Marko Novak[1] ©

ARGUMENT FROM MAJORITY IN JUDICIAL CONTEXT[2]

1. INTRODUCTION

Traditionally courts have decided cases as individual judges or in panels of several judges. When the second was the case, their decisions were to be made unanimously or on the basis of a majority of judges' votes. If unanimity in such a case is an ideal situation, decision-making by majority seems to be more realistic. When a public authority, like a court, decides on a matter by a majority of votes what the principle of transparency would require is for it to disclose publicly how the majority was formed. This also includes information on how a minority of opposing views contributed to the discussion. This is most importantly realized through the institution of separate opinions, through which judges that do not agree with the majority view express their own opinions.

A traditional difference between the legal families of common law and civil law has been the lack of separate opinions by judges of appellate and supreme courts in the latter, unlike the former. Recently this traditional difference has, however, been blurred as the possibility of separate opinions for judges of constitutional courts and supreme courts within the civil-law family has been introduced. Still there are quite a few civil-law systems in which such possibility

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of separate opinions has not yet been provided or has been introduced only to a certain extent (perhaps only for constitutional courts). Moreover, in the midst of this legal family, at least as the European Union is concerned, there is one of the most important supranational courts, namely the Court of Justice of the European Union (hereinafter the CJEU), which still does not provide for the same.

Accordingly, despite the partial introduction of separate opinions for judges of highest national courts it follows that many civil-law systems still lag behind the common-law systems concerning the transparency of judicial decision-making. The same applies to situations in which a difference in opinion between judges on a panel is not disclosed to the public, and in connection with such the judicial argument from majority failing to be fully fledged. Due to that fact there are ample possibilities for reform towards more transparency in judicial deciding, to bridge the gap between the regulation of the possibility of majority voting and the prohibition of disclosing the results of the voting and potential minority reasons stemming from such voting.

Below I firstly present a difference between how the argument of majority appears in two different but to some extent related contexts, such as politics and law, concerning which I also point to a crucial difference between the two systems. Secondly, I turn to the argument of majority as a judicial argument to present various types of these arguments applied in different subsystems of judiciary. The first type of the judicial majority argument that I deal with is the so-called "suppressed" majority argument, which is a typical version of majority arguments that had been historically applied in the civil law legal family. It concerns a situation in which we know that there was more than one judge on the panel and that there could be different votes according to the law, but nothing about the result of a voting on the basis of majority nor of the content of different votes, as if the result of the voting was unanimous.

The next version of the judicial majority argument is the "silent" majority argument, which is already more transparent type of the majority argument. Here we know that there were votes opposing the majority but nothing about the content of these votes is disclosed. The third majority argument is the bare majority argument that is already a transparent argument but in the context of which the prevailing majority seems to be too weak to legitimately prevail over the minority. The final argument from majority in the judicial context is the so-called supermajority argument, which is ideal type of majority arguments even in the institutional milieu of common law judiciary.

I conclude the paper with a short analysis of the majority arguments with respect to their relation concerning transparency of judicial decision-making, and some recommendations for the future.

2. MAJORITY AS A POLITICAL AND JUDICIAL ARGUMENT

In democracy it is entirely legitimate that political decisions are reached by a majority of votes of those participating in such decision-making process.[3] A prototype of such a political decision-making process could be parliamentary procedure but deciding by majority is also a standard of voting at various forms of direct democracy, e.g. referendum. Similarly the decision-making by a majority of votes is also a commonplace in judicial proceedings[4] within a democratic form of government, where there is a panel of judges or a mixed panel of judges and

[3] Majority had ruled even in the first democracies such as the Athenian democracy in Ancient Greece.

[4] The arguments in favor of majority decision in courts »is usually defended on one of three grounds: (i) as a decision-making procedure that is efficient; (ii) as a way of reaching the objectively best decision; or (iii) as a way of respecting the principle of political equality." Waldron, Five to Four: Why Do Bare Majorities Rule on Courts?

lay persons in civil law systems, who decide together on the questions of both guilt/fault and sanctions.[5] Thus when it comes to the general legitimacy of deciding by means of majority within democratic political systems there seems to be no difference between the political and the judicial contexts.[6] This is a general rule in democracy no matter whether it applies to civil law or common law legal families.[7] Moreover, when it comes to the dilemma between supermajority (e.g. two-thirds) and bare (e.g. simple) majority there is no difference between political and judicial procedures as both of them provide for such kinds of majorities depending on the importance of a decision to be made in such a manner.

