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ARTICLE

Bare Majorities at Apex Courts: Lessons from the European Court of Human Rights

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Abstract

Judges on apex courts sit in panels to resolve the most consequential legal issues within their jurisdiction. On occasion, these panels are closely split on the outcome. Where that split reflects only one judicial opinion or vote, the decision is rendered by a 'bare majority'. That decisions with the potential for seismic legal, political and social importance can be made by such slim margins has received increasing academic attention in recent years. Yet, many of the responses to this 'bare majority puzzle' are of a conceptual nature, grounded in theory and addressing the normative implications. This article adds a perspective on the practice of bare majorities to this wider discussion. It does so by drawing on the practice of bare majorities at the Grand Chamber of the European Court of Human Rights and identifying six questions of salience to the nature, style and implications of the division. Engagement with these questions demonstrates that the theoretical discomfort posed by bare majorities is not always replicated in their practice.

Keywords: human rights; adjudication; courts; legitimacy; bare majorities; European Convention on Human Rights; European Court of Human Rights; Grand Chamber

1. Introduction

Across the world, judges on apex courts sit in panels to resolve the most significant legal issues within their jurisdiction. The judicial process in these courts often requires that the bench vote on a particular outcome to reach a final decision. Due to the multiplicity of judges on panel courts, there is a possibility that a court's overall decision can hinge on a single vote, with just one more judge in favour than against. Such circumstances are 'bare majority' votes. They are the five to four decisions of the Supreme Court of the United States (US), the six to five divisions at the South African Constitutional Court, the four to three splits at the Inter-American Court of Human Rights and the eight to seven divisions of the International Court of Justice. In judicial bodies like the United

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Kingdom (UK) Supreme Court, where panels vary in size,[1] they arise in any decision secured by a one-vote margin.[2]

That decisions of such seismic legal, political and social importance can be made on the basis of such slim margins has historically received little attention in scholarship, suggesting that it has been considered unproblematic.[3] In 2014, however, Jeremy Waldron laid bare what he framed as the 'bare majority puzzle',[4] posing the question: 'why is bare majority decision[-making] … an appropriate principle to use in an institution that is supposed to be curing or mitigating the defects of majoritarianism?'[5] His concern was not with bare majority decisions undermining judicial review.[6] Instead, it was a quest for a justification. To Waldron, the response that this was 'simply how judges decide' was intellectually inadequate, and rather merely an expression of the prevalence of the practice.[7] He similarly dispatched three other regular justifications for why majority decision-making prevailed. The argument that majority voting is simply an efficient way to reach a conclusion was termed 'lazy' and an incomplete response to establish the legitimate basis for the procedure.[8] The argument that it was epistemically the most effective process to achieve the truth was rebuffed given that when voting gives rise to a bare majority, there is too slim a margin between competing versions to define one as 'the truth'. A justification that the procedure gave rise to fairness, as it respected the principle of political equality, was termed inadequate as political equality is not easily transferred to expert judges.[9]

Without endorsing an alternative voting procedure for apex courts or attempting to furnish his own philosophical justification, Waldron simply left readers with a puzzle. As León observes, the publication 'shook the ground on which simple majorities have stood. A veil of inertia was unmasked'.[10] To date, much of the literature responding to this puzzle has been, directly in response to Waldron, of a conceptual nature: an answer to the 'why' question. Scholars have attempted to answer why apex courts tend to adopt this voting practice,[11] particularly when alternatives exist, like the use of weighted votes for particular judges,[12] qualified voting and supermajorities.[13] These rich accounts have

[1] Dickson identified 53 close calls in the final eight years of operation of the Appellate Committee of the House of Lords (2001–2009): B Dickson, 'Close Calls in the House of Lords' in J Lee (ed), *From House of Lords to Supreme Court* (Hart Publishing 2011) 283.

[2] See, e.g. the 5:4 split in the school's admissions case: *R (on the application of E) v The Governing Body of JFS and the Admissions Appeal Panel of JFS and others (Appellants)* [2009] UKSC 15.

[3] J Waldron, 'Five to Four: Why Do Bare Majorities Rule on Courts? (2014) 123 YaleLJ 1692, 1701. See also G Krishnamurthi, 'For Judicial Majoritarianism' (2020) 22 UPaJConstL 1201, 1205.

[4] Waldron (n 3) 1692–730.

[5] ibid 1694.

[6] He makes that case elsewhere: J Waldron, 'The Core of the Case against Judicial Review' (2006) 115 YaleLJ 1346, 1372.

[7] Waldron (n 3) 1695.

[8] ibid 1711.

[9] Waldron (n 3) 1722–23.

[10] M León, *Supermajorities in Constitutional Courts* (Routledge 2024) 24.

[11] Krishnamurthi (n 3); cf C Caviedes, 'Is Majority Rule Justified in Constitutional Adjudication?' (2021) 41 OJLS 376, 405.

[12] Dworkin imagined a situation where more votes were given to senior judges because they had more experience, or one in which more votes were given to junior judges because they were more attuned to the popular opinion. R Dworkin, 'Response' (2010) 90 BostonULRev 1059, 1086.

[13] León (n 10).

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pushed the debate further, yet in focusing on the conceptual problems posed by the numbers, they fail to tell the whole story. What they miss is the practice. The how and what questions: how does the bench split in a bare majority? How often does it happen and on which issues? What do the judges do when the bench splits so closely, and what can this reveal about bare majority decision-making as a whole?

This article casts the net wider to establish a bridge between the theory and practice of bare majority voting. Its overarching contention is that while bare majorities have the potential to be deeply uncomfortable instances for judges, courts and even the law itself, their normative potency is often constrained by the context of the case at hand and the institutional setting in which they manifest, and any practical force they have is often entirely case-specific. As a result, a concern with bare majorities simply because of the one vote difference on a judicial panel can be overly simplistic. Bare majorities can mean very different things, to different courts and at different times.

This is unpacked across three sections. Section 2 asserts that the normative concerns of the bare majority puzzle are mitigated by the fact that their existence is parasitic on an environment which has been deliberately structured to convey legitimacy in the first place. That is, bare majority decisions can only arise at institutions where transparent panel adjudication takes place. And yet, distinct concerns remain. Section 3 then identifies the procedural and substantive perils of bare majority voting at apex courts as two acute normative challenges of a more practical nature which cannot simply be explained away by their institutional setting. In this respect, bare majority decisions shine a spotlight on overarching concerns of who makes decisions, how they are made and their impact on the substantive law. With an eye on these concerns, Section 4 surveys how bare majority voting unfolds in practice. It draws out six critical questions which determine the potency of bare majority decision-making, demonstrating how such decisions give rise to an array of complexities. Some bare majorities evidence problematic practices and issues with institutional structuring, while others demonstrate panel judging at its very best. Section 5 then concludes with a series of reflections on the variable potency of bare majority decisions within the wider institutional framework.

Just as Waldron's groundbreaking article solely focused on the US Supreme Court, the approach in this article uses the judicial practice of one court to discern wider lessons. The article uses the Grand Chamber of the European Court of Human Rights (ECtHR) as a case study to unpack the variables affecting the potency of bare majority decisions at an apex court. Comprised of 17 judges, the Grand Chamber is the apex adjudicative formation for cases arising under the European Convention on Human Rights (ECHR). It renders decisions of seismic importance for the 46 Member States of the Council of Europe. Moreover, it is a court which considers the 'most impactful "hard" cases',[14] and thus the most resonant for the deep normative concerns that authors have raised on bare majority decision-making. As an issue-voting court, the judges make several decisions in any given case. These decisions are voted as a binary agreement or disagreement, meaning that the bare majorities are clearly identifiable in the judicial decisions. The article draws on a unique dataset covering the jurisprudence

[14] K Dzehtsiarou, 'What Is Law for the European Court of Human Rights?' (2018) 49 GeoJIntlL 89, 98.

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of the Grand Chamber from its permanent establishment on 1 November 1998 until 31 December 2024. Analysis is focused on the 506 judgments rendered in this period, and the 2291 total votes that Grand Chamber judges took within those judgments, of which only a small fraction split on a bare majority.

While exhaustive in its coverage of the ECtHR's Grand Chamber, it is to be noted that apex courts have different areas of coverage, practice and procedure. This article tries to be mindful of these variations in articulating a general theory applicable across apex courts. These reflections may also be less relevant in some legal cultures—particularly civil law traditions where consensus is paramount to collective judicial decision-making—than to common law and international courts, where bare majorities are often possible. Yet, the observations within them should have relevance to the wider field of ajudication. Before drawing such reflections, the underlying environment within which a bare majority manifests must first be examined.

2. Positioning bare majority votes

Authors writing on the bare majority puzzle have naturally been drawn to the conceptual and normative problems which arise when a bench splits by one vote. Their interest is thus in the end point of a lengthy adjudicative process. By taking a step back, however, and surveying the context within which such decisions arise, it is apparent that they only manifest under conditions where an attempt has been made to infuse legitimacy into judicial decision-making. These conditions are premised on the recognition of two legitimacy enhancing characteristics: collective judging and adjudicative transparency.

2.1. Collective judging

The first of these conditions is that bare majorities will only ever arise where there is an exercise of collective judicial decision-making. In such cases an assumption has been made that a group of decision-makers are superior to one acting alone,[15] and that there is wisdom in a crowd.[16] This assumption is underpinned by epistemic, deliberative and authority justifications.

In an epistemic sense, the use of panels of judges on courts has long been linked to the Condorcet jury theorem (CJT). Developed by the Marquis de Condorcet, this theory contends that when individuals are faced with a binary choice where they are more likely to be correct than wrong, a group is more likely than any single individual to reach the correct decision.[17] The larger the group, the greater the likelihood of reaching the 'right' decision.[18] This theory has long informed justifications for panel judging.[19] It is

[15] See B Barry, 'Judging Better Together: Understanding the Psychology of Group Decision-Making on Panel Courts and Tribunals' (2023) 14 International Journal for Court Administration 6, 9.

[16] J Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few* (Abacus 2004).

[17] LA Kornhauser and LG Sager, 'Unpacking the Court' (1986) 96 YaleLJ 82, 97–98.

[18] ibid.

[19] PJH Edelman, 'On Legal Implications of the Condorcet Jury Theorem' (2002) 31 Journal of Legal Studies 327; B Alarie, A Green and E Iacobucci, 'Is Bigger Always Better? On Optimal Panel Size, with Evidence from the Supreme Court of Canada' (University of Toronto, Legal Studies Research Paper No 08-15, June 2009) 2; M Abramowicz, 'En banc revisited' (2000) 100 ColumbiaLRev 1600, 1632. Cf S Levmore, 'Fractured Majorities and their Reasons' (2023) 127 PennStateLRev 332, 332.

