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Katalin Kelemen

THE DECISION-MAKING PROCESS OF EUROPEAN CONSTITUTIONAL COURTS. A COMPARATIVE PERSPECTIVE

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Katalin Kelemen[1]

The decision-making process of European constitutional courts. A comparative perspective[2]

SUMMARY: 1. Introduction. – 2. Internal court structure in comparative perspective. – 3. The prominent figures of the decision-making process. – 3.1. The president of the court. – 3.2. The most prominent members of the decision-making panel: The rapporteur judge and the opinion-writer. – 3.3. Non-judicial offices: Law clerks and the secretary general.

1. Introduction

The first in-depth interdisciplinary studies of the decision-making process of judges were carried out in the United States in the 1940s. These were stimulated mainly by the dissatisfaction with the traditional legalistic explanations about how controversies are decided. The proliferation of dissenting and concurring opinions generated discontent among legal scholars who started to ask themselves why the members of a judicial panel reach different conclusions on the basis of the same factual background and applicable legal rules.[3] Thus research was carried out in order to investigate the extralegal factors of judicial decision-making, and a new field of study was born in the area of political science, called 'behaviouralism'.[4] Later on, the problem attracted the attention of psychologists and sociologists (and of social psychologists in particular) and, to a lesser extent, of anthropologists and economists.[5] Besides psychological and social factors, judicial behavior was examined from the point of view of political factors, as it had been acknowledged that courts are not free of political pressure. The study of political factors consists of analysing the influence exercised by public opinion and by groups of interests on judicial decisions and

1 Senior Lecturer, Örebro University (Sweden). PhD in Comparative Law (University of Florence, Italy). E-mail: katalin.kelemen@oru.se.

2 This working paper is part of a book under contract with Routledge Publishing on judicial dissent in European constitutional courts (working title: *Judicial dissent in European constitutional courts. A comparative and legal perspective*), to be published in 2017. Please do not quote or cite without permission! Comments are most welcome at katalin.kelemen@oru.se. I am thankful to Routledge Publishing for the courtesy of allowing me to publish this text as a working paper.

3 See Thomas G. Walker and Lee Epstein, *The Supreme Court of the United States. An Introduction* (St. Martin's Press 1993) 125.

4 The term 'behaviouralism' is a typical English one, which is difficult to translate into other languages. In Italian, for example, the Anglicism 'behavioralismo' or its literal translation 'comportamentismo' is used.

5 The most important subbranches of behaviouralism are cultural anthropology, systems theory, psychometrics, games theory and statistics used for predicting decisions. See G. Schubert, 'Judicial Behavior' (1968) 8 *International Encyclopedia of the Social Sciences* 307.

the position of the judiciary in the scheme of checks and balances.[6]

The concept of 'decision-making process' is not to be mixed up with that of 'judicial process' which refers to 'a set of interrelated procedures and roles for deciding disputes by an authoritative person or persons whose decisions are regularly obeyed'.[7] It is both a means of resolving disputes and a process for making public policies, i.e. for affirming certain values and principles. The decision-making process is, therefore, a particular aspect of the ampler judicial process, and concerns those factors and rules which determine the forming of a judge's opinion.

Mathilde Cohen, in her study on supreme and constitutional courts' organizational cultures, hypothesised that there is a reciprocal influence between a court's institutional design and the style of its opinions.[8] I share her hypothesis. Thus, before exploring the practice of judicial dissent, I address its institutional and procedural contexts, since these exert a profound influence on this phenomenon. For this purpose the most relevant aspect of the decision-making process is represented by its personal dimension: the role of the judicial panel's most prominent members (its president, the rapporteur judges and the opinion-writer) and that of law clerks.

2. Internal court structure in comparative perspective

As we have seen, constitutional courts in many respects represent a special combination of a common law supreme court and a civil law supreme court, since they have certain characteristics of both. This is true also with regard to their internal structure. A constitutional court is composed of a relatively limited number of judges (between 6 and 15),[9] like a common law supreme court, and it often decides in smaller panels, similarly to civil law supreme courts, but unlike the US Supreme Court.[10] Where the publication of dissent is allowed, it is usually a prerogative of the plenary session only, so it is not extended to the panels.[11]

6 See Walker and Epstein (n 3) 131-139.

7 Definition by J.W. Peltason, 'Judicial Process. Introduction' (1968) 8 *International Encyclopedia of the Social Sciences* 283.

8 Mathilde Cohen, 'Ex Ante Versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort' (2014) 62 American Journal of Comparative Law 401, 452. She adds that further research should be done to elaborate this hypothesis.

9 See Table 3 at the end of this section. Not all constitutional courts have chambers. For example, the Italian Constitutional Court represents an exception. It always decides in plenary session.

10 The US Supreme Court is actually an exception even among common law supreme courts. The U.K. Supreme Court, composed of 15 members, typically decides in panels of five, but at least three judges (Rule 3 of the Supreme Court Rules 2009 (SI 2009/1603) and UKSC Practice Direction 3). See Neil Andrews, 'The United Kingdom's Supreme Court: Reflections on the Role of the British Nation's Highest Tribunal' (2009) *ZZP Int. Zeitschrift für Zivilprozess International*, 33-42.

11 Hungary represents an exception. However, even there, after the 2012 reform, only the 5-member

Constitutional courts always decide either in panels or in plenary session. Only a few countries allow single-judge formations to take decisions, and their decisions are never on the merits. In Hungary and in the Czech Republic, for example, a single constitutional judge may reject a petition on formal grounds.[12] Formal grounds (such as expiration of a filing deadline, lack of standing or lack of jurisdiction) are usually simple procedural questions and do not require a debate among judges. Thus, entrusting a single judge with this function helps the court to dispose of these cases more expeditiously. Intuitively, single-judge formations do not write dissenting opinions.

The German Bundesverfassungsgericht, which has been often taken into consideration as a model in other countries when creating a new constitutional court, has a unique structure which has not been adopted by any other country. Its sixteen members are grouped in two permanent panels, in German called *Senate*. They have different competences established by law,[13] and a plenary session is summoned only when a contrast arises in the jurisprudence of these two panels and to issue rules on judicial administration.[14] In fact, the German senates are often considered as two separate constitutional courts.[15] An increase in the number of complaints made it necessary to create also smaller panels.[16] The so-called *Kammern* or chambers, composed of three judges, work as a filter. They decide on the admissibility of constitutional complaints (the famous *Verfassungsbeschwerden*) and applications by ordinary courts.[17] Moreover, since 1986, if they find that a complaint is either manifestly unfounded or manifestly founded, they may also decide the case on the merits.[18] Three chambers operate

panels may publish dissent, not the 3-member panels (art. 49 (4) of the Constitutional Court Act requires unanimity from 3-member panels). The creation of 3-member panels is, however, only a possibility. No 3-member panel has been established yet. I thank Johanna Fröhlich, clerk at the Hungarian Constitutional Court, for this information.

12 Art. 43 of the Czech Constitutional Court Act and art. 55 (5) of the Hungarian Constitutional Court Act. In Hungary it is a novelty introduced by the new Constitutional Court Act. Only two members of the Court act as solo judges at a time, appointed by the President for 3 months. Art. 11 of the Rules of Procedure.

