

DIRECTORATE-GENERAL FOR INTERNAL POLICIES

POLICY DEPARTMENT **C**
CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS



Constitutional Affairs

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Petitions

**Dissenting opinions in
the Supreme Courts of
the Member States**

STUDY



**DIRECTORATE GENERAL FOR INTERNAL POLICIES
POLICY DEPARTMENT C: CITIZENS' RIGHTS AND
CONSTITUTIONAL AFFAIRS**

LEGAL AFFAIRS

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Courts of the Member States**

STUDY

Abstract

This study examines the advantages and disadvantages of the practice of separate opinions. After an analysis of its diffusion in the Member States' Supreme and Constitutional Courts, it presents the practice of international tribunals. Finally, the reasons why the publication of separate opinions may, or may not, be suited for the CJEU are also taken into consideration.

This document was requested by the European Parliament's Committee on Legal Affairs.

AUTHOR

Rosa RAFFAELLI
Policy Department C: Citizens' Rights and Constitutional Affairs
European Parliament
B-1047 Brussels
E-mail: rosa.raffaelli@europarl.europa.eu

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ABOUT THE EDITOR

To contact the Policy Department or to subscribe to its monthly newsletter please write to:
poldep-citizens@europarl.europa.eu

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LIST OF ABBREVIATIONS

- ACA-Europe** Association of the Councils of State and Supreme Administrative Jurisdictions of the EU
- AG** Advocate General at the Court of Justice of the European Union
- BVerfG** German Constitutional Court
- CCJE** Consultative Council of European Judges
- CJEU** Court of Justice of the European Union
- ECHR** European Convention of Human Rights
- ECtHR** European Court of Human Rights
- ICC** International Criminal Court
- ICJ** International Court of Justice
- ICTY** International Criminal Tribunal for the former Yugoslavia
- ICTR** International Criminal Tribunal for Rwanda
- NAFTA** North American Free Trade Association
- WTO** World Trade Organization

EXECUTIVE SUMMARY

Background

This study has been requested by the European Parliament's Committee on Legal Affairs on 4 June 2012.

Most Member States of the EU allow their Constitutional and Supreme Court judges to issue separate opinions whenever they do not agree with the court's judgment. Such opinions express the reasoned views of the minority judges (dissenting opinions), or of those judges who, while agreeing with the Court's final decision, disagree with its reasoning (concurring opinions). On the other hand, the CJEU follows a different model, that of secrecy of individual opinions. However, the rules applicable at the CJEU are more and more exceptional in a world of courts that increasingly tend to allow for the publication of dissents. This peculiarity may be due to the unique structure of the European judicial system, and the role of the ECJ in it; yet, some scholars have argued that separate opinions could actually serve the Court's purposes, in particular given its need to engage in a constant dialogue with national courts. Others claim that dialogue can better be improved through different, already existing, means, and that the introduction of separate opinions might threaten the Court's collegiality and its authority vis-à-vis national tribunals.

Aim

This study will examine the practice of dissenting opinions in the Member States of the EU. Firstly, it will present the main arguments **against** and **in favour** of this practice, as identified by scholars who have focused on theoretical issues and on the role of individual opinions in (mostly, national) courts. Then, the second Chapter will analyse the rules that apply in the Supreme and Constitutional Courts of the Member States of the EU. Finally, after a short overview of the use of dissents at the supranational level, this study will consider the current situation at the CJEU, in the context of the views expressed by scholars and judges on this matter.

The study aims to achieve the following objectives:

- Introduce the main theoretical arguments **against** and **in favour** allowing for the publication of separate opinions;
- Examine the practice in the Constitutional and Supreme Courts of the 27 EU Member States;
- Summarise the practice at the supranational level;
- Present the main arguments **against** and **in favour** allowing CJEU judges to publish separate opinions.

KEY FINDINGS

- The practice of allowing judges to publish separate opinions is widespread in the EU. Of the 27 Member States, only seven never allow judges to publish individual opinions. In the remaining 20, the publication of separate opinions is allowed, either in any jurisdiction or in constitutional matters only. In one Member State (Ireland), dissents may be published in ordinary cases, but are forbidden in constitutional cases.
- There is no sharp distinction between "common law" and "civil law" countries: in many "civil law" countries, dissents may be published, while in some "common law" countries they are either limited or forbidden.
- In recent years, there has been a growing trend towards allowing at least constitutional judges to issue separate opinions. Many Eastern European Countries that have recently joined the EU follow this practice.
- The publication of individual opinions is generally allowed in international and regional supranational Courts, with the notable exception of the CJEU.
- The main arguments against separate opinions include: preserving the authority of the courts, and of their judgments; protecting the independence of judges against undue political pressure; ensuring that the final decision adopted by the tribunal is clear and unambiguous; and preserving collegiality among judges.
- The main arguments in favour of separate opinions include: preserving the judges' integrity and moral independence and their freedom of speech; improving the quality of judgments and their persuasiveness; promoting transparency; and improving dialogue with future and lower courts.
- While views about individual opinions vary, there is a general agreement that these best serve their purpose only if they are limited in number, circulated in advance, and drafted in a respectful manner.
- Prominent scholars have argued that the introduction of separate opinions at the CJEU, in the context of a more general reform, could enhance judicial dialogue with national courts and ensure higher clarity of judgments. Others argue that, in the structure of the CJEU, the role of the Advocate General can be considered as an adequate substitute for individual opinions, while preserving the judges' independence and collegiality and the Court's authority.
- The experience of national and international courts, while relevant, is not necessarily indicative of what would happen if separate opinions were allowed at the CJEU, given the peculiarities of the EU judicial system and the unique role of the CJEU in the context of the preliminary rulings procedure.
- Even if dissenting opinions were allowed at the CJEU, this would not automatically imply their widespread use. Different Courts have developed very different practices in application of similar rules, depending on their cultures and traditions. Moreover, while publication of individual opinions may be encouraged, it cannot be mandated. Thus, even if separate opinions were explicitly foreseen, the CJEU would remain free to develop its own practice, and even to maintain its collegiate decision-making process.

1. DISSENTING OPINIONS: THE PRINCIPLES AT STAKE

1.1. Introduction

The purpose of this chapter is to examine the reasons **in favour** and **against** separate opinions in order to introduce the analysis of their role in the different legal systems composing the European Union, as well as in supranational judicial organs.

First of all, a clarification seems necessary: there is a sharp distinction between dissenting and concurring opinions, although they are usually studied together and both fall within the concept of "separate opinions." A **dissenting opinion** presents the reasons for which one of the judges taking part in the deliberations voted against the final decision reached by the majority. It therefore serves to explain why she/he did not agree with the conclusions expressed in the judgment. On the contrary, a **concurring opinion** is written by one of the judges forming part of the majority and serves to provide for different, or additional, legal reasons to support the conclusion.

National and international approaches to individual opinions vary widely. From the practice of *seriatim* opinions,¹ still followed by the Supreme Court of the United Kingdom, to the criminalization of violations of the secrecy of deliberations (interpreted as forbidding the publication of judges' individual opinions and votes), a whole range of options is possible, and different solutions have been adopted in different systems. Such diverging approaches have been justified based on a number of reasons, leading to a discussion that, according to some, has now become a matter of faith more than of reason.²

In the traditional understanding, individual opinions are allowed in common law systems and in international law, while civil law systems follow the long-established principle of the secrecy of deliberations. However, this perception no longer fits reality: many civil law countries do allow judges sitting in their Supreme and - even more so - Constitutional Courts to publish separate opinions.³ Moreover, while the prohibition against separate opinions usually goes hand in hand with the secrecy of deliberations, so much so that the two principles are often used as synonymous, the opposite is not necessarily true. Indeed, many legal systems follow the principle of secrecy of deliberations (meaning that these are held *in camera* and that the discussions that take place among the judges remain secret) while allowing for the publication of separate opinions.⁴ Thus, the existence of a rule prescribing the secrecy of deliberations does not necessarily exclude the possibility of publishing individual opinions.

The following paragraphs will briefly present the main doctrinal arguments **against** separate opinions and subsequently those **in favour**.

¹ Whereby each of the judges taking part in the deliberations publishes his/her opinion separately, and these are published one after the other.

² See C. Walter, La pratique des opinions dissidentes en Allemagne, in *Nouveaux Cahiers du Conseil Constitutionnel*, n. 8/2000, at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-allemande.52541.html>.

³ See J. Malenovsky, Les opinions séparées et leurs répercussions sur l'indépendance du juge international, in *Anuario Colombiano de Derecho Constitucional*, 2010, at 39; K. Kelemen, Dissenting opinions in constitutional courts, forthcoming in *German Law Journal*, n. 11/2012. Also see the analysis below, chapter 2.

⁴ Even in the US Supreme Court, which is well known for its widespread use of separate opinions, judges' deliberations are secret: K. L. Hall (ed.), *The Oxford Companion to the US Supreme Court*, OUP 2005, 201-203.

1.2. Arguments against separate opinions

1.2.1. Historic foreword

The principle of secrecy of deliberations, and of individual votes, is based on a number of historical reasons. Traditionally, the role of judges was to declare the will of the King - and, since the King cannot but have one and only one will, judgments had to be, or at least to seem, unanimous.⁵ Moreover, the principle of secrecy of deliberations was strictly correlated to a culture of secrecy, arguably deriving from the entanglement between State and religion: thus, even in a strictly secular State such as France, judges still take the traditional oath to "religiously" preserve the secrecy of deliberations.⁶ These historical arguments have subsequently been rationalized and supported by more modern reasons.

1.2.2. Preserving the independence of judges

The secrecy of individual opinions is said to be necessary to preserve the independence of the judge, in particular in its external aspect (i.e. independence from possible sources of pressure coming from outside the court).⁷ When the judgment is collegiate, the vote of each judge remains unknown to the public; hence, members of the bench do not have to fear the potential professional consequences of their decisions, and are free to decide following their own individual conscience. The argument is particularly powerful whenever judges are appointed or re-appointed by the executive. Besides, it also applies when their mandate is non-renewable, since even in this case they might be tempted to decide keeping in mind their future professional career.

Secondly, whenever judges are appointed by political forces (as is the case for many constitutional and all international judges), secrecy also secures the court's credibility by preserving an appearance of independence, hence avoiding any undue politicisation of legal decisions and the public's perception that judges decide based on their political preferences, not on legal arguments.⁸

1.2.3. Ensuring the independence of national judges in international tribunals

The need to protect the judges' independence, and appearance thereof, is particularly strong when it comes to international judges, whose nationality is often considered as an important factor in determining their vote. Indeed, the assumption that judges might favour the State that appointed them is among the reasons why, in many international tribunals (most prominently at the International Court of Justice), States that do not have a national judge sitting on the bench are granted the right to appoint an *ad hoc* judge if a case is brought

⁵ See S. Cassese, *Lezione sulla cosiddetta opinione dissidente*, in *Quaderni costituzionali*, n. 4/2009, pp. 973-986; Malenovsky, *op. cit.*, at 37. Some courts' decisions were actually conceived as mere advices to the King, which the latter could decide to endorse or to reject (this was the case, for instance, for the French Conseil d'État and the UK Privy Council).

⁶ See Y. Lécuyer, *Le secret du délibéré, les opinions séparées et la transparence*, in *Revue trimestrielle des droits de l'homme*, n. 57/2004, 197-223; S. O'Tuama, *Judicial review under the Irish constitution*, in *Electronic Journal of Comparative Law*, n. 12/2008. The text of the oath taken by French judges is in Art. 6, *Ordonnance* n° 58-1270 (22 December 1958) *portant loi organique relative au statut de la magistrature*.

⁷ J. Laffranque, *Dissenting opinion and judicial independence*, in *Juridica international*, 2003, 162-172; M. Kirby, *Judicial dissent - common law and civil law traditions*, in *Law quarterly review*, 2007, 379-400.

⁸ See F. Luchaire, G. Vedel, "Contre": le point de vue de deux anciens membres du Conseil constitutionnel, in *Nouveaux Cahiers du Conseil constitutionnel*, 2000, at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-transposition-des-opinions-dissidentes-en-france-est-elle-souhaitable-contre-le-point-de-vue-de-deux-anciens-membres-du-conseil-constitutionnel.52547.html>. On the (highly politicized) US Supreme Court see A. Scalia, *The dissenting opinion*, in *Journal of Supreme Court History*, 1994, 33-44. Note however that the politicization of the US Supreme Court has also been explained with the small number of Justices belonging to it, which allows for more clearly ideological decisions: see A. Peri, *Judicial independence vs. judicial accountability*, in *Comparative law review*, v. 3/2012.

against them. The traditional justification for this right is that States would not trust a Court made entirely of foreign judges. International judges are assumed to be particularly loyal to the State that appointed them, both because by doing otherwise they would risk losing the State's support for their re-election (or the possibility of being offered a different, but equally prestigious position), and because States initially select persons whom they know to be particularly loyal or self-restrained. Thus, it could be argued that a prohibition against separate opinions in international tribunals would serve to protect the judges' independence, while the current practice can lead to the development of a principal-agent relation between the States and the judges they appointed.

Although these theoretical arguments appear to be very sound, scholarly research on the role of nationality in determining the judges' votes allows for more nuanced conclusions, especially in the context of regional tribunals. While there is no agreement among scholars either on statistics or on their interpretation, the incidence of nationality seems to be quite high in the context of the ICJ. Indeed, different studies show that national judges tend to vote in favour of their national State in around 76 to 86 % of all cases (or an even higher percentage in the case of *ad hoc* judges).⁹ However, statistics on the ECtHR show a more nuanced pattern. Indeed, an analysis of the judgments rendered between 1960 and 2006 and classified as important by the Court itself showed that national judges dissented from the majority to vote in favour of their home State (in the case of judgments finding a violation) only in 16 % of cases (as opposed to an 8 % of cases in which non national judges voted against the majority and in favour of a State).¹⁰ Hence, while the argument related to the independence of international judges appears to be solid, its practical relevance might be lower than could be expected.

1.2.4. Safeguarding the authority of judgments and of courts

Another common argument against the publication of separate opinions is the need to safeguard the authority of judgments.¹¹ Once a judgment is final, it has to be respected, regardless of the reasons supporting it. Showing the existence of disagreements among the judges who adopted it, and the reasons that lead some to reach an alternative conclusion, might shake the people's faith in the judiciary and undermine the authority of the judgment and of the court that adopted it. This is particularly the case when it followed an innovative interpretation of the laws, or applied new laws.¹² The publication of separate opinions might encourage the losing party to call into question the validity of the judgment, refuse to enforce it or appeal against it, whenever possible.

Moreover, some authors argue that the introduction of dissents might transform justice into a show ("*justice-spectacle*"). The risk is that individual judges might adopt dissenting opinions mainly in order to obtain publicity for themselves, leading to an individualization of justice that would damage the authority of courts.¹³

⁹ See A. M. Smith, "Judicial nationalism" in *International Law*, in *Texas International Law Journal*, v. 40/2005, 197-232; E. A. Posner, M. F. P. de Figueiredo, *Is the International Court of Justice Biased?*, *Journal of Legal Studies* v. 34/2005, 599-630.

¹⁰ E. Voeten, *The impartiality of international judges: evidence from the ECtHR*, in *American Political Science Review*, n. 102/2008, 417-433. Also see M. Kuijer, *Voting behaviour and national bias in the European Court of Human Rights and the International Court of Justice*, in *Leiden Journal of International Law*, v. 10/1997, 49-67 (results do not coincide given the difference in the set of data considered by the authors, but the conclusions they reach are the same).

