Why and How Judge Dissent: Separate Opinions at the European Court of Human Rights



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A thesis submitted for the degree of
MPhil in socio-legal research
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Trinity Term 2026
Word count: 28 477

Abstract

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This thesis presents a socio-legal study of the dissenting behaviour of judges at the European Court of Human Rights (ECtHR). It asks two questions. First, what motivates ECtHR judges to issue separate opinions? Second, how do judges' motivations shape the performance of separate opinions at the ECtHR? Drawing on interviews with current and former ECtHR judges (n=8), the study identifies two layers of motivation. The first reflects judges' understandings of the broader advantages and disadvantages of separate opinions. Judges may issue separate opinions because they regard dissent as enhancing the Court's transparency and as providing an opportunity to influence the future development of its case law. The second builds on judges' understandings of their own judicial role and that of the Court. Within this second layer, I identify three distinct orientations towards separate opinions. Building on Bruinsma's earlier work on judicial identities, I conceptualise these as the 'instrumental dissenter', 'responsibility dissenter' and 'academic dissenter'. The coexistence of these orientations can generate tensions among judges as they seek to legitimise and justify their approaches to dissent in relation to one another.

Crucially, these different motivations map onto distinct ways in which dissent is behaviourally performed. These motivations shape when judges signal their intention to write separately, why and how judges form dissenting coalitions, and the roles they assume within those coalitions. Three recurring roles emerge: the *author*, most commonly associated with the academic dissenter; the *argument contributor*, associated with the responsibility dissenter; and the *signatory*, associated with the instrumental dissenter. Judges also navigate institutional constraints on dissent, including the prevailing restrictive interpretation of Article 45(2) of the Convention, under which separate opinions cannot be attached to decisions. In response, judges have developed informal collegial practices that can sometimes enable dissenting views to be published. The performance of dissent also extends to the text itself. In the absence of established rules governing the form and style of separate opinions, judges employ rhetorical devices that would ordinarily be inappropriate in majority judgments, including references to academic literature, prominent intellectuals, films, the Bible, music, paintings and poetry, as well as the use of distinctive symbols. This thesis argues that separate opinions have consequently evolved into a distinct genre of judicial writing, shaped by the relationship between judges' motivations and the behavioural and textual performance of dissent.

Acknowledgments

Unfortunately, during my year at Oxford, my grandfather, Yura Sultanic Vartazaryan, passed away. Judges may write as many separate opinions as they wish, but the greatest dissenter I have ever known was undoubtedly my grandfather. As Yura papik would always say: «Մենք ցիրկում ենք ապրում» which means: *We live in a circus*. This thesis is dedicated to both to Yura and my grandmother Zubik Asloyan. May they rest in peace.

I would also like to express my deepest gratitude to my supervisor, Professor Agnieszka Kubal. There are not many people in this world like Agnieszka, and I feel incredibly fortunate to have had the privilege of being supervised by her. It is beyond words to describe the enormous influence she has had on me, both intellectually and personally. But if I had to try to explain it to someone, I would say that Agnieszka has been to me what Virgil was to Dante: a guide through unfamiliar terrain (academia), someone whose wisdom and presence made it possible for me to find my own way.

None of this would have been possible without the unconditional support of my partner, Denisa, who stood by me through all the highs and lows. I am deeply grateful to my parents, Sona and Vahag, who sacrificed so much to give me and my brother the life we have today. I am also grateful to my brother, Aksel, for being the most hardworking Vartazaryan, and to my friends and colleagues at the Faculty of Law in Prague.

A final special dedication goes to all the wonderful people I met during my time in Oxford. I am particularly grateful to everyone at the Centre for Socio-Legal Studies and Linacre college for making me feel so welcome. A very special mention goes to my flatmates – sir John Joshua A. Azucena and Anuprita V. Kulkarni – whose friendship and presence made my time in Oxford truly special.

Thank you all for your support. I could not have done this without you.

Preliminary matters

Ethics Approval

The Social Sciences and Humanities Interdivisional Research Ethics Committee (SSH IDREC) granted ethics approval for this project on 7 January 2026, application ID no. 2507503, in accordance with Oxford University's procedures for ethical approval of all research involving human participants.

Artificial Intelligence and Software Use

I acknowledge the use of Oxford ChatGPT Edu (accessed May–August 2026) to assist with academic English language editing throughout the preparation of this thesis. The tool was primarily used to improve grammar, clarity, style, and overall readability of text written by the author. All scientific content, analyses, interpretations, and conclusions were developed by me. All AI-assisted text was reviewed and revised by me to ensure accuracy and clarity of meaning. In terms of software, I used Microsoft Word for writing and NVivo 15 (15.4.0 version) for the interview transcripts and thematic analysis.

Funding statement

My MPhil studies at Oxford University were funded by Sekyra foundation, Charles University Faculty of Law Foundation, Oxford Law Faculty, Charles University Mobility Fund and Ani Kagramanyan.

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Table of Abbreviations

CCC	Czech Constitutional Court
CoE	Council of Europe
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
RoC	Rule of the Court
SCOTUS	Supreme Court of the United States

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Introduction

'The Convention is a living instrument, and dissent is one of the mechanisms through which its interpretation evolves and adapts to new challenges' (Judge D, female, former judge).

Many constitutional and international courts permit judges to issue separate opinions — essentially, written statements explaining why a judge or group of judges disagrees with the majority. Generally, there are two types of disagreements: (1) a disagreement with the majority's ruling and reasoning and (2) a disagreement with the reasoning alone. The former is known as a 'dissent' or a 'dissenting opinion', while the latter is known as a 'concurring opinion'. In this thesis, the expression 'separate opinion' is used as a broader term encompassing both dissenting and concurring opinions.

Separate opinions have historically played a significant role in the development of human rights. To illustrate this point, it is useful to consider the evolution of dissenting opinions in the U.S. Supreme Court. Often referred to as the 'Great Dissenter', Justice John Marshall Harlan stood alone in opposing the Court's decision in *Plessy v. Ferguson* (1896). In his dissent, he advanced arguments against racial segregation that the majority rejected at the time. More than fifty years later, *Brown v. Board of Education* (1954) rejected the 'separate but equal' doctrine in the context of public education, marking a decisive departure from the majority's reasoning in *Plessy v. Ferguson* (1896) vindicating the position advanced in Harlan's separate opinion. Justice Harlan's dissent in *Plessy v. Ferguson* remains widely regarded as a foundational text in American legal education.[1]

In the European context, the European Court of Human Rights occupies a distinctive position. The Court adjudicates complaints concerning alleged human rights violations committed by member states. The Court itself is a genuinely international judicial body[2] composed of forty-six judges from different legal traditions, professional backgrounds, and national cultures. Given its size and diversity, it is unsurprising that judges do not always reach unanimous agreement on the interpretation and application of the Convention. The Court has permitted separate opinions since its establishment[3], creating a rich body of separate opinions that accompany its judgments. This practice has generated a substantial body of scholarship examining separate opinions from doctrinal, empirical, and socio-legal perspectives. Existing research has explored, among other issues, the functions of separate opinions[4], their influence on the development of the Court's

