

## Dissenting as A Way to Democratize the Russian Judiciary

*Olga A. Krapivkina*

National Research Irkutsk State Technical University 664074, 83, Lermontov st., Irkutsk,  
Russia Vladimir G. Kachkov, Law Department of MoF 664001, 1, Lenin st., Irkutsk, Russia

---

**Abstract:** The attention to the issue of judicial dissenting is caused by growing popularity of this type of writing among the judges of the Russian Constitutional Court. The article has investigated the nature of the dissenting opinion, its main traits and functions in judiciary, arguments for and against this genre of judicial writing. The author attempts to find out why do judges dissent-to lay out an alternative legal theory, to convince the majority of their errors, to express disagreement. The author concludes that the dissenting opinion is an individualistic genre of judicial discourse where the judge is free to use a great variety of language units to mark his or her own identity. The author also argues that the rationale and usefulness of dissents in the judiciary depend on the legal tradition of the nation.

**Key words:** Dissenting Opinion • Decision • Majority Opinion • Judge • Individualistic Voice • Institutionalism

---

### INTRODUCTION

One of the main principles of judiciary is the independence of judges guaranteed by Article 120 of the Russian Constitution which says as follows:

- Judges shall be independent and shall obey only the Constitution of the Russian Federation and the federal law.
- A court of law, having established the illegality of an act of government or any other body, shall pass a ruling in accordance with law.

Among the tools to provide the independence of judges, one can mention the institute of dissenting opinions-a possibility for the judge who has remained in the minority in the voting to add his individual voice to the institutional position of the majority. However, questions arise over the dissenting opinion. Does it endanger the unity of the court, undermine its authority, or does it democratize the judiciary, make it more transparent? Does it weaken the objectivity of the majority opinion, or does it strengthen its authority and credibility?

Although the right of Russian judges to dissent is deeply rooted, Russia generally disallowed publishing of dissenting opinions, principally because of their emphasis on collegiality in the dispensation of justice. So the issue of dissension in judiciary has largely escaped Russian academic attention. This issue has only seldom made appearance in contemporary academic researches [1-15].

After all, the introduction of dissenting opinions is a sign of how far thinking about the judiciary has changed in Russia over the past decade. It is a sign of the stability and effectiveness of judicial power, the independence of the courts and judges.

### RESULTS

**Roots of Dissenting Tradition:** Roots of dissents can be found in common law countries. The British collegial common law courts decide *seriatim* (Latin: separately)-they present not only one judgment but make collective judgments. Each judge says in an order how he would decide the case at hand [12]. Such a style of decision making, as [9] writes, was adopted in the United States, but it was abandoned there at the end of the 18<sup>th</sup> century. The US courts formed a new tradition according to which judges who maintained a different

opinion could add to the opinion of the court their dissenting opinion or concurring opinion which was also published [12]. Rupp sees the roots of the dissents in the fact that Anglo-American judges are not “career judges” like judges in continental Europe who begin from the first instance in order to reach the highest court. The second reason of such popularity of dissenting opinions in the US and England is in the fact that the tradition of public debate belongs among the fundamental building blocks of the organization of state in the common law (legal) system [ibid.]. In common-law countries, the court judgment is a result of public debate. In continental Europe, however, the decision of collegial courts is anonymous and the secrecy of deliberations is not subject to disclosure. There is fear that the disclosure of the dissenting opinion may endanger the judge’s independence [4]. Common law countries, in contrast, consider the disclosure of the judge’s dissenting opinion to be the main criterion of the independence of a judge [9].

In Russia, the submission of dissents in writing was established by Katherine the Great (1762-1796) in her Institutions for the Government of Provinces (1775). As for present, the rules governing the institute of dissenting are included in USSR Act (1989) on the Constitutional supervision in the USSR. According to the Act, the member of the Supervisory Committee is eligible to put into writing his/her dissenting opinion. Indeed, this provision was fictitious, for the sake of appearance. The Act on the Constitutional Court adopted in 1991 also contained the provision on dissent opinions which had to be put into writing as appendices to majority decisions. The controversy dissenting aroused have not died off. As a result, according to the amendment adopted to the Act on the Constitutional Court in 2004, dissenting opinions can be published only in the Bulletin of the Constitutional Court.