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also used widely in other disciplines, including political sciences, economics, business and medicine, and has come to form the principal model of collective decision-making in social and political theory.[20] The CJT can thus be argued to inject normative legitimacy into the practice of panel judging because it suggests that a group of judges, acting appropriately and competently, are more likely to reach a 'correct' decision than a single judge acting unilaterally.[21]

Directly linked to this assumption is a recognition that discussion and deliberation can improve decision-making. Deliberation on panel courts has long been heralded as the quintessential example of the benefits of group decision-making. Rawls, for instance, deemed the US Supreme Court to be the 'exemplar' of public reason in the US.[22] There are perceived to be advantages for the clarity and certainty of the law where large numbers of views are aired and resolved.[23] Moreover, not only are collegiate decision-making processes seen as effective in constraining the personal influences and instincts of individual decision-makers,[24] but the process of deliberation deployed within them is recognised as effective in addressing the diversity of potential viewpoints.[25] Cardozo unpacked the benefits of this diversity in judicial practice, noting:

> The eccentricities of judges balance one another. One judge looks at problems from the point of view of history, another from that of philosophy, another from that of social utility; one is a formalist, another a latitudinarian, one is timorous of change, another dissatisfied with the present; out of the attrition of diverse minds there is beaten something which has a constancy and uniformity and average value greater than its component elements.[26]

The result is that jurisdictions across the globe subscribe to the view that more judges are required at the apex court. Where there is flexibility in panel size, there is also a general recognition that the more important a case is, the more judges should sit.[27]

A final argument in favour of multi-member judicial panels relates to the presumed authority which is exuded by a larger group of experts. Instead of generating an inward-looking normative legitimacy, this manifests as an outward-looking curation of sociological legitimacy. That is, legitimacy is based on the perception that the authority of the institution, actor or rule is justified.[28] For panel judging, there is a

[20] T Koch and M Ridgley, 'The Condorcet's Jury Theorem in a Bioethical Context: The Dynamics of Group Decision Making' (2000) 9 Group Decision and Negotiation 379.

[21] More recently, the quality of group decision-making has been reflected in studies from psychology. See, e.g. D Bang and C Frith, 'Making Better Decisions in Groups' (2017) 4(8) Royal Society Open Science 1.

[22] J Rawls, *Political Liberalism* (Columbia University Press 1993) 231. See J Ferejohn and P Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice' in W Sadurski (ed), *Constitutional Justice, East and West: Democratic Legitimacy and Constitutional Courts in Post-Communist Europe in a Comparative Perspective* (Springer 2002) 21, 22.

[23] KH Lau, 'Enlarged Panels in the Court of Appeal of Singapore' (2019) 31 Singapore Academy of Law Journal 924.

[24] R Cahill-O'Callaghan, *Values in the Supreme Court: Decisions, Division and Diversity* (Hart Publishing 2020) 16.

[25] J Rawls, *A Theory of Justice* (Harvard University Press 1971) 359. See also S Fredman, 'Foreign Fads or Fashions? The Role of Comparativism in Human Rights Law' (2014) 64 ICLQ 631, 634.

[26] B Cardozo, *The Nature of the Judicial Process* (Yale University Press 1961) 177.

[27] Alarie et al (n 19) 6.

[28] F Baetens, 'Unseen Actors in International Courts and Tribunals' in F Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (CUP 2019) 5.

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sense that the greater the number of judges rendering the decision, the greater the authority which the group exudes and the decision holds.[29] In some respects, it is a majoritarian premise in action, one concerned with the number of votes.[30] Former President of the UK Supreme Court Lady Hale has reflected in extrajudicial speeches that the tendency towards a larger judicial panel in the UK Supreme Court was because of ‘the greater authority it gives to a decision, the greater the number of justices who agree upon it’.[31] Lord Burrows has noted the existence of a perception that a larger panel ‘may be thought to enhance the court’s status’ and that a greater number of judges may be seen as ‘outranking’ a smaller judicial composition.[32] Dickson and McCormick state simply that ‘the very raison d’être of an apex court is to allow a larger, more experienced, group of judges to re-assess the legal consequences of a lower court’s decision’.[33] This sense that a bigger bench ‘exudes more authority’[34] is not shared by all commentators.[35] Lee, for instance, notes his scepticism that larger panels mean ‘greater authority or legitimacy’,[36] yet concedes that it could give rise to an increased ‘rhetorical force’ for the judgments.[37]

2.2. Adjudicative transparency

Alongside the necessity for collective judging, a bare majority will also only occur within an institutional structure which promotes transparency in decision-making.[38] Transparency in this way can be achieved through both thin and thick models. A thin level of transparency exists where, at the very least, the institution makes publicly available the level of division in any given judgment. This is a practice which is widely adopted across both international and domestic judicial bodies. Indeed, it is a practice which is inherent in judicial bodies which operate a seriatim model of judging, where each judge delivers an individual opinion. Those institutions where the division is not

[29] M Bobek, ‘What are Grand Chambers For?’ (2021) 23 CYELS 1, 7.

[30] M Bobek, ‘More Heads, More Reason? A Comparative Reflection on the Role of Grand Chambers at National and European Levels’ in D Petrlík et al (eds), *Évolution des rapports entre les ordres juridiques de l’Union européenne, international et nationaux: Liber amicorum Jiří Malenovský* (Larcier 2020) 523, 529.

[31] Lady Hale, ‘Appointments to the Supreme Court’ (Conference to mark the Tenth Anniversary of the Judicial Appointments Commission, University of Birmingham, 6 November 2015) 3. Decisions on panel size at the UKSC fall to the President: A Paterson, ‘Creating a Group Oriented Supreme Court – Lord Neuberger’s Legacy’ (2021) 28 International Journal of the Legal Profession 107, 111.

[32] A Burrows, ‘Numbers Sitting in the Supreme Court’ (2013) 129 LQR 305, 307.

[33] B Dickson and C McCormick, ‘The Development of Lord Kerr’s Judicial Mind’ in B Dickson and C McCormick, *The Judicial Mind: A Festschrift for Lord Kerr of Tonaghmore* (Hart Publishing 2021) 12. See Bobek (n 29) 3.

[34] D Clarry and C Sargeant, ‘Judicial Panel Selection in the UK Supreme Court: Bigger Bench, More Authority?’ (2016) 7 UK Supreme Court Journal 1, 6.

[35] Burrows (n 32) 307.

[36] J Lee, ‘Against All Odds: Numbers Sitting in the UK Supreme Court and Really, Really Important Cases’ in P Daly (ed), *Apex Courts and the Common Law* (University of Toronto Press 2019) 94, 126.

[37] ibid 121.

[38] Grossman notes that when transparency is lacking, an international actor or tribunal may appear illegitimate: N Grossman, ‘Legitimacy and International Adjudicative Bodies’ (2009) 41 GeoWashIntlLRev 107, 121–29.

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recorded are increasingly the exception.[39] One notable example is the Court of Justice of the European Union (CJEU), where there is neither an indication of the vote split, nor the ability for judges to contribute separate opinions. Judgments are instead issued in the name of the Court, ostensibly to uphold the legal order and avoid internal division.[40] Beyond a thin conception of judicial transparency is a more pervasive, thicker model, wherein judicial division is not merely noted, but judges enjoy a right to dissent or concur through a separate opinion. This is a subcomponent of judicial transparency which Dunoff and Pollack refer to as 'judicial identifiability'.[41] An advanced version of this thick model is where all votes are recorded clearly and attributed to the respective particular judges.[42]

Thick transparency contributes to the legitimacy of an institution. It simultaneously allows its stakeholders to see the nature of division, and to evaluate the processes through which the decision was reached by scrutinising the judicial reasoning of more judges than merely those in the majority.[43] Moreover, in a normative sense it evidences that those making complex decisions in apex courts are able to undertake robust debate, retain their differences and 'limit the consensus and the bias that consensus perpetuates'.[44] Alongside the transparency gain which accompanies the publication of dissent, Mistry identifies two further benefits of dissent: opposition, an epistemic value that is derived from disagreement; and conscience, a recognition that judging is a personal exercise and that judges feel a responsibility for their contributions to collective decisions.[45] This latter justification for dissent is one which resonates with some ECtHR judges, who speak of the value of writing separate opinions as a 'valve' for their personal opinion where agreement cannot be reached.[46]

2.3. Positioning bare majority votes at the ECtHR Grand Chamber

The Grand Chamber of the ECtHR generates legitimacy through both collective judging and judicial transparency. In respect of collective judging, a panel of 17 judges sit to hear cases.[47] These judges are drawn from the 46 Contracting Parties to the ECtHR.[48] The 17 who sit include ex officio the President and Vice Presidents of the Court, along with

[39] K Keleman, *Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective* (Routledge 2018) 29.

[40] J Laffranque, 'Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System' (Juridica International 2004). Although note that the Advocates General provide non-binding, individual legal opinions on the cases assigned to them.

[41] JL Dunoff and MA Pollack, 'The Judicial Trilemma' (2017) 111 AJIL 225, 236.

[42] A practice deployed by the International Court of Justice.

[43] Grossman (n 38) 148–52. See also M Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, 926.

[44] R Cahill-O'Callaghan, 'Lord Kerr's Dissents: Jewels in the Crown of the Supreme Court' in Dickson and McCormick (n 33) 66.

[45] H Mistry, 'A Performative Theory of Judicial Dissent' (2023) 86 MLR 729, 734.

[46] A Nußberger, *The European Court of Human Rights* (OUP 2020) 67. Peterson similarly refers to it as 'an outlet for frustrations': SA Peterson, 'Dissent in American Courts' (1981) 43 Journal of Politics 412, 430.

[47] There are a further three substitute judges who join a case should it be necessary to replace one member of the panel: ECtHR, Rules of Court (28 April 2025) rule 241.

[48] Convention for the Protection of Human Rights and Fundamental Freedoms (as amended) (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, arts 20, 22.

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the Chamber Presidents and the judge elected in respect of the State responding to the allegation. The inclusion of this national judge, while controversial, serves to ensure that the bench is fully briefed on the legal and cultural nuances of the State whose actions are under consideration.[49] Beyond them, the remaining judges are appointed by the drawing of lots, organised to ensure a geographically balanced bench which is respective of the various legal cultures within the ECHR system.[50] This results in a hybrid judicial formation of senior and junior, experienced and newer judges.

