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Dissenting Opinions in Constitutional Courts

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Although long considered alien to the civil law tradition, the publication of separate dissenting or concurring opinions is now permitted by the majority of European constitutional courts, the only exceptions being the Austrian, Belgian, French, Italian, and Luxembourgish constitutional courts. The decades-long history of dissenting opinions in the practice of several European constitutional courts calls for an analysis.[1] While there is an extensive literature in the United States regarding the use of dissenting opinions, comprehensive empirical research is still absent in Europe.[2] American scholars have conducted research from several different points of view. Legal scholars have dealt primarily with the relationship between dissenting opinions and the doctrine of binding precedent, and have tried to solve the problem of the precedential value of plurality decisions, e.g. decisions lacking a reasoning shared by the majority of the judges.[3] Political scientists, for their part, have studied the policy-making role of judges and strategic

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[1] There are also examples of continental European countries that allow their ordinary judges to write dissenting opinions: Estonia, Greece (two countries that do not have a separate court for constitutional review), and Spain (which allows the publication both to ordinary judges and to the judges of the *Tribunal Constitucional*). *See* SAULLE PANIZZA, L'INTRODUZIONE DELL'OPINIONE DISSENZIENTE NEL SISTEMA DI GIUSTIZIA COSTITUZIONALE 110–19 (Giappichelli ed., 1998). Dissenting opinions are part of the Scandinavian legal tradition as well. *See* ALESSANDRO SIMONI & FILIPPO VALGUARNERA, LA TRADIZIONE GIURIDICA DEI PAESI NORDICI 64 (Giappichelli ed., 2008).

[2] Empirical research and academic discussion has been limited even in England. The last comprehensive discussions on the decision-making process of English judges remain those of LOUIS BLOM-COOPER & GAVIN DREWRY, FINAL APPEAL: A STUDY OF THE HOUSE OF LORDS IN ITS JUDICIAL CAPACITY (1972) and ALAN PATERSON, THE LAW LORDS (1982). *See also* JOHN BELL, POLICY ARGUMENTS IN JUDICIAL DECISIONS (1983). A more recent essay by an English scholar is the one of John Alder, *Dissents in Courts of Last Resort: Tragic Choices*, 20 OXFORD J. LEGAL STUD. 221 (2000). In Europe, a comprehensive analysis is still missing both at the national level and in a comparative perspective, but not at the supranational level. The European Court of Human Rights publishes dissenting opinions and these were subject of analysis by scholars such as the Dutch Fred J. Bruinsma and Matthijs De Blois, *Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights*, 15 NETH. Q. HUM. RTS. 175 (1997) and other essays authored by Bruinsma; or the English Robin C.A. White & Iris Boussiakou, *Separate Opinions in the European Court of Human Rights*, 9 HUM. RTS. L. REV. 37 (2009).

[3] *See* Linda Novak, Note, *The Precedential Value of Supreme Court Plurality Decisions*, 80 COLUM. L. REV. 756, 763 (1980); Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2083 (1995); Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1128 (1981); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L. J. 419, 419 (1992).

opinion-writing.[4] Scholars of law and economics have analyzed the costs and benefits of writing separately.[5] Even judges themselves have often expressed their own thoughts in essays or conference speeches on the matter.[6]

The thesis that this Article will develop and uphold is that the practice of dissenting opinions has its own distinct dimension in constitutional courts, and consequently the findings of American (and more in general, common law) studies might be used within certain limits. This essay will point out the peculiarities of constitutional courts that researchers have to take into consideration when analyzing the practice of judicial dissent in continental Europe. These peculiarities should induce scholars to carry out research on dissenting opinions within constitutional courts.

This Article will not evaluate the institution of the dissenting opinion and does not intend to undertake the task of establishing whether its introduction in the judicial practice of constitutional courts is bad or good. The aim of this Article is to examine the actual practice in European constitutional courts in order to have a better understanding of their decision-making process and internal dynamics. As a consequence of the lack of comprehensive research in this field in Europe, the present writing will raise more questions than answers. Therefore, the aim of this essay is also to lay down a basis for further research and to point out its possible directions.

A. Judicial Dissent in Continental European Countries

I. The Emergence of Judicial Dissent in Continental Europe

It is important to underline that the tradition of secrecy of deliberation in continental Europe is something like a myth, because as a matter of fact there are several historical examples of a contrary practice. In the Spanish legal tradition, the origins of dissent date back to the 15th century, to an ordinance of Medina that permitted separate opinions,

[4] *See generally* LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE (1997); THOMAS H. HAMMOND ET AL., STRATEGIC BEHAVIOR AND POLICY CHOICE ON THE U.S. SUPREME COURT (2005); PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT (2010).

[5] *See generally* Lee Epstein, William M. Landes & Richard A. Posner, *Why (and When) Judges Dissent: A Theoretical and Empirical Analysis*, 3 J. LEGAL ANALYSIS 101 (2011).

[6] *See* William J. Brennan, Remarks at the Third Annual Mathew O. Tobriner Memorial Lecture at the University of California, Hastings College of the Law (Nov. 18, 1985): William J. Brennan, *In Defense of Dissents*, 37 HASTINGS L.J. 427, 430 (1986); Ruth Bader Ginsburg, Jurisprudential Lecture at the University of Washington School of Law (May 11, 1989): Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133 (1990); Antonin Scalia, *Remarks on Dissenting Opinions*, *in* L'OPINIONE DISSENZIENTE 411 (Adele Anzon ed., 1995); Ruth Bader Ginsburg, Presentation to the Harvard Club of Washington, D.C., (Dec. 17, 2009): Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2-7 (2010).

called *voto reservado*, to be registered in a secret unpublished book.[7] This rule was preserved by the laws on civil and criminal procedure in 1881 and 1882, and it remained in force until 1985, when the use of dissent was extended to the whole justice system.[8] In Italy, before the unification of the country and the adoption of the French model, some local laws were inspired by Spanish law, so dissenting opinions were filed in the Kingdom of Naples, the Este States, and Tuscany.[9] In Germany, in the State of Baden dissents were even published up to the middle of the 19th century,[10] while in the State of Württemberg the practice of public voting was maintained until the Second World War.[11]

Germany, or more precisely West Germany, became the first European country to legislatively recognize dissenting opinion within its positive law. During the drafting of the Judicature Act (*Gerichtsverfassungsgesetz*) in 1877, a proposal was made to allow dissenting opinions, but it was rejected on the ground that the publication of dissent was held to be "incompatible with the authority of the courts and good relations between the judges" which "would foster vanity and disputatiousness."[12] The question emerged again during the creation of the Federal Constitutional Court after the Second World War. At this point, even though the beneficial effect of the publication of separate opinions on the development of a body of constitutional law was acknowledged, its introduction was initially refused on the ground that "the trust in justice and especially in constitutional justice was not yet sufficiently developed […] to preclude the possibility in litigation with political aspects that public reactions […] may result if, in litigation involving political issues, a judge himself asserted that it would have been possible to decide otherwise."[13] Notwithstanding this initial refusal of the legislature to allow the publication of dissent, the

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[7] Chapter XIV of the Ordenanzas de Medina, *in* NOVÍSSIMA RECOMPILACIÓN DE LAS LEYES DE ESPAÑA, Tomo II, Boletín Oficial del Estado 350 (1976).

[8] *See* LORENZO LUATTI, PROFILI COSTITUZIONALI DEL VOTO PARTICOLARE. L'ESPERIENZA DEL TRIBUNALE COSTITUZIONALE SPAGNOLO 163–69 (Giuffrè ed., 1995).

[9] *See* VITTORIO DENTI, *Per il ritorno al "voto di scissura" nelle decisioni giudiziarie*, *in* LE OPINIONI DISSENZIENTI DEI GIUDICI COSTITUZIONALI ED INTERNAZIONALI 1, 3-6 (Costantino Mortati ed., 1964).

[10] *See* Kurt H. Nadelmann, *Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany*, 13 AM. J. COMP. L. 268, 272 (1964).

[11] *See* Luisa Paola Oneto, *Le opinioni dissenzienti dei giudici della Corte costituzionale Tedesca*, *in* ANNALI DELLA FACOLTÀ DI SCIENZE POLITICHE DI GENOVA 1083, 1087 (1976-77).

[12] *See Bericht der Kommission*, *in* DIE GESAMMTEN MATERIALIEN ZU DEM GERICHTSVERFASSUNGSGESETZ 72 (Carl Hahn ed., 1883), *cited in* Arthur von Mehren, *The Judicial Process: A Comparative Analysis*, 5 AM. J. COMP. L. 197, 208 n.42 (1956). The Commission's report states "[t]he development of law and of legal science will be fostered by careful reflection in libraries, but not through violent discussions following expressions of polemically motivated dissenting opinions" and that "[a] court's principal function is to decide the individual case justly and to uphold the authority of the laws, not to provoke scientific discussions over legal questions." *Id.*

[13] von Mehren, *supra* note 12, at 209 n.42.