13 See art. 14 of the German Federal Constitutional Court Act (BVerfGG). At the beginning the First Senate was designed to deal with all constitutional complaints, while the Second Senate was supposed to decide conflicts of power and other cases of political nature like the pre-existing Staatsgerichtshof of the Weimar Republic. However, the especially conspicuous number of constitutional complaints made it necessary to redistribute the caseload, and today also the Second Senate decides complaints. The division of work between the two panels is determined by the plenary session at the beginning of every term. See Sarang Vijay Damle, 'Specialize the Judge, not the Court: A Lesson from the German Constitutional Court' (2005) 91 *Virginia L. R.* 1267, 1298.

14 See Table 1 and art. 1(3), 7a(2), 14(4), 16(1) and 105, BVerfGG.

15 The idea of this two-halved structure represented a compromise between a court of 24 judges deciding in small panels and a united court following in the footsteps of the US Supreme Court. See Donald P. Kommers, *Judicial Politics in West Germany: a Study of the Federal Constitutional Court* (Sage 1976) 86.

16 The Senates were authorized to set up preliminary examining 'chambers' in 1956. See Donald P. Kommers and Russell Miller, 'Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court' (2009) 3 JCL 194, 198.

17 See art. 81a and 93b, BVerfGG. However, the admissibility of applications by state constitutional courts or by a federal supreme court are examined by the senate.

18 However, the authority to declare a statute unconstitutional or in conflict with federal law is reserved to the panel. See art. 93b(2) and 93c(1), BVerfGG.

within both senates, and their decisions shall be taken by unanimity.[19] This means that dissent is allowed only in the senates' plenum.

The Belgian Constitutional Court's internal organization also shows a double structure, but in a sense different from that of the *Bundesverfassungsgericht* and for different reasons. The Belgian Court is composed of 12 judges, half of which are Dutch-speaking and the other half are French-speaking. They form two language groups and have their own president. The Court has even two registrars to ensure an equal treatment to the two linguistic groups.[20] However, there are no two permanent panels, as in Germany, but the two language groups are both represented in all cases. The decision-making panels are composed of three French-speaking and three Dutch-speaking judges and the president of the linguistic group whose language is that of the case to be heard.[21] This strictly double internal organization, like the very existence of the Constitutional Court itself, is due to the development of the Belgian unitary state into a federal state in the 1970s. The then Court of Arbitration, created in 1983, had the task of watching the division of legislative powers between the different legislative assemblies.[22] Three years after the Court delivered its first judgment, it was granted power to review compliance with certain constitutional rights and principles.[23] This historical and political background, together with the strong influence of the French legal tradition on Belgian law, might explain the lack of dissenting opinions in Belgian constitutional justice.

The double structure of the German Federal Constitutional Court is also unknown to the new generation of constitutional courts, the ones set up in East-Central Europe, which followed the German model. Their structure, however, is also far from the simple and united model of the Italian Constitutional Court and of the U.S. Supreme Court, which both decide all cases in plenary session. They indeed represent a middle ground between these two solutions. The most important cases are decided by the plenary session, while the others are assigned to panels composed of three or five judges.[24] Usually, the constitutional review of parliamentary acts and international treaties is reserved for the plenary session, whereas the panels have a residual competence. The Polish Constitutional Tribunal is an exception, as it decides on the constitutionality of parliamentary acts and international treaties in plenary session only at certain conditions, i.e. if the case is of particular complexity, and upon

19 See art. 81a and 93d(3), BVerfGG. See also Peter E. Quint, 'Leading a Constitutional Court: Perspectives from the Federal Republic of Germany' (2006) 154 Univ. of Penn. L. R. 1853, 1862-1863.

20 See art. 31, 33 and 40 of the Belgian Constitutional Court Act. Moreover, one of the judges has to speak German as well (art. 34 (4)).

21 See art. 55 of the Belgian Constitutional Court Act.

22 The Court of Arbitration (*Cour d'Arbitrage*) was established by the Act of 28 June 1983, and became operative on the 1 October 1984.

23 The first judgment was delivered on 5 April 1985, while the constitutional amendment extending the Court's competences was adopted on 15 July 1988. Accordingly, in 2007, the name of the Court of Arbitration was changed into Constitutional Court.

24 The panels are composed of 3 or 5 members both in Poland (art. 25 of the Constitutional Tribunal Act) and in Hungary (art. 49 of the Constitutional Court Act and art. 5 of the Rules of Procedure). However, as already indicated above, in Hungary only 5-member panels have been set up so far (see above note 9). In Croatia there are 3- and 6-member panels (art. 68 of the Constitutional Court Act). In all the other East-Central European constitutional courts they are composed of three members.

proposal by its president or a panel, or if the particularly complex aspect is concerned with financial outlays not provided for in the budgetary act; finally, when the adjudicating panel intends to depart from the legal opinion expressed in the Tribunal's judicial decision given earlier in plenary session.[25]

An interesting solution is offered by the Romanian model which represents a unique combination of the French and the Italian constitutional courts. The Court's composition is clearly inspired by the French Constitutional Council,[26] and cases of preventive review are always decided in plenary session. On the other hand, in the first years, cases referred by ordinary judges were assigned to chambers of three judges whose decisions could be appealed before a chamber of five judges. This system of internal appeal, however, brought to inconsistencies in the Court's case-law and was abolished by the legislator in 1997. Since then, all cases have been decided in plenary session.[27]

As the *Kammern* of the German Federal Constitutional Court, most of the panels of European constitutional courts, where they exist, decide by unanimity. The German solution is understandable if we consider that the panels operate as a filter and decide on the merits only when the case is manifestly founded or unfounded. Clearly, foundedness or unfoundedness is not manifest if there is a disagreement between the judges. The same logic is applied by Slovenian, Croatian and Latvian laws which assign to 3-member panels the decision on the admissibility of constitutional complaints and require unanimity.[28] The Austrian Constitutional Court, which does not hear constitutional complaints against judicial decisions, also applies this rule with regard to all cases. Manifestly unfounded petitions are to be rejected by smaller panels and unanimity is required. However, dismissal of the application on formal or procedural grounds does not require a unanimous decision.[29] The Hungarian Constitutional Court is an exception, as it allows the 5-member panels to take

25 Art. 25 (1) point 1.e of the Constitutional Tribunal Act.

26 The Romanian Constitutional Court is composed of nine members. Three are appointed by the head of the state, three are elected by the upper and three by the lower house of the Parliament. This method of appointment is not identical to the French solution, where two thirds of the judges are appointed by the presidents of the two houses and not by the houses themselves. In Romania constitutional judges are elected by absolute majority. Another similarity with the French model is that one third of the members are replaced every three years. See art. 5 of the Romanian Constitutional Court Act. On the French Constitutional Council's composition see Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford University Press 1992) 46-59.

27 See more in detail in Renate Weber, 'The Romanian Constitutional Court: In Search of its Own Identity' in Wojciech Sadurski (ed), *Constitutional Justice, East and West* (Kluwer Law International 2002) 283, 287-289.

28 See art. 55c of the Slovenian Constitutional Court Act and art. 68(3) of the Croatian Constitutional Court Act. In Croatia also decisions on the merits of constitutional complaints have to be taken by unanimity in the 6-member panels. See art. 23(2) of the Rules of Procedure. In Latvia art. 20(7)1 provides that if one of the three members of the panel considers the petition admissible, a decision on the merits must then be taken by the plenary session, to which the case is transferred.

