Writing Separate Opinions: Acclimation Effects at the German Federal Constitutional Court

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1 Introduction

Courts as political actors are a prominent topic in political science research. However, whereas especially in the United States there is a wide array of literature on highest courts, in Europe and particularly in Germany the field of judicial politics is understudied but nascent. Despite being a crucial actor in the political system of the Federal Republic of Germany there is only little known about the role of the Federal Constitutional Court. From a social science perspective, this is due to a twofold problem. First, until now, it has been almost exclusively legal scholars who engaged in research on the Court. They, however, approach such questions from a different angle. Second, there is a lack of data. Recently more scholars have engaged in investigating the Court’s role in the political system trying to open this black box. This paper makes use of data collected for a newly developing database and can therefore give first empirical insides.

In Germany, we know only little about what happens when the judges are discussing a case and deciding on it. The deliberations are confidential, the judges are not allowed to give any information to the public.

Thus, we can only observe the final outcome. This can entail different information about the judges’ behavior. What we know for sure is the final result - was the plaintiff successful or not - and the rationale behind it. Both are set forth in the written decision. In some cases, the judges reveal the voting result, regularly not indicating, however, who was in the majority and in the minority. The most individualized information a decision can provide is a separate opinion since it has to contain the name of its author. In the heading it has to say “Dissenting Opinion of Judge X.”¹ If we want to understand the decision making processes inside the court it is indispensable to analyze this only information we can observe with certainty.

Subjects of interest in this paper are, therefore, these separate opinions. Those are addenda in which judges express their different standpoint on certain legal question or

¹"Abweichende Meinung des Richters X," translation by the author. See BVerfGE 126, 286.
on the entire ruling. In Germany, we observe them rather rarely. The following analysis wants to shed light on the question of why and under which conditions they occur. An idea repeatedly found in the literature focuses on the judges’ time in office. It suggests that judges undergo a period of adjustment after having taken office. During this process they are expected to be less inclined to deviate from the majority opinion than judges who have been serving for a longer time. Core of the paper is testing the assumption that the likelihood of a judge to write a separate opinion increases during his time in office.

In doing so the paper aims not only to contribute to understanding the occurrence of separate opinions as such. It also wants to foster gaining insights into what we call “the court” when we are looking at it as one single actor. Learning about the individuals this collective actor consists of should be conducive to understanding the Court in general.

Contrary to the findings in the literature so far, this paper cannot corroborate such an acclimation effect for judges at the Federal Constitutional Court. The results rather show that the period of time a judge has been at the Court does not matter as to his propensity to deliver separate opinions. Another main finding suggests that at the Federal Constitutional Court institutional features play a larger role than individual ones. Whereas the profession of the single judge does not seem to influence the behavior with regard to separate opinions, the type of proceeding as well as the panel of judges that renders the decision affects the judges’ likelihood to write concurrences or dissents.

The paper is structured in the following way. First, the separate opinion and the respective procedural rules are introduced. The second section presents the key idea of this paper, i.e. the acclimation effect succeeded by research hypotheses. Subsequently, data and methods are presented, and the hypotheses are tested. The final sections provide the results, offer a conclusion, and give an outlook.
1.1 The Separate Opinion

Separate opinions are a rarely occurring phenomenon in the German judiciary. Only the Federal Constitutional Court employs them. Figure 1 illustrates this, displaying the percentage of decisions with separate opinions per year in each senate.

Figure 1: Share of Decisions with Separate Opinions per Year

Given that separate opinions do not have a direct influence, why would judges make the effort to write additional comments? It is the impact even a minority opinion entails. Segal and Spaeth (1993, 261) explain the judges’ motivation as follows:

“Although the opinion of the Court is controlling and authoritative, the nonmajority opinions that the justices write - concurrences and dissents - are by no means exercises in futility. Concurring opinions punctuate overstated or understated aspects of the Court’s opinion, indicate its scope insofar as the concurring justice is concerned, address related matters, and exhibit the extent to which the members of the majority coalition are in agreement.”
Dissenting opinions [...] provide the rationale whereby the majority’s opinion may be undermined and/or eventually qualified or overruled.”

