types and sources are acceptable in political deliberative forums. The collective nature of the decision implies that only reasons that all members could conceivably embrace are compatible with deliberation. This requirement rules out appeals to exclusively private interests, which are not be translatable into a language of the common good. Deliberators, as a result, must put themselves inside this chain of argumentative constraints and get out of them consistently.<sup>4</sup>

Fifth, deliberation still demands more. It is not just a matter of giving reasons that are attachable to a plausible notion of the common good. Reason-giving is actually intended to spark an interactive engagement in which deliberators try to persuade each other. A process of persuasion assumes at least three things: one, that its participants are willing or at least open to listen and to revise their initial points of view; two, that there is an ethics of consensus underlying the conversation; three, that coercion is absent.<sup>5</sup> All engage in persuasion because there is a shared belief about the potential existence of a better answer, and that it is worth the effort of trying to unfold it dialogically. The ethics of consensus is the motivational drive that feeds the genuine deliberative encounter. It cannot be confounded, though, with an actual need to craft consensus.<sup>6</sup> Consensus is dispensable not only because of the temporal pressure to

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<sup>4</sup> This is one of the most controversial domains of deliberative theory. See Rawls (1997)

<sup>5</sup> See Mansbridge et al, 2010, at 94.

<sup>6</sup> Such ethics requires just “making aim for consensus” (Ferejohn, 2000, at 76). Consensus is seen as an aspirational aim that regulates conduct, not a compulsory end. To what extent the lack of consensus will be considered a failure of deliberation is gradually becoming a less controversial question among authors. Cohen

decide, but also because deliberators might acknowledge that, as long as their argumentative capacities are exhausted,<sup>7</sup> some points may remain irreconcilable.<sup>8</sup> With or without consensus, deliberation is always subject to be reignited.

The formation and transformation of preferences are, therefore, endogenous and autonomous.<sup>9</sup> They are sterilized in relation to exogenous pressure or heteronomous choices. The deliberative reason recognizes its own fallibility, as opposed to oracular reason, which does not leave room to be contested. The former is modest and dialogical, whereas the latter is dogmatic and usually authoritarian. Deliberative engagement is the opposite of talking past each other, of a conversation between deaf. It is neither, again, idle talk nor a verbal duel. A deliberative institution, to that end, is not simply an ivory-tower reason-giver. The fact that a decision follows a certain argumentative canon, although it may help to justify a certain position, does not turn it deliberative either. This perception fails to capture the kernel of the deliberative clash, which comprises horizontal engagement to find and embrace the arguments that prevail over others on a sincere process of persuasion.<sup>10</sup>

Sixth, deliberation presupposes an ethical attitude based on the presumption that all individuals deserve to be treated with equal consideration. As a matter of inter-personal morality, this requires the concrete practice of respect towards every participant and argument that is put forward. This does not mean that such process cannot be heated and conflictive or that it needs to appear amiable and convivial. Neither does it mean that all arguments should have equal weight. It hinges on the recognition, somehow displayed, that there is no hierarchy of status between participants.

Respect towards the individual deliberators, however, does not attain all their moral responsibilities. As a matter of political morality, they are also supposed to adopt an attitude that encompasses three elements: inclusiveness, empathy and responsiveness.<sup>11</sup> When arguing, deliberators have to include (implicitly or explicitly) the different opinions that were aired, to

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(1997) recognizes consensus it as an ideal to be chased while Young (1996) rejects it as oppressive. Chambers points out that deliberative theory has dropped a “consensus-centered teleology” and managed to accommodate pluralism and the agonistic side of democracy. (2003, at 321)

<sup>7</sup> See Rawls and his idea of “stand off” (1997, at 797).

<sup>8</sup> Facile criticisms of deliberation sometimes assume two rather implausible views: that deliberation is pointless unless it leads to consensus; that deliberation, regardless of the context, is always unable to reduce disagreement. Deliberative institutions, however, should be able to make non-consensual decisions, and this feature does not harm its deliberative character. The need of consensus may actually be a disincentive to deliberation and slip into other sorts of interaction. (Ferejohn, 2000, at 78-80)

<sup>9</sup> Rostboll, 2008, at 81, and 2005, at 371.

<sup>10</sup> The canonic regulative standard for that claim is the ideal speech situation, which is governed by the “force of the better argument”, a maxim of discursive ethics. See Habermas, 1996, at 103, 230, 322-3.

<sup>11</sup> The idea of reciprocity, as defined by Gutmann and Thompson, captures some of these elements (1996, at 53). I believe that my formulation makes some internal components more explicit.

vicariously imagine the points of view of those who are absent from the deliberative process but that are equally bound by its result,<sup>12</sup> and to respond (or be prepared to respond) to all counter-arguments. The dynamics between inclusiveness, empathy and responsiveness, therefore, can be complex and certainly over-demanding. In order to be practicable, a qualitative selectiveness upon whom to expressly include, imagine and respond to is indispensable. A deliberator, in any event, is aware of these regulative standards and of the ever possibility that she may be asked to engage with further reasons. The ethical and the political requirements are both embedded in the moral value of equality. The distinction between the sixth and seventh elements is useful, nonetheless, to underscore that the political attitude involves not only respect for the individual, or the shallow recognition that he is a fellow member of the political community, but that it implies a responsibility to take his points of view into account.<sup>13</sup>

Deliberation, in short, is this large composite. It is a variant of practical reasoning applied to collective decision-making processes. Conceptions of the common good, under this ideal, need to stand the test of argument, not just be numerically assented. It is certainly possible to relax or to tighten the deliberative requirements. One can, for example, conceive of public reason in a more or less expansive way, turn the ethical and political attitudes more or less strenuous and so on. What falls inside and outside the borders will depend on the purposes of each theory and account for its applicability and justifiability.

Different blends of those ingredients might lead to decisional processes that resemble but still fall short of this ideal standard. In another end of the spectrum, however, one could find other types of process that are more clearly opposed to it. Two methods would synthesize, by contrast, what deliberation is not: voting and bargaining.<sup>14</sup> The latter consists in a market-type negotiation where the parties openly put their private interests on the table and trade mutual concessions in order to settle on an agreement that optimizes their respective desires. The former is more chameleonic and not necessarily incompatible with deliberation. Formally, voting is a fair method to aggregate individual positions by giving them equal weight.<sup>15</sup> Depending on how this individual position is formed, though, it can shape three different

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<sup>12</sup> I refer to the members of the political community who do not have the power, the chance, the interest or the competence to present arguments through formal or informal ways, and cannot be included but by empathetic imagination.

<sup>13</sup> The use of the terms “moral” and “ethical” are by no means uniform or stabilized in the history of philosophy. By “ethical”, here, I mean “inter-personal morality” outside the realm of politics. The sixth and seventh elements are based on a distinction between inter-personal and political morality, both grounded on the value of equality.

<sup>14</sup> See Elster, 1998, at 7. Habermas (1996) distinguishes between interest-based bargaining and value-based reasoning.

<sup>15</sup> See Mansbridge et al, 2010, at 85.

archetypes. If voting is just the end-point of deliberation in order to reach a decision in the light of remaining disagreement, it is not incongruent but rather required by the deliberative ideal.<sup>16</sup> If, on the other hand, it is the aggregation of brute individual preference framed in private, that ideal precludes it. Somewhere in the middle, finally, voting may serve to merge, instead of naked interest, reflective judgments about the common good that did not pass through interpersonal scrutiny. However valuable it may be, this third variant surely fails to meet the basic features of deliberation. In this stylized picture, voting may thus aggregate three different entities.

This clear-cut separation between deliberation, bargaining and voting can be hard to see in real-world decisional processes. These may prove more or less convoluted and the three components oftentimes arise simultaneously in little distinguishable ways. Actual collective decisions are rarely deliberative or non-deliberative in a puristic sense. Impurities are hardly avoidable. Decision-making processes comprise a sum of different practices, each of which having a distinctive ethics and a proper mechanics.

### **3. Deliberative performance of constitutional courts**

Advocacy for judicial review strolls around a theoretical comfort-zone. Constitutional courts have been praised as unique deliberative forums without much refinement of what that involves. That portion of literature did not develop a meticulous inquiry into this exact institutional property. It quickly assumes that, thanks to the insulation from electoral politics, and because of the expectation that judicial decisions are grounded on public reasons (a demand supposedly less stark in parliaments), the court would have better conditions to protect rights and, more generally, to enforce the constitution. Both attributes are not, in fact, merely peripheral features of a court's institutional context. Absence of elections and tougher argumentative burdens is likely to induce a whole new setting. Nevertheless, these factors still do not, by themselves, unfold what is, can or should be the judicial contribution to the constitutional process.

This strand of normative theory, admittedly, does not buy judicial review at any price. It grants legitimacy under the condition of a singular deliberative performance. Or so I

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<sup>16</sup> Elster addresses this point: "The input to the social choice mechanism would then not be the raw, quite possibly selfish and irrational, preferences that operate in the market, but informed and other-regarding preferences". (1997, at 11). Later he adds: "transformation of preferences can never do more than supplement the aggregation of preferences, never replace it altogether" (1997, at 14). Habermas also distinguishes between aggregation of deliberative or non-deliberative preferences (1996, at 304).

understand it. A constitutional court, in this light, becomes a paramount candidate for the “exemplar deliberative institution”.<sup>17</sup> This burdensome title cannot be presumed. It needs to be earned. The difficulty, again, is to have a precise idea of what that implies. Constitutional theory has to come to grips with this lacuna. We still do not know what to ask for, neither what to expect from, a deliberative court. Not much beyond, at least, the cursory call for a public justification grounded on constitutional principle. Little is said about the practices that should precede it, the values that should guide it or the implications that might follow it.

One needs to unpack what a deliberative court minimally entails. It points to the additional prescriptive work that is yet to be done. If political deliberation, as I claimed, is a good thing and if, on that account, it does also follow that a constitutional court ought to be deliberative, one still needs to investigate what the components of such an endeavour are, instead of taking that for granted. Deliberation is a case-by-case achievement, not an automatic reflex of those meagre institutional features from where those theories set off. I try to bridge this gap by forging an evaluative model of deliberative performance.