29 See art. 19 (3)-(4) and 31 of the Austrian Constitutional Court Act. The Austrian law, instead of providing for panels of a given number of judges, determines a lower quorum for certain types of cases (the president and four other judges, see art. 7(2) of Constitutional Court Act). In practice, these panels are composed of the president, the vice-president, the rapporteur judge and three other judges. See the official website of the Court at <https://www.vfgh.gv.at/cms/vfgh-site/english/organization1.html> accessed 26 September 2016.

their decisions by majority. The reason may lie in the fact that Hungarian panels are not simple filters of constitutional complaints (even if they have this function as well), but they have residual competence. All cases not reserved for the plenary session are decided in panels. In a similar manner, panels of other constitutional courts decide on the constitutionality of sublegislative acts and have other residual competences.[30] From a legal-technical point of view, the constitutional review of sublegislative acts is not necessarily less complex than questions of constitutionality of legislative acts.

Even if the law allows publication of dissents for the panels, the actual practice may be different. In Hungary, 3-member panels could pass decisions by a majority of votes[31], but in practice they never did so. If there was disagreement between the judges they used to refer the case to the plenary session.[32] There is, however, one concurring opinion published in a case decided by a panel, and authored by Judge Zlinszky. The peculiarity of this case is that Judge Zlinszky was also the author of the opinion of the court.[33] Obviously his separate opinion did not state different reasons for the judgment, but it supplemented the panel's opinion with additional grounds for the annulment of the challenged provision.

Table 1: The internal structure of European constitutional courts

	Plenary session	***Panels***	***Single-judge formations***
Albania	*always* *(art. 133 Const. and art. 20 CC Act)* *- quorum: two-thirds (6 judges) – art. 32 CC Act*	*none*	*no*

30 These other courts are the Croatian, the Polish, the Czech, the Slovak and the Spanish constitutional courts. See Table 1 below.

31 See art. 25(3) of the previous Constitutional Court Act (Act no. XXXII of 1989). Art. 49(4) of the new Constitutional Court Act, which entered into force on 1 January 2012, requires unanimity for the decisions of 3-member panels, while upholds the majority rule for 5-member panels.

32 According to Judge Y his panel referred approx. 3-5% of the cases to the plenary session because of internal disagreement. Interview with Judge Y (Budapest, 14 November 2006).

33 Decision no. 44/1991 (VIII.28.) AB of 15 August 1991.

Austria	*as a rule* *(art. 7(1) CC Act)*	*smaller panels of at least 5 members (art. 7(2) CC Act):* *- rejection of a manifestly unfounded complaint* *- dismissal on formal or procedural grounds* *- dropping of the proceeding (withdrawal or accepted complaint)* *- motions for exection of the decisions* *- motions to define the costs in dropped cases* *(art. 19 CC Act)*	*no*
Belgium	*art. 56 CC Act:* *1) in organizational and disciplinary cases* *2) on request by the president* *3) on request by two of seven judges of the bench*	*- deliberation in 7-member panels (art. 55 CC Act):* *composed of 3 Dutch-speaking, 3 French-speaking judge and the president* *- preliminary procedure in 3-member panels (art. 69 CC Act): examines admissibility, manifest foundedness and unfoundedness and jurisdiction*	*no*
Bulgaria	*always* *- art. 151(1) Const.: ruling by absolute majority*	*none*	*no*
Czech Republic	*Art. 11(2) CC Act*	*four 3-member panels (art. 15 CC Act) – the President and the two Vice-Presidents are not a permanent member of any panel* *- residual competence* *- rejecting manifestly unfounded petitions (art. 43 CC Act)*	*rejection of a petition on formal grounds (art. 43(1) CC Act)*

Croatia	*art. 27 CC Act* *art. 10 Rules of Proc*	*- 6-member panels on const. complaints (art. 68 CC Act) and impeachment of judges (artt. 97-98)* *- 3-member panels: reject const. complaint on procedural grounds (art. 68), decide electoral disputes (art. 92)*	*no*
Germany	*- resolution of conflicts between the two senates (art. 16(1) CC Act)* *- issuing rules on judicial administration (artt. 1(3), 7a(2), 14(4) and 105 CC Act)*	*- two 8-member permanent panels (Senates):* *as a rule* *- 3-member panels: admissibility of applications by lower ordinary judges (art. 81a CC Act), admissibility of constitutional complaints (art. 93b CC Act)*	*no (?)*
Hungary	*CC Act, art. 50(2)* *- constitutional review of legislative acts and international treaties,* *- preventive review,* *- constitutional interpretation,* *- review of constitutional amendments, etc.* *- other important cases on proposal by the President of the Court or 5 judges* *Rules of Procedure, art. 2(2):* *- ex officio procedure,* *- omission of the legislator, etc.*	*- 3-member panels: residual competence (art. 50(1), CC Act)* *- the plenary session may also create 3-member panels (none set up yet)*	*rejection of a petition on formal grounds or for manifest unfoundedness (art. 55(5) CC Act)* *- only two judges act as solo judges at a time, appointed for 3 months (art. 11 Rules of Proc)*
Italy	*always* *(art. 16(1) CC Act)*	*no*	*no*

Kosovo	*on the merits always* *(art. 19 CC Act: quorum of 7 judges)*	*- 3-member review panels: filters referrals on formal grounds (art. 22 CC Act) – for refusal unanimity required*	*no*
Latvia	*as a rule* *- two 3-member panels on the admissibility of petitions → may also reject manifestly unfounded complaints* *(art. 20 CC Act)*	*no*	
Lithuania	*always*	*none*	*no*
Luxembourg	*always*	*none*	*no*
Macedonia	*always* *(art. 6 Rules of Proc: quorum of 6 judges)*	*none*	*no*
Montenegro	*always*	*none*	*no*

Poland	*- conflicts between central state organs* *- vesting the temporary performance of the duties of the President of the Republic of Poland in the Marshal of the Sejm* *- constitutionality of the purposes and/or activity of political parties* *- preventive review* *- cases of a particularly complicated nature* *(Art. 25(1) CC Act)*	*5-member panels:* *- constitutionality of statutes and international treaties* *- conformity of statutes to ratified international agreements whose ratification requires prior consent granted by statute* *3-member panels:* *- conformity of other normative acts to the Constitution, ratified international agreements and statutes* *- complaints in relation to the refusal to proceed with the application for the confirmation of the conformity of other normative acts to the Constitution, ratified international agreements and statutes as well as complaints concerning constitutional infringements* *- challenging of a judge* *(Art. 25(1) CC Act)*	*no*

Portugal	*a) preventive review (art. 59 CC Act)* *b) on order by the president, with the agreement of the Court:* *- if it is necessary to avoid a divergence in the case-law* *- because of the nature of the question to be judged* *(art. 79-A(1) CC Act)* *c) appeal from the panels by the complainant or the state attorney):* *if decision contradicts a precedent* *(art. 79-D(1) CC Act)* *d) removal from office and dismissal of the President of the Republic (art. 90(2) and 91(2) CC Act)* *e) general balloting of election (art. 100(4) CC Act)* *f) other minor competences (artt. 102-C(4), 103-A(3), 107(2), 112(2) CC Act)* *5-member panels: three panels, each one comprising the president or the vice-president* *- residual competence*	*preliminary and summary decisions (art. 78-A CC Act) ® can be appealed before the conference (composed of the president or the vice-president, the rapporteur judge and one other judge)*	
Romania	*always*	*Until 1997: 3-member panels decided references from ordinary judges*	*no*
Slovakia	*Art. 131(1) Const.*	*3-member panels: residual competence (art. 131(2) Const.)*	*no*