Thus, we can conclude that the practice of publishing dissents is limited to the area of constitutional proceedings. If 15-20 years ago, dissenting opinions were part of majority opinions, being open to the public, today one can find them only in the Bulletin of the Constitutional Court having limited edition. Other judges are eligible to write a dissenting opinion if they disagree with the decision of the majority. However, other persons cannot be informed about the dissenting opinion of a judge and its content.

**Definition and Types of Judicial Opinions:** A judicial opinion is an opinion of a judge or a group of judges that accompanies and explains an order or ruling in a

controversy before the court, laying out the rationale and legal principles the court relied on in reaching its decision. Its primary function is to challenge the arguments upon which the majority opinion is based. It presents arguments for interpreting a legal text in a different way than the majority of the Court interprets the legal text.

In Anglo-Saxon judiciary, judicial opinions are of two types-concurring opinions (concurrences) and dissenting opinions (dissents). In brief, a concurrence is a written opinion by one or more judges which agrees with the decision made by the majority, but states different reasons as the basis for the decision. That is it is an opinion by a judge who has reached the same result as the majority, but for a different reason. When a judge agrees with the majority opinion but begs to differ on the logic that led to it, a concurring opinion may be written to explain a matter of law relevant to the case.

A dissent is an opinion in a legal case written by one or more judges expressing disagreement with the majority opinion of the court which gives rise to its judgment. A dissenting judge disagrees with the outcome supported by the majority. Their dissenting reflects the expression of differences over the appropriate legal outcome and for strategic purpose. The dissent is different from the concurrence which agrees with the Court's decision but provides an explanation that differs from the majority opinion. The dissent is more expressive and emotional.

The Russian legislation, for example, distinguishes between a “dissenting opinion” (*osoboe mnenie*) and an “opinion” (*mnenie*). In the Constitutional Court Act of the Russian Federation (1991), the latter are called the “opinions concerning disagreement with the majority of judges” when a dissenter votes for the essence of the final decision but challenges the reasoning of the majority opinion. As a matter of fact, they are equivalent to the concurring opinions of common law courts. Concurring opinions seem to be not popular among the judges of the Russian Constitutional Court.

**Dissenting Opinions Vs. Majority Opinions:** The specific character of the dissent, its individualistic tone, special purposes and functions in legal setting are the traits differing from the majority opinion.

In contrast to the majority opinion, the dissenting opinion is not a prescriptive document. It serves different purposes. According to my analysis of dissenting opinions written by 36 judges of the Russian Constitutional Court and the US Supreme Court, they are as follows:

- Supplementing, interpreting, or challenging the reasoning of the majority opinion,
- Evaluating the majority opinion,
- Revealing its errors,
- Voicing disagreement with the Court's final decision.

One more difference between the dissent and the majority opinion is the nature of author's position. According to [6], judicial opinions are characterized by four traits: "the monologic voice, the interrogative mode, the declarative tone and the rhetoric of inevitability". The monologic voice enables the Court composed of several individuals to speak with one voice. The interrogative mode frames the case's question and then responds within the established framework. The declarative tone answers the legal question and the rhetoric of inevitability creates the sense that the Court decided the case in the only manner possible.

Dissents' authors express their personal points of view and values, speak on their own, while majority opinion's authors voice the position of the court and speak for the institutional body.

According to [5], in the Supreme Court, the dissent rate is negatively related to the caseload and positively related to ideological differences, that majority opinions are longer when there is a dissent and that dissents are rarely cited in either the courts of appeals or the Supreme Court.

The second difference follows directly from the first one - rational and logical elements in the majority opinion against emotional and expressive features in the dissent. Formal style of writing typically used in the majority opinion gives place to the metaphorical language of the dissent. A judge becomes a semiotically central category of discourse, positioning him or herself as a person freed from institutional constraints, revealing personal feelings on the matter at issue.