Its purpose is not to insinuate the superiority of judicial deliberation in relation to any other institution, but to justify its place in an overall system of collective decision-making. The paper turns that mainstream stance more complex, and highlights its potential vulnerability and vigour. It tells a more colourful story about the meaning of a deliberative court, with a more intricate plot and diverse characters. It does not promise a happy ending, but believes that courts can contribute to the task of value-based reasoning that underpins the constitutional dilemmas of a democratic community. How and when courts can proficiently do that are questions not to be answered in the abstract. Answers will undoubtedly vary according to context, and context is shaped by a series of legal, political and cultural variables. Middle-level theory, however, can devise normative standards about what is appealing and acceptable for this kind of institution to pursue.

Two preliminary distinctions structure the model of deliberative performance to be proposed here.

First, the distinction between three deliberative phases – pre-decisional, decisional and post-decisional. It corresponds to three moments in which performance might be discerned and appraised, three slices of an overall enterprise. The model of deliberative performance isolates

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<sup>17</sup> This is Rawls' expression from which Ferejohn and Pasquino (2004) depart to classify and justify constitutional courts

three activities in order to diagnose and assess diverse sorts of problems and accomplishments, distinct instances of deliberation.

A deliberative court manifests itself in three consecutive instants. It might be deliberative in one, but not in the other. An ideal-type deliberative court, as we shall see, is masterful in all three phases. Through these diachronic categories, the model incorporates and slightly refines the notions of internal and external deliberation. The internal deliberation would correspond, under the typology suggested here, to the decisional phase, whereas the external deliberation would refer mainly to the post-decisional phase. The pre-decisional, under that frame, is overshadowed. The heuristic disadvantage of that dualist division is its monotonic character, which overlooks the precise deliberative aspects that can and should be observed in the pre and post-decisional phases. That duality is indifferent to this temporal dimension.

This neat distinction, moreover, might prove more or less artificial if we look to the operation of real-world courts, in which the three phases are usually intermingled to varying degrees (sometimes, for example, phases 1 and 2 can alternate, 2 and 3 can overlap, and so on).<sup>18</sup> In the same vein, it may be misleading if we understand it as a linear time-line, with clear boundaries between when one stage stops and the following starts. Still, for the sake of the analysis, it is useful to keep these categories at hand.

Second, one should discern between who deliberates. The decision-makers (judges) and the interlocutors are the two relevant types of deliberators. The community of interlocutors comprises all social actors that, formally or informally, address public arguments to the court and express public positions as to the cases being decided. They provide external argumentative inputs for the judicial decision. They can influence and persuade, but not decide. Formal interlocutors involve all those parties who are qualified and entitled to participate of the specific constitutional case (litigants, *amici curiae* etc.). Informal interlocutors are those who, in the attempt to exert an indirect influence on the court, engage in the debates through the various communicative media of the public sphere. Deliberative performance in the pre-decisional moment is, to a large extent, contingent on how interlocutors discharge their responsibility. Deliberative failures at this stage may thus be attributable to interlocutors too, and even implicate the quality of deliberation in the subsequent phases.

Deliberation is a demanding decision-making process through which reasons of a specific kind are exchanged in the attempt to persuade and reach consensus. If it is pertinent to

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<sup>18</sup> The distinction between the three well-defined phases fits well, for example, the continuous process between hearing sessions, conference meetings and drafting in the US Supreme Court.

qualify those three phases as deliberative, the very concept of deliberation must be malleable enough to permit such parsed instantiations. The give-and-take of reasons in each phase is not done among the same characters and in the same spirit. The cluster of values and promises that is encompassed by a general definition of deliberation, may also need to be adjusted to each of the three

With these distinctions refreshed, an ideal-type deliberative court, put straightforwardly, is one that maximizes the range of arguments from interlocutors by promoting public contestation at the pre-decisional phase; that energizes its decision-makers in a sincere process of collegial engagement at the decisional phase; and that drafts a deliberative written decision at the post-decisional phase. In other words, if someone wants to check whether a constitutional court is fulfilling its deliberative duties, she should inspect the written and face-to-face interaction among interlocutors and judges, then the interplay between judges themselves, and finally the written decision delivered by the court. Each of them deserves a proper examination, according to tailored indicators. Each would have a specific score.

A constitutional court, therefore, conforms three slightly distinct sites of deliberation. Each one should face taxing deliberative patterns. In the pre and post-decisional phases, the institution itself interacts with the public sphere. Interlocutors are expected to be active participants by presenting their cases and, afterwards, scrutinizing the court’s decision. In the decisional phase, there is an intramural deliberation among judges, and interlocutors remain as spectators. The exact layout of each site will ultimately depend upon details of the design of each court, but any decision-making process fits into these elementary iterative categories.

The model breaks deliberation into three practices that, for the sake of phrasal simplification, will henceforth be dubbed as “public contestation”, “collegial engagement” and “deliberative written decision”. They are qualitative indices of this three-phasic process.

<b>Deliberative phases</b>	<b>Deliberative tasks</b>
1. Pre-decisional	“Public contestation”
2. Decisional	“Collegial engagement”
3. Post-decisional	“Deliberative written decision”

### *i. Public contestation*

Public contestation is prompted by one or by a group of political actors that have the formal power to, through appeal or direct intervention, submit a case to a constitutional court. From that moment until the judges sit together to reach a final settlement, the dialogical process among interlocutors and decision-makers contains beneficial deliberative potentialities.

In practice, the quality of public contestation will predictably vary according to the salience of the case and to how a political community mobilizes itself to contribute to the collective issues being addressed. Interlocutors, therefore, share responsibility for the overall performance in this phase.

As a prescriptive aspiration, public contestation corresponds to, on the one hand, the actual involvement of all interested actors in presenting arguments to the court and, on the other, to the earnest attention of the court in receiving these arguments and probing them publicly. Interlocutors speak while decision-makers actively listen and question.

A constitutional court may have strong institutional devices for channelling those voices. In the lack of formal mechanisms, though, nothing prevents it from being alert to the plurality of positions that are aired in the informal public sphere.<sup>19</sup> Interlocutors, therefore, may be included through both the institutional and extra-institutional argumentative channels that are offered by a political community.

On this account, the court should steer the pre-decisional phase with a series of purposes in mind: to collect, as much as possible, arguments from interlocutors; to publicly challenge these arguments so that interlocutors have the opportunity to further refine them; and, above all, to display an institutional openness to the actors that may have something to add to the stock of arguments that bears upon the case. The performance of the court, at this stage, should be judged by these three general patterns.

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<sup>19</sup> The formal mechanisms may be written, comprising different sorts of petitions, or face-to-face, which may include public audiences or typical hearing sessions. According to Paterson, the hearing sessions of the House of Lords were, at least during the period he studied, the primary moment in which the actual persuasion happen. It was an oblique type of deliberation, in which judges did not address each other directly. Through the questions to the litigants, however, they usually intended to convince their colleagues. (Paterson, 1982, at 72) Depending on how flexible and versatile such mechanisms are to capture various sorts of arguments and enable various actors to vindicate their positions, public contestation could be seen as a mechanism of participatory democracy.

## *ii. Collegial engagement*

Collegial engagement is the guiding aspiration of a constitutional court as far as its decisional phase is concerned. It is the proper standard to discipline and evaluate the intramural process that occurs among decision-makers themselves. Rather than looking outwards to collect and test arguments that interlocutors might forge, judges interact with each other to take a decision.

The proper institutional asepsis is assumed to be in place when decision-makers gather to deliberate. Otherwise, collegial engagement would not be a plausible guideline. This setting should thus mitigate, as much as one can anticipate, some of the objections against the dangers of deliberation: by involving professional colleagues, the risks of entrenching and reproducing social inequalities through deliberation is obviously not at stake; by expecting that all decision-makers have the proper argumentative insubordination and mental endurance, the risk of oppression and other types of non-autonomous will-formation are controlled; by requiring decision-makers to be adequately versed in constitutional matters and jargons, the peril of epistemic hierarchy is unlikely to thrive.

Deliberation is not a verbal duel. It is not, thus, conducted in the same spirit of a competition.<sup>20</sup> The standard of collegial engagement mandates judges to listen and to incorporate their peer's reasons into theirs, either to adhere or to dissent. They are not obliged to hide or suppress disagreement, but committed to frank argumentation in the search of the best answer. It is relevant that the court "try harder to arrive at common opinions", like Ferejohn and Pasquino would like the US Supreme Court to do.<sup>21</sup> The formal properties of the rule of law may well be second-order reasons that push for compromises where substantive agreement is arduous to come about. Deliberation, still, is not only an instrument for fabricating consensus, but also for trying to arrive at a good decision irrespective of unanimity.

A deliberative court does so by being permeable to a wide range of reasonable arguments that may have been propelled by various sources. It should assimilate not only the reasonable arguments that were officially presented by interlocutors, but also those that were informally ventilated on the respective topic by other interlocutors and, more hardly, those that can be empathetically imagined. The court, therefore, has the burden of representing and

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<sup>20</sup> As Shapiro believes American judges to do: "Rather they try to show that they have the most cogently reasoned view, the best argument. This is a competitive justificatory enterprise, not a cooperative one. Argument is about winning, which is what lawyers are trained to do. Deliberation is about getting the right answer." (Shapiro, 2002, at 197)

<sup>21</sup> Ferejohn and Pasquino, 2004, at 1702.

inspecting both actual and vicarious positions in the heat of decisional deliberation. The occasional procedural deficits that impede interested interlocutors of formally submitting their reasons, and hence hinder the court's capacity of enlarging its argumentative repository at the previous phase, may be compensated by the court's ability to listen to the outer public sphere and to imagine other possible points of view. This is the only way to counterbalance or even neutralize an occasional poor performance of interlocutors in the preceding phase.