[1] Melvin I Urofsky, *Dissent and the Supreme Court: Its Role in the Court's History and the Nation's Constitutional Dialogue* (Pantheon Books 2015) 105–136.
[2] Nina-Louisa Arold, *The Legal Culture of the European Court of Human Rights* (Martinus Nijhoff Publishers 2007).
[3] Council of Europe, 'European Convention on Human Rights (1950)'.
[4] Jeffrey L Dunoff and Mark A Pollack, 'The Road Not Taken: Comparative International Judicial Dissent' (2022) 116 American Journal of International Law 340 <https://doi.org/10.1017/ajil.2022.1>.

jurisprudence[5], linguistic and rhetorical features[6], voting patterns[7], and the institutional factors associated with judicial disagreement.[8] However, comparatively little attention has been devoted to the judges who author these opinions.[9] While previous studies have inferred individual judicial motivations for issuing dissenting opinions from voting patterns[10], institutional characteristics[11], or textual analysis[12], scholars have rarely examined how judges themselves understand the practice of dissent or what motivates them to issue separate opinions.

This thesis addresses that gap by asking two interconnected questions. First, what motivates ECtHR judges to issue a separate opinion? Second, how do judges' motivations shape the performance of separate opinions at the ECtHR?

To answer these questions, I draw primarily on qualitative interviews with current and former judges of the ECtHR (n=8), complemented by an analysis of separate opinions and relevant institutional materials. While previous scholarship has largely examined dissenting behaviour through quantitative analyses of voting patterns and judicial characteristics[13], this study focuses on judges' own understandings of separate opinions. By exploring both the motivations behind separate opinions and the ways in which they are constructed, written and performed, this thesis

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[5] Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31 European Journal of International Law 797 <https://doi.org/10.1093/ejil/chaa071>.

[6] Emanuele Brambilla, 'Etiamsi Omnes, Ego Non: An Exploratory Study of Argument Types in Separate Opinions' (2025) 64 Comparative Legilinguistics 484 <https://doi.org/10.14746/cl.2025.64.5>; Ilaria Giordano and Angela Zottola, 'Gender-Based Violence against Women in the European Court of Human Rights: A Case Study on Separate Judicial Opinions' (2025) 64 Comparative Legilinguistics 407 <https://doi.org/10.14746/cl.2025.64.2>; Fabiola Notari, 'How Judges Dissent: A Comparative Rhetorical and Metadiscursive Analysis of European Court of Human Rights (ECtHR) and U.S. Supreme Court Separate Opinions' [2025] Comparative Legilinguistics <https://doi.org/10.14746/cl.2025.64.4> accessed 27 May 2026.

[7] Fred J Bruinsma, 'The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)' [2008] Ancilla Iuris 32; Fred J Bruinsma and Matthijs De Blois, 'Rules of Law from Westport to Wladiwostok. Separate Opinions in the European Court of Human Rights' (1997) 15 Netherlands Quarterly of Human Rights 175 <https://doi.org/10.1177/092405199701500204>; Erik Voeten, 'The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights' (2007) 61 International Organization 669 <https://doi.org/10.1017/S0020818307070233>; Erik Voeten, 'The Impartiality of International Judges: Evidence from the European Court of Human Rights' (2008) 102 American Political Science Review 417 <https://doi.org/10.1017/S0003055408080398>; RCA White and I Boussiakou, 'Separate Opinions in the European Court of Human Rights' (2009) 9 Human Rights Law Review 37 <https://doi.org/10.1093/hrlr/ngn033>.

[8] John Alder, 'Dissents in Courts of Last Resort: Tragic Choices?' (2000) 20 Oxford Journal of Legal Studies 221 <https://doi.org/10.1093/ojls/20.2.221>; Helen Keller and Corina Heri, 'Deliberation and Drafting: European Court of Human Rights (ECtHR)' *Oxford Public International Law* (Max Planck Encyclopedias of International Law [MPIL] 2018) 1 <https://doi.org/10.1093/law-mpeipro/e3210.013.3210> accessed 22 June 2026.

[9] Fred J Bruinsma, 'Judicial Identities in the European Court of Human' in A van Hoek and others (eds), *Multilevel Governance in Adjudication and Enforcement* (Intersentia 2006).

[10] Øyvind Stiansen and Erik Voeten, 'Backlash and Judicial Restraint: Evidence from the European Court of Human Rights' (2020) 64 International Studies Quarterly 770 <https://doi.org/10.1093/isq/sqaa047>.

[11] Alder (n 8).

[12] Brambilla (n 6); Notari (n 6); Stanisław Goźdź-Roszkowski, 'Mapping Rhetorical Dissent: A Comparative Analysis of the Obergefell Opinions' (2025) 64 Comparative Legilinguistics 430 <https://doi.org/10.14746/cl.2025.64.3>.

[13] Bruinsma (n 7); Bruinsma and De Blois (n 7); Bruinsma (n 9); Helga Molbæk-Steensig and Alexandre Quemy, 'Judicial Independence and Impartiality: Tenure Changes at the European Court of Human Rights' (2023) 34 European Journal of International Law 581 <https://doi.org/10.1093/ejil/chad036>; Voeten, 'The Politics of International Judicial Appointments' (n 7); Voeten, 'The Impartiality of International Judges' (n 7).

seeks to provide a richer account of dissent as a judicial practice within the ECtHR. The latter research question is guided by a working hypothesis that separate opinions, as a product of judicial deliberation, are performed textually and behaviourally in a way that could be compared to a 'free' genre of legal writing[14]. Legal-linguistic scholarship has extensively examined the textual performance of separate opinions, including their structural patterns[15] and argumentative styles[16]. By contrast, their behavioural performance has received little scholarly attention. In this thesis, behavioural performance refers to the practices through which separate opinions are produced during judicial deliberation: when and how judges communicate their intention to write a separate opinion, how dissenting coalitions emerge, and how judges collaborate in drafting and endorsing a joint or individual separate opinion.

This thesis is structured as follows. Following the Introduction, Chapter 1 engages with existing literature on separate opinions at the ECtHR. It first discusses their legal basis within the European Convention on Human Rights and then explores prior research on dissenting behaviour of ECtHR judges, focusing on the Court's international composition and the influence of judges' backgrounds. Chapter 2 presents this study's methodology. I explain the origins of the project, describe the sample selection process, outline the interview component, and detail the analytical approach used to examine the collected data. Chapter 3 investigates why judges dissent at the ECtHR. Here, I present my empirical findings and put them in conversation with scholarly explanations for separate opinions, including arguments relating to transparency and legal development. I also analyse judges' internal perspectives on dissent within the Court. Chapter 4 explores how separate opinions are performed and expressed. In this chapter, I examine separate opinions as a relatively free judicial genre, discuss the legal and institutional constraints on their issuance, analyse their behavioural and textual dimensions, and consider the Court's internal rules governing their use. Finally, the Conclusion synthesises the study's findings and summarises the thesis's principal contributions to broader socio-legal scholarship.