The incentive Segal and Spaeth depict is convincing and explains possible motivations for the judges. But it also leads to the question under which conditions judges actually render a separate opinion. Why do they sometimes write a concurrence or a dissent while in another decision they refrain from it? Scrutinizing this in depth requires looking at the procedural rules. It was not until 1971 that the possibility to deliver an extra opinion publicly was introduced. Hitherto, the judges could formulate their own standpoint, present it to their colleagues, and then add it to the case file. Those files, however, were - and still are - confidential and therefore inaccessible for the public. After a period of controversial discussions the legislator decided to grant the judges the opportunity to publicly express their individual stances on the ruling and changed the Federal Constitutional Court Act (BVerfGG). Accordingly, the judges adapted the standing orders (BVerfGGO).

The procedure is as follows: During the deliberations a judge may come to the conclusion that he is likely to be of different opinion than the majority. If he considers writing a separate opinion he has to indicate it (see §56 BVerfGGO). This gives the judges in the senate time to discuss the topic again and to find a compromise. Or the standpoints remain as they are, and the respective judge eventually publishes a dissent or a concurrence.

2 The Acclimation Effect

But when and why do judges decide to render a separate opinion? A broad literature suggests personal characteristics and socialization to play a crucial role in judicial decision making. Such personal attributes have been subject to examination as to the likelihood of formulating a separate opinion (Smyth, 2005; Canon and Jaros, 1970; Schmidhauser,
Ulmer (1970) argues that judges have undergone certain patterns of socialization that affect their attitude towards specific issues. Research on political orientation and ideology shaping decisions of judges in general corroborates this argument (e.g. Schubert, 1965; Gibson, 1978; Martin and Quinn, 2002; Brace and Hall, 1997; Segal and Cover, 1989; Segal and Spaeth, 2002). Further studies demonstrate that behavior assumed to stem from those factors changes over time (Ulmer, 1970) due to an “initial acclimation period that may result in behavior that is particular to new justices” (Wood et al., 1998, 690). This holds also true for other political actors. They have been found to change their behavior in office over time as well. Especially studies on legislators show that time is a factor in terms of changing behavior (Elling, 1982; Stratmann, 2000). Research on this so called acclimation or freshman effect can therefore be summarized by the question “do newly appointed justices undergo a process of acclimation upon the ascent to the Court, where they must educate themselves of appropriate institutional norms and behavioral expectations?” (Hurwitz and Stefko, 2004, 121).

The main goal of this paper is to investigate if such an acclimation effect exists at the German Federal Constitutional Court with regards to separate opinions. Does the time a judge has been a member of the Constitutional Court have an effect on his behavior in terms of writing dissents an concurrences? While, as shown above, there is a broad literature on this topic in the American context, no studies on acclimation effects in general or with respect to separate opinions exist for the German case. This paper aims at providing first insights into the role a judge’s length in office plays at the German Federal Constitutional Court.
3 Hypotheses

3.1 Acclimation

Preceding the actual analysis of a freshman effect is the question why judges new to the bench would refrain from writing separate opinions. The literature provides several arguments for such behavior. That judges at the beginning of their term need to adjust to the new environment is the general rationale behind it. They have to adapt their way of working to the new circumstances: First, not all of the Constitutional Court judges have been serving at a court before. For professors or politicians deciding on an actual law case is a new task. Also the organization of the own working procedures and the staff require resources, which leads scholars to assume that “new justices are apparently less efficient and less able to devote time to drafting dissenting and concurring opinions” (Hettinger et al., 2003, 796).

Moreover, new judges are unfamiliar with the informal rules at the Court, so they will be reluctant when it comes to objecting more senior judges. Otherwise they are running the risk of being isolated at the court, which could eventually result in a lack of influence. Similarly, research on the German Federal Constitutional Court has shown that there is a certain norm of consensus (Kranenpohl, 2010). Defying such a rule and even making the disagreement public by writing a separate opinion could weaken a freshman judge’s position in the senate. New judges are therefore expected to be cautious regarding separate opinions.

Based on these arguments, the central hypothesis of this paper focuses on the effect of time in office on separate opinions.

*Hypothesis 1:* Freshman judges are less likely to write a separate opinion than more senior judges.
After having introduced the main hypothesis of this paper, the following other ones are added in order to control for specifics that influence a judge’s decision to write a separate opinion.