The driving-force of collegial engagement is, accordingly, three-fold: the effort to take into account all positions the court was able to collect and to empathetically conceive; the search for the best principled answer; and the pursuit of consensus or, if it does not come forth, minimal dissensus. It is up for each court to balance these demands when they pull to different directions.<sup>22</sup>

### ***iii. Deliberative written decision***

A deliberative written decision is one that translates the ethical commitments of deliberation into a written piece. Apart from well-reasoned, it has the burden of being responsive and readable by the public. Assessing whether a written decision is deliberative, in the sense defined here, requires more than the pedestrian exercise of examining whether the court has addressed the arguments of the litigants, more than simply counting the bullet points of a checklist. This sort of decision is characterized, above all, by its literary style.

As opposed to the two previous phases, in which the court was concentrated in collecting, digesting and imagining diverse points of view in order to take a decision, the focus here is to communicate, in a considerate way, the decision already taken. A deliberative written decision, thus, is not a cryptic and arcane announcement of an allegedly right answer.<sup>23</sup> Neither is it an apodictic assertion of what the constitution means by virtue of the court's putative interpretive superpowers. It is rather the product of an effort to deal with all points of view in a thoroughgoing manner.

A deliberative court is aware of its fallibility and of the inevitable continuity of deliberation in the public sphere and in possible future cases. The written decision needs to

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<sup>22</sup> As Sachs summarized: "The goal is to reach a principled consensus wherever possible." (2009, at 243)

<sup>23</sup> This contrast resembles Llewellyn well-known distinction between two styles of judicial reasoning: the *Formal Style*, which would "run in a deductive form with an air or expression of single-line inevitability", and the *Grand Style*, which is concerned with the principle behind the rule, resort to "situation-sense" and provides guidance to the future. (see Llewellyn, 1960) Each would have distinct "aesthetic urges": while the formal style seeks cold clarity, the grand style strives for "functional beauty – fitness for purpose". (Twining, 1973, at 210)

convey this attitude through a careful and laborious rhetoric. Despite consummating concrete effects, the decision also invites new deliberative rounds. Sachs has tellingly expressed how he managed to face such challenge. The decision, for him, instead of dividing the nation between the “enlightened” and the “benighted”, should demonstrate a special respect to the ones who are having their deep beliefs affected by it. In other words, it has to chase a literary style that avoids treating the parties as winners and losers of an interpretive contest. Interlocutors need to be regarded as fellow members of a community that will keep talking about that specific controversy as long as disagreement persists.<sup>24</sup>

The text of a deliberative decision will usually be an embellished re-articulation of collegial engagement. It needs to render a convoluted process of inter-personal argumentation, face-to-face or otherwise, into an accessible discourse. As Sachs, again, has recommended, the drafting process has a “preening” quality that is fundamental to the prominent function that is played by constitutional courts.<sup>25</sup>

This drafting stage should strive to turn collegial engagement into a supra-individual decision, to produce the special kind of de-personification that only deliberation conveys. A deliberative court, in this phase, has to balance between the need to construct an institutional identity and to respect the place and value of resistant dissenting opinions. It grants special weight to institutional authorship but does not shy away, as far as circumstances commend, from exhibiting internal discord. A deliberative court does not publicly display any sort of discord, but those that withstand collegial engagement. Divisions, when they persist, are serious and respectable ones.

From the formal point of view, a deliberative decision may be manifested both as a single voice or multiple-voice. It may be a pure *seriatim*, a *per curiam* or stand somewhere in the middle, composed by a joint majority opinion, plus the occasional concurring and dissenting opinions. There is no immediate or foolproof causality between collegial engagement and a single voice, neither between the lack of internal deliberation and multiple voice decision. The presence or the absence of deliberation at the decisional phase are not

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<sup>24</sup> Sachs exemplified this challenge with the decision of the South-African constitutional court that upheld same-sex marriage: “While unequivocally upholding the right of same sex couples to be treated with the same respect given to heterosexual couples, it would at the same time acknowledge and give constitutional recognition to the depths of conscience belief held by members of faiths that took a different view.” (2009, at 7) “Courts should seek wherever possible to engage with the whole nation. It’s not for court judgments to divide the nation between progressives and reactionaries...”. (2009, at 254)

<sup>25</sup> “We work with words, and become amongst the most influential story-tellers of our age. How we tell a story is often as important as what we say. The voice we use cannot be that of a depersonalized and divine oracle that declares solutions to the problems of human life through the enunciation of pure and detached wisdom.” (Sachs, 2009, at 270)

automatically determinative of the *per curiam* or *seriatim* formats. Good quality collegial engagement cannot be easily presumed from that formal surface.<sup>26</sup> The permutations of these two variables produce a typology of written decisions. The four types can be graphically represented like this:

<b>Format</b>	<i>Seriatim</i>	<i>Per curiam</i>
<b>Deliberativeness</b>		
Non-deliberative	1	2
Deliberative	3	4

A non-deliberative *seriatim* may symbolize not only the failure but, most likely, the sheer lack of the effort to converge that should animate collegial interaction. Even if preceded by some thin informational communication that is requisite to any aggregation, it falls short, as a written piece, of the normative standard outlined above. It down-rates the institution under the shade of its individual members, who tend becoming public personas: they end up being perceived for what they personally think, not for what they are able to come up when acting as a collegial forum. Such institutional indolence is regrettable for downright abdicating the promises of deliberation (even if each fragmented opinion strives to reason in the best way) and therefore trivializing the dignity of constitutional dilemmas. A non-deliberative *seriatim*, on this account, is the archetype of personification and is composed by a patchwork of individual opinions that do not mutually converse. The lack of communication between opinions makes it all the more damaging, in addition, to the rule of law by not providing a clear *ratio decidendi*.

A non-deliberative *per curiam*, in turn, is a single opinion that does not meet the ethically loaded literary style earlier described. Even if it is able to de-personify and meet some demands of the rule of law, like clarity and coordination, it does not meet the test of responsiveness and empathy. It stands closer to a hermetic and obscurantist exposition of legal

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<sup>26</sup> There is a genuine difference between the traditional common law *seriatim* and the US Supreme Court style. In the former, opinions both for the majority and minority are almost always separate. In the latter, unless the majority opinion is diluted into a series of concurrences, there is usually a single “opinion of the court”, joined by occasional dissents and concurrences. As Kornhauser and Sager contend, the move from the English to the American style “entails more than the mechanical fact of an economy in the number of opinions (...) It involves a commitment to, and a demand for, collegial deliberation, and supports an ideal of a multi-judge court acting as an entity, not merely an aggregation of individual judges.” (1993, at 13) With respect to the format, therefore, there seems to be a difference of degree along a continuum between the *seriatim* and *per curiam* (because the American court may well reach, even if exceptionally, an extreme *seriatim*). Behind the format, however, lies an essential qualitative difference related to the internal ethos of the court, as pointed out by Kornhauser and Sager. If we too quickly attach a *seriatim* with the lack of deliberation, these nuances may get overlooked.

directives. Empirically, it may even be preceded by collegial engagement, but may still be adopted by virtue of some other consideration. In the canonical comparative types, the French dry and synoptic style of judicial reasoning approximates it more patently.<sup>27</sup>

As for the two other strands, both the deliberative *per curiam* and the deliberative *seriatim* follow that full-throated reasoning style.<sup>28</sup> The former, however, is de-personified in a thicker sense, whereas the latter contains multiple voices that, unlike the non-deliberative version, communicate among themselves.<sup>29</sup> Instead of a frail patchwork, its opinions are sewn in a more explicit fashion. Mutual arguments are faced, objections are answered and stands are taken.

All written decisions delivered by a collegiate court will fall into one of these four categories. A deliberative court should, in principle, favour either the third or the fourth type, both of which share that cherished style. It does not mean, nevertheless, that this is a peripheral dilemma, or that a deliberative court should be indifferent with respect to the choice between them. Different contexts may call for other sorts of considerations that could push for one or the other. To the extent that the exact political context of the decision is unknown, both formats are compatible with the deliberative ideal. For middle-level normative theory, there is not enough information for an unassailable choice.

Probably with the exception of a non-deliberative *seriatim*, the choice between the other three formal options might get more complex due to the politics in which constitutional adjudication is enmeshed. Even a non-deliberative *per curiam*, despite lamentable for reasons already articulated, might be commendable when political circumstances so indicate. The political element of the hedges of deliberative performance will orient that choice. The third topic below will return to this question.

In short, promoting public contestation, fostering collegial engagement and crafting a deliberative written decision are the three basic tasks of a deliberative court. It is important to flesh them out by decomposing the specific virtues that these three tasks require from judges.

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<sup>27</sup> Lasser (2004).

<sup>28</sup> MacCormick considers the *seriatim* tradition of the British system a better way to communicate the whole range of arguments and counter-arguments: “One strong reason for clearly articulating these counter-arguments is that a dissenting judge may have articulated in a strong form the very reasons which need to be countered for the justification of the majority view to stand up. (...) Certainly, it is a consequence of the dialectical setting of the British appellate judgment that, characteristically, a much more thorough exploration of arguments one way and the other is set forth than in those systems which in effect express only a set of sufficient justifying reasons for what may be only a majority decision, and which need neither rehearse nor counter any possible opposed arguments.” (1978, at 10)

<sup>29</sup> The extent to which a deliberative *seriatim* can be de-personified depends on other variables of design, like the alternative of anonymity.

#### **4. An ethics of deliberation**

Public contestation, collegial engagement and deliberative written decision are institutional achievements. They embody the three indices of deliberative performance, the three targets to be aimed by this collegiate body. It is still necessary, however, to investigate the individual attitudes that lurk behind such collective pursuit, to translate those three targets into a set of micro-virtues that judges should develop and practice if committed to those goals. The inquiry shifts from the group-level to the individual-level. What sort of behaviour should one expect from the judges that happen to participate in the process of a deliberative constitutional court?