[14] Jekaterina Nikitina and Katia Peruzzo, 'Beyond the Majority: Exploring the Discourse of Separate Opinions' [2025] Comparative Legilinguistics 398 <https://doi.org/10.14746/cl.2025.64.1> accessed 27 May 2026.
[15] Stanisław Goźdź-Roszkowski, 'Communicating Dissent in Judicial Opinions: A Comparative, Genre-Based Analysis' (2020) 33 International Journal for the Semiotics of Law - Revue internationale de Sémiotique juridique 381 <https://doi.org/10.1007/s11196-020-09711-y>; Notari (n 6).
[16] Brambilla (n 6); Giordano and Zottola (n 6); Goźdź-Roszkowski, 'Mapping Rhetorical Dissent' (n 12).

CHAPTER 1 SEPARATE OPINIONS AT THE EUROPEAN COURT OF HUMAN RIGHTS

1. Separate opinions in the European Convention on Human Rights

From the outset, the European Convention on Human Rights provided for judges to deliver separate opinions under Article 51 of its original 1950 text[17]. The European Court of Human Rights ('the Court') was established in 1959 and, following the entry into force of Protocol No.11 in 1998, has operated as a full-time court to which individuals may apply directly. The Court interprets and applies the ECHR, and its primary purpose is to protect individuals from human rights violations committed by members states to the Convention.

Following Russia's cessation as a party to the ECHR, the Court currently consist of 46 judges, each of whom is assigned to one of five Sections.[18] Judges do not represent their home states at the Court; instead, they sit in their individual capacity and are expected to act independently and impartially.[19] Judges are elected for a single, non-renewable term of nine years, following the entry into force of Protocol No. 14 in 2010.

The five Sections are administrative groupings within which judicial formations are constituted to hear cases. Most cases may be considered by single judges, three-judge Committees or seven-judge Chambers (Sections), while particularly important cases may be heard by the Grand Chamber, which is composed of 17 judges. The composition of each Section is geographically and gender balanced and seeks to reflect the different legal systems among the Convention's Contracting Parties (according to Rule 25 of the Rules of Court). If an elected judge is unable to sit on a case at the ECtHR, an ad hoc judge may be appointed to replace a country's elected judge (in accordance with Rule 29 of the RoC). This temporary appointment ensures that the respondent state is represented and that the Court meets its procedural requirements.

In addition to the judges, the Court has an extensive administrative apparatus known as the Registry. The Registry consists of legal, administrative, and technical staff who provide the operational support needed to process thousands of applications each year. Applications submitted to the Court are processed through the Registry and allocated to the appropriate judicial formation in accordance with Article 26 of the Convention.

A review of the official records of the negotiations leading up to the Convention's formation between 1949 and 1952 — the '*Travaux Préparatoires*' — revealed no direct discussion of whether

[17] Council of Europe, 'European Convention on Human Rights (1950)' (n 3).

[18] Council of Europe, 'Russia Ceases to Be Party to the European Convention on Human Rights' (*Council of Europe*, 2022) <https://www.coe.int/en/web/portal/-/russia-ceases-to-be-party-to-the-european-convention-on-human-rights> accessed 22 June 2026.

[19] Keller and Heri (n 8) 3.

judges of the Court should be allowed to issue separate judicial opinions.[20] There was, however, a related debate concerning separate opinions at the European Commission of Human Rights, which, under the original institutional design, was distinct from the European Court of Human Rights. Before Protocol No. 11 established a permanent Court in 1998, the Commission was responsible for deciding the admissibility of applications under Article 26 of the 1950 Convention and preparing reports on the merits, while the Court decided only those cases referred to it. This debate took place between 8 and 17 June 1950 during a conference for senior government officials.[21] During the Conference, delegates debated whether the Commission's reports should include dissenting opinions. Italy, represented by Mr. Perassi, argued that the Commission's authority would be strengthened by presenting a single institutional position, whereas several delegations, including France, Denmark, Ireland, the Netherlands, and Norway, maintained that minority views should be published.[22] They argued that: (1) 'the protection of human rights demanded the inclusion of dissenting opinions by reason of its genesis', (2) 'since a public organisation was involved the opinion of the minority should be made known', (3) 'this system had given good results at International Court of Justice', and finally that (4) 'publication of the arguments put forward would increase the authority of the Commission's conclusion'.[23] The representative for Luxembourg, Mr. Majerus, suggested a compromise that dissenting opinions should be included without author's names.[24] The Conference ultimately endorsed the inclusion of separate opinions by a clear majority, with Italy opposing the proposal, Belgium reserving its position, and Luxembourg taking an intermediate stance.[25] This outcome of this debate was subsequently reflected in Article 31 of the 1950 Convention, which provided that, if a solution was not reached, 'the opinions of all the members of the Commission on this point may be stated in the Report.' Although this provision concerned dissenting opinions within the Commission rather than judge's separate opinions at the Court, the arguments advanced during the negotiations foreshadowed many of the issues that would later emerge in scholarly debates over separate opinions.[26]

[20] With the exception of Council of Europe, *Collected Edition of the 'Travaux Preparatoires' of the European Convention on Human Rights: Volume IV: Third and Fourth Sessions of the Committee of Ministers, Conference of Senior Officials (30 March-17 June 1950)* (Brill Nijhoff 1977) <https://brill.com/edcollbook-oa/title/9574> accessed 2 July 2026.
[21] ibid 154–156.
[22] ibid 154.
[23] ibid.
[24] ibid.
[25] ibid 156.
[26] Alder (n 8) 239–344; Dunoff and Pollack (n 4) 344–350; Peter W Hogg and Ravi Amarnath, 'Why Judges Should Dissent' (2017) 67 University of Toronto Law Journal 126, 129–137 <https://doi.org/10.3138/UTLJ.4216>; Katalin Kelemen, *Judicial Dissent in European Constitutional Courts: A Comparative and Legal Perspective* (Routledge 2017) 158–162.

