

**Dissenting Opinions in Constitutional Courts:  
A Means of Protecting Judicial Independence and Legitimising Decisions**

by **Kateřina Šimáčková**

I will begin with an introduction of philosophical concepts justifying the need for dissenting opinions and continue with an overview of arguments for and against separate opinions. Then I will present conclusions of the Venice Commission's report on separate opinions, which I worked on as one of the co-rapporteurs, together with Monika Hermans, judge of the Federal Constitutional Court of Germany, and Christoph Grabenwarter, the President of the Austrian Constitutional Court. At the end, I will point out selected current issues concerning separate opinions in Central and Eastern European countries.

**I.**

When a separate opinion is made public, the fact the court was not able to reach a unanimous decision is also revealed. Those who oppose the publication of separate opinions argue that it undermines the judgment and diminishes its value as precedent. On the other hand, the proponents claim that the plurality of opinions supports the legitimacy of law and enables its development.

Professor Joseph Weiler offers another good justification of separate opinions. He says that: *„One of the virtues of separate and dissenting opinions is that they force the majority opinion to be reasoned in an altogether more profound and communicative fashion. The dissent often produces the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected.“*<sup>1</sup>

Theoretical arguments in support of the separate opinions can also be based on current analytical philosophy which values plurality of opinions and a "reasonable disagreement". Reasonable disagreement means that rational, well-informed people aware of values do not agree on a particular issue, and their disagreement withstands even very thorough argumentation. The term was introduced as an expression of the fact that less and less philosophers believe that rational discourse tends to converge towards consensus, and on the contrary, the number of those who think rational discourse tends to diverge into plurality is rising.<sup>2</sup>

Even Czech legal philosopher Jiri Priban<sup>3</sup> stresses the paradox that the plurality of legitimation strategies is the most important source of legitimacy of the current liberal democracies based on the rule of law. Instead of a consensus, there is a conversation; its purpose is not to determine

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<sup>1</sup> Even though he is actually criticizing the CJEU for not allowing separate opinions. Weiler J. H. H.: *The judicial après Nice*, in G. De Burca and J. H. H. Weiler (eds.) *The European Court of Justice*, OUP 2001.

<sup>2</sup> Besson S., *The Morality of Conflict – Reasonable Disagreement and The Law*, Oxford 2005; McMahon Ch., *Reasonable Disagreement, A Theory of Political Morality*, Cambridge 2009.

<sup>3</sup> PŘIBÁŇ, J.: *Disidenti práva*, SLON, Praha 2001, p. 15.

the winners and losers of the political debate, but instead to reinforce and lead to the recognition of a multitude of voices participating in the debate.<sup>4</sup>

## II.

The discussion of philosophical justification of separate opinions as such indicate basic arguments for and against these opinions. Their critics fear, among other things, that separate opinions endanger the unity of the court and undermine its authority. On the other hand, proponents argue that separate opinions democratise the judiciary by making it more transparent and strengthen its authority and credibility. According to the proponents of separate opinions, authority and acceptance of any court does not depend on the unanimity of its decisions. They believe separate opinions might even improve the quality of the judgments.<sup>5</sup> Proponents of separate opinions also argue that these enrich public, academic and political debate. Moreover, they can play an important role in the future development of the law; because a well-founded separate opinion may one day become a majority opinion.

The independence of judges is another value that may be at stake. A judge, appointed by a particular political actor, might feel obliged to show loyalty and dissent (or not dissent) in order to please those who nominated him or her. This is especially true of judges who have a chance of being nominated again or re-elected. To counter this fear of political pressure, guarantees of independence are essential, such as the appointment of judges for life, until a certain advanced age or for a certain period of time without the chance of them being re-elected, the fact that judges may not be removed or transferred from office except on specific grounds, and that they have a salary determined by law. However, critics argue that separate opinions can still be misused to attract public attention. When a judge has a right, and not a duty, to write a separate opinion, there is room for strategic behaviour. On the other hand, separate opinions are an expression of a judge's freedom of speech and independence from his or her fellow judges. They could prevent those judges who are often outvoted from becoming frustrated.

