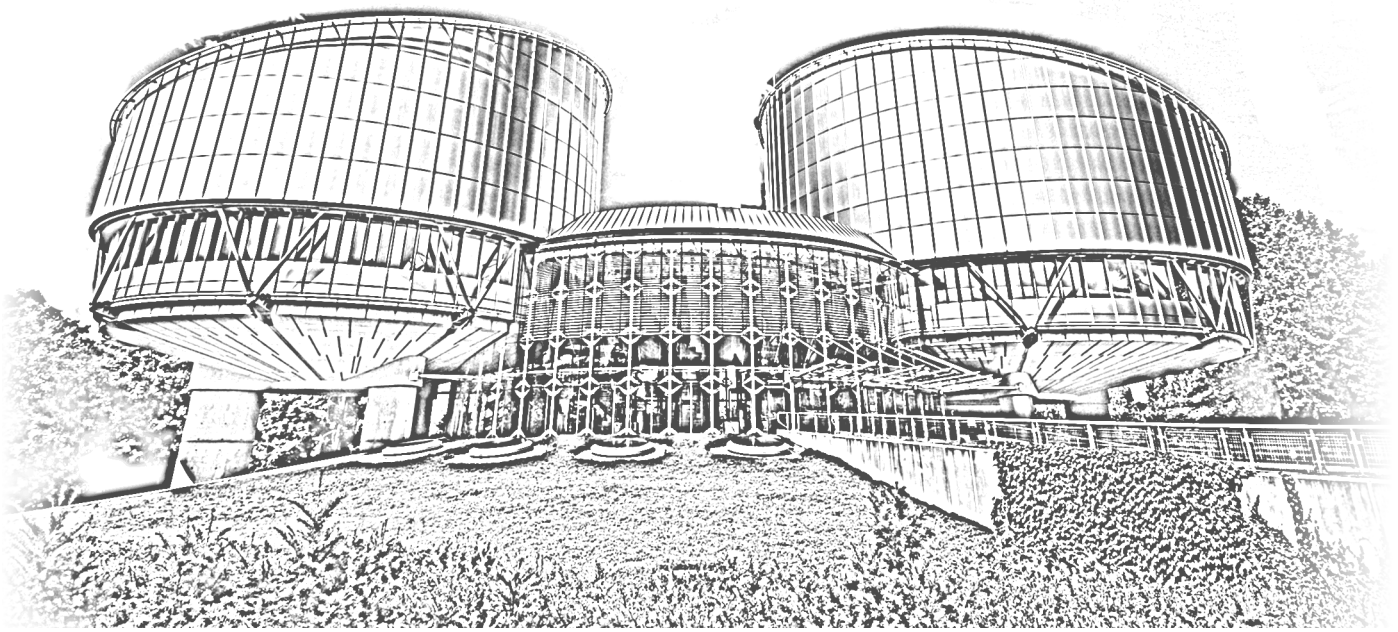

The European Court of Human Rights:
Justices and their choice to separate

Master thesis

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1. Introduction

When studying verdicts from different courts, it becomes clear that not all judicial systems or courts choose to adopt the same form of presenting the court's verdict to the public. This public – consisting of, inter alia, trial parties, media and citizens – does not always receive the same level of information from these verdicts. Common practice in most courts in continental Europe is to present the final judgement of the court to the public without providing any explicit information on the process of reaching this verdict. It remains unclear to the public whether all justices in the court totally agree with the outcome, or if perhaps some justices hold a totally opposing view. Judicial tradition at these courts dictates that justices speak with one voice, implying that justices can not publicly make individual statements contradicting or weakening the contents of the court's verdict. Only the final judgment is revealed.
The opposite situation can be observed in other judicial systems, of which the highest court of the Council of Europe is an apparent example. In these systems, court verdicts represent the opinion of the majority of the justices. However, instead of applying the policy of speaking with one voice, every individual justice is allowed to write an own opinion next to the court's judgment. In this separate opinion, each justice is able to motivate why he voted along with the majority, or can present the own view of how the case should have been settled.
This observation is striking as a theory developed by Visser and Swank (2007) predicts that committees will always speak with one voice and will not show possible dissent to the relevant public.

1.1. The purpose of this thesis

This thesis is concerned with two questions. The first question is which factors can influence the decision of a court to allow separate opinions. This question focuses on the decision at an institutional level. The second question covers the phase after a court has indeed allowed separate opinions; the question is which factors can influence the behavior or likelihood of justices writing a separate opinion. This is thus a question which focuses on decisions at a more individual and behavioral level.

For the first question, a comparison is made between the European Court of Human Rights, a court which chooses to adopt the policy of making all justices speak with one voice, and the European Court of Justice, a court which offers its justices the possibility to explicitly express own separate opinions.
Instead of merely referring to a dominant 'judicial tradition' as an explanation for this difference, I hope to answer this question by thoroughly analyzing one example of

both types of courts, incorporating all relevant characteristics and approaches of either type of courts. With this analysis, I hope to make clear how the decision whether or not to allow separate opinions can turn out differently for different (types of) courts. Particular traits of both courts which will be discussed and compared can explain the possibility of writing separate opinions.
For the second question, the effects which can explain the behavior of individual justices will be discussed. This is both done descriptively as quantitatively by studying separate opinions at the European Court of Human Rights for a certain time period.
Both types of courts – allowing and not allowing separate opinions – will be examined in this thesis. A distinction and comparison shall be made between on the one hand the European Court of Human Rights, and on the other hand the European Court of Justice. The former is the highest court of the Council of Europe and allows its justices to write separate opinions next to the judgment of the court, while the latter is the highest court of the European Union and does not allow separate opinions.

1.2. The structure of the thesis

This thesis will be further structured as follows. Section 2 will give a first formal introduction on the topic of separate opinions; it provides some ideas on why the European Court of Human Rights allows separate opinions and the European Court of Justice does not. Section 3 covers some relevant differences between both courts. Furthermore, it includes a thorough description of why these differences are relevant, with references to existing literature. The relevance of these different factors can be found in either judicial issues or in theories regarding decision making in committees and the corresponding voting behavior.
Section 4 covers a brief discussion on the presence of separate opinions at another notable court, the Supreme Court of the United States. As the relevant literature on this court is far more thorough than for the European Court of Human Rights, discussing the literature on separate opinions at this court will give more insights on this topic. Furthermore, this section can shed some light on the possibility of separate opinions being more common in certain periods than others, thus explaining more about the occurrence of these opinions. As this section has no direct applicability for later sections, it serves as a side step.
Section 5 tries to answer the two main questions of this research. This section shows how the tradeoff between allowing and not allowing separate opinions can indeed turn out differently for different courts. Furthermore, attention is placed on factors which can influence the behavior of individual justices.
Section 6 focuses on career backgrounds of justices at the European Court of Human Rights between 1999 and 2010. A dataset shows all cases in this period and all separate

opinions which were written. Furthermore, the possibility of opinions being joined by other justices is included. With these data, it is studied in this section whether the previous career of justices at the Court can provide any insights on the writing and joining of separate opinions.

Section 7, finally, concludes the main findings of this thesis and gives suggestions for further research.

2. An introduction on separate opinions

This section will give a brief introduction on the possibility for justices at the European Court of Human Rights to write a separate opinion. The discussion of the situation at the European Court of Justice will be briefer, as this court denounces this possibility for its justices. This section will start, however, by referring to a paper by Visser and Swank (2007). The theory developed in this paper contradicts with the finding that separate opinions are allowed at the European Court of Human Rights and is a clear motivation for conducting this research.

2.1. The theory of Visser and Swank (2007)

In Visser & Swank (2007), several theories are developed on the decision making process in a group of experts. The theory which is most relevant for this thesis is that a committee of experts will choose to speak with one voice, whenever the members of the committee care to some extent about their reputation. Visser and Swank show that this care for reputation becomes most apparent in the assumption that every expert has a desire to be perceived as able. Not showing possible disagreement among experts to the outside world would be better for every justice's perceived ability. As able agents are assumed to receive the same signals regarding the desired outcome of a decision making process, the probability that an individual agent is less able increases when he makes a different decision. Showing disagreement among the desired outcome of a project by allowing every member to speak freely would thus be harmful for the perceived ability of the members of the committee and hitherto for the committee as a whole.

When applying the theory of Visser and Swank to justices at an international court, it would be expected that justices would speak with one voice. Revealing that some justices do not support the majority outcome by writing a separate opinion shows that there is no unity between the justices. A decision which is carried by all justices may have a larger probability of being 'correct' than a decision which is only held by a simple majority. The paper by Visser and Swank would then predict that it is better for the committee not to reveal this lack of unity. Speaking with one voice would be preferred. However, this is not the case at the European Court of Human Rights, which is the main topic of this thesis.

2.2. The European Court of Human Rights

The most relevant part of reaching a verdict at the European Court of Human Rights (ECHR) for this thesis is mentioned in paragraph 14 of the procedures of the court:

justices vote with a simple majority[1]. Thus, for the court to reach a verdict, it suffices for at least half of all justices to agree on the desired outcome of the case. However, each justice who opposes of this majority opinion is allowed to write a dissenting opinion. In this opinion, he can indicate that he belongs to the minority of justices who do not agree with the opinion of the majority.

This dissent does not necessarily have to be reasoned; a bare statement of dissent is sufficient. However, if a justice only includes a statement of dissent without a thorough motivation, he can not reveal to the public what the motives for dissent have been. The public can then not learn which underlying motivations this particular justice has for his dissent and can thus not deduce whether the decision of this dissenting justice was 'right' or not[2]. It cannot be ruled out by the public that the choice to separate from the majority opinion was based on false assumptions, or if it could perhaps be characterized as some form of free-riding with another justice who did in fact motivate his dissent.

2.2.1. Occurrence of dissenting opinions

In a study on the occurrence of dissenting opinions at the ECHR, White and Boussiakou (2009) distinguish between single and joint dissenting opinions, the difference lying in the number of justices participating in writing this opinion. They show that in the period between 1999 and 2004 there was a total of 416 dissenting opinions, of which 211 were single dissenting opinions. Furthermore, White and Boussiakou mention the possibility of partly dissenting opinions. With the latter, a justice does not fully disagree with the majority opinion of the court, but wishes to express his dissent with a certain aspect of the court's ruling. These partly dissenting opinions can then also be divided between single and joint opinions; in the before mentioned period, the counts of the former were 103, while the number of the latter was 146.

Figures from 1999 to 2004[3] show that the total number of judgments given by the Court in this period was 4,025. This implies that in a limited amount of all cases in which a judgment was given by the court, one or several justices chose to elaborate a dissenting opinion. A study of dissenting opinions in this thesis thus only deals with a relatively small proportion of all judgments by the ECHR.

To put the number of 416 fully and 249 partly dissenting opinions for this period of six years into more perspective, White and Boussiakou discuss previous research of

1 Source: European Convention of Human Rights, Article 45 paragraph 2. This provision is also available in: European Court of Human Rights, Basic information on procedures at the ECHR, article 14.

2 In later subsections, it will be motivated that labeling a statement as right or wrong is not very appropriate, as different justices might have different preferences.

3 Source: European Court of Human Rights. Survey of Activities. Versions: 1999 – 2004.

Rivière[4], showing that over the period between 1960 and 1998[5], there was a total of 413 dissenting opinions. Dissenting opinions have thus become more common, considering the smaller time span.
The caseload of the court has also grown considerably. The total number of judgments in this period was 837[6], implying that in approximately half of all cases justices felt an urge to distinguish themselves from the majority.
Another interesting feature of the study of White and Boussiakou is thus that not every dissenting opinion carries the same fundamental disagreements with the majority opinion. As every individual justice has the possibility to express possible feelings of dissent, he is free to express any dissent, however secondary this might be considered to be for the interpretation of the case.

2.2.2. Concurring opinions

It is not only in case of dissent that a justice of the ECHR has the possibility to give his own opinion separately. The before mentioned paragraph 14 states that a concurring opinion is also allowed, in which a justice is able to motivate why he belongs to the group holding the majority opinion. In this concurring opinion, the justice has the possibility to defend his position in different words than already used in the judgment. Bruinsma (2008) illustrates this by discussing the case of a Slovenian justice at the ECHR. This justice defends writing a concurring opinion by stating that although he agreed with the outcome, he believed that the case at hand should be defined in other terms than chosen by the majority.
Writing a concurring opinion might be beneficial to a justice, considering that a mere support of the majority opinion, without motivating such concurrence explicitly, might not be enough for the public to be sufficiently convinced of the justice's ability in this case. Beliefs about the justice's ability can be updated and altered, especially if an outspoken justice[7] can motivate why he voted along with the majority. This might be particularly relevant when a justice is part of the majority despite earlier expressions suggesting the justice might take an opposite position in this particular case. These earlier expressions may have been made in the previous profession or can be based on voting behavior in similar cases. Without separately motivating the concurrence with the majority, the belief about this justice's ability could be altered down-

4 Rivière, Les opinions séparées des juges à la cour européenne des droits de l'homme (Brussels: Bruylant, 2004).
5 As will be showed later, in this period the ECHR did not exist as such yet. The predecessor of the Court was the European Committee on Human Rights.
6 These figures are available in all recent annual reports of the ECHR, indicating the development of the caseload at the court. Source: Annual Report, 2010.
7 The extent to which a justice can be considered to be outspoken is obviously dependent on opinions which a current justice has expressed before becoming a justice. Outspokenness can only be said to be present when acting as justice, in the separate opinions which this justice might choose to write.

wards. The decision to support the majority outcome could be seen as a 'weakness', instead of being seen as a result of renewed insights.

These reputational concerns might also concern the fear of being perceived as behaving too distinct from the own national general opinion. Without motivating concurrence or dissent, a justice might fear that his further career possibilities are diminished. When defending an opinion in a manner which can reassure the national opinion, this fear might be reduced.

The study by White and Boussiakou assigns less significance to the study on concurring opinions than on dissenting opinions. They feel that "...some brief concurring opinions could easily have been omitted with no adverse impact on the quality of the overall decision."[8] The study does not include the number of concurring opinions over the relevant period. However, the earlier study by Rivière does include figures for the period 1960 – 1998, showing that in this period a total of 204 concurring opinions were written. This is thus approximately one half of the number of dissenting opinions written in the same period.

2.3. The European Court of Justice

The possibility of giving a dissenting or concurring opinion is not present for justices at the European Court of Justice (ECJ). The introductory discussion for this court can thus be held short. Article 27 paragraph 5 of the Rules of the Procedure of the ECJ states that "the conclusions reached by the majority of the judges (...) determine the decision of the Court".[9] This phrase indicates that although it is indeed the majority which decides the court's verdict, possible feelings of dissent or urges to motivate feelings of concurrence cannot be expressed by individual justices in a separate opinion. All justices have to abide with the opinion of the majority of the justices and stick to this in public; more commonly stated, they have to speak with one voice. The public can then not determine the opinions of individual justices with certainty, making it very difficult for the public to update beliefs about the abilities of all individual justices.[10] It remains unclear for the public whether a specific justice belonged to the majority or not, and whether this would then result in a weakening or strengthening of this individual justice's reputation.

8 Source: White and Boussiakou (2009), page 55.

9 Source: Consolidated version of the Rules of the Procedure of the European Court of Justice. Official Journal of the European Union. 2010.

10 The term 'ability' in this setting is only meant to draw a parallel with earlier literature on voting behavior in committees, as in Visser and Swank (2007). One can imagine that in this case, with committees replaced by courts, other types of reputation will be at stake rather than ability of individual justices.

3. A comparison between the ECJ and the ECHR

In order to get a good understanding of why the ECHR would choose to offer its justices the possibility to present possible dissenting or concurring opinions, while the ECJ renounces this possibility and has its justices speak with one voice, some knowledge has to be obtained on some characteristics of both courts and in which manner both courts differ. This section will discuss some important differences between these courts. This section does not cover every possible difference and one might still think of other differences than the ones covered in this thesis; however, I believe that these differences are the most relevant for a study on separate opinions.

3.1. Justices' career backgrounds

When analyzing the differences between both courts, it is useful to include a comparison of the career backgrounds of justices. Justices with a career in academics will generally be more inclined or accustomed to present own views or opinions on judicial matters than former judges, either from a national or international court. Especially when the latter have served at a court where verdicts are not given by one justice, they are already more accustomed to a certain necessity of reaching consensus in group decision making. This is also likely to be the case for justices with a background in politics.

A study[11] on the careers of current justices[12] shows that a large group of justices of both courts already belonged to the judiciary, either in their own country or at an international court, before being appointed as justice.

Another common factor in the careers of justices is the membership of current justices of several advisory committees, although this seems to be slightly more common for current justices at the ECJ. Membership of advisory committees can show some level of experience with a search for consensus, as the strength and value of the final advice increases with the clarity of the advice and the level of consensus between committee members.

Furthermore, approximately one third of current justices at the ECHR have served as (assistant-) professor of law or as lecturer at a university. In such a position, especially when writing academic papers on - possibly controversial - judicial topics, there is a large opportunity for expressing the own opinions freely. This group of justices might then be relatively more inclined than e.g. former justices to write separate opinions.

11 Insight in the career paths of current justices at the ECHR and ECJ has been obtained through analyzing the curricula vitae of these justices, which are available on the websites of both courts. (www.echr.coe.int) for the ECHR and curia.europa.eu for the ECJ).

12 The situation is not very different for justices in the history of both courts.

When comparing this with the justices at the ECJ, it is apparent that the group of former-academics is roughly the same.

Finally, the possibility of justices having a career in politics can also be taken into consideration. Politicians are likely to express their opinions relatively frequently compared with other professions. Therefore, a large proportion of justices at a court with a career in politics might give rise to a relatively large group of justices desiring to express their separate opinions.
Especially these justices might care about their reputation, as their level of outspokenness will have been greater than that of their current colleagues with different backgrounds. The same holds for their reputational outspokenness: it will be known to the national public which opinions this particular justice holds. A justice, who cares to a large extent about his reputation with this national public, may want to reassure his views to the public by often writing separate opinions.
As the actual career backgrounds show, however, this group is rather small for both courts. Of the current justices at the ECJ, only three had a career in politics (as either Member of Parliament or as a minister), while no current justice at the ECHR has had this as his prevalent career background. Thus, the group of justices who are most likely to have truly outspoken opinions, and as a result may be expected to show a large desire to express their possible feelings of dissent or concurrence, seems to be rather small. Obviously, the relevance for this observation is greater for the ECHR than for the ECJ. Where separate opinions are not allowed, the fear of justices caring to a large extent about their own reputation is less relevant.
Section 6 contains a quantitative analysis of the effects of former careers of (current) justices on writing separate opinions. This analysis is based on Bruinsma (2006), which studied the effect of previous careers on the writing of separate opinions in cases at the Grand Chamber between 1999 and 2004. The analysis in this thesis will follow a different approach than in Bruinsma (2006) and cover a larger time period.

3.1.1. Side note on career backgrounds

The discussion of this subsection on the effect of career backgrounds on the level of outspokenness of justices and the resulting desire to express possible feelings of dissent has another important dimension, which should also be mentioned. Individuals with a large desire to (freely) express the own views might abstain from accepting or even considering the judgeship at a high court, when they fear that they cannot cope with the restrictions which the court imposes on the possibility to express their opinions freely. In case e.g. a former politician is considering a position at the ECHR, he knows that he can keep expressing his opinion freely whenever he disagrees with the

opinion of the majority of the justices. However, he knows that he cannot do so when considering (accepting) the same position at the ECJ. In that case, he will have to abide to the rules of speaking with one voice and get accustomed with these particular characteristics.
If this particular individual feels willing and able to accept all regulations imposed by the court, there will be no problem. However, if this outspoken individual feels that he cannot fully follow these regulations, he might conclude for himself that he is not suitable to serve as a justice for this court. In that case, the truly outspoken individuals who care to a large extent about expressing themselves freely will abstain from (considering) joining this international court.
These court regulations for allowing separate opinions or not then serve as a selection effect for outspoken potential justices. These regulations can thus determine whether the individual is (deemed) suitable as a justice.

3.2. Origin of both courts

Inclusion of a comparison between the origins of both courts can also prove useful. If the establishment of both courts took place in different time periods, then this factor might turn out to be explanatory for whether or not separate opinions were to be allowed. Different time periods might see different prevalent norms regarding the desirability of separate opinions.
The ECJ was set up in 1951, as part of the then European Coal and Steel Society. The court had seven justices: one from all six member states plus an additional justice to ensure an odd number of justices. After the Treaty of Rome of 1957, the ECJ became an actual court.
To alleviate the caseload of the court, and to offer citizens from member states an opportunity to also make claims against member states, the General Court was created in 1988.

Before becoming a permanent court in 1998, the ECHR was called the European Commission of Human Rights. Between its creation in 1959 and 1998, it did not serve as a proper permanent court.
Starting from the implementation of the former ECHR (Commission), justices were able to write separate opinions[13], while this has never been possible for justices at the ECJ.

13 The current provision on separate opinions is exactly the same as the provision in the text of the Convention in 1950.

3.3. Appointment procedures

Another relevant difference between both courts lies in the appointment of new justices. When justices' appointments are settled through different channels, the control mechanisms which member states or the institution itself can use to sufficiently ensure the ability of the potential justice will also be different. The situation might be different when some form of open election takes place where candidates have to show their ability rather than when the appointment procedure stays within the organization.
Not only do the durations of appointments differ between the ECJ and the ECHR, the appointment process of new justices is also different. The only common factor in this respect is that every member state is entitled to deliver one justice to the relevant court. This implies that the ECJ currently consists of 27 justices, while the current number of justices at the ECHR is 47.
At the ECHR, justices serve one term of nine years; there is no possibility to be appointed for another term after these nine years. Another important characteristic is that justices have to be elected by the Parliamentary Assembly (the parliamentary body of the Council of Europe). National governments have to nominate three candidates, of whom one is finally elected by the Assembly. Although limited to the candidates put forward by the national government, with this procedure other member states have a voice in the person of new justices.[14]
This specific procedure has only been in place since 2010, with the ratification of Protocol 14 of the Convention. Before, it was possible for justices at the ECHR to serve more than one term at the court, provided that they had not yet reached the age of seventy years. Furthermore, the terms were not nine but six years.[15]

The procedure for new justices at the ECJ was similar to the situation at the ECHR, but the ratification of Protocol 14 of the Convention has caused differences between the two courts. First, their term is 6 years, but there is the possibility to serve a second term. These justices are not elected, but are appointed by the governments of all member states.[16] The national government chooses the person it wishes to nominate to represent the own country, the other governments can only state whether they approve of this candidate or not. The national government will obviously have to weigh apparent disapproval from other governments, in choosing who to nominate for the position.

Analyzing the different procedures, the most notable difference is the absence of democratic control at the ECJ. Where other countries have a say in the person of

14 Source: Articles 21, 22 and 23 of the European Convention of Human Rights.
15 Source: Council of Europe Factsheet: Protocol 14 – The Reform of the ECHR.
16 Source: Article 253 of the Treaty on the Functioning of the European Union.

the new justice at the ECHR, albeit limited to a choice from three individuals, this is not directly possible at the ECJ. However, other member states can express possible disapproval about a (potential) candidate, possibly indirectly influencing the appointment decision.

3.4. Accessibility and procedure

The ECJ and the ECHR also differ in their levels of accessibility. While access to the ECJ is limited to member states of the EU [17] [18] , the ECHR is also accessible for residents of member states of the Council of Europe. A necessary condition for residents to have access to the ECHR is that all national appeal possibilities have already been exhausted. Applications of residents who still have possibilities of appeal in the own country are denied.

The fact that the ECJ is only accessible for member states implies that the procedure before this court is different than a procedure before the ECHR. Where application is only available for member states, the rulings of the ECJ can only concern more general violations of community law by other member states. These rulings are focused on e.g. the (non-)implementation of EU-regulations, not on violations on an individual level. A procedure before the ECHR is concerned with a claim on a specific violation of the European Convention on Human Rights (later: the Convention) by a member state of the Council of Europe, instigated by a complaint filed by a resident or another member state. This is thus far less general than a case which is brought before the ECJ.

Where a case deals with a rather general or strict interpretation of treaties and other types of regulations, and the uncertainty which has clearly emerged considering this interpretation, it will be important to show unity when giving a verdict. This can then serve as a signal to the member state, who is accused of violating the regulations, and for all other member states, that such behavior is not accepted. Allowing separate opinions when clarity and unity on such interpretations are desired would then possibly lead to a weakening of the verdict expressing the majority opinion and of the mentioned signal, thus keeping some of the uncertainty.