3.2 Profession

The Federal Constitutional Court Act requires at least three judges per senate to be former judges at one of the five highest federal courts. One can also find FCC judges who served on other courts before. The majority of other judges, however, are law professors. Thus, the judges have different professional experiences, which is expected to influence their behavior (Ashenfelter et al., 1995; Schmidhauser, 1962). Having worked as a judge earlier in their career implies prior experience in decision writing. Constitutional Court judges who did not work in the judiciary before are not used to rendering judgments. Approaching legal questions from a judge’s perspective should therefore be a larger effort for the latter ones. This should hold true for every kind of opinion, be it the one of the majority, a dissent, or a concurrence. From this it follows that FCC judges who did not serve in the judiciary before should be less likely to engage in formulating a standpoint differing from the main opinion. The respective hypothesis is therefore the following.

**Hypothesis 2:** Judges without prior experience as a judge are less likely to write separate opinions than judges who have served in the judiciary before.

3.3 Senate

The Court is divided into two senates. The topics they are concerned with have distinct focuses. Whereas the First Senate is responsible for the Basic Rights (Grundrechte) e.g. freedom of faith and conscience, freedom of opinion, or freedom of assembly, the Second Senate’s emphasis lies on the law on the organization of the polity (Staatsorganisation-srecht). It is defined as “the creation, organization and authority of the highest federal
agencies” (Ipsen, 2004, 7).

Therefore, cases in the Second Senate are mainly clustered around questions of legislative power. This leads to the situation that the judges in the Second Senate face two questions: First, they have to evaluate the content of the law under scrutiny, and second they have to examine whether the passage of the bill met the procedural requirements of the Basic Law. This is due to the nature of reviewing norms in the area of polity organization. The competence to pass a law is determined by its content. Since such content is always ambiguous to some extent it leaves room for interpretation. Only after having clearly defined the respective law’s subject matter the judges can turn to applying the rules of legislative power. Those provisions are, again, subject to interpretation. As a consequence, the judges have two chances to be of different opinion than the majority: As to the content and as to the procedure of how the bill was passed. Having the opportunity to deviate more often should lead to an increase in separate opinions. The third hypothesis, therefore, refers to the senate.

Hypothesis 3: Judges in the Second Senate are more likely to write separate opinions than those in the First Senate.

3.4 Type of Proceeding

The type of proceeding is another factor to be controlled for. In this paper the proceedings are categorized as “political” and “nonpolitical” ones. This is due to the differing types of petitioners. While (under certain conditions) everyone can file a constitutional complaint, and lower courts can refer a law for review to the Constitutional Court, it is only political players who can initiate other forms of procedures. The government, the Bundestag, the Bundesrat, certain members of a parliament, and other political players are eligible for bringing a case to the Court. Therefore, those other cases, mainly abstract

\(^2\)"Kreation, Organisation und Zuständigkeit der obersten Staatsorgane", translation by the author.
judicial reviews and constitutional disputes between federal agencies (*Organstreitverfahren*) are more politicized than others. If judges want to have an impact on policies, it is more efficient for them to put more emphasis on those political proceedings than on nonpolitical ones. Being more politicized also entails more visibility in public. Whereas actions of a private person or lower courts are rarely subject to public interest, prominent actors such as those in the political arena attract more attention. Judges can exercise their influence only when the arguments they pose are heard by a broader audience. Therefore, Collins (2008, 160) states: “Inasmuch as a Justice might be concerned with the public’s impression of a case (or lack thereof), the public import of a case might contribute to a Justice’s decision to write or join a separate opinion.” Hence, in more visible cases judges should be more inclined to state their different opinion (Wahlbeck et al., 1999). In addition, given the large number of cases the Court has to cope with, a judge will take the effort of writing a separate opinion only if he has a strong standpoint on a topic. Most likely, those will be politically and socially relevant questions since only those trigger strong preferences. The different types of proceedings account for all of these aspects: Visibility, degree of politicization, and possible personal preferences. Thus, we can derive the following hypothesis.

**Hypothesis 4**: Judges are less likely to write separate opinions in constitutional complaints and concrete judicial reviews than in other types of proceedings.