Federal Constitutional Court, which took up office in September 1951, made the proportion between yes and no votes known to the public the first time in a decision of 8 December 1952,[14] and ten days later Judge Willi Geiger published a dissenting opinion.[15] The Court changed its practice quite gradually, eventually permitting the publication of anonymous dissenting opinions.[16] In 1967, the Second Section (*Senat*) of the Court established the practice of revealing the number of yes and no votes. The bill for the modification of the statute on the *Bundesverfassungsgericht* was proposed by the Federal Government in December 1969, passed by the *Bundestag* a year later, and regulated in detail by the Rules of the Court, modified in December 1971.[17] Under the new rules the Court now has the possibility of publishing dissenting and concurring opinions (*Sondervotum*), and of revealing the number of yes and no votes in anonymous way.

The example of Germany was followed by Spain and Portugal, which permitted the use of dissenting opinions in their constitutional courts from the time of their establishment. Actually dissenting opinions were considered to be part of the German model at that time (the end of the 1970s). In Spain, however, dissenting opinions were not completely novel to the legal system. The practice of registering *voto reservado* in a secret book, as mentioned above, remained in force until 1985, and was available even to ordinary judges. In regards to constitutional justice, the *Tribunal de Garantías Constitucionales*, considered the forerunner of the *Tribunal Constitucional*, in its brief lifetime (1933-1936) during the

[14] The subject of the decision was of primary importance for the German legal system. It dealt with the compatibility of the European Defense Community Treaties with the Bonn Constitution. The Court decided to reveal the number of yes and no votes to the public in order to stop rumors about a close vote. Twenty judges voted in favor and two against the decision. Kurt H. Nadelmann, *Non-Disclosure of Dissents in Constitutional Courts: Italy and West Germany*, 13 AM. J. COMP. L. 268, 272 (1964).

[15] The disagreement between the judges concerned the effects of the decision, as it consisted of an opinion requested by the Federal President. The majority of the judges considered these opinions given during consultation (*Gutachtenverfahren*) to be binding upon the Court in future cases if the same question is raised again as a conflict of competence. Judge Willi Geiger instead was of the opinion that in a second procedure the Court should not be bound by its previous opinion, because in the consultation proceedings the parties do not have the right to be heard. Jörg Luther, *L'esperienza del voto dissenziente nei paesi di lingua tedesca*, *in* POLITICA DEL DIRITTO 241, 244 (1994).

[16] *See* Philip W. Amram, *The Dissenting Opinion Comes to the German Courts*, 6 AM. J. COMP. L. 108, 110 (1957). A well-known example is the Spiegel-decision. *See* Bundesverfassungsgericht [BVerfGE – Federal Constitutional Court], Case No. 1 BvR 586/62, 610/63, 512/64, DEJURE 20, 162 (Aug. 5, 1966), http://dejure.org/dienste/vernetzung/rechtsprechung?Text=BVerfGE%2020%2C%20162&Suche=BVerfGE%2020%2C%20162.

[17] The dissenting opinion was introduced at first by the Rules of the Constitutional Court of the *Land* of Bayern (in 1948), but here dissents are published without the name of the dissenting judge. Afterwards, it was also introduced by the Rules of the *Staatsgerichtshof* (the state supreme court) of the *Land* of Bremen in 1956, but published only on request of the dissenter and is not applied anymore from 1968. Luther, *supra* note 15, at 242.

Second Republic developed the practice of publishing *votos particulares*[18] (public separate opinions) and made abundant use of it. A proper constitutional court was established by the Constitution of 1978, after the breakdown of the Franco regime. The positive experience acquired in the prior use of separate opinions by the *Tribunal de Garantías Constitucionales* led the Spanish legislature to extend, shortly after of their introduction (in 1985), the *votos particulares* to ordinary judges as well, according to a provision of the Organic Law on the Judicial Power.[19] Consequently, today dissenting opinions can be published both by constitutional and by ordinary judges, and the Spanish legal system is the only one in Western Europe that extends the use of dissent to the whole judiciary. Moreover, based on statistics, Spanish constitutional judges make use of it more frequently than their German colleagues do.[20]

Portugal also had a tradition of judicial dissent, and like Spain, included the practice in its constitutional court from the beginning. In what may be considered a forerunner of the modern dissenting opinion, the Portuguese legal tradition had long permitted judges to express their dissent, even if in a relatively limited way, by writing the term *vencido* next to their signature in the decision. When the Portuguese Constitutional Court was established in 1982, the publication of full dissenting opinions was introduced into the practice of the court.[21]

The Greek tradition also includes a very particular practice that is worth mention. Greece has a common law-type judicial review system, in which all judges can declare the unconstitutionality of a law, and a civil law-type justice system with three judicial branches (ordinary, administrative and auditorial). Compulsory publication of dissenting opinions is prescribed directly by the Constitution (Article 93, par. 3). In practice, however, dissents are anonymous and are delivered by the reporting judge.[22]

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[18] LEY ORGÁNICA DEL TRIBUNAL DE GARANTÍAS CONSTITUCIONALES [CONSTITUTIONAL COURT ORGANIZATION ACT] art. 41 (June 14, 1933) (Spain).

[19] LEY ORGÁNICA DEL PODER JUDICIAL [L.O.P.J.] [LAW ON THE JUDICIARY] 6/1985 (Spain).

[20] *See* Maria Theresia Rörig & Carmen Guerrero Picó, *L'opinione dissenziente nella prassi del* Bundesverfassungsgericht *e del* Tribunal Constitucional *spagnolo, in* CORTECOSTITUZIONALE.IT (2009), http://www.cortecostituzionale.it/documenti/convegni_seminari/CC_SS_opinione_dissenziente_12012010.pdf. *See also* GEORG VANBERG, POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY 91 (2007).

[21] *See* SAULLE PANIZZA, L'INTRODUZIONE DELL'OPINIONE DISSENZIENTE NEL SISTEMA DI GIUSTIZIA COSTITUZIONALE 115 (Giappichelli ed., 1998).

[22] *Id.*

II. Dissenting Opinions in the Last Generation of Constitutional Courts

After the breakdown of their socialist regimes, most Central and Eastern European countries adopted an enriched and somewhat modified German model,[23] which at the time of the creation of these new constitutional courts already included the use of separate opinions. Even though there was no extensive debate over the introduction of dissenting opinions in the formerly socialist countries, the German practice certainly exercised a great influence on the new rules. Romania is a good example of this. The Romanian Constitutional Court is a curious cross-breeding of the Italian and the traditional French models, exercising both abstract *a priori* and concrete *a posteriori* control.[24] Neither Italian nor French constitutional justice allows the publication of dissents, and indeed, at its establishment, the Romanian Constitutional Court could not publish dissenting opinions. Later, however, the practice was recognized by a 2004 legislative reform.[25]

Another peculiar exception to the rule is Lithuania, which although it followed the German model, initially did not allow the publication of dissent. This is probably for the same reason Germany refrained from the practice upon establishment of the Federal Constitutional Court: the Court must first achieve authority before it can resist the public influence of the dissenting opinion.[26] Indeed, one and a half decades later, the Lithuanian legislature determined that such authority had been achieved, and in 2008 modified the Constitutional Court Act in order to allow the members of the Court "to set forth in writing his reasoned dissenting opinion within three working days of the announcement of the corresponding act in the courtroom."[27]

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[23] Enriched and modified to a different extent from country to country. For example, Hungary and Poland did not introduce a full constitutional complaint, just a normative constitutional complaint. On the other hand, Hungary introduced *actio popularis*, extending considerably access to the constitutional court. For a recent comparative study on individual access to constitutional justice, *see* Eur. Comm'n for Democracy Through Law [Venice Comm'n] Study No. 538/2009 (adopted in Dec. 2010), http://www.venice.coe.int/webforms/documents/CDL-AD%282010%29039rev.aspx (last visited June 17, 2013). In Hungary, the *actio popularis* has been abolished by the new Fundamental Law, which entered into force on 1 January 2012.

[24] In practice, however, the latter competence is used in the majority of the cases. See the official statistics available on the website of the Court: http://www.ccr.ro/uploads/activ02_13_1.pdf (last visited June 17, 2013). From the moment of its establishment until the end of February 2013 the Romanian Constitutional Court dealt with 30,114 cases and only 0.008% of them concerned *a priori* review (240 cases), while 97.6% emerged from a concrete controversy (own calculations).

[25] Act no. 232/2004 art. 59 (June 3, 2004), which modified the Constitutional Court Act (no. 47/1992), *available at* http://www.cdep.ro/proiecte/2004/100/30/3/leg_pl133_04.pdf (Rom.).

[26] *See* Julia Laffranque, *Dissenting Opinions and Judicial Independence*, 8 JURID. INT'L 162, 165 (2003).