In everyday democratic political debates the argument from majority is not only a commonplace but also an inevitable component for making virtually any political decision given the fact that decisions by consensus are quite rare in this kind of procedures.[8] Another important characteristic of political debates that usually differ from judicial proceedings is also that their decisions, be it in the form of mere resolutions or statutes, are not supported by reasons,[9] or at least "political" reasons are very different from judicial ones.[10] Although the proportion of votes in favor to those against a certain political decision is normally known right immediately after the

[5] In the »real« jury systems of common law unanimity had originally been required to find a defendant guilty, but then gradually a supermajority (never simple majority!) of votes in favor of the conviction (e.g. 10-2) was required.
[6] Compare with Dworkin, who asserted otherwise that the judicial context is different from the political in that it is a »forum of principle«. Dworkin, A Matter of Principle, p. 33.
[7] Taking into consideration a traditional difference in that common law systems have more or less openly recognized dissenting opinions whereas in civil law systems disagreements between the judges have been hidden behind the facade of a unanimous decision.
[8] In the era of democratic pluralism, consensus in a political body could in everyday situations even be perceived as "dangerous" perhaps being a consequence of certain (secret) totalitarian pressures on the members of the political body.
[9] Posner opines that »political issues by definition cannot be referred to a neutral expert for resolution«. A dispute over them is a test of strength to be »resolved only by force or one of its civilized substitutes, such as voting.« Posner, How Judges Think, 272.
[10] I agree with Waldron (supra, note 3) that legislatures also give reasons to their decisions in one way or another but their reasons are different from judicial ones, which are usually legally more »sophisticated«.

voting, the statutory text composed of abstract and general legal norms begins its own life as *ratio legis*[11] without any kind of reasoning or explanation attached to the text.[12]

The above-described solution, based on the principle of no separate reasons attached to a final decision in a typical political procedure such as the parliamentary procedure of enacting a statute, seems to be practically reasonable. The greater the number of members of a deciding body the more severe the problem to provide reasons for such a collective decision. Parliaments usually include several hundreds of people whose potentially very different reasons for particular decisions are very hard to harmonize with other reasons to be included in a uniform and joint reasoning after the voting for a specific statute takes place. Even if there is a common position of the deputy group of a specific political party concerning a certain decision to be voted on, individual deputies might still have their additional and particular reasons when voting. Furthermore, statutory texts are usually much longer than judgments' operative parts so they are expected to be more explanatory in nature.

Would that be any different, in terms of courts providing reasons for their decisions, if we had a court panel composed of several hundreds of judges? Probably not as it would be very hard to join all their particular reasons into a uniform reasoning.

Even if we have reasons for court decisions published together with the decisions, the problem does not stop here, as even in such a manner the requirement of transparency of judicial decision- making[13] is not fully ensured if there is no publication of minority reasons or reasons of

[11] The text of the statute is supposed to explain itself.

[12] We only find »reasons« for particular statutory articles in the (legally non-binding) *travaux préparatoires* but these »reasons« could refer to particular stages of parliamentary debates and may not in every situation refer to the last version of the statute finally enacted.

[13] In my opinion the principle of transparency of judicial deciding stems from two important constitutional principles: (a) the rule of law ensuring that judges follow the law in their decision-making; and hand in hand with

those on the judicial panel who disagreed with the majority decision. That is still all too frequent in civil law jurisdictions although certain changes have already taken place. Yet if the judicial audience is unable to examine from the reasoning of a court decision the manner in which the majority overcame potential dissenters, this seems to undermine not only the strength of persuasion in that decision but also the constitutional values of authority, transparency, and democratic legitimacy of court decisions.

There are several manners in which judicial majorities express their opinions that in one way or another take into consideration minority views. These will be presented below as types of judicial majority arguments.

3. TYPES OF 'JUDICIAL' MAJORITY ARGUMENTS

3.1. The "Suppressed" Majority Argument

In his most famous book from 1748 Montesquieu wrote: "In monarchies the judges assume the manner of arbiters; they deliberate together, they share their thoughts, they come to an agreement; one modifies his opinion to make it like another's; opinions with the least support are incorporated into the two most widely held. This is not in the nature of a republic."[14]

From the above-cited passage from Montesquieu's book it follows that he ascribed the situation in which dissenting opinions of judges were suppressed and eventually eliminated from the majority opinion to the courts operating in the situation of a monarchy, not republic. This

this principle also the (b) principle of democracy making sure that judges adjudicate on behalf of people who have the right to find out about that through the public activity of courts.