### 4 Data and Method

A newly developing data base of decisions of the German Federal Constitutional Court provides the data for the analysis. The data used in this paper cover a time span of thirty-eight years from 1972 to 2010. Since unit of analysis is the individual judge it consists of information on all decisions a judge participated in. This adds up to 15023 observations.
The dependent variable Separate Opinion indicates for each case whether an individual judge authored a separate opinion. For now, concurring and dissenting opinions are treated equally. They both show disagreement with the decision. In the eye of the author, the main opinion is either missing certain points, or it is contrary to his understanding of the legal situation. Both scenarios, however, are a result of a judge being dissatisfied with the ruling. Also, the data do not differentiate between single and joint opinions. Rendering a separate opinion on one’s own and being co-author both is therefore treated equally. The only aspect that could be affected by the difference between single and joint opinions is workload. One could argue that it is less time consuming to share the task of writing than to do it on one’s own. However, regardless of whether one, two, or three judges author one separate opinion, it involves a considerable amount of work. Even if it happens to be less writing as such for each of the judges, a jointly written document requires consultations among the authors in order to make consistent and convincing points. This should counterbalance the reduction of actual writing. It also justifies treating jointly written separate opinions on the one hand and single authored ones on the other hand equally. For the future, however, it is desirable to create distinct categories for single and jointly written opinions.

Time in Office serves as key independent variable. Investigating whether something like an acclimation or freshmen effect exists at the Constitutional Court requires information on how long a judge has been in office at the time of a decisions. In this paper we define as freshman someone who is holding his office for one year or less. There are different concepts of “being new to the Court”. But given that judges at the Federal Constitutional Court have a maximum of twelve years in office, that they quite often employ experienced lower-court judges as clerks, and that they engage in extensive and in-depth discussions during their deliberations on a case it seems reasonable to operationalize a period of adjustment as one year. Therefore, Time in Office is a dichotomous variable that indicates whether a judge has been in office for less than 365 days. If a
judge has served a second term at the Court - which was possible in the Court’s early
days - the date of taking office for the first time serves as the basis for the calculation.

As elaborated on above, the politicization of a case is expected to play a crucial role
for the judges’ motivation to formulate a dissent or a concurrence. In this paper it is
operationalized as Type of Proceeding. The proceedings at the Federal Constitutional
Court can be divided into political and non-political proceedings. Those that are initi-
ated by political actors are defined as “political”, the others fall into the “non-political”
category. The former category consists of the following proceedings: abstract judicial
review (Abstrakte Normenkontrolle), constitutional disputes between federal agencies
(Organsstreitverfahren), disputes between federal government and the Länder (Bund-
Länder-Streit), scrutiny of election (Wahlprüfungsverfahren), general public law disputes
(Öffentlichrechtliche Streitigkeiten), and forfeiture of basic rights (Verwirkung von Grund-
drechten).

Further independent variables used in the model are Senate and Profession. As men-
tioned above, the Court consists of two Senates, both of which with at least three judges
on the bench. The variable Senate indicates whether the First or the Second Senate
rendered the decision.

Since gaining practice in the judiciary prior to entering the Constitutional Court is
expected to have a positive effect on a judge’s likelihood to write a separate opinion (see
Hypothesis 2) the variable Profession indicates if a judge has previous experience in the
judiciary and is also added to the model.

Due to the binary nature of the dependent variable Separate Opinion the paper em-

dploys a logistic regression model. As raw coefficients from a logistic regression are difficult
and only little intuitive to interpret the results are presented as predicted probabilities.
The estimates of the regression are reported in the appendix. Quantities of interest
for all independent variables are obtained through simulation with 1000 runs. For each
variable Figure 2 visualizes first differences in expected values between the two possible
scenarios: judges in office for one year or less vs. judge in office for more than one year; decision of the First Senate vs. decision of the Second Senate; political proceeding vs. nonpolitical proceeding; judges with prior experience in the judiciary vs. judges without such experience.

5 Results

In general it is noticeable that the probability of observing a separate opinion is very low. This is not surprising since looking at the share of dissents and concurrences in Figure 1 has already revealed a low percentage of separate opinions per year.

The focus of this analysis lies on the judges’ time in office and its effect on the occurrence of separate opinions. Hypothesis 1 suggests that judges at the beginning of their term undergo a period of adjustment during which they are less inclined to write separate opinions. Figure 2 shows that such an effect cannot be proven to exist. While the effect is in the expected direction this result is too uncertain. One can see that the probability of judges to render a separate opinion is lower in the first 365 days of their term than later on. However, the value for judges serving for more than a year and its confidence bounds lie within the large confidence interval of the case of a freshman judge. Therefore, Hypothesis 1 needs to be rejected.