A verdict considering a possible violation of rules of the Convention deals with a possible violation of fundamental rights of a particular resident in a particular case. As

17 The word 'state' has to be defined broadly in this context. It does not only consist of governments filing complaints about other member states, but also of national courts, having the possibility to preliminary rulings to the Court, considering the interpretation of EU-law.

18 It is important to acknowledge here that the ECJ is part of a larger entity, The Court of Justice of the European Union. Within this entity, there exists an opportunity for residents of member states to file applications at the General Court. In this research, this part of the overall court will be kept out of the consideration.

these rights are defined in general terms, differences can exist among justices regarding the interpretation of these rights. The individual characteristics of the case are of high importance for the Court's verdict. Therefore, it is less likely to be a verdict on policy on more general grounds, although verdicts of the Court obviously impact policy of other member states. A precedent is then created by the Court.
Although unity is obviously preferred, these cases may be more open for interpretation and discussion than cases regarding a national regulation. This leaves a larger possibility for debate among the justices. The outcome of that debate will be the verdict of the court, giving room for possible dissenting opinions for those justices not agreeing with the majority opinion.

3.5. The position of the regulations within member states

A factor of interest may also be the position of the regulations within the member states of the particular organization. With a different position of these regulations may also come a different value which can be attached to the courts which have to judge the adherence to these regulations?
The different scopes of both courts within the community they represent are well reflected in the position which both 'umbrella organizations' (European Union and Council of Europe) have in their member states: the main purpose of the Council of Europe is to safeguard the protection of human rights. On the other hand, the European Union has deeper goals, i.e. to create a common market within its geographical area. With a certain transition of national sovereignty to the institutions of the European Union, it is quite clear which (supranational) goals are to be pursued.
Justices seating at the ECJ will have to consider all cases at stake from the view of European integration and equal treatment of EU-citizens and organizations throughout the entire EU. These regulations are the same for all member states and leave relatively little room for national interpretation. Thus, there is little room for applying own national values regarding the interpretation of these regulations. As such, justices do not actually represent their own country, and the corresponding prevalent values, as such in the court. They primarily serve as a member state's rightful representative.[19]
With the Council of Europe, however, the goals are less absolute, as the norms and the regulations of the Convention are more open for interpretation.
Justices at the ECHR from different member states have to reach a verdict, while they may have different insights or preferences regarding the interpretation of human rights. This can lead to different valuations of actions as possible violations of the Con-

19 It is important to acknowledge here that the ECJ is part of a larger entity, The Court of Justice of the European Union. Within this entity, there exists an opportunity for residents of member states to file applications at the General Court. In this research, this part of the overall court will be kept out of the consideration.

vention. Government actions might be considered to be a violation of human rights by a justice from one member state, while a justice from another member state might find justifications for such actions more easily.
With this apparent form of heterogeneity in the preferences of justices at the ECHR, it appears to make sense that possibilities to express feelings of dissent do exist for justices at this court and not for justices at the ECJ.

3.6. Types of cases

A clear distinction can also be made between the types of cases which are brought to either court. The relevance of this factor lies in the fact that some cases may give rise to desirability of separate opinions, while other types of cases require more unity.
The ECHR deals with cases regarding possible violations of the Convention, on claims put forward by either member states or individuals from these member states. Of all declared violations in 2010, approximately one third dealt with complaints regarding the length of legal proceedings in a member state, violating article 6 of the Convention. Other common outcomes of the cases concern violations of the right to liberty and security and the right to a fair trial. These rights are also comprised in article 6. Graph 1 gives the distribution of the most commonly determined violations in 2010. The number of violations is not necessarily equal to the number of verdicts given by the ECHR in a particular year, as each case may include several violations. In 2010, the total number of acknowledged violations was 2,135, on a total of 1,499 judgments.
The types of cases which the ECJ deals with mainly consist of possible violations of EU-law, inter alia failure to implement certain EU-regulations, or a non-timely implementation. Furthermore, the ECJ can give a verdict on a complaint of a member state that an institution of the European Union has failed to follow certain EU-regulations. Since the scope of the ECJ is much wider than that of the ECHR, as the European Union has a wider range of topics to consider than the Council of Europe, there is a larger variety of subjects which the court has to decide on. Most common topics are Environment & Consumers and Taxation.[20] Graph 2 gives the distribution of the cases by topic. The large proportion of cases in the category 'Other' indicates that the range of topics which the ECJ can give verdicts on, is relatively large, especially when comparing this with the distribution of cases at the ECHR.

The differences between the types of cases can also serve as possible explanation for allowing separate opinions. Where the ECHR has to deal with the interpretation of mostly open standards, there seems to be large room for debate on the exact interpretation and the acceptable boundaries of actions by member states. This is e.g. reflected

20 Source: Statistics European Court of Justice, Annual Report 2009.

in the earlier mentioned article 6. As the rules of the Convention are stated in general terms, it will be the Court which will have to set out which government actions are acceptable in the light of protection of human rights and which actions have to be considered to be too excessive infringements.
On the other hand, the room for interpretation of the rules which the ECJ has to apply seems smaller in some cases, as part of EU-regulation requires member states to take (or abstain from) specific actions. As these rules are less open for interpretation[21] , member states have less room to deviate. In such cases, a firm verdict by the ECJ seems desirable, in which room for dissenting opinions is less suited.

3.7. Number of justices

The following subsection discusses the difference in chamber size between both courts, i.e. the number of justices having to reach a verdict in a particular case. Where the number of justices having to reach a verdict increases, and where the possibility exists of justices showing some heterogeneity in their preferences, there might be an effect on the desire to express possible feelings of dissent. This section will study possible effects of committee size on the outcomes of cases in more detail, relying on theories from literature on decision making in committees.

3.7.1. Size of chambers and the number of cases

3.7.1.1. Size of chambers at the ECHR

At the ECHR, the number of justices can differ among the type of cases. Relatively light cases are handled by a single justice or by a committee of three justices.[22] This is the case when it is apparent at first inspection of the case that the claim is inadmissible. This inadmissibility might be caused by unexhausted national possibilities for judicial appeal. The term 'first inspection' is meant to illustrate that it is likely that this justice merely considers the procedural aspects of the case. The contents of the complaint, and the individual characteristics of the case, are not covered in detail. Furthermore, to alleviate the increasing caseload of the Court, a case can also be declared inadmissible, whenever this single justice rules that no significant disadvantage has been suffered by the claimant.[23]
When the case has not been declared inadmissible, the verdict of the court can be given by a committee of 3, a chamber of 7 or by the Grand Chamber consisting of 17 justices. This last option is only available after a chamber of 7 justices has already considered the case. The case is only brought to the Grand Chamber in exceptional

21 This is meant to ensure the common market within the European Union.
22 Source: Articles 27 and 28 of the Convention.
23 Source: Article 35, Paragraph 3 sub b of the Convention. This procedure has been in place since 2010.

cases, either when the parties request a referral to the Grand Chamber or when the chamber itself wants to relinquish the case to the Grand Chamber. This desire of a chamber can be due to the complexity of the case or the belief that the importance of the case requires the verdict to be given by the Grand Chamber. Both situations are rather uncommon; only a limited number of cases are treated by the Grand Chamber.

Ad hoc justices

Furthermore, every justice within a chamber is obliged to withdraw from the case, whenever he has already taken part in an earlier stage of the case. If this justice represents the member state which is accused of violating the regulations, he has to be replaced by an ad hoc justice. The ad hoc justice, who formally is not part of the court as such, is appointed by the government of the own member state.[24] Several member states have submitted a list to the Court in which they show who can serve as ad hoc justice for their country. Obviously, this ad hoc justice needs to have experience in the field of human rights and should have some touch with how to reach a verdict on possible violations of human rights. It is also possible for member states to present former justices of the ECHR as ad hoc justice.[25] The advantage of having former justices serve as ad hoc justice is that they are already familiar with the customs of the court.
The appointment of an ad hoc justice is needed to ensure that the chamber consists of at least a justice from the member state which is the accused party.

The majority of cases are handled by a single judge, approximately 63% of pending applications in 2010.[26] Only 3% of applications are pending before a committee, while the remaining 34% of applications is pending before a Chamber.
The total number of judgments at the ECHR in 2010 was 1,499. Graph 3 shows the distribution of judgments in 2010, ordered by the number of justices giving the judgment. The great majority of judgments are given by a chamber of 7 justices. This was thus preferred considerably over a treatment by a committee of 3 justices.
Graph 3 also shows that of all judgments only 18 (approximately 1%) were given by the Grand Chamber. This implies that it is only deemed necessary for 17 justices to deliver the verdict in cases of particular interest, for the question whether certain actions of a state should be considered a violation of the Convention. The possible reasons for this choice are threefold. First, it signals to the public that the case is so complicated that it will not suffice for a smaller group of justices to give the verdict. It

24 Source: Rule 29, Paragraph 1 sub a of the Rules of the Court, European Court of Human Rights.
25 An example is the appointment as ad hoc justice of Feyyaz Gölcöklü for Turkey. Gölcöklü had already served as justice for Turkey at the (then) European Commission on Human Rights between 1977 and 1998.
26 Source: European Court of Human Rights: Analysis of Statistics 2010. January 2011. From: www.echr.coe.int

is then the complexity of the case which demands a large group of justices giving the verdict. Second, it can give more weight and meaning to the verdict itself. Lastly, an excessive treatment by the Grand Chamber has a signaling function. It shows that the court considers such a particular case and such an extensive treatment to be of high importance for the interpretation of possible violations of the Convention.

3.7.1.2. Size of chambers at the ECJ

A chamber at the ECJ can consist of 13, 5 or 3 justices, where verdicts given by 13 justices (the Grand Chamber) are rather uncommon. Even more exceptional are the cases where the full court, in which justices from all (currently 27) member states are represented, has to give its verdict.[27] The most recent cases in which the full court was required to give the verdict were in 2005 (1) and in 2006 (2).[28]

That the possibility of one justice handling the case does not exist at the ECJ can be explained with the applicability rules. Where residents from member states are not allowed to apply at the ECJ and the applicability rules are thus stricter than at the ECHR, there is no need for the court having a single justice sorting cases by applicability. The 'filtering' system which a single justice has at the ECHR is therefore not required.

Largely due to the different rules for applicability at the ECJ and the differences in types of cases, the number of cases before this court is relatively low compared with the number of proceedings before the ECHR. The number of new cases brought before the court in 2010 was 631[29], while the number of completed cases was, with 574, also far less than was earlier mentioned for the ECHR.

Another obvious reason for this difference in case load lies in an apparent desire to stay collegial with the other member states of the EU. A member state will not want to jeopardize its relationship with another member state too easily. It is likely that only when a member state feels rather secure that EU-regulations have been violated by another member state, and in case it feels it is disadvantaged by this violation, will it decide to file a complaint at the ECJ.

More than half of all cases before the ECJ are treated by a Chamber of 5 justices, while approximately a third of all cases are settled by a Chamber of 3 justices. The Grand

27 The ECJ is only required to give a verdict in a full court in very exceptional cases, e.g. when having to give a verdict on possible breaches in the obligations of a Member of the European Commission. Sources: Article 16 of the Statute of the Court of Justice; Article 245, paragraph 2, Treaty on the Functioning of the European Union.

28 Source: ECJ, Annual Statistics 2009. Paragraph 7: Bench hearing action (2005-09).

29 Source: Statistics concerning judicial activity in 2010: references for a preliminary ruling have never been dealt with so quickly. Court of Justice of the European Union, Press Release No 13/11. March 2011

Chamber gives its verdict in 8% of all cases. Graph 4 shows the distribution.
A comparison of these figures shows that this distribution is far less restricted to one prevalent chamber size than at the ECHR. Furthermore, only in very exceptional cases the Grand Chamber of the ECHR gives a verdict, while this turns out to be far less exceptional for the ECJ.
The remainder of this section focuses on this difference in treatments by the Grand Chamber between both courts. The inclusion of some further observations and insights from relevant literature, regarding both research on either courts and theories on voting in committees, might shed some more light on the occurrence of dissenting opinions.

3.7.2. Verdicts of a Grand Chamber

Although a direct comparison between the number of verdicts of the Grand Chambers of both courts is difficult to make and is not likely to be explanatory, it is useful to think of possible explanations for this difference.
The belief might exist at the ECHR that those cases that are deemed very important for the Court, concerning some specific boundaries of the Convention, should preferably not be dealt with by a (too) large chamber. After all, the possibility of at least one justice disagreeing with the majority outcome is larger with more justices participating in reaching a verdict. With more members deciding on a case, it is clear that the possibility of at least one member of the committee disagreeing with the majority outcome is larger than would be the case with a smaller committee. This is especially true if it is assumed that committee members have heterogeneous preferences and opinions, however small the differences may be. This factor can prove particularly relevant whenever an important case requires unity of all justices, or whenever the court wishes to signal the importance of the case by preferably having the Grand Chamber giving the judgment.
This fear seems less justified when the preferences of committee members are fairly similar. In that case, the size of the committee has no effect on the possibility of members disagreeing with the majority.
Although all justices pursue the same goal, i.e. clarifying the boundaries of the rules of the Convention and guaranteeing the protection of human rights, the preferences have to be characterized to a large extent as heterogeneous. With one justice from every member state of the Council of Europe, every justice can be seen as representing his own country, defending the prevalent judicial values of his country regarding the interpretation of human rights. Another possibility is the justice taking positions

which are different from the prevalent values of the own country, but which he feels to be right.[30]

3.7.2.1. The effect of personal preferences and career perspectives

With currently 47 member states, it is likely that justices of the ECHR have different experiences with the protection of human rights in their own country and thus show some bias. This seems particularly relevant for justices from the former socialist countries in Eastern-Europe. As every justice will consider a case from the own standpoint, the fear might exist that justices do not consider every case with the required full impartiality, but are driven by some personal or national preferences.

Voeten (2008) discusses the possible role of personal or national preferences, which might lead to a decrease in the justices' desired level of impartiality. Voeten concludes, based on a dataset of cases at the ECHR until 2006, that there are no large differences in preferences between justices from different judicial systems. That is, justices from countries with a common law tradition do not vote significantly different than justices from countries with a more civil law tradition.

There is significant evidence, however, for the claim that justices are not fully impartial when judging on a possible violation by the own national government. This is most apparent for ad hoc justices, especially when studying the situation where a majority of all justices sees no violation. Of the total 33 judgments of ad hoc justices in this subgroup (on a total of 3,268 observations), there was not a single judgment opposing of the majority opinion. As it is difficult to determine whether choosing this position is correct or not, other possible explanations for this interesting result have to be thought of. These ad hoc justices may feel less pressure from other justices in choosing their position. They might thus face less barriers when defending actions of the own government. Another explanation might simply be the relative unfamiliarity of these ad hoc justices with the norms of the court.

Although the fear also exists that justices might be driven by career concerns[31], Voeten states that the data do not provide significant evidence for this career concerns hypothesis. Furthermore, there seems to be sufficient evidence for the conclusion that

30 Every justice is free to choose his position, as long as he is able to motivate this position. He is also free to take different positions than the prevalent values of the own country. Because of his independent position at the court, the national government cannot prevent the justice acting in this way. As reappointments are no possible instruments, threatening to not consider a second term is not possible. The government can only try to prevent 'extreme' positions ex ante when choosing which individuals to recommend as potential new justice.

31 Voeten points out that, for some member states of the Council of Europe, the salary for a justice at the ECHR is much higher than the salary a justice can obtain in the own country, for a comparable judicial appointment. Voeten therefore investigates the possibility of these justices being driven by career concerns.

justices are motivated to agitate against particular government actions because of past experiences from the own country with violations of human rights. Justices from Eastern-European countries are more likely to regard actions of other Eastern-European governments as violations of human rights than justices from Western-European countries. Voeten explains this difference by referring to the motivation of justices from these former socialist countries to "rectify a particular set of injustices."[32]
The conclusion which can be drawn from the study by Voeten is that although justices of the ECHR do appear to let (at least some of) their decisions be driven by personal preferences, the situation is not as extreme as one might fear; there is sufficient evidence that personal preferences can influence voting behavior, but not to such an extent that this is influential for the outcomes of many important cases.

A similar study has been conducted by Bruinsma (2008), in which separate opinions at the Grand Chamber are studied in a smaller time span than Voeten has done, i.e. between 1998 and 2006. Bruinsma concludes, inter alia, that separate opinions are mostly written by justices from member states from Western-Europe and are more uncommon for justices from states in Eastern-Europe. It is thus the group of justices from Western-European countries who feel the largest urge to distinguish themselves from the majority opinion. No possible explanations have been given by Bruinsma for this observation. An explanation might be found in assuming that justices from Western-European countries have a longer tradition with safeguarding human rights and therefore wish to oppose from majority outcomes more easily.
Furthermore, Bruinsma states that there is sufficient evidence to conclude that national preferences cause some justices to treat cases against the own country in a more favorable manner than against other member states. This seems to confirm the earlier finding of Voeten.
The major difference between both studies is that Voeten focuses on the extent in which justices see actions as violations, while Bruinsma specifically focuses on the writing of separate opinions. The latter is more or less independent of the outcome of the case and focuses on the writing of opinions as such.

The studies by Voeten and Bruinsma appear to follow a similar reasoning as Levy (2005), who focuses on careerist judges. Levy concludes that, in equilibrium, justices tend to contradict previous decisions, as this signals a justice's ability; simply mimicking an earlier decision would point towards the opposite. Furthermore, less-able justices know that a higher court will see through such behavior. For less-able justices, it is better to follow the decisions of more able justices.

32 From: Voeten (2008), page 431.

All three articles focus on the possibility of justices not only caring about reaching a correct decision, but also about their own career and the degree in which they are regarded as able. There are, however, some important differences between especially Voeten and Levy which should be mentioned here.

First, the discussion of Voeten focuses entirely on the ECHR, where no appeal is possible. Levy, on the other hand, considers courts where appeal possibilities exist. Justices of the courts which Levy considers have to weigh the possibility of being overruled by a higher court and might choose to alter their behavior compared with a situation where no appeal is possible. They may fear being overruled by a higher court. This is not relevant in the study by Voeten.

Second, Levy focuses on the availability of previous decisions. Where information on the past treatment of similar cases, preferably from higher courts, is available for lower courts which Levy considers, this is not really the case with the ECHR and the study of Voeten. The ECHR can obviously learn from other courts, but as it is the highest authority regarding human rights within the countries of the Council of Europe, it does not necessarily have to follow these courts' reasonings. It can also, if motivated sufficiently, deviate from its own earlier verdicts. Previous decisions do thus not play an important role at the ECHR.

A final difference is linked to the previous point. Although Levy correctly states that the correctness of justices' decisions is hard to determine, she concludes that the possibility of appeal at a higher court can indicate whether the court's decision was correct or not. As will be motivated in a later section, the correctness of a decision is harder to determine where the court has to apply open norms, where there is room for different interpretations of the regulations and where appeal is not possible. Absence of appeal possibilities gives an extra indication that it cannot be verified ex post whether the decision was correct.

To conclude, Levy (2005) can serve as a useful tool for analyzing behavior of justices, which can then be applied or checked in empirical studies. However, the assumptions made by Levy cannot be applied fully in a study on the ECHR.

3.7.3. Importance of a case & treatment by the Grand Chamber

An earlier subsection covered the importance of a case and the associated desire to signal this importance through an excessive treatment by the Grand Chamber. The extent to which a case is considered to be important to the ECHR is a feature which is also covered in the yearly statistics which the court provides. Of all 1,499 judgments delivered in 2010, approximately two thirds were considered of low importance, implying that these judgments were of 'little legal interest'.[33] This means that the judg-

33 Source: ECHR, Analysis of Statistics 2010. Chart 6: Judgments by level of importance.

ments in these cases were merely an application of existing case law or included so-called friendly settlements. Only 5% of all judgments were considered to be of high importance to the ECHR. The judgments in the latter cases had, according to the Court, a significant impact on the case-law of the court and could thus largely influence member states' future behavior. The importance of judgments can obviously only be determined ex post, after the court has considered the case in full depth and has delivered its judgment.
Comparing these numbers with the numbers on the distribution of cases, it becomes clear that no direct relationship exists between the extent to which a case is considered of high importance and the number of justices reaching a verdict.

1% of all cases are treated by the Grand Chamber, while 5% are of high importance. Some cases which are of high importance can thus be dealt with by a regular Chamber, while others are handled by the Grand Chamber. Also, it is not necessarily the case that cases at the Grand Chamber are of high importance. The possibility also exists that a case is referred to the Grand Chamber, following a request of the parties involved, while the ex post determination of the importance does not show that the case was in fact of high importance.
Obviously, a first study of a case can already give an indication of whether the case will ex post be characterized as highly important. The contents of the case, and the severity of the accusation, can already give an indication of the eventual outcome of the case. This can then serve as a consideration for a Chamber for whether or not referring the case to the Grand Chamber.
If the degree of importance of a case is apparently not perfectly reflected in the size of the chamber giving the verdict in that case, there might be some other considerations, regarding the effect of committee size, when deciding whether the Grand Chamber can handle the case or not. The next subsection discusses these possible negative consequences of committee size on the outcome of a case.

3.7.4. The impact of committee size on voting behavior

When determining the impact of committee size and the size which facilitates the best outcome of a decision-making process, in terms of efficiency, it is relevant to determine how committee members obtain the information required for reaching a decision. Gerling et al. (2005) discuss the main results of the literature on decision making by committees. They state that in order to determine the effect of the committee size on the decision making process, it has to be established whether the informedness of committee members is endogenous or exogenous. The former means that committee members have to exert costly effort to obtain all relevant information. The informa-

tion is thus not freely available. With the latter, gathering information comes at no cost to the committee members.
Concerning the informedness of justices, it seems plausible to assume that this is to a large extent endogenous. Their knowledge of the judicial matter may be assumed to be sufficiently high to reach a verdict for a court of such high judicial relevance (and to justify a position at such a high judicial institution). However, the degree of informedness that is relevant for justices at both the ECJ and the ECHR lies in the information an individual justice obtains on the particular case (regarding particular accusations, defenses etc.). For this knowledge to be sufficient to make a proper decision possible, it is necessary for all justices to actively participate in gathering all relevant information required. In general, in committees where information is aggregated endogenously, smaller committees will lead to more efficient aggregation of information than committees with more members. This seems contradictory with the earlier observation, especially at the ECHR, that the vast majority of cases are covered by a Chamber consisting of more justices. Although this is dependent on the contents of the case and the availability of past judgments in similar cases, it is easy to conclude that the benchmark level of justices is seven. Deviating to more or less justices is possible, depending on the contents of the case and possible desires of process parties.

Other branches of the literature on voting behavior focus on the effect of committee size on the quality of decision making by juries. Although the matter seems different for professional justices at a court than for unprofessional members of a jury, some valuable insights can still be obtained.
Mukhopadhaya (2003) focuses on possible free-riding behavior by jury members; he shows that a larger jury is more likely to make mistakes in reaching a decision as, with an increase in jury size, more members will be inclined to pay less attention than they would do when in a smaller jury. The reason for this decrease in attention might be the feeling among members that their lack of attention can stay unnoted. The level of information acquired by individual jury members will then be less than in the most efficient case, where every jury member obtains all necessary information. When applying Mukhopadhaya's theory to the case of justices at either of the courts treated in this thesis, an important comment has to be made. Mukhopadhaya primarily focuses on whether jury members pay attention or not. This type of behavior might be possible for jury members, who are required to passively obtain information in the court room. Justices at the ECHR and ECJ, however, are required to actively participate in the discussion[34] and to prepare statements for this discussion, in order to reach a ver-

34 The ECHR has set out the behavior it expects from its justices in a Resolution of Judicial Ethics. Comparable requirements have also been set out for justices at the ECJ.

dict; it therefore does not seem to be an option to not pay attention.
The possibility that justices choose to show some other form of free-riding behavior does seem relevant, i.e. justices following arguments put forward by other justices, not motivating why they choose for a certain position. This is the case with justices who choose to merely give a statement of dissent, without motivating this dissent in a separate opinion. Another option is choosing to join an opinion relatively easily.