[27] Law no. X-1806 (Nov. 11, 2008), Valstybės žinios (Official Gazette) No. 134-5179 (Nov. 22, 2008). The provision allowing the publication of dissent is now contained in Article 55 of the Constitutional Court Act. The Act's English translation is available on the official website of the Lithuanian Constitutional Court: http://www.lrkt.lt/Documents3_e.html (last visited June, 17 2013). Consequently, the Constitutional Court modified its Rules of Procedure inserting a Section VII entitled "Dissenting opinion of a Justice of the

Today every constitutional court in Central and Eastern Europe allows the publication of dissenting opinions. There are no more exceptions. However, there are some differences as to the modalities of publication. In Latvia, for example, they are not published as attachments to the majority opinion, but are published once a year in the collection of judgments at the end of the term.[28] In Slovenia, dissenting opinions are not published in the Official Gazette, but on the Court's website, in the Digest, and in a special law journal. The explanation for this is even more curious: it is simply too expensive, since the Court must pay for publication in the Official Gazette.[29] Also, in the Czech Republic, dissents and concurrences are published in the Court's own reporter, but not in the Collection of Laws, where there is only a note at the bottom of the judgment that indicates the existence of a separate opinion.[30]

B. The *Sui Generis* Nature of Constitutional Courts and Why It Matters

The historical overview reveals that, even if few and isolated, there were examples of recognition of judicial dissent in the civil law tradition. The comparative overview, furthermore, shows that the publication of dissent is not limited anymore to the practice of common law judges. Today it is a widespread practice even in continental Europe. However, it still represents an exception for judges of ordinary courts. Only Spain and Estonia allow their ordinary judges to publicly express their dissent. They represent the exceptions that prove the rule. On the other hand, the overwhelming majority of constitutional courts provide for it.

At this point a few questions emerge. First, why is the publication of dissent basically a privilege of constitutional courts in civil law countries? Second, does this confirm the *sui generis* nature of constitutional courts? Third, what are the consequences?

Constitutional Court" in Chapter VIII concerning the consideration of a case at a judicial hearing (Decision of Nov. 26, 2008). For the English translation of the Rules of the Constitutional Court see its official website: http://www.lrkt.lt/Documents4_e.html (last visited June 17, 2013).

[28] *See* Article 225 of the Latvia Rules of Procedure of the Constitutional Court providing that dissenting opinions shall be kept attached to the case file for three months and after that are published; and Article 33 par. 2 of the Constitutional Court Law providing that once a year the Constitutional Court shall publish a collection of judgments of the Constitutional Court, including all judgments in full and individual opinions of justices attached to cases. The English translation of the Rules of Procedure and of the Constitutional Court Law is available on the site of the Court: http://www.satv.tiesa.gov.lv/.

[29] I thank Prof. Dr. Arne Mavćić, European Law School Faculty for Government and European Studies, for this observation.

[30] The judgments, together with the separate opinions, are included on the main computer database in the Czech Republic (called ASPI), but the names of dissenting Justices are redacted out, and only their initials appear. I thank Mark Gillis for this information.

Constitutional courts are *sui generis* institutions, since they merge judicial (dispute resolution) and political (lawmaking) functions.[31] It is to be pointed out that constitutional courts differ from supreme courts in several aspects. It is not simply a question of jurisdiction. They are not special supreme courts. First of all, they are not supreme, in the sense that there are no lower courts below them. There is no hierarchy in the administration of constitutional justice.[32] In the American model, all judges have the power of judicial review. In the European model, on the other hand, this is the sole privilege of the constitutional court. That is why the European (or Austrian) model is also called the centralized or, less often, concentrated model. An important consequence of this difference is that constitutional issues are not discussed by ordinary judges in civil law countries, if not in the ambit of a reference to the constitutional court. Ordinary judges do not decide constitutional issues and do not deliver judgments declaring the unconstitutionality of a piece of legislation. This means that there is no variety of judicial voices heard on these issues. Constitutional courts, as described by Ferreres Comella, have a 'dialogic disadvantage'[33] in comparison to common law supreme courts, which have the final word on constitutional questions but have at least one other judicial opinion on the matter at their disposal.

In the European model, however, the time for debate is shortened. In this context, separate opinions may play an important role in enriching the constitutional debate and may help the evolution of constitutional law. In the same line of thought, Julia Laffranque considers dissenting opinions instructive commentaries that are especially important for legal culture that are not yet fully developed, as was the case of her own country, Estonia.[34] Her observation can be extended to all transitional contexts where interpretive gaps are frequent and an established interpretation of the new rules has not yet emerged. This is especially true for constitutional law, which is much more affected by political regime changes than other, more technical branches of law. In fact, this may be a potential explanation for the introduction of dissenting opinions in the formerly socialist countries of Central and Eastern Europe. However, as mentioned above, in all likelihood the influence of the German model is the more probable reason for this.

The fact that constitutional courts have a monopoly on judicial review does not only mean that they do not share this power with lower courts. The lack of hierarchy in the

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[31] *See generally* MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 55 (1971) (becoming one of the first scholars theorizing the models of judicial review).

[32] There is no hierarchy in federal states either. German state constitutional courts cannot be considered the first instance courts of the German constitutional justice system.

[33] *See* VICTOR FERRERES COMELLA, CONSTITUTIONAL COURTS AND DEMOCRATIC VALUES 58 (2009).

[34] *See* Julia Laffranque, *Dissenting Opinion in the European Court of Justice. Estonia's Possible Contribution to the Democratisation of the European Union Juridical System*, 9 JUR. INT. 14, 17 (2003).

administration of constitutional justice also signifies that there is no other court above them. The fact that the decisions of constitutional courts are final and cannot be appealed may have an impact on their argumentative style. Interesting empirical research carried out in French administrative courts showed that for many judges, reason-giving is mainly an activity directed towards the appellate court so as to avoid reversal.[35] This observation certainly does not apply to supreme courts and constitutional courts. So, the motivations of judges in their reason-giving practices are to be found elsewhere.

Even though constitutional courts have to be considered separately from supreme courts, it is quite common for comparative constitutional studies to compare the case law and the functioning of European constitutional courts to supreme courts of countries belonging to the common law tradition, in particular and primarily to the U.S. Supreme Court. Such a comparison is motivated by functional reasons: the compared courts exercise the power of judicial review. Moreover, both models of judicial review (centralized and decentralized) are struggling with the so-called counter-majoritarian difficulty, or as it is addressed in European constitutional theory, with democratic legitimacy.[36] In addition, their composition shows similarities. However, there are still important differences that distinguish constitutional courts from common law supreme courts and are relevant to studying the practice of dissenting opinions.

First, constitutional courts in civil law systems actually co-exist with ordinary supreme courts and special supreme courts. In Germany, for example, there are five supreme courts besides the *Bundesverfassungsgericht*. It means that constitutional courts do not give the final word on every legal question. Their jurisdiction is limited to constitutional adjudication, while other matters are decided by the other courts. Obviously, a controversy may rise that raises both constitutional and other legal questions. In this case, these parallel judicial bodies have to share the work and decide the questions in their respective jurisdiction. Today every European constitutional court combines abstract and concrete review.[37] After the 2008 French constitutional reform[38] every centralized model in Europe

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[35] *See* Mathilde Cohen, *Reason-Giving in Court Practice: Decision-makers at the Crossroads*, 14 COLUM. J. EUR. L. 257, 264 (2008).

[36] *See, e.g.*, Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, *in* EUROPEAN AND US CONSTITUTIONALISM 165, 184 (Georg Nolte ed., 2005). The argument of counter-majoritarian difficulty is addressed against the power of judicial review on the ground that the judiciary, not being elected by the people, lacks democratic legitimacy; therefore, its power to set aside unconstitutional legislation is unjustified.

[37] Abstract review means that the court compares two normative texts and assesses their compatibility without regard to their concrete application. Concrete review, on the other hand, implies that there is a controversy from which the constitutional question has arisen.

[38] *See* Federico Fabbrini, *Kelsen in Paris: France's Constitutional Reform and the Introduction of a* Posteriori *Constitutional Review of Legislation*, 9 GERMAN L. J. 1297, 1297 (2008).

now provides for incidental review as well, and since the creation of the German Federal Constitutional Court, several constitutional courts also hear constitutional complaints challenging ordinary judicial decisions.[39] This "judicial cohabitation" results in a dialogue between ordinary and constitutional judges, but also implies a potential conflict between the parallel supreme jurisdictions, since a truly genuine separation of jurisdictions is not possible.[40] Dissenting and concurring opinions may play a role in this dialogue as well, and this interaction could be a subject for further specific research.

Second, constitutional courts are often able to intervene in the legislative process, which is not the case for common law supreme courts. Indeed, when a constitutional court exercises preventive (or *a priori*) review, it decides on the constitutionality of a statute before its promulgation. In this case the review procedure is necessarily initiated by a political actor (a member of the parliament or a group of members of the parliament, the government or a member of it), and the decision is a result of a trialogue between the court, the proponent of the bill and the actor who challenged it. In fact, the centralized model of judicial review facilitates the right of the governmental majority to defend the constitutional legitimacy of the challenged statute.[41] In the United States, however, notwithstanding the decentralized system of judicial review, the legislator is able to intervene in the proceedings, as courts must notify the U.S. attorney general or the relevant state attorney general if the constitutionality of an act of the Congress or a statute of a state becomes an issue in litigation.[42]

Third, abstract review is traditionally listed among the features that determine the *sui generis* nature of constitutional courts. As mentioned above, abstract review means that the court compares two normative texts and assesses their compatibility without regard to their concrete application.[43] It is abstract because there is no litigation from which the question of constitutionality emerged. What in the European model is called "concrete review," on the other hand, is initiated by an ordinary judge, so there is a concrete controversy behind the constitutional issue. However, as Alec Stone Sweet observes, in the European model even concrete review "remains meaningfully abstract in an overt and

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[39] *See* Gianluca Gentili, *A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America*, 29 PENN ST. INT'L L. REV. 705, 707 (2010).

