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National and international systems of law differ in as far as they allow separate opinions to be published. In the Netherlands, for example, collegial courts speak with one voice. In the European Court of Human Rights, however, court members who disagree with the majority of the court may express their divergent views in a separate opinion. In this paper I will investigate institutional constraints that may affect the argumentation brought forward in separate opinions and I will set about defining separate opinions as a distinct argumentative activity type.

KEYWORDS: argumentative activity type, concurring opinion, dissenting opinion, ECHR, legal argumentation, separate opinion, strategic manoeuvring

1. INTRODUCTION

In many countries judicial decisions taken by a court's judge panel may be accompanied by separate opinions. These separate opinions, written by one or more of the judges forming a minority, serve to comment on the final decision reached by the majority of the court's judge panel. These separate opinions of the minority offer the possibility to provide insight in the considerations on which judges disagree with the decision taken by the majority or with the arguments on which the decision is based. Traditionally separate opinions are allowed in most common-law countries whereas in most civil-law countries the publication of these opinions is not permitted.

However, studies by Raffaelli on behalf of the European Parliaments Committee on Legal Affairs (2012) and by the European Commission for Democracy through Law (2018) signal that among the Member States of the EU there is a distinctive trend to allow separate opinions in civil-law countries as well as in common-law countries. The studies note that only a small minority of the Member States of the EU,

including the Netherlands, have no provision on separate opinions or even explicitly forbid separate opinions. Similar disparities in provisions and practices exist between the European Court of Human Rights which does, and the European Court of Justice which does not allow separate opinions international courts.

These different practices in national and international courts together with the increasing trend towards allowing separate opinions have triggered a discussion on the desirability of separate opinions. One of the arguments presented by the proponents is that separate opinions promote transparency and improve the dialogue with future and lower courts. This raises the question of how the argumentation in separate opinions may contribute to realizing these goals. Insights and concepts from argumentation theory may contribute to answering this question by characterizing separate opinions as an argumentative activity type and determine how institutional constraints may affect the argumentation that takes place in this activity type.

In this paper I will focus on separate opinions in the European Court of Human Rights because the rulings of this court are to be respected by all EU countries, which makes separate opinions also relevant for EU countries that do not allow separate opinions on a national level. In section 2 the stage model of argumentative discussions is used to clarify how the argumentative activity that takes place in separate opinions relates to that in legal proceedings. Section 3 of this paper is concerned with the rules and regulations that govern the publication of different types of separate opinions in the European Court of Human Rights and with the reconstruction of the standpoints adopted in these dissenting and concurring opinions. In section 4 an attempt is made to specify characteristics of a separate opinion as an argumentative activity type and to set out some techniques a judge may use to strategically present his or her criticism on the majority decision in a separate opinion.

2. SEPARATE OPINIONS AS PART OF A DISCUSSION

A model that may serve as a starting point to study argumentation brought forward in judicial decisions and separate opinions, is a model that has been developed in the pragma-dialectical argumentation theory. This general model of critical discussion was introduced by Van Eemeren and Grootendorst (1984) and has been applied to the context of legal discussion by Feteris (1999), Jansen (2003), Kloosterhuis (2002) and Plug (2000). In order to render the general model suitable for the reconstruction of legal argumentation, specific characteristics of legal procedures should be taken into account. The general model presents an overview of the four discussion stages that must be

completed in order to further the resolution of a dispute. These stages are referred to as the confrontation stage, the opening stage, the argumentation stage and the concluding stage, respectively. When modeling legal procedures (Feteris, 2017), the confrontation stage concerns the scope and the content of the dispute: it is to be established what the difference of opinion exactly amounts to in legal terms, within the context of the law. In the second stage, the opening stage, the common legal starting points are established in view of the legal procedural rules (the procedure of the discussion) as well as regarding rules of material law (the rights and obligations of citizens and institutions). In the argumentation stage, the parties to the process defend their standpoints in accordance with the rules of procedure and provide evidence when required to do so. The court evaluates the quality of the argumentation and the evidence. In the final stage of a legal procedure, the concluding stage, the court determines whether the claim of the party who initiated the proceedings can be maintained or should be rejected. By means of a justification of the final decision, the court accounts for the way in which its discretionary power was used to apply and interpret the law.

The concluding stage of a legal procedure may give rise to a new discussion. If this new discussion is initiated by the parties to the process, it takes the form of an appeals procedure. In addition, in legal systems in which separate opinions are allowed, a new discussion may be started by one or more of the judges who took part in the deliberation of the court. These newly initiated discussions may also be reconstructed applying the four-stage model of critical discussion. Within the framework of pragma-dialectics, it is assumed that participants in both discussions maneuver strategically in every stage of the procedure in order to resolve their differences of opinion. 'Strategic maneuvering' refers to the efforts discussants, in this case parties to the process and court members, make to reconcile rhetorical effectiveness with the maintenance of dialectical standards of reasonableness. In the following section I will analyze the differences of opinion that may be established in the confrontation stage of separate opinions of the European Court of Human Rights.