¹¹ See e.g. Walter, *op. cit.*; F. Gallo, *Intervento al seminario di studi "L'opinione dissenziente"*, Conference held at the Italian Constitutional Court on the 22nd of June 2009, available at http://www.cortecostituzionale.it/documenti/convegni_seminari/Relazione_Gallo_opinione.pdf.

¹² A case that is often cited as an example of the importance of issuing unanimous judgments is the US Supreme Court landmark decision that ended segregation in schools, *Brown v Board of Education*, 347 U.S. 483 (1954).

¹³ See Luchaire and Vedel, *op. cit.*; Malenovsky, *op. cit.*, at 38.

While the argument regarding the authority of the institution can apply to all courts, it is particularly powerful in the case of newer, weaker courts. For instance, it has been argued that the original reason why separate opinions were not allowed at the CJEU was to secure its authority at a time when it was still a feeble institution, bound to apply a completely new set of legislation. Conversely, it is also argued that the admissibility of dissents at the ECtHR was initially a factor weakening its authority, as well as the authority of its judgments, putting at risk the Court's survival.¹⁴

1.2.5. Ensuring clarity

An important argument against separate opinions is the need to ensure that the final decision adopted by the Court is unambiguous. The purpose of judgments is to give a definite answer to a specific legal question, not to open a discussion about the best possible interpretation of the law.¹⁵ In this perspective, allowing judges to publish individual opinions, be they dissenting or concurring, might create unneeded confusion as to the solution chosen by the Court and the reasoning supporting it. Indeed, while the introduction of separate opinions is favoured mostly by scholars, who are interested mainly in increasing the level and quality of the theoretical debate over any legal issue, claimants tend to approach courts expecting a clear and final answer to their legal question. As one of the Justices of the US Supreme Court famously stated, "in most matters it is more important that the applicable rule of law be settled than that it be settled right."¹⁶ This argument, while according to its own author unpersuasive with regard to decisions having constitutional implications, seems to be particularly cogent when it comes to decisions affecting economic operators, such as the ones that are recurrently taken by national lower courts and, in the context of the EU, by the CJEU.

1.2.6. Preserving collegiality

Another recurring argument against allowing judges to publish dissenting and concurring opinions relates to the need to preserve collegiality and to ensure that judges sitting on the bench are guided by a spirit of cooperation and collaboration.¹⁷ According to some authors, in systems where separate opinions exist, minority judges stop taking part in the deliberation once it emerges that the majority does not share their views. As a consequence, they do not contribute to the language of the final decision, cooperating in order to improve its quality, but they focus on writing their dissent in order to make their personal opinion known to the public. In contrast, in many systems where separate opinions are forbidden, and most notably in the CJEU, the decision-making process is a truly collegiate one, and all judges cooperate in the drafting of the final decision.

1.2.7. Practical arguments: speediness of trials and economic costs

Some additional arguments against dissenting opinions are based on practical, instead of theoretical, considerations. Firstly, the implications of allowing the publication of individual

¹⁴ On the CJEU, see F. Rivière, *Les opinions séparées des juges à la Cour Européenne des Droits de l'Homme*, Bruylant 2004, at 17; on the ECtHR, see D. Nicol, *Lessons from Luxembourg: federalisation and the Court of Human Rights*, in *European Law Review*, 2001, 3-21. However, some argue that dissents are particularly useful when courts apply a new type of law, since they allow it to develop: J. Laffranque, *Dissenting opinion in the European Court of Justice - Estonia's possible contribution to the democratisation of the European Union Judicial System*, in *Juridica International*, 2004, 14-23.

¹⁵ See e.g. D. Hart, *Why we allow dissents - by our judges*, available at <http://ukhumanrightsblog.com/2012/10/14/why-we-allow-dissent-by-our-judges/>.

¹⁶ Justice L. Brandeis, *Dissent, Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932).

¹⁷ Luchaire and Vedel, *op. cit.* On the CJEU see J. Azizi, *Unveiling the EU Courts' internal decision-making process: a case for dissenting opinions?* in *ERA Forum*, 2011, 49-68; D. Edward, *How the Court of Justice works*, in *European Law Review*, n. 20/1995, 539-558.

opinions on the speediness of trials and an appropriate internal organization of the courts need to be considered. Allowing judges to write long, time-consuming dissents, instead of requiring them to cooperate in the drafting of the single final decision of the Court, could considerably slow down the process of judicial deliberation.¹⁸

Moreover, allowing for the publication of separate opinions also has economic consequences. In fact, in some Member States, publication is limited in order to reduce expenses.¹⁹ Economic considerations are particularly relevant when it comes to Courts that might be required to publish their judgments in more than one official language, such as national tribunals in multilingual States or the CJEU. In such Courts, allowing for individual opinions would represent a considerable burden, in terms of time and resources, since it would require their translation into all official languages.²⁰

1.3. Arguments in favour of separate opinions

1.3.1. Historic foreword and legal culture argument

The practice of joining separate opinions to the judgment of the court emerged, in the US Supreme Court, from an evolution of the British tradition of deciding *seriatim* (each judge adopting and publishing his own full decision).²¹ Separate opinions are, therefore, often believed to be typical of the common law culture, and foreign to continental systems of law. Historically, however, many civil law systems did not fully safeguard the secrecy of deliberations and the fiction of a unanimous court: dissents could be registered, and in a few cases even published, in Spain, as well as in some of the States forming pre-Napoleonic Italy and pre-united Germany.²²

1.3.2. Preserving judges' independence and freedom of expression

The need to ensure the independence of judges is often cited as a compelling argument against the publication of separate opinions; however, it is also used as an argument in favour of this practice. According to some authors, the possibility of issuing an individual opinion safeguards the judges' internal independence, i.e. their autonomy from the other members of the bench. Individual opinions allow judges to maintain their intellectual integrity by enabling them not to subscribe to a judgment whose reasoning and conclusions they do not share. From this perspective, the right to publish separate opinions can foster the courts' independence, as well as the appearance thereof and - as a consequence - the legitimacy of tribunals in the eyes of the public.²³ This 'intellectual integrity' argument is also related to the idea that judges enjoy freedom of expression. This right, however, plays an essential role in the discussion over dissents in some legal systems, while it is almost ignored in others.²⁴

Scholars arguing that individual opinions enhance the autonomy of the judiciary also contest the use of the 'independence argument' to support secrecy. The risk of undue

¹⁸ See in particular Azizi, *op. cit.*, p. 58 (but rejecting this argument).

¹⁹ This is the case, for instance, in Slovenia: see *infra*, Chapter 2.2.16.

²⁰ See D. Edward, *op. cit.*, at 557.

²¹ While this evolution initially led to the adoption of seemingly unanimous decisions, the practice soon evolved into the current one: the publication of a majority decision (binding as a precedent), that may be accompanied by minority opinions. See R. Bader Ginsburg, *The Role of Dissenting Opinions*, in *Minnesota Law Review*, 2010, 1-8.

²² See W. Mastor, *Les opinions séparées des juges constitutionnels*, Presse Universitaire d'Aix-Marseille, 2005, at 114 - 117; K. Kelemen (forthcoming), *op. cit.*

²³ See e.g. C. L'Heureux-Dubé, *The dissenting opinion: voice of the future?*, in *Osgode Hall Law Journal*, n. 38/2000, 495-516. Also see W. J. Brennan, *In defense of dissent*, in *Hastings Law Journal*, n. 37/1986, 427-438.

²⁴ See Brennan, *op. cit.*, at 438; with regard to the British tradition, also see J. Alder, *Dissents in courts of last resort: tragic choices?* in *Oxford Journal of Legal Studies*, n. 20/2000, 221-246, part. at 233.

influence over judges would not be a sufficient argument to ban separate opinions, since there is no relationship of proportionality between the means used and the objectives pursued. While preserving the external independence of judges is essential to ensure their legitimacy and ability to properly carry out their functions, forcing them to an apparent unanimity is seen as a disproportionate means to achieve this goal. This objective could be more easily ensured by creating institutional protections to shield judges from external influences: for instance, providing for longer, non-renewable mandates, eliminating the role of the executive in their appointment, and excluding any possibility of retaliations.²⁵

1.3.3. Ensuring authority and clarity

The authority argument is also a recurring theme in scholarly writings both supporting and contesting the admissibility of dissenting opinions. Authors who favour the publication of separate opinions argue that authority should not rest on secrecy, but on quality.

Scholars and judges tend to agree that dissents can, and often do, improve the quality of the final judgment. As Justice Ginsburg of the US Supreme Court has stated, "there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation."²⁶ Thus, if a dissent is carefully drafted and circulated among the bench before the final decision is taken, it can visibly improve the quality of the judgment by forcing the majority to respond to the arguments of the dissenters. In some cases, dissenting opinions may even be drafted, circulated, and never published: once the dissenters achieve their goal of ensuring that a certain argument is dealt with, and not merely disregarded, they may feel that there is no need to publish the dissent.²⁷

Resting authority on secrecy, instead of on a rational, exhaustive reasoning, has been considered as a sign of weakness. According to many authors, there is a clash between the force of reason and that of ignorance, and the former is much better suited for democratic societies. If a decision is to be "not only authoritarian but also authoritative,"²⁸ it must be amply explained and fully reasoned. Dissents might thus have "the paradoxical effect of legitimating the majority because it becomes evident that alternative views were considered even if ultimately rejected."²⁹ In such cases, publishing dissenting and concurring opinions might also offer some consolation to the losers, who will at least be sure that their arguments were carefully taken into account.³⁰

Additionally, scholars stress that the secrecy of dissents ensures the authority of the judgment by presenting it as seemingly unanimous, and thus, as if there was one - and only one - possible solution to the legal question at stake. Authority thus rests on the perceived need to convince citizens of the infallibility of the judiciary. However, no human institution is infallible, or is entitled to be believed so:³¹ hiding the existence of dissents, in particular when these are well-grounded, only serves to avoid well-deserved criticism. Moreover, forced unanimity seems to be based on an understanding of the law as a

²⁵ See e.g. Lécuyer, op. cit., p. 205; Kirby, op. cit., para. 8; Kelemen (forthcoming), op. cit.

²⁶ Ginsburg, op. cit., at 3.

²⁷ See e.g. Brennan, op. cit., at 430, with reference to former US Supreme Court Judge Brandeis; also see, with reference to the BVerfG, § 26(1) of the 1986 *Geschäftsordnung des Bundesverfassungsgerichts*, allowing judges to request a reopening of the deliberations when there is a dissenting opinion.

²⁸ J. H. H. Weiler, Epilogue: the judicial après Nice, in G. De Burca, J. H. H. Weiler (ed.s), *The European Court of Justice*, Oxford University Press 2001, 215-226.

²⁹ Weiler, op. cit. Also see Lécuyer, op. cit., p. 209; V. Perju, Reason and Authority in the European Court of Justice, in *Virginia Journal of International Law*, n. 49/2009, 308-376, at 323-325.

³⁰ See e.g. J. Lee, A defence of concurring speeches, in *Public Law*, 2009, 305-331, at 324; D. Grimm, Some Remarks on the Use of Dissenting Opinions in Continental Europe, in *Global Constitutionalism*, Yale Law School, 2008, p. I - 3.

³¹ See Kirby, op. cit., para. 7.

monolith, allowing for only one correct interpretation, and of judicial reasoning as a legal syllogism³² - an idea that has grown obsolete.

Finally, dissents would improve the quality of the judgment also through other means: by ensuring that judges are not compelled to try and reach a compromise at all costs, they safeguard the rational coherence and clarity of the final judgment. Even authors who argue against dissenting opinions admit that, in some cases, the search for consensus can result in unclear judgments, whose reasoning remains somewhat obscure due to the need to include certain statements to satisfy all the judges sitting on the bench. In such cases, it might be better to have a clearer judgment (whose reasons are comprehensible and easy to follow), joined by a dissent, rather than a "camel" judgment in which diverging views are included and it is unclear which one prevails.³³

1.3.4. Preserving collegiality

The need to preserve collegiality in the decision-making process is a twofold argument. Indeed, while some fear that judges, once given the possibility of writing their own individual opinion, will no longer fully engage in the deliberations with a view of reaching a decision that is acceptable to all of them, facts seem to point to the opposite conclusion. Indeed, in many of the States where separate opinions have been introduced, this has not led to a less cooperative attitude on the part of judges. For instance, in Germany, a legal culture favouring unanimous decisions, together with an understanding of the need to ensure that separate opinions are only used when it is truly impossible to come to an agreement between the judges, has led the BVerfG to maintain a very cooperative decision-making process.³⁴ Thus, if judges feel a strong duty of loyalty to their institution, the introduction of dissenting opinions does not necessarily weaken the collegiality of the deliberations. On the contrary, from a theoretical point of view, it has been argued that the possibility of issuing dissenting opinions can foster collegiality by reducing the risk that minority judges might develop a feeling of frustration because they are unable to make their views public.³⁵

1.3.5. Democracy and transparency

In many jurisdictions, when a judgment is delivered, it contains the words "in the name of the people," recalling that the power that the judges exert comes from the people. In order to ensure democratic accountability of such exercise of power, it is argued, it is neither necessary nor advisable to appoint judges by direct elections, since this would subject them to excessive political pressure and prevent them from carrying out their functions properly; on the contrary, it would be sufficient to render the decision-making process more transparent, allowing for internal criticism.³⁶ In a way, this argument is related to that concerning the authority of judgments. A democratic society should rest on the power of

³² W. Mastor, *op. cit.*, at 61-74.

³³ See Edward, *op. cit.*, at 557: "a disadvantage of the collegiate approach is that the judgment may simply cloak an inability to reach a clear decision. A camel is said to be a horse designed by a committee, and some judgments of the Court of Justice are camels."

³⁴ See M. T. Rörig, *L'opinione dissenziente nella prassi del Bundesverfassungsgericht (1994-2009)*, at http://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_12012010.pdf; Grimm, *op. cit.* For an opposite example see Peri, *op. cit.*, at 19: the use of separate opinions in the US Supreme Court shows that it is strongly divided along ideological lines.

³⁵ See L'Heureux-Dubé, *op. cit.*

³⁶ Lécuyer, *op. cit.*, 219-221, and authors cited therein. Also see H. Mayer, Die Einführung der "dissenting opinion" am Verfassungsgerichtshof, in *Journal für Rechtspolitik*, n. 7/1999, 30-32.

reason, not just on the formal authority of its institutions. The authority of judicial decisions also depends on their quality.³⁷

The argument related to the need to ensure a transparent, open exercise of power is particularly relevant when it comes to Constitutional Courts: citizens must be made aware of the reasons that led the Court to invalidate a law that had previously been adopted by their representatives in the Parliament. In the current debate over the governance of the European Union, the transparency argument is also sometimes applied to the CJEU.³⁸

1.3.6. Dialogue with future and lower courts

One powerful argument in favour of permitting the publication of individual opinions is that dissents are an appeal "to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed."³⁹ Dissents can thus play an essential role in the future development of the law: in some cases, they may eventually become the majority opinion, or influence it.

While this argument is persuasive in common law systems, where adherence to the principle of *stare decisis* requires lower courts to follow the binding precedents of higher courts, it is also relevant in civil law systems. Indeed, lower courts are expected to follow the interpretation of higher courts even in such systems, and Constitutional Courts' decisions are usually binding for all legal actors. Thus, in both systems a change in the interpretation of the law given by the highest court has an impact on its application by lower courts.