[40] *See* Lech Garlicki, *Constitutional Court Versus Supreme Courts*, 5 INT'L J. CONST. L. 44, 47 (2007).

[41] FERRERES COMELLA, *supra* note 33, at 65.

[42] *See* 28 U.S.C. § 2403 (2012).

[43] *See supra* text accompanying note 37. With reference to the French *a priori* review it was called also 'constitutional review of objective law' (controllo di costituzionalità di diritto obbiettivo). *See* GUSTAVO ZAGREBELSKY, IL DIRITTO MITE 78–79 (Einaudi ed., 1992).

formal way,"[44] since the constitutional court does not dispose of the litigation in which the question of constitutionality emerged. That is the job of the ordinary judge who made the reference to the constitutional court. The predominantly abstract nature of European constitutional review induces us to also think that the style of argumentation of constitutional courts differs considerably from the style of common law supreme courts, whose main function is to dispose of the litigation. In the American model of judicial review, the decision on the conformity of a statute with the Constitution is incidental to the dispute resolution. However, abstract review is not unknown to the American legal system. Preliminary injunctions and declaratory judgments, first developed by the courts of equity, have become instruments of rights adjudication. They have been especially used in relation to the First Amendment freedom of expression, a field in which the restrictive doctrines on standing and justiciability have been relaxed.[45] In such cases, American judges act like their European colleagues on constitutional courts: they make authoritative guesses about how a law would likely be enforced by public officials and how a statutory provision would likely be construed by the courts.[46] The techniques of abstract review developed by American judges are strikingly similar to their European counterparts: they use balancing tests; they try to save the "uncontaminated" provisions of the challenged statute or the entire statute by interpreting it in a way compatible with the Constitution.[47] To conclude, both American and European constitutional judges routinely engage in abstract reasoning and decision-making. In this respect the differences may not be as striking as we might expect at first sight.

Finally, an important distinguishing feature of constitutional courts in comparison to supreme courts is their age. Unlike the traditional supreme courts, constitutional courts are relatively new institutions. With the exception of their prototype, the Austrian Constitutional Court, all were created after the Second World War,[48] and the last generation has just recently turned twenty. This creates several consequences that a researcher may consider when analyzing the decision-making process. First, constitutional courts are institutions that often had to face transitional issues, and in the period shortly

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[44] Alec Stone Sweet, *Why Europe Rejected American Judicial Review: And Why It May Not Matter*, 101 MICH. L. REV. 2744, 2771 (2003).

[45] *Id.* at 2773–74. Abstract review has become the "normal" mode of adjudicating also in the domain of reproductive rights. *Id.* at 2777.

[46] *Id.* at 2777.

[47] This latter technique is called the "saving construction" in American parlance, "strict reserves of interpretation" in France, and *verfassungskonforme Auslegung* in German. *Id.* at 2778.

[48] The Czechoslovakian Constitutional Court, established in 1920, is another exception, even if in its twenty years of functioning it delivered only 65 decisions. *See* Jiři Přibaň, *Judicial Power vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System*, *in* CONSTITUTIONAL JUSTICE, EAST AND WEST 373, 374 (Wojciech Sadurski ed., 2003).

after their establishment cannot rely on an established body of case law. They have to build a new, coherent system from scratch. As already mentioned above, in such circumstances dissenting, and maybe to an even greater extent concurring opinions, can be of a great help in establishing a body of constitutional law. Second, the constitutional courts, as newly created institutions in their first years of existence, struggle with asserting their own authority and legitimacy.[49] In a context of initial distrust in the public institutions, the publication of dissents can be seen as a way to ensure transparency of the decision-making of the new court, thereby enhancing its credibility and legitimacy.[50] Constitutional courts created after the breakdown of an authoritarian regime were faced with this situation. On the one hand a lack of confidence in the legislative power increased the need for judicial review,[51] and on the other hand mistrust in a new institution composed of members appointed by politicians increased the need for transparency. However, in times when the court's authority and legitimacy are still weak, the publication of seemingly unanimous opinions can serve to protect the newly established court. Consequently, in a transitional period, it may be also argued that a ban on dissenting opinions would serve exactly the same goal as permitting dissents.[52] This apparent contradiction was solved in different ways by different countries. In Germany and in Lithuania, as pointed out above,[53] the publication of dissent was not allowed in the first period on the ground that it might compromise the authority of the newly established court. In both cases it took approximately two decades to acknowledge that the constitutional court's authority was sufficiently established to introduce dissenting

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[49] *See* Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009, 2031 (1997).

[50] I thank Wojciech Sadurski for this suggestion.

[51] *See* László Sólyom, *The Role of Constitutional Courts in the Transition to Democracy: With Special Reference to Hungary*, 18 INT'L SOC. 133, 135 (2003).

[52] This was the opinion expressed by Hjalte Rasmussen in relation to the European Court of Justice. He argues in favor of the introduction of dissenting opinions into the practice of the Court, but at the same time he recognizes that the ban on the publication of dissent served a legitimate purpose at the time of the adoption of the foundational treaties of the European Communities. *See* HJALTE RASMUSSEN, LEGAL OPINION ABOUT THE EUROPEAN COURT OF JUSTICE'S COMPETENCE TRANSGRESSIONS, POOR REASONINGS AND THE COMPLETE NON-TRANSPARENCY OF *WILLENSBILDUNG* 8–9 (2009), *available at* http://curis.ku.dk/ws/files/18105617/Doc (last visited June 17, 2013). The situation of the European Court of Justice was, however, peculiar, because it did not emerge in a context of transition from an authoritarian regime to democracy but as a new supranational court which had to operate in a completely new legal system and affirm the legitimacy of EC law. Recently, in June 2012, the European Parliament's Committee on Legal Affairs requested the Directorate General for Internal Policies a study on the practice of dissenting opinions in the Member States of the European Union, with the aim of assessing the appropriateness of the introduction of separate opinions for the European Court of Justice. The study, authored by Rosa Raffaelli, is available in its entirety at http://www.europarl.europa.eu/committees/en/studiesdownload.html?languageDocument=EN&file=78915 (last visited June 17, 2013).

[53] *See* Raffaelli, *supra* Part A.I for Germany and Part A.II for Lithuania.

opinions.[54] Other countries (Spain, Portugal and Central and Eastern European countries with the exceptions of Lithuania and Romania), on the other hand, allowed constitutional judges to publish their dissent from the very beginning. Therefore, in these countries the institution of dissenting opinion has 'grown up' together with the constitutional court itself, and it is more difficult to examine whether dissenting opinions had a negative effect on the court's authority.

The main thesis of this Article is that when carrying out a research on the practice of dissenting opinions in constitutional courts it is important to be aware of these differences in order to use and interpret the results of American studies properly. It seems that the *sui generis* nature of constitutional courts in continental Europe is confirmed, among others, by the fact that their judges are allowed to publish dissenting opinions. Constitutional judges are less attached to the traditional judicial mentality than ordinary judges, as they use different interpretative techniques and style of argumentation.[55] That is also the reason why the publication of dissent, with a few exceptions, is a privilege of constitutional courts in continental Europe. As to the third question set out at the beginning of this section, we established that there are several factors that bring us to consider the decision-making process of constitutional courts. All these factors affect the practice of dissenting opinions.

C. Independence vs. Transparency: A Difficult Balance

Dissenting opinions have always been seen and studied in the light of their impact on the legitimacy of the judiciary, whether constitutional or ordinary. The question of democratic legitimacy is crucial for an accurate analysis of the phenomenon of judicial dissent. However, much depends on our understanding of the concept of legitimacy. In relation to the legitimacy of constitutional courts, Wojciech Sadurski discusses a "meta-constitutional" character. He explains that since constitutional courts are explicitly endowed with the power of judicial review by their respective national constitutions, the issue of legitimacy of these courts cannot have a "formal" character, and in this sense, their legitimacy is much stronger than that of the U.S. Supreme Court. Therefore as regards constitutional courts, "the question is not whether these courts exercise their powers in accordance with the constitution and other laws but whether the constitution *should* endow them with

[54] In Germany they were introduced after 19 years (in 1970), in Lithuania after 15 years (in 2008).