These arguments fall within the broader debate in normative theory on advantages and disadvantages of separate opinions.[27] This scholarly debate is often summarized as a list of competing advantages and disadvantages.[28] However, these arguments can be grouped around two underlying normative concerns: (1) the Court's transparency[29] and (2) the development of future case law[30]. The same arguments are invoked both in support of and against the publication of separate opinions. On the one hand, separate opinions are said to enhance the legitimacy of courts by increasing transparency, demonstrating that competing arguments have been fully considered, and allowing judges to explain their reasoning.[31] They are also regarded as an important mechanism for the development of legal doctrine by exposing alternative interpretations that may influence the future development of the Court's case law.[32] On the other hand, greater transparency may weaken rather than strengthen judicial legitimacy by exposing internal disagreement and undermining the authority of the court[33]. The continued expression of competing legal interpretations may also reduce legal certainty and contribute to doctrinal instability. Dunoff and Pollacks' comparative study challenge many of these assumptions, concluding that the presence of separate opinions has little systematic effect on judicial legitimacy and that, although separate opinions contribute to legal reasoning, there is limited evidence that they frequently become the basis for future majority decisions.[34] Despite the continuing scholarly debate, separate opinions have formed part of the institutional design of the ECtHR since its establishment. Any judge elected to full term or appointed ad hoc may deliver a separate opinion. Article 45(2) of the ECHR allows for separate opinions (underline added):

> '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.'

[27] Katalin Kelemen, 'Dissents and Other Separate Opinions' in Lee Epstein and others (eds), *The Oxford Handbook of Comparative Judicial Behaviour* (Oxford University Press 2024) 548–549 <https://doi.org/10.1093/oxfordhb/9780192898579.013.27> accessed 7 January 2025; Nuno Garoupa and Catarina Santos Botelho, 'Judicial Dissent in Collegial Courts: Theory and Evidence' in William R Thompson (ed), *Oxford research encyclopedia of politics* (Oxford University Press 2022) 3 <https://doi.org/10.1093/acrefore/9780190228637.013.1990>.
[28] Dunoff and Pollack (n 4) 344–350; Katalin Kelemen, 'Dissenting Opinions in Constitutional Courts' (2013) 14 German Law Journal 1345, 1357–1363 <https://doi.org/10.1017/S2071832200002297>.
[29] Dunoff and Pollack (n 4) 346, 348; Hogg and Amarnath (n 26) 131–132.
[30] Dunoff and Pollack (n 4) 345; Hogg and Amarnath (n 26) 137–141.
[31] Hogg and Amarnath (n 26) 131–132.
[32] Dunoff and Pollack (n 4) 345.
[33] ibid 348.
[34] Dunoff and Pollack (n 4).

Rule 74(2) of the Rules of Court further stipulates that judges who have participated in a case before a Chamber or the Grand Chamber may issue one of three different types of separate opinions (underline added):

> 'Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.'

Rule 74(2), therefore, gives judges the option to concur with the ruling while disagreeing with the reasoning, to dissent from both the reasoning and ruling, or simply to issue a bare statement of dissent. In practice, however, ECtHR judges have a wider range of options as to the form their separate opinions may take. When a judge disagrees with the majority, one possibility is to vote against the judgment without issuing a separate opinion. In such cases, the disagreement is apparent only from the voting result reported in the judgment, while the identity of the dissenting judge or judges remains undisclosed. Alternatively, judges may choose to issue a separate opinion. This may take the form of a dissenting opinion, either authored individually or jointly with other judges. Joint dissents can be structured in different ways. Judges may appear as co-authors of a single opinion (for example, 'joint dissenting opinion of Judges X and Y'), or one judge may be identified as the author while others formally join the opinion (for example, 'dissenting opinion of Judge X, joined by Judges Y and Z'). Similar arrangements exist for concurring opinions, which may likewise be written individually or jointly, or authored by one judge with the support of additional signatories. Judges may also issue partly dissenting or partly concurring opinions, reflecting agreement with some aspects of the judgment and disagreement with others. These opinions may likewise be authored individually or jointly. Beyond these more common forms, judges may issue a bare statement of dissent. Such statements are typically limited to a brief one- or two-sentence declaration, whereby the judge disagrees with the majority's finding on a particular issue, without providing any substantive reasoning.

Finally, a judge is not limited to a single separate opinion in a case. A judge may join a dissenting or concurring opinion while simultaneously authoring an additional separate opinion that develops arguments not included in the jointly signed text.[35] As a result, the practice of separate opinions at the ECtHR reveals a far greater diversity of forms and strategies than is immediately apparent from

[35] To illustrate this in the Grand Chamber case of Yasak v. Türkiye (2026, application n. 17389/20) judge Ní Raifeartaigh and Guerra Martins have their own solitary separate opinion but they are also part of the joint dissenting opinion of judges Vehabović, Schukking, Chanturia, Yüksel, Seibert-Fohr, Roosma, Guerra Martins and Ní Raifeartaigh.

the formal wording of Article 45 of the ECHR and Rule 74(2). Understanding how judges use these possibilities in practice therefore requires moving beyond the legal framework and examining the patterns of judicial behaviour that have developed within the Court.

2. Separate opinions in action

Prior research on separate opinions at the ECtHR provides valuable insights into the broader patterns and motivations underlying the issuance of separate opinions. As noted above, the ECtHR adopted a model that permits the publication of separate opinions. Over the decades since the Court's establishment, scholars have extensively examined the dissenting behaviour of its judges. This section reviews and discusses their findings.

2.1. Truly international court?

Article 21(3) of the ECHR provides that judges shall sit on the Court in their individual capacity. Early research on dissenting behaviour among ECtHR judges therefore focused on whether judges exhibit a bias toward their home country. Bruinsma and De Blois examined whether judges dissented more often when the majority found that their home state had violated the Convention.[36] Based on their quantitative analysis of voting patterns in judgments decided on merits between 1991 and 1995, they concluded that the ECtHR had become a truly international court, as judge's national background did not appear to influence their voting.[37] The authors famously compared the ECtHR to 'a house of Europe'[38]. Despite this overall finding, Bruinsma and De Blois identified striking examples of national bias in dissents written by ad hoc judges compared with elected judges.[39] They explained this tendency by reference to the distinctive institutional position of ad hoc judges, who sit in a particular case involving their own state and, unlike permanent judges, are less likely to develop a sense of collegial solidarity with the other members of the Court.[40]

In her book, *The Legal Culture of the ECtHR,* Nina-Louisa Arold starts with the hypothesis that — given the differences in judges' legal backgrounds, histories, and cultures — the ECtHR judiciary would not develop a common, or what she describes as 'harmonic', culture[41]. Drawing on fieldwork — which included access to deliberation meetings, interviews with ECtHR judges and clerks —

[36] Bruinsma and De Blois (n 7) 176.
[37] ibid 182.
[38] ibid 186.
[39] ibid 182–183.
[40] ibid.
[41] Arold (n 2) 15.

and a study of 153 judgments delivered under Articles 8, 9 and 10 of the ECHR between 1998 and 2001, Arnold found that her hypothesis was not supported.[42]

She found that, despite the diversity of national legal traditions, a distinct Strasbourg legal culture had emerged. Differences in political or educational background (such as East-versus-West backgrounds or civil-law versus common-law traditions) had no significant effect on voting patterns or the frequency of dissent[43]. Similar findings emerged from subsequent studies. In an analysis of 7,319 ECtHR judgments from 1960 to 2006, Voeten found no evidence that judges systematically displayed cultural or geopolitical biases in their rulings.[44] In a mixed-method study based on judgments from 1960 to 1998 and nine interviews with ECtHR judges, White and Boussiakou similarly concluded that the Court demonstrated high levels of collegiality.[45]