3. DISPUTES IN SEPARATE OPINIONS OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court of Human Rights rules on applications filed by states or by individuals raising matters concerning violations of the civil and political rights as set out in the European Convention on Human Rights. Applications to the court that are considered admissible, as a rule, are heard by a Chamber that is composed of seven judges. When a

case raises a serious question of interpretation or involves an issue of general importance, it may be referred to the seventeen-member Grand Chamber. The Parliamentary Assembly of the Council of Europe elects all judges from lists of candidates proposed by each state. Although these judges have been proposed for election by individual states, they hear cases as individuals and do not represent any state.[1] The decisions of the court are taken by a majority of the judges present (Rule 23 of the Rules of Court). The court's ruling consists of both the judges' considerations as well as their individual votes.

The European Court of Human Rights allows judges to publish separate opinions. Article 45 (2) of the European Convention of Human Rights reads: "If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion." Rule 74 (2) of the Rules of Court then specifies this provision: 'Any judge who has taken part in the consideration of the case shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.' A dissenting opinion contains the reasons for which one or more of the judges taking part in the deliberations voted against the final decision reached by the majority. A concurring opinion is written by one or more of the judges forming part of the majority and serves to provide for different, or additional legal arguments to support the conclusion. The Rules of Court provide that a separate opinion does not need to be justified. However, since this present paper focuses on the argumentation in separate opinions, I will not discuss bare statements.

3.1 Standpoints in different types of separate opinions

In legal practices such as the European Court of Human Rights we may distinguish different types of separate opinions. The propositions from which the judge takes a stance can be divided in two categories. We may specify these categories along the lines of pragma-dialectics (1992).

The first category, dissenting opinions, concerns a standpoint adopted with respect to a proposition that refers to the decision (d) of the majority of the court. This standpoint, if it amounts to 'the decision (d) should be evaluated negatively (-/d)', results in a mixed difference of opinion because both positions relate to the same proposition (d). This mixed difference of opinion between the minority and the majority of the court may be reconstructed as follows: Minority/judge (-/d); Majority (+/d). However, if the standpoint of the minority amounts to 'the decision (d) by the court should be different (+/d'), the difference of

[1] See Bruinsma (2008) on the question whether or not judges in the ECHR (Grand Chamber) may be suspected of partiality or chauvinism.

opinion should be considered to be non-mixed because the minority adopts a standpoint with respect to a different, newly introduced, proposition (d'). This difference of opinion may be reconstructed as: Minority/judge (+/d'); Majority (?/(+/d').

Dissenting opinion (joint): majority +/d; minority -/d

An example of a standard dissenting opinion is the case *Carson and Others v The United Kingdom*. In this case, the European Court of Human Rights rejected a claim that UK pensioners who had earned pensions by working in Britain but had been living abroad, should have their pensions raised in line with UK inflation. The pensioners claimed discrimination (article 14 of the Convention and article 1 of the First Protocol) because their treatment was in contrast with the position of pensioners who had remained resident within the United Kingdom. The court held by eleven votes to six that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. In their (joint) separate opinion, the six dissenters presented their standpoint as follows.

> We are unable to find that there has been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1. (…).
>
> (*Carson and others v. The United Kingdom*, no. 42184/05, 16 March 2010)

In this case positive standpoint of the majority concerns the proposition 'there has been no violation of (…)' (+/d). Since this positive standpoint has been countered with a negative standpoint with respect to the same proposition (-/d), the difference of opinion may be characterized as mixed.

The second category concerns a standpoint adopted with respect to a proposition regarding the argumentation (a) underlying the decision by the majority of the court. This standpoint results in a mixed difference of opinion between the minority and the majority of the court, in case the minority counters the positive standpoint of the majority with the negative standpoint: 'the argumentation (a) should be evaluated negatively' (-/a). The difference of opinion may be reconstructed as follows: Minority/judge (-/a); Majority (+/a). A negative standpoint regarding the argumentation underlying the decision by the court usually functions as an (indirect) attack (-/d) on the decision by the majority of the court. If the decision by the court is disputed via the

argumentation, the separate opinion should be considered as a dissenting opinion.

The minority's standpoint on the argumentation (a) in the decision may also concern a different, newly introduced, proposition (a') and could then be formulated as: The argumentation (a) for the decision by the court could (should, would) be different (+/a'). This standpoint may imply that there is not necessarily a difference of opinion on the decision by the majority. The separate opinion can therefore be considered a concurring opinion.