3.8. Conviction rates

A last comparison between both courts can still be made. The actual number of cases, whether this is categorized through type or committee size, does not reveal information on the actual outcomes of the cases. It cannot reveal whether the court has ruled that certain regulations have been violated. To learn this type of information, it is useful to obtain figures on the conviction rates of both courts, i.e. what percentage of cases brought before the courts resulted in a court ruling that a member state indeed violated certain regulations.
The statistics of the ECHR[35] show that the conviction rate is consistently large. Of all 1,499 judgments of the ECHR in 2010, in 107 judgments no violation was found. This is approximately 7% of all cases. For the entire period between 1959 and 2010, of all 13,697 judgments, in 794 judgments no violation was found. This is approximately 6%. The figures from 2010 thus fit nicely with the results from earlier years.
These numbers show that in the large majority of cases in which the ECHR gives a verdict, state actions are regarded as some form of violation of the Convention. This is obviously not meant to say that all complaints directed towards the Court are taken into account here. The conviction rate is lower when the cases which are declared inadmissible are also considered.

Exact numbers of conviction rates at the ECJ are not available. However, the argument delivered in Section 3.7.1.2 fits well here and can serve as an indication for the conviction rate. As member states will not want to accuse other member states too easily, it is likely that they will only start a judicial procedure when they are sufficiently convinced that a violation has indeed occurred. Following this reasoning, it is likely that the percentage of cases in which the ECJ indeed sees violations of EU-regulations is high. This percentage is probably comparable to the conviction rate at the ECHR.

35 Source: Statistics of the ECHR 2010, and Statistics of the ECHR 1959 – 2010. Both documents are available on the website of the ECHR.

3.9. Concluding remarks on this comparison

The previous subsections studied the main differences between the ECJ and the ECHR. This was meant to illustrate how the ECHR has chosen to allow separate opinions, while the ECJ has renounced this possibility. The last subsections focused on the effect of committee size on the outcomes of cases at the ECHR. It became clear that, by allowing its justices to write separate opinions, the ECHR has to weigh the possibility of one or more justices disagreeing with the majority opinion of the Court. With fewer people in a committee, the possibility of one person disagreeing will obviously be smaller. Also, with fewer people, the outcome will more easily be a compromise of the most extreme opinions, lowering the necessity or need of an individual justice to show his dissent.

What then becomes visible can be described as the result of some tradeoff by the Court or its founders stating the relevant procedures of the Court. On the one hand, there is the desire to show a united front in a case of high importance. This high level of unity is intended to prevent possible future violations, in order to give clear boundaries to member states on the acceptability of certain violations of the Convention. On the other hand, there is the desire to treat a case of high deemed significance accordingly, i.e. by the Grand Chamber, implicitly signaling that this case is of such high importance to the Court. That the result of this tradeoff does not always turn out the same becomes clear when observing the figures of an earlier subsection. Apparently, in cases which the Court regards as highly important, it is not necessarily the Grand Chamber of the Court which gives the verdict. Clearly, there are other factors which also (partly) determine the outcome of this tradeoff, and thus the size of the chamber in a specific case. Apart from logical considerations regarding the difficulty of the case, a request by one of the parties or similar cases which can already give an indication of the final judgment of the Court, other factors will also play a large role.
Where this possible fear might be present for the ECHR, it is not relevant for the ECJ, given that separate opinions are not possible. This implies that cases that require high levels of clarity to member states regarding the interpretation of EU-law do not face the possible negative consequences of a lower level of clarity than desired due to possible separate opinions. Thus, the tradeoff which has to be made by the ECJ seems less complicated than for the ECHR. Cases deemed to be of high importance can be handled by the Grand Chamber more easily, as the possible negative consequences of such a decision are smaller than for the ECHR. This can serve as possible explanation for why the percentage of cases that is dealt with by this chamber is much larger than is the case with the Grand Chamber of the ECHR. However, as also mentioned in

an earlier section, actual quantitative comparisons are difficult to make between two courts with very different scopes.

4. Side Step: Separate opinions at the US Supreme Court

Although this section does not provide any additional differences between the ECJ and the ECHR, and therefore seems to fall out of the actual scope of this thesis, it can provide some understanding on the rise of separate opinions over time, and might thus prove useful for the analysis of separate opinions at the ECHR. As the history of separate opinions at the US Supreme Court shows, a comparison can be made between periods with hardly any dissenting or concurring opinions, and periods in which these opinions were much more common. This was the case at the US Supreme Court, where the rate of dissenting opinions rose significantly in the 1940s, after being relatively low in earlier decades. Section 4.1 covers this rise in dissenting opinions in more detail. Then, section 4.2 deals with the question what might have been the cause for this shift; hopefully, this provides some useful insights on dissenting opinions, which can be used in later sections. First though, this subsection rules out another possible explanation. Furthermore, this subsection will show whether the given explanations of the rise in dissenting opinions can prove useful for the ECHR.

4.1. Rise of dissent in the 1940s

Figure 1[36] shows the development of the number of dissenting and concurring opinions at the US Supreme Court between 1800 and 1981. Although the number and rate of dissenting opinions[37] have never been constant over this long period, it is plausible to assume that at the beginning of the 1940s a break occurred in the rate of dissenting opinions. Smyth and Narayan (2006) tested for the existence of a structural break at the beginning of the 1940s, using a Lagrange Multiplier test for one break, and show that there is indeed significant evidence for a break in 1941.

They argue, however, that this is not the only structural break in the rate of dissenting opinions; using a different test for the existence of more breaks (derived from Bai and Perron (1998)), they show that there is also significant evidence for structural breaks in the rate of dissenting opinions in 1836 and 1867. Figure 1 showed a spike in the number of dissenting opinions around 1836. However, this was less obvious for the break of 1867.[38]

36 Derived from: On the Mysterious Demise of Consensual Norms in the US Supreme Court. Thomas Walker, Lee Epstein and William Dixon. 1988.

37 For simplicity, only dissenting opinions will be discussed throughout this section. The articles mentioned in this section also study the possibility of breaks in the rate of concurring opinions. The explanations which I present in this section, however, also hold to some extent for concurring opinions.

38 A graph showing the development of dissenting and concurring opinions in Smyth and Narayan (2006) covers opinions between 1800 and 1900. As the range of this graph is different than the range in Figure 1 and only includes a period in which separate opinions were still relatively uncommon compared to the current situation, the break of 1867 is less discernable in Figure 1 in this thesis.

These additional shifts in the rate of dissenting opinions will not be discussed in here; the following subsection only discusses the break of 1941 and the possible explanations for its occurrence.
However, the existence of these additional breaks does prove useful, since this gives more weight to the argument that the occurrence of dissenting opinions is not time-independent. The inclusion of this argument can thus serve as providing a more thorough explanation of the occurrence of dissenting opinions.

4.2. An explanation for the rise in dissent

The following subsections provide possible explanations for the observations of the previous subsection. Before discussing these explanations, however, giving more weight to these possibilities requires sufficiently ruling out one important factor.
It is important to acknowledge that, although the rise in dissenting opinions since the 1940s might be due to a change in policy or might be attributed to personal traits of justices, the increase might also be partly explained by the types of cases which the justices had to deal with since this period. Perhaps the cases at the start of the 1940s were different from the cases from the years before. Such differences could possibly facilitate a rise in the dissent rate and rule out other, more explanatory, factors. Walker et al. (1988), in discussing the rise in dissenting opinions in the 1940s, show however that the types of cases brought before the court at the beginning of the 1940s were not significantly different from the types of cases which were dealt with in the last two years of the 1930s. In fact, they conclude that it that cases which at first did not lead to much dissent were, at the start of the 1940s, more likely to be accompanied by dissenting opinions. This result thus helps to rule out the possibility that the rise of dissent in the 1940s was actually caused by a difference in the types (and content) of cases.

4.2.1. The role of the Chief Justice

A first possible explanation for the structural break of 1941 is the important role of the chief justice at the US Supreme Court. Walker et al. focus their attention on the leadership of chief justice Stone. It was during his period as chief justice, between 1941 and 1946, that the number of dissenting opinions rose significantly, compared with the dissent rate during the terms of his predecessors. Walker et al. state that an important cause for this shift was a certain lack of consensus seeking behavior by chief justice Stone. Justices preceding Stone as chief justice considered it an important task of the chief justice to reach high levels of consensus in the court's verdicts. This meant limiting the number of dissenting opinions and exerting effort to keep consensus levels high. This consensus would be smaller, and would signal disagreement regarding the

outcome and interpretation of the case, whenever each majority opinion would be accompanied by one or more separate opinions. Walker et al. state that Stone found this less important; they quote Stone that "(...) the right of dissent is an important one."[39] After Stone's departure, there was no clear shift back to the old culture of consensus seeking. Figure 1 shows that the number of dissenting opinions did not drop back to 'pre-Stone' levels. A large part of the rise in dissenting opinions can thus be attributed to Stone's feelings and actions regarding dissenting opinions.
However, it should be acknowledged that apparently Stone's successors as chief justice did not view dissenting opinions entirely different than Stone. If his successors were as opposed against dissenting opinions as one of Stone's predecessors, Chief Justice Taft[40], they would have wanted to reverse this increase in dissent and have exerted sufficient effort to ascertain a return to the culture of seeking consensus. This would most likely have led to an even sudden decrease in the rate of separate opinions. The fact that this did not occur implies that such truly outspoken views were not present. A large part of the rise in dissent can thus be attributed to Stone and his leadership style, but Stone's successors at the Supreme Court also played a role.

Such an outspoken role of a chief justice at the US Supreme Court does not seem relevant at the ECHR. Although the court does have one president and every section of the court has its own section president, the role of this president is smaller than the role of chief justice in the US, and his position is less influential. The president of the ECHR merely serves as head of the court – leading the discussions, assigning the responsibility of writing the court's majority opinion and representing the court towards the public – without the influential role of driving the other justices into a certain direction. However, a separate opinion written by the president of the Court can be regarded differently than an opinion written by e.g. a newly elected justice. Although the difference will generally have more to do with the experience of the justice rather than the fact that it concerns the president, some weight can obviously be attached to his opinion.
A factor which complicates a full comparison between the US Supreme Court and the ECHR in this respect is that the judicial system which the US Supreme Court represents is distinct from the judicial system of the Council of Europe. A president of a court which represents 47 states is unlikely to have a similar position as his colleague at the highest court of a single country.

39 From: Walker et al. (1988), page 19.
40 William Howard Taft, also former president of the United States, led the US Supreme Court between 1921 and 1930.

4.2.2. Ideological division

Characteristic for the US Supreme Court are the apparent ideological differences between the justices, becoming most clear by the appointment by the President.[41] The President of the United States generally chooses to appoint justices with preferences similar to his own. Nominations for new justices at the Supreme Court thus run, at least partly, through party lines.

To answer the question whether the rise in dissent of the 1940s can perhaps be attributed to a more ideologically divided court, the paper of Walker et al. proves useful. They conclude that ideological divisions do play a role when examining dissenting and concurring opinions. However, as the justices at the Stone Court were largely the same as the justices in the previous court, this factor is not fully explanatory.

At the ECHR, nominations for new justices are placed by the member states. However, it is expected that the background or set of norms of the particular member states brings forward some ideological differences between justices from different countries within the Council of Europe; differences may exist between countries of Western- and Eastern Europe regarding the interpretation of human rights. However, this distinction is less clear than in the US, as nominations are not divided through party lines. Nevertheless, ideological differences may indeed appear to be relevant to some extent at the ECHR. An ideologically divided court, whether through country lines or not, may indeed give rise to an increase in the number of separate opinions.

4.2.3. Level of experience

The last factor considered here is the experience of justices at the Court. A relatively inexperienced justice who is unfamiliar with the particular sets of rules for acting as a justice at a high court (by not dissenting too often) and perhaps less accustomed with the practice of consensus seeking, might be more inclined to express the own opinion. This is most likely, as has already been showed for justices at the ECJ and the ECHR, if he has already done so in an earlier profession. With more experience might come a better understanding of and feeling with these norms, possibly reducing the desire to express feelings of dissent.

In order to learn whether justices' experience as member of a court is explanatory for the increase in dissent, a further study on career paths – similar to the analysis of section 3.1 – can prove useful. For this study, a comparison shall be made between the justices at the Supreme Court in 1941, the year of the structural break in dissent, and the justices serving at the Supreme Court in earlier periods.

This part of the analysis is not meant to see which particular justices have written the most opinions. The aim is more to see whether the presence of justices with certain

41 Source: Article 2, Section 2, Clause 2 of the United States Constitution.

backgrounds or certain levels of experience can serve as possible cause for the rise in dissent.

As a benchmark, the Stone Court of 1941 will be compared with the court of Chief Justice Taft in 1929 and of Chief Justice Hughes in 1938.[42] Whenever this comparison would show apparent differences in the backgrounds of the justices at the different courts, it becomes more likely that this difference in careers can serve as a possible explanation for the increase in dissent.

Of the Taft court, two justices – including the Chief Justice – had served a career in politics. The majority of justices, however, had a judicial career. A similar situation seems to have been present at the Hughes court, where only a small minority of two justices – again with inclusion of the Chief Justice – was active in politics.

Although a positive answer to the question raised above would imply that a cause for the rise in dissent during the term of Chief Justice Stone was a clear inexperience of justices at his court, I do not believe that this was actually the case. At least, the careers of the justices at the Stone court do not seem so entirely different from the careers of justices at either of the other two courts. Obviously, there was some overlap. The Stone court of 1941 consisted of 4 justices, including Stone, who also served as justice in the Hughes court. The number of justices serving in both the Taft court as the Hughes court was also 4.

Obviously, this discussion can also prove useful for the ECHR. A court consisting of relatively inexperienced justices may behave differently than a court which mainly contains highly experienced individuals. Whether these differences have an effect on the inclination to write separate opinions is hard to predict. On the one hand, an inexperienced justice may use experience from his previous career as leading in deciding whether to separate or not. On the other hand, this can also be said of a justice with long experience at the court, who feels that his opinion should receive high authority.

4.2.4. Concluding remarks

The discussion in this section on the US Supreme Court has proved useful, in that it has provided some interesting features which can help for the further proceeding of this research. First, the side step to the US Supreme Court has showed a good example of a judicial system where the occurrence of separate opinions has differed considerably over time. As has been showed, this can be contributed largely to some swift in attitude against separate opinions, driven by Chief Justice Stone. The increase in dissent which started during his term as Chief Justice has had a lasting effect in later years.

42 The choice for these particular years is based on the desire to compare the Stone Court with two other courts, which preceded the Stone Court. Then, the choice for these particular years of the chosen courts is arbitrary.

The other factors which were covered in this section can also help explain why dissent has increased at the US Supreme Court. Since the possibility to apply these factors to the ECHR is either unclear or seems difficult, it is not possible to include more than this discussion here. The distinction in levels of experience or ideological division is more applicable to the US Supreme Court than to the ECHR.

5. Theories on allowing separate opinions

This section discusses the main questions of this research. The first question is which factors might be relevant for the ECHR to allow separate opinions and for the ECJ to not allow them. The second question concerns the factors which are relevant whenever a court has indeed chosen to allow separate opinions.

It is important to acknowledge that the explanations discussed in this section do not necessarily reflect the true considerations for both courts' policies on separate opinions. The considerations which were made will most likely have concerned judicial matters and have been the result of debate between founders of the different courts on the most desired judicial regime. The factors offered in this section serve primarily as possible explanations, which are derived from a more economic or behavioral perspective. These arguments mostly concern considerations regarding the behavior of individual justices and actions concerning the maximization of their individual utility. The possibility of justices showing certain behavior, treated in this section, is then the factor which may have been relevant for the founders of the courts to weigh in the decision making process.

Whether or not these considerations have actually been taken into account is of lesser importance for this section. The relevance of this section lies in the possibility of including these relevant factors in the decision making process. In the end, it may obviously be possible to conclude whether or not these factors should have been considered by the court.

The considerations mentioned in this section have been derived partly from the analyses of the previous sections, where the differences between the ECJ and the ECHR, and the observations from the US Supreme Court, were covered in detail.

5.1. Theories explaining the allowing of separate opinions

The topics discussed in the next subsections concern the factors which can explain the choice of the ECHR to it's justices to write separate opinions. These theories thus concern the first main question of this research.

5.1.1. Cohort effects

It can be ruled out that the difference between the ECJ and the ECHR is caused by time dependent factors. Section 3.2 showed that both courts[43] were established in the 1950s. The unlikelihood that a prevalent institutional norm is altered dramatically within such a small period of time helps to rule out the possibility that the difference

43 As has already been discussed in section 3.3, with the ECHR it is more precise to speak of its 'predecessor', as the actual court was established in 1998.

is caused by differences in prevalent social norms at the time of establishment.
Furthermore, in the period following the Second World War, international cooperation started to grow, leading to the formation of organizations as the Council of Europe and the predecessor of the European Union. These organizations were rather unique for the time and cannot be said to have had significant predecessors. The same holds for the courts of both organizations.
Establishment of both courts in sufficiently distanced time periods would allow for the decision whether or not to allow separate opinions to be (partly) dependent on the presence of a prevalent institutional norm.
A newly formed court might then be inclined to simply follow the main institutional traits of already existing courts. This is closely linked to the possibility of herding behavior, which is discussed in the following subsection. The decision whether or not to allow separate opinions could then be explained through the existence of cohort effects or some form of herding behavior.

5.1.2. Herding behavior

A large possibility of herding behavior at a court would imply that the founders of the newly formed court are in some way concerned about adopting a procedure which differs from the prevalent procedure. When showing some form of herding behavior, the fear is then presented that ex post the newly chosen procedure turns out to be less efficient than the prevalent procedure. It is then also the fear of the founders of a court to be seen as less able, in adopting a procedure at the new court. Scharfstein and Stein (1990) model this herding behavior and show that managers, who have to take investment decisions and who care about their reputation, will choose to follow the previously made decision[44], regardless of the own signal. In the terminology of Scharfstein and Stein, herding behavior by founders of international courts means that court A has adopted a certain procedure in the past; when the newly formed court B has to decide which procedure to adopt, she is likely to mimic the decision of court A, regardless of the own signal which might indicate that an opposite procedure is better to implement.
Although a court's decision how to manage the procedure of future verdicts is largely distinct from a firm's investment decision, an interesting parallel can be drawn from Scharfstein and Stein.
A newly formed court might have a preference to follow the decision of an established institution, which was taken earlier. The new institution might fear taking a less correct decision, implying that the prevalent procedure is chosen. It would then be safer

44 The opposite situation, where the second manager always chooses the decision opposite of the previous decision, is also a separating equilibrium according to Scharfstein and Stein (1990).

to follow the previous decision; choosing the same procedure thus increases the likelihood for these founders to be seen as able, as it is generally assumed that able agents are likely to make correlated errors.[45] Founders of a newly formed international court might thus choose to adopt the same procedures as chosen by already existing courts, knowing that they can 'share the blame' when it turns out that another procedure turns out to be 'better' ex post. In this theory, sharing the blame is preferred over risking taking an incorrect decision alone.

It is tempting to rule out herding behavior as possible explanation for several reasons. First, the decision to form a new court as the ECJ or the ECHR should be considered to be more independent from earlier steps than in the investment decision making of Scharfstein and Stein. Key is that the newly formed courts were part of newly formed international organizations. It is then less likely to adopt procedures which were implemented by national courts or by courts of other international organizations.
Second, herding behavior seems irrelevant here for the comparison between the ECJ and the ECHR for the simple reason that these courts have adopted different procedures for separate opinions. Since both courts adopted different procedures, it is unlikely that one prevalent institutional norm existed at the time. If a manager A existed, in the form of an existing court, it cannot have been the basis for both of the courts to follow the same decision as was taken by this A.
However, the ECHR's decision to allow separate opinions can be partly driven by the experiences of the US Supreme Court. When the founders of the ECHR learn that the Supreme Court allows its justices to write separate opinions, they can choose to adopt the same procedure. However, as the judicial systems of the Council of Europe and the United States differ considerably, the latter cannot serve as proper reference material for the founders of the former.[46] To conclude in the terms of Scharfstein and Stein, the US Supreme Court cannot function as the 'firm A' as such.
Herding behavior is thus not a proper factor to explain the differences between the ECJ and the ECHR in choosing to allow separate opinions or not.

5.2. Theories explaining justices' behavior

The following subsections will consider factors which can explain the behavior of individual justices whenever a court has indeed allowed it's justices to write separate opinions. These sections thus pose to answer the second question of this research.

45 This is also defended in e.g. Scharfstein and Stein.
46 This has also been discussed in Section 4.

5.2.1. Pandering behavior

Another theory concerns pandering behavior and the fear of justices showing such behavior. This means that justices do not act as independently as may be required from a justice at an international court. Instead, justices would then settle a case as required by a superior or by the (national) public. Although both seem unlikely, Shepard (2002) discusses the former possibility in detail in his article on 'telephone justices'. [47] The latter possibility is a justice pandering towards the public. The justice chooses to take positions of which he expects that this is favored by the public. Reputational concerns can also induce a justice to vote differently than in the most sincere situation, where his decisions are entirely based on his true valuations of the case. Whenever the theory of pandering behavior proves applicable to the courts of this study, this would imply that the ECJ considered this a too high risk for allowing separate opinions, opposite to the conclusion of the ECHR.

Pandering behavior is not necessarily restricted to reaching judgments in individual cases. It might also occur in the selection process of new justices, by acting as a 'model justice'. A model justice would act in a manner which seems the most appropriate for a future justice of a high court.

Obviously, it is hard to determine independently and with certainty whether pandering has actually occurred, as it is difficult to prove that a justice has not chosen his position impartially and independently, but is driven entirely[48] or influenced by others. Thus, this discussion can only deal with the question if enough means are available to prevent justices showing this pandering behavior. Whenever these means are not available or to a very low extent, this can serve as explanation for the existence of separate opinions.

However, a problem with this approach is the causality of reasoning. It is more likely that the possibility of separate opinions is (at least partly) motivated by the absence of possibilities for pandering behavior than that the absence of pandering possibilities causes the allowance of separate opinions. Nevertheless, inclusion of this analysis in the following subsections can provide the insights needed for the discussion whether pandering behavior is possible at either of the courts.

5.2.1.1. Pandering & ECHR

This subsection will start by discussing the application process at the ECHR in more detail.

47 Shepard uses this term, derived from US Supreme Court justice Breyer, meaning a justice who makes his judgment dependent on demands from a superior, given over the telephone.

48 A partial influence by (the opinion of) others should not be characterized as pandering behavior and, as such, undesirable. A justice who is open for the opinions of others should actually be preferred.

Information on the exact proceeding of electing new justices for the ECHR is not provided. In a recent description of the electing process[49], the committee of the Parliamentary Assembly of the Council of Europe (PACE)[50] only clarifies the important role it sees for itself. In reference to earlier adopted resolutions and recommendations, it is stated that it is necessary for the subcommittee on the election of justices to 'receive' all candidates. The precise meaning of this 'receiving' does not become clear from the PACE's publications.

Since this committee is not obliged to present its findings and opinions on the suitability of the candidate-justices[51], it does not necessarily become clear to the public what the contents are of the recommendations which are sent to the other members of the Assembly.[52]

This election process is thus less open than e.g. the process in the United States, where candidates for judgeship at the US Supreme Court have to be heard by a special committee of the Senate. In these hearings, which take place in an open meeting and which are thus visible for the public, the candidate is questioned on his suitability and on his possible outspokenness on certain (controversial) issues.

When comparing the situation at the ECHR with the US Supreme Court, it is apparent that the procedure in the US is more public, and that the relevant public for the procedure at the US Supreme Court is far bigger than that for the ECHR. This discussion on the openness of this decision making process by both committees (of both the Assembly and the Senate) is relevant, in that a relatively secret process has as a consequence that the decision is relatively more 'conservative' than in a more transparent setting. With a secretive process, a possible group reputation effect can inhibit committee members to make a choice which in a more open process would perhaps be preferred. Although this discussion, derived from Levy (2004), focuses primarily on decision making on a project, rather than an election process, it may also prove applicable for election processes. A conservative setting here implies that a candidate is elected who is less outspoken.

The other factor which is relevant for the possibility of pandering justices is justices having reputational concerns. The fear of justices altering their behavior to please the public and secure a possible second term at the court is not relevant at the ECHR, as

49 Source: Procedure for electing judges to the European Court of Human Rights. By: Committee on Legal Affairs and Human Rights, Sub-Committee on the election of judges to the European Court of Human Rights. 11 October 2010.

