



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

## Opening of the Judicial Year

### Seminar

#### Judgments and Separate Opinions: Complementarity and Tensions

Speech by Andreas Paulus\*

Strasbourg, 25 January 2019

#### I. Introduction: Separate Opinions and Legal Tradition

The topic of judgments and separate opinions is one that has fascinated me – in different ways – since the beginnings of my legal career. It was in the school library that I studied the first dissenting opinion ever published of the German Federal Constitutional Court<sup>1</sup>. The dissent dealt with the exception to the separation of powers in Article 10 § 2 of the German *Grundgesetz*, which tasks a special parliamentary body rather than a court with the legal supervision of telecommunication surveillance. The schoolboy considered the majority judgment to be an egregious violation of the separation of powers, the very separation he had just learnt to be fundamental to a constitutional democracy and thus not open to constitutional amendment<sup>2</sup>:

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\* Justice of the Federal Constitutional Court (Germany), University of Göttingen/Germany. Presentation at the Annual Seminar of the European Court of Human Rights in Strasbourg on 25 January 2019. I thank President Raimondi and Judge Gabriele Kucsko-Stadlmayer, in particular, for the opportunity to present my views. The presentation reflects the personal views of the author alone and in no way binds the Federal Constitutional Court. The oral format has been maintained. I thank Ms Mary Gorman for her thorough language review and Ms Caroline Lichuma for her support with regard to the footnotes.

<sup>1</sup> BVerfGE 30, 1 (33), diss. op. Geller, v. Schlabrendorff, Rupp. The ECtHR has however approved the German practice – see *Klass v. Germany*, 6 September 1978, §§ 50 et seq., Series A no. 28; see also ECtHR (First Section), *Big Brother Watch and Others v. the United Kingdom*, nos. 58170/13 and 2 others, § 320, 13 September 2018, with further references and discussion (judicial authorisation of surveillance “neither ... necessary nor sufficient to ensure compliance with Article 8” ECHR).

<sup>2</sup> BVerfGE 30, 1, 33 (43, 46), diss. op.: “Die Gewährung eines individuellen Rechtsschutzes ist im System der Gewaltenteilung eine Funktion der Rechtsprechung, da sie dem Schutz gegen Eingriffe der beiden anderen Gewalten dient. Die Rechtsschutzorgane gehören daher in den Funktionsbereich der Rechtsprechung. ... Es ist ein Widerspruch in sich selbst, wenn man zum Schutz der Verfassung unveräußerliche Grundsätze der Verfassung preisgibt” (In the system of separation of powers, providing individual legal protection is a function of the judicial branch, because it serves as protection against interventions by the two other powers. For this reason, the organs of legal protection belong to the judicial function. ... It is a contradiction in itself to forego the inalienable principles of the Constitution for the sake of the protection of the Constitution” – our translation).

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*“Nobody can tell whether the first step on the comfortable path to the easing of the existing bonds, undertaken by means of the changing of the Constitution, will be consequential. That is why, in our view, the limiting provision of Art. 79 § 3 GG should not be interpreted and applied extensively, but strictly and in an uncompromising fashion. After all, the provision is meant to ‘resist the beginnings’”.*<sup>3</sup>

“Resist the beginnings!” is also the frequently heard battle cry in dissent, in particular in a “hard” dissent such as the one in question<sup>4</sup>.

I have to confess: I still love to read dissents. Most of them are clearly argued, consistent in their reasoning, and unforgiving of what they perceive as mistakes within the majority findings. They do not seek to build a consensus, but to declare why compromise is impossible. Phrases such as my former colleague Gertrude Lübke-Wolff’s “One ought to refuse being sent on grand desert tours that will not lead to any spring”<sup>5</sup>, or Law Lord Hoffmann’s “The real threat to the life of the nation ... comes not from terrorism but from laws such as these”<sup>6</sup>, are still ringing in our ears. In my own practice as a constitutional judge I have used this tool only rarely, however, not always writing when I disagreed with the majority. Several colleagues have not written or joined a single dissent yet.

In the Anglo-Saxon tradition the person of the judge is much more important, and in the past most decisions were attributed to individual judges<sup>7</sup>. Today, however, a lead opinion is pronounced by a specific judge. In such a setting, dissents result much more naturally from the discussion of the lead opinion among individual judges. Some international courts, such as the European Court of Human Rights<sup>8</sup> or the International Court of Justice<sup>9</sup>, allow for separate and dissenting opinions, whereas others, such as the Court of Justice of the European Union, do not<sup>10</sup>. According to this view, the unitary result is more important than the transparency of the court’s reasoning<sup>11</sup>.