Slovenia	*- all cases on the merits* *- on the admissibility of const. complaints (art. 10 Rules of Proc) – by unanimity (art. 55C CC Act)*	*no*	*no*
Spain	*Art. 10(1) CC Act:* *- constitutionality of international treaties;* *- constitutional appeals against laws (→ may be deferred to the panels);* *- reserved questions of constitutionality;* *- conflicts of competence between the state and autonomous communities or between the autonomous communities;* *- actions by the Government against decisions of autonomous communities;* *- conflicts in defence of the local self-government* *- conflicts between the constitutional bodies of the state* *- annulments in defence of the Court's jurisdiction provided by art. 4(3)*	*Art. 7(1): two 6-member panels (Salas) appointed by the plenary session (Pleno)* *Art. 8(1): 3-member panels (Secciones) decide on admissibility and appeals of constitutional protection (amparo) deferred by the appropriate panel*	

2. The prominent figures of the decision-making process

2.1. The president of the Court

In those constitutional courts that embraced the publicity of internal disagreements, the traditional civil law principle of impersonality of judicial decisions is losing its strength. In these courts the personal views of the single judges are increasingly given consideration. Consequently, first I will examine the position of the judicial panel's most prominent members, their tasks and role in the decision-making process.

As regards the most prominent members of the judicial panel, constitutional courts differ considerably from the US Supreme Court. Even if, as previously indicated, these organs are comparable to each other, it is important to bear in mind certain differences. First, the US Supreme Court is at the top of the hierarchy of the country's entire court system, while a constitutional court co-exists with a supreme court and has special competences. Furthermore, the latter, technically, is not part of the hierarchy of a country's court system. Consequently, the president of a constitutional court is a relatively less important figure in the legal life of a country than the Chief Justice of the United States, even if she still presides over the court that reviews the constitutionality of legislation and decides other questions of constitutional importance. Moreover, she definitely plays a key role in the life of the court she presides. As we shall see in more detail further, the personality of the president of the court has had a great impact on the practice of opinion-writing, just as in the United States.

It is a well-known fact that the Chief Justice of the United States is appointed by the President with the advice and consent of the Senate, the upper house of the Congress.[34] The majority of the presidents of European constitutional courts, on the other hand, are chosen by the judges from among themselves. The former starts his career in the court as its chief, while the latter are first appointed as ordinary members of the court and become presidents later and for a limited term. This is true even when the president of the court is appointed not by the court itself but by the head of the state or by the Parliament. She is always chosen from among the sitting members of the court.

34 Art. II, Section 2 of the U.S. Constitution.

Table 2: Methods of appointment and term of office of the presidents of European constitutional courts

	Appointment by the Parliament	***Appointment by the Head of the State***	***Election by the members of the Constitutional Court***
Albania	*Art. 125(4), Const. and art. 7 CC Act:* *Appointed by the President of the Republic with the consent of the Assembly* *– for 3 years*		
Austria		*Art. 147(2) Const.: appointment by the Federal President on the recommendation of the Federal Government*	
Belgium		*Art. 33 CC Act: two presidents ® one of each language group, elected by the respective language group* *Art. 54 CC Act: Presidency of the Court assumed by each president for a one-year term on a rotating basis*	
Bulgaria			*Art. 147(4), Const.* *- by secret ballot* *- for 3 years, re-eligible* *Art. 7 CC Act* *- by simple majority*
Czech Republic		*Art. 62(e) Const.* *Art. 2 CC Act*	

Croatia			*Art. 125 Const.* *Art. 15 CC Act* *- by secret ballot* *- for 4 years* *- by absolute majority*
Germany	*Art. 9(1) CC Act:* *The Bundestag and the Bundesrat shall alternately elect the President and the Vice-President.*		
Hungary	*Since 2012:* *Art. 24(8) FL: the Parliament from among the members of the Court by two-thirds majority*		*Until 2011:* *Art. 4(2) CC Act* *- for 3 years* *- re-eligible*
Italy			*Art. 135(5) Const.* *- for 3 years* *- re-eligible* *Art. 7(1) Rules of Proc.* *- by secret ballot*
Kosovo			*Art. 114(5) Const.* *- for 3 years* *- by secret ballot*
Latvia			*Art. 12 CC Act* *- by secret ballot and absolute majority* *- for 3 years*
Lithuania	*Art. 103(2) Const.* *- by the Parliament (Seimas) upon submission by the President of the Republic* *- from among the sitting members of the Court*		

Macedonia			*Art. 109(3) Const.* *- for 3 years, not re-eligible* *Art. 7 Rules of Procedure* *- by two-thirds majority and secret voting*
Montenegro			*Art. 153(3) Const.* *- for 3 years*
Poland			*Art. 194(2) Const.* *- candidates proposed by the General Assembly of the Const. Court* *Art. 15 CC Act* *- candidates nominated by the General Assembly from among the judges of the Tribunal* *- by secret ballot*
Portugal			*Art. 222(4) Const.*
Romania			*Art. 142 (4) Const.* *- by secret ballot* *- for 3 years* *Art. 7 CC Act* *- by majority vote* *- re-eligible*

Serbia			*Art. 172(6) Const.* *- for 3 years* *- by secret ballot* *Art. 23(2) CC Act* *- by majority vote*
Slovakia		*Art. 135 Const.* *- from among the sitting members of the Court*	
Slovenia			*Art. 163(3) Const.* *- 3-year term* *Art. 10 CC Act* *- elected by secret ballot*
Spain		*Art. 160 Const.* *- appointment by the King from among the judges, on the recommendation of the plenum of the Court* *- for 3 years* *Art. 9 CC Act* *- by secret ballot* *- re-eligible only once*	

As regards the role of the president, the Bundesverfassungsgericht is again unique in the European panorama. The special internal structure of the German Court, divided in two permanent panels, seems to give the president less power compared to the Chief Justice of the United States and the presidents of East-Central European constitutional courts. The president of the Bundesverfassungsgericht only presides over one of the two Senates. The other Senate is presided by the vice-president of the Court.[35] Consequently, the possible influence of the Court's president is limited to only one of the panels. Moreover, since there are three *Kammern* composed of three judges within each Senate and the Senate has only eight members, one judge has to be part of two chambers. During the 2000s it was the president and the vice-president who assumed this task in their respective senate. On one hand, this practice increases their role as filters of constitutional complaints, a function performed by the chambers. On the other hand, however, it also increases their workload, so

35 See art. 9(1) and 15(1), BVerfGG. Out of eight presidents of the German Court's history (between 1951 and 2006) six presided over the First Senate and two the Second Senate. See Quint (n 19) 1856. Currently, the President is a member of the Second Senate (in the person of Andreas Vosskuhle, in office since March 2010).

they act as rapporteur judge in fewer cases. This second circumstance limits their influence on the overall Court's case-law.[36]