Deliberative performance of constitutional courts, imply an ethics, that is, a set of criteria that draws a line between the rightness and wrongness of action. Of the several elements that shape deliberation, some more immediately invoke ethical attitudes. Deliberation denotes absence of coercion, inter-personal argumentation detached from egotistic interests, tolerance towards enduring disagreement after the exhaustion of the argumentative horizon, presumption of equal status among participants and clear display of respect. Deliberators are prone both to listen and to speak, and are disposed to change their previous preferences in the light of the new arguments that are raised during discussion.

These statements, part of the mantra of the deliberative literature, are yet too blunt. They still do not solve the difficulties deliberators face and the polemical choices they need to make in the course of that activity. The way deliberators behave and engage with each other must be more deeply theorized. Further behavioural guidelines are needed to face the several dilemmas that routinely emerge out of such complex interaction. Deliberation takes place in diverse sites, each of them with distinct priorities and expectations. Circumstances are mutable, and those of a constitutional court may, indeed, request different ethical responses.

I intend to illuminate this more intricate ethical phenomenon that underlies deliberation in constitutional courts. It has four additional topics. The second approaches a preliminary discussion about the character of an ethics of deliberation. The three following topics, then, deal with the specific ethical burdens that may get more or less pronounced in each of the three phases of deliberation. In sum, I seek to expand on what is requested, by the three indices of deliberative performance, from judges of a constitutional court devoted to deliberation.

## 5. The character of an ethics of deliberation

Normative ethical inquiries often start by positioning themselves somewhere within a classificatory triad. “Virtue ethics”, “deontology” and “consequentialism”, with their respective internal variants, are the generic alternatives offered by the philosophical tradition.<sup>30</sup> The ethics of deliberation could arguably be elaborated in different ways and hence approximate itself from each of these three branches of ethical thought.

If devised in consequentialist terms, for example, deliberation would be better or worse, and deliberators would be more or less praiseworthy, inasmuch as the four expected results – epistemic, communitarian, psychological and educative – unfold. Important though the consequences of deliberation might be, that focus would be, if not mistaken, surely impoverishing. The ineptness of an exclusively consequentialist formulation is not due to the fact that deliberation, also having a value in itself, should supposedly be practiced anytime, anyplace, irrespective of its outcomes.

That simplistic moral case was already cast aside. When it comes to a decision-making institution, that stand-alone justificatory path gets even weaker. Institutions should not deliberate for the sake of deliberation. There must be some instrumental purchase, even if just in probabilistic terms, as already contended. Deliberation is not consequence-indifferent. The difficulty, still, is that a focus solely on the consequences does neither portray nor explain the proper actions that are likely to produce those cherished effects. It does not do justice to the phenomenological experience of a deliberator. Even if deliberation authorizes the participants to expect more or less beneficial outputs, or even require them to seek those outputs, its very definition is indifferent to what consequences, in practice, ultimately ensue.

A robust ethics of deliberation, if that trichotomy holds, would thus have to be further fleshed out either in deontological terms or as an instance of virtue ethics. This division is more intricate. To rigidly matriculate the propositions of this section under any of these headings would require a more technical analysis of moral philosophy than the one I am prepared or need to engage with.<sup>31</sup> I do, still, resort to the notion of virtue in order to elaborate my claims.

It is hard to talk about deliberation without uttering the vocabulary of virtue. Virtues inspire a sincere act, rather than a strategic obedience to a rule. Doing the right thing, in

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<sup>30</sup> Aristotle, Kant and Bentham are regarded as, if not originators, the spiritual fathers of these traditions. See Oakley (1996).

<sup>31</sup> To call it a virtue ethics, I would need to enter the debate about emotions and moral remainder, the possibility of emerging out of resolvable, irresolvable and tragic dilemmas with clean or dirty hands etc. (see Hursthouse, 2002)

deliberation, is not simply to abide by the duties or patterns of right conduct. The “spirit” of deliberation calls for more than conformity “to the letter of a rule”.<sup>32</sup> It conveys something beyond a sheer duty to exchange arguments. Individuals cannot deliberate but with the right motivations (apart from the consequentialist expectations embedded in the promises of deliberation). Otherwise, a relevant part of the normative appeal of deliberation would melt away. The ambitious epistemic and communitarian promises, at the very least, would become fake. The search for the best answer and the attempt of persuasion need to be genuine, not “just for the show”.

Whether a virtue is just a sincere “disposition to act” for the sake of a certain reason, or an unhesitating predisposition derivative from deep and entrenched character traits is a discussion in normative ethics on which I do not plan to embark. The ethics of deliberation cannot entirely be grasped in crude deontological terms, but this claim, alone, does not suffice to solve that classificatory dispute.

The distinction between motivations, deeds and consequences of deeds is indispensable to better understand deliberation. If not accompanied by the right motivations, an argumentative interaction cannot be regarded as veritably deliberative.<sup>33</sup> Deliberation, in this sense, collapses deeds and the motivations behind them. If we were to elaborate the ethics of deliberation in the form of a set of duties or to codify it through a list of rules, the rules themselves would have to include character traits. This, in turn, would apparently break down the distinction between deontology and virtue ethics itself. As Hursthouse shows, however, that is not necessarily the case.<sup>34</sup>

Virtues are not an overly explored issue in contemporary jurisprudence. Solum, though, has been emphasizing the role of virtues in the practice of judging. He advances a normative

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<sup>32</sup> “The Devil, after all, can quote scripture to serve his own purposes; one can conform to the letter of a rule while violating its spirit.” (Hursthouse, 2002, at 32) Or in another passage: “Clearly, one can give the appearance of being a generous, honest, and just person without being one, by making sure one acts in certain ways. And that is enough to show that there is more to the possession of a virtue than being disposed to act in certain ways; at the very least, one has to act in those ways for certain sorts of reasons. But, in fact, we think of such character traits as involving much more than tendencies or dispositions to act, even for certain reasons.” (Hursthouse, 2002, at 11)

<sup>33</sup> Deliberators must first believe there is a point in deliberating. A useful analogy can be borrowed from Wolfe’s provocation against conservatives: “Conservatives cannot govern well for the same reason that vegetarians cannot prepare a world-class boeuf bourguignon: If you believe that what you are called upon to do is wrong, you are not likely to do it very well.” (Wolfe, 2006)

<sup>34</sup> For a clear explanation about these nuances, and also about how the mere reference to virtue does not makes an ethical theory part of “virtue ethics”, not more than the mere reference to “duties” makes it deontological, see Hursthouse, 2002. Virtues, as much as rules, generate prescriptions and prohibitions. It is not correct to claim that virtue ethicists, in being “agent-centred”, do not provide action guidance or a notion of right action, or that deontologists, in being “rule-centred”, cannot have a notion of character or judgment, or that neither care about consequences (because sometimes, to know what is virtuous or right act depend on estimating its consequences). (Hursthouse, 2002, 28-29)

theory of judging that is “virtue-centred” rather than “decision-centred”, “thick” rather than “thin”.<sup>35</sup> Instead of conceiving of judicial virtues – like temperance, courage, temperament, intelligence and wisdom – as serviceable means to reach good legal decisions, which he believes to be shared by every plausible theory of judging, he accords virtues a weightier role.

Such a role is specified by two controversial propositions: (i) “A lawful decision is a decision that would characteristically be made by a virtuous judge in the circumstances that are relevant to the decision.” (ii) “A just decision is identical to a virtuous decision.”<sup>36</sup> He wants to counter a position that envisions the just decision as logically prior to the virtue of justice. To be truly “virtue-centred”, then, a theory of judging could not rely on an independent standard of the right legal decision.

Duff praises Solum’s effort to identify the “substantive qualities of character that will equip or enable the person to make right decisions”.<sup>37</sup> Nevertheless, he claims, virtues are still derivative and dependent of a previous account of the good decision.<sup>38</sup> Judicial virtues, in his account, retain an important epistemological function, but not metaphysical. A judge, for him, could not justify her own decision by appealing to her alleged virtues, but only through some prior explanation of what an accurate or reasonable interpretation of law is.

Duff’s critique may have been too quick. Solum contends: “Although we might say that a just decision is independent of the virtue of the particular judge who made the decision, it is not the case that the justice of the decision is independent of judicial virtue.”<sup>39</sup> Solum seems to propose a distinction that Duff may have missed: the right decision is determined not by a “particular judge” who claims to be virtuous, but rather through a reflection about what an ideally virtuous judge would do in a specific situation. Therefore, *contra* Duff, Solum may say that a judge, indeed, could not justify her decision by saying that she is virtuous, but by showing that the decision accords to what a hypothetical virtuous judge, in those circumstances, would do.

However charitably we read it, though, Solum’s stance seems to beg the question. His conceptual trick is to incorporate into the set of judicial virtues the virtue of lawfulness – the ability to understand and adequately apply the law. If the virtuous judge is one that, thanks to his lawfulness, is able to come up with acceptable legal decisions, one will first need to discuss

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<sup>35</sup> Solum (2003).

<sup>36</sup> Solum, 2003, at 198.

<sup>37</sup> Duff, 2003, at 218.

<sup>38</sup> “We might need virtue to discern what justice requires, but what constitutes an outcome as what justice requires is not that this outcome is discerned by the eye of virtue.” (Duff, 2003, at 221)

<sup>39</sup> Solum, 2003, at 199

what a lawful decision is in order to know how a virtuous judge would decide. Solum, therefore, does not really manage to circumvent the need for a virtue-independent criterion of just outcome: in order to fill in the meaning of “lawfulness” in each case, one would proceed through the route he was trying to avoid.

A normative theory of judging, as far as it seeks to specify the right outcomes of law application, cannot be “virtue-centred” in the way Solum defines it. Nonetheless, a normative theory of deliberation can. Virtues are not just a means for good deliberation. Rather, the practice of a specific set of virtues instantiates deliberation itself. Virtues, indeed, are a means for the cherished results that are supposed to ensue from deliberation, and the correctness of these results should be rated, unlike Solum would suggest, by an independent criterion. But they are not merely that. The plausibility of the epistemic promise of deliberation, in other words, depends on frankly virtuous acts. Virtues, though, are not the appropriate standard to assess what is epistemically right.