However, on the basis of the studies reviewed above, it cannot be stated definitively that there is a consensus regarding patterns of judicial behaviour at the ECtHR. In a later study, Bruinsma analysed 106 Grand Chamber judgments from 1998 to 2006 and interviewed 19 judges to examine whether judges exhibited national bias—that is, whether they adopted a more favourable or benevolent position towards their home state when it was the respondent State—in cases where the Court found a violation of the Convention.[46] His study produced two main findings. First, national bias did occur. However, it tended to be more pronounced among ad hoc judges than among than elected judges. Bruinsma explained this difference on the basis that ad hoc judges 'do not feel much solidarity with them [elected judges] and are, contrary to them, they are not exposed to group pressure'.[47] Second, judges' professional backgrounds significantly influenced their likelihood of dissenting.[48] Bruinsma's research was limited in terms of the data and the number of cases analysed. Even so, because these two findings recur across the literature on judicial dissent at the ECtHR, they merit independent and detailed consideration.

2.2. Alternative explanations for national bias

Martin Kuijer examined voting behaviour and national bias comparatively at the ECtHR and International Court of Justice (ICJ).[49] Based on a dataset of cases between 1970 to 1994, he found

[42] ibid 152.
[43] ibid 87–103.
[44] Voeten, 'The Impartiality of International Judges' (n 7) 426.
[45] White and Boussiakou (n 7) 59.
[46] Bruinsma (n 7) 32–34.
[47] ibid 37.
[48] ibid 39–40.
[49] Martin Kuijer, 'Voting Behaviour and National Bias in the European Court of Human Rights and the International Court of Justice' (1997) 10 Leiden Journal of International Law 49 <https://doi.org/10.1017/S0922156597000046>.

higher levels of national bias among ad hoc judges.[50] Arold also noted that ad hoc judges tend to favour their own states more than elected judges.[51] She states that this finding 'supports the claim of a general legal culture at the Court that only the permanent judges partake in. Outside judges may not share this legal culture'.[52] One common explanation for bias among ad hoc judges is that, as potential future nominees, they may avoid ruling against their home states in order to protect their career prospects. Voeten advances a similar argument in relation to elected judges. He found evidence that career insecurity makes judges more likely to favour their national governments when they are parties to a dispute.[53]

Voeten also identified another potential source bias at the ECtHR. He found that judges from former socialist countries were more likely to find violations against both their own governments and other former socialist governments, suggesting that they were motivated by a desire to rectify a particular set of historical injustices.[54]

However, Voeten's findings are inconsistent with Bruinsma's findings, which showed that judges elected in respect of the new member States of Central and Eastern Europe (socialist countries) delivered significantly fewer separate opinions than judges elected in respect of the old member states. This apparent contradiction may be explained by the differences in the datasets used. Bruinsma's study examined only 160 Grand Chamber cases from 1998 to 2006, whereas Voeten's dataset comprised 7,319 judgments from 1960-2006.

In a separate paper, Voeten offered another explanation for dissent rates at the ECtHR through the lens of judicial appointment politics.[55] He argued that the continuum from judicial activism to judicial restraint was the main dimension of contestation among ECtHR judges. Restrained judges believed that states should be afforded a broad margin of appreciation, whilst activist judges took the opposite view. His results showed that judicial activism could not be explained by differences in judges' legal cultures or by levels of domestic human rights observance in their countries of origin.[56] Instead, Voeten found that aspiring European Union members, as well as governments more favourably disposed towards European integration, had historically appointed more activist judges.[57]

Another study by Molbæk-Steensig & Quemy found that, following the introduction of non-renewable judicial term at the ECtHR by Protocol No. 14, judges have delivered more separate

[50] ibid 58–62.
[51] Arold (n 2) 154.
[52] ibid.
[53] Voeten, 'The Impartiality of International Judges' (n 7) 427.
[54] ibid 428.
[55] Voeten, 'The Politics of International Judicial Appointments' (n 7).
[56] ibid 688–692.
[57] ibid 693–694.

opinions overall.[58] This finding was based on a quantitative analysis of judgments from 1998 to 2021. Interestingly, Molbæk-Steensig & Quemy's analysis went beyond voting patterns and examined the arguments advanced in separate opinions. They found that judges serving non-renewable terms were, on average, more likely to write separate opinions that framed violations as systemic problems and provided guidance to their appointing states on implementing judgments and improving human rights protection.[59] This raises a further question: what other factors — beyond national bias — might predict or explain dissent?

2.3. Beyond national bias: professional background and separate opinions

Prior research suggests that judges' professional backgrounds significantly influence their likelihood of dissenting.[60] For example, Bruinsma examined whether the relationship between 'judicial identity' and a judge's formative years were reflected in majority judgments and separate opinions.[61] Based on 19 interviews with ECtHR judges, their professional CVs, and an analysis of 85 Grand Chamber cases, Bruinsma concluded that 'judicial identities can be derived from the curricula vitae'.[62] He classified judges into four groups according to their professional backgrounds: (1) former judges; (2) former academics; (3) former administrators; and (4) former practising lawyers.[63] He found that distinctive features of the four classifications of former experience are marked by identifiable tendencies. Former trial judges and lawyers were characterised as accustomed to thinking in terms of case particularities, whereas former academics and administrators were more inclined to think in terms of the general interest and broader policy considerations.[64] The former tended to favour deciding cases individually, while the latter were more oriented towards the development of a dynamic body of human rights case law.[65] Those characterised as former legal practitioners were more likely to see themselves as members of a collegiate body delivering majority judgments and therefore attached less importance to filing separate opinions.[66] In his later research, Bruinsma provides further support for these findings through a mixed-methods analysis of separate opinions.[67] He found that former academics tended

[58] Molbæk-Steensig and Quemy (n 13) 602–603.
[59] ibid 604–611.
[60] Bruinsma (n 9) 239; Bruinsma (n 7) 39; White and Boussiakou (n 7) 59.
[61] Bruinsma (n 9) 210.
[62] ibid 239.
[63] ibid 214; Erik Bleich and others, 'Diplomats in Robes: Judicial Career Paths and Free Speech Decision-Making at the European Court of Human Rights' (2021) 46 Law & Social Inquiry 1141 <https://doi.org/10.1017/lsi.2021.9>.
[64] Bruinsma (n 9) 214.
[65] ibid 222–223.
[66] ibid 222.
[67] Bruinsma (n 7).

to be more activist, while career judges and diplomats exhibited greater judicial restraint.[68] White and Boussiakou's mixed-methods study likewise found some evidence that the judges' professional background (prior to their election to the Court) influenced their approach to writing separate opinions.[69] They conclude that the main determining factor in writing a separate opinion was 'judicial temperament', which they described as being 'shaped by a judge's prior experience and by the value set which that judge brings to his [sic] judicial work'.[70]