The risks associated with separate opinions may be avoided if separate opinions are used only as the last resort (*ultima ratio*) and are prepared with respect to the majority opinion. A separate opinion should not be a defiant reaction to having been overruled. Their role should be to contribute to the development of the law by promoting certain alternative legal opinions. Even proponents of separate opinions admit that dissent for its own sake has no value and can be detrimental to the collegiality among judges and the credibility of a court. Yet, where significant disagreement exists, members of the court have a responsibility to articulate it.

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<sup>4</sup> Canadian Supreme Court judge Claire L'Heureux-Dubé compares separate opinions to polyphony in music as they allow law to speak in a plurality of voices. According to her, separate opinions make an important contribution to the development of the law and legal culture. L'HEUREUX-DUBÉ, Claire. The Dissenting Opinion: Voice of the Future? *Osgoode Hall Law Journal* [online]. 2000, vol. 38, no. 3, p. 496.

<sup>5</sup> Antonin Scalia, a former US Supreme Court judge renowned not only for his dissents, said that he prefers when somebody disagrees with a majority opinion he wrote, because unanimous decisions often have the lowest quality of argumentation. SENIOR, Jannifer. Conversation: Antonin Scalia. In: <http://nymag.com/news/features/antonin-scalia-2013-10/>.

In his book on independence of international judges, Jiri Malenovsky argues for every judge's right to criticise, after the judgment is issued, the intellectual inadequacy or weaknesses of his or her colleagues' reasoning, either in a dissenting opinion or outside of the judicial decision-making process – of course while respecting the ethical duty to do so in a reserved manner and without insults or damaging the colleagues' reputation.<sup>6</sup> Malenovsky refers also to the opinion of the European Court of Human Rights in *Wille v. Liechtenstein* in which the court allowed for the possibility that the petitioner (the president of an administrative court) can publicly express his legal views, even if they have political implications.<sup>7</sup> If we understand judicial independence not as a judges' prerogative, but as judges' duty to decide independently, and thus impartially, separate opinions protect such independence and impartiality because they help to avoid ill-considered decisions which could later be criticized. This also strengthens responsible decision-making of the whole court.<sup>8</sup> Dissenting judges become the guardians of proper and independent exercise of judicial power by showing that the judges who voted for the majority opinion were informed of its potential problems.

Regarding decision-making of the CJEU, Jiri Malenovsky and Joseph Weiler argue that introducing a right to dissenting opinion would increase the responsibility of individual judges and the quality of decisions of the entire court.<sup>9</sup> The absence of dissenting opinions was originally perceived as a protection of judges against their home states – but could it weaken the individual judges' sense of responsibility for the final decision instead? I raise this question being fully aware of changes in some EU Member States where disloyalty to the state could pose a professional risk for a particular judge. In this case, the best protection would probably be to set a long term of office without the possibility of renewal.

### III.

Thus, we have seen that there are valid arguments for as well as against having separate opinions in constitutional courts. The Venice Commission has a favourable attitude to introducing them, but the choice of whether or not to do so clearly remains with the States. For Member States which have decided to allow separate opinions, the Venice Commission has made in its report the following general recommendations.

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<sup>6</sup> Malenovsky, J. *L'indépendance des juges internationaux*. In *Académie de Droit International de La Haye. Recueil des Cours de l'Académie de droit international*, vol. 349. Leiden: Nijhoff, 2011, p. 262-263.

<sup>7</sup> Judgment of the Grand Chamber of the European Court of Human Rights, *Wille v. Liechtenstein*, 28. 10. 1999, no. 28396/95, § 67.