[14] Montesquieu, The Spirit of the Laws, p. 76.

could well be typical of old European monarchies, most notably medieval France, before the bourgeois revolutions. My claim is that today, at least in the Western hemisphere, the situation with judges' independence is far different from Montesquieu's times when the judges could be reasonably afraid of the executive branch. Nowadays they need not be afraid of politics since they have been constitutionally recognized life tenure. This necessarily makes the regulation in those countries that still prohibit the publication of minority votes obsolete.[15]

All judicial arguments from majority normally concern decision-making in judicial panels. The situation described above refers to the possibility of a panel member to dissent from a majority decision that is regulated in the procedural law,[16] but the fact that he or she actually voted against the majority decision appears nowhere in the reasoning of the decision, nor is there the possibility for such a judge to write a dissenting (separate) opinion. The name of this panel member only appears in the heading of the judgment while at the end of the same only the president of the panel is signed.[17]

I call this argument from majority "suppressed" since there is the formal legal possibility of majority decision-making that includes the possibility of dissenting from the majority. Still formally it is recognized only in a half-way, and quite contradicting manner: we know from the procedural regulation that a dissent is possible to happen but from the reasoning it was eliminated since we are supposed not to know that it actually did happen.

[15] The situation in which only the opinion of a court, as if necessarily unanimous, is published, not of individual judges, seems to be more appropriate for absolute monarchies in order for "unpleasant" opinions of individual judges to be protected from the Crown. David, Grasmann, *Einführung in die grossen Rechtssysteme der Gegenwart,* 230.
[16] See, *infra,* where I discuss the regulation of the Slovene Criminal Procedure Act.
[17] We have the same situation when a case is decided by a judge accompanied with two assessors the names of whom are only mentioned in the heading of the judgment irrespective of the fact that they could have even outvoted the judge in that case.

As already mentioned this type of argument used to be a classical and far prevailing argument from majority in the legal family of civil law. Today, however, the lack of separate opinions of judges in the minority is no longer a typical difference between common law and civil law courts since many judges of constitutional courts and supreme courts of European countries (or at least those within the EU) were subsequently given the opportunity to publish their separate opinions along with the majority opinion.[18] Still there remain quite a few examples of the use of the suppressed argument from majority. The most notable example is the Court of Justice of the European Union, and in Slovenia all the courts[19] save the Constitutional Court.[20]

Arguments against the introduction of separate opinions are usually the following: (i) to preserve the authority of the courts and of their judgement; (ii) to protect the independence of judges against undue political pressure; (iii) to ensure that the final decision adopted by the tribunal is clear and unambiguous; and (iv) to preserve collegiality among judges.[21] In my opinion all of the just mentioned arguments are no longer suitable for contemporary conditions in which the EU judiciary operates, and seem to be rather pre-modern. Thus I much more support those opposing arguments in favor of separate opinions: (a) to preserve the judges' integrity and moral independence and their freedom of speech; (b) to improve the quality of judgements and

[18] Only 7 countries never allow judges to publish individual opinions, in 20 the publication of separate opinions is allowed at least at the level of constitutional courts. In Ireland dissents may be published in ordinary cases but not in constitutional cases. Rosa Raffaelli, Dissenting Opinions in the Supreme Courts of the Member States, European Parliament, 2012, p. 7 accessed 27. 1. 2016 from: http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf.

[19] For example, the most typical provisions in this regard are Art. 113 of the Criminal Procedure Act, which provide that: »A panel of judges shall pass decisions after oral consultation and voting. A decision shall be considered adopted if carried by the majority of panel members; and Art. 115 of the same act, determining "(2) Consultations and voting shall take place in camera (secret)." This last provision has been challenged before the Constitutional Court by a Supreme Court judge as having been inconsistent with the principle of independence of judges, but the Court unfortunately did not recognize the importance of the matter so it rejected the complaint on procedural grounds. A similar provision is contained in the Civil Procedure Act as well.

[20] However, amendments to the Civil Procedure Act introducing the possibility of separate opinions for Supreme Court judges have already been sent to the parliamentary procedure and will presumably be enacted at the beginning of 2017. A similar change has also been envisaged for the Criminal Procedure Act, but why not extend it to commercial, labor and social, as well as administrative cases at the Supreme Court as well?