In upholding transparency, the Grand Chamber—and ECtHR system as a whole—gains a further degree of legitimacy. The concern for transparency within the Strasbourg human rights system has been described by one judge as 'near absolute'.[51] Both the text of the ECHR and the Rules of Court enshrine the transparency of judicial divisions and the right for judges to file separate opinions.[52] While perhaps not an obligation,[53] this right has been widely exercised by judges and frequently been the subject of academic commentary.[54] Indeed, in practice it is only in exceptional circumstances that a dissenting judge does not identify their vote by writing or joining a separate opinion, and quite often when the issue is of comparatively lesser importance.[55] Former ECtHR Judge Nußberger observed how the positive elements of both the per curiam model, where decision-making tends to be based on the composite decision of the judges, and the seriatim model where judges deliver individual opinions, are visible at the ECtHR.[56] This is 'clarity on the one hand, and transparency and openness of the decision-making process on the other hand'.[57]

The transparency of the ECtHR is, however, undermined by one practice. Judicial divisions are not always identified in admissibility opinions, with the Court's judgment merely noting whether an opinion was adopted unanimously or by a majority, without the possibility of separate opinions. This practice has drawn internal criticism, with

[49] LL Guerra, 'The National Judge and Judicial Independence: The Case of the Strasbourg Court' (2017) 24 MaastrichtJEur&CompL 552, 553.

[50] Rules of Court (n 47) rule 24(2)(d). In pursuit of gender equality, when States nominate candidates for the position of judge, they must include 'one candidate of each sex'. Parliamentary Assembly of the Council of Europe, Resolution 1366 'Candidates for the European Court of Human Rights' (30 January 2004).

[51] P Pastor Vilanova, 'Accountability of the Judiciary: Shared Responsibility of Judges and the State' in Proceedings of the Seminar 'The Authority of the Judiciary, Challenges to the Authority of the Judiciary, Responses to the Challenges' (Strasbourg, 2018) 25.

[52] Rules of Court (n 47) rule 24.

[53] A Nußberger, 'The Fine-Mechanics of Judicial Decision-Making at the European Court of Human Rights' in B Häcker and W Ernst (eds), *Collective Judging in Comparative Perspective: Counting Votes and Weighing Opinions* (Intersentia 2020) 227, 247.

[54] RCA White and I Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9 HRLR 37, 60; FJ Bruinsma, 'The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998–2006)' (2008) 32 Ancilla Iuris 32; RP Anand, 'The Role of Individual and Dissenting Opinions in International Adjudication' (1965) 15 ICLQ 789;

[55] L Garlicki, 'Judicial Deliberations: The Strasbourg Perspective' in N Hulis, M Adams and J Bomhof (eds), *The Legitimacy of Highest Courts' Rulings* (TMC Asser Press 2009) 396. See also White and Boussiakou (n 54) 39.

[56] While the per curiam model tends to arise in civil law jurisdictions, and the seriatim model in common law jurisdictions, there exists some overlap. See I Robbins, 'Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions' (2012) TulaneLRev 1197.

[57] Nußberger (n 53) 248.

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Judge Pastor Vilanova noting that the lack of clarity on particularly slim majorities restricts transparency on how views were formed, and that identifying judicial divisions would not affect judicial independence, the secrecy of deliberations or the authority of the decision.[58] Given that the numerical split is not always identified, there may be bare majority votes which are unaccounted for in this article. There were 79 decisions where a division was noted but the precise split was not given, out of the 2291 total votes taken over the period assessed.

To draw this section together, the practice of majority voting which gives rise to bare majority decisions is parasitic upon a structured institutional setting which contains the legitimacy-enhancing features of collective judging and judicial transparency. The inherent legitimacy credit which these features construct to some extent offsets the normative challenges posed by bare majority voting. Put another way, the possibility of bare majority decisions are the price that is paid for a sophisticated system of transparent panel adjudication.

3. The peril of bare majority votes

While conceptual concerns around bare majority decisions can be partially justified by the institutional setting within which they take place, there are two inter-linked challenges that remain. The first is procedural in nature, with an emphasis not only on the outcome of a decision but on the process by which the decision was reached.[59] The lack of a convincing outcome can give rise to a sense of randomness that the decision landed one way rather than the other.[60] A spotlight is then thrown on both the composition of the bench and the competence of the judges.[61] In relation to the composition, the critical issue is that, unless a court is sitting en banc, the replacement of just one judge may have swung the decision.[62] As Dickson highlighted in respect of the Appellate Committee of the House of Lords, this means that the decision 'can sometimes depend on which judges are sitting' to hear the respective case.[63] Such concerns have also been voiced by judges. Reflecting on the influential English tort law case, *McLoughlin v O'Brian*, Lord Hoffmann noted that it was 'one of those cases in which one feels that a slight change in the composition of the Appellate Committee would have set the law on a different course'.[64] Even where a court sits en banc, the bare majority can undermine the perceived objectivity of the judges. Riggs notes that five to four decisions at the US Supreme Court create an image of Justices voting based on

[58] Vilanova (51) 25.

[59] Baetens (n 28) 7.

[60] J Shugerman, 'Balanced Checks: It Should Take Two-Thirds of the Supreme Court to Stop Congress' (*Slate*, 20 June 2012) <https://slate.com/news-and-politics/2012/06/supermajority-voting-on-the-supreme-court.html>.

[61] JH Shugerman, 'A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court' (2003) 37 GaLRev 893, 942.

[62] On the enlarged panel in *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, see Lady Hale, 'Judges, Power and Accountability' (Queen's University Belfast, 11 August 2017) 18.

[63] Dickson (n 1) 302.

[64] *White and Others v Chief Constable of South Yorkshire* (1998) 2 AC 455, 502. See also R Buxton, 'Sitting En Banc in the New Supreme Court' (2009) 125 LQR 288, 288.

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their individual political preferences 'in situations where substantive rules seem to provide little guidance'.[65]

A second peril for bare majority decisions is of a more substantive nature. Decisions, particularly those by apex and appellate courts, should produce coherence and clarity for stakeholders to follow. Bare majority decisions risk imploding this coherence in the law.[66] In common law courts, this is particularly acute where the split is on the ratio of the decision, and not merely a point in obiter. As Cardozo has noted, 'the closeness of the division attests to the measure of doubt', and that doubt can potentially carry from the decision over into the area of law.[67] Not only do bare majority decisions demonstrate 'fundamental differences as to what rules or principles should prevail',[68] they also identify just how easily a decision—and even an area of law—might have been placed on another path.[69] By their very nature they are 'close-calls'.[70] The differences of opinion run deeper than merely which way a court went, as in bare majority decisions the reasoning of the court is inherently in doubt. This reasoning is critical to the external legitimacy of a court and its judges. At the international level, Grossman emphasises that legal reasoning and judicial discourse must be commonly accepted by all parties involved.[71] Lasser notes that the legitimacy of a decision largely stands and falls on the 'logic and argumentation' of the judgment, even more so than the procedure which results in the decision.[72] With a bare majority decision, the reasoning of a court is inherently vulnerable to critique, as it is immediately flagged as not having convinced almost half of the bench.

These procedural and substantive concerns in bare majority votes are problematic for the Grand Chamber of the ECtHR. In a procedural sense, the Grand Chamber does not suffer from regular concerns over who is sitting in any given case. As most of the bench is drawn by lot from a pool of ordinary judges by the President of the Court, and under the supervision of the Registrar, there is little scope to suggest that a bench is being 'packed' with judges of a particular disposition. Moreover, as ECtHR judges are less likely to be broadly classed as 'activist' or 'conservative', there is less room to suggest that if judge X or Y had sat on a case the result would have been different. The issue of competence is, however, a trickier question. While the Court and its leaders regularly espouse the expertise, capability and the high standards required to be a judge, Court critics have frequently targeted the competence of ECtHR judges.[73] This has been

65 RE Riggs, 'When Every Vote Counts: 5-4 Decisions in the United States Supreme Court, 1900–90' (1993) 21 HofstraLRev 667, 709.

66 Two components which Franck saw as critical to its legitimacy: T Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 84.

67 *People ex rel Hayes v McLaughlin*, 247 NY 242 (Court of Appeals of the State of New York, 1928) (Cardozo J).

68 Dickson (n 1) 284.

69 N Duxbury, *The Intricacies of Dicta and Dissent* (CUP 2021) 131.

70 Dickson (n 1) 284.

71 Grossman (n 38) 148–49. See also Levmore (n 19) 336.

72 M Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy* (OUP 2004) 338.

73 D Raab, *Strasbourg in the Dock: Prisoner Voting, Human Rights and the Case for Democracy* (Civitas 2011); HC Deb 28 May 2015, vol 596, col 273 (P Davies MP). For further discussion, see B Çalı, A Koch and N Bruch, 'The Legitimacy of Human Rights Courts: A Grounded Interpretivist Analysis of the European Court of Human Rights' (2013) 35 HRQ 955, 967.

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compounded by some accounts from the bench itself. One of the longest serving judges on the Court, Judge Boštjan Zupančič, commented after retirement that the judges were becoming 'more and more mediocre'.[74] In other cases, the conduct of judges also betrays concerns around their character. For instance, after retiring Judge Zupančič himself was accused of posting offensive statements online,[75] while former Russian Judge Dedov wrote a notable dissent in *Bayev v Russia*, which was characterised by one commentator as 'outrageously homophobic'.[76] The challenge raised by bare majority voting is that when observers are reminded that the individual judge can be the difference in a decision, the quality and character of those individual judges becomes more relevant.

Substantive concerns can also be particularly acute given that the Grand Chamber's remit is specifically to provide clarity.[77] Cases are brought before the Grand Chamber by virtue of two main avenues. The first is where a Chamber of seven judges relinquishes jurisdiction to the higher formation so as to address 'a serious question' affecting the interpretation of the ECHR, or the consistency of its caselaw.[78] The second is through a referral after a Chamber judgment where the application 'raises a serious question' of interpretation or general importance.[79] The very raison d'être of the Grand Chamber is therefore to provide cohesion and clarity, not only to lower formations of Chambers, Committees and single judges in the ECtHR, but also to the judges in the 46 jurisdictions across the Council of Europe's membership. Indeed, judicial leaders have noted that there is clearly a preference for 'consensus or compromise', where it can be achieved on the bench.[80] Thus, when the Grand Chamber issues a decision of nine to eight, not only are observers left to question just how coherent the law is, but the divisions on the bench will most likely have been stark.