The Belgian model is also interesting. As indicated earlier, the Belgian Constitutional Court has a quite unique internal organization which reflects the dividedness of the country between French-speaking and Dutch-speaking citizens.[37] Both linguistic groups choose their own president. One of the two presidents represents the Court in its external relations on a rotary basis, but in the decision-making process they are on equal footing. They both sit in all cases, have a casting vote in the plenary session, and may submit a case to the plenary session.[38]

The casting vote (or presidential veto) is a good indicator of power of the court president. Its presence usually indicates a strong presidential role. In European constitutional courts we can find two different solutions in case of equality of votes: the casting vote of the president (for example in Austria,[39] Belgium, France, Hungary, Italy and Lithuania) or the challenged law cannot be declared unconstitutional (for example in Germany and Latvia). And sometimes there is no explicit rule for the circumstance of equality of votes (for example in Bulgaria, Poland and Romania). A court president may, however, play an important role even without the presidential veto. In the United States, the Chief Justice is, in theory, *primus inter partes* whose vote has the same value as that of the other eight members of the Court. However, in practice, he plays a very important role in the Court's life.[40] He is the Supreme Court's public face and voice, as he represents the body in public relations. Even more importantly, he has the power to assign cases to the single Justices. This means that he decides who will be the author of the opinion of the Court. This, in practice, allows him to influence the outcome of a case. It should be underlined that in the US Supreme Court the case is assigned to a Justice after the first voting only, and the Chief Justice is requested to choose among those Justices who were part of the majority (himself included, if that is the case). If he voted against the decision, however, he loses his right to assign the case. This exception has two important consequences. First, certain Chief Justices used their power to assign what they perceived to be pivotal cases to themselves.[41] Second, the Chief Justice may circumvent the rule by tactical voting. If he does not want to lose his power to assign the case, he can vote with the majority, even if he actually disagrees with it.

Also, most of the presidents of European constitutional courts have the power to choose the rapporteur judge, even if in practice they rarely have a complete discretion. There are different methods for appointing the rapporteur judge. In Belgian practice, cases are

36 See Quint (n 19) 1863.

37 See n 20.

38 See art. 56(2), 56(4) and 59 of the Belgian Constitutional Court Act.

39 The Austrian practice is peculiar. As a rule, the president, who sits in all cases, does not participate in the voting. He does so only if there is a tie of votes, and in this case his vote is decisive (see art. 31 of the Austrian Constitutional Court Act).

40 See Henry J. Abraham, *The Judicial Process* (7th ed., Oxford University Press 1998) 215.

41 This practice characterised the presidency of Chief Justices Taft and Hughes, but not that of Burger. See P.G. Fish, 'Office of the Chief Justice' in Kermit L. Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (2nd ed., Oxford University Press 2005) 162-165, 163.

assigned on the basis of a complex rota system established by law. In German practice this is done on the basis of the judges' expertise,[42] which is the case also in Austria, even if there it is not required by the law which provides for no rule on how this presidential power shall be exercised. The president of the Austrian Constitutional Court, however, cannot assign a case to himself, as she must choose among the so-called 'permanent reporters' elected by the plenum.[43] On the other hand, many European constitutional court presidents do have a casting vote and the power to assign cases.

In the Hungarian experience statistics showed a clear increase in the number of separate opinions from 1998, after the Court's first president, László Sólyom left the Court. According to a former member of the Hungarian Constitutional Court, President Sólyom, just like the famous Chief Justice Marshall of the U.S. Supreme Court, had set the goal of delivering mostly unanimous decisions and his efforts can be seen in the statistics.[44] After the appointment of János Németh as president, the number of separate opinions doubled. Despite his strong and dominant personality, President Sólyom never wanted to exercise his casting vote provided by the law (the so-called presidential veto).[45] András Holló, instead, during his short presidency, made use of it once. In that case, in which the Court had been requested by the head of state to interpret the constitutional provisions determining the powers of that office, the discussion came to a halt. The Court was composed of ten members at the time, and the judges split evenly over the decision.[46] President Holló supported the opinion of fellow judges with an expertise in public law and his vote decided the issue. In similar cases President Sólyom postponed the debate until a majority was achieved.[47]

2.2. The most prominent member of the decision-making panel: The rapporteur judge and the opinion-writer

A majority of the presidents of European constitutional courts enjoy, as the US Chief

42 See Kommers (n 15) 176-177. The Federal Constitutional Court Act provides that the panels decide at the beginning of every term upon the division of the proceedings and constitutional complaints among the rapporteurs (see art. 15a(2)).

43 See more below in Section 2.2.

44 Interview with Judge I (Budapest, Hungary, 27 April 2007).

45 See art. 30(3) of the old Constitutional Court Act. The new Constitutional Court Act has upheld the same solution (see art. 48(5)).

46 Decision no. 62/2003 (XII.15.) AB of 15 December 2003. This case was particular because eight judges out of ten expressed their separate opinion, three concurring in and five dissenting from the judgment. The concurring judges (Kiss, Czúcz and Kukorelli), however, just supplemented the majority's opinion and did not state alternative reasons for the decision. The five dissenters were Judges Bagi, Erdei, Harmathy, Strausz and Tersztyánszkyné.

During Németh's Presidency the problem never emerged. Interview with Judge M (Budapest, Hungary, 26 September 2007).

Justice, the power to assign cases.[48] This way, they choose the rapporteur judge.[49] Within these constitutional courts, in fact, the cases are assigned before any discussion, immediately after being considered admissible. Thus the office of the rapporteur judge is different from that of the US opinion-writer. The former is the 'master' of the case from the very beginning and during the whole procedure, while the latter assumes that role only after the first voting.[50] The author of the opinion of the U.S. Supreme Court is, therefore, not a central figure of the discussion of the case. All Justices participate in the discussion in the same way. The rapporteur judge, conversely, is vested with the task of presenting the case to the court. To this purpose, she collects materials and information, prepares a draft judgment before the voting, and keeps contacts with the petitioner.[51] Thus she also takes important procedural decisions.

Nonetheless, the difference between the two models might not be as significant as it seems at first sight. Mathilde Cohen, in her comparative analysis of the internal organizational cultures of French supreme courts, the US Supreme Court and the two European courts, demonstrated that both models may present institutional obstacles to deliberation.[52] She calls these two models *ex ante* and *ex post* deliberations. In the first, prevalent in the French and European courts, where a rapporteur judge is designated at an early stage of the proceedings, judges draft and deliberate the court's opinion *before* the case is orally argued and scheduled for the conference meeting. In the second model, typical of Anglo-American supreme courts, judges do most of the deliberative work *after* the case has been orally argued and a vote on the merits has taken place at the conference. According to Cohen, both models diverge from the deliberative ideal in at least three ways. First, decision-makers are not always on equal footing. Some court members are considered worthier than others, for example because they have a specific expertise, as rapporteur judges often do.[53] Second, collective face-to-face meetings are relatively rare events. The deliberative importance of the conference has been overstated, in both *ex ante* and *ex post* courts.[54] Third, docket pressure sometimes interferes

48 An exception is represented by the Constitutional Court of Kosovo, where the president appoints the rapporteur without choosing her. The rapporteur judges are assigned to a case by a system of random draw. See Rule 8 of the Rules of Procedure.

49 While this office takes on different names in the English translation of the various laws (for example, 'judge-informer' in the Macedonian Rules of Procedure or 'reporter' in the Austrian Constitutional Court Act), they all refer to the same function.