[21] Raffaelli, note 18, p. 7

their persuasiveness; (c) to promote transparency; and (c) to improve dialogue with future and lower courts.[22]

My general conclusion concerning this suppressed argument from majority is that it only provisionally "protects" the authority of majority decisions, however, substantially only a disclosure of dissenting reasons can enhance the general level of courts' argumentation. If opinions dissenting from a majority decision existed at the level of appellate courts, the parties who are not satisfied with the majority decision, if decided to appeal to the Supreme Court, would certainly take the advantage of the dissenting opinions in order to be better "equipped" with additional arguments when appealing to the Supreme Court. Consequently the majority opinion of the appellate court would need to be even more persuasive in order to "survive" the appeal at the Supreme Court.[23] Generally, in a shorter run dissenting opinions that are published together with majority opinions make on one hand the work for parties easier and perhaps more successful and, on the other hand, cause the work of courts to become more demanding. In a longer run, however, they would produce many benefits such as: (a) necessarily increase the level and quality of courts' legal argumentation; (b) increase transparency of judges' deliberations and deciding; and (c) all together contribute to greater trust in judges and courts.

3.2. The "Silent" Majority Argument

[22] The last argument would even more be important for the CJEU in order to enhance dialogue with national courts and ensure higher clarity of judgements. However, there are certain views that instead of the possibility of separate opinions it is important to stress the role of the Advocate General being considered as a substitute for individual opinions while with no separate opinions judges' independence and collegiality and the Court's authority will remain preserved. *Ibidem.* For me this argument seems to be outmoded as it symbolically leaves judges being civil servants subordinated to a symbolic king instead of them becoming independent and autonomous public figures.

[23] A similar relation as to the strength of argumentation will be established between the Supreme Court and the Constitutional Court where there is the possibility to complain against a Supreme Court decision to the Constitutional Court.

The next version of the argument from majority is a bit more transparent but still far from ideal. It concerns a situation in which it is legally possible, according to procedural law, for a dissenter from the majority opinion that his or her vote against the majority is mentioned at the end of the judgment. However, his or her separate reasons are not published along with the majority decision which essentially reduces the impact of the dissenting reasons for any further deliberations.

An example of such is when judges of the Slovene Constitutional Court vote against the majority decision but do not decide to write a separate (concurring or dissenting) opinion. In such a case the result of the voting appears at the end of the judgment with no reasons to be disclosed from the side of the dissenting (or concurring) judge.[24]

Theoretically in such a case there could either be a bare majority (5-4) or even a supermajority (6-3, 7-2 or 8-1) of the Constitutional Court, but what is the point of knowing who has voted how if no separate reasons are published? It is the reasons that count to evaluate the quality of argumentation; merely disclosing who of the judges voted in favor and who against seem to contribute only to political impression that the judges want to make on the public.

More precisely, the possibility that a result of voting is disclosed to the legal audience to some minimal extent contributes to more transparency of the deliberation and decision-making and that is positive, however, it still leaves in doubt and even puzzles more the audience about the substance (reasons) of the possible dissenting voices, which can be perceived as negative. We could then ask ourselves what purpose the "silent" majority argument serves since what is initially built by disclosing the existence of opposing votes is subsequently destroyed by the fact that the reasons for such dissents remain hidden.

[24] Article 41 of the Constitutional Court Act.

My general attitude towards this kind of argument is for the above-mentioned reasons negative. I would even insist on establishing a practice that all judges of the Constitutional Court who vote against the majority opinion would need to reason their separate opinions, which is not required now as already mentioned.

3.3. The Bare Majority Argument

When it comes to the transparency of the argument from majority we may proceed further. In case of the next argument reasons for dissenting from a majority opinion are actually revealed but the problem is that the majority votes only slightly overcome the minority votes. There could be even just one vote difference so the legitimacy of such a majority could be lower than in the case of a stronger majority. What remains after such a decision is an impression in the public that it could have been very easily decided in the other way since only one vote made the difference, which makes such a decision publicly controversial.

Here we could return to the initial discussion about the argument from majority in the situations of politics and judiciary respectively. Unlike the important difference between the political decision having no separate reasons, although politicians are allowed to explain their votes before the voting takes place, and the judicial decision with reasons, the issue concerning the difference between simple and qualified majority seems to have the same relevance for both the contexts. It has been well established that simple majority is more appropriate for less important decisions and qualified majority for more important ones.[25]

[25] In the frame of this article this refers to the difference between bare and super majorities.