It is of course true that most dissenting opinions never find their way into a subsequent final judgment. However, dissents can play a positive role even in such a case, since they ensure that the decision-making process does not become rigid by infusing different ideas and methods into it and by pointing to the existence of alternatives.⁴⁰ Such a function is particularly precious because it guarantees that the decision-making process is, indeed, such: a process leading the judges to take the most convincing decision, not merely one where old decisions are confirmed without paying much attention to their rationale and persuasiveness. Thus, dissents (as well as concurring opinions) ensure that decisions are periodically reviewed and taken afresh by attaching to judgments interpreting the law the reasons why different interpretations might be warranted.

Moreover, dissents have been considered as a means to foster dialogue between courts, legislators and lawyers. Dissenting judges may point to additional, alternative arguments that lawyers, or lower courts, can incorporate into their next file to ensure its success; they may highlight the need to adopt certain amendments in the law by showing that it could be interpreted in a manner contrary to legislative intent; or they can attract the attention of the media, and public opinion, in order to build pressure on the legislator to change a law that the public perceives to be unfair.⁴¹ Dialogue - with lower courts, legislators, and possibly foreign courts that might need to apply the same body of law - serves to promote developments in the law and to ensure that the decisions that are taken are fully reasoned

³⁷ The democracy argument has also been used to support some very strong claims, such as the one according to which dissenting opinions (and the protection they grant to the judges' freedom of speech) would be inherent to a democratic society, while forced unanimity would be the natural choice of despotic regimes. W. O. Douglas, *The Dissent: a Safeguard of Democracy*, in *Journal of the American Judicature Society*, vol. 32/1948, 104-107, at 105.

³⁸ See e.g. H. Rasmussen, *Present and future European judicial problems after enlargement and the post-2005 ideological revolt*, in *Common Market Law Review*, 2007, 1661-1687; A. Alemanno, O. Stefan, *Openness at the Court of Justice of the EU: Toppling a Taboo*, Draft paper presented at the Transatlantic Conference on Transparency Research, Utrecht, 7-9 June 2012; and *infra*, chapter 3.3.6.

³⁹ C. Hughes, *The Supreme Court of the United States*, cited in L'Heureux-Dubé, *op. cit.*

⁴⁰ Brennan, *op. cit.*, at 437.

⁴¹ See e.g. Kirby, *op. cit.*; L'Heureux-Dubé, *op. cit.*; Ginsburg, *op. cit.*, at 6; M. Cartabia, *Europe and Rights: Taking Dialogue Seriously*, in *European Constitutional Law Review*, 5/2009, pp. 5-31.

and grounded. Separate opinions are part of such dialogue and help improve its quality and quantity.

1.3.7. Speediness of trials

The need to ensure the speediness of trials, avoiding unnecessary delays, is a persuasive argument against dissents, but it seems to prove too much. As has been noted, practical reasons, such as time and resource constraints, could be used to justify not only the absence of separate opinions, but even the adoption of short, summary judgments, with only superficial reasoning. However, this would ultimately go to the detriment of judicial efficiency by making judicial dialogue impossible.⁴² Thus, while there are good practical reasons to avoid the unnecessary waste of judicial resources, including time, such reasons cannot, by themselves, justify sacrificing transparency, openness and a fully grounded reasoning.

1.4. Provisional conclusions

The analysis of the arguments for and against the practice of separate opinions shows that there are no compelling reasons either **in favour** or **against** permitting their publication. An in-depth examination of the practice of States, and in particular of those EU Member States that only recently converted to prioritize publicity over secrecy, can help to understand how many States are following the two traditions and to establish whether the introduction of dissenting opinions in systems that did not know them has led to any negative consequence.

⁴² See in particular *Cartabia*, cit., at 29–31.

2. THE PRACTICE IN THE MEMBER STATES OF THE EUROPEAN UNION

This chapter will examine the practice of EU Member States as regards separate opinions. The analysis will take into account, first and foremost, the practice of national Constitutional Courts, but also that of ordinary Supreme Courts (courts of cassation), whenever different. As emerges from this chapter, of the 27 Member States, only seven maintain a complete ban on dissenting opinions. In the vast majority of States, judges, or at least constitutional judges, are given the possibility of publishing their separate opinion.

2.1. States where separate opinions are never allowed

Although there is a growing trend towards permitting constitutional judges to publish concurring and dissenting opinions, some Member States still prohibit it. However, even there, scholars have been discussing about the possibility of lifting the ban, often with the involvement and encouragement of the constitutional courts themselves. Thus, for instance, while Italian constitutional judges are not allowed to publish individual opinions, the Constitutional Court has held a number of seminars to obtain information about the practice of other courts. At one stage, this discussion seemed to be bound to lead to the adoption of new rules, allowing separate opinions.⁴³ Even if no concrete changes took place, the mere fact that proposals to introduce separate opinions were discussed shows that, even in States where they are not allowed, the topic is no longer a taboo.

2.1.1. Belgium

The Belgian judicial system is inspired by the principle of the secrecy of deliberations, which is interpreted as also prohibiting the publication of individual opinions. The Court of Cassation has recognized that the secrecy of deliberations is a principle of Belgian law and recently confirmed that judges are bound to preserve it. Moreover, the Court held that any violation of such secret, including by publishing the individual views of the judges on the decision to be taken, is punishable in accordance with art. 458 of the criminal code.⁴⁴ Although the oath that Belgian judges take does not explicitly mention the secrecy of deliberations,⁴⁵ the courts, including the Constitutional Court, strictly follow the principle: separate opinions are never published.⁴⁶

⁴³ See the papers available at <http://www.cortecostituzionale.it/convegniSeminari.do>.

⁴⁴ See Cour de Cassation, 29 May 1986, *Pars.* 1986, I, p. 1194, cited in F. Kutu, *L'impartialité du juge en procédure pénale*, De Boek-Larcier 2005, at 98-100; Cour de Cassation, Arrêt n. P.11.1750.N, 13 March 2012, para. 19, available at http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=F-20120313-1 (according to which "les projets de décision rédigés et les points de vue adoptés par les juges concernant la décision à prendre relèvent du secret du délibéré" - draft decisions and the opinions expressed by the judges on the decision to be taken are covered by the secrecy of deliberations).

⁴⁵ See B. Nelissen, *Judicial loyalty through dissent or why the timing is perfect for Belgium to embrace separate opinions*, in *Electronic Journal of Comparative Law*, 2011; Art. 2, *Décret du 20 juillet 1831 concernant le serment*.

⁴⁶ The Constitutional Court was initially called "*Cour d'Arbitrage*" and was only competent to judge over conflicts between different State powers; according to some authors, this explained the decision to ban separate opinions, given that the Court's main function was to pacify different institutions. However, the Court's competences have been expanded over time (and its name correspondingly amended to *Cour Constitutionnelle*) without any change to the secrecy surrounding its deliberations. See M.-F. Rigaux, *La Cour constitutionnelle et les opinions séparées*, 17 February 2012, available at <http://www.justice-en-ligne.be/article404.html>.

2.1.2. France

The French judicial system adheres to the principle of the secrecy of deliberations, which has been explicitly interpreted as prohibiting the publication of dissents.⁴⁷ The French *Conseil d'État* (the supreme administrative tribunal) has recognized that the principle of secrecy is a general principle of French public law, prohibiting even the presentation of a decision as "unanimous," since this would result in revealing the individual vote of each of the judges taking part in the deliberation.⁴⁸

The secrecy of deliberations is still proscribed by law, as well as forming part of the oath that judges must take when taking up judicial functions. The principle is binding not only on ordinary judges, but also on constitutional judges.⁴⁹ The latter also take an oath to preserve the secrecy of deliberations and of votes and not to publicly take a stand on any matter on which the Constitutional Council (*Conseil Constitutionnel*) has, or may in the future exert, jurisdiction.

The principle of the secrecy of deliberations and its application to constitutional judges has sometimes been contested, and it has recently been subjected to a broad debate. However, those who favour the introduction of separate opinions have remained quite isolated. Indeed, the wide majority of authors seem to consider such a change in the practice of the Council as unnecessary, if not potentially harmful for its authority, credibility and collegiality.⁵⁰ The same holds true with regard to ordinary judges: while the issue has also been discussed, in particular in the context of a critique to the style of the judgments of the Court of Cassation (often considered to be too short and summary) and with a view of ensuring more transparency and better legal reasoning, such debate has remained marginal.⁵¹ Thus, no reform seems forthcoming in the foreseeable future.

2.1.3. Italy

Italy follows the principle of the secrecy of deliberations and of individual opinions both at the ordinary and at the constitutional level: no judge is allowed to publish dissenting opinions. The principle of secrecy is expressly recognized by law, both in civil and in criminal trials; its importance is such that its violation is a crime.⁵² However, since 1988 (when the new law on judges' civil liability was enacted), dissents, and the grounds therefore, may be recorded, upon the dissenter's request, but are kept in a sealed envelope.⁵³ The same principles apply in front of the Court of Cassation and of the Constitutional Court.

The decision to extend the rule of "apparent unanimity" to constitutional rulings was never completely undisputed. The principle was discussed during the Parliamentary debate leading to the adoption of the law on the functioning of the Constitutional Court, and it has

⁴⁷ See W. Mastor, *op. cit.*, at 171 (citing an 1827 decision annulling a judgment to which a dissent had been joined). The principle was first recognized in the XIV century and was shortly abandoned between 1793 and 1795.

⁴⁸ See *Conseil d'Etat*, 17 nov. 1922, *Lebon* 1922 849, cited in J.-P. Ancel, *Les opinions dissidentes*, available at http://www.courdecassation.fr/IMG/File/opinions_dissidentes_jp_ancel.pdf; *Conseil d'Etat*, 15 October 1965, in Mazel, *Droit administratif*, 1965, n. 377, cited in Lécuyer, *op. cit.*, at 199.

⁴⁹ Art. 448, *code de procédure civile*, and art. 6, *ordonnance* 58-1270, cit. (for ordinary judges); art. 3, *ordonnance* 58-1067 portant loi organique sur le *Conseil constitutionnel*, 7 November 1958 (for constitutional judges).

⁵⁰ See *Nouveaux Cahiers du Conseil Constitutionnel*, n. 8/2000, at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/cahier-du-conseil-constitutionnel-n-8.52501.html> (in particular, the articles by Rousseau and by Luchaire and Vedel); Mastor, *op. cit.*, 177-283.

⁵¹ Mastor, *op. cit.*, at 180. On the style of the judgments of the Court of Cassation, compared to the US Supreme Court: M. Lasser, *Judicial deliberations. A comparative analysis of judicial transparency and legitimacy*, OUP 2004.

⁵² See Art. 276, *Code of Civil Procedure*; Art. 125(4), *Code of Criminal Procedure*. Art. 685 of the *Criminal Code* criminalizes the publication of the names and votes of judges sitting in criminal cases.

⁵³ See Art. 125(5), *Code of Criminal Procedure*, and Art. 131(2), *Code of Civil Procedure*, as amended by Law 117/1988 and subsequently by the Constitutional Court, Judgment n. 18/1989.

subsequently been challenged a number of times. Already in the 1960s, an influential author wrote a book in favour of dissenting opinions; subsequently, the possibility of allowing for dissents was discussed a number of times during the 1990s, and draft bills were presented in Parliament.⁵⁴ While the momentum for reform has faded, most scholars seem to support the introduction of separate opinions. Moreover, some amendments to the rules of procedure of the Court have led to the possibility of indirectly revealing internal dissents, although not the reasons therefore.⁵⁵

2.1.4. Luxembourg

Until 1997, judicial review was unknown in Luxembourg, as ordinary courts had rejected the idea that they might be allowed to review the compatibility of the laws with the Constitution. However, in 1996 the Constitution was amended, leading to the creation, one year later, of the Constitutional Court.⁵⁶

Although the Court is a modern creation, it still follows the traditional practice of secrecy of deliberations and votes. Thus, according to the 1997 Law on the organization of the Constitutional Court, the latter's deliberations are secret (Art. 12).⁵⁷ The principle of the secret of deliberations, interpreted as extending to individual opinions, also applies in front of all tribunals in Luxembourg.⁵⁸

2.1.5. Malta

The judicial system in Malta includes both ordinary courts and a separate Constitutional Court. All courts protect the secrecy of deliberations and of votes: decisions are taken by majority and "the decision of the majority shall form the judgment which shall be delivered as the judgment of the whole court."⁵⁹

2.1.6. The Netherlands

Since there is no Dutch Constitutional Court,⁶⁰ the only relevant practice with regard to separate opinions is that of ordinary courts. Dutch tribunals traditionally follow the principle of secrecy of deliberations, which is also endorsed by legislation and is interpreted as prohibiting the publication of individual opinions.⁶¹ However, the principle has been debated

⁵⁴ See C. Mortati, *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, Giuffrè 1964; G. Zagrebelsky, *La pratique des opinions dissidentes en Italie*, in *Nouveaux Cahiers du Conseil Constitutionnel* n. 8/2000, at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-italie.52545.html>; also see the acts of the seminar held at the Constitutional Court in 1993: A. Anzon (ed.), *L'opinione dissenziente*, Giappichelli 1995.

⁵⁵ When the judge who drafts the final decision is not the one who had been appointed as rapporteur, this is seen as a sign of his disagreement with the outcome. See A. Rauti, *Le nuove "norme integrative" della Corte fra collegialità e celerità del giudizio costituzionale*, in *Forum di quaderni costituzionali*, available at http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0168_rauti.pdf.

⁵⁶ See e.g. J. Gerkrath, *La Jurisprudence de la Cour Constitutionnelle du Luxembourg 1997-2007*, Pasicrisie luxembourgeoise 2008; N. Kuhn, E. Rousseaux, *La Cour constitutionnelle luxembourgeoise*, in *Revue Internationale de Droit Comparé*, n. 53/2001, 453-482.

⁵⁷ See Art. 12, Loi portant organisation de la Cour Constitutionnelle (adopted on 27 July 1997).

⁵⁸ Kuhn, Rousseaux, op. cit., at 467.

⁵⁹ See Article 217 of the Code of Organisation and Civil Procedure of Malta. On the Maltese judicial system, see Constitutional Court of the Republic of Malta, Report: the relations between the Constitutional Courts and the other national courts, available at <http://www.confcoconsteu.org/reports/rep-xii/Malta-EN.pdf>

⁶⁰ Indeed, the Dutch legal system does not provide for any form of constitutional review - on the contrary, Article 120 of the Constitution explicitly forbids judicial review of the compatibility of the laws enacted by Parliament with the Constitution: see P. van Dijk, *Constitutional review in the Netherlands*, in *Liber Amicorum Antonio La Pergola*, Istituto Poligrafico e Zecca dello Stato, 2009; G. van der Schyff, *Constitutional Review by the Judiciary in the Netherlands: A Bridge Too Far?*, in *German Law Journal*, n. 11/2010, 275-290.