<sup>8</sup> Wildhaber, L. *Opinions dissidentes et concordantes de juges individuels a la cour européenne des droits de l'homme* in *Mélanges en l'honneur de N. Valticos, Droit et justice* ed. R. J. Dupuy, Paris, Pedone, 1999, s. 529

Rousseau, D. *Le opinions dissidentes, preuve de la rationalité des décisions de justice. The Spanish constitution in the European Constitutional context. La Constitución española en el contexto constitucional europeo*. F. Fernández Segado (dir. publ.) Madrid, Dykinson S. L., 2003

<sup>9</sup> Weiler J. H. H.: *The judicial après Nice*, In G. De Burca and J. H. H. Weiler (eds.) *The European Court of Justice*, OUP 2001

First, the law should treat separate opinions as a right of judges and not their duty.<sup>10</sup>

Second, separate opinions should focus on explaining that the matter could be dealt with differently, perhaps in a better way, but not that the solution chosen by the majority was of poor quality. In other words, separate opinions should remain loyal to the court and its institutional role.

Third, a separate opinion should be considered as an *ultima ratio* solution. Therefore, it is essential that judges debate and attempt to influence the majority opinion before opting to write a separate opinion.

Fourth, it is important for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary.

Fifth, the judges' code of conduct or ethics should deal with separate opinions and set out which lines should not be crossed, without impeding on the independence of the individual judge or harming the institution.

Sixth, separate opinions form a part of the judgment and should therefore be published in every case together with the majority judgment and *ex officio*, not only upon request by the judges who formulated them.

#### IV.

The Venice Commission issued the report on separate opinions because it was aware, among others, of certain problems concerning publication of dissenting opinions.<sup>11</sup> For example, one of the judges at the Romanian constitutional court wrote very critical dissenting opinions accusing the majority of interfering with rule of law etc. The president of the court reacted by refusing to publish the dissenting opinions. Also, decision no. 1/2017 was adopted which states that “separate and concurrent opinion cannot transgress the point of view of the judge so as to become a direct criticism of the decision of the Constitutional Court.”<sup>12</sup> According to the decision, separate opinions have to be handed to the President of the Court who requests the judge concerned to re-write the opinion if it does not respect the criteria laid down in the decision. If the judge refuses, the president decides that the dissenting opinion will not be published. Situations like this led the Venice Commission to include the recommendation to always publish separate opinions, even the ones in conflict with the code of ethics.

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<sup>10</sup> During the plenary discussion of the Venice Commission, an interesting comment was made by judge Dimitrov from the Bulgarian constitutional court who emphasized that, from his point of view, it should be an ethical duty of a constitutional court judge voting against the majority opinion to release a separate opinion explaining the different conclusion and its reasons.

<sup>11</sup> See (CDL-AD(2009)042) Opinion on Draft Amendments to the Law on the Constitutional court of Latvia, paragraph 18 and subsequent; (CDL-AD(2011)018) Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, para. 51; (CDL-AD (2016)017), Opinion on the Amendments to the Organic Law on the Constitutional court of Georgia and to the Law on constitutional Legal Proceedings, para. 61.

<sup>12</sup> Report of the Venice Commission on Separate Opinions of Constitutional Courts, CDL-AD (2018)030, para. 124.

An interesting situation occurred also at the Czech Constitutional Court this year. The court declared one of the government COVID-related crisis measures, regulating retail sales, unconstitutional because it differentiated among various businesses without a rational justification.<sup>13</sup> Since this was a short-term measure, it was necessary to adjust the court's working method and speed up the decision-making process. One of the judges reacted to this in his dissenting opinion by describing in great detail the communication among judges during the plenary discussions taking place before the decision was adopted. In my opinion, this violated the confidentiality of plenary meetings. When we were preparing the report of the Venice Commission on separate opinions, it really did not occur to me it should be noted that dissenting opinions cannot include information breaching the confidentiality of judicial deliberations.

It is apparent that separate opinions which are supposed to protect judicial independence can actually undermine it if they do not comply with judicial ethics principles. After all, confidentiality of judicial deliberations is also a means of protecting judicial independence and legitimising judicial decisions.

As I sometimes write dissenting opinions myself, I believe they may be beneficial by becoming the majority opinion in the future.

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<sup>13</sup> Judgment of the Czech Constitutional Court Pl. ÚS 106/20, 9. 2. 2021, available on-line: <https://www.usoud.cz/en/current-affairs/judgment-pl-us-106-20-of-9-february-2021-state-of-emergency-declared-in-response-to-covid-19-pandemic-restrictions-on-retail-sales-and-provision-of-services>