I will elucidate the virtues that are conducive to deliberation and the occasional dilemmas that may arise in the course of promoting public contestation, furthering collegial engagement and drafting a deliberative written decision. All enumerated virtues, to some extent, are in play along the three phases, and disentangling them too much would be artificial. It is useful, however, to underscore which virtues outstand in each phase.

This set of virtues furnishes the court with a sense of direction. Together, they construct a decision-making culture that is indispensable to the credibility of a deliberative court. Without this shared belief on the potential benefits of deliberation, deliberative performance would be hindered. The following diagram illustrates the virtues to be described by the next sections:

<b>Phases</b>	<b>Virtues</b>
1. Pre-decisional	Towards interlocutors: i. Respectful curiosity
2. Decisional	Towards fellow colleagues: ii. Collegiality iii. Cognitive modesty iv. Cognitive ambition v. Empathy
3. Post-decisional	Towards interlocutors: vi. Responsiveness vii. Clarity viii. Sense of fallibility and provisionality

## 5.1 Pre-decisional phase and public contestation

How is public contestation translated into the attitudes of judges? Judges of a deliberative court do not only address the court's interlocutors when delivering a written decision. Their interaction with interlocutors during the pre-decisional phase is essential for what deliberation can mean at this point.

Contemporary constitutional courts, as a matter of fact, for the sake of independence and impartiality, tend to restrict the opportunities for such interaction and prioritize judicial passivity. Formal design, to be sure, can nourish or prevent the potential of public contestation. The question of institutional design, in any event, will not be addressed here. For present purposes, I imagine what public contestation entails under the assumption that design variables do not levy any unbridgeable obstacle against it. Public contestation is characterized, as far as the role of judges is concerned, by the virtue of "respectful curiosity".

### *i. Respectful curiosity*

A deliberative constitutional court should have the capacity to hear a plural group of interlocutors and be porous to various sorts of outside arguments. It should maximize the points of view that can profitably inform its subsequent deliberations, but not in an unqualified "the more, the better" sense. It gives a broad range of interlocutors an opportunity to speak, and develops a qualitative filter for the reasonable arguments that will have to be better digested later.

At this stage, judges are concerned with actively listening and understanding what interlocutors have to say, instead of properly arguing with them. They may incidentally argue with the purpose of probing the consistency and clarifying the interlocutor's contentions, which is, in itself, part of "active listening". Their purpose, yet, is not so much a persuasive one as it is inquisitorial and informative.

Respectful curiosity, therefore, consists in putting "active listening" into practice, taking care of the risks it can bring. In spite of their natural pre-deliberative inclinations, judges must resist forming their positions before they experience the sequence of argumentative interaction they are supposed to attend subsequently. Apart from being open to listen before sticking with their occasional pre-deliberative inclinations, they must be sensitive enough to *show* that their decision is not already taken and that they are disarmed. It does not mean, again, that they cannot raise sharp questions and challenge the quality of the arguments being aired.

The technique for raising these questions in a non-tendentious way, considering the respective social positions and political vulnerabilities of interlocutors, and also the originality of their arguments, will demand skill and acute judgment. Respectful curiosity does not necessarily mean, therefore, that each interlocutor will need to be granted exactly equal opportunity and time to manifest his case. This flexible and selective treatment may be justified in the light of all promises of deliberation. Even fairness can sometimes recommend that flexibility, if one assumes a less formalistic take on deliberation. A rigidly ritualized procedure, which prevents the court from calibrating the adequate participation of each interlocutor, can hamper public contestation. This dilemma, however, concerns a calculus of institutional design that is out of the current scope.

Public contestation, for sure, cannot be guaranteed by the judicial respectful curiosity alone. It is contingent on the contribution that interlocutors are able or willing to make. That virtue can, nevertheless, steer judges on mustering arguments in a way that is serviceable to the constitutional court's role as a deliberative forum.

## **5.2 Decisional phase and collegial engagement**

Collegial engagement is a complex mode of deliberation. It is oriented to consensus but does not depend on it. It deals with the tension between the epistemic and communitarian promises, and also with second-order reasons for reaching unanimity. Decision-makers have the burden of reaching an authoritative solution to the case, of converting individual positions into an institutional one, without suppressing disagreement. In order to discharge their responsibility in the deliberative way, judges should take four virtues into account: collegiality, empathy, cognitive modesty and cognitive ambition, as follows.

### ***ii. Collegiality***

Collegiality is the primary and usually the sole virtue addressed by the legal literature that connects courts with deliberation.<sup>40</sup> There is a commonplace assumption according to which collegiality leads to a *per curiam* decision whereas individuality prompts a *seriatim* decision. Unanimity, thus, would signal its presence whereas multiple opinions would echo its

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<sup>40</sup> There are a number of articles about collegiality in American literature. The major bulk of them was written by judges themselves, reminiscing on their own experience in a collegiate court. The discussion usually concentrates on whether, how and when to dissent. It does not thoroughly touch on the other qualities of deliberation.

absence. These inferences, however credible, should be handled with care. In courts where multiple opinions are proscribed, the presence or absence of collegiality is not a matter of concern. In those where multiple opinions are allowed, the effects of collegiality may be various. In any event, a deliberative court is collegial in an ethical rather than in a numerical sense. But what does this virtue entail?

There are manifold definitions of collegiality. In its primitive forms, collegiality evokes camaraderie, clubbiness and exclusivity, or yet narrow-mindedness and self-interested corporatism.<sup>41</sup> It would consist in the nurturing of close personal relationships for the pursuit of private-oriented goals. Slightly refined, it may also mean the “constructive use of relationships with other professionals in the making of professional decisions.”<sup>42</sup>

Collegiality as a virtue of deliberation has a more precise sense. It remains, indeed, attached to a collaborative project, but one that is concerned with the internal institutional culture that favours deliberation and the search of unity.<sup>43</sup> It generates the conditions for “comfortable controversy”<sup>44</sup> and develops an “intimacy beyond affection”,<sup>45</sup> in the eloquent expressions of American judges.

Edwards offers a more useful understanding. For him, rather than consensus, collegiality implies “that we discuss each other’s views seriously and respectfully, and that we listen with open minds.”<sup>46</sup> In a more elaborated version, he claims that collegial judges are prepared to “listen, persuade, and be persuaded, all in an atmosphere of civility and respect”, and that such process “helps to create the conditions for principled agreement.”<sup>47</sup>

Collegiality, therefore, is an umbrella that could be decomposed into several other virtues. It comprises a certain level of respect, a commitment to argue and to cooperate, and a disposition to strive for a supra-individual decision. It is more encompassing and nuanced than the “ethics of consensus”, but certainly includes this shared “aim at unanimity”.<sup>48</sup>

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<sup>41</sup> See Edwards, 2003, at 1666, and Collier, 1992, at 7.

<sup>42</sup> Collier, 1992, at 4.

<sup>43</sup> “Collaboration and deliberation are the trademarks of collegial enterprise”. (Kornhauser and Sager, 1993, at 2)

<sup>44</sup> “Collegiality is lively, tolerant, thoughtful debate; it is the open and frank exchange of opinions; it is comfortable controversy; it is mutual respect earned through vigorous exchange.” (Tacha, 1995, at 587)

<sup>45</sup> “Collegiality has several faces. One is intimacy. But it is intimacy beyond affection. (...) It is fed from the spring of our common enterprise.” (Coffin, 1980)

<sup>46</sup> Edwards, 1998, at 1361.

<sup>47</sup> Edwards, 2003, at 1645.

<sup>48</sup> While they “do permit dissenting opinions, there seem to be strong internal norms against such public display of disagreement. Indeed, in most of the European courts most of the time, the justices seek to deliberate to a consensus or common decision. They aim at unanimity wherever that is possible.” (Ferejohn and Pasquino, 2004, at 1692)

A collegial enterprise involves a “shift in the agency of performance from the individual to the group.”<sup>49</sup> In the case of collegial adjudication, the agency of performance is the court, not the judge. Collegiality is a magnetic needle that pulls towards convergence. Without this gravitational force, the interaction turns to mere mutual justification and occasional passive acquiescence rather than deliberation. Collegiality, therefore, is clearly at odds with a judge that, despite carefully studying the case and elaborating well-reflected reasons to decide, does not feel any responsibility to interact and communicate with his colleagues. This is an easy example of the lack of collegiality. This virtue may have to arbitrate, however, more intricate ethical dilemmas. Such dilemmas materialize when, despite the mutual effort to argue and persuade, disagreement persists. In such situations, deliberators can compromise and find common ground, concur or, as a measure of last resort, dissent. These alternative getaways from consensus turn courts “imperfectly or at least complexly collegial” if compared to totally collaborative enterprises.<sup>50</sup>

When spontaneous consensus, or even a minimal majority, does not come forth, compromise may be an acceptable solution. Second-order reasons can push a judge who believes he is right to alleviate his first-best choice and join the group. Sometimes, judges may concede in the name of the symbolic and political power of a unanimous decision, as opposed to the susceptibility of divided ones. Managing this political variable is part of the everyday diet of constitutional courts that allow dissenting opinions. For now, I return to a more general point about the acceptability of compromise.

Compromise, specially in the domain of adjudication, may call to mind a suspicious moral aura. More often, this notion gets embroiled with less legitimate kinds of bargaining that, although stimulated in other fora, could not be tolerated by the standards of impartiality that the application of law is supposed to involve. Brennan, for example, is deemed to once have said: “my business is to form majorities.” Many have understood it to confirm a model of judicial behaviour which identifies nothing but strategic bargaining in a collegiate court. This apparently cynical statement, though, should not be taken at face value. It can also be read through a deliberative prism. In order to reach a majority or a consensus, judges may deliberate and reach principled compromises, or a non-objectionable type of compromise.<sup>51</sup> Such

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<sup>49</sup> Kornhauser and Sager, 1993, at 5.