[55] According to András Jakab, constitutional courts are able to develop a system of concepts considerably more sophisticated than that of the actual text of the Constitution in order to serve as a "helping toolkit" for the solution of future cases. Moreover, this conceptual system is not always based on the text of the Constitution. It can also be the result of a text-independent abstract speculation. *See* ANDRÁS JAKAB, CONSTITUTIONAL REASONING IN CONSTITUTIONAL COURT – A EUROPEAN PERSPECTIVE 2, 29 (2011), *available at* http://ssrn.com/abstract=1956657 (last visited June 17, 2013).

such powers."[56] In this context the notion of legitimacy at work is "meta-constitutional" because the objection is addressed to the constitution-makers, not to constitutional judges. However, the objection of illegitimacy is addressed to constitutional judges as well on the ground that they exceed the limits determined by the constitution. Here the notion of "judicial activism" comes into play, which again can be interpreted in different ways.[57]

Another distinction made by Sadurski is between input and output legitimacy.[58] Input legitimacy is related to the way constitutional courts are set up (the appointment procedure and the composition), while output legitimacy concerns their decision-making and its impact on the legal system and the society. Judicial dissent is clearly an aspect of the problem of output legitimacy. Sadurski, however, does not include dissenting opinions in his analysis of output legitimacy, but instead focuses on the distinction between separation-of-powers issues and rights adjudication, explaining that constitutional courts' legitimacy is higher in relation to the first.[59] Other authors discussing the problem of legitimacy do not deal with dissenting opinions either. They focus on input legitimacy and judicial activism.[60] Empirical research on the use of dissenting opinions in constitutional courts might help us to understand the dynamics of legitimacy, since the publication of dissent affects the authoritativeness of the decisions and the public image of the courts.

There are two principles which come into play when discussing the problem of legitimacy, both of which are strictly related to the issue of dissenting opinions: judicial independence and transparent decision-making. These two principles are to be considered cornerstones of a democracy, and at the same time, they are difficult to balance. How do these values influence the assessment of dissenting opinions?

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[56] Wojciech Sadurski, *Constitutional Courts in Transition Processes: Legitimacy and Democratization* 4 (Sydney Law Sch. Legal Studies Research Paper No. 11/53, 2011), *available at* http://ssrn.com/abstract=1919363 (last visited June 17, 2013).

[57] The notion of judicial activism in relation to legitimacy has been discussed mostly by political scientists. *See, e.g.*, Christian Boulanger, *Europeanization Through Judicial Activism? CEE Constitutional Courts' Legitimacy and the Return to Europe*, *in* SPREADING DEMOCRACY AND THE RULE OF LAW? PART II, 263 (Wojciech Sadurski et al. eds., 2006); Shannon Ishiyama Smithey & John Ishiyama, *Judicial Activism in Post-Communist Politics*, 36 LAW & SOC'Y REV. 719, 720 (2002).

[58] Sadurski, *supra* note 56, at 4.

[59] It was also explicitly declared by László Sólyom, the first President of the Hungarian Constitutional Court. *See* András Mink, *Interview with László Sólyom*, 6 E. EUR. CONST. REV. 71, 72 (1997).

[60] *See, e.g.*, Sergio Bartole, *Conclusions: Legitimacy of Constitutional Court: Between Policy Making and Legal Science*, *in* CONSTITUTIONAL JUSTICE, EAST AND WEST 409 (Wojciech Sadurski ed., 2003).

I. Dissenting Opinions and Judicial Independence

Judicial independence has an intertwining external and internal aspect. One can analyze the independence of the judiciary from the other powers (the external aspect) or the judges' independence from their colleagues and superiors (the internal aspect). Furthermore, a distinction can also be made between the institutional and the individual aspects of judicial independence. We can talk about the independence of courts as institutions or about the independence of judges as individual persons. The multi-faceted nature of the notion of judicial independence makes it more complex to relate it to judicial decision-making and in particular to the practice of dissenting opinions. In fact, the independence argument has been used both in favor and against dissenting opinions.[61] It is important to be aware of which facet of judicial independence we take into consideration when discussing the issue of dissenting opinions.

On the one hand, the publication of dissent can be objected to on the ground that it compromises the impartiality of the judge. This argument is based on the external aspect of judicial independence, and for constitutional courts it is mainly expressed in terms of fear of political pressure on the judges, but it can also be related to the risk of economic or social pressure exercised by publicly influential interest groups and the media.[62] As to the danger of political pressure, the issue of dissenting opinions is often discussed in connection with the possibility of re-election of constitutional judges. As a result, the Venice Commission and several scholars have recommended a prohibition against re-election, since it may undermine the independence of a judge.[63] If judges are allowed to run for a second term, they will want to be popular among their nominators in order to be re-elected.[64] Dissenting opinions come into play because they reveal the opinion of the single judges. In a system where the publication of dissent is not permitted, it will be difficult for the nominators to understand the position of the members of the court, since all decisions appear as unanimous and, consequently, anonymous. On the other hand, a separate opinion expresses a judge's personal opinion, even if it is sometimes written together with another judge or expressed in the form of simply joining the opinion of another judge. So if judges are allowed to publish their dissent, the possibility of re-election becomes even more dangerous to their independence. This has been sometimes

[61] Laffranque, *supra* note 26, at 168.

[62] *Id.*

[63] Venice Commission, *The Composition of Constitutional Courts*, *in* SCIENCE AND TECHNIQUE OF DEMOCRACY No. 20 pt. 4.2 (1997), *available at* http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx (last visited June 17, 2013).

[64] *See* Eli M. Salzberger & Stefan Voigt, *On the Delegation of Powers: With Special Emphasis on Central and Eastern Europe*, 13 CONST. POL. ECON. 25, 38 (2002).

used as an argument against dissenting opinions. However it should rather be used as an argument in favor of a ban on re-election. Indeed, there is a clear tendency in Europe to abolish the possibility of re-election.[65]

On the other hand, the principle of judicial independence may also be used as an argument in favor of dissenting opinions. In this case, the internal expect of judicial independence comes into play. Dissenting opinions are an expression of the judge's independence from his or her fellow judges. The ability to publish dissent may also be perceived in terms of freedom of expression.[66] It guarantees the judge's dignity, allowing him to express his opinion even if remains in the minority. For judges, the decision to publish their dissent is often a question of conscience. This is exemplified by the title of a collection of dissenting opinions published by a Hungarian constitutional judge, Imre Vörös, after the end of his term: *Dixi et salvavi*.[67] He decided to publish all of his separate opinions in a single volume in order to protect his personal integrity, which he describes as one of the main functions of the dissenting opinion.[68] "Dixi et salvavi animam meam," which means "I spoke and saved my soul," is a Latin saying based on a passage of the Bible,[69] and perfectly illustrates this argument. Even if the judge is aware of the fact that his opinion will not bind anyone and will not become law, he still deems it important to express it publicly in order to safeguard his personal integrity and dignity.

II. Dissenting Opinions and Transparency of Decision-making

When the democratic legitimacy of constitutional courts is questioned, an important question emerges: how far can democratic requirements go in relation to constitutional courts? The need for a certain extent of democratic legitimacy is clearly reflected in the appointment procedure of constitutional judges, which is an openly political and interest-

[65] The most recent examples are the European Court of Human Rights and the Hungarian Constitutional Court, which functioned with re-eligible judges until 2010 and 2011, respectively. *See* European Convention on Human Rights, Protocol 14, art. 2, which modified art. 23 of the Convention and entered into force on 1 June 2010, and art. 6, par. 3 of the new Hungarian Constitutional Court Act (Law no. CLI/2011), which entered into force together with the new Fundamental Law on 1 January 2012. In both cases the abolition of the possibility of re-election was accompanied by an extension of the term of office.

[66] Laffranque, *supra* note 26, at 169.

[67] *See* IMRE VÖRÖS, DIXI ET SALVAVI. KÜLÖNVÉLEMÉNYEK, PÁRHUZAMOS INDOKOLÁSOK [Dixi et salvavi. Dissenting and concurring opinions] (Logod Bt. ed., 2000).

[68] The other function, according to Judge Vörös, is the one related to the evolution of constitutional law. *Id.* at 5–7. It is due precisely to the publication of dissenting opinions that the contrast between Judge Vörös and the Court's influential President, László Sólyom, became well-known at that time. In fact, half of the dissents written by Judge Vörös (9 out of 18) were expressed in cases in which the majority judgment was written by President Sólyom (as *rapporteur* judge).

[69] *Ezekiel* 3:19.

laden process.[70] How far must the democratic legitimacy requirement go? Can it be employed also to the decision-making process of constitutional courts? The notion of majority rule is central to traditional conceptions of democracy, and indeed, also applies to judicial decisions. When a decision is made by a panel of judges, the opinion of the majority prevails. No system requires unanimity in every case, even where the publication of dissent is prohibited. While the members of the Austrian Constitutional Court, for example, are not allowed to write dissenting opinions, the Constitutional Court Act nonetheless expressly provides for majority voting.[71] Unanimity is required only from the chambers when they reject hearing a constitutional complaint or dismiss a complaint on the ground that no constitutional right has evidently been infringed.[72] In Italy, where dissenting opinions are also banned, and the Constitutional Court does not hear constitutional complaints of individuals, unanimity is never required. The Italian Constitutional Court Act provides for simple majority voting as a general rule,[73] and the only exception is for the removal of its members from office, where two-thirds majority is required.[74]

The fact that in some systems, politically sensitive cases and cases of primary constitutional importance require a qualified majority indicates an effort to introduce a democratic element into the court's decision-making process. Germany, for example, requires a two-thirds majority for impeachment proceedings against the federal President or against ordinary judges, proceedings to determine the constitutionality of political parties, and decisions regarding the forfeiture of basic rights.[75]

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[70] According to Zdeněk Kühn and Jan Kysela this acknowledges that European constitutional courts are major actors of domestic politics. The political scrutiny of nominees is made possible also by the fact that constitutional judges are generally seasoned lawyers, scholars or politicians with a clear background and a record of mature opinions. *See* Zdeněk Kühn & Jan Kysela, *Nomination of Constitutional Justices in Post-Communist Countries: Trial, Error, Conflict in the Czech Republic*, 2 EUR. CONST. L. REV. 183, 185 (2006).