50 This Parliamentary Assembly is composed of members of parliament from the member states of the Council of Europe.

51 A large part of the suitability is determined through inspection of the curriculum vitae which every candidate has to send to the committee. It is also important for the committee to determine whether the candidate is able to function properly as a justice, e.g. is expected to behave in a collegial manner.

52 Source: Procedure, point 11.

all justices can only serve one term of nine years, without any possibility of re-election. Pandering in order to extend the own career at the ECHR is thus not possible. However, before the implementation of Protocol 14 of the Convention, this possibility did in fact exist. With the possibility of re-election, justices could act differently when seeking re-election. Pandering behavior was thus possible to some level, also considering that the reform through Protocol 14 was intended to "...increase their independence and impartiality".[53] The necessity of this reform thus shows that pandering behavior could not be excluded sufficiently. Whether or not pandering behavior did actually occur is not clear. The possibility of pandering behavior is enough reason to prevent this in the future.

5.2.1.2. Pandering & ECJ

The appointment process at the ECJ does not include the election of justices; they are nominated for appointment by the national government. Although the possibility of pandering in order to achieve the nomination for judgeship at the ECJ does exist, it does not seem likely: it may be possible to some degree to persuade the own government, but other member states still have to approve of the country's nominee.
Furthermore, pandering towards the public cannot occur, as only the name of the appointed justice will become known. No information is revealed on the possibility of some governments opposing of this decision.[54]
Regarding the possibility of pandering behavior driven by reputational concerns, this fear looks more appropriate to some extent than for justices at the ECHR. With the possibility of re-appointment comes the possible urge for individual justices to alter their voting behavior in individual cases in order to secure another term as justice. However, and this is a key aspect, justices at the ECJ have no possibility of publicly distinguishing themselves when seeking re-election. They cannot use their voting behavior as a mechanism to seek re-election, as individual voting behavior is not made public. Obviously, justices can tell about or motivate their individual voting behavior towards the responsible authority, and why they believe that this is a good reason for re-election, but it is unlikely that this can have an effect on the outcome of this appointment procedure. The responsible authority will know that a justice is seeking reelection and will know that statements of this justice regarding his suitability can contain cheap talk.

53 Source: Council of Europe Factsheet "Protocol 14 – The Reform of the ECHR". 15 May 2010 (updated)

54 The nomination of a particular candidate can only convey that other member states do not have insurmountable objections. If this were the case, the unwritten norm of collegiality between member states requires the government not to nominate this particular candidate for judgeship.

The ECJ has thus chosen differently than the ECHR. Although the causal order is difficult to distinguish, it may be assumed that because justices are allowed to have a second term, it is deemed undesirable to allow for separate opinions. The possibility of pandering behavior by acting as a 'model justice' is thus not present.

5.2.1.3. Concluding remarks on pandering behavior

Pandering behavior by individual justices does not seem a relevant factor in studying the differences between both courts. Where the means to show pandering behavior are available through re-election possibilities, there is no possibility to actually persuade the responsible authority in any way. On the other hand, the ECHR has reduced the possibility of pandering behavior by removing the incentive to show this behavior, i.e. by removing the possibility of re-election. The possibility of pandering behavior has thus been largely removed by both courts. It can therefore not serve as proper factor in studying the ECHR. However, the necessity which was apparently felt to implement Protocol 14 of the Convention shows that the fear of pandering behavior did exist. Removing the possibility of reelection was thus a good step to prevent pandering behavior.

5.2.2. Career effects

This section will focus on the possibility of career backgrounds having an effect on the decision of justices whether or not to write a separate opinion. As this cannot be studied for the ECJ, attention has to be limited to justices at the ECHR. The possible consequence of the existence of these career effects is that the distribution of careers at the ECHR can have an effect on the number or rate of separate opinions written by individual justices. Justices with a particular background might have a larger inclination than others to separate themselves from the verdict of the court.

If this is indeed possible, members of the election committee at the PACE can incorporate this factor in their decision to elect an individual as justice. This is then dependent on the member's view on the desirability of justices writing separate opinions. If members feel, for some reason, that a court which consists of many justices who are likely to write separate opinions is undesirable, they might make their electing decision dependent on the career backgrounds of the individual candidates.

As I consider this to be an important factor, I have chosen to elaborate this factor in more detail in section 6. By performing a quantitative analysis of the opinions written by individual justices, and by studying the careers of the individual justices, I hope to discover whether the background of a justice has an effect on the opinion writing behavior.

5.3. Concluding remarks

This section has shown that the presented theories for the choice of the ECHR to allow separate opinions, with which the first question of this research can be answered, are not applicable. Both cohort effects and herding behavior do not appear to be proper explanations.

Concerning the second research question, focusing on behavior of individual justices, pandering behavior seems a possibly influential factor. However, the abolishment of reappointment possibilities at the ECHR has drastically decreased this effect.

The effect of career backgrounds seems an important factor, which is therefore discussed more extensively in the following section.

6. Quantitative analysis on effect of careers

In this section, I choose to make a similar analysis as Bruinsma (2006) has done in his research. Bruinsma tried to answer the question whether career backgrounds (can) have an effect on the inclination of individual justices to write separate opinions. Bruinsma concludes that these career effects do seem to be present. The career background can impact the desire to have a united court and thus influences the likelihood of a justice writing an opinion. An important remark which is made by Bruinsma is that his research is not intended to show an actual truth about justices with a particular background. He only wishes to show that some justices with a particular background tend to write opinions more often than others.

Bruinsma combined both a qualitative and quantitative approach. The former consisted mainly of interviewing (past) justices of the court to gain more insights in their voting behavior and their opinion on the writing of separate opinions.
The latter used figures from 1999 until 2004 on the occurrence of separate opinions and the corresponding possible impact of the past career. Bruinsma thus focused on the first years in which the ECHR functioned as a permanent court. Furthermore, he only considers verdicts of the Grand Chamber and ignores possible separate opinions in verdicts at chambers of seven justices. This leaves out a very large group of cases, which makes it harder to draw hard conclusions based on this relatively small data set. Bruinsma motivates his decision to focus on the Grand Chamber by, inter alia, quoting justice Zupančič that "(...) this Court functions at its best in Grand Chambers".[55] A study of verdicts of the Grand Chamber would give a proper reflection of the functioning of the court. However, my choice is to also include judgments from regular chambers. This choice is motivated by the fact that quantitative conclusions are difficult to draw based on a small data set. Also, restricting attention to judgments in the Grand Chamber does not guarantee the coverage of merely the most important cases. As mentioned earlier, judgments of the Grand Chamber do not necessarily concern cases of high importance to the court. Therefore, restricting attention to the Grand Chamber possibly leaves out those cases in which separate opinions are also likely to be written. Still, urges to express dissent are not likely to be restricted to cases of high importance. Cases of lower importance, which are less likely to be dealt with by a Grand Chamber, should therefore also be included.

The research conducted in this section will focus on the quantitative component. The first important distinction between what is done here and the study of Bruinsma has

55 Source: Bruinsma (2006), page 224.

already been mentioned, i.e. that this study also includes judgments from the chambers of seven justices. Secondly, Bruinsma considers a period where the caseload of the court was still relatively small; he studies the period between 1999 and 2004. A new analysis, which also includes the cases at the court between 2005 and 2010, will prove to be useful. This period saw a significant rise in caseload of the court, compared with earlier periods.
The rationale for the inclusion of years with higher caseload is the following. With an increase in caseload, it is reasonable to assume that justices might behave differently, possibly altering the effect of career backgrounds on the writing of separate opinions. When justices have to participate more frequently in judging on possible violations, they might be less inclined to exert the costly effort of writing a separate opinion. On the other hand, justices who are truly driven by concerns of their reputation or hold a true desire to express themselves freely will keep doing so anyway.

In 2004, the number of judgments delivered by the court was only 718. The caseload started to increase, however, starting from 2005. The caseload had already risen to 1,105 in 2005, rising even more in the years to follow, in which the average annual caseload was more than 1,500. This was thus an increase of approximately one third compared with 2005. When comparing the caseload with 2004, the increase was even larger: approximately a doubling of the number of cases. This development is also reflected in Graph 5, showing the difference in periods covered in both studies.
For the justices who look at the writing of separate opinions through the costs perspective, it is then expected that the period between 2005 and 2010 saw a (relative) decline in the number of separate opinions. Separating will come at too large a cost for this group. On the other hand, for the justices who truly care about their reputation, the number of separate opinions should remain (relatively) stable.

It is also important to consider the possible role of the number of justices at the court. Whenever the increase in caseload can be absorbed by a proportional increase of the number of justices in the same period, results of this new analysis would be comparable to the outcomes presented by Bruinsma. It is thus important to control for this factor first.
While the caseload thus rose considerably in this period, the number of justices at the court was far more stable. While the period considered by Bruinsma saw an increase of the number of justices at the ECHR of 6[56], this increase was limited to 1 in the pe-

56 The countries to join the Council of Europe in this period, who thus obtained the right to be represented by one justice at the court, were: Georgia (1999), Armenia (2001), Azerbaijan (2001), Bosnia and Herzegovina (2002), Serbia (2003) and Monaco (2004).

riod after 2005.[57]
The number of cases which every justice had to participate in has thus increased since this period. The statistics of the court already showed that this increase mostly counts for the cases of little and medium legal interest. While the absolute number of cases with high legal interest remained quite stable, this meant that the relative amount of this group has decreased over this period.

The goal of this quantitative analysis is thus to study whether the conclusion of Bruinsma, that the career background of a justice can have an effect on the urge to write a separate opinion, still holds in a longer time span where justices face an increase in case load. Although this analysis is thus similar to Bruinsma's quantitative approach, it is interesting to see whether the effect of career background remains equally strong with an increase in caseload, and also holds when not limiting attention to verdicts of the Grand Chamber.
The further structuring of this section is as follows. First, section 6.1 contains a thorough description of the data, as well as a description on the use of the data and the division of justices among different careers. Sections 6.2 and 6.3 contain some basic tests, which can shed some more light on the dataset. Section 6.4 then gives the main part of this analysis, showing the possible relationship between career backgrounds and separating behavior. Section 6.5 gives the results of other applications of the dataset. Finally, section 6.6 concludes the results of this section.

6.1. Description of the data

The data for this section have been gathered from the database of the ECHR.[58] Opinions have been sorted by year; for every case containing one or more opinions, the name of the justice(s) writing the opinion has been added, as well as the type of opinion that has been written.
The distinction which is made is not only between dissenting and concurring opinions, but also in the level in which the writer of the opinion separates from the court verdict. This distinction is made by the justice himself: he can decide the characterization of his opinion. A partly dissenting or concurring opinion thus indicates that the writer does not fully (dis)agree with the verdict, but only with particular parts of the verdict. Finally, some separate opinions have not been characterized as either of these alternatives. If this is the case, the writer of the opinion apparently did not wish

57 Montenegro became the 47th member of the Council of Europe in 2007.
58 Source: http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en. The database of the ECHR, HUDOC, offers the possibility to scroll through every judgment delivered by the Court or the Commission since 1994.

to make this distinction, possibly arguing that the opinion is not meant as a means to criticize the majority outcome, but more to include an important statement.

Another common factor in opinion writing is that justices can choose to write a separate opinion together. They will only choose to do so when the motivations for dissent or concurrence are (sufficiently) similar. It would obviously be wiser to write an own opinion whenever the motivations for dissent differ.
Furthermore, justices can choose to join an opinion which has already been written by one or more justices. A possible motivation for joining an opinion might be the idea that the reasons for dissent or concurrence have already been expressed to satisfaction by another justice. Bruinsma has not accounted for the possibility of justices joining an opinion; I believe, however, that this factor is sufficiently relevant to include in the research. Its inclusion gives the opportunity to see whether a group of justices generally does not write opinions, but does feel inclined to join an opinion. The justice choosing to join an opinion can thus show that he wishes to distinguish himself from the majority, but does not (wish to) face the costly effort of writing the opinion himself.

Although very uncommon, the dataset also contains a few observations where no opinion has been written, but where an individual justice only states his dissent with the verdict. As has been discussed in section 2.2, choosing for this option cannot display on what grounds this justice disagrees with the majority opinion and does not seem very helpful for justices wishing to distinguish themselves from the verdict of the majority. This serves as a proper explanation of why these statements are so uncommon.

6.1.1. The use of the data

All 1,856 opinions written in the period between 1999 and 2010 are included in this research.
The primary goal was to treat all cases in which one or more separate opinions have been included separately. However, with a considerable subgroup of observations this would lead to undesirable outcomes. The dataset contains a large group of – essentially – separate cases, which treat the same possible violation of the Convention by a member state. A justice who disagrees with the verdict in one of these cases is then likely to disagree with the outcomes in these other cases, as all cases deal with essen-

tially the same.[59] Therefore, the adjusted number of opinions in the entire period is 1,552; 304 opinions have been excluded from the total.[60]
Treating all these cases separately would bias the results of the research and decrease its explanatory value. As the number of cases in which a justice writes a separate opinion would rise dramatically for those justices, it would then appear as if these justices write separate opinions very frequently in distinct cases. A bias of the results would be the inevitable consequence.
As I believe this to be highly undesirable, these observations have been removed from the original dataset. The separate opinions of one or more individual justices which essentially concern the same (possible) violation by a member state are treated as one, whenever these opinions concern verdicts given on the same day, are directed towards the same country and include the same comments on the verdict.

6.1.2. Establishing career backgrounds

In order to establish a possible relationship between the previous careers of justices and their voting behavior as justices, every justice has to be categorized in a certain career background. Preferably this would result in assigning one particular career background to every individual justice and drawing conclusions based on these results. However, the actual situation is more complicated. It turns out to be difficult to actually assign one career background to every justice, as a large group of justices have worked in several functions over time, or have combined different types of functions at the same time.
A distinction is made between the following backgrounds: judgeship (J), academics (A), advocacy (Al), prosecution (At), advisory (Ad) (either individually or within a committee), politics (Po) and a residual category containing those career backgrounds that are less common and not suited for the other categories (O).

It becomes clear when studying the backgrounds that not every justice has been active in the same field during his entire career. Switching between different categories is quite common. This makes it somewhat unclear in which category this justice should be placed.
Therefore, another category for justices with more than one prevalent background (Mu) has to be included to account for this possibility. This has also been done in

59 The most apparent example from the dataset is a number of cases in February 2002, treating possible violations of the Convention by Italy. In more than 130 cases the justice representing San Marino at the court, Ferrari Bravo, disagreed with the court verdict. For all these cases, he wrote a dissenting opinion.
60 As the largest number of excluded opinions were written in 2002 by Ferrari Bravo (see previous footnote), the effect of removing these particular opinions has had the largest effect on the number of opinions written in the period also considered by Bruinsma.

Bruinsma (2006). Only those justices of who it does not become clear what the most relevant career path has been, are included in this category. This is done to prevent a too large group of justices being assigned to this category. Simply assigning all justices with experience in more than one field to this group would reduce the size of other (relevant) categories, thus reducing the information revealed on the possible relationship between career background and the writing (and joining) of separate opinions.
Finally, ad hoc justices (AH), who choose to write (or join) a separate opinion, are also treated separately. As this group is not formally part of the court, no particular background is assigned to these individuals. With this group, I assume that the attitude with the writing and joining of opinions is not based in the same extent as with formal justices on their previous career, but more on the fact of not officially being part of the court. This group of justices might feel less restricted by or familiar with the most common practices at the court. This can also include relative unfamiliarity with the phenomenon of separate opinions.

6.2. Basic results from the research

This section begins with discussing some first basic results of the research, characterizing the data in more detail.
First, it has been checked whether the relationship between the annual number of judgments and separate opinions has remained constant. In this stage, all opinions are considered independent of their type and the number of justices concerned with these opinions. These results are depicted in Graph 6. The difference between both variables in this graph is that the standard judgment/opinion rate also includes those opinions which are written by the same justice(s) and contain the same texts in different judgments. Especially the spike in 2002 can be attributed to the inclusion of these observations. Correcting the results of all years for these particular observations removes this relative outlier. As this type of observations was far less common in other years, the differences between the ratios in these years are much smaller.
However, it is still the case that the ratio is far higher in 1999 than in all other years. A logical explanation is that the number of judgments in this year was far lower than in all other years. This makes that the relative number of judgments containing a separate opinion was higher.
The correlation between caseload and number of opinions shows a clear relationship: the value of the correlation coefficient is 0.915; this score is highly significant. There is thus nearly a 1-to-1 relationship between annual caseload and the number of opinions.[61]

61 The analyses of later (sub)sections are conducted through the division of opinions by quarters, instead of the approach here, which is a division by years. The correlation between quarterly caseload and the quarterly number of opinions is lower (.662), but is still highly significant.

Another possibility is not looking at the total number of opinions, but at the total number of opinion writing actions. This variable incorporates the possibility of more than one justice writing a particular opinion. The value of the corresponding coefficient is 0.837. This score is also highly significant.

6.2.1. Distribution of opinions

This subsection covers the distribution of opinions, when distinguishing between concurring, dissenting and other types of opinions. It is also checked whether this distribution is constant for both sub periods of the study.

When studying all opinions, it is clear that the majority consists of expressions of feelings of dissent. Approximately two thirds of all opinions are either dissenting or partly dissenting opinions, with or without justices joining the writer of the opinion. Only 26.7% of opinions were either form of a concurring opinion.

That the writing of separate opinions is to such a large extent restricted to dissenting opinions makes sense and fits with the theory of earlier sections. The urge to write or join an opinion is likely to be larger for someone who disagrees with a majority than for someone who is part of this majority. Feelings of concurrence are likely to be indirectly reflected in the joining of the court's verdict, lowering the incentive to separate by writing a concurring opinion. The views of the individual justice belonging to the majority are already reflected (partly) in the majority opinion.

Such implicit representation is not present for justices disagreeing with the majority. It is only known that they disagree with the majority; how they feel the case at stake should have been resolved remains largely unclear, unless a dissenting opinion is written.

When comparing this distribution for all years with the distributions in 1999-2004 and 2005-2010, it becomes clear that there are some differences. These distributions are shown in Table 1.

	1999-2010	1999-2004	2005-2010
Dissenting	66.24	66.55	66.05
Concurring	26.74	22.88	29.03
Other	7.02	10.57	4.92

Table 1: Distribution of opinions (I), in percentages.

The table shows that the differences do not appear at the rates of dissenting opinions, which are quite similar. There is a discrepancy, however, in the percentages of concurring opinions. With the increase in case load, it appears as if more justices are inclined to express the feelings of concurrence separately.

However, Graph 5 showed that the number of observations in 1999 was much lower than in the other years which Bruinsma considered in his study. Furthermore, the number of observations in 2005 does not seem to fit well with the number of observations in the other years of the Bruinsma study or with the observations of the latest years. The previous analysis should thus be extended, removing 1999 and placing the observations of 2005 in the different groups. The results are shown in Tables 2a and 2b.

	All years (2000-2010)	2000-2005	2006-2010
Dissenting	66.01	65.32	66.51
Concurring	27.63	25.65	29.10
Other	6.36	9.03	4.39

Table 2a: Distribution of opinions (IIa), in percentages.

	2000-2004	2005-2010	2005
Dissenting	65.91	66.05	63.16
Concurring	24.85	29.03	28.57
Other	9.24	4.92	8.27

Table 2b: Distribution of opinions (IIb), in percentages.

The percentage of dissenting opinions does not appear to differ much between the different sub periods. The percentage of concurring opinions does show some fluctuations, but these do not seem to differ much from the earlier derived pattern. The inclusion of 1999 and the placement of 2005 do not seem to have much influence on the results.

6.2.2. Relationship between caseload and distribution of opinions

It is then interesting to see whether a significant relationship exists between caseload and the percentages of the opinions treated above. For this purpose, correlation tests have been performed. As the number of years in the dataset (12) is too limited to allow for the use of such testing methods on an annual basis, the years have been divided into quarters, thus increasing the number of observations to 48.[62]

62 A further division into months would, however, reduce the explanatory value of the tests. As monthly fluctuations in caseload and opinion writing can be large, the results would not necessarily reflect true effects.

	Dissenting	Concurring	Other
Correlation coefficient	-.031	.370	-.457
P-value	.833	.010	.001
Significant at 5%?	No	Yes	Yes

Table 3: Correlation between caseload and types of opinions

Table 3 shows that the percentage of dissenting opinions does not correlate with caseload; highly significant correlations exist between caseload and the percentage of concurring opinions and between caseload and the category 'Other'. As it was already shown that the latter group is consistently smaller than the other categories, this shall not be considered further.

First, it is apparent that the percentage of dissenting opinions does not alter significantly with an increase in caseload. The overall (relative) inclination to separate from the majority by expressing feelings of dissent has not increased. This has been the case, however, with concurring opinions. With this type of opinions, the overall effect of caseload is positive. Periods which saw an increase in caseload thus also saw a relative increase in concurring opinions.

All in all, the increase in caseload has caused a certain shift from writing separate opinions (without characterizing the contents) to writing concurring opinions. An increase in caseload thus makes justices more motivated to express feelings of concurrence.

6.3. Opinions concerning more than one justice

6.3.1. Opinions in general

Until this point, no distinction has been made between opinions which are written by one justice and opinions which concern more than one justice. When more justices are involved with an opinion, there are two options. Either justices choose to write an opinion together, or a justice chooses to join an opinion which has already been written by (an)other justice(s).

The data show that, although the vast majority of opinions is written by one justice and is not joined by others, a considerable part concerns more than one justice. The term 'concerning more than one justice' implies that the possibilities of writing and joining a separate opinion are combined here. A distinction between both possibilities is made at a later stage.

Graph 7 shows the development of the annual percentage of opinions which concern more than one justice. Although year-to-year fluctuations are common, it is clear that in most years more than one third of all opinions are concerned with more than one

justice. The horizontal red line in the graph shows the weighted average percentage.[63] It is reasonable to conclude based on this graph that the percentage of opinions involving more than one justice is higher at the end of this period than earlier.

Although it is hard to find the actual explanations for this finding, it makes sense to assume that with an increase in caseload, fewer justices are inclined to fully separate from the other justices by writing own separate opinions. As every justice is required to participate in more cases than in years with a smaller caseload, he has fewer possibilities to write the same amount of separate opinions as before.[64]

Obviously, a justice who has fundamental problems with the outcome of a case will still feel the urge to express this dissent and remains likely to do so. However, this is unlikely to be done with all cases. Justices can consider the possibility of writing less individual separate opinions. One option is simply not writing separate opinions anymore. The other option is writing an opinion together with other justices holding a similar view, or joining the opinion of another justice.

6.3.1.1. The effect of caseload

The remainder of this subsection focuses on the latter possibilities, of justices writing or joining separate opinions together. It is studied whether there has been an effect of the increase in caseload of the court on the rate of opinions concerning more than one justice. For this purpose, correlation tests have again been performed.

The tests show that some significant positive correlation exists between caseload and the percentage of separate opinions concerning more than one justice.[65] This is thus an indication that whenever justices are confronted with an increase in caseload, they choose to work together with other justices (in whatever form) more frequently.

As a side note, the correlation might be caused to some extent by the inclusion of the year 1999, which is clearly an outlier concerning caseload. It is therefore useful to check the robustness of this result by removing the 4 observations for 1999 from the test. With 44 observations left, the correlation coefficient turns out lower. Furthermore, this coefficient is no longer significant. At a 10% level, the test would be significant. The results from both tests are included in Table 4.

63 This average has been constructed by dividing the total number of opinions including more than one justice in the entire period by the total number of opinions. As the caseload of the court has increased during this period, the later years have more weight in this average than earlier years.

64 This only counts when assuming that the endowment to every case consists of deliberation and writing of a (majority or minority) opinion and is fixed. Whenever it is assumed that the time which is available for writing opinions is not fixed, it is obviously still possible for justices to write the same number of opinions (or more) with an increase in caseload.

65 The chosen significance level is 5%.

	N= 48 (1999-2010)	N=44 (2000-2010)
Correlation coefficient	.322	.251
P-value	0.026	.100
Significant at 5%?	Yes	No

Table 4: Correlation between caseload and opinions concerning more than one justice

Based on these results, there is no conclusive evidence for the hypothesis that a positive effect exists of caseload on the rate of opinions concerning more than one justice. Although a test on correlation is not best suited for discovering whether a causal relationship exists, it does present some insights in the possible relationship between both variables. The next subsection goes a step further, by studying whether a relationship exists between caseload and the different types of opinions.