This argument refers to a decision of, let say, a constitutional court that is not based on consensus but rather on a bare majority of votes (e.g. 5-4 if the full number of judges is nine, or 4-3… if some of the judges are missing from deliberation and voting for whatever reasons), but we do have the judges' separate opinions. The fact that separate opinions are published enhances the transparency of decision-making, which might increase or decrease the (practical) reasonableness of the majority reasons when juxtaposed with the minority reasons. In a shorter run this possibly might even jeopardize the persuasiveness of the majority reasoning, but in a longer run it definitely contributes to increasing the quality of argumentation.

In bare majority decisions (e.g. 5 – 4), where perhaps an entire statute is struck down, the pragmatic value of a single vote deciding the outcome of the voting overshadows other important values such as legitimacy, persuasiveness, and epistemic strength that would be met through a supermajority reached in such a decision. Concerning the following type of the argument from majority, which presents an ideal version of this type of argument, we will have the opposite situation: all the just mentioned values met to a great extent but a pragmatic and practical problem existing of how to achieve such a thick majority.

3.4. A Supermajority Argument

Taking into account that, in the topic discussed here, consensus would be ideal but this would no longer be an argument from majority so in the case of, e.g., nine judges, the ideal or the strongest argument from majority would be 8 – 1. This could be called a "very" supermajority

with 6 – 3 still being (just) a supermajority, the first step on a stairway upwards from the 5-4 bare majority.

Thus when deciding in a nine judges court is concerned it seems that a 6 – 3 ratio to constitute a majority would increase the legitimacy, strength, and persuasiveness of majority decisions.

One of examples of requiring qualified majority for a judicial decision to be adopted is from Germany when the Federal constitutional court must secure a two-thirds majority in order to declare the unconstitutionality of a political party. It follows that such a supermajority is reserved for the most important decisions. It is not difficult to agree that legitimacy of such decisions is beyond dispute and very much welcome but the crucial problem is that it is practically quite difficult to secure such a majority in judicial proceedings.

According to Waldron, "one might imagine a supermajority rule for constitutional review especially. Actually, imagination is not necessary: the Nebraska Constitution ordains that the state's "Supreme Court shall consist of seven judges" and that "[a] majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges." The North Dakota Constitution is even more stringent: it requires four out of five justices to strike down legislation. These seem like good rules, embodying as they do a sort of presumption in favor of the constitutionality of legislation."[26]

However, in the case of Poland, concerning its present constitutional crises, the Venice Commission for Democracy through Law of the Council of Europe has criticized the Polish

[26] Waldron, *supra* note 2, *ibidem.*

legislative amendments in 2015 that introduced a two-thirds majority requirement for the Constitutional Tribunal to pass its decisions in all cases, by the following wording: "[s]uch a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its key task of ensuring the constitutionality of legislation."[27] By another legislative amendment, of the Constitutional Tribunal Act, in 2015, Poland then returned that to a simple majority.

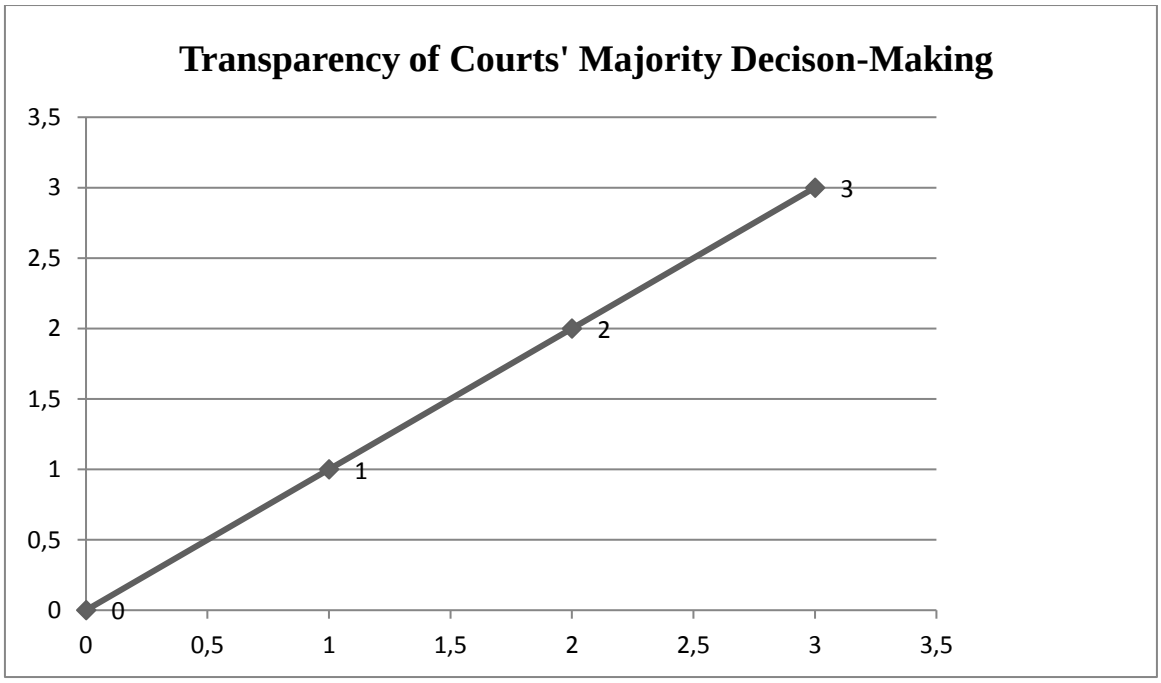
Moreover, what is often suggested as a welcome practice for election of constitutional court judges is the introduction of a two-thirds majority requirement to be reached in parliament, in order to overcome political ambitions of governing parliamentary coalitions to stuff these Courts with their own candidates. Such supermajority was introduced in Croatia but that eventually almost blocked the operation of their Constitutional Court since it was impossible to reach such a supermajority in their parliament, to reach the full composition of judges on that Court.