Concurring opinion (joint): minority +/a'; majority ?/(+/a')

An example of a standard joint concurring decision is the case *Karatas v. Turkey*. In this case the applicant, Mr Karatas, had published poems that the Turkish national court found to be of a terrorist nature because they incited separatist movements. Mr Karatas was convicted and claimed a violation of Article 10 of the Convention (the right to freedom of expression). The majority of the court (twelve votes to five) agreed with Mr Karatas's point of view that his conviction amounted to a violation of Article 10 because the poems did not encourage the use of violence. There were six judges who dissented and six judges who attached concurring opinions. In a joint concurring opinion, five judges presented their collective standpoint as follows.

> We share the Court's conclusion that there has been a violation of Article 10 in the present case although we have reached the same result by a route which employs the more contextual approach (…).
>
> (*Karatas v. Turkey*, no. 23168/94, 8 July 1999)

In this case the judges agree with the decision of the majority of the court (+/d). However, according to the judges, the argumentation underlying the decision should be different: +/a'. Since it may be assumed that this standpoint may be questioned by the majority, ?/(+/a'), the difference of opinion may be regarded as non-mixed. If, in their justification, the court already would have discussed and rejected a', then the difference of opinion would have been mixed.

The differences of opinion may be more complex if the decision or the argumentation that is questioned relates to two or more propositions: d1, d2, dn or a1, a2, an. In case of propositional complexity, the difference of opinion in the confrontation stage of a separate opinion may relate to one or more of these propositions. Separate opinions that discuss a selection of the propositions are referred to as 'partly dissenting opinions' or 'partly concurring

opinions'. An overview of the different implicit or explicit standpoints that are defended in the different types of separate opinions is presented in table 1.

Dissenting opinion:	- The decision (d) by the court should be evaluated negatively (-/d) - The decision (d) by the court should be different (+/d') (because) the argumentation (a) for the decision (d) by the court should be evaluated negatively (-/a)
Partly dissenting opinion:	- Part of the decision (d1) by the court should be evaluated negatively (-/d1) - Part of the decision (d1) by the court should be different (+/d1') (because) part of the argumentation (a1) for the decision (d) by the court should be evaluated negatively (-/a1)
Concurring opinion:	-The argumentation (a) for the decision by the court should/would / could be different (+/a')
Partly concurring opinion:	- Part of the argumentation (a1) for the decision by the court should/ could/ would be different (+/a1')

Table 1. Reconstruction of standpoints in different types of separate opinions

4. STRATEGIC MANEUVERING IN SEPARATE OPINIONS

The way in which judges present the justification of their standpoints in separate opinions can be analyzed from the perspective of the strategic maneuvering. Such an analysis clarifies how judges make an expedient choice from the options that constitute the starting points of separate opinions in the context of a legal discussion.

In order to answer the question how strategic manoeuvres in separate opinions compare to strategic manoeuvres in judicial decisions, it is necessary to ascertain the characteristics of the argumentative activity type of separate opinions in contrast to those of the argumentative activity type of judicial decisions. Relevant to the characterization of both activity types is the institutional context in which the judges' decision-making task takes place.

The institutional point of a legal procedure, as prescribed in the law, is that the procedure results in a justified, binding decision by the

judge(s) to whom the legal dispute is submitted. In the judicial decision, the judge is obliged to state the grounds for his decision. Although the judge is not obliged to deal with each argument that was raised by the parties to the proceedings, they should be enabled to ascertain how and to what extent the facts and legal foundations, as presented by them, have been taken into consideration. Moreover, the justification should enable the public at large to monitor the administration of justice as well as gain insight into its proceedings.

As regards the process of drawing up a judicial decision, it is considered to be vitally important in a democracy that individual judges and the judiciary as a whole are impartial and independent of all external pressures and of each other: parties to the process as well as the wider public should have confidence that legal decisions are taken fairly and in accordance with the law. This principle of judicial independence is embedded in international and European codes and differentiates between external en internal independence. The aim of external independence, as laid down in Article 6 of the Convention of Human Rights, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence. The aim of internal independence, as laid down in recommendation 5 and 22 of the Committee of Ministers, is that 'In their decision making judges should be independent and be able to act without any restriction.' Judges should have 'unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts.'

The possibility of issuing a separate opinion can be seen as one that safeguards the judges' internal independence (Anand, 1965, p. 801). The opportunity of allowing individual members of the court to openly challenge the decision and the argumentation of the majority of the court, enables the judiciary to meet the demands that follow from the principle of independence. The institutional point of issuing a separate opinion may, therefore, be considered as a means to publicly ensure the judiciary's independence.[2] It is precisely because each individual court member should be able to independently account for his or her point of view, that institutional rules on separate opinions are less strict then those on judicial decisions.