Whether a bare majority decision gives rise to a concern based on procedural or substantive grounds, the result can have an impact on a court's legitimacy and authority. Judges at the ECtHR in particular, are acutely aware that for their judgments to be followed, national actors may need to be convinced that the Court's position is correct. As former Judge Nußberger concedes, bare majorities simply 'do not convey a very strong message, particularly when the arguments of the minority are spelled out very convincingly'.[81] Some have gone further to suggest that the judicial division can have a

[74] 'About the ECHR: Full Interview with B Zupančič' (European Centre for Law and Justice, 24 January 2020) <https://eclj.org/geopolitics/echr/about-the-echr-full-interview-with-bostjan-m-zupancic>.

[75] G Swerling, 'Antisemitic Posts by former European Court of Human Rights Judge Exposed' *The Telegraph* (24 August 2023) <https://www.telegraph.co.uk/news/2023/08/24/bostjan-zupancic-echr-judge-anti-semitism/>.

[76] L Lavrysen, 'Bayev and Others v. Russia: On Judge Dedov's Outrageously Homophobic Dissent' (*Strasbourg Observers*, 13 July 2017) <https://strasbourgobservers.com/2017/07/13/bayev-and-others-v-russia-on-judge-dedovs-outrageously-homophobic-dissent/>.

[77] Garlicki (n 55) 395; F Krenc, 'The European Convention on Human Rights: Pillars, Shifts, and Challenges' (2025) 25 HRLR 1, 14.

[78] ECHR (n 48) art 30.

[79] ibid art 43(2).

[80] R Spano, 'Primus Inter Pares, but More Pares than Primus! – Recollections of a Former President of the European Court of Human Rights' (2023) 4 ECHRLR 7.

[81] Nußberger (n 53) 248. On the importance of convincing domestic audiences, see also Garlicki (n 55) 394.

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material effect on whether the ruling is implemented or not. In a study on how dissent affects the enforcement of judgments, Naurin and Stiansen found that rulings which included heavy 'judicial dissent are significantly less likely to be complied with' when compared to those which are unanimous.[82]

Tying this together, bare majority decisions have the potential to undo a court's legitimacy base while also presenting challenges for the parties involved. While a bare majority decision alone does not have the capacity to destabilise a court and endanger its authority and legitimacy, it certainly has the potential to exacerbate criticism and neutralise some of the claims to legitimacy that the body holds. The extent to which a bare majority decision is problematic for any court will turn on how it manifests in practice.

4. Bare majorities in practice

Unpacking incidences of bare majority voting reveals that there is much more to the judicial disagreement than the numbers reflect. Some bare majorities can pose more significant questions for a court and the law than others. This section identifies six questions relating to bare majority votes, with the jurisprudence of the Grand Chamber of the ECtHR used as a case study to show their salience. It is with their frequency that the analysis commences.

4.1. How frequently does the bench split in a bare majority?

This question is particularly pertinent to the reputation of the judicial body under consideration and the narrative it projects. A judicial institution which splits on a bare majority basis with regularity can give the perception that the bench is divided into factions, with judges immovable by compelling argument. Such perceptions can critically undermine the legitimacy of the judicial process and see the bench labelled as a site of disagreement, rather than one of deliberative engagement. This labelling can take place even where the frequency of disagreement is not particularly high. Sunstein noted at the turn of the century that there was a perception that the US Supreme Court was in a 'remarkable era' of bare majority decisions, when only roughly 20 per cent of cases saw the bench split five to four.[83] Thus, even a modest frequency can lead to an assumption that a bench is permanently divided.

Canvassing bare majority divisions across the jurisprudence of the Grand Chamber demonstrates that such nine to eight splits are incredibly rare. As noted in Section 2.3, the Grand Chamber is an issue-voting formation and so within each case the judges usually vote several times on a series of 'operative provisions'. Voting is based on a simple majority with no abstentions permitted on the final vote.[84] Across the period under consideration, there have only been 34 bare majority votes. As some cases involved multiple votes of this nature, the number of cases which included such a

[82] D Naurin and Ø Stiansen, 'The Dilemma of Dissent: Split Judicial Decisions and Compliance with Judgments from the International Human Rights Judiciary' (2020) 56 Comparative Political Studies 959, 960.

[83] C Sunstein, 'Courting Division' *The New York Times* (6 October 2005) <https://www.nytimes.com/2005/10/06/opinion/courting-division.html>.

[84] Nußberger (n 53) 248.

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marginal division is reduced even further to 29.[85] This low number is not only indicative of the ECtHR being a court of consensus but is also a result of simple statistical probability relating to court size.[86] The Grand Chamber can render nine possible outcomes, including a nine to eight.[87] In contrast, a judicial composition of seven justices can only render four possible outcomes, ranging from a unanimous seven to zero, to a clearly divided four to three. The frequency of bare majority decisions is thus influenced by the size of the bench.

4.2. Does the bench split clearly, or fracture?

Related to the frequency of such votes, there is also a distinction to be made between those cases in which the bare majority reflects a division between the majority and a united group of dissenters, and where the dissenters themselves fracture across several different opinions.[88] A united group of dissenters casts the entire bench as being divided into two separate blocks, with one seemingly adopting a progressive stance and the other a more conservative one. This perception may develop even where the stance is temporary, or the progressive stance may appear conservative when cast in other contexts. Thus the way in which the bench is populated becomes highly relevant. A bench with a stagnant formation of a set number of judges can split along the same lines regularly, furthering the impression of ideological trenches, while a bench—like the Grand Chamber—which blends ex officio and transient judges is far less likely to convey entrenched positions. Nonetheless, in separating into a binary format like this, the bench is projecting the image that there are two conceptions of this area of law, with one being correct and the other incorrect. In contrast, where the dissenters fracture into multiple different parties, a multiplicity of potential opinions is presented. This can have the benefit of demonstrating that judges are rigorously interrogating the law and facts, and not merely 'slip-streaming' behind other colleagues.[89] Nonetheless, it can also present the law as incoherent where several expert interpreters arrive at different conclusions as to its meaning or application.

At the Grand Chamber there is a predominance of clear dissents, where the minority deliver a joint dissent, appearing in most of the cases (16). The remaining cases (13) feature fractured dissents, where the judges write separately, in pairs, or in small groups. Even then, there is often common ground in the reasoning among some of the dissenters. This is evident where a judge may choose to dissent alone, yet within that dissent they note their shared viewpoint with other dissenters. For instance, in *Correia De Matos v Portugal*, Judge Sajó delivered a paragraph-long dissent which effectively wove together the arguments of the other dissenters,[90] while in *Paladi v Moldova*, Judge

[85] Rules of Court (n 47) rule 23.2.

[86] N Arold, *The Legal Culture of the European Court of Human Rights* (Martins Nijhoff Publishers 2007).

[87] The other possibilities are: 17–0; 16–1; 15–2; 14–3; 13–4; 12–5; 11–6 and 10–7.

[88] The focus here is on dissenters, yet it should be noted that the majority can also fracture. See Levmore (n 19) 331.

[89] Lady Hale, 'Judgment Writing in the Supreme Court' (First Anniversary Seminar, London, 30 September 2010) para 2.

[90] *Correia de Matos v Portugal* Application No 56402/12 (ECtHR, 4 April 2018) para 1 (Separate Opinion of Judge Sajó).

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Costa dissented individually, yet he aligned with an opinion from six other dissenters, effectively making it closer to a clearly split bench.[91]

Fractured dissents, like these, range from two parties of dissenters,[92] through to a truly splintered judicial bench with five separate dissenting opinions.[93] These latter dissents are reminiscent of Duxbury's characterisation of some five to four decisions resembling a sustained attack on the majority, with 'the opinion of the Court hanging like a piñata which the dissenters take turns to beat'.[94] It is also important to note that those who create the 'piñata' in this case—the majority—do not always have the opportunity to respond, as while the dissenters may see the text of the majority position before writing their separate opinions, the majority may not always see the dissents.

4.3. How pervasive is the disagreement within the case?

A further distinction in practice touches on the extent of the disagreement in a particular case. Is the bare majority the only site of disagreement or is the bare majority reflective of a more comprehensive lack of unity on the court? This is a particularly acute consideration for courts which utilise issue-voting, which allows stakeholders to clearly identify the number of areas upon which there is disagreement. In contrast, judicial compositions which take more case-based approaches may be able to obscure the extent of disagreement within the individual judicial opinions.

As an issue-voting court, the pervasiveness of disagreement at the Grand Chamber is evident in the voting record of the bench. In some cases, the bare majority may be the only site of disagreement in an otherwise harmonious decision. For instance, in *Labita v Italy* the Court was split on whether the applicant had been subjected to torture while detained in prison, but remained unanimous in respect of the 11 other operative provisions voted upon.[95] In *Merabishvili v Georgia*, a case concerning the detention of the former Prime Minister of Georgia, the Court split in a bare majority on two votes but was unanimous in the remaining eight.[96] Conversely, multiple bare majorities can characterise an entire judgment as divisive. In both *Béláné Nagy v Hungary* and *Vasiliauskas v Lithuania* respectively, three of the five operative provisions, including on whether there had been a violation or not, and the remedies, were bare majorities.[97] In *Jasper v United Kingdom*, relating to disclosure issues in a criminal trial, the split on the right to a fair trial was the only issue voted upon.[98]

[91] *Paladi v Moldova* (2008) 47 EHRR 15 (Partly Dissenting Opinion of Judge Costa). See similarly *Vasiliauskas v Lithuania* Application No 35343/05 (ECtHR, 20 October 2015) (Dissenting Opinion of Judge Ziemele).

[92] e.g. *Animal Defenders International v United Kingdom* (2013) 57 EHRR 21; *Kurić and Others v Slovenia* Application No 26828/06 (ECtHR, 26 June 2012).

[93] *Correia De Matos* (n 90).

[94] Duxbury (n 69) 178.

[95] *Labita v Italy* (2008) 46 EHRR 50.

[96] *Merabishvili v Georgia* Application No 72508/13 (ECtHR, 28 November 2017).

[97] *Béláné Nagy v Hungary* Application No 53080/13 (ECtHR, 13 December 2016); *Vasiliauskas v Lithuania* (n 91).

[98] *Jasper v United Kingdom* (2000) 30 EHRR 441. See also *Correia De Matos* (n 90).

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Of itself, the frequency of bare majority votes within a case does not necessarily determine the significance of the disagreement. It may be that the areas of agreement were less contentious than the site of disagreement. For instance, in *Folgerø v Norway*, the bench was unanimous on four out of five issues, yet it split on the critical question of whether children's compulsory attendance at religious instruction in schools unjustifiably interfered with the right to education.[99] Thus, the extent of disagreement needs to be weighed against the importance of the issue being voted upon. This will often turn on the focus of the disagreement.