I am fully aware that such supermajority requirements for either passing decisions or electing judges might cause practical problems of blocking the decision-making process or the election process. But these are practical or pragmatic problems that do not say much about legitimate reasons to have such a supermajority requirement. I guess that it much depends on particular contexts in which such supermajorities might cause problems to democratic and rule-of-law procedures, while in others they would function perfectly well. But does not that apply to almost all social concepts and institutions that are by definition culturally dependent?

[27] Venice Commission, Opinion 860/2016 of 14 October 2016.

4. In Lieu of Conclusion: A Short Analysis of (Non)Transparency of Majority Arguments

What follows below is a short diagram demonstrating how transparency of majority decision-making in court panels progress with specific types of majority arguments as applied in different courts and different legal systems, and different legal contexts.



0 – “Suppressed” Majority

1 – “Silent” Majority

2 – Bare Majority

3 – Super Majority

Number 0 is allocated to the "suppressed" majority argument which means absolutely no transparency for the public concerning the possibility of knowing different views in a court panel. From the introductory part of a judgment the public can learn that a panel of different judges was deciding on a certain matter, but what follows at the end of the judgement is a unanimous decision of the court with no traces of possible dissents. Even if there actually were judges who voted against the majority opinion, these were finally suppressed by the unanimous decision by the court. Due to the no-transparency of the argument it received the value 0.

Number 1 is used for the "silent" majority argument, which is already transparent to a certain extent, which is why it has a positive value 1. In the case of such we know from the judgement that there were judges who did not share the majority's view, but the problem is that we do not have their separate opinions to learn about their particular for such views.

Number 2 was allocated to the bare majority argument, in the context of which we do have both elements: the voting disclosed as well as the separate opinions published. The only problem compared with a more ideal situation is that the majority argument which won the voting only slightly prevailed over the minority views, the problem of which might be legitimacy of such majority (perhaps of only one vote difference). This is why this argument received the value 2.

Finally, number 3 is utilized for the ideal argument of majority, which is the supermajority argument. This kind of argument is a proof that a decision was reached by a more substantial majority that it would be a bare majority. For example, if we take the number of nine (constitutional-court) judges, supermajority could stretch from 6 to 8 votes, meaning that the 6–3 majority would have the value of – 3, the 7–2 majority the value of 3, and the 8–1 majority the value of + 3, which would also be the most ideal version of the majority argument, taking into

consideration that the ratio of 9-0 would already be unanimity and as such out of my interest here.

Accordingly, from the above-mentioned it seems that the more the actual deliberation and decision-making is disclosed the more transparency concerning the work of judiciary is ensured. At least in a majority of modern national constitutions the public character of activities of the judiciary is an important value. As a rule trials are public and only exceptionally are they closed. Why also different opinions of judgments should not be made public? Today judges are protected against possible "revenge" from politics and the public by their life tenure. The historical fear from the King is thus obsolete. This appeal is normally directed towards those systems which are quite hesitant to allow separate opinions in their high courts, as well as towards the lack of such separate opinions at the CJEU, whose legal regulation has a very important symbolic value for European legal cultures in general.

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