50 See W.P. McLauchlan, 'Assignment and Writing of Opinions' in Hall (n 41) 705-706.

51 András Holló, former judge of the Hungarian Constitutional Court, compares these tasks to the activity of a solo judge. See András Holló, *Az Alkotmánybíróság. Alkotmánybíráskodás Magyarországon* [The Constitutional Court. Constitutional justice in Hungary] (Útmutató Kiadó 1998) 54.

52 Cohen (n 8).

53 In this sense, courts are elitist not because judges are unelected, but because they constitute a professional environment revolving around expert knowledge. Cohen (n 8) 443.

54 In *ex ante* courts, the conference is an end point. By the time they get together, the judges have already pre-deliberated. In *ex post* courts, the conference is a starting point. Judges begin to deliberate in small groups afterwards. As Cohen explains, in both judicial cultures the conference remains a forum for decision-making, but not so much for deliberating. In ex ante courts, the conferences serves to confer a collective stamp of approval on an opinion prepared by a sub-group of the panel. In ex post courts, the conference serves to determine a majority in favour of a disposition and to assign the writing of opinions. See Cohen (n 8) 447.

with full-fledged deliberations. This is especially true for *ex ante* courts that typically have mandatory jurisdiction.[55]

In the *ex ante* courts, as indicated earlier, the rapporteur is chosen either by the president of the court or on the basis of a pre-established system, sometimes even randomly. In Belgian practice, for example, as mentioned earlier, the distribution of cases is not random but it is made according to a complex rota system provided by law. In Czech practice, on the other hand, cases are distributed randomly in order to avoid subjective choices and any speculation over the probable future opinion of the rapporteur judge.[56] The Slovenian Constitutional Court offers a third alternative: an administrative session prepares the Court's schedule twice a year.[57] In Austria, where the assignment of cases is a presidential prerogative, and the law does not provide for any criteria to be followed, in practice the rapporteur judge is chosen considering the specific experience and expertise of the judges and ensuring a fair distribution of the workload.[58] As a rule, cases can be assigned only to judges who assume also the office of 'permanent reporter', and only in exceptional cases may the president choose another member of the court.[59] Permanent reporters are elected by the members of the courts from among themselves for a three-year period. Today, actually, 11 of the 12 judges and the vice-president act as permanent reporters. Re-election is allowed and, in fact, a common practice.[60] Also in Germany rapporteurs are chosen on the basis of the experience and expertise and, like in Austria, it has not been imposed by the legislator, but established by practice.[61]

In continental European court practice the author of the opinion of the court is usually, although not always, the rapporteur judge. If the latter remains in the minority, she is allowed to refuse to write the judgment and or the task may be passed to a judge of the majority.[62] In such a case the draft already written by the rapporteur, originally meant to be the opinion of the court, may then become a dissenting opinion.[63] In most cases, however, the rapporteur

55 Cohen (n 8) 449-452.

56 I thank Mark Gillis, advisor of the Czech Constitutional Court on comparative and European law matters, for this information. In Czech terminology the rapporteur judge is called *soudce zpravodaj*. See also art. 40 of the Czech Constitutional Court Act.

57 See art. 11 of the Slovenian Constitutional Court's Rules of Procedure.

58 See art. 16 of the Austrian Constitutional Court Act and the official website of the Court at <https://www.vfgh.gv.at/ cms/vfgh-site/english/organization1.html> accessed 26 September 2016.

59 However, the law does not provide for any definition of 'exceptional case'. See art. 16 of the Austrian Constitutional Court Act.

60 See the official website of the Court at <https://www.vfgh.gv.at/cms/vfgh-site/english/organization1.html> accessed 26 September 2016. Permanent reporters earn almost double their fellow judges (see art. 4(1) of the Constitutional Court Act).

61 Art. 15a(2) of the German Federal Constitutional Court Act simply states that prior to the beginning of a business year the panel shall decide, for the duration of that year, upon the division of proceedings and constitutional complaints among the rapporteurs.

62 In Portugal, for example, the Constitutional Court Act provides clearly that if the solution proposed by the rapporteur is not accepted, the judgment is drawn up by another judge (see art. 59(3)). In Italy, instead, the rule is that the rapporteur writes for the majority even if she is not part of it. She passes the task to a fellow judge only in exceptional cases.

63 This happened, for example, to Judge Erdei of the Hungarian Constitutional Court in case no.

judge does not remain in the minority. The reason may lay in the fact that the president usually chooses the rapporteur judge according the judges' area of specialisation, so the rapporteur is an expert on the issue. And the pressure of time often prompts judges to defer to the rapporteur's opinion.[64] In these circumstances the other members of the panel are less likely to conduct their own research.[65] So, in most cases the rapporteur's opinion becomes the opinion of the court, and she is also the author of judgment. The primary importance of the rapporteur's opinion is also recognized by the legislator when, as it happens in Italy, it provides that the rapporteur judge shall cast her vote first, before all other judges.[66]

The system of assigning the cases to a rapporteur may be one of the reasons behind the low dissent rate in constitutional courts. First, as indicated above, the rapporteur is often a specialist of the issue at hand in the case, and as such her opinion has a greater weight in the eyes of the other judges. Second, the rapporteur holds a near monopoly over knowledge of facts and other materials concerning the case, including the competing arguments, so the other judges may be left at an informational disadvantage which discourages them from writing separately.

Special reference also needs to be made to the publicity or confidentiality of the rapporteur's identity. Does the public know the name of the judge who handled the case as rapporteur and/or wrote the judgment? The role of rapporteur judge exists in all European constitutional courts, including the French Constitutional Council.[67] In France, however, her identity is not revealed. This practice is not surprising. In the French context judgments have always been considered impersonal decisions of the court. What may be surprising is

43/2004 (XI.17.) AB of 15 November 2004. Even though Judge Erdei did not succeed in convincing his peers (apart from Judge Kukorelli who joined his dissent), his argumentation persuaded the legislator who followed his opinion and modified the Code of Criminal Procedure. Interview with a former law clerk (Budapest, Hungary, 26 September 2007). Interestingly, however, the explanatory memorandum attached to the bill does not make reference to the dissenting opinion but to the opinion of the court. (See the explanation attached to art. 83 of Act no. 51 of 2006 modifying Act no. 19 of 1998 on criminal procedure.) Another example is case no. 48/1998 (X.2.) AB of 29 September 1998, in which the original rapporteur was President Sólyom, who remained in minority with his position which he explained in a dissenting opinion (joined by two other judges). The majority opinion was authored by Judge Holló, who is indicated a rapporteur of the case in the judgment. Judge Holló also wrote a separate concurring opinion in order to explain his disagreement with the dissenters. The change of rapporteur in this case is revealed by Gábor Halmai, in 'Az aktivizmus vége? A Sólyom-bíróság kilenc éve' [The end of activism? Nine years of the Sólyom Court] (1999) 2 Fundamentum 5.

64 See Kommers and Miller (n 16) 205 and Cohen (n 8) 445.

65 See also Amos Tversky and Daniel Kahneman, 'The Framing of Decisions and the Psychology of Choice' (1981) 211 Science 453.