4.4. Where is the site of disagreement?

In a substantive sense, the most important question is where the bench splits. What is the area, issue or context of the division? Some disagreements will be more charged than others. On collegial courts disagreement will take several different forms, with varying consequences.[100] For the Grand Chamber, one way to view the importance of splits is by separating those which occur on substantive rights application issues (i.e. votes on whether there was a violation of a right or not) and those which occur on more procedural questions like admissibility, just satisfaction and case management. The majority of the bare majority votes (22) have been in the application of substantive rights, with division over the right to a fair trial in Article 6 being the most prevalent (7). The remaining votes (12) have been of a more procedural nature, with the majority of these (8) being in respect of the just satisfaction to be awarded to the applicant(s). That said, some of these procedural issues have been of considerable importance for the Court and so it is somewhat superficial to solely view the importance of bare majorities based on the precise location of disagreement.

Looking at the whole case in context gives a better understanding of where a bench may split. For the Grand Chamber, three types of divisions come to the fore: (a) disagreements in the application of the law (Section 4.4.1); (b) disagreements on issues of policy (Section 4.4.2); and (c) disagreements of a more institutional nature relating to the operation of the ECHR (Section 4.4.3). While the walls between these three categories are porous, they encapsulate the principal disagreements. Each is now addressed in turn.

4.4.1. Disagreements in application

The first division reflects disagreements on the application of legal principles to the specific facts of the case. This is an orthodox style of disagreement in any court. When the application is troublesome, dissent is possible.[101] In many of these cases, the judges are approaching the law from the same angle and applying the same standards but arriving at a different conclusion. Judge Dedov explained such an approach in *Fernández Martínez*, a case relating to a married priest who was effectively dismissed from his teaching job in Spain, by noting that 'the Grand Chamber has divided almost in

[99] *Folgerø and Others v Norway* (2008) 46 EHRR 47.
[100] D Landa and JR Lax, 'Disagreements on Collegial Courts: A Case Space Approach' (2008) 10 Journal of Constitutional Law 305.
[101] Peterson (n 47) 413.

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the middle. Both the majority and minority of judges … used the same proportionality test, but they have come to opposite conclusions'.[102] The disagreement, then, is of the kind referred to by former President Robert Spano as 'case-specific factual assessment'.[103]

Characteristic of this line of bare majority is a localisation of the disagreement. In these cases, there is a tendency for the dissenting judges to commence their separate opinions with agreement on the general principles that the Court has articulated. For instance, in *Merabishvili v Georgia* the dissenters commenced by noting that they 'fully concur with the Court's important clarification of the general principles' relating to the purpose of the restrictions of rights.[104] In *X v Bulgaria*, a case involving sexual abuse faced by children in an orphanage, the dissenters immediately noted their agreement with the general principles pertaining to the procedural obligation under Article 3 outlined by the majority. In this type of bare majority, rather than having fundamental misgivings about the understanding of the law, the dissenters tend to 'part company with the majority' in its application.[105]

Where disagreement in application emerges, it may fall into what can be characterised as orthodox methods of adjudication. One line of disagreement in this respect is simply in the application of the legal standard to the facts at hand. For instance, in cases involving bare majorities on just satisfaction, there are sites of disagreement in relation to what is considered 'just, fair and reasonable in all circumstances'.[106] In *Pindo Mulla v Spain*, the majority awarded 12,000 Euros in respect of non-pecuniary damages for failures in a decision-making process that authorised a blood transfusion against the wishes of the applicant. Despite agreeing that there had been a violation, the dissenters would not have awarded any damages, citing mitigating factors which included a lack of evidence of bad faith on the authorities' part, and the life-threatening circumstances faced by the applicant, medical professionals and judge.[107] Similar fine divisions are apparent in other cases relating to procedure. In *Gross v Switzerland*, a case involving complex circumstances surrounding assisted suicide where the Court was not notified of the applicant's death

[102] *Fernández Martínez v Spain* Application No 56030/07 (ECtHR, 12 June 2014) (Dissenting Opinion of Judge Dedov).

[103] R Spano, 'The Future of the European Court of Human Rights—Subsidiarity, Process-Based Review and the Rule of Law' (2018) 18 HRLR 473, 476.

[104] *Merabishvili* (n 95) para 1 (Joint Partly Dissenting Opinion of Judges Raimondi, Spano, Kjølbro, Grozev, Ravarani, Pastor Vilanova, Poláčková and Hüseynov).

[105] *X and Others v Bulgaria* Application No 22457/16 (ECtHR, 2 February 2021) para 2 (Joint Partly Concurring, Partly Dissenting Opinion of Judges Spano, Kjølbro, Lemmens, Grozev, Vehabović, Ranzoni, Eicke and Paczolay). See also *X v Latvia* (2014) 59 EHRR 100, para 7 (Joint Dissenting Opinion of Judges Bratza, Vajić, Hajiyev, Šikuta, Hirvelä, Nicolaou, Raimondi and Nußberger); *Schatschaschwili v Germany* Application No 9154/10 (ECtHR, 15 December 2015) para 2 (Joint Dissenting Opinion of Judges Hirvelä, Popović, Pardalos, Nuβberger, Mahoney and Kūris). Note that in a separate dissenting opinion, Judge Kjølbro was more hesitant about endorsing the Grand Chamber's clarification of general principles: para 1 (Dissenting Opinion of Judge Kjølbro). See also *Fitt v United Kingdom* (2000) 30 EHRR 1 (Dissenting Opinion of Judges Palm, Fischbach, Vajić, Thomassen, Tsatsa-Nikolovska and Traja).

[106] *Pindo Mulla v Spain* (2024) EHRR 753, para 5 (Partly Concurring and Partly Dissenting Opinion of Judge Seibert-Fohr, joined by Judges Kucsko-Stadlmayer, Pastor Vilanova, Ravarani, Kūris, Lubarda, Koskelo and Bormann).

[107] ibid.

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for almost two and a half years, the dissenters felt that the threshold to find an abuse of the right of individual petition had not been met.[108]

Sometimes the application difference stems from a distinction in the treatment of evidential standards. In *Labita v Italy*, the dissenters noted the difficulty that the applicant would have faced in proving the ill-treatment he claimed to have suffered while in an Italian prison.[109] In *X v Bulgaria*, the dissenters held that allegations of sexual abuse which had been made to Bulgarian authorities were, at that point in time, not sufficiently credible and substantiated to trigger the level of investigation required under Article 3 and, therefore, the obligation was not breached.[110]

In a particular series of cases, the disagreement relates to proportionality assessment. In *Pedersen and Baadsgaard v Denmark* the dissenters contended that the justification provided by Danish authorities for interfering with journalists' freedom of expression, in a case which led to a high-profile miscarriage of justice, was not 'necessary in a democratic society'.[111] This was also the basis for the distinction in proportionality assessments rendered by the Court in *Fernández Martínez v Spain*, involving the non-renewal of the teaching position of a married catholic priest,[112] and in *Mouvement Raëlien Suisse v Switzerland*, where the division related to a ban imposed on a poster campaign organised by a group with unorthodox views.[113]

A further area of disagreement lies in a distinction in the application of interpretative methods available to the Court. One site of disagreement is in respect of the scope and breadth of a State's margin of appreciation, particularly in areas where European consensus is developing.[114] In *Correia De Matos v Portugal*, several of the dissenters felt that the majority was overly deferential to Portugal on the issue of the right to defend oneself and contended that the development of a 'clear trend' across Europe towards allowing defendants to conduct their own defence had shrunk the margin of appreciation available to States.[115] Similar disagreements on consensus were at issue in *Moreira Ferreira v Portugal (No 2)*, where the dissenters accused the majority of taking a 'methodologically incorrect comparative method' which led to a 'misevaluation of the European Consensus' on the reopening of criminal procedures in light of the ECtHR's rulings.[116] For them, doing so

[108] *Gross v Switzerland* Application No 67810/10 (ECtHR, 30 September 2014) (Joint Dissenting Opinion of Judges Spielmann, Ziemele, Berro, Zupančič, Hajiyev, Tsotsoria, Sicilianos and Keller).

[109] *Labita* (n 95) para 1 (Joint Partly Dissenting Opinion of Judges Pastor Ridruejo, Bonello, Makarczyk, Tulkens, Strážnická, Butkevych, Casadevall and Zupančič).

[110] *X v Bulgaria* (n 105) para 26 (Joint Partly Concurring, Partly Dissenting Opinion of Judges Spano, Kjølbro, Lemmens, Grozev, Vehabović, Ranzoni, Eicke and Paczolay).

[111] *Pedersen and Baadsgaard v Denmark* (2006) 42 EHRR 486, para 10 (Joint Partly Dissenting Opinion of Judges Rozakis, Türmen, Strážnická, Bîrsan, Casadevall, Zupančič, Maruste and Hajiyev).

[112] *Fernández Martínez* (n 102) para 37 (Joint Dissenting Opinion of Judges Spielmann, Sajó, Karakaş, Lemmens, Jäderblom, Vehabović, Dedov and Saiz Arnaiz).

[113] *Mouvement Raëlien Suisse v Switzerland* (2012) EHRR 1598, para 1 (Joint Dissenting Opinion of Judges Tulkens, Sajó, Lazarova Trajkovska, Bianku, Power-Forde, Vučinić and Yudkivska).

[114] For further discussion on this disagreement, see K Dzhetsiarou, *European Consensus and the Legitimacy of the European Court of Human Rights* (CUP 2015).

[115] *Correia De Matos* (n 90) para 18 (Joint Dissenting Opinion of Judges Tsotsoria, Motoc and Mits).

[116] *Moreira Ferreira v Portugal (No 2)* Application No 19867/12 (ECtHR, 11 July 2017) para 35 (Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović and Kūris).

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applied a 'particularly high threshold to the European consensus, thus potentially extending the States' margin of appreciation beyond its limits'.[117]

Interpretative disagreements such as this are of a broader nature than a simple disagreement over factual application. Nonetheless, they remain largely localised as in these cases the disagreement is not over the applicability of the interpretive doctrine but, instead, in how it is utilised in the case at hand. For instance, in *Animal Defenders v United Kingdom*, a case involving a general ban on political advertising in broadcasting, Judge Tulkens partly characterised the dispute as an interpretive one involving the scope of the margin of appreciation.[118] On this, she complained that the European consensus issue was dealt with in a 'brief and selective' way, and was particularly critical of the 'barely relevant' references made to the US as a comparator.[119] While a consistent approach in using a particular interpretative principle may, over time, alter how that method of interpretation is understood, these cases remain largely contained to the facts at hand.