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<sup>3</sup> “Ob der mit der Verfassungsänderung vollzogene erste Schritt auf dem bequemen Weg der Lockerung der bestehenden Bindungen nicht Folgen nach sich zieht, vermag niemand vorauszusehen. Deshalb sind wir der Auffassung, daß die Sperrvorschrift des Art. 79 Abs. 3 GG – zwar nicht extensiv, aber – streng und unnachgiebig ausgelegt und angewandt werden sollte. Sie ist nicht zuletzt dazu bestimmt, schon den Anfängen zu wehren.”

<sup>4</sup> See the distinction in US practice between a “respectful” and a strong dissent.

<sup>5</sup> BVerfG, Order of the Second Senate of 14 January 2014 – 2 BvR 2728/13 – paragraph 23 [http://www.bverfg.de/e/rs20140114\\_2bvr272813en.html](http://www.bverfg.de/e/rs20140114_2bvr272813en.html) (Lübke-Wolff dissenting, official translation), BVerfGE 134, 366 (419 para. 127) (2014): “Nur sollte man sich auf große Wüstenwanderungen, die zu keiner Quelle führen, gar nicht erst schicken lassen.”

<sup>6</sup> *A (FC) and others (FC) (Appellants) v. Secretary of State for the Home Department (Respondent)*, [2004] UKHL 56, paras. 96-7 (partly dissenting opinion of Lord Hoffmann); see ECtHR, Grand Chamber, *A. and Others v. the United Kingdom* [GC], no. 3455/05, §§ 179 et seq., ECHR 2009 (granting a wide margin of appreciation to national governments regarding derogations under Article 15 of the Convention).

<sup>7</sup> It was difficult, at times, to identify the common denominator of the *ratio decidendi* and therefore also the effect of some of the majority decisions. For a famous example, see UK House of Lords, *R. v. Bow Street Stipendiary Magistrate and Others*, Ex parte Pinochet Ugarte (No. 3), 24 March 1999, [1999] 2 WLR 827; 38 International Legal Materials (1999) 581.

<sup>8</sup> Articles 45 § 2 and 49 § 2 ECHR and Rules 74 § 2 and 88 § 2 of the Rules of Court.

<sup>9</sup> Statute of the International Court of Justice, Article 57; Rules of Court, Article 95 § 2. See also Mistry, “The different sets of ideas at the back of our head: Dissent and Authority at the International Court of Justice”, 32 Leiden JIL (2019) 293.

<sup>10</sup> See Article 36 of the Protocol on the Statute of the Court of Justice of the European Union, OJ C 202 of 7 June 2016, p. 218 (not mentioning separate opinions). See also Höreth, “Richter contra Richter: Sondervoten beim EuGH als Alternative zum ‘Court Curbing’” 50 *Der Staat* (2011) 191.

<sup>11</sup> However, this effect may be balanced by the broader opinions of the Advocate General; see Höreth, op. cit.

## II. The Functions of Separate and Dissenting Opinions

Just as the role of separate opinions in different legal regimes is varied, the practice with regard to separate and dissenting opinions is also far from uniform<sup>12</sup>. In several instances the question whether dissenting opinions should be allowed has been raised, with different results: in Germany, they were introduced as far back as 1971, albeit only in the Federal Constitutional Court, after a controversial debate pitting academics against sceptical judges. In France, at the end of the 1990s, the continued bar on dissenting opinions was based on the fear of a loss of authority of the courts – in the words of the *doyen* Vedel, a “justice spectacle”<sup>13</sup> – and, in particular, of the secrecy of deliberations<sup>14</sup>. In the Court of Justice of the European Union, separate opinions are considered a threat to the unitary application of the law and the authority of the Court, whereas in human rights courts and treaty bodies, they are allowed at least in substantive decisions, as in the practice of the European Court of Human Rights<sup>15</sup>.

Those arguing in favour of separate and dissenting opinions can point to several factors. First of all, separate and dissenting opinions lead to greater transparency of courts’ deliberations in a democratic society. They help to understand the constitutional issues at stake and the reasoning in question. Separate opinions will also challenge the majority to give the best possible reasons for their conclusions. The losing side can see that its arguments were duly considered, even if they did not win. As they are not the result of a compromise, separate opinions may be much more fully reasoned. They also allow a special role for the *ad hoc* or national judge in explaining the domestic position. The threat of a dissent may also forge compromise within the court, preventing the majority from simply imposing its will on the minority. In other words, dissents have an effect even before they are issued.