[71] "All orders shall be passed with a definite majority." Austrian Constitutional Court Act [VfGG] No. 85/1953 § 31. The Act acknowledges the possibility of the emergence of diverging opinions and contains detailed rules on how to proceed if none of the opinions reached the majority required for a decision. *Id.* at §§ 31–32. For the removal from office of a constitutional judge two-thirds majority is required. *Id.* § 10, para. 4.

[72] *Id.* § 31. In a similar way, unanimity is also required from the chambers of the German Federal Constitutional Court if they refuse to decide an application by an ordinary judge and when they decide on the admissibility of constitutional complaints. BUNDESVERFASSUNGSGERICHTS-GESETZ [BVERFGG] [FEDERAL CONSTITUTIONAL COURT ACT], Mar. 12, 1951, REICHSGESETZBLATT [RGBL.] 1823, as amended, §§ 81a, 93d (Ger.).

[73] Legge 11 marzo 1953, n. 87 art. 16 (It.), *available at* http://www.governo.it/Presidenza/USRI/magistrature/norme/L87_1953.pdf.

[74] The exception is provided for by another law containing supplementary norms concerning the Constitutional Court. Id. at n. 1 art. 7, *available at* http://www.cortecostituzionale.it/documenti/download/pdf/CC_SS_fonti_lc_11031953_n_1_rev.pdf (last visited June 17, 2013). The same rule can be found in Austria. *See supra* text accompanying note 68.

[75] BVerfGG § 15 para. 4 (Ger.).

The *sui generis* nature of constitutional courts, however, suggests that the democratic legitimacy argument cannot be employed in exactly the same way as towards representative bodies. Nobody expects the same degree of transparency from constitutional courts. Not even the U.S. Supreme Court deliberates in public, even if its decisions are far more transparent than those of the European constitutional courts. According to Henry J. Abraham, "the secrecy of the [U.S. Supreme] Court's proceedings behind that 'Purple Curtain' is a necessary by-product of its work."[76] As Justice Frankfurter explained in an essay dedicated to the life and work of Justice Owen Roberts, "the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court."[77] However, there are commentators of the U.S. Supreme Court's case law who consider the Court's secrecy excessive.[78] But even if decisions are made behind closed doors in the U.S. Supreme Court, the final result of is completely public and transparent. In fact, from a comparative perspective, the Justices follow a rather unique practice. On the famous Opinion Day the Court announces the decisions it has reached. In this occasion every judge, commencing with the junior Justices, and proceeding in order of seniority, reads or paraphrases or summarizes his or her opinion.[79] Consequently it is no secret which judges approved the ruling and which ones remained in minority. The identity of the opinion-writer judge is also public. The judgment is written as the "opinion of the Court," but it is authored by one judge who delivers the decision in the name of the majority.[80]

No European constitutional follows this practice. The secret nature of deliberation within constitutional courts includes the secrecy of voting. Every judge has to sign the decision.[81] As a rule, the result of the voting is not made public. An exception to this rule is the already mentioned German practice, in which the court may decide to reveal the number of votes for and against. There are, however, two important differences from the American practice: the court may state the number of votes in the decision, but it is not obliged to do so, and in any case, the identity of the judges who voted for and against the decision is not

[76] HENRY J. ABRAHAM, THE JUDICIAL PROCESS 239 (1998).

[77] Felix Frankfurter, *Mr. Justice Roberts*, 104 U. PA. L. REV. 311, 313 (1955).

[78] *See* David Lazarus, *The Supreme Court's Excessive Secrecy: Why It Isn't Merited*, FINDLAW LEGAL NEWS, Sept. 30, 2004, http://writ.news.findlaw.com/lazarus/20040930.html (last visited June 17, 2013).

[79] ABRAHAM, *supra* note 76, at 240.

[80] Tie votes are an exception to this rule. In these cases no opinion is written at all, and the Court does not announce on which side of the tie the Justices stood. *See id.* at 219. The so called *per curiam* opinions are another exception to the rule. A *per curiam* is an unsigned, usually brief opinion for the Court, applying *res judicata*, and amount to 15-25% of all judgments. *See id.* at 201–202.

[81] *See, e.g.*, BVerfGG art. 30(1).

revealed. In the European constitutional courts' practice, the identity of judges remaining in the minority is revealed only if they write a dissenting opinion. Otherwise, if they decide not to write separately, the public will never know who voted against the decision, since it is signed by every judge who participated in the decision-making.

So, there may be different degrees of transparency within the final stage of the decision-making process. The first degree is to allow judges to publish their dissent. The rule is that they cannot simply state their disagreement but also have to give reasons for it, even if just in the form of joining another judge's separate opinion. The second degree of transparency is the possibility of additionally revealing the number of the votes in favor and against the decision. This is implemented in Germany, even if in a limited way, since there it is not a duty but a possibility. Finally, the third degree of transparency is represented by the American (and English) practice in which the vote of every judge is public, whether or not they choose to write their own dissent.

However, even in countries where dissenting opinions can be published by the judges of the constitutional court, there are some instances in which they are prohibited. A ban on the publication of dissent is usually provided for in cases in which the decision concerns the criminal or disciplinary responsibility of a Justice or other high official of the state.[82] It seems that in these cases the publication of dissent is considered to be inappropriate. The same approach applies in the English criminal appeals, where it has been long regarded as imperative that "the discomfiture of the unsuccessful appellant should not be aggravated by an overt division of opinion among the judges."[83] As regards the criminal or disciplinary responsibility of high public officials and judges, the question is even more delicate and has also political implications. In these cases, the overt expression of disagreement in the court could lead to friction between the judiciary and the other two branches of power.

D. The Internal Effects of Dissenting Opinions: The Judges' Point of View

Analyzing the practice of dissenting opinions from the point of view of judicial independence and transparency involves studying its external impact. This kind of analysis considers the court's relationship with the other public powers and with the public in general. It attempts to understand the way and the extent to which the publication of dissenting opinions affects the court's external relationships, such as those with the

[82] For example, in Bulgaria, decisions on the lifting of a justice's immunity or establishment of his actual incapacity to perform his duties and decisions on impeachments by the National Assembly against the President or the Vice President cannot reveal disagreements between the judges. *See* KONSTITUTSIYA NA REPUBLIKA BALGARIYA [CONSTITUTION] art. 148 (2), 149 (1) July 12, 1991, (Bulg.); Rules on the Organization of the Activities of the Constitutional Court, No. 106/20 art. 32 para. 4 (Dec. 6, 1991), *available in English at* http://legislationline.org/documents/action/popup/id/6197 (last visited Mar. 15, 2012).

[83] BLOM-COOPER & DREWRY, *supra* note 2, at 81. Under the statute in force today, the presiding judge may authorize the publication of separate opinions in criminal appeals.

parliament, the executive, the other courts, and public opinion. However, there is another dimension that deserves the attention of researchers—the internal one. The internal dimension basically consists of the judges' point of view. When do judges decide to publish their dissent? How do they make use of this possibility? How does it affect their relationship with their colleagues?

The internal dimension is no less complex than the external one, and for several reasons. First, judges are not obliged to publish their dissent even if they vote against the decision. In constitutional courts, where the result of the voting is not public, it is impossible to compile statistics on the voting behavior of judges. A researcher can only analyze the number and style of separate published opinions, but only the judges themselves know how many times they remained in the minority with their opinions. As already mentioned above, this is not the case for the U.S. Supreme Court where the result of the voting is public, therefore making it possible to undertake a thorough analysis of voting behavior.[84] On the other hand, the fact that for judges it is a right and not a duty to write a dissenting or concurring opinion leaves space for strategic behavior. Another factor making the researcher's job more difficult is the already-mentioned principle of secrecy of deliberation. Only the product (the judgment) is public, not the production (the decision-making process). This ties the external observer's hands to a considerable extent. Some insight into the court's deliberation process can be gained if a judge or a clerk breaches his or her duty of confidentiality and speaks out about events inside the court,[85] but the records are not within the reach of researchers. So, a systematic and comprehensive analysis of the decision-making process seems impossible. Dissenting opinions, on the other hand, still provide a remarkable insight into how courts work.

The internal problem raises a number of questions, partly described above. Here I would like to pick out only two of them that have been completely unexplored in European research.

I. The Dissenting Opinion as a Conflict Resolution Device

Most of the scholars, and judges themselves, agree that a system permitting the publication of dissent improves the quality of the majority opinion.[86] It is a constraint on the majority to require it to take into consideration minority views. It is not a secret that

[84] *See, e.g.*, HAMMOND ET AL., *supra* note 4.