66 See art. 17(3) of the Supplementary Rules (*Norme integrative*) for the Procedure before the Constitutional Court of 7 October 2008 (SR[2008]). Alternatively, or in addition, the law may provide for voting in order of seniority. This is the case for example in Austria, where seniority means age (see art. 30(3) of the Austrian CC Act) and in Italy, where seniority is based on the length of service (see art. 17(3) of the Italian SR[2008]).

67 The President of the Conseil designates the rapporteur judge in each case. He takes into consideration the judges' expertise and distributes the work fairly among all the members. See Paolo Passaglia, 'La giustizia costituzionale in Francia' in Jorg Luther et al. (eds), *Esperienze di giustizia costituzionale*, vol 1 (Giappichelli 2000) 199. Since this office is absent in common law jurisdictions, and no good English translation has been provided yet, the French term 'rapporteur' is usually used also in English legal discourse.

that not even the German Federal Constitutional Court's decisions reveal the identity of the rapporteur judge (*Berichterstatter*).[68] Among the constitutional courts of second generation the Italian *Corte costituzionale* is the only one that opted to make it public when it was established. However, the practice changed in 1987, when the Court amended the Rules of Procedure.[69] Since then, judgments are no longer drafted and signed by the rapporteur, but by the opinion-writer,[70] a change that made it clear that the two figures do not necessarily coincide within the decision-making process. If we look at constitutional courts of third generation, the Portuguese court reveals the rapporteur's identity, while the Spanish *Tribunal constitucional* does not. Therefore, there seems to be no correlation between the publicity of the rapporteur's identity and the publicity of judicial dissent.

Almost all East-Central European constitutional courts include the name of the rapporteur judge in their judgments. This practice largely contributes to present the decisions as personal to the public. An exception is represented by the Lithuanian and Romanian constitutional courts, which chose the French way and do not reveal the identity of the rapporteur. It is also worth mentioning that in Hungarian legal history the publicity of the rapporteur judge is not unprecedented. Before the rise of socialism, it had been common practice to specify the name of the rapporteur in the judgments of the *Kúria*, the ordinary Supreme Court.[71] Today the Hungarian Supreme Court (called *Kúria* again after the 2012 constitutional reform) makes public the name of the rapporteur only in its uniformity decisions.[72] Despite this historical precedent, and similarly to the German Federal Constitutional Court, the Hungarian Constitutional Court in the first year did not reveal the identity of the rapporteur judge. A practice that changed, however, in 1991[73]. The fact that, in the beginning, the Hungarian Constitutional Court showed a greater collegiality, and that there has been a gradual shift towards individualisation of decision-making, is also demonstrated by the first collective separate opinions. In the first two years there was no case of simple joining. If a judge decided to join the separate opinion of a colleague, she was indicated as co-author. Among the separate opinions from that period, we can find several ones co-authored by three of four judges[74].

68 See Kommers and Miller (n 16) 205.

69 See art. 18(5) of the Rules of Procedure, Decision of 16 March 1956 of the Italian Constitutional Court (in Gazzetta Ufficiale, 24 March 1956, no. 71, special edition), modified by the Decision of 7 July 1987 (in *Gazz. Uff.*, 9 July 1987, no. 158). The rule has been upheld by the new Rules of Procedure as well (see art. 17(6), Decision of 7 October 2008 of the Italian Constitutional Court, in Gazz. Uff., 7 November 2008, no. 261).

70 See more in Alessandro Pizzorusso, 'Dal 'relatore' al 'redattore' delle sentenze della Corte costituzionale' (1988) Il Foro italiano, I, c. 2-3.

71 Interview with Judge G (Budapest, Hungary, 19 October 2007).

72 'Uniformity decisions' are adopted by the supreme court to ensure the uniform application of the law, on iniative by the court's presidents, the president of one of its panels, the president of a court of appeal, or the prosecutor general. Art. 32-33 of Act No. CLXI of 2011 on the organisation and administration of courts.

73 This fact was explained to me by Judge M who also added that at the same time the Court abandoned the practice of specifying the name of the petitioner(s) in the published judgments. Interview with Judge M (Budapest, Hungary, 9 November 2006).

74 See, for example, Decision no. 48/1991 (IX.26.) AB of 23 November 1991, in which there is a dissenting opinion co-authored by three judges, a concurring opinion co-authored by four judges and another

2.3. Non-judicial offices: law clerks and the Secretary General

As explained in the previous section, the president assigns the case to a rapporteur judge who is usually, but not necessarily, the author of the judgment. The final decision is taken by the judicial panel whose members vote after a long and thorough discussion of the case. Sometimes it may take several meetings to reach an agreement and drafts are circulated among judges. Judges, however, do not work alone, in isolation: in their work, they are supported by collaborators, or law clerks,[75] who play a very important role in the decision-making and give their personal contribution to the development of the court's case-law. Thus, if we want to thoroughly understand a constitutional court's decision-making process, the role of law clerks cannot be ignored.

The very existence of law clerks shows the influence of the American model in Europe. All European constitutional courts employ lawyers who assist judges as clerks, even if their denomination and number varies from court to court.[76] Their main task is to research legal questions under the court's supervision and to prepare draft judgments. Law clerks not only write a report for each case, but they also analyse precedents, study foreign solutions to similar questions, present the leading legal doctrine and other opinions. In a few constitutional courts they also play an important role in filtering the petitions. Each judge has his or her own team including a few clerks, usually three or four. A law clerk, therefore, works for a given judge, not for the court in general.

Besides clerks, another non-judicial office supports the work of constitutional judges: the secretary general of the court. He is the head of a special department: the Secretariat.[77]

concurring opinion co-authored by two judges. The first case in which a judge simply declared the intention to join at the bottom of the separate opinion of a colleague dates back to November 1991 (Judge Schmidt joining the dissenting opinion of Judge Kilényi in Decision no. 57/1991 (XI.8.) AB of 5 November 1991). Interestingly, the second time this happened, one and a half year later, Judge Kilényi chose to join Judge Schmidt's dissent (Decision no. 5/1993 (II.12.) AB of 8 February 1993), and the opinion is not written in first-person plural, as they would have co-authored it.

75 'Law clerk' is the American term which I chose to use consistently throughout the book also for European constitutional courts in order to facilitate reading and understanding. We are talking about the same figure, even if they may be called with different names in the English translation of the various European constitutional court acts.

76 In Germany, each federal constitutional judge is entitled to four clerks, called 'scientific collaborators' (*wissenschaftliche Mitarbeiter*), of his or her own choosing. German clerks are already experienced lawyers (judges, civil servants, professors) and usually serve for two or three years. See Kommers and Miller (n 16) 203 and 206. Similarly in Italy, where law clerks (three working for each judge) are usually experienced legal scholars or judges themselves. In Slovenia 34 law clerks work at the Constitutional Court. In Poland each constitutional judges has two *asystent*s. At the Czech Constitutional Court every judge collaborates with three *asistent*s employed full-time, as at the Slovak Constitutional Court where they are called *súdny poradca* (judicial advisor). At the Hungarian Constitutional Court, since 2000, there are three *tanácsadó*s (advisors) working for each judge. Until 2006 one of them had the title of 'personal secretary' (*személyi titkár*) and was chosen among the best recent law graduates by the judge herself/himself. This office could be considered analogous to that of the American law clerk.