⁶¹ See Art. 7(3), Wet op de rechterlijke organisatie (18 April 1827 and subsequent amendments); N. F. van Manen, *The secret of the Court in the Netherlands*, in *Seattle University Law Review* n. 24/2000, 568-576; M. Malsch, *Democracy in the Courts: Lay Participation in European Criminal Justice Systems*, Ashgate 2009, at 88.

a number of times. While reform does not seem to be on its way, adherence to secrecy is not uncontroversial.⁶²

2.1.7. Austria

Austria strictly adheres to the secrecy of deliberations, both at the ordinary and at the constitutional level. According to the law on the Constitutional Court, its deliberations and votes are not public. A similar prohibition is also established in the law on the administrative court, and the other courts follow the same principle.⁶³ While dissenting judges are allowed to have their views, and the grounds therefore, recorded, these are kept secret: only higher courts (in the case of ordinary courts) and colleagues have access to the private registers.⁶⁴

This tradition of secrecy, however, has not gone unchallenged. Since the 1960s, scholars have repeatedly called it into question, and many authors seem to support a reform, while the Constitutional Court is, on the whole, against such a change.⁶⁵

2.2. States where separate opinions are allowed: varying practices

This sub-chapter will describe the practice of those EU Member States where dissenting opinions are allowed. While a distinction could be drawn between States where all judges have the right to publish their dissent and States where this right is reserved for constitutional judges, presenting their practice separately seems hardly useful, given that in some countries constitutional review is diffuse. In this case, the same judges exert both ordinary and constitutional functions, depending on the nature of the case, and there is no specialized Constitutional Court. This sub-chapter will present the practice of all 20 Member States where individual opinions are allowed, and it will specify, as far as possible, the scope of application of the rules on separate opinions.

2.2.1. Bulgaria

Bulgaria, like most Central and Eastern European countries, has adopted a centralized system of judicial review; its Constitutional Court was created in 1991. Dissenting and concurring opinions are expressly mentioned in the Regulations on the Organization of the Activities of the Constitutional Court. According to Article 32, the Court renders most of its decisions by open vote: justices who do not agree with a decision, or with a resolution with which a motion is denied review, may sign them but attach a written dissenting opinion. Additionally, justices forming part of the majority may also publish concurring opinions. Separate opinions are, however, not permitted when the decision is to be adopted by secret ballot, that is, for decisions regarding the judges' immunity or incapacity or the President's impeachment. Constitutional Court decisions are published in the Official Journal within

⁶² In 1973, the Dutch Lawyers Association discussed the desirability of publishing dissenting opinions, with the vast majority of participants favouring it (see van Manen, op. cit., at 570). For a more recent discussion, see M. A. Loth, *Repairing the engine of Cassation: Form and function of the adjudication of the Hoge Raad and its Parket*, at <http://www.pembaruanperadilan.net/v2/content/2012/04/Marc-Loth-Repairing-The-Engine-of-Cassation.doc>.

⁶³ Verfassungsgerichtshofgesetz (VfGG), BGBl. 85/1953, § 30; Verwaltungsgerichtshofgesetz, § 15. See H. Schäffer, *Die Einführung der "Dissenting Opinion" am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre*, in *Journal für Rechtspolitik*, n. 7/1999, 33-39.

⁶⁴ See R. Machacek, *Die Einrichtung der "Dissenting Opinion" im internationalen Vergleich*, in *Journal für Rechtspolitik*, n. 7/1999, 1-9.

⁶⁵ See Mayer, op. cit., at 30; *contra*, B. Bierlein, Paper presented at the 2011 World Conference on Constitutional Justice, available at http://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Bierlein_E.pdf, p. 10. In 1998, a parliamentary inquiry on dissenting opinions took place, leading to the publication of a number of papers addressing this issue in the *Journal für Rechtspolitik*, n. 7/1999.

fifteen days of their adoption, together with the reasons and any dissenting and concurring opinion.⁶⁶

Publication of dissents is also allowed in ordinary courts: minority judges must sign the majority ruling but may attach to it a reasoned dissent.⁶⁷

2.2.2. Czech Republic

The Czech Republic adopted the law on the Constitutional Court on 16 June 1993, shortly after the division of Czechoslovakia. According to Articles 14 and 22, a judge who disagrees with a decision, or with its reasoning, has the right to have his/her individual opinion noted in the record of discussions and appended to the decision with his name stated. Separate opinions are published in the Court's own Reporter, not in the Collection of Laws, where there is only a note at the bottom of the judgment mentioning their existence.⁶⁸

Dissents are not published in ordinary courts.⁶⁹

2.2.3. Denmark

Denmark follows the tradition of diffuse judicial review: all courts may review the compatibility of existing legislation with the Constitution, and there is no centralized Constitutional Court, although the Supreme Court has the last word on constitutional matters.⁷⁰

As regards dissenting opinions, the Danish system has evolved slowly. Traditionally, the judges' votes and opinions were secret, but in the 1930s a new system was enacted allowing for the courts to include anonymous dissenting opinions by mentioning the views of the dissenters in the majority judgment.⁷¹ This compromise solution has subsequently been abandoned and, since 1958, decisions are fully transparent and open. Hence, in all collegiate courts, individual opinions are published as a part of the judgment, with an indication of the name of the judge issuing them. While the justices of the Supreme Court make often use of their right to publish a separate opinion, lower judges do so more rarely and, consequently, their dissents are often interpreted as an invitation to appeal before the Supreme Court.⁷²

⁶⁶ E. Tanchev, *Constitutional control in comparative and Bulgarian perspective*, Paper presented at the World Conference on Constitutional Justice, available at http://www.venice.coe.int/WCCJ/Papers/BUL_Tanchev_E.pdf. The regulations are available, in English, at <http://www.constcourt.bg/Pages/LegalBasis/default.aspx?VerID=224>.

⁶⁷ CCJE, Questionnaire for 2008 CCJE Opinion concerning the quality of judicial decisions: Reply submitted by the delegation of Bulgaria, at <https://wcd.coe.int/ViewDoc.jsp?id=1242255&Site=COE>; ACA-Europe, Administrative Justice in Europe, Report for Bulgaria, at http://www.juradmin.eu/en/eurtour/i/countries/bulgaria/bulgaria_en.pdf.

⁶⁸ See the Constitutional Court Act, 182/1993 Sb., available at http://www.concourt.cz/view/const_court_act; K. Kelemen, *The road from common law to East-Central Europe: the case of the dissenting opinion*, in P. Cserne, M. Könczöl, *Legal and Political Theory in the Post-National Age*, Peter Lang 2011, 118-134, at 130.

⁶⁹ See V. Novotny, Report for the Czech Republic, Administrative Justice in Europe, available at http://www.juradmin.eu/en/eurtour/i/countries/czech/czech_en.pdf.

⁷⁰ While the courts have affirmed their power to review the constitutionality of the laws, thus creating judicial review, judgments in which they have declared a law to be unconstitutional are exceptional. Supreme Court of Denmark, *Report for the XIV Congress of the Conference of European Constitutional Courts*, 2007, at http://www.confcoconsteu.org/reports/rep-xiv/report_Denmark_en.pdf (mentioning the existence of only one judgment by the Supreme Court, adopted in 1999, declaring the unconstitutionality of a law); J. Steenbeek, *The Kingdom of Denmark*, in *Constitutional Law of 15 EU Member States*, op. cit., at 172 f.

⁷¹ See E. Hambro, *Dissenting and Individual Opinions in the International Court of Justice*, in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, n. 17/1956, 229-248, at 232; Mastor, op. cit., 132.

⁷² O. Due, *Danish preliminary references*, in D. O'Keefe, A. Bavasso (Ed.s), *Judicial review in European Union law*, Kluwer 2000, p. 363-377 at 366.

2.2.4. Germany

Germany is one of the best known examples of a country following the civil law tradition but allowing constitutional judges to issue separate opinions. While judges sitting in ordinary courts are bound to respect the secrecy of deliberations and votes, constitutional judges represent an exception to this rule.

Historically, Germany has not always adhered to the principle of secrecy; however, since the XIX century this has become a general rule.⁷³ When the Constitutional Court was created, separate opinions were not foreseen: a draft proposal that would have granted minority judges the right to publish their dissent was rejected. Dissenting opinions emerged through practice. In some instances, the Court made public the results of the vote, breaching the appearance of unanimity while keeping secret the identity, and reasons, of minority judges. In 1966, a decision was taken with a 4 to 4 vote for the first time: the court therefore decided to incorporate the views of both groups of judges in the judgment. The same happened again in 1969, eventually leading to a change in the law.⁷⁴

In its current text, as amended in 1970, the law on the Constitutional Court explicitly grants minority judges the right to publish their separate opinion (*Sondervotum*).⁷⁵ While this right was initially used extensively (in the first year after the amendment, 17 separate opinions were issued out of a total of 72 judgments), enthusiasm for its use subsequently decreased. Nowadays, a separate opinion is attached to approximately 6% of all decisions, usually those on the most controversial cases (involving sensitive political issues, such as abortion or asylum, or complex legal questions).⁷⁶

If the institution of separate opinions was initially quite controversial, it is now well accepted and its usefulness is no longer questioned: critiques target mostly the style and manner in which specific dissents are drafted, not the institution itself. German lawyers agree that judges are bound by a duty of loyalty to the Court and Chamber of which they are part, and that highly polemic opinions are to be avoided. At the same time, the BVerfG seems to have found a laudable compromise between secrecy and widespread use of dissents by holding to its tradition of collegiality in the decision-making process. Judges make strenuous efforts to reach a common solution and adopt a unanimous decision; however, when such efforts do not succeed, dissents do not need to be hidden, but can be made public, allowing for a more coherent reasoning in the majority judgment and ensuring transparency.⁷⁷ Moreover, in a few instances dissents have proven useful as a basis on which subsequent changes in the interpretation of the Constitution could be built.⁷⁸

2.2.5. Estonia

Estonia allows the publication of judicial dissents in nearly all its judiciary. While the country has no specialized Constitutional Court, constitutional review is exercised by a special section of the Supreme Court.⁷⁹

According to the Constitutional Review Court Procedure Act,⁸⁰ separate opinions may be attached to final judgments and to opinions on the interpretation of the Constitution.

⁷³ See e.g. F. Fernández Segado, La recepción del Sondervotum en Alemania, in *Revista Iberoamericana de Derecho Procesal Constitucional*, n. 12/2009, pp. 77-119.

⁷⁴ See Mastor, op. cit., at 122; Walters, op. cit.

⁷⁵ See § 30(2) of the Gesetz über das Bundesverfassungsgericht.

⁷⁶ Walters, op. cit.; Rörig, op. cit., at 2-4. Also see Annex 1.

⁷⁷ Grimm, op. cit., at I-2.

⁷⁸ See D. Hennecke, § 30, in D. Umbach, T. Clemens, F.-W. Dollinger (Ed.s), *Bundesverfassungsgerichtsgesetz. Mitarbeiterkommentar*, Müller 2005, 484-490.

⁷⁹ Information on Estonia is taken from Laffranque (2003), op. cit., unless otherwise specified. Information was also provided by the European Parliament Library.

⁸⁰ Adopted on 13 March 2002, and available at <http://www.legaltext.ee/text/en/XX00014.htm>.

Decisions are adopted in accordance with the secrecy of deliberations by a simple majority vote. Nonetheless, according to § 57(5) and 59(5), "a judge who disagrees with the opinion or with the reasons therefore has the right to annex a dissenting position to the opinion. The dissenting position may be shared. The dissenting position must be submitted by the time of pronouncement of the opinion and it shall be signed by all judges who hold a dissenting position."

Additionally, dissenting opinions may be published both in civil and in administrative trials. Criminal trials are somewhat different, since the Code of Criminal Procedure allows judges to have their dissent recorded, not - however - published.

In practice, dissenting opinions have been published by judges sitting in all sections of the Supreme Court, although most often in the constitutional section. Such opinions are published together with the judgment, both in the Official Journal and on the website of the Court. At a lower level (in second instance courts), dissenting opinions are also allowed but they are used more rarely, due to the Courts' heavy caseload and, possibly, to the fact that issues of principle (on which dissents are more likely to arise) are finally settled by the Supreme Court.

2.2.6. Ireland

As regards dissenting opinions, the Irish legal system represents a rare exception, since the Constitution explicitly prohibits the publication of separate opinions in most constitutional matters. Thus, while ordinary judges, and the Supreme Court when exerting ordinary jurisdiction, can issue separate opinions,⁸¹ constitutional cases follow a stricter procedure. According to Articles 26 and 34 of the Constitution, the Supreme Court, when deciding on the constitutionality of any law upon the President's request, or upon appeal from a lower court, issues a single opinion. No other opinion, "whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed."⁸²

The absence of dissenting opinions in constitutional matters has been criticized by Irish scholars, who see it as a serious obstacle hindering the development of the Court's constitutional jurisprudence and a limitation on the possibility of a more dynamic, less restrictive interpretation of the Constitution.⁸³

2.2.7. Greece

In Greece, constitutional review is diffuse. Any court may rule on the compatibility of a law with the Constitution, and, if disputes on constitutional interpretation arise between the Highest Courts, the Supreme Special Court is convened to settle them.⁸⁴

The publication of dissenting opinions is mandated by the Constitution. Article 93(3) provides that "Publication of the dissenting opinion shall be compulsory. A law shall specify matters concerning the entry of any dissenting opinion into the minutes as well as the conditions and prerequisites for the publicity thereof."⁸⁵ The exceptionality of having a constitutional provision devoted to requiring publication of dissents is striking, and

⁸¹ In some cases, they may even follow the practice of *seriatim* opinions: see G. P. J. McGinley, *The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts*, in *Adelaide Law Review*, n. 11/1987, 203-214; Laffranque (2003), *op. cit.*, at 165.

⁸² However, the Supreme Court interprets Articles 26 and 34, in coordination with Article 50, as referring only to the laws enacted after the entry into force of the Constitution: separate opinions are therefore allowed when the Court decides on the constitutionality of pre-1937 laws. See A. K. Koekkoek, *Ireland*, in *Constitutional Law of 15 EU Member States*, *op. cit.*, at 465.

⁸³ See S. O' Tuama, *op. cit.*, and the authors cited there.

⁸⁴ See A. Calogeropoulos, *The Hellenic Republic*, in L. Prakke, C. Kortmann (Ed.s), *Constitutional Law of 15 EU Member States*, Kluwer 2004, 369-418.

⁸⁵ Translation available on www.oceanalaw.com.

especially so since this rule applies regardless of the type of adjudication (constitutional or ordinary) or Court. However, dissents are anonymous: the judgment must include the number of dissenting votes, and their reasons, without mentioning the identity of minority judges.⁸⁶

2.2.8. Spain

In Spain, a traditional civil law country, all judges have a right to publish dissenting opinions. Historically, Spain did not follow the tradition of secrecy to the same extent as France, although most judgments were taken without any possibility of published dissents. On the one hand, dissenting judges could have their vote recorded in a separate register, which the president of the tribunal had sworn to keep secret. The practice of the so-called *voto reservado* was maintained in the Code of Civil Procedure and in the Code of Criminal Procedure until recently. The votes, and the grounds therefore, could only be disclosed to the judges forming part of the Supreme Court in case of appeal. On the other hand, there were also some (isolated) cases in which separate opinions were published.⁸⁷

The 1978 Constitution explicitly provides for the publication of dissenting opinions together with the judgment of the *Tribunal Constitucional* (Art. 164): hence, the right of constitutional judges to publish their dissents is entrenched in the Constitution. This rule, which was not included in the original draft of the Constitution, was adopted unanimously, because it was considered to be a guarantee of transparency and a limit to the powers of the majority.⁸⁸ The Organic Law on the Constitutional Tribunal further specifies that separate opinions include both dissenting and concurring opinions.⁸⁹

Subsequently, the possibility of adopting separate opinions has also been extended to ordinary courts. Since 1985, Art. 260 of the *Ley Orgánica del Poder Judicial* (Organic Law on the Judiciary) allows ordinary judges to publish their separate opinion.⁹⁰ This reform has been triggered by the practice of constitutional judges, as well as by a long-established tradition of public dissents.