These studies make an important contribution by demonstrating, through both interviews and empirical analysis, that judges' professional backgrounds are associated with different approaches to separate opinions. At the same time, these explanatory frameworks remain conceptually underdeveloped. Bruinsma attributed these differences to 'judicial identity', while White and Boussiakou referred to 'judicial temperament', yet neither concept is clearly defined or operationalised.[71] As a result, it remains unclear whether the observed differences stem from professional experience itself or from broader individual characteristics that these concepts are intended to capture. Moreover, Bruinsma's conclusion that judicial identity could be derived from a judge's curricula vitae arguably understates the significance of his own interview material, which provided a much richer account of how judges perceive their own roles. Reliance on curricula vitae alone also presents practical limitations, as many ECtHR judges have followed mixed career paths, sometimes combining experience in academia, legal practice, the judiciary, public administration and diplomacy. This diversity makes it difficult to classify judges within a single predominant professional category.[72]

2.4. Linguistic discourse of separate opinions

While the studies mentioned above seek to explain why judges at the ECtHR issue separate opinions, a growing body of legal-linguistic scholarship[73] examines how judges express their disagreement through language. Rather than treating separate opinions as indicators of broader voting patterns, these studies analyse them as deliberate acts of judicial agency and as standalone genres, focusing on the language through which judges perform their judicial roles.[74] Early work by Goźdź-Roszkowski conceptualised separate opinions as a distinct communicative genre. In a

[68] ibid 39.
[69] White and Boussiakou (n 7) 57.
[70] ibid 59.
[71] Bruinsma (n 9) 211–223; White and Boussiakou (n 7) 46, 59.
[72] Bruinsma (n 9) 209.
[73] It is worth noting the special issue of Comparative Linguistics (International Journal for Legal Communication), vol. 64 (2025), which examines the linguistic discourse of separate opinions.
[74] Nikitina and Peruzzo (n 14) 398.

comparative study of judgments from the Supreme Court of the United States (SCOTUS) and Poland's Constitutional Tribunal, Goździ-Roszkowski identified clear structural similarities in how judges wrote their judgments.[75] Judges employed highly conventionalised formulaic expressions to declare and justify dissent, while also relying on evaluative language to distinguish their reasoning from that of the majority.[76] More recent research has expanded this perspective. Notari's comparative analysis of 112 dissenting opinions from the ECtHR and SCOTUS demonstrated that, despite differences in legal traditions, dissenting opinions shared a common structure while differing in how judges positioned their individual voices in relation to the institution and their intended audience.[77] Her research validated Goździ-Roszkowski's earlier rhetorical taxonomy[78] and identified nine core moves that commonly structure dissenting opinions: (1) introduction, (2) declaration, (3) scope specification, (4) thesis statement, (5) argument elaboration, (6) evaluative judgment, (7) justification, (8) significance and (9) conclusion.[79] Moving from structure to writing styles and forms of argumentation, Brambilla drew on pragma-dialectical theory to analyse a corpus of ten ECtHR judgments delivered between 2020 and 2024.[80] He found that ECtHR judges predominantly relied on three forms of argumentation: (1) arguments from authority (symptomatic); (2) analogical reasoning (comparison); and (3) pragmatic arguments that emphasised the consequences of the majority's decisions in order to strengthen the persuasiveness of the dissent.[81]

Giordano and Zottola analysed 14 dissenting opinions in 12 ECtHR judgments concerning gender-based violence to explore how intertextuality functioned as a rhetorical resource.[82] They demonstrated that dissenting judges strategically invoked legal and institutional authorities to construct competing narratives, which could either challenge or reproduce gender stereotypes.[83] Their findings showed that some separate opinions employed intentionally harmful discursive practices, including victim-blaming, minimisation of trauma, and the prioritisation of defendants' rights over victim protection.[84]

In a study of dissenting opinions in the SCOTUS case *Obergefell v. Hodges* (2015), Goździ-Roszkowski found that, despite reaching the same conclusion in dissent, Justices Roberts, Scalia,

[75] Goździ-Roszkowski, 'Communicating Dissent in Judicial Opinions' (n 15) 398.
[76] ibid 398–399.
[77] Notari (n 6) 463–471.
[78] Goździ-Roszkowski, 'Communicating Dissent in Judicial Opinions' (n 15) 391–398.
[79] Notari (n 6) 453–454.
[80] Brambilla (n 6) 488–490.
[81] ibid 492–505.
[82] Giordano and Zottola (n 6) 413–415.
[83] ibid 420–424.
[84] ibid 421–424.

Thomas, and Alito differed markedly in the form and style of their opinions, and in their implied audiences.[85]

Collectively, this literature demonstrates that separate opinions are more than mere expressions of disagreement. Unlike majority judgments, which are constrained by rules governing textual structure and shaped by the collegial consensus, separate opinions provide judges with greater freedom to articulate their own reasoning, rhetorical style and interpretative preferences. Existing studies have identified common structural patterns across separate opinions in different legal cultures.[86] Even where judges reach the same outcome, the expression of their disagreement can differ in form, style and intended audience.[87] Research in this area remains at an early stage and has focused primarily on the ECtHR and the SCOTUS. In the editorial to the 2025 special issue of *Comparative Linguistics* the editors argued that separate opinions should be understood as 'deliberate acts of judicial agency – and a standalone genre – rather than incidental byproducts of disagreement or misalignment' and that 'in this sense, a dissent or concurrence is both a textual and behavioural performance'[88]. While studies support this view by demonstrating shared rhetorical structures and communicative purposes across jurisdictions, broader cross-jurisdictional research is still needed to establish the extent to which these patterns could be generalised across different legal traditions. At the same time, existing research has operationalised only the textual dimension of this framework. Studies have concentrated on how dissenting opinions are structured, linguistically performed, and strategically positioned to different audiences within judicial discourse. The behavioural dimension — how judges decide to write separate opinions, why they choose to dissent individually or jointly, and how these decisions emerge during judicial deliberation — has received little systematic attention. Yet these choices constitute an equally important aspect of judicial agency and of the performance of dissent.

2.5. Summary

Taken together, the studies reviewed above provide insight into several aspects of dissenting behaviour at the ECtHR. The literature converges on two key insights. First, the ECtHR's dissents are not primarily products of national bias or legal-cultural divides.[89] However, some studies identified particular exceptions to this general pattern. Ad hoc judges were found to dissent more

[85] Goździ-Roszkowski, 'Mapping Rhetorical Dissent' (n 12) 437–446.
[86] Goździ-Roszkowski, 'Communicating Dissent in Judicial Opinions' (n 15); Notari (n 6).
[87] Brambilla (n 6); Giordano and Zottola (n 6); Goździ-Roszkowski, 'Mapping Rhetorical Dissent' (n 12).
[88] Nikitina and Peruzzo (n 14) 398.
[89] Arold (n 2); Bruinsma and De Blois (n 7); Voeten, 'The Impartiality of International Judges' (n 7); White and Boussiakou (n 7).

frequently than elected judges,[90] while judges from former socialist countries were more likely to find violations against their own governments and other former socialist governments.[91] Research has also suggested the introduction of non-renewable term at ECtHR[92] was associated with an overall increase in separate opinions, potentially indicating greater judicial autonomy and independence.