The right to voice an individual viewpoint challenging the position of the Court gives the sense of freedom, independence and personal responsibility.

[10] following Ferguson's lead argues that dissenting opinions are characterized by four traits: "an individualistic tone, a skeptical voice, a democratic standard and an advocacy medium".

In the dissent, the judge is allowed to position him/herself as a subject of free will deliberately determining discourse. The judge expresses his opinion in a tone that is reflective of his personal view about the legal issue. The first-person singular pronoun helps him produce a phenomenological personalized statement.

Having the purpose to undermine the authority of the Court and its members as keepers of the Constitution, they attack their decision, challenges the validity of their reasoning and position, questions his peers' legal expertise. They oppose their own views to the majority opinion which they deem to be untrue and incorrect.

Let us look at the issue of tone in dissenting opinions in greater detail.

**Arguments for and Against Dissenting Opinions:** One of the arguments against dissenting opinions is that they, [10] states, "endanger the unity of the court, dismember the body of the court giving voice to alternative legal visions." "Dissenting opinions are considered to endanger the integrity of the majority opinion, to cause confusion in understanding it, to dilute its obligatory force, to reveal judges' political bias", [1] claims. Dissents endanger the authority, prestige and legitimacy of the court, weakening the court's credibility [9]. They undermine the belief in objectivity of judicial decisions. Personalized judiciary cannot be objective, many researchers believe. They can be used for political purposes.

The belief that dissent is a symptom of dysfunction is shared with many US judges, the most famous of which is John Marshall who regularly curbed his own viewpoints, preferring to arrive at decisions by consensus. One of his arguments is that dissenting opinions weaken the judicial body by exposing internal divisions publicly. For example, the Russian Judge Kononov wrote in his dissenting that the Court Ruling distorted the meaning of such concepts as federalism, rule of law and democracy. Further, Judge Kononov launched a stinging attack on his colleagues accusing them in cynicism. Of course, one can suggest that dissenting opinions discredit the judicial body, raise doubts in its justice. Dissenting undermine the reputation of the court if it criticizes the majority forcefully.

Dissents are a pernicious waste of time, they cause uncertainty in the law, shake the public's faith in the courts and are fundamentally inconsistent with the nature of judicial authority, some other opponents believe. They claim courts should speak as anonymous institutions, not as groups of individual judges [14].

Some other arguments against the dissenting opinion are its individualistic nature and the breach of the secrecy of deliberations.

Thus, one can see that all arguments against dissenting opinions result from the individualistic and skeptical tone of discourse where judges are eligible tell people that it is their own unique point of view, to show their colleagues where they stand in relation to the issues.

Arguments in favor of dissenting opinions are as follows:

- The dissent is a guarantee of judicial independence. It guarantees the dignity to judges who remained in the minority and enables them to decide by their conscience and not by the majority [9].
- The dissent is a way to democratize the judicial system, a kind of a tuning fork of the judicial reform [7]. Dissents have a democratizing effect on the Court via the possibility to deliver different opinions which are not in conformity with the majority opinion. [3] claims, the existence of conditions “for rhetorical struggle in the structure of judicial decision-making gives the dissent its influence”. The ‘marketplace of ideas’ belief holds that the truth arises out of the competition of various ideas in free, transparent public discourse. Different ideas and opinions are free to enter into the ‘marketplace’.
- The right to dissent individualizes judges, helps them position themselves as independent and responsible members of the judiciary. Dissents increase the Court's responsibility by forcing the majority to refine its opinion. Dissents augment the Court's stature by forcing “the majority to refine its opinion” and making the Court “not just the central organ of legal judgment [but] center stage for significant legal debate”, [13] writes.
- The dissenting opinion provides alternative interpretations of the Constitution. It compromises “the authoritarian character of the law” [11]. Dissent is considered “a healthy and even necessary, practice that improves the way in which law is made” [2]. Dissenting points out fatal mistakes in the majority's reasoning, influences later courts and convince them to decide the same question in a different way.
- The availability of dissents to the public makes the majority of judges better feel their responsibility for their decision.
- The dissenting opinion ‘ensures the effective functioning of the courts and promotes public debates, it opens a dialogue among the judges and legal scholars, between the commentators of court judgments and the legislators’ [9].