The use of separate opinions by Spanish Constitutional judges has been growing constantly, attaining a level of around 3% of the total number of judgments in 1992-1993 and around 4% of all judgments adopted between 1980 and 2008.⁹¹ While some judges tend to avail themselves of the possibility of drafting a separate opinion more often than others, Presidents have tended not to publish individual opinions during their mandate, even when they had previously done so. Separate opinions are usually attached to judgments deciding on very sensitive issues. According to scholars, the use of separate opinions has not affected the credibility or authority of the Constitutional Tribunal, although at times it led the media to "politicize" an issue.⁹² Moreover, in some cases separate

⁸⁶ In accordance with Law no. 184/1975, Article 35(1). Also see A. M. Mavčič, *Importance of the dissenting and concurring opinions (separate opinions) in the development of the Constitutional and judicial review with a special reference to the Slovenian practice*, available at [http://www.venice.coe.int/docs/2010/CDL-JU\(2010\)016-e.pdf](http://www.venice.coe.int/docs/2010/CDL-JU(2010)016-e.pdf).

⁸⁷ Mastor, op. cit., 114-117. Also T. Freixes, *La pratique des opinions dissidentes en Espagne*, in *Nouveaux Cahiers du Conseil Constitutionnel*, 2000, available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-espagne.52543.html> (citing the statute of the Constitutional Court of the Second Spanish Republic).

⁸⁸ Mastor, op. cit., at 118.

⁸⁹ See Ley Orgánica 2/1979 del Tribunal Constitucional, Art. 90, as amended by the Ley Orgánica 6/2007.

⁹⁰ See Art. 260, Ley Orgánica 6/1985 del Poder Judicial; contrary to the practice in many States (e.g. the USA), all judges must sign the final decision, even if they dissent. Moreover, according to Art. 206, if the judge rapporteur does not agree with the majority, he must refuse to draft the judgment and write a reasoned dissent.

⁹¹ See Freixes, op. cit. The numbers, however, are much higher if one considers only the decisions adopted in the form of judgment (*sentencia*), ranging between 16 and 20% since 2004. For more data, see Annex 2 and C. Guerrero Picó, *L'opinione dissenziente nella prassi del Tribunal Constitucional spagnolo (1994-2009)*, at www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziante_12012010.pdf.

⁹² See Freixes, op. cit.

opinions subsequently became the majority opinion, leading to developments in the interpretation of the law.

2.2.9. Cyprus

In Cyprus, the Supreme Court currently also exerts constitutional jurisdiction, notwithstanding the constitutional provisions that foresee a separate constitutional court. Judges are allowed to publish dissenting opinions.⁹³

2.2.10. Latvia

Latvia has followed the system of centralized judicial review, with a separate Constitutional Court. While ordinary judges are not allowed to publish their dissent when deciding collegiately, constitutional judges have this option. According to the Constitutional Court Law, judgments are adopted by majority and deliberations take place *in camera*. However, any judge who has voted against the opinion expressed in a judgment "shall express in writing his dissenting opinion that shall be appended to the case but not declared in the court sitting" (Section 30). In accordance with the Court's Rules of Procedure, dissenting opinions must be written, signed and presented to the Chairperson of the Court session within two weeks (at the latest) from the announcement of the judgment (Rule 221). While judgments are served on the parties of the case and published on the Official Journal within five days of their adoption, dissenting opinions are first circulated among all judges who sat on the deciding bench (Rule 222) and are only published subsequently and in bulk.⁹⁴

2.2.11. Lithuania

Lithuania has followed the German model of a centralized Constitutional Court. However, it initially did not allow constitutional judges to publish separate opinions, while ordinary judges were granted this possibility.⁹⁵ According to the original text of the 1993 law on the Constitutional Court, neither the judges nor the registrar could publish the votes and opinions expressed during the deliberation of constitutional judgments.⁹⁶

The law on the Constitutional Court was amended in 2008 and it now allows the publication of separate opinions. According to Article 55, "a justice of the Constitutional Court, who disagrees with an act adopted by the Court, shall have the right to set forth in writing his reasoned dissenting opinion within three working days of the announcement of the corresponding act in the courtroom. The dissenting opinion of the justice shall be attached to the case and the parties participating in the case and mass media shall be informed about this fact." In accordance with the Rules of Procedure, dissents are circulated among all constitutional judges; the reasoned dissenting opinion is attached to the case and

⁹³ See ACA-Europe, Administrative Justice in Europe, Report for Cyprus, at http://www.juradmin.eu/en/eurtour/i/countries/cyprus/cyprus_en.pdf. On the judicial system in Cyprus, see http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLfaq_en/DMLfaq_en?OpenDocument; A. Markides, Republic of Cyprus, in Kortmann, Fleuren, Voermans (Ed.s), *Constitutional Law of 10 EU Member States*, Kluwer 2006, I.

⁹⁴ See the Constitutional Court Law, adopted on 9 June 1996 and available at <http://www.satv.tiesa.gov.lv/?lang=2&mid=9>, and the Rules of Procedure, available at <http://www.satv.tiesa.gov.lv/?lang=2&mid=10>. Also see Kelemen (2011), op. cit., at 126.

⁹⁵ See V. Staugaityte, Dissenting opinion in the constitutional justice: Collegiality of the courts vs personal independence of the judge, in *Jurisprudencija*, n. 9/2008, p. 125-131. Also see Article 63 (2) of the Civil procedure Code, allowing a judge who does not agree with the majority opinion to express his written dissenting opinion (information provided by the European Parliament Library).

⁹⁶ See art. 53 of the law, cited in Mastor, op. cit., 148. The ban on dissents at the Constitutional Court may have been due to the fear that they would prevent the Court from obtaining the authority needed to resist public pressure: see Kelemen (forthcoming), op. cit.; Laffranque (2003), op. cit., at 165.

published on the Internet website of the Constitutional Court, while the parties and the media are informed of its existence.⁹⁷

2.2.12. Hungary

The Hungarian Constitutional Court was created in 1990, following the German model. Consequently, constitutional judges are allowed to deliver their individual opinions, which are published together with the final judgment.⁹⁸ Section 66 of the Act on the Constitutional Court (adopted in 2011, as a result of the recent constitutional reforms) explicitly allows for the publication of individual opinions, which may be either dissenting or concurring.⁹⁹ Separate opinions (that may be drafted by all dissenting judges collectively, or by one of them who is then joined by others) may be delivered in a period of four days after the final decision has been adopted: the judgment is only published after this period has elapsed, so that any dissenting opinion can be attached to it.

According to scholars, dissents reflect the political and ideological views of the judges who draft them, and in many cases they influence the subsequent case-law of the Court, although they are never expressly cited. The possibility of issuing dissenting opinions has been widely used in practice.¹⁰⁰

In the ordinary courts, dissents are not published, although they may be recorded in a sealed envelope. Higher courts have access to the dissent in case of appeal.¹⁰¹

2.2.13. Poland

The Polish Constitutional Tribunal was created in 1982, by constitutional amendment, but its decisions only have final, binding effect since 1997. Article 190 of the Constitution provides that decisions of the Constitutional Tribunal are taken by majority, while the Constitutional Tribunal Act of 1 August 1997 details the rules applicable to dissenting opinions.¹⁰² According to Article 68, while the judgment must be signed by all judges sitting on the bench, including those forming part of the minority, any dissenting judge may, before the announcement of the decision, express an individual opinion, explained in writing and indicated in the judgment. Such opinion may also refer to the reasoning only: thus, Article 68 provides a firm legal basis for both dissenting and concurring opinions.

Separate opinions may also be issued in ordinary courts: dissenting judges are allowed to publish their *votum separatum*.¹⁰³

⁹⁷ See Article 55 of the Law on the Constitutional Court of the Republic of Lithuania, as amended on 11 November 2008, available at http://www.lrkt.lt/Documents3_e.html; Rules 163, 164 and 165 of the Rules of the Constitutional Court of Lithuania, available at http://www.lrkt.lt/Documents4_e.html.

⁹⁸ Information on Hungary is taken from L. Trosanyi, A. Horvath, La pratique des opinions dissidentes en Hongrie, in *Nouveaux Cahiers du Conseil Constitutionnel*, 2000, at www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/nouveaux-cahiers-du-conseil/cahier-n-8/la-pratique-des-opinions-dissidentes-en-hongrie-les-opinions-individuelles-en-hongrie-une-institution.52544.html unless otherwise specified.

⁹⁹ The Act is available at <http://www.mkab.hu/jog/ab-torveny>. Previously, separate opinions were allowed on the basis of Art. 26 of the Law on the Constitutional Court.

¹⁰⁰ K. Kelemen (2011), op. cit.

¹⁰¹ See Act III of 1952 on the Code of Civil Procedure (and subsequent amendments), Art. 214(2); also see P. Darak, Report for Hungary, Administrative Justice in Europe, available at http://www.juradmin.eu/en/eurtour/i/countries/hungary/hungary_en.pdf.

¹⁰² The text of the Act is available at <http://www.trybunal.gov.pl/eng/index.htm>. The text of the Constitution is available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. Also see Mastor, op. cit., at 141.

¹⁰³ See CCJE, Questionnaire for 2008 CCJE Opinion concerning the quality of judicial decisions: Reply submitted by the delegation of Poland, at <https://wcd.coe.int/ViewDoc.jsp?id=1263345&Site=COE>; ACA-Europe, Administrative Justice in Europe, Report for Poland, at http://www.juradmin.eu/en/eurtour/i/countries/poland/poland_en.pdf.

2.2.14. Portugal

In Portugal, both constitutional and ordinary judges may deliver a dissenting opinion, in accordance with a long-established tradition.¹⁰⁴

The judges of the Constitutional Tribunal have the right to table their reasons for a dissenting vote (*voto vencido*, literally, defeated vote), in accordance with Article 42(4) of Law 28/1982.¹⁰⁵ If the dissenter had been appointed as judge rapporteur, the President will usually appoint another judge to draft the final judgment of the majority.

As far as ordinary judges are concerned, the Codes of Civil Procedure and of Criminal Procedure also allow them to publish their separate opinion, which is attached to the decision of the majority.¹⁰⁶

2.2.15. Romania

After the fall of the Communist regime, Romania adopted the centralized system of judicial review: the Constitutional Court was set up by the 1989 Constitution. The Court initially followed the Italian and French models, and separate opinions were not allowed. However, they have been introduced over time. Currently, constitutional judges may deliver a dissenting or concurring opinion, which is published in the Official Journal together with the decision.¹⁰⁷

Separate opinions are also allowed in ordinary courts, according to the Code of Civil Procedure (Art. 258).¹⁰⁸

2.2.16. Slovenia

Judges in the Slovenian Constitutional Court have the right to publish separate opinions, as expressly stated in the Constitutional Court Act and in the Rules of Procedure of the Court.¹⁰⁹ According to Art. 40 of the Constitutional Court Act, the Court decides at a closed session; any judge who does not agree with a decision, or its reasoning, may declare that he will write a separate opinion. The Rules of Procedure further specify that separate opinions may take two forms (dissenting and concurring opinions) and may also be submitted by a group of judges, or by a judge joined by others. Separate opinions, once drafted, are submitted to the other constitutional judges, who may comment within three days; replies to such comments are also allowed (Art. 72).

Separate opinions are usually served on the parties together with the decision or order to which they are attached. When the latter is served immediately, mention must be made of the existence and identity of the dissenters. As regards publication, if a decision or an order is published in the Collected Decisions and Orders of the Constitutional Court, the website of the Constitutional Court, or other computer databases, separate opinions are published

¹⁰⁴ Reports on the tradition, and widespread use, of the *voto vencido* can be found in K. H. Nadelmann, The Judicial Dissent: Publication v. Secrecy, in *American Journal of Comparative Law*, n. 8/1959, 415-432, at 421.

¹⁰⁵ Lei 28, 15 November 1982, Organização, Funcionamento e Processo do Tribunal Constitucional. In some cases the Tribunal has noted whether a particular justice voted in the minority even when he had not issued a reasoned dissent: see C. Hanretty, Dissent in Iberia: The ideal points of justices on the Spanish and Portuguese Constitutional Tribunals, in *European Journal of Political Research*, n. 51/2012, 671-692.

¹⁰⁶ See in particular Código de Processo Civil, Art. 653(3) and 713(1); Código de Processo Penal, Art. 372.

¹⁰⁷ See Kelemen (forthcoming), op. cit.; Art. 59 of Law n. 47 of 1992 on the Organisation and Operation of the Constitutional Court, available at <http://www.ccr.ro/default.aspx?lang=EN>; T. Toader, V. Puskás Zoltán, National report presented at the 2011 World Conference on Constitutional Justice, available at http://www.venice.coe.int/WCCJ/Rio/Papers/ROM_Toader_E.pdf.

¹⁰⁸ See ACA-Europe, Administrative Justice in Europe, Report on Romania, available at http://www.juradmin.eu/en/eurtour/i/countries/romania/romania_en.pdf.

¹⁰⁹ Available at (respectively) <http://www.us-rs.si/media/constitutional.court.act.full.text.pdf> and <http://www.us-rs.si/media/the.rules.of.procedure-2012.pdf>.

together with it. However, they are not published in the Official Journal, arguably because it would be too expensive, as the Court must pay for publication.¹¹⁰

The publication of separate opinions is limited to constitutional judges: ordinary judges cannot publish their dissent.¹¹¹

2.2.17. Slovakia

Slovakia initially adhered to the Czechoslovak tradition of secrecy of deliberations. Consequently, dissenting judges had the right to have their dissent registered in the voting record, but this was kept secret and not disclosed to the public. Since August 2000, however, the practice has been amended and dissenting opinions may now be published. Change was prompted by an important precedent in which a decision was so controversial that one of the Justices sitting on the bench insisted on having his dissent published and, after having been denied this possibility, published a critical case note in a law review.¹¹² According to § 32 of the Act on the Organisation of the Constitutional Court,¹¹³ a judge who disagrees with a decision has the right to have his/her dissenting opinion briefly noted in the record on voting, as well as submitted and published.

In ordinary courts, while judges are allowed to have their dissent registered, and, in cases on appeals, published, this possibility is never used in practice.¹¹⁴

2.2.18. Finland

In Finland, judicial review has long remained unknown, since the task of reviewing the constitutionality of draft laws was considered as pertaining exclusively to the Constitutional Law Committee of Parliament. Recently, however, the Constitution has been amended to provide for judicial review when laws manifestly conflict with it. Such review is to be carried out by ordinary judges, since the Constitution does not set up a special constitutional court.¹¹⁵

Finnish judges are allowed to publish separate opinions; the same rules regarding individual opinions apply when they carry out ordinary judicial functions and constitutional review.¹¹⁶

2.2.19. Sweden

The Swedish legal system adheres to the model of diffuse constitutional review, as explicitly foreseen by the Constitution. All ordinary courts may test the constitutionality of any law, and there is no centralized constitutional court.¹¹⁷ Judges may issue separate opinions in all cases, whether exerting ordinary or constitutional jurisdiction.¹¹⁸

¹¹⁰ See Kelemen (2011), op. cit., at 128-129; Mavčič, op. cit., at 7-8. The Rules of Procedure are available at <http://www.us-rs.si/en/about-the-court/legal-basis/the-rules-of-procedure-of-the-constitutional-court/>.