Contrary to the acclimation-effect assumption, the results verify the senate-hypothesis. The difference between the effect of the First and the Second Senate with respect to observing separate opinions is quite substantial. While in the First Senate the probability of observing a separate opinion is below 0.01, for the Second Senate it lies somewhere between 0.02 and 0.025. From this it follows that - as expected - the probability of observing a separate opinion is higher in the Second than in the First Senate.

Type of Proceeding is another variable that has a strong effect on the judges’ probability of formulating a minority opinion. The variable separates non-political proceedings, i.e. (mainly) Constitutional Complaints and Concrete Judicial Reviews, from those pro-
Figure 2: First Differences in Expected Values by Variable

Note: Obtained through simulation. FD= first differences between expected values of the respective variable. sd= standard deviation of first differences. Confidence level= 95%
ceedings that can be initiated by political actors only. Looking at Figure 2 it becomes obvious that “political” proceedings have a strong effect on the probability of observing a judge delivering a separate opinion. This is in accordance with the expectations formulated in Hypothesis 1 and underlines that judges are policy seekers who engage in the political arena.

A further interesting observation is that there are almost no differences with regard to the effect of experience in the judiciary. It does not matter if a judge has served at a court before taking office at the Constitutional Court or not. Not even a certain direction of the effect can be detected. The value for the first differences has a negative sign suggesting Constitutional Court judges without a career in the judiciary to have a lower probability of rendering separate opinions. This would be contrary to the expectations posed in Hypothesis 4. However, the almost non-existing difference together with the given uncertainty does not allow for claiming any evidence for such a direction. Thus, Hypothesis 4 has to be rejected by stating that the former profession of a judge does not have any effect on his probability of writing separate opinions.

6 Conclusion and Outlook

The analysis conducted here reveals several interesting results. Judges who are new at the Constitutional Court do not show significantly different patterns in terms of writing separate opinions than their colleagues who are more experienced as to working at the Court. In other words, one cannot find something like an acclimation effect. This is entirely against the expectations and the literature on other courts. The same holds true for the occupational background of the judges. Contrary to research on other courts the behavior as to separate opinions does not differ depending on prior professional experience. However, factors unique to the German court, i.e. those that cannot be found at the U.S. Supreme Court and courts of similar nature do have an effect. Two panels of judges and significantly differing proceedings covering both, non-
political topics on the one hand and highly political ones on the other hand, have an influence on the probability of observing separate opinions.

What are the next steps for enhancing the understanding of separate opinions? First, I will include data on workload. So far, only very rough numbers on incoming cases per year are available. As soon as there are more precise data on the workload of individual judges they will be added to the model. Moreover, the topic of the case should have an influence on whether a judge wants to express his deviant opinion. For example, in decisions that are concerned with ethical questions I expect judges to have stronger stances, which they will be willing to publicly express. Finally, differentiating between concurrences and dissents as well as between separating single opinions from jointly written ones will increase the precision of the model.

In sum the paper provides two main conclusions. First, there is reason to believe that in the German case institutional rules and constraints play a larger role than personal characteristics. While individual tenure and professional experience of a judge do not show substantial effects, the structure and content of a decision - represented here by the different panels of judges (First and Second Senate) - as well as the type of proceeding play a crucial role. Second, the mechanisms at the German Federal Constitutional Court differ from those we find at the U.S. Supreme Court and other high courts. This suggests developing new, better fitting theories of judicial decision making for the German Federal Constitutional Court in particular and for all courts of the Kelsen type in general.
References


# Appendix

## Table of Regression Results

|                          | Estimate | Std. Error | z value | Pr(>|z|) |
|--------------------------|----------|------------|---------|----------|
| (Intercept)              | -5.6057  | 0.2708     | -20.70  | 0.0000   |
| Days in Office           | -0.2489  | 0.2691     | -0.92   | 0.3551   |
| Senate                   | 0.9076   | 0.1503     | 6.04    | 0.0000 *** |
| Proceeding               | 0.6325   | 0.1560     | 4.05    | 0.0001 *** |
| Profession               | -0.0351  | 0.1301     | -0.27   | 0.7872   |
| N                        | 15023    |            |         |          |