However, there are instances where the disagreements in application between the majority and minority are reflective of differing views of the general principles of law. *Béláné Nagy v Hungary* is indicative of this as it includes judicial disagreement on fundamental issues as to how ECHR rights were understood. The applicant had complained that a change in eligibility criteria for disabled pensions had led to a loss of her only source of income. The majority found in her favour, effectively recognising that while she did not have a right to a disability pension under Hungarian legislation, she held a legitimate expectation which fell within the scope of the protection of property under Article 1 of Protocol No 1. In dissenting, the minority expressed their 'significantly different' understanding of the general principles applicable to the area.[120]

4.4.2. Disagreements encroaching on policy issues

A separate category of bare majority disagreements are those cases in which the judges exhibit a variety of approaches to a particular area of policy. It may still be ostensibly orthodox application and interpretation disagreements which render the bare majority, yet both the interpretation and its effects are less localised to the case at hand. In these cases, the judges note that they are influenced by non-legal considerations when rendering their decision.[121] *Medvedyev v France* offers an example of this. The case concerned the interception by the French Navy of a vessel being used to smuggle narcotics off the western coast of Africa. The ship's crew were held for a period of 13 days in transit back to Brest Harbour before being brought before a judge competent to authorise their detention. The ECtHR found no violation of the right to liberty, yet those dissenting were of the opinion that, while judicial consideration could be delayed

[117] ibid para 50.

[118] *Animal Defenders* (n 92) para 4 (Dissenting Opinion of Judge Tulkens, joined by Judges Spielmann and Laffranque).

[119] ibid para 17.

[120] *Béláné Nagy* (n 97) para 2 (Joint Dissenting Opinion of Judges Nußberger, Hirvelä, Bianku, Yudkivska, Møse, Lemmens and O'Leary).

[121] Dzehtsiarou (n 14) 94.

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in 'wholly exceptional circumstances', those circumstances did not apply in this case.[122] This distinction essentially hinges on what it is reasonable to expect a State to do in order to ensure ECHR compliance in its fight against illegal drug trafficking. The dissenters felt that there were sufficient alternative options to the French authorities—such as transporting a judge to the relevant vessel—to secure compliance with Article 5(3).[123] Indeed, the language of the dissenters clearly reflects the applicable policy terms concerning the fight against drug trafficking, noting that unlike the majority, they were not willing to endorse 'unnecessary abridgements' of rights.[124]

A similarly high-level issue was at play in *Al-Adsani v United Kingdom.* The applicant alleged that he had been tortured by Kuwaiti authorities and that British courts had breached his fair trial rights by granting sovereign immunity to Kuwait for civil proceedings brought in the UK. The case was seen as a major opportunity to provide clarity to the scope of State immunity in respect of acts of torture committed by foreign States and a clear articulation of the force of the jus cogens prohibition of torture. Yet, the majority found no violation, with the dissenting judges criticising them for their treatment of jus cogens and willingness to negate its force in respect of civil proceedings.[125] Judge Bravo delivered a colourful dissenting opinion describing the judgment as a 'pity' and suggesting the Court had missed 'a golden opportunity to issue a clear and forceful condemnation' against any act of torture.[126]

A case of similar importance in respect of policy is *Animal Defenders v United Kingdom*, in which the majority upheld the blanket ban in British legislation on political advertising in broadcast media. The Court had been tasked with assessing whether the ban was proportionate or whether exceptions could be made, for instance for smaller campaign groups. The case followed *VgT Verein gegen Tierfabriken v Switzerland*, a judgment which several dissenters considered to contain 'an essentially identical' general prohibition, and where a violation had been found. The dissenters were perplexed as to how the ban could be deemed 'not necessary in Swiss democratic society, but … proportionate and *a fortiori* necessary in the democratic society of the United Kingdom'.[127] The different approaches taken on such a similar issue then gave rise to concerns of double-standards in the application of ECHR obligations.

A final example of a bare majority on a policy issue with the potential for major implications is the judgment in *Oršuš v Croatia.* The case concerned the education of Roma children across several Croatian towns. This often involved the children being segregated into their own groups and classes as they lacked adequate command of the Croatian language. The majority found the measures to be in violation of the right to education when read alongside the prohibition of discrimination. The dissenters

[122] *Medvedyev and Others v France* Application No 3394/03 (ECtHR, 29 March 2010) para 6 (Joint Partly Dissenting Opinion of Judges Tulkens, Bonello, Zupančič, Fura, Spielmann, Tsotsoria, Power and Poalelungi).

[123] ibid para 8.

[124] ibid para 2.

[125] *Al-Adsani v United Kingdom* (2002) 34 EHRR 11 (Joint Dissenting Opinion of Judges Rozakis and Caflisch, joined by Judges Wildhaber, Costa, Cabral Barreto and Vajić).

[126] ibid (Dissenting Opinion of Judge Ferrari Bravo).

[127] *Animal Defenders* (n 92) para 1 (Joint Dissenting Opinion of Judges Ziemele, Sajo, Kalaydjiyeva, Vučininć and De Gaetano). See also: *VgT Verein gegen Tierfabriken v Switzerland* Application no 24699/94 (ECtHR, 28 June 2001).

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contended that there had been objective and reasonable justifications for the measures adopted by the State in respect of Roma children's language needs, and recognised that the State enjoyed a 'wide margin of appreciation' in social policy issues like this.[128] At the heart of their dissent, however, was an accusation that the majority were attempting to treat the case as a general issue on the vulnerability of the Roma population, instead of judging it in respect of the specific facts.[129]

Much like the first group, these types of cases involve strong elements of orthodox application and interpretative disagreement. Where they differ, however, is in the extent to which the judges transparently observe how external policy factors may have shaped the decision and/or the extent to which the decision holds the capacity to shape policy going forward.

4.4.3. Institutional differences

The Grand Chamber occasionally renders bare majority decisions in cases which go beyond application of the relevant rights and instead address more fundamental issues relating to the ECHR's operation. For instance, in *Moreira Ferreira v Portugal (No 2)* the Court was confronted with the question of whether it could compel States to take certain measures where it had found a violation of the ECHR in an earlier decision. As Donald notes, this question has come to the fore in recent years with an increasing number of States failing to implement judgments.[130] In the case, an earlier Chamber panel had found Portugal to be in violation of Article 6 as the applicant had not been heard in person in a hearing upholding her conviction. The Chamber had identified reopening the hearing as an acceptable outcome. Subsequently, however, the Supreme Court of Portugal held that a reopening was not necessary as the judgment had not raised doubts as to the merits of the conviction. The applicant returned to the ECtHR accusing Portugal of breaching Article 46 ECHR by failing to execute the earlier judgment, and a further breach of Article 6. At the Grand Chamber, the majority held that there had not been a violation of Article 6. The dissenters lamented the majority's approach to this on several fronts, with the importance of the judgment recognised as a 'crucial issue' and 'bound up with the distribution of powers between the Court and the Committee of Ministers, and therefore indisputably calls for a ruling regarding the institutional legal framework of the Convention'.[131] The dissenters were highly critical of the majority for failing 'to bring coherence' and instead making the issue 'perhaps even more … confusing'.[132]

A further example of questions of such an institutional nature is *Jeronovičs v Latvia*, where again the disagreement related to the ECtHR's own previous behaviour and judgments. The applicant had alleged ill-treatment in a police station in an earlier

[128] *Oršuš and Others v Croatia* Application No 15766/03 (ECtHR, 16 March 2010) para 8 (Joint Partly Dissenting Opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić).

[129] ibid para 2.

[130] A Donald, 'Judges at Odds Over Court's Authority to Order Remedies' (*Strasbourg Observers*, 28 July 2017) <https://strasbourgobservers.com/2017/07/28/judges-at-odds-over-courts-authority-to-order-remedies/>.

[131] *Moreira Ferreira (No 2)* (n 116) para 3 (Joint Dissenting Opinion of Judges Raimondi, Nußberger, De Gaetano, Keller, Mahoney, Kjølbro and O'Leary).

[132] ibid para 2 (Dissenting Opinion of Judge Kūris, Joined by Judges Sajó, Tsotsoria and Vehabović).

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application. A Chamber had struck out the applicant's case on that occasion as it had received a unilateral declaration by the State conceding that it had violated Article 3, and a commitment to make an ex-gratia payment to the applicant. The Chamber made no order, however, into completing an investigation into the incident and so when Latvia failed to conduct any further review in compliance with Article 3 the applicant returned to the Court. At the Grand Chamber, the majority found a violation of Article 3 ECHR under its procedural limb for the State's failure to reopen an investigation into the ill-treatment he had suffered, with the majority awarding the applicant further compensation. The dissenters disagreed with this, contending that the applicant should not be compensated twice for what was essentially the same violation.[133] For seven of the eight dissenters, the critical issue was of an institutional nature in that the Court itself had failed to clearly outline the obligations it expected to be met after the strike-out decision. They opened their dissent by questioning '[W]hat is the status of a strike-out decision of the Court?',[134] and were damning in their assessment of the majority decision, noting that the 'judgment erodes the certainty that should prevail after the Court has completed its examination'.[135] Such cases, where the bench splits on its own institutional practices and procedures, have the capacity to shine a negative light on the sophistication of the system as a whole.

4.5. How the division is positioned within the case history

Bare majorities at apex courts may be the last time that a case receives judicial attention, but almost certainly will not be the first. The case is likely to have been considered by multiple panels of judges on its route to the highest judicial body. For international courts operating on the principle of subsidiarity, the extent of previous judicial consideration may be even greater with an expectation that domestic remedies have been exhausted before an application is made to the international body.[136] The result is that the bare majority division will not sit alone in a case's overarching narrative. While it may reflect the most consequential division, that vote remains a snapshot within a lengthy period of multiple judicial considerations.

One question which can inform the character of the bare majority is whether the disagreement reflected in the final court's decision is consistent with a lack of harmony in earlier judicial consideration. As has been discussed at length, there are 'hard cases' where a community of adjudicators disagree about what the outcome should be.[137] A bare majority in an apex court on an issue which has split earlier benches may be accurately framed then as simply a 'hard case', thus relieving some of the concerns posed by judicial disagreement. At the Grand Chamber, both the cases of *Medvedyev v France* and *Pedersen and Baadsgaard v Denmark* had split the Chamber composition in four to three judgments before splitting the higher formation nine to eight. Both were highly

[133] *Jeronovičs v Latvia* Application No 44898/10 (ECtHR 5 July 2016) para 17 (Partly Dissenting Opinion of Judge Nicoloaou).

[134] ibid para 1 (Dissenting Opinion of Judge Silvis, joined by Judges Villiger, Hirvelä, Mahoney, Wojtyczek, Kjølbro and Briede).