6.3.2. Different types of opinions

This subsection contains a similar analysis as the one included in the previous subsection. However, a distinction will be made here between the different types of separate opinions, while the previous subsection only covered opinions in general.
Graphs 8 through 10 in the appendix give the same analyses as also covered in Graph 7, but now for dissenting, partly dissenting and concurring opinions respectively. However, the patterns appear to be different than in Graph 7. Especially with the category of partly dissenting opinions, there has been quite an apparent rise over the years.

Table 5 gives the results of the different correlation tests.

	Dissenting	Partly dissenting	Concurring
Correlation coefficient	-.207	.452	-.031
P-value	.159	.001	.834
Significant at 5%?	No	Yes	No

Table 5: Correlation between caseload and opinions concerning more than one justice, sorted by type (I)

The only significant effect is the relation between caseload and the percentage of partly dissenting opinions. This effect is positive, showing that an increase in caseload is accompanied by an increase in the rate of partly dissenting opinions. As Graph 9 shows, approximately one half of all partly dissenting opinions concerns more than one justice. The trend is also clearly positive in the last years of the study. This implies that partly dissenting opinions serve as some kind of substitute for 'real' dissenting opinions. Whenever caseload increases, a shift is visible from dissenting to partly dis-

senting opinions concerning more than one justice. This obviously also reflects the general increase in partly dissenting opinions.

To allow for proper comparisons with the previous subsection, the same tests have been conducted with the exclusion of the observations of 1999. The results are shown in Table 6.

	Dissenting	Partly dissenting	Concurring
Correlation coefficient	-.300	.407	.032
P-value	.048	.006	.836
Significant at 5%?	Yes	Yes	No

Table 6: Correlation between caseload and opinions concerning more than one justice, sorted by type (II)

The correction shows that the rate of dissenting opinions has become significant at a 5%-level. Furthermore, the correlation between caseload and the percentage of concurring opinions has changed signs and has stayed highly insignificant. Finally, the correlation between caseload and the percentage of partly dissenting opinions has stayed roughly the same.
There is thus no clear pattern; whereas the total relationship between opinions with more than one justice and caseload was positive, this was not the case with the separate tests for the different types of opinions. The observation that the correlation for the percentage of dissenting opinions is negative even seems contradictory with what might be expected.

A possibility is that with an increase in caseload, justices choose not to write dissenting opinions together as the cost might still be considered too high. Instead, they choose to write a partly dissenting opinion, which might come at a lower cost. Although justices still face the costs of having to write this separate opinion, they might choose to focus on a particular part of the verdict, thus choosing to only partly show dissent with the majority.

6.3.3. Differences between 1999-2004 and 2005-2010

To see whether any differences exist between the period which Bruinsma considers and the period which is added in this study, the tests of the previous subsections are repeated for both periods. As this reduces the number of observations with each tests, a higher significance level of 10% will be used with these tests.

1999-2004

For the first five years, there is no significant overall effect. With the relatively low number of judgments in these years, there is thus no significant correlation between caseload and the percentage of opinions concerning more than one justice. Furthermore, no significant effects – even at an adjusted level of 20% – exist when distinguishing the different types of opinions. The inclination to separate by working together with another justice is thus not dependent on caseload whenever this caseload is at a relatively low level.

	All opinions	Dissenting	Partly dissenting	Concurring
Correlation coefficient	.304	.152	.079	.008
P-value	.148	.478	.714	.969
Significant at 10%?	No	No	No	No

Table 7: Correlation between caseload and opinions concerning more than one justice, sorted by type (III)

	All opinions	Dissenting	Partly dissenting	Concurring
Correlation coefficient	.086	-.425	.390	-.048
P-value	.689	.038	.059	.824
Significant at 10%?	No	Yes	Yes	No

Table 8: Correlation between caseload and opinions concerning more than one justice, sorted by type (IV)

2005-2010

For the second sub period, the overall correlation between caseload and number of opinions concerning more justices is slightly positive but highly insignificant. Here, the significant negative correlation between caseload and dissenting opinions is very apparent, as well as the significant correlation for the group of partly dissenting opinions.

Where the scores for both variables were positive in the first sub period, there appears to be a negative interaction between the two types of opinions. Where the rate of dissenting opinions tends to decrease, this effect is absorbed by an increase in the number of partly dissenting opinions. This is the conclusion which was already drawn from the calculations for the entire period.

When comparing both sub periods, two differences emerge. The first difference lies in the rise in partly dissenting opinions concerning more than one justice in the second sub period. The inclination of justices to separate by working together with other jus-

tices has thus not altered dramatically, but has shown a shift towards partly dissenting opinions.
The second difference concerns the effect of caseload. With relatively low caseload, no effects exist. With the higher caseload levels, observed in the second sub period, some significant correlations emerge.

6.3.4. Concluding remarks

The main conclusion of the previous subsections is that the claim that an increase in caseload facilitates an increase in the percentage of opinions concerning more than one justice does not hold. Although certain shifts in opinions written or joined by more than one justice are indeed visible, these shifts are too limited to draw the general conclusion that the increase in caseload has caused a shift in writing or joining behavior. Furthermore, no significant differences exist between both the sub periods which are considered here when the overall effect is concerned. The effect of caseload on behavior is thus not different in a period where the overall caseload is higher than in an earlier period. However, these differences do become clear when distinguishing between the different types of separate opinions. Then, some shifts appear toward the partly dissenting opinions.

6.4. Analyzing the effect of career backgrounds

This section will deal with the primary motive for this quantitative analysis. It will be studied whether a relationship exists between the career background of justices and their behavior regarding the writing and joining of separate opinions.
In the first part of this section, no distinction is made yet between the writing of opinions and the total of writing and joining opinions. This is done in later subsections. For both types of opinion behavior, several tests will be performed.

6.4.1. Differences between different careers

First, when looking at the most common opinions per year, it becomes clear that these are the individual concurring, dissenting and partly dissenting opinions. No distinction is made here between opinions which are fully individual and those opinions which are joined by one or more other justices. It is only checked which is the most common career background for the writers of these opinions. Table 9 on page 56 gives some insights in the distribution of these opinions. For every year and every type of opinion, the career background is shown which has written the most of this particular type of opinions, complemented with the percentage of opinions written by this group. The number of observations is thus not the number of opinions, but the number of justices involved in writing these opinions.

The interpretation of this table is as follows. The results for, for instance, dissenting opinions in 2005 are given by the value 27, the percentage 29.6 and the variable A. This means that of all 27 dissenting opinions written in 2005, 29.6% was written by the group of former academics. This was the largest percentage for this type of opinions in this year. The remaining percentage is divided among the other types of justices.
Several facts become clear from this overview. First, there is not a clear pattern regarding the distribution of cases. For many cells in the table, the relatively low percentage for the most common career background indicates that there is a large variety in the type of justice writing such particular opinion. There is mostly not a single background which clearly stands out.
Second, whereas ad hoc justices were likely to write opinions in the first years of the study, this effect has faded out over the latest years.[66] Although the table does not provide all necessary information needed to draw such a conclusion, the dataset shows that the observed number of opinions written by the group of ad hoc justices was indeed higher during the first years than during the last years of the study.

With the increase in caseload over the years, however, it becomes clear that opinions are more concentrated around the group of former academics. Especially the individual concurring opinions are written in majority by this group in the latest years. This can explain the finding of section 6.2.2, which showed the increase in the percentage of concurring opinions for the period 2005-2010. The increase in the rate of concurring opinions found in that section can thus largely be attributed to the group of former academics.

Looking at the total number of justices involved with an opinion – without distinguishing between the writing or joining of an opinion – the categories with the highest annual percentage are the group of former academics (A) and former justices (J). Graph 11 shows the distribution of opinions for these two groups. The graph shows that former academics show more active opinion writing and joining behavior than former justices; the opposite occurs in three of the twelve years. The average percentages for both categories are also included, where the averages are based on the total number of opinions and joining statements. As the writing and joining of opinions has occurred more during the later years, these years weigh heavier in this average than earlier years.
The inclusion of the development of the total number of opinions and joining statements is meant to see whether a relationship exists between the number of opinions and the percentage of these opinions, which is either written or joined by former aca-

66 The opinions which were written by these ad hoc justices were mostly dissenting opinions.

demics and justices. A positive answer to this question would imply that an increase in the number of opinions is caused, at least partly, by a particular group of justices. This could thus indicate which group of justices might be driving the increase in opinions. An increase in opinions could then be attributed to this particular group.

		Concurring			Dissenting			Partly dissenting		
	Case-load	Total	Most common	% of Total	Total	Most common	% of Total	Total	Most common	% of Total
1999	177	8	Al	37.5	16	A	31.3	31	AH Al J	19.4
2000	695	24	J	33.3	24	A	50.0	26	AH	42.3
2001	888	25	A	28.0	25	A	36.0	34	AH J	26.5
2002	844	18	J	50.0	20	At	30.0	28	Al	32.1
2003	703	23	A	47.8	25	J	32.0	19	A J	21.1
2004	718	16	At	37.5	28	J	25.0	28	J	28.6
2005	1105	25	A	24.0	27	A	29.6	28	O	25.0
2006	1560	29	A	24.1	54	J	25.9	22	Al	27.3
2007	1503	32	J	25.0	48	At	25.0	30	Al	26.7
2008	1543	42	A	28.6	41	A	26.8	30	A	40.0
2009	1625	36	A	55.6	58	A	41.4	38	A J	34.2
2010	1499	53	A	52.8	38	A	34.2	25	A	40.0

Table 9: Most common careers for several types of opinions

Correlation tests have been performed to test the relationship between the percentage of opinions written and joined by a group of justices and the total number of opinions and joining actions. As before, the chosen division is among quarters as a means to increase the number of observations. The results in Table 10 show that such correlation is slightly positive but not significant for the groups of former justices and former academics.

For all other groups of justices, the same tests have been performed. The correlations are found to be insignificant for the variables Al, At and O.[67] For Ad, Po and AH there exists a significant negative correlation; the correlation is positive and significant for the group of justices with more than one prevalent career.

Furthermore, the table contains the results of the correlation tests between the percentage of opinions written and joined by a group of justices and the total caseload

67 This insignificance even exists with a high level of significance.

of the court.[68] The effects are roughly the same, although the significance of the correlation for former academics is slightly improved, and the sign has changed for the group of justices in the 'Other' category.

	Total of opinions and joining actions		**Caseload**	
	Correlation coefficient	P-value	Correlation coefficient	P-value
A	.149	.314	.237	.105
Ad	-.053	.718	.041	.784
AH	-.403	.005	-.445	.002
Al	.134	.365	-.044	.764
At	-.266	.068	-.115	.436
J	.065	.663	-.004	.980
Mu	.408	.004	.504	.000
O	-.153	.298	.050	.738
Po	-.294	.042	-.381	.008

Table 10: Correlation between career and opinion behavior

The interpretation of these results, however, is more difficult than appears at first sight. Where the group of justices with a background in academics or as a justice is constantly quite large, this is less the case for justices with different backgrounds. A negative correlation between the total number of opinions and the relevant percentage might then not depict a change in opinion writing behavior, but more a drop in the number of justices at the court with this background. A drop in the number of e.g. former politicians at the court over the years and a constant level of opinions written by the remaining former politicians would then serve as explanation of the negative correlations for this group of justices. It would be wrong to conclude that former politicians are less likely to participate in separate opinions when caseload increases.

One remark still has to be made here. Although the effect of the number of justices at the court is not yet taken into consideration, the scores for the group of former politicians and justices from the 'Other' category are highly dependent on this outcome. As the court did not consist of justices with this background in 2009 and 2010, the percentage of opinions written by these groups was obviously zero. Correcting for this outcome by excluding these two years, the correlation coefficients for O become positive and highly significant. The scores for Po become highly insignificant, with a

68 As a means of control, the correlation between caseload and the number of opinions and joining actions has also been calculated. The correlation coefficient is close to 1 (.869) and is highly significant.

positive correlation with the number of opinions and a negative correlation with total caseload.

6.4.2. A correction for the distribution of careers

The observation that not every career background is equally common makes it necessary to weigh the effect of the presence of all backgrounds at the court into the analysis. The results from the previous section might depend to a large extent on the distribution of careers over the court.
The most common careers during the entire period have been judgeship and a career in academics. Least common are a background in politics and the residual category 'other'. The rates of justices of the Court with a career as a lawyer and with more than one prevalent career have risen, while the opposite holds for a previous career as an attorney. Another factor which is apparent from the data is that the distribution of careers is not constant during the period of research, but changes each year. This makes sense, as a member state's new justice does not necessarily have the same career background as his predecessor. This development is depicted in Graph 12. As the possibility exists for a justice's term to end during a year, this justice might just serve only a part of that particular year. If the replacing justice has a different background, both careers have to be incorporated.

To determine the effect of career background, it is necessary to determine for which career background a separate opinion is relatively most likely to be written or joined. It is then important to not only look at the distribution of opinions among justices, but also correcting this annual distribution for the distribution of careers.
Ratios have been calculated, reflecting the relationship between the adjusted percentage of opinions and statements of joining an opinion for every career background, and the percentage of justices in a particular year with that background. The adjusted percentage is based on the number of opinions and joining statements, excluding the actions of ad hoc justices. As discussed earlier, no specific background has been assigned to these justices. Including this group in the analysis would thus not be of real use for the explanatory value of this research.[69]

With the calculation of these 'career-opinion ratios', the pattern which emerges is roughly opposite to the pattern which was observed earlier. The former conclusion

69 Possible effects which can be observed for these particular justices would most likely be caused by the special position which this group of justices has at the court (only serving as a justice whenever the actual justice of his member state cannot cover the case), not by the career background which these justices have. As the commonality between all 'regular' justices is that they are in fact all members of the same court, this makes it possible to distinguish them by career.

that opinions are most common for former justices and academics is lost when controlling for the distribution of careers.
As Graph 13 shows, in which the development of these ratios is depicted for the group of former justices, academics and attorneys, the ratio is almost never higher than 1 for the group of former justices. This means that the percentage of opinions written or joined by this group is hardly ever higher than the relative number of justices in those years predicts. Separate opinions are thus relatively unlikely to be written or joined by a former justice, when a correction for group size is made.
This part of the result fits nicely with what was discussed in earlier sections. The group of former justices is not too inclined to express possible feelings of dissent, as this has not been possible or desirable in the previous working position. This group thus writes relatively few opinions.

The same seems to hold for the group of former academics, although the observations for this group in the final years point towards the opposite. In these years, the scores well over 1 indicate that this group has participated more actively in writing and joining opinions than suggested by their relative presence at the court.
The result for the former academics is twofold and more surprising than for the former justices. Where the former were accustomed to freely expressing an opinion, the latter have experienced this in a lesser extent in their previous tenure. It was expected that the former academics would show more active opinion writing behavior, which is in fact only observed in 2009 and 2010. The extent to which the group of former academics distinguishes itself from the other justices is thus smaller than was predicted. A shift towards the more expected outcome is only seen in the final years of this research.
The inclusion of the ratios for the group of former attorneys in the graph is mainly meant to illustrate that the writing and joining of opinions can be relatively more common for another group, although this might not appear when not controlling for career distributions. The graph shows that the ratios for this group hardly ever fall beneath the threshold score of 1, implying that the – relatively small – group of former attorneys at the court is relatively overrepresented in the writing and joining of opinions.
Ratios were especially high for those careers which are least represented at the court. However, the interpretative value of these ratios is low, considering that they are composed of the separating behavior of only a few individuals. It is more likely that the observations for these individuals are caused by personal characteristics and views on the desirability of separate opinions rather than by their career background.

Linking the observations from this graph to the earlier discussion on the effect of caseload on opinion writing, an increase in ratios over time with increasing caseload would imply that a group is more inclined to write and join separate opinions when the number of judgments increases. The interpretation of such a result is that justices would still be inclined to separate themselves often rather than choosing to abstain from frequent opinion writing.

6.4.2.1. Excluding the joining of opinions

In order to establish the relationship between career background and the writing of opinions, a similar analysis as before will be performed, with the difference that the observations of justices joining an opinion are excluded. This means dropping the 360 joining actions from the previous total of 2,598 observations.

The rationale for performing this analysis is that a difference might exist between the likeliness of writing an own opinion and joining an already written opinion. The required effort level of the latter is obviously smaller than for the former, while the former gives the justice a greater opportunity to separate from others. Distinguishing between either type of action can thus shed light on the possible differences in separating behavior for the different types of careers. It shows which effect apparently weighs heavier for the different groups.

Graph 14 shows the annual development of the ratios, as was shown previously for the distribution of opinions and joining of opinions. The graph shows that the pattern is similar to the pattern depicted in Graph 13.

To see whether both distributions are indeed sufficiently similar, paired sample t-tests have been performed. As before, the chosen division is among quarters. This has not only been done for the careers depicted in Graphs 13 and 14, but for all career backgrounds. The main results of these tests are shown in Table 11 on the next page.

The depicted values reflect the mean differences between the value of the first ratio (containing opinion writings and the joining of opinions) and the second ratio (containing opinion writings). A positive value in the table thus means, on average, a higher ratio when including the joining of opinions. Stated differently, this group of justices might be more inclined to join an already written separate opinion than a group which has a negative mean difference.

The mean difference is negative and highly significant – especially when the relatively small number of observations is considered – for the group of former attorneys, politicians and advisers. Dropping the joining of opinions has had the smallest effect for the group of former justices, for which the mean ratios have remained rather constant.

	Mean difference	P-value		Mean difference	P-value
A	.031	.117	J	.004	.795
Ad	-.122	.056	Mu	.066	.020
Al	.039	.141	O	.014	.810
At	-.073	.038	Po	-.132	.002

Table 11: t-tests for difference between writing and joining of opinions.

As the mean differences are only significant for some career backgrounds, which on top have constantly constituted only a small percentage of the justices at the court[70] , the impact of removing the joining actions appears to have been rather small. Stated differently, compared with the situation of only considering the writing of opinions, adding the observations of justices joining a particular opinion does not alter the results significantly. Based on these results, it can be concluded that no significant differences exist between the different groups of justices in the likelihood to join an opinion.

6.4.2.2. Comparing writing and joining behavior

The result from the previous subsection can also be obtained and checked from a different angle by calculating career-joining ratios, restricting attention to the observations of justices joining an opinion and a weighted career average. As the number of joining actions is limited and shows serious fluctuations, calculating annual ratios would create too large a bias in the results and have low or even no explanatory value. Instead, one ratio is calculated for every career background, using a weighted average of the distribution of careers over all years. This weighted average is necessary to incorporate the fact that the court consisted of 41 justices in 1999 and 47 justices in 2010 These ratios are shown in the first bar for every career in Graph 15.

Most ratios are close to 1, indicating that no career is particularly dominant in joining an opinion. It is thus not the case that a justice with a particular career background is relatively more likely to join an opinion than a justice with another background. In fact, the scores which lie well below 1 indicate the relative absence of joining actions for these particular justices. This is mostly the case for the group of former politicians. As this group is consistently small, the effect for this group might be driven more by personal traits of the individual justices rather than a specific group effect.

The only apparent outlier in these scores in the graph is the ratio for the group of former academics is the highest, at a level of 1.18. Although this ratio is not much higher than 1, this result does prove particularly interesting. It shows that this group of justices chooses for the easiest and least costly alternative relatively often. The desire to

70 The combined total of these three categories have never been higher than 16% of all justices at the court in a particular year. Partly due to the absence of former politicians at the court in 2010, this percentage has dropped even further to a mere 6%.

distinguish from the majority thus outweighs the costs which are accompanied with this distinction, but not in such an extent that this group chooses to write an own opinion more often.

When constructing average ratios in a similar manner for all opinion writings, as a means to compare the joining and writing of opinions, it becomes clear that the average ratio for the group of former academics is only 1.00. The value is 1.08 for the combined average of writing and joining ratios. All these averages are also included in Graph 15.
The most apparent feature of these comparisons is that on average former academics write a similar amount of opinions as might be expected from their presence at the court. The average ratio for this group only exceeds the value of 1 when including their joining of already written opinions.
Considering the other types of justices, the differences between the ratios for the group of former justices are much smaller. These differences are large for former attorneys, politicians and advisers.
Another way to compare the scores of the ratios either including or excluding the joining of opinions is through the calculation one-sample t-tests. For both categories, a test value of 1 is chosen, indicating the cut-off value of the ratios. The most important characteristics are included in Table 12.

	Including		Excluding			Including		Excluding	
	T-value (sign)	P-value	T-value (sign)	P-value		T-value (sign)		P-value	
A	+	.197	+	.469	J	-	.001	-	.001
Ad	+	.000	+	.000	Mu	-	.000	-	.000
Al	+	.545	+	.886	O	+	.198	+	.234
At	+	.000	+	.000	Po	+	.007	+	.003

Table 12: One-sample t-test, comparing the inclusion and exclusion of the joining of opinions.

Concerning the most relevant careers, the negative value for the group of former justices, which is highly significant, shows the low separation levels for this group.
For the former academics, both scores do not differ significantly from the cutoff value of 1. However, the earlier results are also reflected well, in that the test score for the ratios including the joining of opinions is less insignificant than the alternative. This reflects the relative tendency of this group to separate by joining an already written opinion.

6.4.2.3. Differences between sub periods

As has been done in earlier subsections, a distinction can be made between average career-opinion ratios for the different sub periods. Large differences between both sub periods can then show the response of justices to an increase in caseload. It can then show the result of the tradeoff which all justices make between distinguishing themselves or not. The results are shown in Table 13.

	1999-2004		2005-2010	
	Incl	Excl	Incl	Excl
A	0.9519	0.9289	1.1496	1.1260
Ad	2.477	2.7073	1.0314	1.0791
Al	1.2422	1.1974	0.8697	0.8690
At	1.312	1.4813	1.6164	1.6716
J	0.9454	0.9640	0.7590	0.7480
Mu	0.5008	0.3940	0.8552	0.8518
O	0.8742	0.8179	0.9927	1.0096
Po	1.1803	1.2339	1.5116	1.6941

Incl = including the joining of opinions. Excl = excluding the joining of opinions

Table 13: comparing opinion behavior in 1999-2004 and 2005-2010

Table 13 shows some interesting observations. The ratios for former justices are higher in the first six years than in the last years. The same holds for the former lawyers and former advisers.[71] In a period with a relatively low caseload, these justices were apparently relatively more inclined to write or join an opinion than in a period where the court was required to give more verdicts. With an increase in caseload, the extent to which they wished to distinguish themselves from the other justices has diminished. The costs of distinguishing did not outweigh its benefits.

The opposite holds for the group of former academics. This group has clearly shown more active opinion writing and joining behavior in the latest six years. These justices apparently valuated the tradeoff between effort and the desire to distinguish differently than the former justices.

6.4.2.4. Quantifying the effect of career background

The tests of the previous subsections showed that some relationships exist between career background and the likeliness of separating by writing or joining a separate opinion. The method which was used was largely the calculation of correlations. This implied that the research did not focus on the possibility of causal relationships. Al-

71 As has already been discussed, the small size of this last group makes it difficult to draw actual conclusions for this group.

though this choice seems justified for this research[72], a negative consequence is that quantifications of the overall effect of career background are more difficult to make. The relevance of career backgrounds is then preferably determined through the calculation of R^2-scores of a regression model.

Calculation of R^2-scores shows that only 3% of all variation in the number of opinions is caused by the opinion-career ratios of the most common justices, i.e. former academics and former justices. The effect of these careers on variations in the levels of separate opinions is thus negligible, especially considering that approximately 60% of justices belong to either of these categories.

A regression model including all eight career backgrounds gives a value of .294. The degree to which all career backgrounds influence the writing and joining of separate opinions is thus limited, but some effect does indeed exist.

An interesting feature is that the value of R^2 clearly increases when the joining of separate opinions is not included. The value increases to .374. Although this still means that career background can only partly explain the writing of separate opinions, it is clear that the effect is higher than is the case with the inclusion of the joining of separate opinions.[73]

A consistent approach requires, however, limiting attention to the backgrounds which have relatively high representation levels at the court. This means calculating R^2-scores for models which only contain the most prevalent careers. According to the information in Graph 12, these are the former academics, justices and lawyers. Restricting attention to this group drastically decreases the R^2-levels to .061 and .058 respectively. This is largely due to highly significant correlation scores between the number of opinions and the career-opinion ratios for the group of justices with more than one prevalent career (Mu). Leaving out this group of justices is preferred, however, as its inclusion has grants no additional explanatory value compared to models with other variables. It is this particular category which consists of justices with different career backgrounds. It then makes sense that the observations for this group show some 'pooling results', as the influence of previous careers is some pooled effect for this group.