[85] In the United States law clerks of the Justice have come to the spotlight recently. They started to gain the attention of commentators and scholars in the last two decades, since some of them revealed confidential information in relation to certain cases. *See generally* David Lane, *Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality*, 18 GEO. J. LEGAL ETHICS 863 (2004).

[86] Scalia, *supra* note 6, at 422. According to Justice Scalia "the mere *prospect* of a separate writing renders the writer of the majority opinion more receptive to reasonable suggestions on major points."

both the majority opinion and separate opinions are circulated among judges before the final vote on the decision. They do not form their opinions in a complete isolation, but discuss it on several occasions. Consequently, majority and dissenting judges inevitably influence one another.[87] The question is: in which circumstances does a judge decide to break his (or her) loyalty towards his fellow judges and write a separate opinion? What is the degree or the nature of disagreement that induces a judge to publish his or her dissent? Or rather, does it depend on the importance or the nature of the issue under discussion? The question is even more interesting in relation to European constitutional courts, where judges are more unwilling to write separately. The dissent rate in constitutional courts is remarkably lower than in the U.S. Supreme Court.[88]

As Donald Kommers explains in relation to the practice of the German Federal Constitutional Court:

> The institutional bias against personalized judicial opinions has tended to minimize published dissents. Dissenting judges—even if they have circulated written dissents inside the court—more often than not choose not to publish their dissents or even to be identified as dissenters partly out of a sense of institutional loyalty. The prevailing norm seems to be that personalized dissenting opinions are proper only when prompted by deep personal convictions.[89]

This means that German constitutional judges write separately only in exceptional circumstances, when the disagreement with the majority is so unbearable and the issue at stake is so important that the judge's conscience prevails over loyalty towards his colleagues. This shows that the mentality of German (and in general continental European) judges differs considerably from the mentality of their American colleagues, even though constitutional courts have many features in common with the U.S. Supreme Court. The fact that constitutional courts exert more effort to reach unanimity calls for attention. Does this mean that constitutional judges make use of dissenting opinions in order to disclose unbearable disagreements inside the court? Does it help them to resolve internal conflicts

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[87] In the words of Justice Brennan, "[f]or simply by infusing different ideas and methods of analysis into judicial decision-making, dissents prevent that process from being rigid or stale. And, each time the Court revisits an issue, the justices are forced by a dissent to reconsider the fundamental questions and to rethink the result." Brennan, *supra* note 6, at 436.

[88] In the period 1990-2007, there were one or more separate opinions in 62% of the cases in the U.S. Supreme Court. *See* Epstein et al., *supra* note 5, at 106. On the German Federal Constitutional Court the dissent rate hardly reaches 6%. In the period 1971-2002, only 115 decisions out of 1,781 revealed disagreement between judges. *See* VANBERG, *supra* note 20, at 91. In the Spanish Constitutional Court the dissent rate is somewhat higher (in the period 1981-2008: 12,7%), but still does reach the American level. Rörig & Guerrero Picó, *supra* note 20, at 15.

[89] DONALD P. KOMMERS, THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY 26 (1997).

that emerge between judges? As the title of the volume published by Judge Vörös, *Dixi et salvavi*, shows,[90] when a judge expresses his disagreement publicly, he sets his mind at rest, which can clearly help to improve his relationship with colleagues and to solve internal tensions within the court.[91]

II. Concurring Opinions: An Often Improperly Used Tool

Of course judges may have several reasons for writing separately. Their reasons may be especially varied when they decide to write a concurring opinion. While dissenting opinions (understood in a strict sense) disclose profound and fundamental disagreement with the majority, concurrences do not necessarily do so. Indeed, in most of the cases a concurring opinion is not really expressing an alternative reasoning, but simply supplements it, providing further arguments or further bases for unconstitutionality of the norm that is subject to control by the Court. These two categories of concurrence may be called "supplementary reasoning" and "explanatory opinion," respectively.

Judges make use of these different forms of concurring opinions particularly in hard cases involving classic constitutional issues of significant importance, such as the right to life or equality. To illustrate this point, examples can be found in the practice of the Hungarian Constitutional Court.[92] The Court attached four concurring opinions, all of the explanatory kind, to a judgment on the death penalty in 1990;[93] five concurring opinions (four explanatory and one supplementary) in the first abortion case decided the year after;[94] two concurrences (one explanatory and one partly explanatory, partly alternative) in the second abortion case;[95] and two dissents and two concurrences (one supplementary and one explanatory) in the more recent case relating to discrimination based on sexual

[90] VÖRÖS, *supra* note 67.

[91] Interesting research carried out by Canadian scholars analyzed judicial opinions (both majority and separate opinions) in order to understand how emotion and anger are reflected in them. The authors state "it is in dissent that emotion is most apparent because dissent expresses a difference in opinion." Marie-Claire Belleau & Rebecca Johnson, *Faces of Judicial Anger: Answering the Call*, 1 EUR. J. LEGAL STUD. 20, 22 (2007).

[92] Examples are included from the Hungarian practice because it was the object of empirical research carried out by the Author in 2006-2008 during her PhD at the University of Florence (Italy). However, the results of this research have not yet been published in their entirety.

[93] Alkotmánybíróság (AB) [Constitutional Court] Oct. 24, 1990, Decision no. 23/1990 (X 31) (Hung.) (Sólyom, J., Szabó, J., Zlinszky, J., Lábady, J., and Tersztyánszky, J., concurring) (Schmidt, J., dissenting).

[94] Alkotmánybíróság (AB) [Constitutional Court] Dec. 9, 1991, Decision no. 64/1991 (Hung.) (Ádám, J., Herczegh, J., Kilényi,J., concurring) (Zlinszky, J., explanatory opinions) (Lábady, J., supplementary reasoning).

[95] Alkotmánybíróság (AB) [Constitutional Court] Nov. 18, 1998, Decision no. 48/1998 (Hung.) (Lábady, J., Tersztyánszky, J., dissenting) (Ádám, J., concurring explanatory) (Holló, J., partly explanatory, partly supplementary).

orientation.[96] However, judges write concurrences for other reasons as well. In some occasions the judge makes use of it in order to communicate with the public. This was the case, for example, for Judge Zlinszky, who wrote a concurring opinion to a decision declaring an action inadmissible. He wrote separately in order to give instructions to the claimant on how to proceed if he wanted to find a remedy to his problem. In his concurrence Judge Zlinszky criticized the opinion of the Court for not having explained the alternative solution to the problem.[97] In another case Judge Kiss availed himself of the opportunity of writing a separate opinion in order to draw the legislature's attention to an error of codification.[98] A particularly interesting aspect of this concurrence is the fact the Judge Kiss wrote the main opinion as well. It was not the only occasion in which he decided to attach a separate opinion to a judgment written by himself. In two other cases he supplemented a judgment with his own ideas not shared by the majority.[99] It is clear that even if a judge is entrusted with the writing of the opinion of the court, he has to express the opinion of the majority and not just his own opinion.

E. Dissenting Opinions in Legal Research: An Object or a Tool?

This essay has attempted to lay down bases for further research on the use of dissenting opinions in constitutional courts and to point out possible directions for an analysis. We established that the practice of dissenting opinions, as well as the judicial decision-making process in general, calls for an empirical research. This is due to the secrecy of deliberations prevalent in courts and the confidentiality of the records from which we could learn more about the decision-making process. In this field, research cannot be exclusively based on written documents, since they are not generally available to the researchers, and even if they were, they would not necessarily reveal all the relevant facts. Certainly a thorough analysis of the decisions and separate opinions may reveal a lot about how judges decide the cases before them. It may bring to the light the interactions between the members of the court and possible personality clashes among them.[100]

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[96] Alkotmánybíróság (AB) [Constitutional Court] Sept. 3, 2002, Decision no. 37/2002 (Hung.) (Strausz, J., Tersztyánszkyné, J., dissenting) (Kiss, J., concurring supplementary) (then President of the Court Németh, explanatory). Declared that the violation of the Constitution by a provision of the Criminal Code penalizing homosexuality between a minor and an adult.

[97] Alkotmánybíróság (AB) [Constitutional Court] Apr. 22, 1996, Decision no. 1079/H/1995 (Hung.). Also, common law judges sometimes use concurring opinions directed to litigants. Furthermore they also write concurrences to furnish lower courts with practical guidance, such as ways of distinguishing subsequent cases. Brennan, *supra* note 6, at 430.

[98] Alkotmánybíróság (AB) [Constitutional Court] Feb. 16, 2004, Decision no. 827/B/2000 (Hung.).

[99] Alkotmánybíróság (AB) [Constitutional Court] July 4, 2000, Decision no. 24/2000; Alkotmánybíróság (AB) [Constitutional Court] Jan. 16, 2001, Decision no. 2/2001 (Hung.).