[135] ibid para 1 (Dissenting Opinion of Judge Wojtyczek).

[136] See further J Crawford and TD Grant, 'Exhaustion of Local Remedies' (2007) MPIL (online).

[137] JJB Fischman, 'How Many Cases Are Easy?' (2021) 13 Journal of Legal Analysis 595, 601.

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charged decisions with significant potential policy implications and likely to generate considerable public interest. That they split in such a fashion is perhaps reflective of how both the legal and policy implications of the decisions pulled adjudicators in different directions.

Potentially more problematic are the instances whereby, through a bare majority vote, the apex formation reverses a unanimous decision of a lower judicial composition. In these cases, at least two compositions of expert judges are tasked with considering the same issue and when the aggregate votes are tallied, the side which loses in the final judgment may still have convinced more of the judges. The justification for such divisions lies in the fact that the apex court has the jurisdiction to provide the final ruling. That formation may be better resourced, have a larger judicial panel and—through a rigorous process of judicial selection—may boast greater judicial competence and authority.

Divisions like this can be more problematic for some judicial formations than others. For the Grand Chamber of the ECtHR, the challenge of justifying such divisions where a bare majority Grand Chamber reverses a unanimous Chamber judgment are particularly acute for two reasons. First, the internal structure of the ECHR institutions is designed in such a way that Grand Chamber cases are not defined as appeals, but rather continuations of the existing dispute. Chamber judgments do not become final until three months after they are issued to allow the parties to seek a 'referral' to the Grand Chamber.[138] Where the Grand Chamber accepts the referral request, the Chamber judgment never becomes final and thus the case rolls on into the higher formation. The justifications of court hierarchy and authority are therefore less convincing in this system. Second, there is a thinner justification that the Grand Chamber panel boasts greater competence or authority than the composition of the Chamber. As noted in Section 2.3, the Grand Chamber is not a permanently established formation with a fixed composition selected by merit. The President sits as the leader of the Court. While considered *primus inter pares*, the tendency of recent Presidents has been to be deeply collegial, with former office holder Judge Spano referring to himself as 'more pares than primus'.[139] The presence of the Vice-Presidents and Section Presidents on the Grand Chamber is not solely reflective of their authority but, rather, to ensure their understanding when consistently applying the Court's jurisprudence in the sections which they lead. Most of the Grand Chamber judges are therefore drawn from the pool of judges who are already serving in the Chambers. It is a mere 'coincidence' where a judge sits.[140] Thus, when a narrow majority in the Grand Chamber reverses a unanimous Chamber decision, the justification becomes more troubling.

Such divisions have occurred in two cases rendered by the Grand Chamber, with the dissenters in both noting the incongruity of the situation. In *X v Bulgaria*, the case involving sexual abuse in a Bulgarian orphanage, the dissenters noted their approval of

[138] Referral requests are rarely successful: see B Baglayan and J Hendrik Fahner, 'One Can Always Do Better: The Referral Procedure before the Grand Chamber of the European Court of Human Rights' (2017) 17 HRLR 339, 349.

[139] Spano (n 80) 7–21.

[140] Nußberger (n 53) 248–49.

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the unanimous Chamber judgment and concluded that the overall outcome created 'the uncomfortable and unattractive position that the current judgment only has the support of nine out of the overall 23 judges of this Court who have considered this application'.[141] To the dissenters, the numerical division against their argument was 'a factor which should have sounded a note of caution to the Grand Chamber'.[142] In *Oršuš v Croatia*, the dissenters further identified that the majority was not only reversing a unanimous Chamber judgment, but also 'a well-reasoned judgment by a Constitutional Court' of Croatia.[143] On this occasion, the dissenters' appeal was that the majority should have presented 'more convincing arguments to justify its decision'.[144] As former Judge Nußberger notes, this is a 'somewhat paradoxical' situation which is 'open to criticism'.[145] Indeed, it is a situation where, through no fault of the judges, the conceptual challenges that the division gives rise to are amplified by the nature of the institutional structure.

4.6. How do the dissenters handle the disagreement?

A final characteristic to determine the potency of a bare majority is how the bench handles the division. The sharp split between judges in the decision can be either exacerbated or mitigated by the tone through which they choose to express their disagreement. Such practices will be informed as much by the individuality of the respective judges, as by the legal culture to which the group of adjudicators belong.[146] Nonetheless, it is worth noting that even in generally harmonious judicial communities the tone can be charged. In his study on the practice at the House of Lords, Dickson noted that 'sometimes the language used is rather strong, indicating that the judge cannot understand how anyone could have come to an alternative conclusion to the one he or she prefers'.[147]

At the Grand Chamber, there can be considerable variance in the judicial discourse from the minority towards the colleagues with whom they disagree. At one end of the spectrum, the judicial tone can be collegiate and reflective of a mutual respect between office holders. In most cases the nine are referred to simply as the 'majority',[148] while in *Göç v Turkey*, concerning whether the absence of an oral hearing constituted a violation of Article 6, the dissenters referred to disagreement 'with our colleagues'.[149] They continued to outline their disagreement before concluding in a measured tone that '[a]ll in all, while understanding the reasoning of the majority, we were regretfully

[141] *X v Bulgaria* (n 105) para 2 (Joint Partly Concurring, Partly Dissenting Opinion of Judges Spano, Kjølbro, Lemmens, Grozev, Vehabović, Ranzoni, Eicke and Paczolay).
[142] ibid.
[143] *Oršuš* (n 128) para 19 (Joint Partly Dissenting Opinion of Judges Jungwiert, Vajić, Kovler, Gyulumyan, Jaeger, Myjer, Berro-Lefèvre and Vučinić).
[144] ibid.
[145] Nußberger (n 53) 248–49.
[146] See, e.g. Kelemen (n 39).
[147] Dickson (n 1) 301–02.
[148] e.g. *Schatschaschwili* (n 105) para 1 (Joint Concurring Opinion of Judges Spielmann, Karakas, Sajo and Keller); *Animal Defenders* (n 92) para 1.
[149] *Göç v Turkey* Application No 36590/97 (ECtHR, 11 July 2002) (Joint Partly Dissenting Opinion of Judges Wildhaber, Costa, Ress, Türmen, Bîrsan, Jungwiert, Maruste and Ugrekhelidze).

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unable to subscribe to it'.[150] There is also a practice in some minority opinions of addressing the law directly, rather than the arguments or intentions of the majority. The division in *Mooren v Germany*, a case concerning the legality of an individual's detention for tax evasion, is reflective of this dry and forensic disagreement.[151] A similar approach is taken in *Kurić v Slovenia*, relating to rights derived from nationality in Slovenia, where the dissents were brief, concise and measured. Notably, in this latter case many of those dissenting were leading judges within the Court, including then President Bratza and future Presidents Spielmann and Raimondi.[152]

In other cases, the sense of disagreement on the bench evident in the fine split can be amplified by a more forceful tone in dissent. The case of *Correia de Matos v Portugal* contained a series of particularly charged dissents. In the judgment, the majority declared that there had been no violation of the right to a fair trial in respect of rulings by domestic Portuguese Courts which prohibited the applicant, a lawyer, from representing himself at trial.[153] Judge Pinto de Albuquerque excoriated the Court in his dissenting opinion describing the 'whole line of reasoning [as] deficient'.[154] He suggested that the Court was granting Portugal greater deference than other States had received in previous cases,[155] and that there had been a perversion of the interpretive doctrine of the margin of appreciation in the majority's ruling.[156] Moreover, his criticism touched on policy matters, suggesting that the majority had abdicated 'judicial responsibility'[157] and been 'conspicuously pragmatist and purposely minimalist'.[158] Most significantly, he accused the majority of engaging in a 'contortionist exercise' in its framing of the applicant's conduct,[159] referring to their characterisations as 'false representations of decisive elements' in their reasoning.[160] His dissenting opinion was joined by a further joint dissenting opinion condemning the majority for inaccurately reflecting aspects of the case,[161] and for condoning 'a paternalistic measure' and paving the way for other such measures in Contracting States' legal systems.[162]

This type of criticism is not unique. In some bare majority cases, the dissenters have described majority opinions as 'illogical'[163] and 'bewildering'.[164] In others, the criticism has fallen into a more orthodox activist versus constrained divide,[165] along with

[150] ibid.
[151] *Mooren v Germany* Application No 11364/03 (ECtHR, 9 July 2009).
[152] *Kurić* (n 92) (Partly Dissenting Opinion of Judge Costa).
[153] *Correia de Matos* (n 90).
[154] ibid para 4 (Separate Opinion of Judge Pinto de Albuquerque).
[155] ibid para 18.
[156] ibid para 33.
[157] ibid para 4.
[158] ibid para 12.
[159] ibid para 81.
[160] ibid para 45.
[161] ibid para 7 (Separate Opinion of Judges Pejchal and Wojtyczek).
[162] ibid para 12. Paternalism is an accusation echoed by Judge Bošnjak in his Dissenting Opinion: para 7.
[163] *Moreira Ferreira (No 2)* (n 116) para 12 (Judge Kūris, joined by Judges Sajó, Tsotsoria and Vehabović).
[164] ibid para 17.
[165] See, e.g. *Vasiliauskas* (n 91) para 6–8 (Dissenting Opinion of Judge Kuris); *Moreira Ferreira* (n 116) para 50 (Dissenting Opinion of Judge Pinto De Albuquerque, joined by Judges Karakaş, Sajó, Lazarova Trajkovska, Tsotsoria, Vehabović and Kūris).

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accusations of inconsistent application amongst different Member States.[166] This style of bare majority, where the scale of the disagreement seeps into the judicial discourse, has the capacity to be particularly problematic for a court which has tended to be characterised by its harmony.[167]

5. Bare majorities beyond the numbers

Reflecting on a proposal to impose a qualified majority of a six to three split on the US Supreme Court, Shugerman noted that whether successful or not, the debate itself 'has tremendous expressive value'.[168] The same can be said for considerations of the practice of bare majority voting on any court. It is a debate which, while beginning with fine splits, returns to core principles and invites critical thinking to justify why things are done the way they are. Adding a reflection of how things are done, alongside why, gives a more complete picture.