At times, dissents may criticise judicial timidity and demand more forceful application of existing jurisprudence. But they may also criticise decisions which exceed jurisdictional or substantive limits. Dissents may question the wisdom of established precedent and mark the beginning of a new line of jurisprudence. Sometimes, this will happen at another time or in another age. Think of US Supreme Court Justice Harlan’s “Great Dissent” to the infamous *Civil Rights Cases* of 1883 retracting Reconstruction rights for African-Americans<sup>16</sup>, and the *Plessy v. Ferguson* judgment in 1896<sup>17</sup>. Harlan’s powerful words may have lost in court, but they won in history<sup>18</sup>. Thus, it is not only one’s own court that is the addressee of separate opinions. The dissenters may also convince the public that the law needs to change, thus playing the ball back to the legislative branch<sup>19</sup>. Those of you who

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<sup>12</sup> For a list of practices in different countries, see the overview provided by the ECtHR Research Division and the European Commission for Democracy Through Law (Venice Commission), Opinion No. 932/1018, 17 December 2018, CDL-AD(2018)030rev., pp. 18 et seq.

<sup>13</sup> Rivière, *Les opinions séparées des Juges à la Cour européenne des droits de l’homme* (2004), at 20 n. 95.

<sup>14</sup> *Ibid.*, at 1, 18 et seq.

<sup>15</sup> See also the practice of the Inter-American Court of Human Rights, Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, entry into force 18 July 1978, 1144 UNTS 123, available at: <https://www.refworld.org/docid/3ae6b36510.html> [accessed 28 January 2019], Article 66 § 2 (“If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to have his dissenting or separate opinion attached to the judgment”) and of the African Court of Human and Peoples’ Rights, Article 28 § 7 of the Protocol on the Establishment of the African Court on Human and Peoples’ Rights, 10 June 1998, available at: <https://www.refworld.org/docid/3f4b19c14.html> [accessed 28 January 2019]. But see also Article 55 § 2 sentence 2 of the 2000 Rules of Procedure of the Inter-American Court of Human Rights, available at: [https://www.oas.org/xxivga/english/reference\\_docs/Reglamento\\_CorteIDH.pdf](https://www.oas.org/xxivga/english/reference_docs/Reglamento_CorteIDH.pdf): “The said opinions shall only refer to the issues covered in the judgment.”

<sup>16</sup> *The Civil Rights Cases* 109 U.S. 3 (1883) (Consolidating: *U.S. v Stanley*; *U.S. v Ryan*; *U.S. v Nichols*; *U.S. v Singleton*; *Robinson and wife v Memphis & Charleston Railroad Company*).

<sup>17</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896), § 39 (Harlan dissenting).

<sup>18</sup> See *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>19</sup> See BVerfGE 146, 1 (150, 159 § 17) (Paulus and Baer dissenting) – *Tarifeinheit* (Uniformity of Collective Agreements).

watched the 2018 documentary “RBG” chronicling the career of Justice Ruth Bader Ginsburg<sup>20</sup> may remember the Ledbetter Act<sup>21</sup>, named after RBG’s forceful dissent in the case bearing the same name<sup>22</sup>.

Let me add to these functions a few more, without suggesting an exhaustive list. In court systems with several instances or courts with several judicial bodies, dissents may help to elucidate differences between the established jurisprudence and a new decision, thereby preventing potential precedents from gaining traction<sup>23</sup>. They may point to alleged differences between the decisions of equal bodies of the same rank, such as recently in the ECtHR case *Big Brother Watch*<sup>24</sup>. Dissents may also help the higher instance to decide whether to accept lower-instance judgments for reconsideration, a recent example being the dissent by Judges Keller and Serghides in *Mutu and Pechstein v. Switzerland*, which was explicitly directed at the Grand Chamber but was not successful<sup>25</sup>. Some even regard separate opinions as a sort of running commentary on the Convention<sup>26</sup>.

### III. Separate Opinions and the Authority of International Courts

For all the advantages of admitting separate opinions, for the gains in terms of transparency and fostering judicial dialogue – with other judges, with the other branches of government, with society, and even with posterity – separate opinions also have important downsides, in particular regarding the topic of today’s seminar, namely the authority of courts and their decisions, both national and international.

As we have seen, separate opinions, by not being part of a compromise, may be more convincing than majority opinions. Their rhetoric is often more forceful than the serene tone of the judgments to which they relate. However, at times they may run the risk of merely expressing vanity and personal offence rather than sober and rational argument. They may create expectations of modification and thus prevent effective implementation. At times, the possibility of dissent will hamper the hard labour of forging consensus within the court.

In systems allowing the re-election of judges, the possibility of dissent may also invite political statements and thus politicise a court. In a poisoned political atmosphere, in which the approach to interpretation between an original interpretation and a living constitution is controversial, dissents may weaken the authority of the court as a body applying the law, not making it – a distinction that is as problematic in theory as it is necessary for the maintenance of the separation of powers and the authority of the courts in practice. Dissents may also confuse the legal message of the court. If the law is considered a simple “on the one hand ... on the other hand” affair, in which each argument is

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<sup>20</sup> See RBG (film), Wikipedia, en.wikipedia.org (accessed 24 April 2019).