<sup>50</sup> Kornhauser and Sager have in mind, for example, scientists that develop a research project together, writers that co-author a novel and so on. (1993, at 56)

<sup>51</sup> A deliberator may strike a partnership compromise (she defers because, not having deep feelings about her own position, she values institutional unity) or a pragmatic compromise (she defers to change the *status quo* in a favourable direction, although the solution still falls short from her ideal position). The frontier between principled

compromises, however, presuppose a level of inter-personal trust that only collegiality can plausibly engender.

Collegiality pushes deliberators to find principled compromise where spontaneous agreement proves unviable. Disagreement survives only when principled compromise is not possible.<sup>52</sup> A collegial body induces a spirit of accommodation, a default preference for compromising instead of concurring or dissenting, a willingness to locate points of conflict and dissolve them.<sup>53</sup> It implies a pressure to deflect “in deference to one’s colleagues”.<sup>54</sup>

Digging deeper to find common ground may be easier in a court that shares some methodological backbones of interpretation, like, for example, the German Constitutional Court and its usual recourse to balancing and proportionality.<sup>55</sup> In a more polarized setting like the US Supreme Court, where the dispute between originalists, textualists and the like are cashed in such an adversarial (and even partisan) fashion, common ground is harder to find. There are levels of analysis in which communicability is simply broken, which is regretful for the prospects of deliberation.

Collegiality, in sum, is a virtue that cannot be imposed by design, although some procedural constraints may stimulate it. It leads a judge to act “in concert with colleagues”,<sup>56</sup> or expects judges to “behave as colleagues”.<sup>57</sup> But is not incompatible with an occasional individual manifestation, where such is institutionally allowed. A judge may concur or dissent and still be collegial.<sup>58</sup> This will depend, among other variables, on the effort he initially does to converge, on the perceived reasonableness of the separate public statement he wants to make

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compromise and bargaining may become less clear when concessions are made not within a controversial issue of a case, but inter-issues (in a multi-issues case) or even inter-cases.

<sup>52</sup> Brandeis hints to an idea of compromise: “Can’t always dissent. I sometimes endorse an opinion with which I do not agree. I acquiesce.” (Bickel, 1957, at 18) Holmes is also cautious to dissent: “if I should write in every case where I do not agree with some of the views expressed in the opinions, you and all my other friends would stop reading my separate opinions”. (Ginsburg, 1990, at 142)

<sup>53</sup> “In most cases, we debated the issues until there was enough common ground for a unanimous judgment to be produced.” (Sachs, 2009, at 209)

<sup>54</sup> For Kornhauser and Sager, collegiality is not at odds with compromise, but it obviously rejects strategic behaviour: “For a collegial judge, strategic behavior is behavior that transgresses both her own convictions per se, and her convictions as appropriately modified to respond to the pressures of collegial unity and sound collegial outcome. (...) A judge is entitled, indeed obliged, to deflect her conduct in deference to her colleagues. But she is not entitled to misrepresent her views or redirect her voting conduct in order to better advance her own candidates for rationale and outcome.” (1993, at 56)

<sup>55</sup> Grimm (2000).

<sup>56</sup> Edwards, 2003, at 1661.

<sup>57</sup> Kornhauser and Sager, 1993, at 2.

<sup>58</sup> There are ways and ways to dissent. Some are compatible with collegiality and others are not. See O’Connor (1998) and Stack (1996). Minority opinions do not detract from an authentic collegial enterprise as long as the minority judges do consider the majority opinion as the “opinion of the court”. The dissenter implicitly declares: if I were to decide for the court, I would decide like this. That is why dissents would “read in the subjunctive”. (Kornhauser and Sager, 1993, 38)

and on the frequency in which that happens.<sup>59</sup> Genuine collegiality avoids the risk of “overindulgence in separate opinion writing”<sup>60</sup> and nurtures an institutionally-minded style of judging, even in case of dissent.<sup>61</sup> It refuses turning the decision into a “showcase of the autonomous minds of the justices.”<sup>62</sup>

If the right to dissent is guaranteed, collegiality turns its exercise burdensome and conditional. A collegial dissent is perceived to be a measure of last resort.<sup>63-64</sup> Its licentious use would undermine collegiality and, as a consequence, the very conditions for deliberation. How to distinguish a justified dissenting opinion from a self-regarding, vain and gratuitous one?<sup>65</sup>

Collegiality is what inspires the dissenter’s dilemma. This is a charged moral choice that an individualist judge ignores. It involves an intricate balance between competing claims.<sup>66-</sup><sup>67</sup> Zobell believes that the judge has a duty to dissent when he thinks that his opinion “may contribute to the eventual correction of a decision which he believes to be wrong”, provided this is less costly than the “appearance of a disintegrated Court”.<sup>68</sup> For Pound, dissents are welcome to the extent they provide a “useful critique of the opinion of the court”.<sup>69</sup> Even the American Bar Association had once recommended an effort of self-restraint: “Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.”<sup>70</sup> For Bickel, only instinct will tell how to strike the balance between these abstract standards.<sup>71</sup>

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<sup>59</sup> The discussion about the dilemmas of dissenting is by no means an exclusively American one. This is a relevant question, for example, for most Latin American and European constitutional courts. The French Constitutional Council and the Italian Constitutional Court remain as the few exceptional cases where dissent is absolutely forbidden.

<sup>60</sup> Ginsburg, 1992, at 1191.

<sup>61</sup> Ginsburg, 1992, at 199.

<sup>62</sup> Kelman, 1985, at 227

<sup>63</sup> Sometimes the right to dissent is seen as a corollary of “judicial independence”. This is a risky and atomistic view of collegiate judging, that mixes up insulation of the institution against external pressure and a freedom to be soloist within a multi-member body.

<sup>64</sup> The effective dissent, for Ginsburg, “spells out differences without jeopardizing collegiality or public respect for and confidence in the judiciary.” (1992, at 1196)

<sup>65</sup> Many consider the practice of dissent by the US Supreme Court as pathologically personalized (Quick, 1991, at 62; Ginsburg, 1992). “Dissent became an instrument by which Justices asserted a personal, or individual, responsibility which they viewed as of a higher order than the institutional responsibility owed by each to the Court, or by the Court to the public.” (Zobell, 1958, at 203)

<sup>66</sup> Ginsburg, 1990b, at 150.

<sup>67</sup> “The judge should balance the advantage of insisting on his opinion with the disadvantage created by the very expression of dissent; (...); balance the advantage of expressing a dissent that may in the future become the majority opinion with the disadvantage of the uncertainty that dissent may create within the legal system.” (Barak, 2006, at 209-210)

<sup>68</sup> Zobell, 1958, at 213.

<sup>69</sup> Pound, 1953, at 795.

<sup>70</sup> “Canons of Judicial Ethics”, ABA, 1924.

<sup>71</sup> Bickel, for example, recognizes the tension: “Thus the dilemma. To remain silent, not drawing attention to a possibly nascent doctrine which one deems pernicious, not assisting, despite oneself, in its birth; or to speak out. Silence under such circumstances is a gamble taken in the hope of a stillbirth. The risk is that if the birth is

The dissenter's dilemma may actually be more taxing due to a relevant temporal dimension. After dissenting once, should a judge keep dissenting in cases that raise similar issues in the future, or simply defer to precedent? Does it make any ethical difference to persist with dissents that were already clearly stated in the past? The pull of collegiality, in such circumstance, becomes even starker.<sup>72</sup>

Collegiality nourishes the presupposed group psychology of a deliberative body.<sup>73</sup> It does not welcome soloists, who do not hesitate to use petty and capricious dissents. A deliberative forum must be immunized against the cult of celebrity. The collegial atmosphere may, for sure, oscillate over time. Its maintenance cannot be taken for granted. The abuse of dissents and other kinds of individualist attitudes deteriorates the court's deliberative capacity. Judges of a deliberative court get to know each other's intellectual personas quite well.<sup>74</sup> Their quotidian interaction may entrench theoretical divisions and lead to a deadlock. Deliberation shrinks when differences become fossilized and collegiality evaporates, a challenge that can be tackled by some institutional devices

Being collegial in a court, to sum up, is different from being collegial in a golf club. Collegiality in a court does not imply interacting with colleagues for the sake of mutual enjoyment. It also implies more than deferring to colleagues in order to find common ground, regardless of what that common ground is. It indicates the belief on a supra-individual good that they can only reach together, and on which the external respectability of their decision will depend. This good should normally outweigh their preferred individual position. Renouncing that good deprives the institution of an important source of legitimation.

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successful, silence will handicap one's future opposition. For one is then chargeable with parenthood. Yet dissent may serve only to delineate clearly what the majority was diffident itself to say. (...) Instinct, a craftsman's inarticulable feel, which must largely govern the action in such a matter, dictated now one choice, now the other." (Bickel, 1957, at 30)

<sup>72</sup> Kelman for example, distinguishes between a dissent that is superseded by stare decisis, a sustained dissent and a suspended dissent, which is characterized by temporary acquiescence. (1985, at 238) Bennett also sees the sustained dissent as problematic: "There is an important institutional purpose served by dissent the first time some issue arises. (...) The matter is very different when an issue already decided arises again." (1990, at 259) For Kornhauser and Sager, there would be an "unencumbered license to dissent in a case of first impression", whereas dissents in subsequent cases would be "encumbered by the contrary obligations of precedent." (1993, 8-9)

<sup>73</sup> Grimm, again, narrates how collegiality is ingrained in the German Constitutional Court's decisional culture. The reluctance to file a dissenting opinion or even to ask for a postponement of the judgment, according to him, would be perceived as "very unfriendly to ones' colleagues." (Grimm, 2003)

<sup>74</sup> Coffin has suggested a dichotomy that captures this: anticipatory collegiality entails "sensitivity to one's colleagues' sensibilities", whereas responsive collegiality corresponds to the "written acknowledgement by a justice of the feelings of another colleague." (Coffin, 1980 at 181-192)

### *iii. Cognitive modesty*

Collegiality is a central virtue if the decisional phase is to fulfil its deliberative job. However, collegial engagement is not reducible to it. Three complementary virtues help typify this practice more sharply. The first one is cognitive modesty, a logical and moral condition of preference transformation. This virtue could be seen as underlying collegiality, but it is worth taking note of its particular role in shaping deliberation.