- The dissenting opinion creates the necessary prerequisites for scientific doctrines. Dissenting opinions communicate legal theories to other justices, lawyers and politicians and have sometimes turned into good law later on as a result of this.

## CONCLUSION

The article has investigated the nature of the dissenting opinion, its main traits and functions in judiciary from the legal point of view, arguments for and against this type of legal writing.

The issue of the judicial dissent has been discussed for many decades and is still a debatable problem. Arguments are being suggested both for and against the dissenting opinion.

On the basis of the foregoing, it can be concluded that dissents fulfill the following functions:

- They guarantee judge's independence, his or her freedom to speech;
- They enhance judge's responsibility for decision-making;
- They democratize the judiciary;
- They serve as an alternative interpretation of the law;
- They attract public attention to legal issues;
- They influence lower courts decisions.

Will this genre of judicial writing gain a popularity in all Russian judicial body in the next ten years? The question is difficult to answer. We can suggest only two factors which can result in decreasing the number of dissents-growing caseload which leaves judges little time to write individual opinions and a totalitarizing influence inside democracy.

The answer to the question concerning the rationale and usefulness of dissents in the judiciary depends on the legal tradition of the nation-the tradition to extend powers of the judge and democratize the judiciary, or to limit judge's independence by prohibiting any forms of individualistic writing that dismember the integral body of the court in which “the individual members are merged into a unit constituting a distinct department”.

## REFERENCES

1. Basangov, D.A., 2006. Pravovaia priroda osobogo mneniia sud'i Konstitutsionnogo Suda Rossiiskoi Federatsii, *Journal of the Russian Law*, pp: 24-34.
2. Brennan, W.J., 1986. In Defense of Dissents, *HASTINGS Law Journal*, 37: 427-438.
3. Cole, D., 1985. Creative Misreadings in the First Amendment Traditions. *Yale Law Journal*, 95: 857-905.
4. David, R., 1973. *Les grand systems de droit contemporains*. Paris, Dalloz.
5. Epstein, L., W.M. Landes and R.A. Posner, 2011. Why (and When) Judges Dissent: A Theoretical And Empirical Analysis, *Journal of Legal Analysis*, 3-1: 101-137.
6. Ferguson, R.A., 1990. The Judicial Opinion as a Literary Genre, *Yale Journal of Law and Humanities*, 2: 201-219.
7. Hadjiev, G.A., 2005. Publikatsiia osobykh mnenii, Date views 05.02.2009. <http://www.medialaw.kiev.ua/zmisud/sudanalityka/195/>.
8. Kononov, A.L., 2006. Pravo na osoboe mnenie, *Zakon*, 11: 26-34.
9. Laffranque, J., 2003. Dissenting Opinion and Judicial Independence, *Juridica International*, 8: 162-172.
10. Langford, C.L., 2009. Toward a Genre of Judicial Dissent: Lochner and Casey as Exemplars, *Communication Law Review*, 9-2: 1-12.
11. Posner, R.A., 1990. *The Problems of Jurisprudence*. Cambridge, Harvard University Press.
12. Rupp, H.G., 1966. Zur Frage der Dissenting Opinion, *Die moderne Demokratie und ihr Recht*, FS für Gerhard Leibholz. Tübingen, Mohr.
13. Scalia, A., 1994. The Dissenting Opinion, Address Before the Supreme Court Historical Society, *Journal of Supreme Court History*, June, 13: 33-41.
14. Smith, H., Individual and Institutional Authority: The-Turn-of-the Century Quest to Abolish the Dissenting Opinion. Date views 15.03.2011. <http://ssrn.com/abstract=1566673>.
15. Vereshchagin, A.N., 2007. *Judicial Law-Making in Post-Soviet Russia*, NY, Routledge.