<sup>21</sup> Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2

<sup>22</sup> *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007) available online: <https://supreme.justia.com/cases/federal/us/550/618> (visited 4 May 2019).

<sup>23</sup> See BVerfGE 138, 261, 289 (294 paragraph 14) – Thuringia’s Shop-opening Hours (Paulus dissenting).

<sup>24</sup> ECtHR (First Section), *Big Brother Watch and Others*, cited above, partly concurring, partly dissenting opinion of Judge Koskelo, paragraph 4, and joint partly dissenting and partly concurring opinion of Judges Pardalos and Eicke, paragraph 2, both pointing to ECtHR (Third Section), *Centrum för Rättvisa v. Sweden* (no. 35252/08, 19 June 2018); see also ECtHR (Grand Chamber), *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018, joint partly dissenting opinion of Judges de Gaetano and Wojtyczek, p. 55. However, the majority explicitly attempt to resolve contradictions in the previous case-law (*ibid.*, pp. 36 et seq., paragraph 108). Both judgments are pending before the Grand Chamber – see Press Release ECHR 053 (2019) of 5 February 2019, <https://hudoc.echr.coe.int/eng-press> (accessed 5 April 2019).

<sup>25</sup> ECtHR (Third Section), *Mutu and Pechstein v. Switzerland*, nos. 40575/10 and 67474/10, 2 October 2018. Nevertheless, the Grand Chamber did not accept Ms Pechstein’s application for referral to the Grand Chamber. See Press Release 53 (2019), footnote 21 above.

<sup>26</sup> See Rivière (footnote 13), at 320 *et passim*.

as good as the contrary one, the authority of the law and of the courts as its interpreters may be affected.

#### IV. Some Modest Proposals for the Use of Separate Opinions

Thus, dissents expose, for better or for worse, the relativity of the judicial enterprise. If the legislature had already solved the case in question, the court's intervention would be pointless. On the other hand, if a court is making new rules rather than applying the existing ones, it may be charged with political activism. Implementation may suffer.

Nevertheless, when used wisely, occasional dissents will be helpful, not harmful, to the authority of courts in a democratic society. Such a society will not accept mere claims of authority, but expects judgments restricting democratic legislation to be at least based on plausible reasoning derived from some basic principle or rule that society has democratically accepted as binding. Such a society must keep an open mind and should be ready to reverse its thinking occasionally. The minority of today may well become tomorrow's majority. Separate opinions can thus contribute to a court holding itself accountable but also to the dialogue with other courts and with society at large.

To fulfil this task, and to avoid negative consequences for the authority of the court and the judicial system in question, the downsides of separate opinions should also be cause for some modesty. In my view, dissents should be clear and concise but not offensive, and be based on legal argument, not hyperbole. This is better for the authority of the court and for future working relations with your colleagues too. Accordingly, separate opinions should be as brief and succinct as possible, and should focus on the law alone. They require a public that accepts that legal determinism is in many cases an illusion and that legal argument is open to discussion and reversal. In my view, it is not necessary to add a dissent each time one disagrees with the result, still less with one or other aspect of the majority's reasoning<sup>27</sup>. Dissents and occasional separate opinions should always serve a function beyond demonstrating disagreement. In general, a dissent that criticises the court for not going far enough is more defensible than one that points out that the court has acted beyond its powers, because the former indicates the potential for future change and does not, in general, deny the authority of the court in the same way as the latter.

Consider the consequences: dissents should not aim at the impossible but should demonstrate why, in the opinion of the dissenter, the majority did not faithfully interpret and apply the law in question – of course without impugning malign intent. In particular, the dissent should not be used to demonstrate who is the better judge, but rather what would have been the better judgment. Separate opinions may be helpful for explaining the majority opinion, but may also expose arrogance and presumptuousness. Thus, they should enhance dialogue between majority and dissent<sup>28</sup>, not deepen the wounds between the winners and losers of the deliberations. When this dialogue has taken place and the majority has the opportunity to check its own views against those of the minority, separate opinions and dissents may serve as important tools for greater transparency of the process of judicial reasoning in a democratic society.

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<sup>27</sup> This is in line with the recommendations of the Venice Commission (*supra* footnote 12), Opinion No. 932/1018, at 13, paragraph 42: "The law should treat separate opinions as a right of judges, and not impose on them a duty to disclose their opinion in every case they were not able to join the majority."

<sup>28</sup> See the criticism by Luzius Wildhaber, "Opinions dissidentes et concordantes de juges individuels à la Cour européenne des droits de l'homme", *Mélanges Valticos* (Paris 1999) 529 (530).