Deliberation assumes its participants do not stick to their pre-deliberative dispositions and are not too self-assured about conclusions individually reached. Deliberators, therefore, make themselves vulnerable to the scrutiny of their fellow colleagues. Modesty is often what persuasion and mutual concessions logically and morally entail.

Cognitive modesty exhorts judges to investigate deeply what they share and to clean up their misunderstandings, to take each other's opinions seriously and exercise, to the limit, the method of self-doubt.<sup>75</sup> Judicial deliberation requires, apart from the virtue of "judicial intelligence",<sup>76</sup> that is, the appropriate intellectual equipment to understand and to cope with legal complexity, an unassuming attitude towards knowledge itself. The character and role of modesty resembles the notion of "interpretive charity": its point is not to "pay homage, deference or respect to our interlocutors", but rather to inspire a constructive attitude for the acquisition of insight.<sup>77</sup>

### *iv. Cognitive ambition*

Cognitive ambition is the flipside of cognitive modesty. Deliberation asks for their co-existence. It consists in the institutional willingness or the collective disposition to strive and persist in the search of the best possible decision. It fuels collegiality with an investigative energy without which the epistemic promise of deliberation gets anemic and fatigued.

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<sup>75</sup> "There is a modesty inherent in the judicial function that prevents me from being convinced that I necessarily am right, or, rather, that there is only one right answer to a legal problem. (...) My modesty is institutional, not personal" (Sachs, 2009, at 143)

<sup>76</sup> As proclaimed by Solum (2003).

<sup>77</sup> "The aim of interpretive charity is not generosity towards others, or anything like that. It is not to pay homage, deference or respect to our interlocutors, or to avoid giving offense. (...) The aim is to learn. It is aggressively to learn what there is to be learnt from puzzles the interlocutors pose to us, by assuming there is method in their madness and doing our best to ferret that out". (Michelman, 2008, at 4)

Cognitive ambition furnishes deliberation, therefore, with a more powerful epistemic drive than sheer collegiality.<sup>78</sup>

Deliberators inspired by that virtue are not content, thus, with reaching agreement, but try to subject an occasional convergence to further tests of argument. If uncomfortable with a too hasty agreement, they return to the counter-arguments that a “Devil’s advocate” could make. Deliberators, in this sense, are not “advocates of a position” but “students of an issue”,<sup>79</sup> and are relentless in the search of the best decision.

Collegial engagement is the setting where the ideal of non-hierarchy but of the best argument gets most closely instantiated along the three-phasic decisional structure of a constitutional court. The articulation between cognitive modesty and ambition, that is, between the deliberator’s attitude of self-doubt and the commitment to persist in searching the right answer and challenging superficial agreements, is what maximizes the epistemic plausibility of judicial deliberation as far as judicial attitudes are concerned. Institutional design, as we will see, can provide adequate conditions for this articulation to flourish.

#### *v. Empathy*

Finally, empathy qualifies cognitive ambition. This virtue relates to the ability of vicariously imagining the points of view that were not formally voiced in the course of the judicial process, or of “submerging in other people’s narratives”.<sup>80</sup> It is the principal corrective a constitutional court can have against a poorly deliberative pre-decisional phase. When institutional hindrances impede interlocutors to fully argue their positions, or when the interlocutors themselves do not manage to do justice to the complexity of the case, empathetic

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<sup>78</sup> Edwards, for example, considers the epistemic benefit that derives from collegiality alone: “since collegiality fosters better deliberations, collegial judges are more likely to find the right answer in any given case.” (Edwards, 2003, 1684) Tacha also goes in the same direction: “Often these deliberations do not change a judge’s vote or a case’s outcome, but the rationale behind the vote is more fully informed and intellectually sound because of the collegial interaction.” (Tacha, 1995, at 587)

<sup>79</sup> Tacha, 1995, at 587

<sup>80</sup> Wills (2010).

judges can, to some extent, fill that gap.<sup>81</sup> Empathy enables the court to amplify “whom the judges listen to before they decide, and whom they encourage to speak after they decide”.<sup>82</sup>

A constitutional court, in this sense, can go beyond the arguments it was able to collect in the pre-decisional phase through empathetic imagination of the potential community of interlocutors. This may be particularly relevant for an institution that is usually seen as “elitist” and with comparably weaker capacity to be heterogeneous and representative (although design can slightly mitigate it).

Sachs elaborated on the empathy of a constitutional judge with remarkable acumen. As a judge, according to his memoirs, he tried to be sensitive not to the actual but to the “potential readership” his opinions could have. That implied, for him, taking the widest imaginable audience into account<sup>83</sup> and developing an “enlarged mentality”.<sup>84</sup>

### 5.3 Post-decisional phase and deliberative written decision

A deliberative written decision concludes the process by communicating to the public what decision collegial engagement was able to produce and the broad set of arguments that were duly weighed. It expresses a de-personified institutional identity, however format it might take. Again, the choice between *per curiam* and *seriatim* is a serious one, and should be made according to contextual criteria. However counter-intuitive it may sound to claim that a *seriatim* can be de-personified, there arguably are institutional devices to accomplish that.

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<sup>81</sup> Empathy is implicit in Kornhauser’s and Sager’s concern with the need for “just treatment of unrepresented parties”, which would indicate the complementarity between adversarial exchanges in the pre-decisional phase and deliberation in the decisional: “While each party will advocate positions most favorable to it, this advocacy ensures that any biases of the judges are exposed to conflicting arguments and views. (...) Our understanding that judicial decisions affect parties not before the court and our conception of just treatment of these unrepresented parties argues that judges should consider the interests of those parties not before the court because the adversarial process will not necessarily produce arguments and options favorable to these persons.” (Kornhauser and Sager, 1986, at 101)

<sup>82</sup> Thompson, 2004, at 84.

<sup>83</sup> Sachs defines his audience in a broad a non-formalistic sense: “It is a notional community, made up by all those who feel they are wearing legal hats when dealing with a problem”. (2009, at 143) And regarded “potential readership” as his chief criterion: “however reduced the actual readership of any judgment of mine might be, its potential readership is vast”. “The objective is not to please or displease anyone, but to converse with as much rigour, integrity, and awareness of our constitutional responsibilities as possible, with as wide an audience as can be imagined.” (Sachs, 2009, at 149)

<sup>84</sup> “active vision that enables him or her to rise above individual idiosyncrasy to cover the standpoint of others belonging to the community to be persuaded” (Sachs, 2009, at 143)

More important than format, a deliberative written decision embodies an argumentative style. And an argumentative style, as Walzer reminds, is also a moral style.<sup>85</sup> The court has the responsibility to tell its story about the case in a particular way.<sup>86</sup> Such story-telling will depend on the exercise of three main virtues: responsiveness, clarity and a sense of fallibility and provisionality.<sup>87</sup> The deliberative promises at stake in this phase will hinge, again, upon the court's capacity to embrace these virtues.

#### *vi. Responsiveness*

Responsiveness entails a capacity to select which of the arguments raised by formal and informal, actual and vicarious interlocutors, deserve a proper reply. Rather than a duty to respond to everything that was publicly voiced, the court has to exercise, as a matter of practicality and fairness, sensible judgment. This is the corollary of the qualitative filter applied at the stage of public contestation. Responsiveness, therefore, unlike its common sociological sense – a mere reaction to some prior action, is content-driven. Apart from interlocutors, a responsive court has to consider the chain of precedents in which the case is inserted, so that the decision contributes to the coherence and systematicity of law.

Moreover, responsiveness also concerns the tone of the answer. Constitutional courts take decisions in the name of and addressed to the whole political community. Controversial moral choices have to be done, which are doomed to spark disagreement.<sup>88</sup> The decision has the arduous and sometimes unachievable challenge of making the interlocutors on the losing side of the conflict realize that their positions were taken seriously and that their equal moral status was not disregarded. It has, in other words, to “speak with equal voice to both groups”.<sup>89</sup> This is a dignitarian side of the decisional tone.

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<sup>85</sup> Walzer summarizes the deliberative moral style: “a form of political argument that is nuanced, probing, and concrete, principled but open to disagreement: no slogans, no jargon, no unexamined assumptions, no party line. This argumentative style, which is also a moral style (...).” (Walzer, 2008, at ix)

<sup>86</sup> “We work with words, and become amongst the most influential story-tellers of our age. How we tell a story is often as important as what we say. The voice we use cannot be that of a depersonalized and divine oracle that declares solutions to the problems of human life through the enunciation of pure and detached wisdom.” (Sachs, 2009, at 270)

<sup>87</sup> These three virtues resemble the three demands Thompson requires from an ethically responsible court: recognition of agency, justification and interlocution. As he contends: “Citizens are better able to respond to a judicial decision if the judge acknowledges it as his or her own; gives reasons for it that citizens can understand; and supports practices that permit challenges to it.” (Thompson, 2004, at 74)

<sup>88</sup> “adjudicating such disagreements involves choosing for the whole society one set of values and rejecting others.” (Thompson, 2004, at 72)

<sup>89</sup> “The judgment should attempt to speak with equal voice to both groups. (...) To discover the humanity, the integrity, the honesty in everybody, and to present your response in a way that everybody can say ‘I understand what is being said; I have grave doubts about the result; but the judgments acknowledges what I’m thinking,

### ***vii. Clarity***

“Simple, clear, persuasive to the legal community, that is my dream.”<sup>90</sup> Clarity is probably a much too obvious virtue to ask from judicial decisions. Adding that platitude would not tell much about its deliberative specificity.<sup>91</sup> Sachs’ dream, however, reveals that achieving this pre-requisite of communication in the realm of legal reasoning is an arduous job. Clarity demands more than shallow intelligibility. It qualifies responsiveness: a deliberative written decision is the opposite of an oracular statement, and cannot indulge in rarefied legalese, however hard this may prove to realize in practice.