¹¹¹ See ACA-Europe, Administrative Justice in Europe, Report for the Republic of Slovenia, available at http://www.juradmin.eu/en/eurtour/i/countries/slovenia/slovenia_en.pdf.

¹¹² See Mastor, op. cit., at 142; Kelemen (2011), op. cit., at 127.

¹¹³ Act on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges, adopted on 20 January 1993 and subsequently amended, available at http://portal.concourt.sk/download/attachments/3604914/a_38_1993.pdf.

¹¹⁴ See ACA-Europe, Administrative Justice in Europe, Report from the Slovak Republic, available at http://www.juradmin.eu/en/eurtour/i/countries/slovakia/slovakia_en.pdf.

¹¹⁵ See art. 106, as amended in 1999, available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (English translation); J. Lavapuro, T. Ojanen, M. Scheinin, Rights-based constitutionalism in Finland and the development of pluralist constitutional review, in *International Journal of Constitutional Law* n. 9/2011, 505-531.

¹¹⁶ See Mastor, op. cit., 132; R. M. Mosk, T. Ginsburg, Dissenting opinions in international arbitration, in M. Tupamäki (Ed.), *Liber amicorum Bengt Broms*, Pms Print Oy 1999, 259-284.

¹¹⁷ See Art. 14, chapter 11, of the Instrument of Government, which allows for judicial review if a law violates the Fundamental Laws; however, cases in which laws have been declared to be constitutionally invalid are very rare.

2.2.20. United Kingdom

In the United Kingdom, judges' decisions are traditionally issued *seriatim*: judges deliver their individual opinion separately, and decisions are taken by majority. This practice is said to depend on the fact that appeals from lower courts were traditionally heard by the House of Lords, who, like all other members of parliamentary committees, have the right to freely express their opinion.¹¹⁹ Moreover, the decision-making process in the House of Lords did not favour collective decisions, since there was no special collegiate procedure. Historically, there were two exceptions to the rule allowing for dissents: in the Judicial Committee of the Privy Council (where dissents were originally not allowed, while since 1966 only one minority opinion may be published) and in certain criminal trials (where dissents are, as a general rule, banned).¹²⁰

The UK judicial system has recently undergone some major changes. With the 1998 Human Rights Act, the UK introduced a form of "weak," diffuse constitutional review based on the ECHR (not on a national Constitution). Besides, in 2009, the Appellate Committee of the House of Lords was replaced by the formally independent Supreme Court. The latter also has the last word (at national level) as to the compatibility of existing legislation with the ECHR and the ECtHR's jurisprudence. The Supreme Court follows the tradition of *seriatim* decisions, even when it decides cases based on the Human Rights Act (which might be said to be cases of constitutional review¹²¹). Yet, there appears to be some evidence of a new trend towards issuing single judgments, or single majority judgments. However, while the appropriateness of the practice of issuing *seriatim* opinions has recently been challenged, the right of judges to issue dissenting or concurring opinions is not under discussion.¹²²

2.3. Conclusions

As shown above, the traditional assumption that separate opinions are an exception to the general rule of secrecy of individual votes is clearly outdated. In reality, such secrecy is only preserved in seven of the 27 Member States of the EU, while the remaining 20 do allow the publication of individual opinions. Moreover, while it is often suggested that separate opinions form part of the traditions of the common law system, and are foreign to the civil law tradition, this statement has also been proven false. While many civil law States do allow - at least - constitutional judges to publish separate opinions (e.g. Germany), and in some of them all judges are granted this right (Spain is exemplary in this regard), there are also some common law systems where individual opinions are not permitted (e.g. Malta) or are limited to ordinary judges (e.g. Ireland).

This fact calls into question the validity of some traditional arguments against dissenting opinions, such as those related to legal cultures and differences in understanding the role of judges. Moreover, while it is often argued that allowing judges to issue separate opinions might constitute a threat to the spirit of collegiality and collaboration that is essential in the decision-making process, the experiences from some States that have only recently

Also see V. Hautamäki, Reasons for saying: no thanks! Analysing the Discussion about the Necessity of a Constitutional Court in Sweden and Finland, in *Electronic Journal of Comparative Law*, n. 10/2006.

¹¹⁸ See W. von Eyben, Judicial Law making in Scandinavia, in *American Journal of Comparative Law* n. 5/1956, 112-115. Also see Mastor, op. cit., at 132; Laffranque (2003), op. cit., at 165.

¹¹⁹ See Kirby, op. cit.; Lee, op. cit.

¹²⁰ See T. Ingman, *The English Legal Process*, OUP 2011, at 98; Alder, op. cit., at 234-236; Lee, op. cit., at 311.

¹²¹ See e.g. Lord A. Lester, The impact of the Human Rights Act on public law, in Beatson et al. (Ed.), *Constitutional Reform in the United Kingdom: Practice and Principles*, Hart Pub. 1998, 105-107; S. Gardbaum, The New Commonwealth Model of Constitutionalism, in *American Journal of Comparative Law*, n. 49/2001, 707-760.

¹²² For an analysis of the practice of *seriatim* opinions, see B. Hale, Judgment writing in the Supreme Court, 2010, at http://www.supremecourt.gov.uk/docs/speech_100930.pdf. The rate of unanimous judgments in the House of Lords between 1970 and 2009 was 81.2%, and in the UK Supreme Court it is 82%: C. Hanretty, Dissenting opinions in the UKSC, available at <http://ukscblog.com/dissenting-opinions-in-the-uksc>.

introduced this possibility allow for a more positive evaluation: scholars who have studied the practice in such States have concluded that the possibility of issuing individual opinions did not negatively affect cooperation and collegiality, at least until now.¹²³

The diffusion of separate opinions in the 27 EU Member States is summarized in the table below.

Table 1: Practice of separate opinions in the 27 EU Member States.

State	Publication of separate opinions not allowed	Separate opinions only published in ordinary jurisdiction	Separate opinions only published in constitutional jurisdiction	Separate opinions published in all cases
Belgium	X			
Bulgaria				X
Czech Republic			X	
Denmark				X
Germany			X	
Estonia				X
Ireland		X		
Greece				X
Spain				X
France	X			
Italy	X			
Cyprus				X
Latvia			X	
Lithuania				X
Luxembourg	X			
Hungary			X	
Malta	X			
Netherlands	X			
Austria	X			
Poland				X
Portugal				X
Romania				X
Slovenia			X	
Slovakia			X	
Finland				X
Sweden				X
United Kingdom				X

¹²³ See e.g. Grimm, op. cit., at I-3; Walter, op. cit.; Freixes, op. cit.

3. SUPRANATIONAL COURTS AND THE CJEU

3.1. Introduction

This chapter will briefly examine the practice of separate opinions at the supranational level: in international and regional courts and at the CJEU. While an argument could be made that the CJEU is not to be considered as an international court, since it is a peculiar institution having a unique role in the context of the EU judicial system, a short examination of the international practice confirms the existence of a trend towards allowing separate opinions, and might even lead to conclude that this permissive rule is a general principle of international law.¹²⁴ In the final portion of this chapter, the scholarly arguments **in favour** and **against** allowing the CJEU to issue separate opinions will be presented.

3.2. The practice of international courts

In most international courts, the possibility of publishing separate opinions represents an unchallenged tradition. International judges are granted the right to issue individual opinions, which are attached to the judgment of the majority and often carry an enormous importance. Similar rules apply in truly international courts (such as the ICJ) and in regional courts (e.g. the ECtHR); only exceptionally are individual opinions limited.

This sub-chapter will present the practice of some particularly representative supranational courts. While an analysis of the traditions of all supranational courts would scarcely be useful, a short summary of the practice of the most relevant among them might help understand the scope of application of what seems to be a generally accepted practice at the international, as well as European, level.

3.2.1. The ICJ

Judges at the International Court of Justice, including *ad-hoc* judges whenever appointed, are allowed to issue separate opinions: in this regard, the Court follows the practice of its predecessor, the Permanent Court of International Justice. At the time of the establishment of the latter, the rules concerning separate opinions were widely discussed. An initial proposal would have granted the right to publish dissenting opinions to all judges, with the exception of those having the nationality of the States concerned. This exception reflected a general belief that national judges would always feel compelled to issue a separate opinion in favour of their State. However, this solution, which would have led to a substantial disparity between national and other judges, was subsequently rejected, and the final decision was to allow all judges to publish dissenting opinions.¹²⁵ Similar rules were maintained in the Statute of the ICJ, which expressly allows separate opinions (Art. 57). Judges at the ICJ have frequently made use of their right to express their individual opinion: according to a recent study, until 2005 the Court had rendered a total of 243 judgments, to which 1017 individual opinions have been appended.¹²⁶

According to scholars, allowing individual opinions safeguards the judges' freedom of expression and ensures their independence and impartiality, but also serves to clarify the majority judgment and foster the development of international law. At the same time, statistics show a remarkable trend, on the part of national judges (and, even more so, *ad*

¹²⁴ According to Malenovsky, *op. cit.*, at 53, international law includes a principle allowing international judges to publish dissenting opinions, which is generally valid unless derogated.

¹²⁵ See M. Manouvel, *Les opinions séparées à la Cour Internationale*, L'Harmattan 2004, at 67-69.

¹²⁶ A. Zimmermann, C. Tomuschat, K. Oellers-Frahm, *The Statute of the International Court of Justice: a commentary*, OUP 2006, at 1209.

hoc judges), to publish dissenting opinions whenever the decision is against their national State. The data can thus lead to call into question the degree of independence of the judges from their national State.¹²⁷ Despite this, the possibility of publishing separate opinions, which was initially contested, has not been questioned in recent years.

3.2.2. The ECtHR

The European Convention of Human Rights expressly mentions separate opinions: Art. 45(2) provides that "if a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." Moreover, according to Rule 74(2) of the Rules of Court of the ECtHR, "any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent." This Rule foresees not only separate opinions, but also "statements of dissent," which only ensure transparency to a lesser extent.¹²⁸

In practice, dissenting opinions have been widely used¹²⁹ and have played an important role in developing the Court's interpretation of the Convention, in particular by pointing to an emerging European consensus or to the need to adopt an evolutionary interpretation of a rule. In some cases, dissenting opinions have anticipated subsequent developments in the Court's case-law;¹³⁰ in others, they have helped explain the Court's reasoning by pointing to alternative reasons and explanations that the majority had decided not to follow. However, the possibility of issuing separate opinions has also had some negative consequences. Thus, for instance, in some cases there have been allegations that States have tried to pressure their national judges. Such allegations eventually led to the amendment of the rules concerning the appointment of judges, who are now elected for a longer, but non-renewable, term.¹³¹

The rules on dissenting opinions at the ECtHR are also representative of those of the Interamerican Court of Human Rights and of the African Court on Human and People's Rights.¹³²

3.2.3. International criminal courts

All existing international criminal tribunals allow judges to publish separate opinions.

Articles 23(2) of the Statute of the ICTY and 22(2) of the Statute of the ICTR both explicitly provide that "the judgement shall be rendered by a majority of the judges of the Trial Chamber, and shall be delivered by the Trial Chamber in public. It shall be accompanied by a reasoned opinion in writing, to which separate or dissenting opinions may be appended."¹³³

At the time of the negotiation of the Statute of the International Criminal Court, the issue of dissenting opinions was widely discussed. The initial project, drafted by the UN

¹²⁷ Ibidem, at 1210-1211; on *ad hoc* judges, also see Manouvel, op. cit., at 200-203. For the statistical data, see above, para. 1.2.3.

¹²⁸ See Rivière, op. cit., at 81 ff.

¹²⁹ Between 1999 and 2004, the Court was unanimous in around 20% of the cases, while, in the remaining 80%, the judgment was accompanied by a separate opinion: R. C. A. White, I. Boussiakou, Separate opinions in the European Court of Human Rights, in *Human rights law review*, 2009, 37-60, at 50. However, the situation has recently changed and non-unanimous decisions are now only prevalent in the Grand Chamber: see L. Garlicki, Note on Dissent in the European Court of Human Rights, in *Global constitutionalism*, op. cit., I-8.

¹³⁰ A well-known example are the cases on transsexuals: *Rees v. UK*, 17 October 1986; *Cossey v. UK*, 27 September 1990; and *Christine Goodwin v. UK*, Grand Chamber, 11 July 2002.

¹³¹ See Protocol 14 to the ECHR (CETS No 194) and its Explanatory Report, para. 50.

¹³² See Art. 24(3) of the Statute of the IACHR and Art. 28(7) of the Protocol establishing the African Court.

International Law Commission in 1994, explicitly excluded the possibility of publishing individual opinions. In the Commission's view, allowing them would have negatively affected the authority of the newly established Court. However, during the discussions that followed, the relevant rule (draft Art. 45) was amended, partly also as a result of the views expressed by the judges of the ICTY and ICTR and their positive appreciation of the role of individual opinions.¹³⁴ Consequently, the Rome Statute - which provides for a system representing a unique blend of the civil law and common law traditions - does allow for the publication of the views of both majority and minority judges.¹³⁵ Individual opinions have already been attached to judgments adopted at all stages of the procedure.

3.2.4. Dispute settlement in international trade law

One exception to the principle of full transparency and openness in international trials and arbitrations is the Understanding on rules and procedures governing the settlement of disputes annexed to the WTO Agreement. While this instrument also provides for individual opinions to be issued by panellists, such opinions must be anonymous (Articles 14 and 17). However, anonymity may often be only apparent, since - as scholars have underlined - in many cases experts in the field will be able to guess the identity of the dissenter. Consequently, while at first sight the anonymity rule might seem to aim at preserving the independence of panellists from possible external pressure, it actually does not ensure it and might merely dissimulate external pressure on specific individuals. Accordingly, anonymity has been considered as a principle meant to protect the system as a whole by focusing public discussion on the merits of the dissent, instead of the reasons moving the dissenter, and by discouraging any abuse of the right to issue separate opinions by individual panellists who might otherwise use this right to obtain publicity for themselves.¹³⁶ A similar practice of anonymous dissents is also followed by NAFTA panels.

3.3. The CJEU

The Court of Justice of the European Union follows the tradition of secrecy of deliberations (Art. 35, CJEU Statute) and apparent unanimity that originally prevailed in the six founding Member States. The possibility of allowing the publication of individual opinions was initially discussed, but the proposal was finally rejected. Yet, some form of publicity of internal discussions is allowed, given that the views of the Advocate General are public.¹³⁷

This sub-chapter will present the main arguments **in favour** and **against** the introduction of separate opinions at the CJEU. The recent scholarly discussion over the style of the CJEU's judgments has added new fuel to the pre-existing debate over individual opinions. While many scholars favour a change, and the introduction of separate opinions, most voices against it come from CJEU judges and former judges (such as Judges Azizi and Edward), who fear mainly for the Court's collegiality and authority.

¹³³ Also see Art. 18 of the Statute of the Special Court for Sierra Leone and Art. 23 of the Statute of the Special Tribunal for Lebanon.

¹³⁴ As reported by Malenovsky, *op. cit.*, at 51. Also see C. Staker, Article 83, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Hart Pub. 2008, 1481-1486, para. 11.

¹³⁵ Art. 74 provides that "The Trial Chamber shall issue one decision. When there is no unanimity, the Trial Chamber's decision shall contain the views of the majority and the minority." Art. 83 provides that "when there is no unanimity, the judgement of the Appeals Chamber shall contain the views of the majority and the minority, but a judge may deliver a separate or dissenting opinion on a question of law." A similar text is to be found in Art. 14 of the Law on the Establishment of the Extraordinary Chambers for Cambodia.