Finally, some differences exist between both sub periods considered in this research, although these differences are smaller than the differences with the values for the overall period. Where the R^2-scores for the first period lie between .125 and .416, and

72 I do not wish to draw conclusions of the type that try to predict behavior of individual justices. The purpose was to study behavior and to see whether any conclusions can be drawn from justices' backgrounds.

73 Since the number of joining actions is limited and no separate quarterly ratios have been calculated for this particular type, a calculation of a separate R^2 for this category is not possible.

.163 and .492, respectively including and excluding the possibility of joining statements, these are .154 and .631, and .161 and .530 for the years from 2005 to 2010. For both periods, the R^2-scores are clearly higher than for the entire period. This does obviously not imply that career effects are necessarily larger within these smaller sub periods than in the overall period. The relevance of this finding is that the scores within both time periods fit rather nicely compared with the effect in the overall period. Regressions for the entire period then show less explanatory value than for the period as a whole.

6.4.2.5. Concluding remarks on this section

The conclusion which can be drawn from the tests and calculations of the previous subsections is that the relationship between career background and the joining of opinions is less clear than expected. Every career background is (roughly) equally likely to join an already written opinion, although the group of former academics seems to stand out in this respect. This group chooses to stand out relatively more often by joining an opinion than others. By doing so, they can distinguish themselves, while not facing the costly effort of writing an opinion. However, the limited number of joining statements makes it difficult to conclude that a relationship truly exists.

With the writing of a separate opinion, the situation is more complex. There does appear to be some relationship between career and separating behavior, implying that certain groups of justices are more likely to express themselves than others. Put simply, all scores above 1 indicate that those groups are relatively more likely to write a separate opinion.

The former justices and the justices with multiple relevant careers are consistently underrepresented in both the writing and joining of opinions. The group of former lawyers and academics are represented rather evenly, although the former academics are more active in joining opinions. The other categories are clearly overrepresented in the writing and joining of separate opinions.

However, the constantly small size of these groups makes it difficult to conclude that justices with these backgrounds are indeed more likely to write and join separate opinions. With the small size of these groups, it cannot be ruled out that it is not the career which influences the opinion writing behavior, but more the personal traits of these justices. The explanatory value of the results of these tests is then restricted to the observations for the groups of former justices and academics.

6.4.3. Opinions written by more than one justice

This subsection goes further than the research of the preceding subsections and focuses on the possibility of justices writing a separate opinion with other justices. It

may be expected that justices are more inclined to do so whenever they are confronted with increasing caseload. Indeed, working together with one or more other justices in writing a separate opinion might be a good alternative for a justice, who still wishes to distinguish himself from a majority of justices with a different opinion. It might then be expected that with an increase in caseload, the percentage of opinions which is written by more than one justice increases compared with years with a lower caseload.

The study in this section differs from the earlier discussion in section 6.3 on opinions concerning more than one justice. This section will focus primarily on writing opinions together and does not include the possibility of joining opinions. Furthermore, it covers the possible differences between justices with different backgrounds. This is thus an extension of the discussion in section 6.3.

The general pattern, which is shown in Table 14, is that with an increase in caseload, the number (and percentage) of opinions written by more than one justice also increases. In the lowest row, the totals are included.

	Number of opinions (adjusted)	Number of opinions with multiple writers	Percentage	MC	MD	MPD	Other
1999	90	20	22.2	3	11	5	1
2000	101	17	16.8	0	10	7	0
2001	105	13	12.4	3	7	3	0
2002	91	11	12.1	1	6	4	0
2003	92	17	18.5	2	11	4	0
2004	98	15	15.3	3	6	5	1
2005	133	35	26.3	6	17	12	0
2006	164	46	28.0	9	21	14	2
2007	164	46	28.0	4	23	18	1
2008	146	28	19.2	6	10	12	0
2009	183	43	23.5	7	16	18	2
2010	185	60	32.4	10	21	24	5
Total	1,552	351	22.6	54	159	126	12

MC = Multiple Concurring MD = Multiple Dissenting MPD = Multiple Partly Dissenting

Table 14: Patterns for opinions with multiple writers (1)

The pattern for the percentage of opinions written by more than one justice is less clear than predicted by theory. Theory would suggest that justices caring about the possibility of distinguishing from a majority will choose possibilities to make distinguishing possible, even at high caseload levels. This is not shown so clearly in the

table. Although the percentages are mostly higher in the second sub period than in the first, the fluctuations between the years within each sub period are too large to draw hard conclusions.

The correlation between caseload and the percentage of all opinions which is written by multiple justices is positive and significant at a 10% level. Whenever the number of judgments increases, the likelihood of an opinion being written by more justices also increases. As the table shows, this is most apparent in 2006, 2007 and 2010.

Looking at the distribution of opinions which are written by more than one justice in more detail, a general distinction is made between 2, 3 and more than 3 justices respectively. It is shown that opinions written by 2 justices are most common. The (relative) amount of opinions written by more than 3 justices is limited in each year. This can largely be attributed to the fact that dissenting opinions which are written by more than 3 justices can only be written for verdicts which are given by the Grand Chamber of 17 justices. Earlier subsections already showed that the annual number of cases covered by the Grand Chamber has remained relatively constant.

No clear relationship exists in the average number of justices writing these types of opinions. Table 15 shows features regarding the distribution of opinions written by more than one justice.

	Number of opinions with multiple writers	Number of justices writing the opinion						Average number of justices in opinions with multiple writers
		2		3		> 3		
		#	%	#	%	#	%	
1999	20	9	45	4	20	7	35	3.05
2000	17	11	64.7	1	5.9	5	29.4	3.24
2001	13	4	30.8	6	46.2	3	23.1	3.46
2002	11	7	63.6	3	27.3	1	9.1	2.73
2003	17	7	41.2	6	35.3	4	23.5	3.35
2004	15	9	60	3	20	3	20	2.93
2005	35	15	42.9	14	40	6	17.1	2.97
2006	46	25	54.3	18	39.1	3	6.5	2.54
2007	46	26	56.5	11	23.9	9	19.6	2.78
2008	28	17	60.7	6	21.4	5	17.9	2.71
2009	43	24	55.8	16	37.2	3	7.0	2.63
2010	60	32	53.3	19	31.7	9	15	2.95

Table 15: Patterns for opinions with multiple writers (2)

The table shows that most of these opinions are written by two justices. In most years,

especially the last six years, only a minority of these opinions is written by more than three justices.
The average number of authors is added to see whether an overall pattern has emerged. This does not appear to be the case. Differences between all years are limited. It is therefore of lesser importance to justices with how many justices they choose to write an opinion.

6.4.3.1. Ratios for opinions written by more than one justice

The chosen approach to determine the effect of career background is to calculate ratios regarding the possible relationship between career background and the behavior of writing an opinion together with (an)other justice(s).
A division is made between years. As the annual number of opinions with multiple authors is limited, a comparison between quarters would not deliver the required level of explanatory value. The ratios are shown in Table 16.

	1999	2000	2001	2002	2003	2004
A	2.323	2.251	1.892	2.386	2.319	1.467
Al	5.125	3.618	1.402	0.745	2.529	2.93
Ad	6.150	7.236	9.46	0	5.059	11.733
At	0.683	4.020	2.103	2.485	3.373	2.200
J	1.491	1.754	2.294	1.864	2.529	1.600
O	2.050	0	6.308	5.591	1.265	1.467
Po	5.125	4.824	8.410	1.864	1.265	2.933
Mu	1.025	1.206	2.365	2.033	0.843	3.352

	2005	2006	2007	2008	2009	2010
A	2.571	2.167	2.167	2.158	2.751	2.686
Al	1.286	2.33	2.000	2.066	3.610	2.304
Ad	4.500	5.000	2.500	1.679	1.605	2.742
At	3.214	2.250	3.000	2.014	1.070	5.483
J	1.714	1.538	1.615	1.420	1.146	1.675
O	3.214	2.000	3.000	4.478	-*	-*
Po	3.857	5.000	10.000	3.357	-*	-*
Mu	2.786	1.833	1.500	2.841	2.140	2.350

* No value for these observations

Table 16: Development of ratios for opinions written by more than one justice

These ratios reflect the annual percentage of opinions written by more than one jus-

tice[74] in which every career is represented, controlled for the distribution of justices in each year. As the same opinion can include different backgrounds or the same background multiple times, the total percentages in this particular setting can sum up to more than 100%. It therefore makes sense that the ratios depicted in the table are far higher than all ratios calculated in earlier subsections.

Especially for those subgroups of justices with low representation levels at the court, the ratios fluctuate heavily. These high fluctuations reduce the informativeness of these results. It is therefore more interesting and informative to see the development of the ratios for the groups of justices with higher representation levels. The informativeness of these careers seems more secured, reflected in the more stable values of the ratios over the years.

The groups which are considered informative are former justices, academics, lawyers and justices in the 'Mu'-category. Of these groups, the former lawyers have written opinions together with others the most, although the effect has become smaller in later years. For the former academics and justices, the ratios are more constant, being higher for the former than for the latter. The differences seem to grow in the later years; this was also reflected in an earlier section.

For these informative groups, the correlations have been calculated between the ratios and caseload and number of opinions respectively. The results are given in Table 17. Problematic to these tests is the low number of observations. This severely reduces the explanatory value of these tests and largely inhibits interpretation of the significance of the found results. Nevertheless, inclusion of these results can reveal possibly interesting results regarding the relationships.

	Caseload		Number of opinions	
	Correlation	P-value	Correlation	P-value
A	.319	.312	.470	.123
Al	-.378	.225	-.084	.794
J	-.421	.172	-.559	.059
Mu	.349	.267	.226	.480

Table 17: Correlation between ratios and caseload / number of opinions

Concerning the group of former lawyers and the group of justices with more than one relevant career, no clear conclusions can be drawn from the results above. This is more the case for the groups of former academics and justices, for which the results are also less insignificant. Still, however, no scores are significant at a 5%-level.

74 The joining of an opinion is not considered.

The results are opposite for the former academics and justices. Where the former are more active in the writing of separate opinions with other justices whenever the caseload or the overall number of opinions increases, this is not the case for the latter.

The former academics thus choose to work together with other justices whenever they are confronted with an increase in caseload. Rather than choosing to reduce the writing of separate opinions, as would be expected for justices caring to a lesser extent about their reputation or about the possibility to express the own opinion freely, this group thus chooses to work together with other justices more often. The former is the case for the group of former justices. Weighing the costs of writing opinions, even when this is done together with other justices, with the 'benefits' of separating from the majority, this group is less inclined to write opinions together with other justices with an increase in caseload.
Although it is not possible to conclude based on this table alone that the group of former justices is less inclined to separate from the majority, the results above combined with the earlier calculated ratios does show that this group is indeed less likely to write separate opinions with an increase in caseload than e.g. the group of former academics.

6.5. Additional tests for the effect of career backgrounds

This section includes some additional tests, studying differences between the different career backgrounds from different angles. Section 6.5.1 does this by studying some linear regressions. Section 6.5.2 looks at correlations between the distribution of careers and the different career-opinion ratios. As will be shown, the relevance for this analysis may be found in the process for electing new justices.

6.5.1. Establishing relationships through linear regressions

Several linear regressions have been performed, all including the annual number of judgments and the annual opinion/judgment ratios as independent variables. Either the career-opinion ratios or the percentage of justices with a particular career background have been included as independent variables for all career backgrounds. The motivation for including (either of) the latter two, is that the number of opinions can be dependent on the career-opinion ratio whenever this ratio shows large fluctuations over the years. Whenever this ratio is more or less constant, it is more likely that the percentage of justices with a particular background has some explanatory value for the dependent variable.

In the different regression models, several dependent variables have been chosen, namely the number of opinions, the number of opinion writings and the number of opinion writings and joining actions. Distinguishing between these variables may prove valuable for studying the different effects of the chosen independent variables and thus the possible differences in the writing and joining of opinions for the different groups of justices.

As caseload is highly correlated with the number of opinions, it is not surprising that in all models, and for all career backgrounds, this variable has a significant and positive effect on this particular dependent variable.
Although still high and largely significant, the correlations between caseload and number of opinion writings and between caseload and number of opinion writings and joining actions are slightly smaller than for the number of opinions. This is also reflected in the effects in the regression models; the effect of the number of opinions is now less significant in most models, and has even lost its significance in a few.

The effect is more ambiguous with respect to the opinion-judgment ratio. Although the effect is positive and significant in most models for the number of opinions, this is not the case for the models including the number of opinion writings and joinings. The most logical explanation for this fact is that the number of opinions is in large connected with the opinion-judgment ratio in that the value of the latter is de facto dependent on the value of the former. As this is not the case for the number of opinion writings and joinings, the effect is not necessarily predetermined and does in fact turn out to be largely insignificant.

Considering the effect of either career-opinion ratio or the percentage of justices with a particular background, the effects are shown in Table 19 on page 73.
The interpretation of this table is that every variable – both the percentage of justices and the career-opinion ratio for all careers - depicts the partial effects of this variable on the number of opinions, the number of opinion writings and the combined total of opinion writings and joinings. All models also include the earlier discussed caseload and opinion-judgment ratio. The latter two are not included in the table.
The signs of all coefficients in the relevant regression models are included, as well as the corresponding p-values.
For the group of former academics and attorneys, the career-opinion ratio has a positive and (mostly) significant effect in all models. The opposite holds for the group of former justices and politicians, where the percentage of justices has the most significant effects, and for the group of former lawyers. In the latter group, however, the ef-

fects are not all significant at the chosen levels.

With the other career backgrounds, the pattern is far less clear; the coefficients are also highly insignificant for most careers. There seems to be little effect of a single background on the general inclination to write or join separate opinions.

As the career-opinion ratio turns out to have only a significant effect for the group of former academics and attorneys, repetition of the regression analysis can prove useful. It is interesting to see that although all effects are still positive, whenever the ratio for academics and attorneys are included in the same model, the coefficients for the group of former academics lose their significance. Although the p-values of the coefficients for former attorneys are higher when the effect of former academics is not included in the same model, the effects are still highly significant. The former attorneys therefore seem the most responsive to other factors in their choice to distinguish and write or join separate opinions.

Dependent variable	A		At	
	Sign	P	Sign	P
Number of opinions	+	.226	+	.035
Opinion writings	+	.267	+	.029
Opinion writings and joining actions	+	.222	+	.038

Table 18: Regression analysis repeated, for former academics and attorneys

Dependant variable		A				J				Ad				Al			
		Ratio		%		Ratio		%		Ratio		%		Ratio		%	
		Sign	P	Sign	P	Sign	P	Sign	P	Sign	P	Sign	P	Sign	P	Sign	P
Number of opinions	Ratio	+	*.099*	X	X	-	.405	X	X	-	.398	X	X	+	.809	X	X
	%	X	X	+	.921	X	X	+	**.031**	X	X	+	.646	X	X	+	*.708*
Opinion writings	Ratio	+	.116	X	X	-	.429	X	X	-	.268	X	X	-	.897	X	X
	%	X	X	-	.808	X	X	+	**.043**	X	X	+	.378	X	X	+	.100
Opinion writings and joining actions	Ratio	+	*.097*	X	X	-	.506	X	X	-	.450	X	X	+	.882	X	X
	%	X	X	+	.698	X	X	+	**.024**	X	X	+	.804	X	X	+	.107
		At				O				Po				Mu			
		Ratio		%		Ratio		%		Ratio		%		Ratio		%	
		Sign	P	Sign	P	Sign	P	Sign	P	Sign	P	Sign	P	Sign	P	Sign	P
Number of opinions	Ratio	+	**.013**	X	X	-	.723	X	X	+	.069	X	X	-	.126	X	X
	%	X	X	-	.295	X	X	-	*.076*	X	X	-	**.010**	X	X	+	.643
Opinion writings	Ratio	+	**.011**	X	X	+	.923	X	X	+	.085	X	X	-	.229	X	X
	%	X	X	-	.448	X	X	-	.230	X	X	-	**.022**	X	X	+	.704
Opinion writings and joining actions	Ratio	+	**.014**	X	X	-	.568	X	X	+	.155	X	X	-	.164	X	X
	%	X	X	-	.273	X	X	-	.057	X	X	-	**.013**	X	X	+	.891

Significant at 5% = **bold**
Significant at 10% = *cursive*
Dependent variables: Number of opinions, Number of opinion writings, Opinion writings and joining actions.
O/J-ratio **including** 1999

Table 19: Results of regression analysis.

6.5.2. Relationship between percentage of justices and opinion-career ratios

A final test is whether a relationship exists between the percentage of justices at the court with a particular career background and the opinion-career ratio for this group of justices and for other groups of justices. Although finding significant correlations is no actual proof of the existence of causal relationships – justices adjusting their opinion writing behavior because the percentage of justices with a particular background has altered – it can provide insights in the possible existence of such reactions. The writing and joining of opinions can then be, at least partly, dependent on the distribution of careers at the court and the presence of justices with a particular background. The existence of strong correlations can then influence the decision which new justice to elect. Representatives in the advisory committee, who fear that a certain balance at the court is lost when electing a justice with a particular background, may refrain from choosing this individual.

Table 20 on the next page shows the correlations between the percentage of opinions and the career-opinion ratio for all different careers. For instance, the positive sign in the row '% Justices Al' and the column 'ARatio' indicates that a positive correlation exists between the percentage of justices which had a career as a lawyer, and the value of the career-opinion ratio for former academics. This means that in periods in which former lawyers are more represented at the court, the group of former academics is relatively more likely to write or join a separate opinion.

Before drawing conclusions from this table, the small number of justices at the court for some career backgrounds still inhibits drawing interpretative conclusions. Therefore, it is best to focus attention to the most common careers: the former academics, justices and lawyers. For the other groups, the representation levels are too small to allow for actual conclusions.

		J Ratio	A Ratio	Al Ratio	Ad Ratio	At Ratio	Mu Ratio	O Ratio	Po Ratio
% Justices J	Sign	-	+	-	-	+	+	+	+
	P-value	.720	**.009**	.084	**.000**	.596	.180	.211	.253
% Justices A	Sign	+	+	+	+	-	-	-	-
	P-value	.917	.889	**.000**	.187	.453	**.006**	.153	**.033**
% Justices Ad	Sign	-	+	-	-	+	+	+	+
	P-value	.050	.301	**.020**	**.000**	.560	**.000**	**.008**	**.005**
% Justices Al	Sign	-	+	-	-	+	+	+	+
	P-value	.176	**.001**	**.005**	**.002**	.103	**.003**	**.010**	**.041**
% Justices At	Sign	+	-	+	+	-	-	-	+
	P-value	.640	**.000**	.354	**.019**	.348	.335	.764	**.046**
% Justices Mu	Sign	-	+	-	-	+	+	+	+
	P-value	.836	.167	**.001**	.257	.136	**.011**	.494	.286
% Justices O	Sign	+	-	-	+	-	-	+	+
	P-value	.250	**.005**	.522	**.032**	.357	.979	.491	.286
% Justices Po	Sign	+	-	+	+	-	-	-	-
	P-value	.089	**.020**	**.009**	**.000**	.250	**.001**	**.009**	**.007**

Bold: significant at 5%.

Table 20: Correlations between percentage of justices and opinion-career ratios

The correlation between the percentage of former justices and the career-opinion ratio for former academics is positive (.375) and highly significant. This implies that in periods in which the group of former justices is relatively large, the group of former academics chooses to separate relatively more than in periods in which the former group is relatively small. This seems to fit nicely with the expectations and to a lesser extent with the results from section 6.4. As former academics were rather responsive to increases in caseload, it makes sense that responsiveness is also revealed with respect to the court's composition. The result holds to a lesser extent when controlling for caseload. In that case, the correlation is smaller (.277) and only significant at a 10% level.

The opposite relationship, between the percentage of academics and the ratios for justices, is also in line with expectations; the responsiveness for former justices was smaller than for former academics.

Results are also largely significant for the group of former lawyers. The career-opinion ratios for this group are also partly dependent on the distribution of careers at the court.

These results show that some relationship exists between these variables. The writing of opinions is at least partly dependent on the distribution of careers at the court. Therefore, it cannot be excluded that the possibility of a court consisting to a large

extent of justices with the same career background can have an effect on the opinion writing behavior. As the dataset does not contain observations of years in which a particular background was dominant, this claim cannot be tested empirically. The consequence of a relatively homogeneous court, caused by the dominance of either one career type or groups proposing a certain attitude against separate opinions, may or may not be desirable for the electing committee, depending on the own view of the desired functioning of the court. A sufficient number of committee members holding a particular view can thus indeed influence voting behavior and thus the composition of the court. Whether this is considered a desirable situation or not, is dependent on the views of an individual.
This last factor thus indicates the relevance of studying career backgrounds of individual justices.

6.6. Conclusions from the quantitative analysis

After conducting the quantitative analysis of the previous subsections, some conclusions can be drawn on the effect of career background of justices of the ECHR on their opinion writing behavior.
First, the conclusion can be drawn that the career background of a justice does indeed matter. Based on the results of several tests, it has been shown that the group of former justices and the group of justices with more than one relevant career background are relatively least likely to write a separate opinion. The finding for the group of former justices fits nicely with the expectation that this group is not very likely to separate from a majority opinion, as these justices are more accustomed to speak with one voice than the other groups.
Considering the group of justices which is most likely to separate by writing or joining a separate opinion, the expectation was that this would be the group of former academics. Being accustomed to expressing the own views frequently, by the writing of academic papers, this group was expected to feel large urges to write or join separate opinions. However, the results show that this is not to the same extent as expected. Only the results for the final years of the research show the expected pattern of academics separating considerably. For the other years, former academics do not behave differently than other groups of justices. It is with the increase in caseload that the relative likelihood of former academics to write an opinion has started to increase.

The joining of an already written separate opinion is also done relatively often by the group of former academics. The small number of observations, however, limits the possibilities to draw hard conclusions. Second, the fact that the number of observations is so limited shows that the motivation for justices to join an opinion is smaller

than the inclination to write an own opinion. The desire to express the own opinion thus seems to outweigh the costs of effort for writing an opinion. Nevertheless, the fact that a considerable number of opinions is joined rather than written separately indicates that this is still considered a good alternative for justices who do not wish to bear the costs of writing an opinion.
These costs are alleviated partly by the joint writing of separate opinions; writing separate opinions together with (an)other justice(s) reduces the individual costs for justices, while the opportunity to distinguish from other justices is still higher than when only joining an opinion. Comparing former academics and justices, the tests show that this inclination is larger for the former than for the latter. This is also partly a reaction of the former academics to the increase in caseload at the court.

Other tests have given practical implications for the election of new justices, regarding relationships between separating behavior and the distribution of justices. Where these relationships exist, this means that separating behavior of justices with a particular background (mostly former academics) is partly influenced by the presence of justices with another background. A court consisting to a large part of former justices can show a different number of separate opinions than a court which consists of mostly former academics. This observation can be considered relevant by the electing committee of the Parliamentary Assembly of the Council of Europe. This committee can make the decision which candidate to elect dependent on the background of the candidates and the effect of electing a particular candidate on the composition of the court.

7. Main conclusions

In this thesis, I have studied the existence of separate opinions at the European Court of Human Rights (ECHR). Contradictory to predictions from economic theory, justices at this court do not have to speak with one voice, but are allowed to show differences in opinion by writing or joining separate opinions. Rather than searching for the true judicial reasons for this choice, I have chosen to study factors with respect to decision making in committees to explain this finding. The approach was twofold. Both the decision of the founders of the ECHR to allow separate opinions and the factors concerning decisions of individual justices have been covered.

With respect to the choice of the ECHR to allow separate opinions in the first place, the theory of herding behavior seemed realistic, but not plausible. Allowing for this theory in this respect would imply that the ECHR simply followed the same procedure as the US Supreme Court when choosing to allow separate opinions. However, it is not likely that the court of a newly formed international organization simply follows the same procedure of a longer existing court in a different legal system.
Whenever separate opinions are indeed allowed, pandering behavior and career effects may influence justices' behavior. When reelection possibilities still existed at the ECHR, there was an opportunity for justices to alter their behavior when seeking reelection. The writing of separate opinions could be used as a mechanism to please members of the electing committee. With the implementation of a new protocol to the Convention, this type of behavior has been inhibited.