Clarity is a virtue that presupposes good writing, but goes beyond that. It stems, first and foremost, from the assumption that legal decisions, and specially constitutional ones, need to speak to a broader audience than the professional legal community. Closure and opacity are not inevitable features of the decisional text. A measure of rhetorical self-restraint and candour contributes to the potential readership of a decision.<sup>92</sup>

A deliberative judge, when in charge of drafting a decision, takes public readership as his primary responsibility. If a constitutional court is going to attract and enable the broader community to join in the political deliberation about fundamental principles, it needs to convey an accessible message that includes non-experts in law. It is through this stern devotion to open communication, rather than through its supposed legal expertise, that a deliberative court pursues to obtain public trust.

### ***viii. Sense of fallibility and provisionality***

Lastly, and further qualifying its tone, a deliberative written decision expresses a sense of fallibility and provisionality. It recognizes that the decision is historically situated, that the court might have made a mistake and that deliberation should continue as long as disagreement

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knows where I am, and takes account of my convictions and respects my conscience and dignity; I’m not being defined out of the answer by what purports to be a completely neutral way of framing issues and arriving at conclusions; my convictions, values and perspectives are being taken seriously and treated thoughtfully and with respect” (Sachs, 2009, at 239)

<sup>90</sup> Sachs, 2009, at 58.

<sup>91</sup> Clarity is an inherent quality of the rule of law itself. (Fuller, 1968, at 63)

<sup>92</sup> “It would, of course, be reprehensible to go in for the headline-seeking. The temptations of judicial populism, which offer shallow judicial sound bites without any real jurisprudential content, are great. (...) But I do not feel there is anything wrong in employing a resounding phrase or sharp image that is potentially memorable...” (Sachs, 2009, at 57)

perseveres or whenever it re-emerges. This virtue requires a careful calibration of how the court envisions or announces judicial supremacy.<sup>93</sup> In other words, the decision reflects the court's awareness of the "continual moral challenge"<sup>94</sup> upon which the legitimacy of collective decisions, taken through whatever procedure, depends.<sup>95</sup>

There is something morally and politically relevant in a decision that expresses, in whatever subtle form it may find, the awareness of its potential reversibility in the future (even if actual reversal turns out not to be the case). Political deliberation is an incorrigibly iterative process. The prospect of incessant iteration constrains the judge to account for his decision and to explain herself in public.

One conventional technique to convey such message of continuity is a dissenting opinion.<sup>96-97</sup> Dissents may sow the seeds of a potential jurisprudential shift in the future, or so it has been largely believed, for example, by a slightly over-idealized history of judicial dissents in the US Supreme Court.<sup>98</sup> In spite of this romantic view, and even if actual jurisprudential changes cannot be attributable to the existence of courageous dissents in the past, one should not ignore their role in signalling fallibility and provisionality. Dissents may serve as a critical benchmark from which the quality of the decision can be assessed.<sup>99</sup> In any event, with or without dissents, a deliberative decision should find its proper way of inviting responses.

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<sup>93</sup> Thompson, 2004, at 91.

<sup>94</sup> "If neither citizens nor judges can finally justify making the authoritative choice of fundamental values for society, we must preserve the possibility of continual moral challenge to the choices of values that public officials inevitably make for us." (Thompson, 2004, at 73)

<sup>95</sup> For Thompson, responsible judicial decisions need to offer "genuine opportunities for citizens to respond" (2004, at 84). "Responsible officials encourage response to their decisions." (Thompson, 2004, at 73)

<sup>96</sup> Minority votes would have a "concurrent jurisdiction over the future": "For a dissent is a formal appeal for a rehearing by the Court sometime in the future, if not on the next occasion." (Kelman, 1985, at 238)

<sup>97</sup> The opposite of this potential quality of divided decisions would be the French tradition of corporate opinions: "foster the myth of law's impersonality and inexorability" (Kelman, 1985, at 227).

<sup>98</sup> The three most epic dissents in US Supreme Court history (published by Justices Curtis in *Dred Scott* [1857], Harlan in *Plessy* [1896] and Holmes in *Lochner* [1905]) form the pantheon of the "Great Dissenters". Cardozo, among others, helps to nurture this heroic view of the dissenter, whom he sees as a "gladiator making a last stand against the lions" (1934, at 34). Holmes, by his dissents, is deemed to have contributed to debunk the myth of judicial certainty, at the cost of invigorating the myth that "dissenting justices are anticipating future trends". (Zobell, 1958, at 202)

<sup>99</sup> "Dissent for its own sake has no value, and can threaten the collegiality of the bench. However, where significant and deeply held disagreement exists, members of the Court have a responsibility to articulate it. (...) A dissent challenges the reasoning of the majority, tests its authority and establishes a benchmark against which the majority's reasoning can continue to be evaluated, and perhaps, in time, superseded." (Brennan, 1985, at 435)

## Conclusion

Deliberation requires a moral, intellectual and psychological disposition that are hard to develop, let alone to regularly maintain over time. Persuasion is a long-term process, not the conclusion of an afternoon conversation. The paper described the moral experience of deliberators in the language of virtues and set indicators for the assessment of deliberative performance. Deliberation is a way of doing things. It is, as it were, a virtue-based procedure. It must be distinguished from the outcome that follows it, and there will be independent criteria to judge the substantial rightness of such outcome. The notion of virtue is certainly not the criterion to appraise the rightness of the outcome (as Solum tried to do with respect to judging in general). It is, however, the appropriate standard to assess the quality of the interactive process that precedes decision. A deliberator does not simply follow duties. One cannot search for the best possible answer, imagine vicarious interlocutors, be open to be persuaded, and so on, simply as a matter of duty.

Deliberation cannot be reduced to one single virtue either. Collegiality is not the only one at stake. If one were to summarize those virtues through the lenses of their respective vices, an anti-deliberative judge would be passive and ritualistic rather than respectfully curious; individualist and pedantic, rather than collegial; cognitively over self-confident rather than modest and susceptible to persuasion; cognitively indolent, rather than ambitious; egocentric rather than empathetic. An anti-deliberative decision would mirror an ivory-tower reason-giver, rather than grappling to respond to the relevant arguments; would be obscure and cryptic rather than clear and transparent; would offer an apodictic and supremacist statement of the right answer instead of recognizing the continuity of deliberation. The anti-deliberative attitude, in sum, is stubborn and confrontational. However well designed it might be, a constitutional court will only deliberate if judges are dedicated to tackle these vices.

In a non-deliberative court, there cannot be agreement or disagreement properly so called. Decision-makers celebrate individual authorship and do not exactly care about what others happen to think. They do not acknowledge that a supra-individual decision embeds any special value. Agreement or disagreement are mere accidents of a fragmented and personalized decisional process.

Does Hercules have the virtues required by deliberation? Or is he the stereotype of the anti-deliberative judge? Michelman, as we have seen earlier, understood Hercules as a loner, a

criticism that Habermas embraced.<sup>100</sup> Hercules would be too self-assured and self-centred to participate of a deliberative encounter. Even when he reaches the Olympus (that is, when he gets promoted to the Supreme Court<sup>101</sup>), he seems not to be very concerned with his colleagues. This might or might not be a fair and charitable reading of Dworkin. Whatever the appropriate understanding of the role that Hercules plays in Dworkin's theory of adjudication, it would be refreshing to think, with the same idealistic vitality, about how a mythical judge with such intellectual vigour should behave in a collegiate body.

A deliberative judge does not seek a single goal, but balances a whole set of considerations. When to compromise, to concur or to dissent, which interlocutors deserve a more thorough response, for how long to deliberate, among others, are but a few of the ethical dilemmas she faces. The decisional body in which she participates can be reduced "neither to one nor to the many"<sup>102</sup>, and crafting this middle-ground requires dense moral reflection.

Public contestation, collegial engagement and deliberative written decision are not hard and fast targets, but complex and interconnected ones. They all play a part in making the promises of deliberation more plausible. The virtues described above better capture those goals themselves, and are also instrumental to achieve the promises of deliberation. Cognitive modesty and collegiality, for example, are indispensable for any sort of communitarian persuasion to take place. Cognitive ambition, in turn, is an essential part of what collegial engagement entails, and is also a necessary means for the epistemic promise of deliberation to obtain.

The existence of the right answer in constitutional interpretation is irrelevant for a further question: considering that we disagree about what moral or legal truth is, and that we cannot demonstrate to have reached the truth, what ethical attitude is owed to any fellow citizen who has a different understanding of the constitution? I argue that he deserves to be treated as an interlocutor. This implies an earnest recognition of the moral complexity of constitutional conflicts. In the right circumstances, deliberation is, compared to alternative decision-making methods, and all other things remaining constant, a powerful way to reach good legal decisions. On top of this key epistemic task, however, deliberation has a non-negligible remainder: it involves agents gravely committed to go through this strenuous process for the respect it symbolizes. Deliberative institutions, deciding in the name of the whole political community,

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<sup>100</sup> Michelman, 1986, at 76; Habermas, 1996, at 223.

<sup>101</sup> Dworkin, 1986, at 379.

<sup>102</sup> To slightly rephrase Kornhauser and Sager's title "The one and the many" (1993).

take this moral complexity seriously. In trying to produce the right answer, they deliver supplementary political goods.

The ethics of deliberation was here outlined in a comprehensive way. I have described a list of traits that characterize how deliberators are morally inclined to act, not just a list of skills to be technically mastered by them. These traits embody a relevant part of the phenomenological experience of a constitutional judge that is concerned with the ideal of deliberation.