¹³⁶ See J. Flett, Collective Intelligence and the Possibility of Dissent, in *Journal of International Economic Law* n. 13/2010, 287-320. The publication of dissents in WTO panels is quite exceptional: in 2006, there had only been 6; the number rose to 14 by 2010 (compare Flett, *op. cit.*, to M. Kolsky Lewis, The lack of dissent in WTO dispute settlement, in *Journal of International Economic Law*, n. 9/2006, 895-931).

¹³⁷ See Malenovsky, *op. cit.*, at 55; Laffranque (2004), *op. cit.*, at 16; Rivière, *op. cit.*, at 17.

One last introductory comment is needed: while publication of dissents might appear to be forbidden by the numerous rules of the CJEU Statute concerning the secrecy of deliberations (such as Articles 2, 10, 13 and 35), it is their interpretation that actually prevents such publication. Indeed, as mentioned above, the principle of secrecy may be interpreted as prohibiting judges merely from reporting what happens during *in camera* deliberations,¹³⁸ or also from publishing their dissent. It is this second interpretation that has prevailed at the CJEU, possibly also as a consequence of the influence of the continental tradition. Thus, legislative reform would not necessarily be required in order to allow for the publication of separate opinions, although it would provide a clear legal basis for this practice.

3.3.1. The style and reasons of the CJEU's judgments

Many authors maintain that the decisions of the CJEU are often cryptic. Their reasoning, it is argued, tends to be summary and excessively short, does not always take into account possible counter-arguments, and sometimes includes partly diverging views without clarifying which line of reasoning is endorsed by the Court. Such a style has been criticized for being confusing and unhelpful for practitioners. In the words of Gaja, "scantily reasoned judgments may have the advantages of offering fewer opportunities for the reader's criticism and of leaving the ECJ freer when making further decisions; however, such judgments hardly persuade."¹³⁹ In a few, exceptional cases, this has even led national Courts to refer the same case, again, to the CJEU, since they found its first judgment too ambiguous and were, therefore, unable to interpret and apply it.¹⁴⁰

Additionally, it has been argued that the Court's style discourages dialogue with lower courts. The Court's judgments have been described as following a "Cartesian style," based on the assumption that legal reasoning is a syllogism that, if correctly applied, leads to the only correct, inevitable result. Prominent scholars believe that the need to improve judicial dialogue with national courts, especially pressing now that the CJEU is developing into a truly Constitutional Court, requires the adoption of better reasoned, more explicit judgments, in which all different legal opinions - and especially those of the referring judge and of national Supreme and Constitutional Courts - are explicitly and fully taken into account.¹⁴¹

According to some authors, the perceived faults in the style of the Court's decisions could be directly connected with the prohibition against separate opinions. Indeed, the reasoning of the Court might sometimes be difficult to follow precisely because the bench had to incorporate partly diverging views in order to find a compromise between judges. The introduction of separate opinions is thus considered as a potential trigger for change. Individual opinions could force the majority to explicitly deal with the views of the minority and to contest the validity of their legal arguments, while keeping the views of the dissenters separate, ensuring a more explicit, coherent and understandable judgment.¹⁴² Clearly, as many authors also recognize, this argument is only valid if separate opinions remain limited to a low number of highly relevant cases. An excessive use of dissenting and

¹³⁸ As is the case, for instance, in Estonia and Latvia (*supra*, at 2.2.5 and 2.2.10), and at the US Supreme Court.

¹³⁹ G. Gaja, Beyond the reasons stated in judgments, in *Michigan Law Review*, n. 92/1994, 1966-1976. On the style of the CJEU's decisions see Lasser, *op. cit.*, at 103-141; Perju, *op. cit.*, at 338-339.

¹⁴⁰ See the case mentioned by Lord Kerr of Tonaghmore, *Dissenting judgments - self indulgence or self sacrifice?*, Birkenhead Lecture delivered on 8 October 2012, available at <http://www.supremecourt.gov.uk/docs/speech-121008.pdf>.

¹⁴¹ See in particular Cartabia, *op. cit.*, at 30-31; Weiler, *op. cit.*, at 225.

¹⁴² See, in addition to the authors cited above, J. Mance, Exclusive jurisdiction agreements and European ideals, in *Law Quarterly Review*, 2004, 357-365.

concurring opinions would obviously lead to more confusion as to how the case has been decided, and why.¹⁴³

While the argument based on the need to improve the quality of judgments is particularly powerful in the light of the current debate over the style of the CJEU's judgments, it could still be used to back the introduction of separate opinions even assuming that decisions are fully grounded. As mentioned above (Chapter 1), separate opinions serve a function not only because they encourage a more extensive reasoning and allow judges to present clearer arguments, but also because they help explain the judgment and, in particular, show the reasons that the majority took into consideration without endorsing them. Separate opinions thus further clarify the reasons behind a judgment even when the latter is fully grounded, since they make explicit the alternative lines of reasoning that were discussed, but ultimately rejected.

3.3.2. The role of the Advocate General's views

Some scholars argue that the Advocate General's views may be a substitute for individual opinions. Indeed, they also help clarify the legal issues at stake, since the AG's role is to make reasoned submissions on cases, acting in complete impartiality and independence (Art. 252, TFEU). It has been claimed that the historical reason why the Office of Advocate General was established was exactly to compensate for the lack of dissenting opinions, which was originally considered as a means to protect the judges' independence from their national governments, potentially threatened by their short, renewable mandate.¹⁴⁴ However, other authors claim that the AG's views cannot serve the same purpose as dissents. In particular, they cannot clarify the reasoning followed by the majority during the deliberation, since this takes place afterwards; moreover, whenever the Court follows the AG's opinion (which reportedly happens in a high percentage of cases), the latter surely does not point to any possible alternative reasoning.¹⁴⁵

Additionally, in some cases the Court follows the AG's conclusions without fully endorsing their reasoning. Often, this will not require an explicit rejection of the arguments brought by the AG - mere neglect will suffice. However, in these cases it might be difficult to determine whether the court rejected the argument, implicitly accepted it, or merely disregarded it. Consequently, it seems that the AG's opinions, while useful to understand the Court's judgment, cannot fully replace dissents, since they do not serve to the same purpose.

3.3.3. Collegiality and solidarity in the decision-making process

Introducing dissenting opinions could lead the CJEU to move away from the cooperative method it has hitherto followed in the decision-making process. Currently, the practice at the CJEU is one that fosters collegiality and cooperation in the deliberations. The Rapporteur prepares a note that can serve as a basis for the judgment, and all judges who disagree also submit their notes explaining their position. If substantial disagreements emerge, the case will be discussed in order to try and reach an agreement on a common text. Yet, even if no consensus can be reached, and a vote is taken, the outvoted judges

¹⁴³ See M. Bobek, A fourth in the Court: why are there Advocates-General in the Court of Justice?, forthcoming in *Cambridge Yearbook of European Legal Studies*, 2011-2012, available at <http://ssrn.com/abstract=2119932>.

¹⁴⁴ See M. Rasmussen, The First Advocate Generals and the Making of European Law, forthcoming as a EUI Working Paper.

¹⁴⁵ See e.g. Azizi, *op. cit.*, at 59; Laffranque (2004), *op. cit.*, at 18-20; Perju, *op. cit.*, at 355-357. For a comparison of the style of the AG's Opinions with that of separate opinions at the US Supreme Court, concluding that the AG's style is less confrontational, see M. Rosenfeld, Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court, in *International Journal of Constitutional Law*, vol. 4/2006, 616-651.

continue to take part in the drafting of the text of the judgment, suggesting improvements. Thus, the final outcome is a truly collegiate judgment.¹⁴⁶

Some authors fear that allowing judges to publish individual opinions might lead the majority to ignore the views of minority judges and to marginalize them at the time of the drafting of the judgment, while dissenting judges would focus on drafting their individual opinion instead of cooperating with the majority to improve the judgment of the Court.¹⁴⁷ Allowing the publication of separate opinions would trigger a complete change in the decision-making process of the CJEU, leading to sacrifice its current collegiate, cooperative method of deliberation, which ensures a more thoughtful and consensual decision. This argument, however, is counterbalanced, in the view of other scholars, by the experience of most national courts. Indeed, in many of them, and especially in those where separate opinions are a new tool, efforts are made to ensure that no dissent is actually published by taking into account, as far as possible, the views of the minority.

A final consideration needs to be added: it is impossible to predict whether allowing for separate opinions at the CJEU would lead to their actual use. In fact, judges would remain free to decide whether to publish a dissenting opinion or not, and they might even continue to follow their previous practice of collegiate, collaborative opinions. Thus, even if the expression of individual opinions were to be allowed, it would by no means be mandatory.

3.3.4. Authority of the judgment

Another typical argument against individual opinions, which has also been consistently cited with reference to the CJEU, is the potential threat to the authority of the Court's judgments. According to some authors, the legal system of the EU is still too young and fragile to allow for public dissents that might weaken it. States would not yet be ready to see national judges vote against national interests, or to accept the legitimacy of the Court once its (apparent) unanimity is no longer veiling the existence of internal dissents and of alternative, but equally valid, solutions to the legal issues at stake.¹⁴⁸ Moreover, given the peculiarities of the EU judicial system, and the complex interactions between the CJEU and national courts, allowing the publication of separate opinions might have unforeseen consequences, especially in the context of the preliminary ruling procedure, undermining the national courts' perception of, and respect for, the authority of the CJEU.

On the other hand, it could also be argued that the legal system of the EU is now quite stable and settled. Moreover, Member States are already used to having their national judges voting independently, since this already happens at the ECtHR (although, as we have seen, not completely without allegations of undue influences and pressures). As far as the appearance of unanimity is concerned, scholars are already studying the patterns of CJEU decisions in order to establish the different preferences of individual judges:¹⁴⁹ allowing individual opinions would hence not destroy any general perception as regards the Court's unanimity. In contrast, it would merely eliminate the need for scholars to second-guess each judge's preferences using indirect indicators, with the risk of endangering the perception of their independence and leading to mistaken conclusions.

¹⁴⁶ See D. Edward, *cit.*, at 555-556.

¹⁴⁷ See in particular P. Jann, *Entscheidungsbegründung am Europäischen Gerichtshof*, in *Journal für Rechtspolitik*, n. 7/1999, 28-30; G. C. Rodríguez Iglesias, *Entscheidungsfindung im Europäischen Gerichtshof*, *ibi.*, 27-28. Both authors argue that this claim is supported by the practice at the ECtHR.

¹⁴⁸ See in particular Azizi, *op. cit.*, at 67; Rodríguez Iglesias, *op. cit.*, at 27. Studies have been conducted on the voting patterns of national judges sitting in international courts and adjudicating on the responsibility of their home State, but their results are still controversial: recent studies call into question the widespread assumption that nationality plays a major role. See above, 1.2.3., as well as D. Terris, C. Romano, L. Swigart, *The international judge*, Brandeis University Press 2007, at 153.

¹⁴⁹ For an example of this type of scholarly work, see e.g. M. Malecki, *Do ECJ judges all speak with the same voice?*, in *Journal of European Public Policy*, n. 19/2012, 59-75.

Furthermore, as mentioned above, two models of judicial authority have been identified: one that is based on the quality of a Court's reasoning and one in which authority derives from the Court's formal role and position. Prominent scholars have argued that the CJEU should ensure that its judgments are "not only authoritarian but also authoritative" by taking more fully reasoned decisions.¹⁵⁰ According to some authors, the Court should move from a "command" model (in which the judgment has authority because it is formally a Court's order) to a "justification" model, where authority also rests on the quality and persuasiveness of the judgment's grounds.¹⁵¹ Such a change could be encouraged by allowing individual opinions, since these would arguably stir deeper discussions among the judges and thus lead to more authoritative and convincing decisions. On the other hand, introducing separate opinions merely in order to trigger a change in the style of the Court's decisions might be considered as a disproportionate and somewhat rash reform, bringing more risks than benefits. Indeed, altering the decision-making process of the Court might be an excessive response to the need to improve quality and clarity in its judgments, as well as a symptom of insufficient trust in the ability of the Court to evolve in order to respond to the needs of national courts and other claimants.

3.3.5. Independence of the judges

Another argument against the introduction of dissenting opinions at the CJEU relates to the independence of its judges. Most authors agree that allowing judges to issue separate opinions, while maintaining the current rules on their appointment (particularly including the possibility for their reappointment), could threaten their independence. In fact, national authorities might be tempted to use the threat of not reappointing a judge in order to pressure him/her to publish a dissent in the case of decisions contrary to their national interest. In this context, the example of the ECtHR seems to be particularly relevant. While its judges overwhelmingly favour the right to issue separate opinions, there have been reports of States trying to exert pressure over their national judges.¹⁵² Hence, the rules on the judges' appointment have recently been amended (making their mandates longer, but non-renewable) precisely in order to protect their independence from external pressures.¹⁵³

Scholars supporting the introduction of separate opinions at the CJEU tend to agree that a revision of the rules on the appointment of judges would also be necessary, so as to provide for longer, but non-renewable, terms and thus protect judges from possible external pressure.¹⁵⁴ However, it has also been argued that non-renewability of the mandate is not a precondition to protect the independence of individual members of a Court. In this respect, the example of the CJEU's Advocates General is particularly relevant, since their absolute and unchallenged independence in issuing their (individual) views seems not to be affected by the fact that they are appointed according to the same rules as judges, including the possibility of reappointment.¹⁵⁵ Moreover, there may be other possible avenues to preserve the judges' independence without the need to amend the Treaties (Art. 19.2 TEU; Art. 253 and 254 TFEU) and the Court's Statute. One option could be, for instance, providing for the possibility of publishing anonymous separate opinions (as already happens in Greece and in the WTO system).

¹⁵⁰ See Weiler, *op. cit.*, at 225.

¹⁵¹ See in particular Perju, *op. cit.*, *passim*.

¹⁵² For some examples of cases of non-renewal of national judges, allegedly caused by their voting behaviour, see e.g. J.-F. Flauss, *Brèves observations sur le second renouvellement triennal de la Cour Européenne des Droits de l'Homme*, in *Revue Trimestrielle des Droits de l'Homme*, n. 61/2005, 5-32; Voeten, *op.cit.*, at 421. However, the latter study concludes that career motivations (and thus, national bias) play but a small if any role in the judges' behaviour. On the judges' preference for the practice of dissenting opinions, see White, Boussiakou, *op. cit.*, at 57.

¹⁵³ See Protocol 14 to the ECHR (CETS No 194) and its Explanatory Report, para. 50.

¹⁵⁴ See e.g. H. Rasmussen, *European Court of Justice*, GadJura Publisher 1998, at 66; Weiler, *op. cit.*, at 225.

¹⁵⁵ See Edward, *op. cit.*; Rodríguez Iglesias, *op. cit.*, at 27.