The differences between the institutional point of binding decisions and separate decisions result in different options for the majority and the minority to manoeuvre strategically with regard to the following three aspects: audience demand, topical choice and presentational devices. In the following I will give short examples of

[2] See, for example, Laffranque (2003) and Raffaelli (2013) for an overview of arguments for and against allowing separate opinions.

how the aspect of audience demand and the use of presentational devices may become apparent in the strategic manoeuvring in separate opinions.

4.1 Audience demand

A judicial decision and its justification are addressed primarily to the parties to the process, but are also aimed at a broader audience ranging from legal specialists and the legislator to the society of as a whole. In a separate decision, that not has the status of a binding decision, however, the judge may choose to address the audience that suits him best. That means that the argumentation in a separate decision may be aimed at, for example, members of the Court of Human Rights in order to affect future judgments in cases about situations similar to the case in question (Ginsburg, 2010). Another audience the argumentation may be aimed (exclusively) at is the legislator: the judge may write a separate opinion in the hope that, by means of its argumentation, current legislation may be rectified or reformed or possibly give rise to new legislation.[3]

Take for instance *Lindon, Otchakovsky-Laurens and July v. France*. In this case, the ECHR found that the criminal conviction of the applicants for defaming Jean-Marie Le Pen and his political party, the Front National, was consistent with the European Convention. To be precise, it held by thirteen votes to four that there had been no violation of the Article 10 freedom of expression, and held unanimously that there had been no violation of the Article 6 right to fair trial. In a concurring opinion, one of the judges brought forward the following.

> I agree with the findings of the Court in this case but I would like to express certain views regarding freedom of expression and the right to protection of one's reputation. [...] The Convention expressly protects rights of lesser importance, such as the right to respect for one's correspondence. It is therefore difficult to accept that the basic human value of a person's dignity was deprived of direct protection by the Convention and instead simply recognised, under certain conditions, as a possible restriction on freedom of expression.
>
> (*Lindon, Otchakovsky-Laurens and July v. France* (Grand Chamber), nos. 21279/02 and 36448/02, 22 October 2007)

[3] In Plug (2011, 342) I demonstrated how the court may seek to address the legislator by means of an obiter dictum.

In this case the judge agrees with the decision of the majority of the court (+/d). However, according to the judge, the argumentation underlying the decision should be different: +/a'. The judge makes use of the opportunity provided by a separate opinion to address the legislator. His standpoint, aimed at the legislator, is the following: the Convention should expressly protect the basic human value of a person's dignity. Such an amendment to the Convention would provide a more acceptable argumentation for future decisions in similar cases.

4.2 Presentational devices

In judicial decisions by the European Court of Human Rights, the court presents the decision and its justification by using an institutional reference to themselves: 'The court considers that…' and 'The court holds that…'. This third-person perspective underlines the impersonal, institutional role of (the majority of) the court. Whereas the court avoids a first-person perspective, the first-person singular pronoun 'I' or plural pronoun 'We' are used in separate opinions. Kaehler (2013, 551-553) points out that when judges use the first person singular they can best describe their personal attitudes. Moreover, the first person perspective makes the judge(s) accountable for the statement in public.

One of the presentational devices used in particular in (partly) dissenting opinions can be observed in the confrontation stage of these opinions. If we look at the way in which the standpoints in (partly) dissenting opinions are formulated, we may notice that the standpoints are expressed in a courteous manner.[4] In the example of a dissenting opinion under 3.1, the judges use 'we are unable to…' to introduce the difference of opinion. Other expressions of politeness that can be found are 'To my regret, I cannot agree with…' or 'I respectfully disagree with…'. In From Consensus to Collegiality (Anonymous, 2011) it is observed that many Supreme Court of the United States dissents also include the phrase, 'I respectfully dissent…' or some variation thereof. According to the authors, these polite formulations of a standpoint in the beginning of a (partly) dissenting opinion may be used to express collegiality and thereby avoid long apologies for deviating.'

[4] The European commission for democracy through law (2018, 14) notes that as regards limits in the wording of separate opinions, there are only a few countries which have special provisions in this respect. Linguistic features of separate opinions in other systems of law are discussed by Krapivkina (2016) and Langford (2009).

5. CONCLUSION

In this paper I made a first attempt to characterise separate opinions as an argumentative activity type in the domain of legal communication. I focused on separate opinions in the European Court of Human Rights from an argumentation theoretical perspective in order to investigate how institutional constraints deriving from this specific context may affect argumentation brought forward in these opinions. By applying the stage model of an argumentative discussion, I set out to demonstrate that argumentation in a separate opinion relates to that in a judicial decision, but should be considered as an argumentative contribution to a newly initiated legal discussion. By analyzing standpoints and differences of opinion that may occur in the confrontation stage of a new discussion, the two types of separate opinions, dissenting and concurring opinions, could be specified. Finally, I illustrated how differences between strategic maneuvering in separate opinions and in judicial decisions may be explained by observing characteristic of these two activity types.

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