The possibility of effects of career backgrounds was covered in a quantitative analysis, which looked at the possible effect of the career background of an individual justice on his inclination to write separate opinions. Most attention is directed towards the groups of former academics and former justices. Although this analysis was not meant to give generalizations regarding the behavior of individual justices, some statistically significant relationships did appear to be present. First, former academics are most likely to join an already written separate opinion. Separate opinions which are written together with one or more other justices seem to be divided rather evenly over the different types of justices. Former academics do appear to write together more often than former justices, also considering the effect of an increase in caseload over the years. With respect to the overall effect of career background on the writing of separate opinions, no clear effect has emerged. Former justices are underrepresented in the writing of separate opinions, while former academics do not distinguish themselves as often as was predicted.

Finally, some tests show significant correlations between the percentage of justices with a particular background and the writing of separate opinions. The implication of this result is that the composition of the court may influence the rate of separate opinions in a particular period.

The main conclusion of the quantitative section is that career background of justices can indeed influence the likeliness of separate opinions being written. This has also been shown with the calculation of R^2-scores, which showed that the percentage of the variation in opinions which is explained by career background is limited. Depending on the factors included, these scores lie between .03 and .37. This is thus not a factor which has a very large impact on separating behavior of individual justices, but which is large enough to consider for any individual who attaches some weight to the effect of the composition of a committee on its functioning.
Other personal traits of individual justices, as well as country- or region-specific characteristics, are likely to also play a large role. The latter can indeed be studied further to get an even better understanding of separate opinions, the effects which they have and the working of the ECHR in general. The former will prove difficult to study quantitatively. Nevertheless, the results from this thesis show that the background with which an individual joins an international court can indeed have an effect on the functioning of this court. Whenever a new institution which is required to set up a decision making board or committee faces the question whether to allow its members to speak freely, it may be wise to consider the role which the career of its potential members can have on the outcomes in individual cases. The weight attached to this factor may differ among individuals. It is then of lesser importance whether this institution is a high court or not; other committees or institutions may face the same issues.

7.1. Suggestions for further research

The quantitative analysis performed in this thesis included the observed separate opinions in all chambers of the Court for the period between 1999 and 2010. This meant an addition to the study of Bruinsma who performed an analysis, based on a smaller time period and focused on cases of the Grand Chamber.
Future research can combine both studies to see whether opinion writing behavior differs across the different types of chambers. Furthermore, possible differences between chambers over time can then be studied. It is then likely that the effect of caseload on the likelihood of justices writing or joining a separate opinion diminishes. As the cases of the Grand Chamber are likely to be of high importance, opinion writing behavior should not be influenced by an increase in workload for justices. It actually seems more likely that an increase in caseload only has an effect on the inclination

to write opinions for cases of lesser importance. These are then most likely the cases which are not treated by the Grand Chamber.

Future research can also look in more detail at possible similarities between the ECHR and the US Supreme Court. A similar analysis as conducted in this study can be done for the US Supreme Court, covering a larger time span than proved possible for this research. It can then be checked which justices showed the most active opinion writing behavior. It is then also interesting to see whether the opinion writing behavior of justices at the US Supreme Court shows more resemblance with the situation with a chamber of 7 justices at the ECHR or with the Grand Chamber of 17 justices. The effect of career background on the inclination to write separate opinions can then be compared with the results of this study. Possible differences which can exist between both courts can then be explained by references to relevant theories from the economic literature.

Third, although this possibility has ceased to exist with the implementation of Protocol 14 of the Convention, future research can study whether justices at the Court have showed different voting behavior whenever they were facing reelection. This new research can thus study whether justices of the Court have acted as careerist judges, as discussed by Levy (2005). This study then focuses on the possibility of pandering behavior, as justices would then let their voting behavior depend on the way which they wish to be regarded. However, as the size of such a study is limited, a parallel might again be sought with a court as the US Supreme Court.

Finally, an interesting extension is to study whether a more or less uniform or homogeneous court, mainly consisting of justices with one particular background, behaves differently with respect to separate opinions than a court consisting of a multitude of career backgrounds. . This suggestion is linked to the discussion in section 6.5.2 on the relationship between the distribution of careers and the likelihood of distinguishing through the writing or joining of a separate opinion. Since such a situation has not occurred at the ECHR since its formation, this cannot be tested for this court. Future research can, however, look at similar situations at other courts or model the expected consequences of a homogeneous court.

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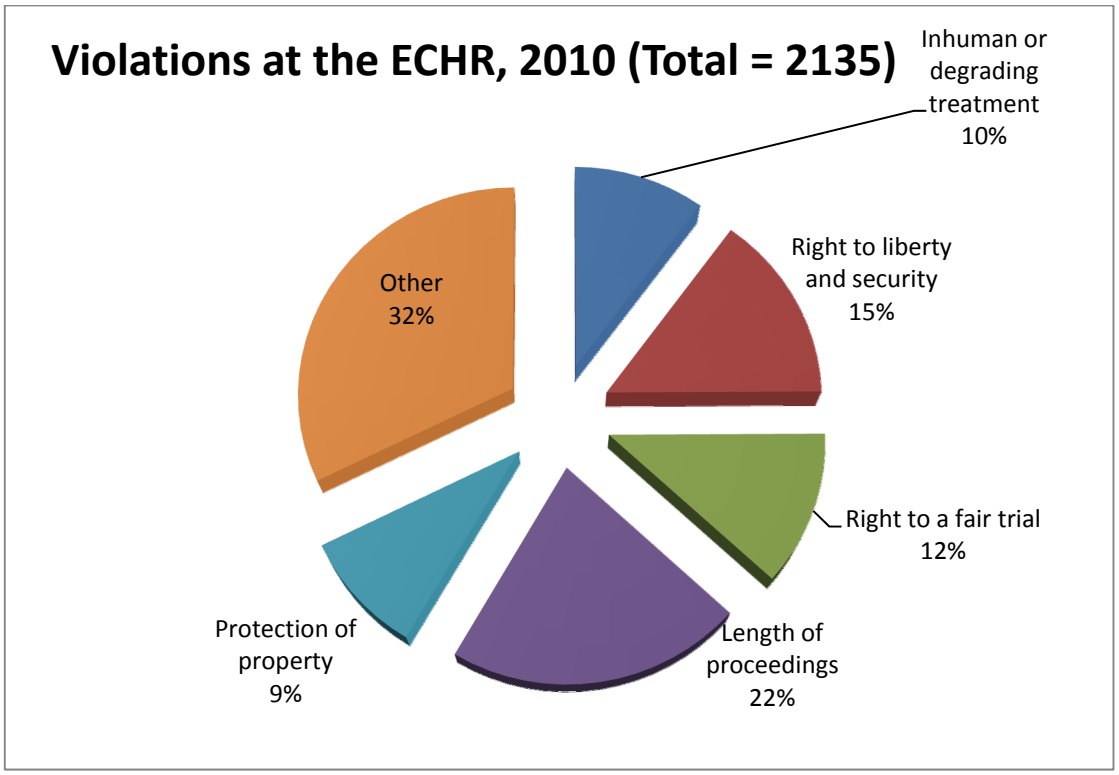
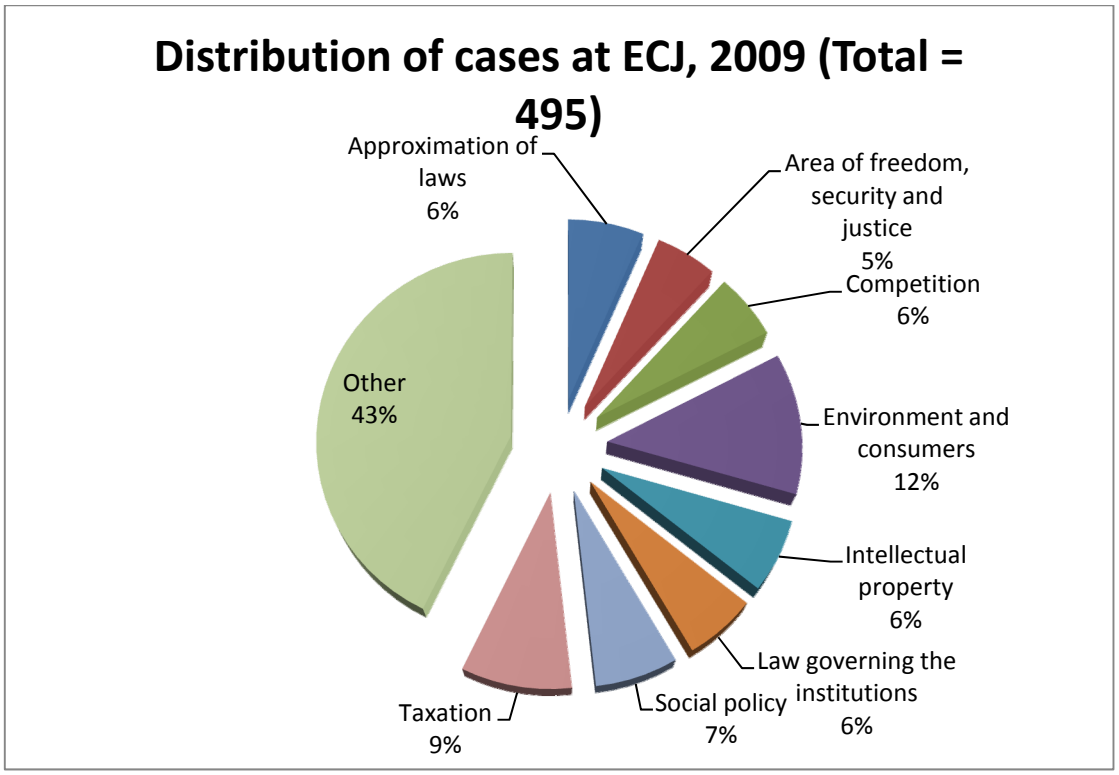
Annexes

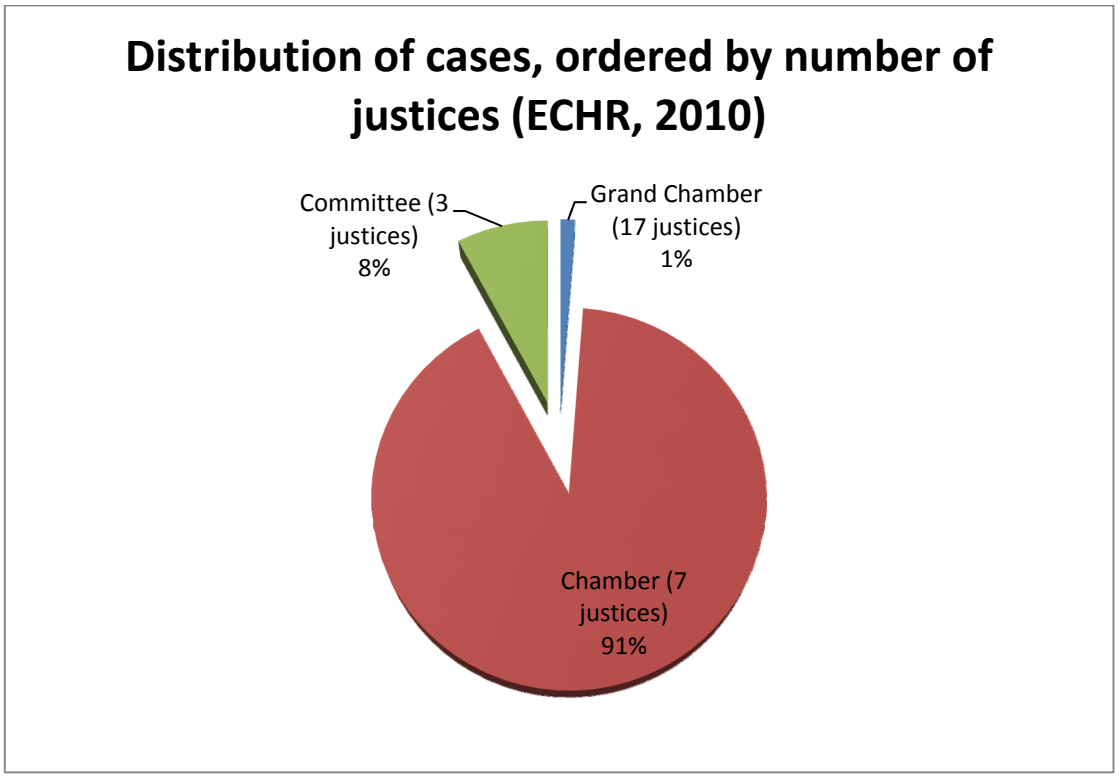
Graph 1



Graph 2



Graph 3



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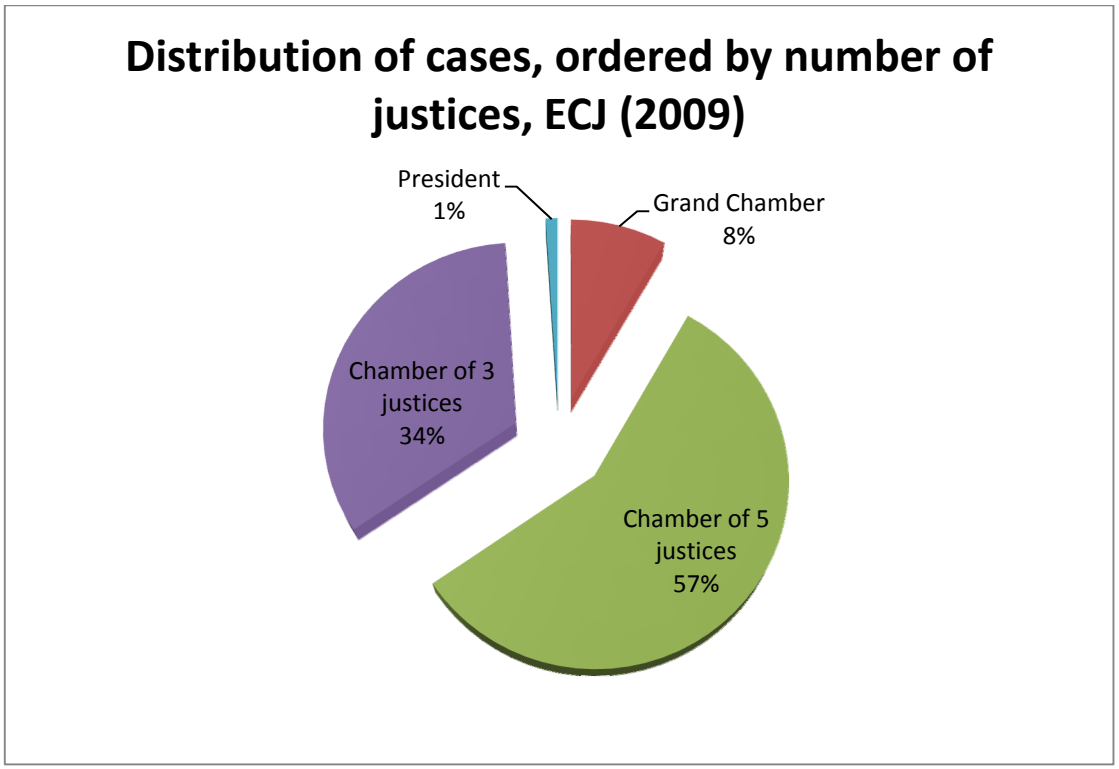
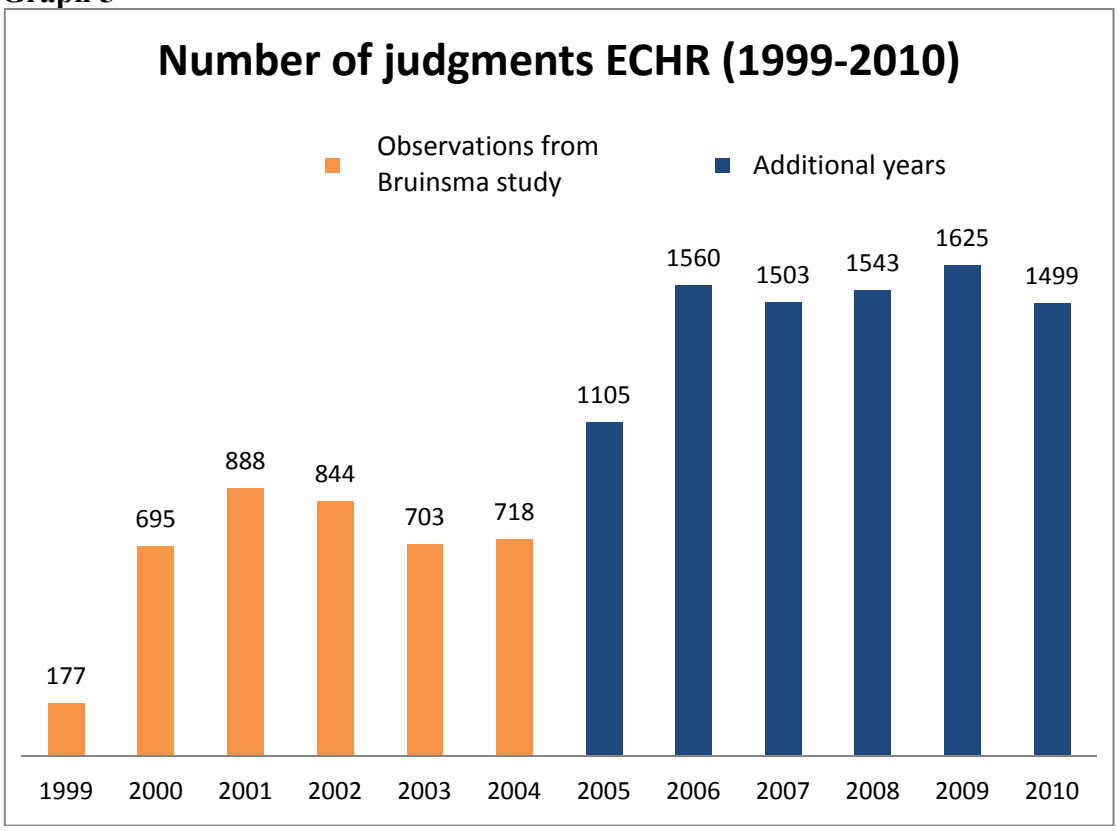
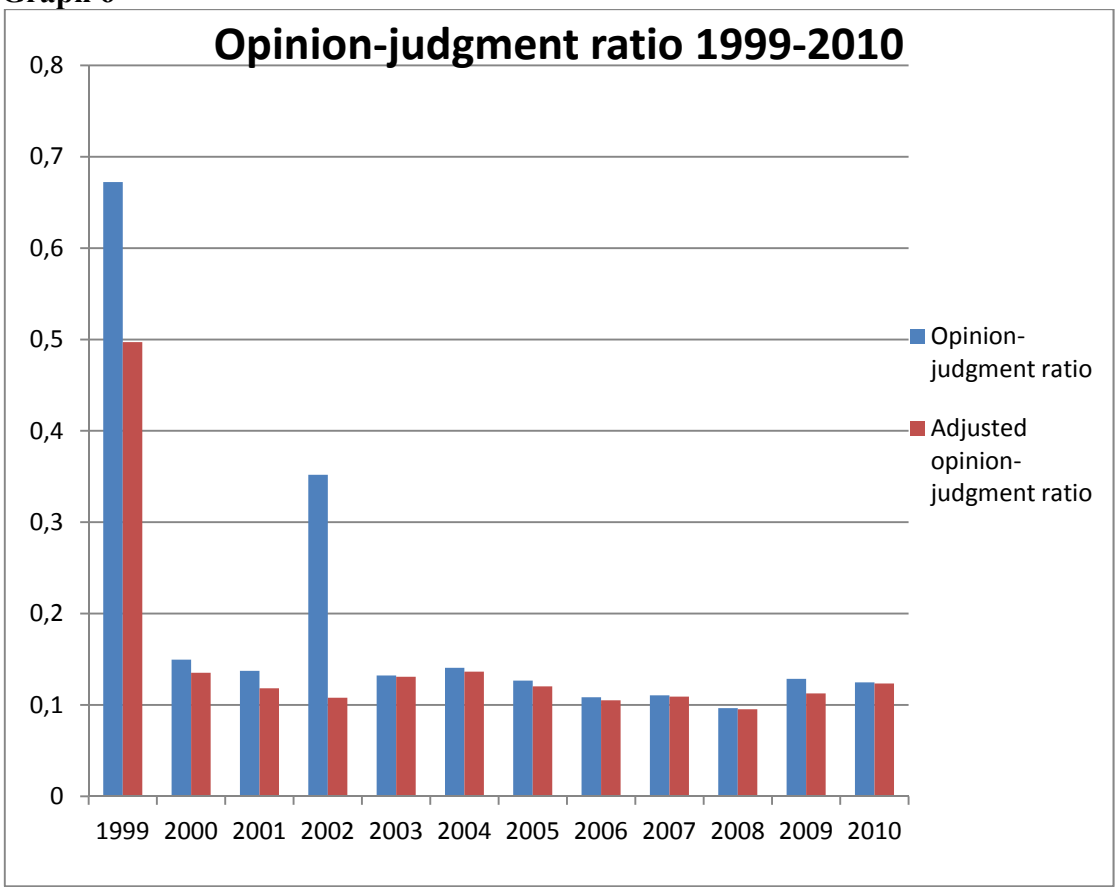