Three interlinked observations can be made of the practice of the ECtHR Grand Chamber. The first of these is the simple recognition that not all bare majority decisions are equal. This is particularly the case at an issue-voting court like the ECtHR, where the bench votes on several issues of varying levels of importance. Not all issues which are interpreted and voted upon by a court will carry the same weight. Moreover, the site of division alone may not accurately reflect the importance of the vote. For instance, while a division on remedies may be perceived to be of lower importance to a division on the substantive interpretation of the law, the impact on the relevant individuals may be more profound in the former than the latter. Even internally in cases involving splits on remedies, not all will be equal. The divisions in *Pindo Mulla v Spain* and *Jeronovičs v Latvia*, on whether to award just satisfaction to a single individual, are of a completely different nature to those in *Georgia v Russia (II)* where the majority dismissed an award to 1,408 alleged victims of torching and looting by Russian forces in South Ossetia.[169]

Not only are bare majority votes substantially different in this sense, but they also arise differently in respect of the procedural and substantive concerns which were outlined in Section 3. Procedurally, some bare majorities are unquestionably more challenging than others. Those which betray vulnerabilities in the adjudicative structures and systems, like those witnessed in both *X v Bulgaria* and *Oršuš v Croatia*, where the majority are outnumbered by an aggregate of dissenters and Chamber judges, pose pressing questions about whether the institutional architecture is logically robust enough to sustain the important work that is carried out. At the other end of the spectrum, cases where judges disagree on the weighting they accord to certain issues, following clear and consistent application of the Court's own proportionality test, and where dissenters deliver well-reasoned opinions, showcase adjudication in its proper working order.

[166] *Animal Defenders* (n 92) para 1 (Joint Dissenting Opinion of Judges Ziemele, Sajo, Kalaydjiyeva, Vučininć and De Gaetano).

[167] Arold (n 86) 16.

[168] Shugerman (n 61) 1011.

[169] *Georgia v Russia (II) (Just Satisfaction)* Application No 38263/08 (ECtHR, 28 April 2023). See also *Centro Europa 7 S.r.l. and Di Stefano v Italy* Application No 38433/09 (ECtHR, 7 June 2012).

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Substantive concerns about the coherence of the cases delivered by way of a bare majority split are also variable. Those where the dissenters disagree with the majority in the establishment or recapitulation of general principles of law may convey an unclear message to lower formations and domestic courts.[170] At the other end of the spectrum are a host of cases whose precedential value is entirely unaffected by the narrow division. These are cases where the general principles are agreed upon and yet the application of those principles varies sufficiently to cause a rupture on the bench. In these instances, the site of disagreement can be heavily localised to a particular factual detail, leaving no lasting imprint on the coherence of the law which the judges are applying.

A second reflection on bare majority decisions is that they serve as a reminder that, beyond the numbers, the outcome is a product of individuals judging in a collective capacity. In this sense, a simple preoccupation with 'head-counting' misses 'the essence of judging'.[171] Bare majority votes are not merely cast; they are cultivated. They are the product of a process which is strategically designed to enhance the legitimacy of the outcome and therefore showcasing a composite account of judging in action to the Court's stakeholders. When focusing on a bare majority, much can be made of the divergent opinions of judges and yet, as Stevens notes, '[c]ontroversy is the germ of every lawsuit, and disagreement … permeates the entire judicial process'.[172] What they represent is that judicial process in action. Indeed, in some cases best practices of this process are evident as in bare majority decisions there is a motivation on both sides—the majority and dissenters—to provide as compelling a reasoning as possible.

When the numbers divide is peeled away, there is often little to differentiate a bare majority from a case involving forceful dissents with slightly smaller numbers. Some commentators suggest that any dissent makes the law uncertain.[173] Dissent is also said to weaken the emphasis of decisions[174] and reduce the legal authority of a judgment.[175] Whether bare majority or not, forceful dissents can also bear the hallmarks of a divided court and uncertain caselaw. Take, for instance, the dissents in the *Georgia v Russia (II)* merits judgment. This involved the bench splitting eleven to six in respect of whether the ECHR applied during active phases of hostilities in the 2008 conflict. The majority had found that as the conflict had created a 'context of chaos' Russia lacked the relevant jurisdiction during these phases and, therefore, owed no obligations under the ECHR.[176] That decision drew highly critical comments from the minority, with one judge suggesting that the ruling 'runs counter to the spirit of the Convention'[177] and another reflecting that the Court would face 'a gargantuan task to restore the damage to its credibility'.[178] The controversial judgment did not last intact for long. It was qualified in the *Ukraine and Netherlands v Russia* case five years later, where the Court unanimously held that the 'extensive, strategically planned' military operations

[170] Béláné Nagy (n 97).
[171] Shugerman (n 61) 931.
[172] R Stevens, 'The Function of Concurring and Dissenting Opinions in Courts of Last Resort' (1952) 5 UFlaLRev 394, 394.
[173] Peterson (n 47) 426.
[174] Duxbury (n 69).
[175] Naurin and Stiansen (n 82) 960.
[176] *Georgia v Russia (II)* Application No 38263/08 (ECtHR, 21 January 2021).
[177] ibid para 55 (Separate Opinion of Judge Chanturia).
[178] ibid (Separate Opinion of Judge Pinto de Albuquerque).

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carried out by Russian forces extended Russian jurisdiction to those in Ukraine affected by its attacks.[179] Despite not being a bare majority decision, the initial judgment had produced uncertain and unstable law, and included a variety of evocative dissenting positions and strong judicial tones.

At the other end of the voting spectrum, it may be asked whether bare majority decisions are worse than decisions in which the judges silence dissent to present a united front. Unanimous judgments are attractive conclusions to legal disputes. They are said to 'reduce the appearance of judicial discretion' and thereby increase the legitimacy of the decision.[180] Some suggest that consensus on the bench can increase support for a judgment,[181] and this can lead to a greater prospect of compliance from losing parties.[182] Decisions reached with a consensus are also said to establish more reliable general principles and norms.[183] Yet, just as bare majorities may be representative of too much dissent, it is possible for a body to demonstrate too much consensus. Stevens notes that '[a] frank acknowledgement and full disclosure of disagreement among judges is hardly as damaging to judicial prestige as would be a feigned unanimity skilfully attacked by persons outside the judiciary'.[184] Yet this too could fall victim to the allure of counting heads. Many unanimous decisions may be unanimous in outcome and yet judges may arrive at their decision with an entirely different basis for their reasoning.[185] Therefore, just as with bare majorities, it is important to remember that the true texture of a judgment crafted by a composite of judges is almost always more complex and cluttered than the numbers show.

This leads to a third and final reflection. If it is accepted that not all bare majority decisions are equal, and that they are, on occasion, a natural endpoint of adjudicative deliberation, then that leaves the question of what their value is. Unless operating in a system of qualified or super-majorities, the voting split simply has no impact on the decision. As Judge Nußberger notes in respect of the ECtHR, 'a final judgment of the Court is a final judgment, be it adopted unanimously, by a qualified majority, or by a narrow vote'.[186] A losing party may feel less aggrieved if they have managed to convince a large number of judges of the virtue of their position, and yet they still lose.[187] As for the case, and the law that it establishes, reinforces or applies, there does not appear to be any material difference between a bare majority or any other decision. Tracing the subsequent treatment of some of the bare majority cases from the Grand Chamber considered in Section 4, it can be seen that they are repeatedly applied and relied upon in later ECtHR judgments.[188] Perhaps their toxicity—if any—can be washed away by this subsequent treatment and particularly the positive application in future cases.

[179] *Ukraine and the Netherlands v Russia* Application Nos 8019/16, 43800/14 and 28525/20 (ECtHR, 9 July 2025) para 361.

[180] Y Shany, 'Bosnia, Serbia and the Politics of International Adjudication' (2008) 45 Justice 21, 24.

[181] ibid.

[182] Naurin and Stiansen (n 82) 960.

[183] Shugerman (n 61) 938.

[184] Stevens (n 172) 400–01.

[185] Keleman (n 39) 9.

[186] Nußberger (n 53) 249.

[187] Duxbury (n 69) 132.

[188] e.g. in *Correia De Matos* (n 90) para 90, Judges Pejchal and Wojtyczek rely on *Animal Defenders* (n 92). In *Markovic v Italy* Application No 1398/03 (ECtHR, 14 December 2006), *Roche v United Kingdom* Application No 3255/96 (ECtHR, 19 October 2005) is relied upon.

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The potential power of a bare majority, then, lies in its rhetorical force. The division of the Court is a useful rhetorical tool which a future advocate, or judge, may be able to use to address a later bench on their position. In the domestic proceedings of *Jones v United Kingdom*, a successor case to the bare majority judgment in *Al-Adsani*, again concerning the operation of State immunity in British courts, the advocates encouraged the Court to depart from the majority decision and instead follow the minority arguments.[189] When the case ultimately reached the ECtHR, Judge Bianku used the 'very narrow majority' in the earlier decision as a reason for why the Chamber should have relinquished the case to the Grand Chamber.[190] Judge Kalaydjieva similarly used the 'conclusions of the narrow majority' as a reason to justify her dissent from the majority.[191] It may be here, in the rhetorical power that can be mustered by advocates, that a bare majority is most practically deployed.

6. Conclusion

The possibility that a bench will split by one vote is an uncomfortable reality on many apex courts. This article has sought to move beyond the normative challenges which such bare majorities pose and instead ask what can be learnt about them from their practice. The exploration commenced with recognition that a bare majority is a snapshot at the end of lengthy deliberative process, which has been strategically structured to produce epistemic, normative and authoritative benefits. They are therefore a product of a much wider process. Nonetheless, in addition to the normative challenges outlined by Waldron and addressed by others, they raise concerns in respect of both the procedure through which decisions are reached, and the potential impact that they may have on the substance of the law. These challenges manifest differently in different courts and will pose more pressing concerns for some than others.

Through analysis of the practice of the Grand Chamber of the ECtHR, this article has identified a series of six questions which may be applied to any judicial body to interrogate the salience of a bare majority. The first three questions speak to how frequently a bench splits, as well as how the bench splits and how pervasive that split is across the respective case. Responses to these questions have potential implications on the narrative in relation to both the judicial bench and the case under consideration, with greater disharmony potentially exacerbating conceptual concerns. Perhaps the most important issue is thus that examined in the fourth question: the location of the dispute. This determines the areas of law and policy and institutional issues which have particularly challenged the bench. In respect of this, both the question of how the split correlates with the judicial treatment of the same issue by lower courts and how the dissenters' frame their disagreement can exacerbate, or mitigate, the general disagreement. These six questions could be posed to any apex court where bare

[189] *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia and Another* [2006] UKHL 26, para 13.

[190] *Jones and Others v United Kingdom* Application Nos 34356/06 and 40528/06 (ECtHR, 14 January 2014) (Concurring Opinion of Judge Bianku).

[191] ibid (Dissenting Opinion of Judge Kalaydjieva).

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majorities arise. Answers to them provided in this article have added some pieces to Waldron's aptly titled 'bare majority puzzle'.

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