3.3.6. Transparency or secrecy?

A final argument that is often cited in support of allowing the publication of dissenting opinions is the one related to the need to ensure transparency, a value that is explicitly mentioned in Art. 15, TFEU. It is true that this provision specifically limits the application of the principle to the CJEU when it is exerting administrative functions. However, this would not necessarily prohibit its further extension to other Court activities. Arguments are made that publication of dissents, expressing a preference for transparency and openness over secrecy, might contribute to the process of democratization of the European Union. According to some scholars, the open government principle, to which the EU committed itself, would require openness on the part not only of the three institutions involved in the legislative process, but also of the Court. Judicial openness is considered as a means to ensure a significant dialogue with external actors, including lower courts, but also as an ends in itself. In this perspective, allowing the publication of dissents might enhance the Court's role in creating a shared political consciousness among European citizens, thus developing their political identity. Publicity over internal dissents and debates might stir interest on European matters, helping create a European identity among citizens.¹⁵⁶

¹⁵⁶ See Laffranque (2004), at 23; H. Rasmussen (2007), *op. cit.*, at 1667; Perju, *op. cit.*, esp. at 309 and 327-344; Mance, *op. cit.*, at 364-365.

CONCLUSIONS

This study shows that the practice of the Member States of the EU regarding separate opinions is not as monolithic as it might be assumed. Indeed, the expected division between civil law and common law countries seems to play little, if any, role. Many civil law countries do allow their Supreme Courts' judges to publish individual opinions, often at the constitutional level and sometimes even in ordinary jurisdiction. Thus, of the 27 Member States, only seven do not allow separate opinions in any jurisdiction. Moreover, the practice of Member States is so much at odds with traditional assumptions regarding different legal traditions that, for instance, Ireland, a common law country, does not allow constitutional judges to publish individual opinions, while in Spain, these are allowed both in constitutional and in ordinary courts. Additionally, at the supranational level, the ban on individual opinions at the CJEU is very much isolated: in most other regional and international Courts, separate opinions are allowed.

Scholarly debates on the role of separate opinions have flourished over the years, and a number of arguments have been brought both **in favour** and **against** this practice. While it is argued that there can be no correct legal solution, since this is a matter of preferences, there are a few elements on which there is wide agreement.

Firstly, there is a recent trend towards allowing at least constitutional judges to issue separate opinions. This trend is particularly evident in the context of the EU. Central and Eastern European countries have followed the German model of judicial review, leading to a substantial increase in the number of civil law countries, and EU Member States, that allow for public judicial dissent.

Secondly, while opinions about individual opinions vary, there is a general agreement that these best serve their purpose when they are limited in number, circulated in advance, and drafted in a respectful manner. It is only in such cases that they can foster collegiality, enhance the level and deepness of the legal debate among judges, and lead to better reasoned and more coherent judgments. On the other hand, the publication of individual opinions can threaten the authority of the judiciary, and of judgments, endanger the independence and perceived impartiality of judges, and trigger more academic debate instead of providing a solution to the concrete legal question posed by the claimant.

Finally, highly renowned scholars claim that the judicial style of the CJEU is not fully satisfactory, and that one way to improve it could be by allowing the publication of separate opinions. The Court has been criticized for the formalistic style of its decisions, to the detriment of judicial dialogue with national courts and clarity. Many view separate opinions as a means to prompt change in the Court's style, but also as a tool to enforce the principles of transparency and openness, which inspire the EU's governance and should serve to enhance its level of democratization. On the other hand, the introduction of individual opinions might have unforeseen consequences over the Court's authority and its deliberative method. In this perspective, the examples drawn from national and international practice may not necessarily be pertinent, given the peculiarities of the EU judicial system, particularly the unique structure of the relationship between the CJEU and national courts. In any case, a change in the rules to explicitly provide for separate opinions would not necessarily imply a change in the Court's practice. This would finally depend on the judges' willingness to depart from their current decision-making process and embrace the practice of individual opinions.

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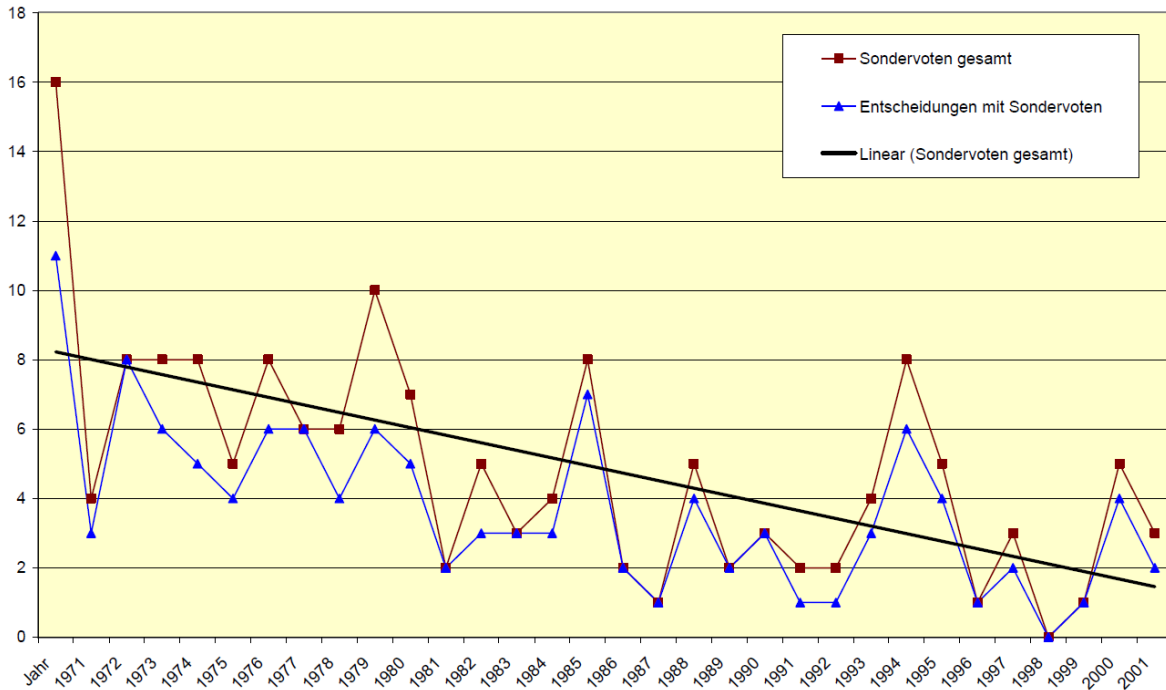
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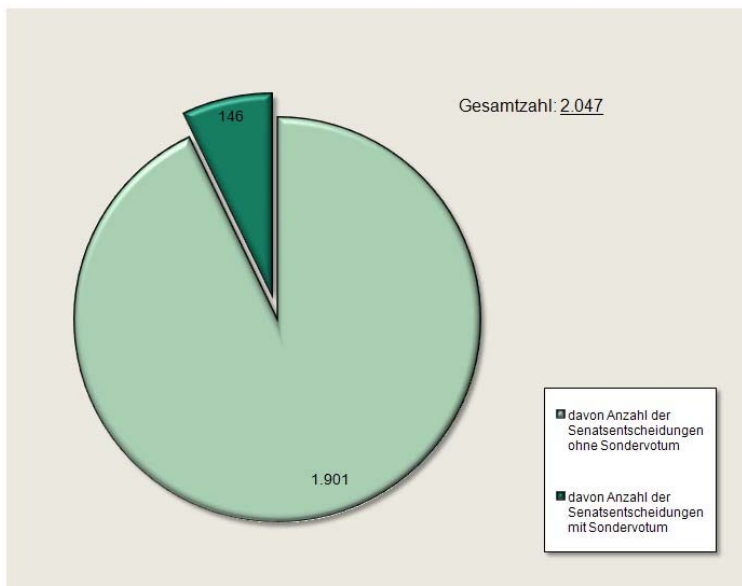
ANNEX 1 - PRACTICE OF THE BVerfG

Figure 1: trends in the use of separate opinions in the BVerfG



Source: J. Prof. Dr. Christoph Hönnige, Konferenzpapier: Impliziter Verfassungswandel durch das Bundesverfassungsgericht in gesellschaftlichen und politischen Fragen, available at <https://www.dvpw.de/fileadmin/docs/2008WS5Hoennige.pdf>.

Figure 2: total number of constitutional judgments, with and without separate opinions

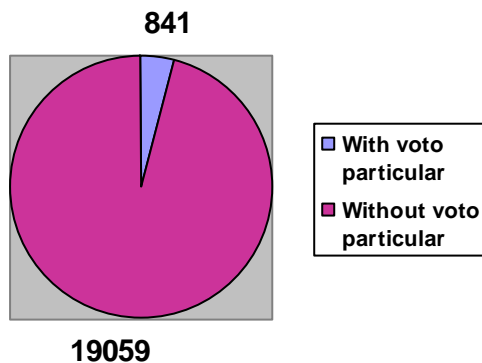


Source: Entscheidungen mit oder ohne Sondervotum in der amtlichen Sammlung (BVerfGE) - Bände 30 - 127 (1971 - 2011).

Available at <http://www.bundesverfassungsgericht.de/organisation/gb2011/A-I-7.html>.

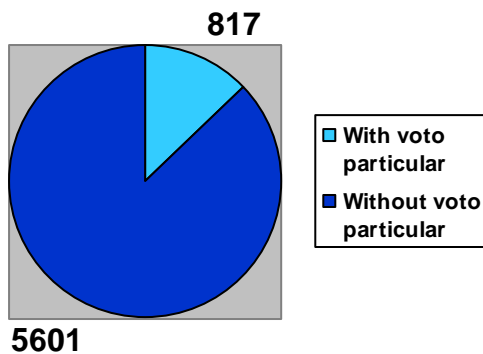
ANNEX 2 - PRACTICE OF THE SPANISH TRIBUNAL CONSTITUCIONAL

Figure 1: Total judgments of the Spanish Constitutional Court, 1980-2008, with and without separate opinions.



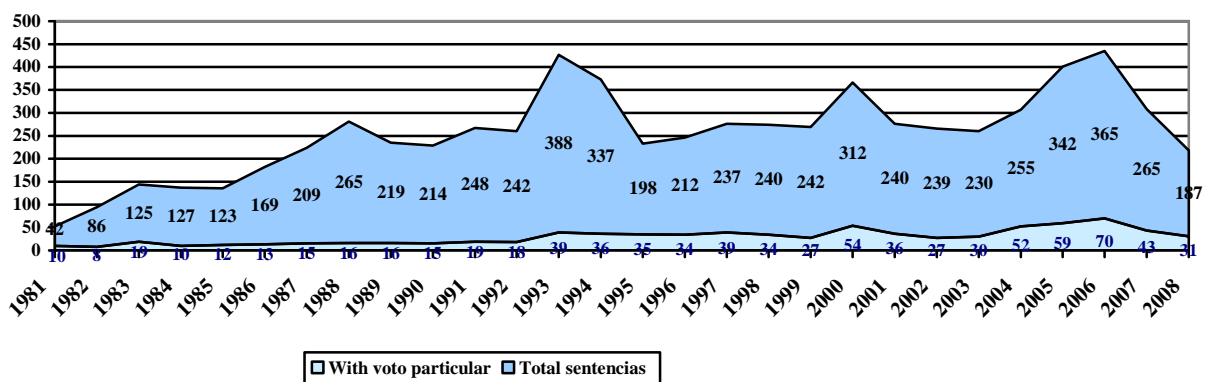
Source: C. Guerrero Picó, L'opinione dissenziente nella prassi del Tribunal Constitucional spagnolo (1994-2009), www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_1201_2010.pdf, at 15.

Figure 2: Total judgments in the form of *sentencias* of the Spanish Constitutional Court, 1980-2008, with and without separate opinions.



Source: C. Guerrero Picó, L'opinione dissenziente nella prassi del Tribunal Constitucional spagnolo (1994-2009), www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_1201_2010.pdf, at 16.

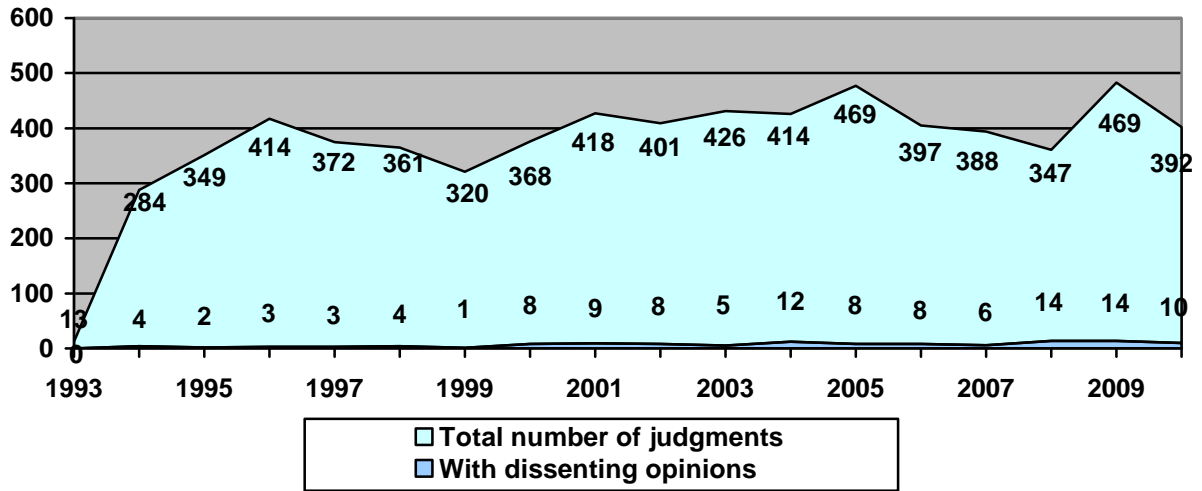
Figure 3: Trends in the use of separate opinions in the *sentencias* of the Spanish Constitutional Court, 1980-2008.



Source: C. Guerrero Picó, L'opinione dissenziente nella prassi del Tribunal Constitucional spagnolo (1994-2009), www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_12012010.pdf, at 15-16.

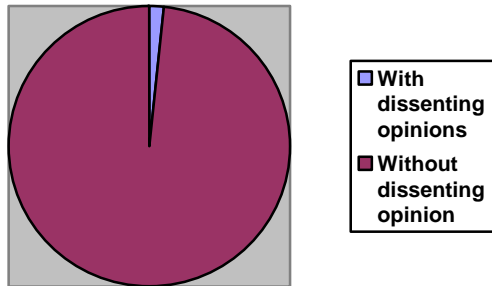
ANNEX 3 - PRACTICE OF THE ESTONIAN SUPREME COURT

Figure 1: Trends in the use of separate opinions in the judgments of the Estonian Supreme Court, 1993-2010.



Source: Data kindly made available by Dr. Chris Hanretty, University of East Anglia.

Figure 2: Total judgments of the Estonian Supreme Court, 1993-2010, with and without separate opinions.



Source: Data kindly made available by Dr. Chris Hanretty, University of East Anglia.

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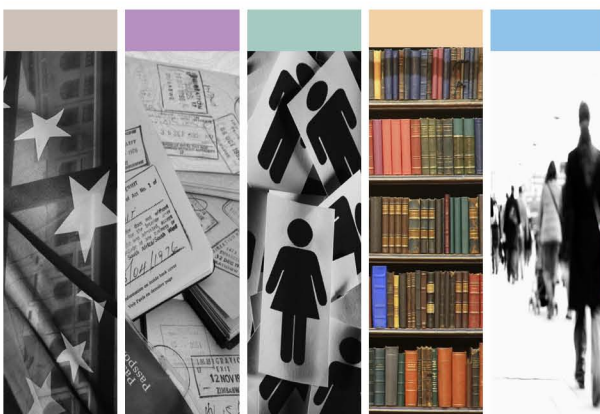
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