Second, professional background appears to be a more consistent predictor of dissent than a judge's nationality.[93] Former trial judges, lawyers and diplomats tended to be more case-focused and less inclined to issue separate opinions, reflecting a preference for collegial majority judgments.[94] By contrast, former academics tended to be more activist, while administrators were described as more policy-oriented.[95] It is also important to note that most of the research on judicial behaviour reviewed above examined voting pattern only up to 2008.[96] This fact further reinforces the need for renewed research on separate opinions at the ECtHR, particularly because key explanatory frameworks such as 'judicial temperament' and 'judicial identity' remain insufficiently explored and defined.

More recently, a body of legal-linguistic scholarship has emerged examining separate opinions as expressions of judicial agency. Although this body of research remains at an early stage, studies have identified common rhetorical structures and communicative purposes across jurisdictions[97], suggesting that separate opinions may constitute an autonomous judicial genre. Recent scholarship has also conceptualised dissent as both a 'textual and a behavioural performance of judicial agency'.[98] However, the existing research has almost exclusively focused on the textual dimension. The behavioural dimension — on how judges decide to issue a separate opinion, why they choose to dissent individually or jointly, and how these decisions emerge during judicial deliberations — remains largely unexplored. This thesis builds on these strands of literature by bringing them into dialogue with the empirical findings of this project. Chapter 3 explores judges' motivations for issuing separate opinions at the ECtHR and interacts with the conceptual frameworks of 'judicial identity' and 'judicial temperament' introduced above. Chapter 4 follows the legal-linguistic findings and explores how judges' motivations shape the textual and behavioural performance of separate opinions at the ECtHR.

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[90] Bruinsma (n 7).
[91] Voeten, 'The Impartiality of International Judges' (n 7).
[92] Molbæk-Steensig and Quemy (n 13).
[93] Bruinsma (n 7).
[94] Bruinsma (n 9) 222–223.
[95] ibid.
[96] With the exception of one study that analyses dissenting opinions up to 2021 Molbæk-Steensig and Quemy (n 13)..
[97] Goździ-Roszkowski, 'Communicating Dissent in Judicial Opinions' (n 15); Notari (n 6).
[98] Nikitina and Peruzzo (n 14) 398.

CHAPTER 2 METHODOLOGY

1. Prelude: start of this project

I began this project at the beginning of October 2025. To be transparent about my position, I am a lawyer and political scientist from the Czech Republic. Before beginning my studies at Oxford, I spent a year pursuing a PhD at the Faculty of Law at Charles University in Prague, where my dissertation is titled 'Why Do Judges Dissent?'. Separate opinions have been my research interest for the past four years now. My previous research predominantly focused on the Czech Constitutional Court. I have conducted social-network analysis of dissenting coalitions among Czech constitutional judges[99] and, in collaboration with Štěpán Paulík, published research that combines quantitative empirical approach (logistic regression) with qualitative interviews (thematic analysis) to better understand what motivates judges to issue separate opinions.[100] This research experience gave me insights into the study of separate opinions, as well as experience with a range of different methodological approaches.

This MPhil project was intended to shift my focus from the Czech Constitutional Court to the ECtHR. This shift proved particularly timely, as I began working on the project just a few months after the ECtHR became embroiled in a political contestation over its jurisprudence. On 22 May 2025, nine European governments issued a joint statement accusing the Court of 'going beyond the original intent of the Convention' and of 'limiting their ability to control migration', while also claiming that the 'interpretation of the Convention has resulted in the protection of the wrong people'.[101] On the International Human Rights Day, 10 December 2025, 27 Council of Europe member states issued a further joint statement in a more confrontational tone[102], raising more serious concerns.[103] In reaction to these criticisms, the Council of Europe held a meeting on 14-15 May 2026, which resulted in the Chişinău Declaration.[104] The ECtHR has faced increasing political

[99] Gor Vartazaryan, 'Síť'ová Analýza Disentujících Ústavních Soudců' [2022] Právník 1196.

[100] Štěpán Paulík and Gor Vartazaryan, 'Disagreement on a Bench: An Empirical Analysis of Dissent at the Czech Constitutional Court' (2024) 1 European Journal of Empirical Legal Studies 231 <https://doi.org/https://doi.org/10.62355/ejels.23797>; Gor Vartazaryan and Štěpán Paulík, 'I Have Spoken and Saved My Soul: A Qualitative Analysis of Dissenting Behaviour of Czech Constitutional Judges' (2026) 16 The Lawyer Quarterly <https://tlq.ilaw.cas.cz/index.php/tlq/article/view/683> accessed 27 May 2026.

[101] 'Letter to ECtHR (May)' (05 2025) <https://www.governo.it/sites/governo.it/files/Lettera_aperta_22052025.pdf>.

[102],In addressing under the Convention, the challenges in expulsion of foreign criminals, migration management and cooperation with third countries regarding asylum and return procedures, as well as removal procedures and instrumentalization of migration, a right balance has to be found between the migrants' individual rights and interests and the weighty public interests of defending freedom and security in our societies' 'Letter to ECtHR (December)' (12 2025) <https://www.gov.uk/government/news/joint-statement-to-the-conference-of-ministers-of-justice-of-the-council-of-europe> accessed 2 January 2026..

[103] ibid.

[104] In addition to this, political parties in the United Kingdom (namely UK Independent Party and Conservative and Unionist Party) have recently called for withdrawal from the European Convention on Human Rights, citing migration rulings as emblematic of judicial overreach Sam Francis, 'UK Will Leave ECHR If Tories Win Election, Badenoch

pressure from several member states over the past decade.[105] In particular, a narrative has gained traction around the Court's immigration and asylum cases, with growing criticism that the ECtHR has increasingly constrained member states' ability to prevent 'illegal' immigration. The narrative holds that 'the rights and freedoms of our populations are challenged by people who take advantage of our hospitality by committing serious crime; trafficking in human beings; and the instrumentalisation of migrants'.[106] However, academic commentary suggests that the Court's case law is more nuanced than this narrative implies.[107]