77 For the functions of the Secretariat see, for example, art. 25-26 of the Rules of Procedure of the

Neither of these can be found within the U.S. Supreme Court. The secretary general of the constitutional court assists the president in the assignment of cases and often acts as a first filter of petitions. The rapporteur judge may be designated either before or after the decision on admissibility. Each constitutional court has its own specific method of filtering petitions. At the Czech Constitutional Court, for example, judges may delegate to their clerks the task of rejecting defective petitions and to give notice of it to the petitioner. In this case the clerk also sets a deadline by which the petition may be cured.[78] German law clerks also play an important role in filtering constitutional complaints. Their allegedly substantial influence on the Court's decisions has been subject to serious criticism. Some commentators affirmed that they actually form a secret third chamber (*Dritter Senat*) within the German Federal Constitutional Court.[79] The Hungarian Constitutional Court's method is different. There are four lawyers working at the Secretariat who filter the petitions before they are assigned to a rapporteur judge. Only 60% of the petitions pass this first filter and reach a judge at all.

The German and Czech solutions are closer to the decision-making process of the US Supreme Court, where clerks play an important role in the selection of 'certworthy' cases.[80] They analyse petitions and prepare the so-called pool memos which summarise the case and recommend a certain decision. In German and Czech constitutional justice, however, there is no writ of certiorari, and the Court is mandated to adjudicate all petitions deemed admissible. Only those petitions that are deemed defective or manifestly unfounded are rejected. This means that neither law clerks nor judges have any discretionary power in selecting cases. The Court has to decide all petitions which fulfill the legal requirements. Even so, also law clerks review all cases, especially those in which the judge they work for is not the rapporteur,[81] and they recommend a certain outcome.

The tasks performed by a clerk and her/his influence on the court's decisions may differ considerably even within the same court. It lies within the discretionary power of the judge to decide how to distribute tasks within her/his team and to what extent make use of her/his clerks' assistance. At the Hungarian Constitutional Court, for instance, Judge Attila Harmathy was known for writing most of the opinions alone (irrespective of whether he wrote for the majority or just for himself) and never left any draft prepared by a clerk unchanged.[82] Generally speaking, judges involve their clerks in the preparation of judgments

Hungarian Constitutional Court.

78 Art. 41 of the Constitutional Court Act. Czech constitutional judges may also delegate other procedural tasks to their clerks, such as preparing the matter for consideration on the merits by the plenum or the panel.

79 See, for example, Friedrich Karl Fromme, 'Die Mitarbeiter der Verfassungsrichter sind nich mehr en Korps wie enst' *Frankfurter Allgemeine Zeitung* (24 August 1995), cited in Adele Anzon, 'Gli assistenti di studio dei giudici costituzionali' in Pasquale Costanzo (ed), *L'organizzazione e il funzionamento della Corte costituzionale*, vol 1 (Giappichelli 1996) 215, 225.

80 By a 'certworthy' case the American legal jargon means a case worthy of being granted a writ of certiorari, i.e. of being admitted to the court.

81 The same is true for the Hungarian Constitutional Court. In general, with a few exceptions, the cases are not distributed among all clerks of the judge, but they are assigned to one clerk according to their expertise.

82 Interview with a former law clerk (Budapest, Hungary, 26 September 2007). According to her, Judge Harmathy was the last one to write all opinions on his own.

rather than in that of separate opinions. Indeed, separate opinions usually have a more personal tone and character. The judge speaks for herself/himself and not for the court, and therefore she is less willing to delegate this task. In the United States, legal commentators have observed that the increasing involvement of law clerks in the preparation of judgments in the last decades has largely contributed to the proliferation of separate opinions and to a perceived worsening quality of the judgments.[83] As regards East-Central European constitutional courts, sufficient information on a sufficiently long period of time are still unavailable and therefore it is not possible to make any similar claim. However, what can be observed is that at the Hungarian Constitutional Court it has become a common practice under the Presidency of János Németh[84] to delegate the task of preparing draft judgments to clerks. This indicates that the period of increased involvement of law clerks in the preparation of judgments also coincides with a raise in the number of separate opinions. However, if we consider that Judge Harmathy himself - a judge who notoriously made a more limited use of his clerks' assistance than his colleagues - is considered one of the Great Dissenters of the Hungarian Constitutional Court, the aforementioned possible correlation is called into question. Thus, it could be argued that a larger involvement of clerks in the preparation of judgments does not necessarily entail an increase in the number of separate opinions. During Mihály Bihari's presidency, at the beginning of 2006, the practice was consolidated in a new unwritten rule, according to which the draft judgment had to be signed with the initials of its author, i.e. of the clerk who prepared it.[85]

In the formerly socialist countries, in the first period, most of the law clerks had a consolidated background of academic excellence in legal science. Péter Paczolay's career at the Hungarian Constitutional Court is noteworthy and illustrates well this point. He was a clerk of the first president, László Sólyom, and later became the Court's secretary general, then a member and the president of the Court.[86] Only after some time, space was given also to fresh graduates, as in the United States.[87] The reason probably lies in the fact that it took a decade for the courts to develop their own case-law, after which they did not have a compelling need for the advice of authoritative scholars anymore. Moreover, a general increase in the number of clerks, which may also explain the changing composition.[88] Unlike

83 See Artemus Ward and David L. Weiden, *Sorcerers' Apprentices. 100 Years of Law Clerks at the United States Supreme Court* (New York University Press 2006) 231.

84 János Németh, appointed to the Constitutional Court in June 1997, was the second president of the Hungarian Constitutional Court, from November 1998 to August 2003, when he reached the compulsory retirement age of 70 years.

85 Interview with a former law clerk (Budapest, Hungary, 26 September 2007).

86 Péter Paczolay sat on the Court from 2006 to 2015 and was its president from July 2008 until the end of his term.

87 In the Czech Republic, for example, in 1993, at the moment of the establishment of the Constitutional Court, the majority of the clerks had come from the Law Faculty of Masaryk University located in the same city as the Court (Brno). I thank Mark Gillis, advisor of the Czech Constitutional Court in comparative and European law, for this information.

88 In the Czech Republic the need for law clerks increased even more because in 1999-2000 also the Supreme Court introduced this position, previously unknown at that Court. Today, all 50 Supreme Court judges have a clerk. This rule was later extended also to the Supreme Administrative Court upon its establishment in 2003. Finally, the ombudsman has its seat in Brno too, a circumstance that further limits the number of availa-

their American counterparts, East-Central European law clerks are not employed only for one year, but, conversely, they work for the same judge for several years, usually for her whole term of office. Actually, it is not uncommon for them to remain at the court even after the retirement of the judge who originally employed them, so that they can continue to work in the team of another judge.[89] It is therefore possible to make a lifetime career as a clerk at the constitutional court, even if many work also in the academia at the same time. This circumstance has an impact on the practice of opinion-writing as well. European constitutional judges are more prone to delegate opinion-writing to their clerks than their American colleagues, as law clerks are more experienced than a fresh graduate. It is especially true when a newly appointed constitutional judge 'inherits' a law clerk from a retired judge. In this case, at least in the first period, the law clerk has more experience in preparing constitutional court judgments and separate opinions than the judge herself.[90]

ble lawyers for the office of law clerk.

89 See Béla Pokol, 'Az alkotmánybíráskodás szociológiai megfigyelése' [Sociological observation of constitutional justice] (2014) 3 Alkotmánybírósági Szemle 158, 181.

90 See Pokol (n 87) 181.