Graph 5



Graph 6



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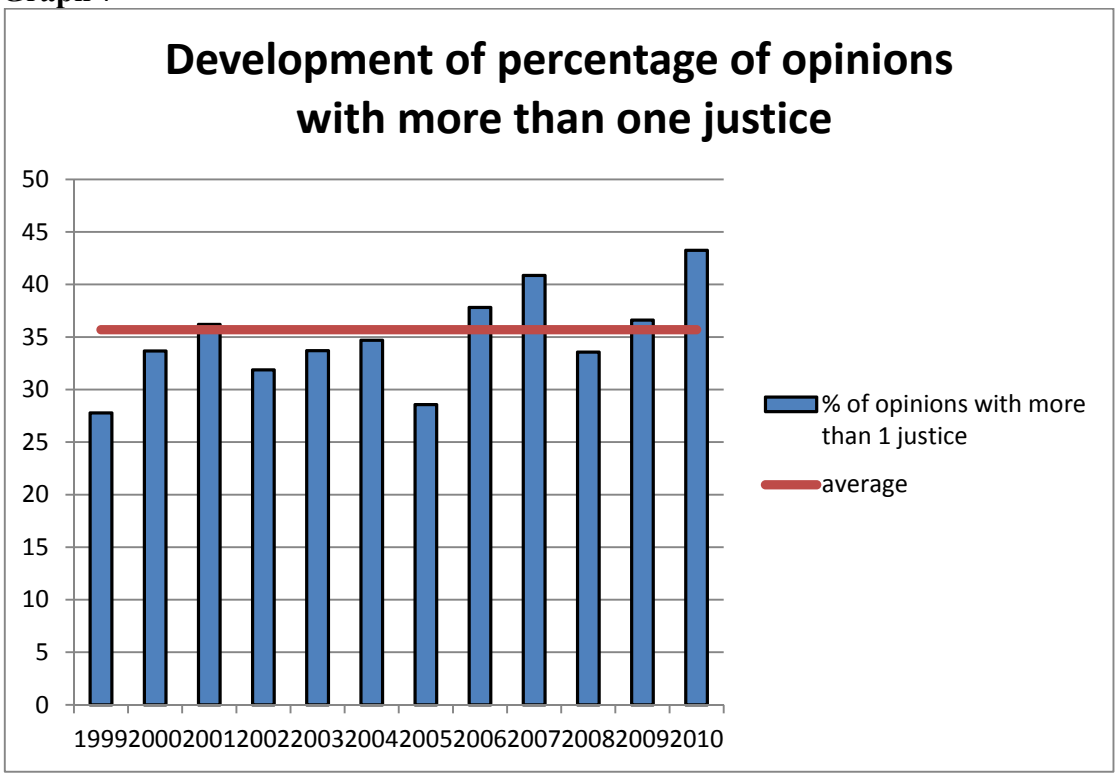
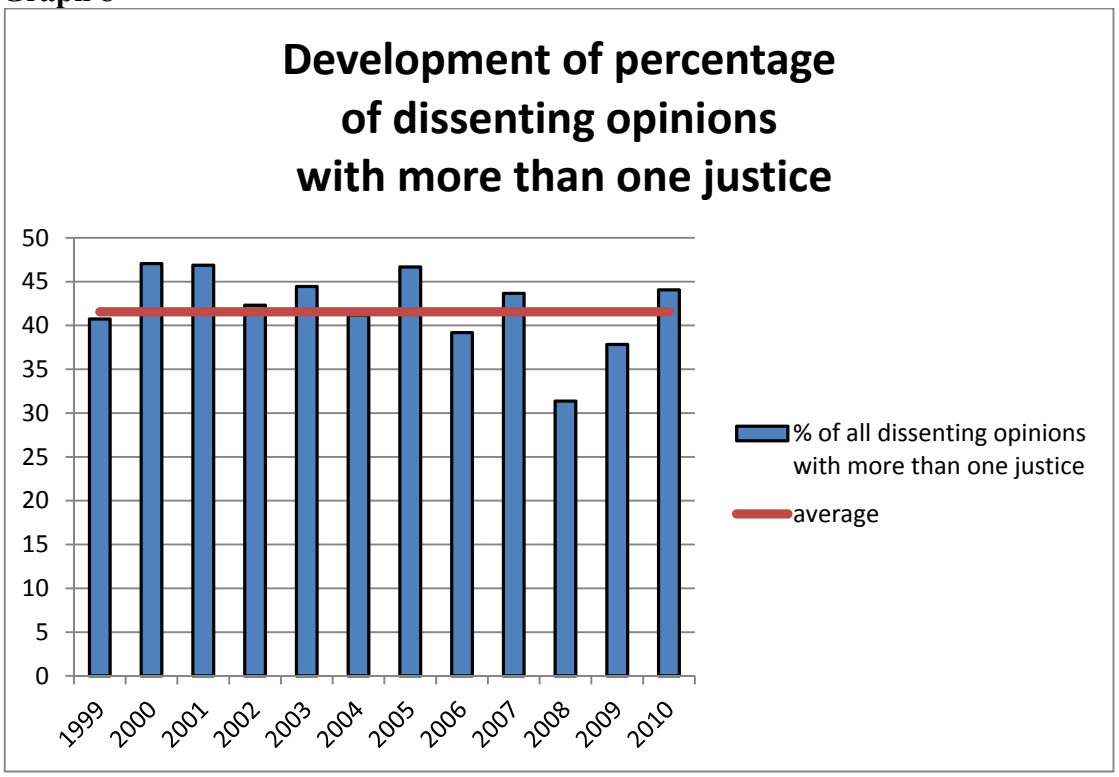
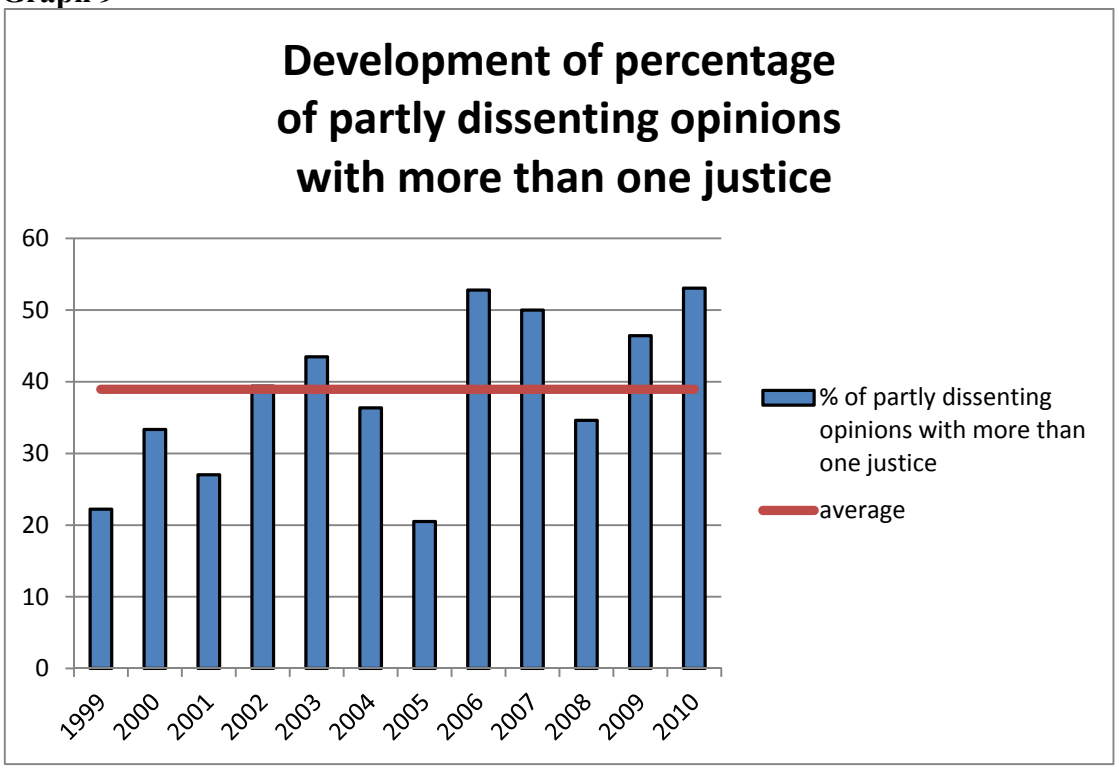


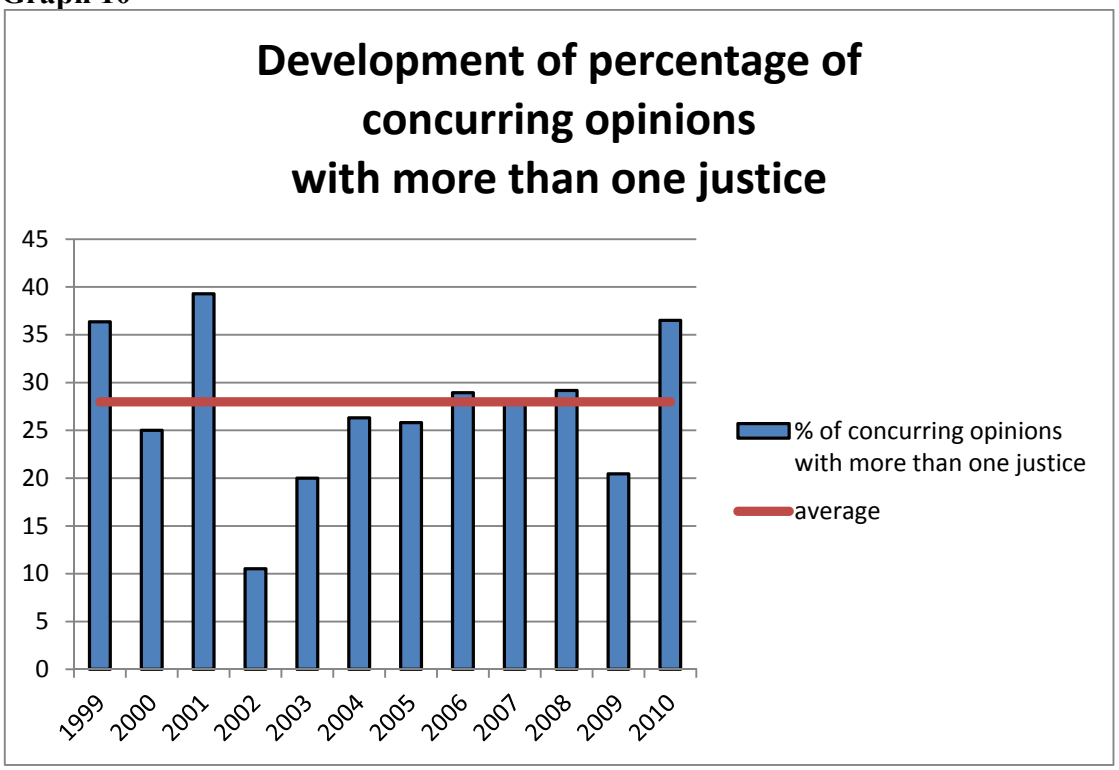
Graph 8



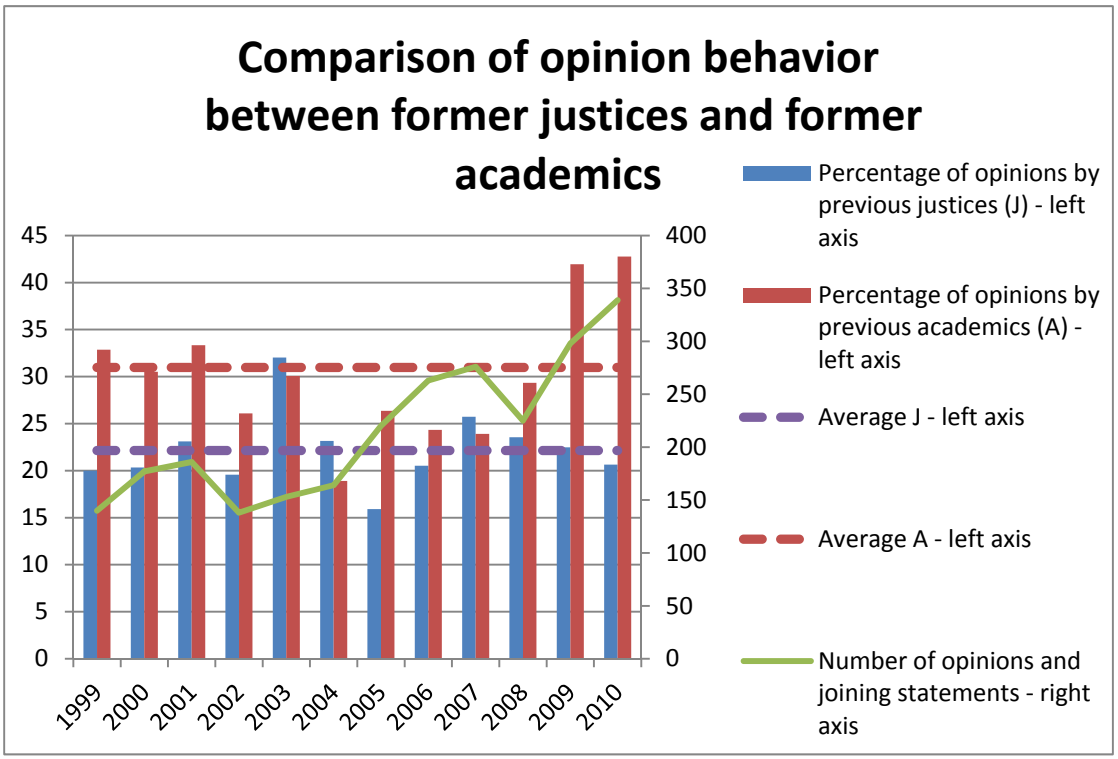
Graph 9



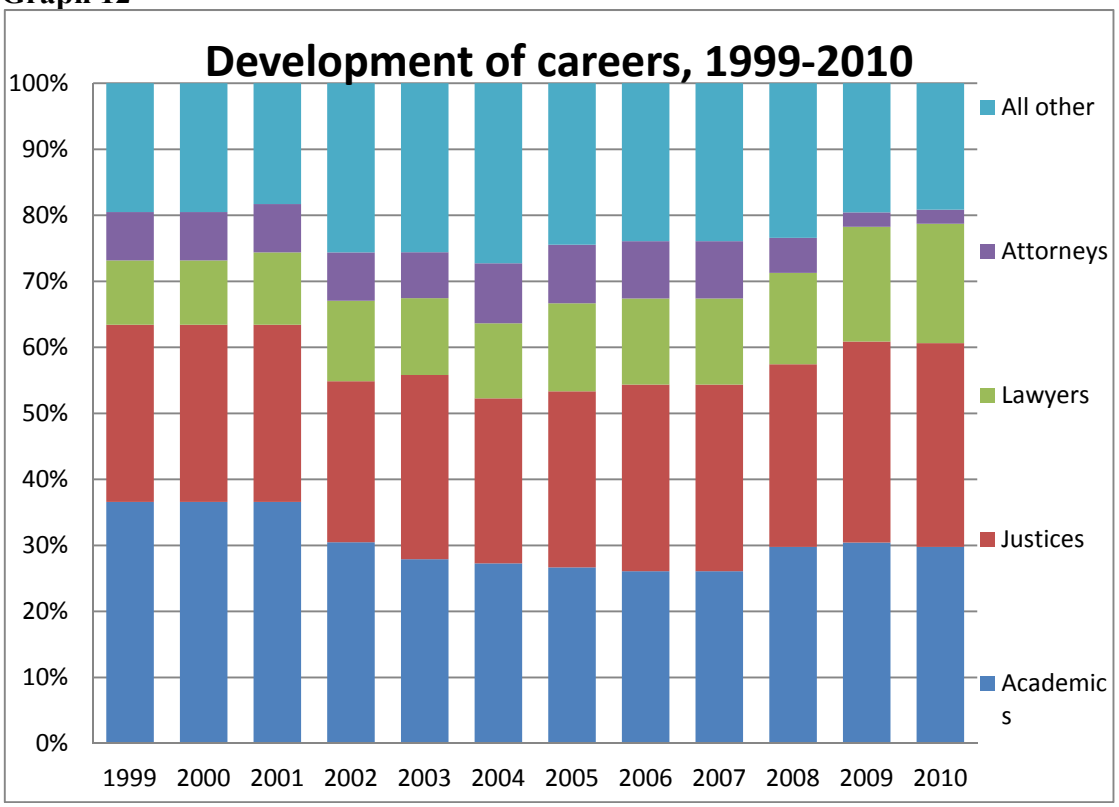
Graph 10



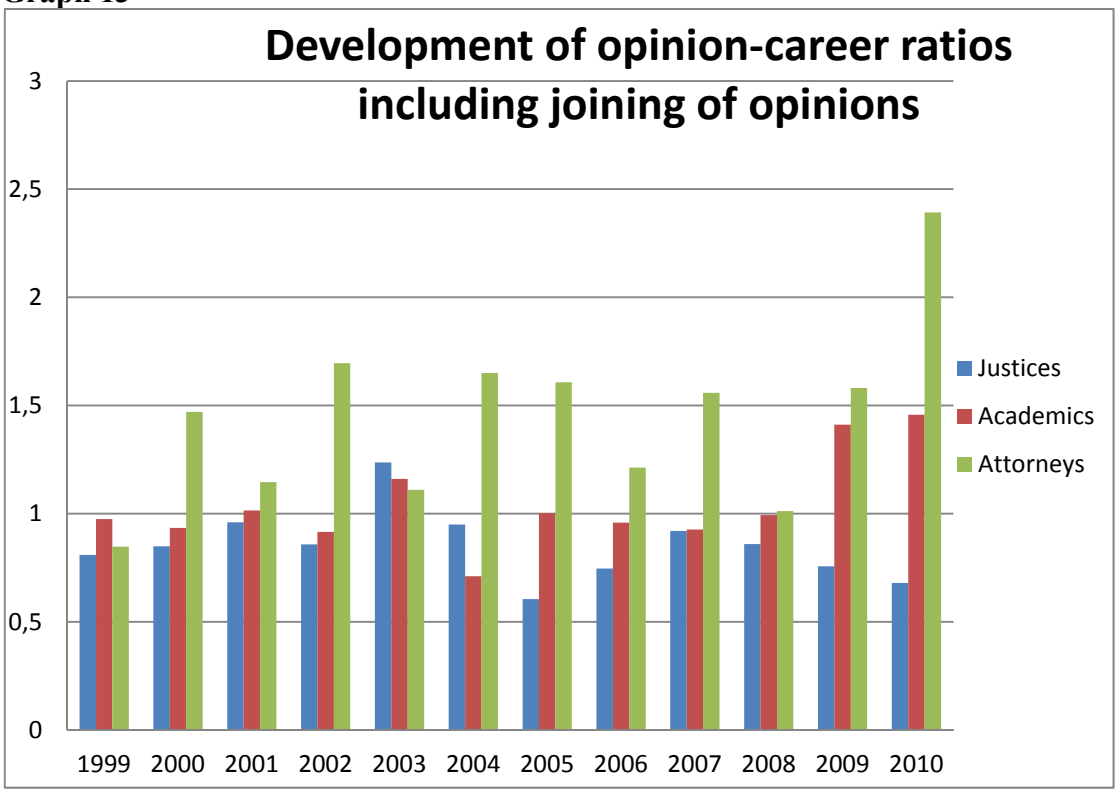
Graph 11



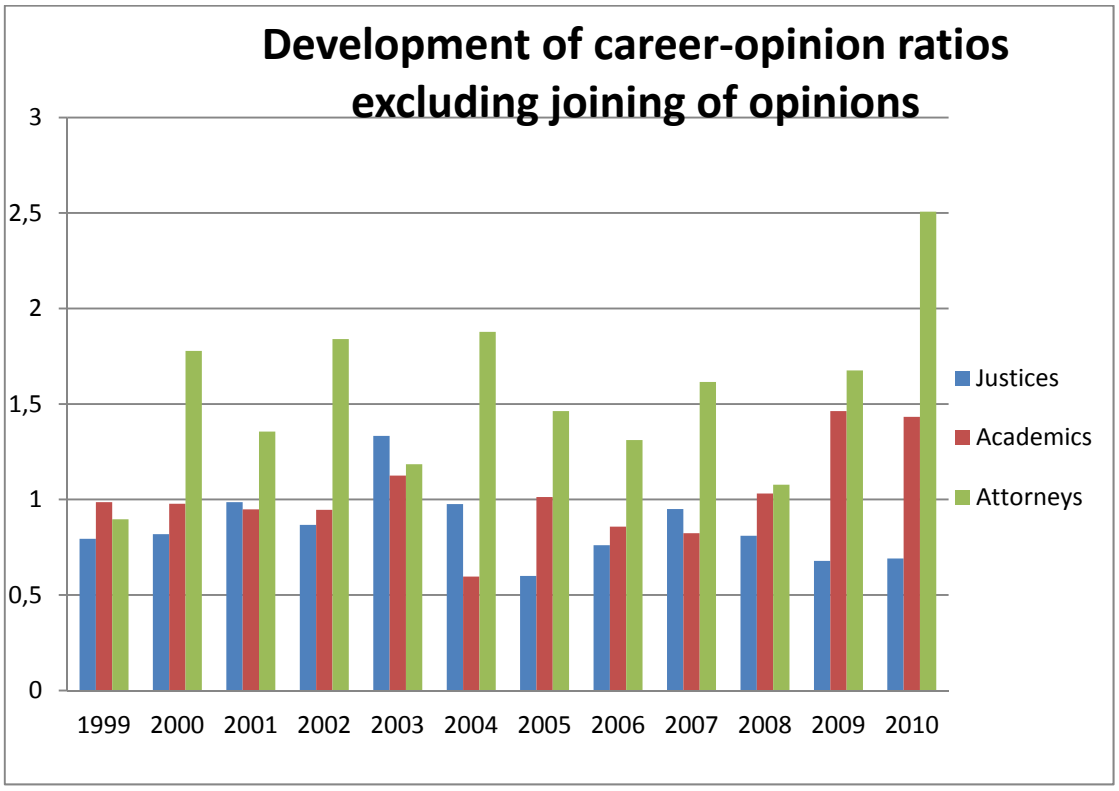
Graph 12



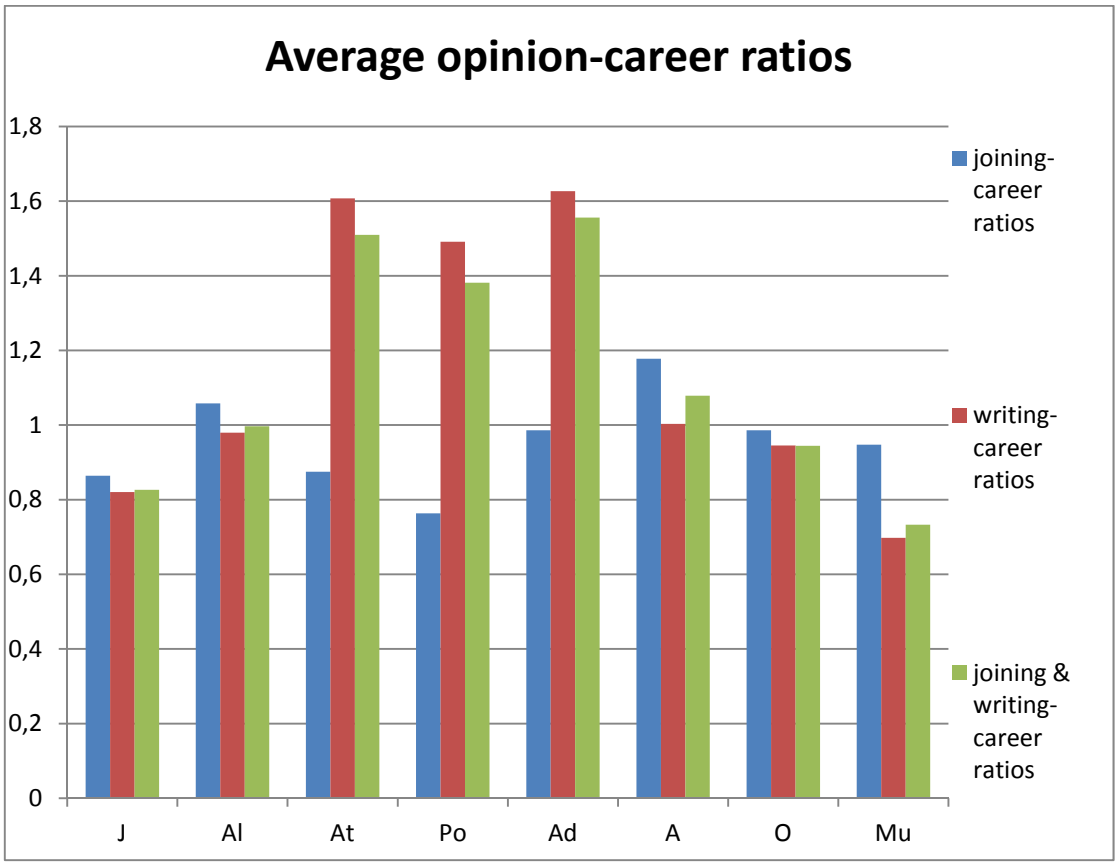
Graph 13



Graph 14



Graph 15


Average opinion-career ratios
1,8
1,6
1,4
1,2
1
0,8
0,6
0,4
0,2
0
J
Al
At
Po
Ad
A
O
Mu
joining-career ratios
writing-career ratios
joining & writing-career ratios

Career backgrounds of justices at the US Supreme Court: comparison between the courts of 1929, 1938 and 1941.

Table a

1929

Justice	Experience
Taft (chief justice)	Secretary of War, US President
Holmes	Professor of Law, Chief Justice at state court
Van Devanter	Assistant attorney general, 8th circuit court of appeals
McReynolds	Lawyer, judge, Attorney General
Brandeis	Law firm, activist
Sutherland	House of Representatives, Senator
Butler	Court attorney, President of Bar Association
Sanford	Assistant attorney general, district judge
Stone	member law firm, Attorney General

Table b

1938

Justice	Experience
Hughes (chief justice)	Professor of Law, Governor, justice (earlier period), secretary of state
McReynolds	Lawyer, judge, Attorney General
Brandeis	Law firm, activist
Butler	Court attorney, President of Bar Association
Stone	member law firm, Attorney General
Roberts	District attorney, investigator of scandals
Cardozo	Court of Appeals, lecturer
Black	Legal practice, Senator
Reed	General counsel of Reconstruction Finance Corporation, Sollicitor General

Table c

1941

Justice	Experience
Stone (chief justice)	member law firm, Attorney General
Roberts	District attorney, investigator of scandals
Black	Legal practice, Senator
Reed	General counsel of Reconstruction Finance Corporation, Sollicitor General
Frankfurter	Professor of Law, advisor to President (activist
Douglas	Lecturer ,SEC chairman
Murphy	Judge, mayor, High Commissioner Phillipines, Governor, Attorney General
Byrnes	Senator
Jackson	Advisor of president, Attorney General

Figure 1 (derived from Walker et al. 1988)

FIGURE 1

DISSENT AND CONCURRENCE PER 100 MAJORITY OPINIONS IN THE UNITED STATES SUPREME COURT, 1800–1981