[100] *See, e.g.*, Edward McGlynn Gaffney, *The Importance of Dissent and the Imperative of Judicial Civility*, 28 VAL. U. L. REV. 583 (1994), *available at* http://scholar.valpo.edu/vulr/vol28/iss2/5/ (last visited June 17, 2013) (reporting

However, judicial opinions cannot offer a complete picture. If it is not stated in the opinion itself, it will be hard to understand the circumstances that motivated its writing. There may be many subjects of speculation, but the only reliable sources of information come from inside the court. In the U.S., for example, despite the duty of confidentiality, law clerks have sometimes served as a source of information for journalists.[101] Moreover, judges themselves at times reveal important facts in scholarly articles or interviews given to researchers or journalists. During my doctoral research, I interviewed several current and former members of the Hungarian Constitutional Court, and I realized that judges are usually willing to talk about their personal experiences on the court and are very open with researchers who want to inquire into the internal dynamics of the court.

In relation to the practice of European constitutional courts, other factors make the job of researchers even more difficult. First, constitutional courts do not make public the results of voting. Even though in Germany the court has the ability to publicize the number of votes in the decision, it rarely decides to do so, and in any case the identity of the judges who voted for and against the decision is not revealed.[102] Other constitutional courts do not have the ability to do even this, making it impossible to provide complete statistics for the voting behavior of constitutional judges. This severely restricts the scope of research. However, there is still space for an analysis based on written opinions (majority decisions and separate opinions) and on personal accounts by judges and their clerks. Second, if we wish to study specific aspects of the decision-making process of constitutional courts, a comparative approach is necessary, since it is not possible to draw reliable conclusions if we base them on the practice of only one or two constitutional courts. However, a comprehensive study of European constitutional courts runs into linguistic difficulties. This is especially true in the study decision-making processes, as it involves the analysis of judicial opinions all written in the official language of the court and not necessarily translated to other languages. As a rule, constitutional courts translate only a small number of their decisions that they consider to be potentially relevant to comparative research due to their relevance to the legal system or the importance of the issue at hand. Researchers cannot analyze the practice of writing dissenting opinions if provided with only a few separate translated opinions from which to work. A comprehensive study is needed. This means that a comparatist carrying out research of this kind must read German, Spanish, Portuguese, Swedish, Hungarian, Polish, etc. texts.[103] This is a difficult, if

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the study by an American scholar analyzing the personal relationship between Justices of the U.S. Supreme Court).

[101] This was the case for example in relation to the *Bush v. Gore* (2000) judgment already mentioned above. *See supra* note 85 and accompanying text.

[102] *See supra* Part C.II.

[103] I mentioned all languages in which dissenting opinions can be found. There are no dissenting opinions for example in Italian, as the Italian constitutional judges are not allowed to write separately.

not impossible, task. Consequently, this kind of comparative study should be made by a group of researchers coming from different European countries. One researcher may limit his (or her) analysis to the practice of a certain constitutional court (or two or three of them), but in order to obtain a complete picture of constitutional court practice, a comprehensive comparative study would be needed.

While an analysis of the internal effects of dissenting opinions is restricted by the confidentiality of court records, a study of the external effects does not encounter the same difficulties. In this respect, it is sufficient to study the published dissenting opinions and unpublished dissents. In fact, in regards to external effects, unpublished dissents are not really even relevant, since these by definition cannot have external effects. Only published dissents may.[104] In any case, research on the practice of dissenting opinions has been very limited in Europe. The interest of scholars towards separate opinions is not necessarily dependent on their actual existence in the constitutional court of their country. In Italy, for example, notwithstanding the fact that the *Corte Costituzionale* is not allowed to publish dissent, legal scholars are traditionally in favor of the publication of dissenting opinions. Piero Calamandrei wrote already in the 1930s that "the secrecy of deliberation is the institutional consecration of conformism."[105] Moreover, the *Corte Costituzionale* itself has debated the issue on several occasions.[106] However, the legislature has never approved any proposal of introducing dissenting opinions in the practice of the *Corte*. In spite of this fact, Italian scholarship has given a considerable contribution to (the limited) European literature on dissenting opinions.[107]

Regarding the possible place for separate opinions in legal research, it is noteworthy to mention that, besides being subjects of research, they may also be used as tools. Looking at constitutional courts through the lens of separate opinions may reveal the complexity of

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[104] Indeed, there are examples of dissenting opinions in Europe which later became the opinion of the majority. *See* Katalin Kelemen, *The Road from Common Law to East-Central Europe: The Case of the Dissenting Opinion*, *in* LEGAL AND POLITICAL THEORY IN THE POST-NATIONAL AGE 118, 130 (Péter Cserne & Miklós Könczöl eds., 2011) (providing some examples from Eastern and Central European constitutional courts); Rörig & Guerrero Picó, *supra* note 20, at 23 (providing Spanish examples).

[105] Translation by the Author. PIERO CALAMANDREI, ELOGIO DEI GIUDICI SCRITTO DA UN AVVOCATO 274 (reprint 1989) (1935).

[106] The question emerged from time to time in the Italian legal doctrine, culminating in the publication of a book by Saulle Panizza, professor of law in Pisa. *See* SAULLE PANIZZA, L'INTRODUZIONE DELL'OPINIONE DISSENZIENTE NEL SISTEMA DI GIUSTIZIA COSTITUZIONALE (Giappichelli ed., 1998). The last seminar on dissenting opinions was organized by the Constitutional Court in Rome on 22 June 2009. The papers are available on the website of the court: http://www.cortecostituzionale.it/convegniSeminari.do (last visited June 17, 2013).

[107] PANIZZA, *supra* note 21; *See also* LORENZO LUATTI, PROFILI COSTITUZIONALI DEL VOTO PARTICOLARE. L'ESPERIENZA DEL TRIBUNALE COSTITUZIONALE SPAGNOLO (Giuffrè ed., 1995) (discussing Spanish practice from a comparative perspective); LE OPINIONI DISSENZIENTI DEI GIUDICI COSTITUZIONALI ED INTERNAZIONALI (Costantino Mortati & Giuffrè eds., 1964).

their decision-making processes and may grant particularly eye-opening and thought-provoking insight into the internal debates between judges. This might enrich the range of arguments used in relation to a given constitutional issue. In fact, scholars usually include observations and analysis of separate opinions in their comments to a judicial decision. Concurring opinions may be especially useful in understanding a case, being frequently used by judges not to give an alternative reasoning, but with the purpose of integrating the majority judgment.[108] They often reveal facts concerning the internal dynamics of the court. Moreover, they frequently aim to better explain the opinion of the court or some aspects of it, as majority opinions emerging from compromise inevitably include less clear language. For research on how the constitutional courts of the new EU Member States (the ones that acceded to the EU in 2004-2007) interpret the principle of supremacy of EU law, it may be instructive to take into consideration the dissenting opinions written by Central and Eastern European constitutional judges. A researcher in this case will find that the Estonian Supreme Court judge Villu Kõve held that the Chamber "overestimated the principle of supremacy of the EU law over Estonian legal order,"[109] or that the opinion of the Czech constitutional judge Stanislav Balik, written in the European Arrest Warrant case, is written like a short story, using empathetic arguments to detailing the situation of a man held in a foreign prison.[110] Additionally, the complete lack of separate opinions in a case may also hint at certain conclusions and require deeper examination. In any case, taking into consideration separate opinions when analyzing case-law on any constitutional issue is an instructive and eye-opening exercise.

F. Concluding Remarks

While there is no strict correlation between constitutional justice and the publication of dissenting opinions,[111] we can say that allowing constitutional judges to publish their dissent has become a clear trend in Europe.[112] This might be due to the increased need for

[108] *See supra* Part D.II.

[109] See his dissenting opinion attached to an Opinion of the Constitutional Review Chamber of the Supreme Court on the interpretation of the Constitution of 11 May 2006, no. 3-4-1-3-06. Its English translation is available at http://www.nc.ee/?id=663 (last visited June 17, 2013).

[110] See the Czech Constitutional Court's decision of 3 May 2006 on the European Arrest Warrant from which three judges dissented (Justices Eliška Wagnerová and Vlasta Formánková wrote a joint opinion). The English translation of the judgment (including the dissenting opinions) is available at http://www.concourt.cz/view/pl-66-04 (last visited Mar. 19, 2012).

[111] Article 34.4.5 of the Irish Constitution, for example, explicitly excludes the possibility of publishing separate opinions in relation to the constitutional review of a statute. Article 26.2.2 prohibits the publication of dissent also in cases of preventive review (when the Supreme Court decides on the constitutionality of a bill referred to it by the President).

[112] The last example is Lithuania, which introduced dissenting opinions in 2008. *See supra* note 27 and accompanying text.

transparency in constitutional adjudication and to the endless debate over the democratic legitimacy of constitutional courts. However, even if today the majority of European constitutional courts are allowed to publish dissenting opinions, there is much heterogeneity as to how they make use of this possibility.

To a comparatist the practice of dissenting opinions reveals that there is still much difference in the mentality of judges between common law and civil law systems. In continental Europe, ordinary judges, with a few exceptions, are still not permitted to state their dissent publicly, and constitutional judges, who attach a higher value to institutional loyalty than common law judges, are still quite reluctant to dissent. In this respect, even in constitutional justice, the classic division between civil law and common law carries some weight, as the mentality of the jurist tends to differ. Consequently, an analysis of dissenting opinions in constitutional courts can offer a very instructive and eye-opening picture on continental European constitutional adjudication.