My initial research question was built around separate opinions in border protection cases, exploring: 'How do ECtHR judges use separate opinions in border protection-related cases to articulate positions on the human rights protection?'. I wanted to go beyond the limitations of doctrinal methods by adopting a socio-legal approach[108] and combining quantitative and qualitative methods. As the previous chapter demonstrated, the vast majority of the literature examines the factors influencing dissenting behaviour among judges at the ECHR through quantitative analysis of voting patterns with a few exceptions.[109] However, these studies have mostly used interviews as supplementary material.[110] I therefore decided to situate this project firmly within a socio-legal methodological framework[111] and to answer my research questions through semi-structured interviews with ECtHR judges. Semi-structured interviews have been described as 'a qualitative data collection strategy in which the researcher asks informants a series of predetermined but open-ended questions.'[112]

However, my initial recruitment efforts were unsuccessful. After receiving ethical approval from the Social Sciences & Humanities Interdivisional Research Ethics Committee (SSH IDREC) on 7 January 2026, I contacted 15 ECtHR judges (11 former judges and 4 current judges) - 11 of them by email and 4 of them on LinkedIn. I used LinkedIn because, as part of the new Court President's strategy to increase the Court's visibility, judges now have profiles on this platform.[113] In the email or LinkedIn message sent to prospective interviewees, I explained that 'I am conducting a study

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Says' (*BBC News*, 3 October 2025) <https://www.bbc.co.uk/news/articles/c1mxy2j2elro> accessed 22 October 2025..

[105] Jasper Krommendijk Möller Lina Sophie, 'A Divided Response to Migration' (*Verfassungsblog*, 15 December 2025) <https://verfassungsblog.de/a-divided-response-to-migration/> accessed 3 January 2026.

[106] ibid.

[107] Dana Schmalz, 'Migrants' Rights Before the European Court of Human Rights' [2025] Verfassungsblog <https://doi.org/10.17176/20251208-172136-0> accessed 3 January 2026.

[108] Anthony Bradney, 'Law as a Parasitic Discipline' (1998) 25 Journal of Law and Society 71.

[109] Arold (n 2); Bruinsma (n 7); Bruinsma (n 9); White and Boussiakou (n 7).

[110] Bruinsma (n 7); White and Boussiakou (n 7).

[111] Roger Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press 1995); Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, Massachusetts 1936) <http://archive.org/details/dli.ministry.13242> accessed 10 December 2025.

[112] Lisa M Given, *The SAGE Encyclopedia of Qualitative Research Methods* (SAGE Publications 2008).

[113] 'European Court of Human Rights Now on LinkedIn' (*ECHR*, 2025) <https://www.echr.coe.int/w/european-court-of-human-rights-now-on-linkedin> accessed 20 June 2026.

on the judicial understanding of separate opinions and its role within the ECtHR particularly focused on migration cases.' Of the 15 judges contacted, 11 did not respond to my initial inquiry or follow-up messages, three declined to participate, and one agreed to be interviewed. Despite the agreed-upon time and place, the judge did not show up for the interview and stopped responding to my emails. Given the time constraints of this project, I was prepared to proceed without interview data and instead focus exclusively on the textual analysis of dissenting opinions.

Nevertheless, after attending a conference in Scandinavia, I had the opportunity to meet one current ECtHR judge in person. During the conference, several scholars suggested broadening the scope of my study by moving away from the border-protection framing — which they thought may have contributed to the judges' reluctance to participate — and instead examine judicial motivations for dissent more generally. I also received some useful suggestions about which judges to contact. Acting on this advice, I went back to the drawing board and conducted an extensive literature review on factors motivating dissent. One finding that appeared particularly underdeveloped was the judges' own explanations on why they dissent. Although previous studies suggested that 'judicial temperament'[114] or 'judicial identity'[115] may influence their propensity to issue separate opinions, scholars provided little explanation of what these concepts could entail (see Chapter 1). Rather than examining judges' own understandings of dissent through qualitative inquiry, the existing literature largely inferred motivations from patterns of judicial behaviour. To address this gap, I reformulated my research questions as follows: 'What motivates judges at the European Court of Human Rights to issue a separate opinion?' and 'How do judges' motivations shape the performance of separate opinions at the ECtHR?

2. Sample

Based on these recommendations and my new trajectory, I emailed three ECtHR judges, all of whom were willing to participate in the project. I ultimately secured eight interviews through snowball sampling.[116] At the end of each interview, I would ask the interviewee whether they could recommend a colleague who might be willing to speak with me about separate opinions. Given the seniority of the participants and the relatively small population from which they were drawn, I paid particular attention to issues of confidentiality and anonymity.

[114] White and Boussiakou (n 7) 37, 46, 59.
[115] Bruinsma (n 9) 239.
[116] David L Morgan, 'Snowball Sampling' *Sage Research Methods - The SAGE Encyclopedia of Qualitative Research Methods* - (SAGE Publications 2008) <https://doi.org/https://doi.org/10.4135/9781412963909.n425> accessed 17 June 2026.

At the beginning of the interviews, several judges asked about the extent to which their identities would be protected. I assured them that I would take all possible measures to ensure their anonymity, while also explaining that complete anonymity could not be guaranteed. Given the elite status of the participants and the highly specialised nature of their professional roles, participants could remain potentially identifiable through their positions, career trajectories, or contextual information, even where direct identifiers were removed.[117] In accordance with participants' preferences, every effort was made to protect their anonymity and confidentiality. Neither the interview transcripts nor the identities of the participating judges will be disclosed. All potentially identifying information was removed or anonymised during the transcription and analysis process. It is also important to recognise that expectations surrounding anonymity and access to ECtHR judges have changed considerably over time. Earlier empirical studies were conducted under markedly different institutional conditions. For example, Arold was granted access to observe judges' deliberations from November 1998 until October 2001.[118] Bruinsma reported that the President of the Court, Judge Wildhaber, had endorsed his study and expressed the hope that judges would participate, while emphasising that participation remained entirely voluntary.[119] Consequently, interviews were not anonymised, allowing Bruinsma to attribute quotations to his sample of 19 judges and analyse their views in light of their professional backgrounds.[120]

Two decades later, this present study was conducted in a substantially different research environment. Access to serving judges proved considerably more restricted. One respondent explained that the Court had recently adopted a 'more cautious approach' to research interview requests. The respondent attributed this development to two principal considerations: first, the need to safeguard the confidentiality of the Court's deliberative processes and to protect its institutional legitimacy; and second, the growing volume of interview requests received by judges. While participation ultimately remained a matter of individual discretion, the respondent noted that some judges routinely decline such requests. Prior to the interview, the respondent had also informed me by email that the judges had collectively agreed to approach interview requests with greater restraint. This shift illustrates the increasingly restrictive conditions under which this qualitative research was conducted and provides important context for the access achieved in this study.

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[117] Christoph Houman Ellersgaard, Kia Ditlevsen and Anton Grau Larsen, 'Say My Name? Anonymity or Not in Elite Interviewing' (2022) 25 International Journal of Social Research Methodology 673 <https://doi.org/10.1080/13645579.2021.1932717>.

[118] Arold (n 2) 16–17.

[119] Bruinsma (n 9) 209, fn. 19.

[120] ibid, fn. 19.

Nevertheless, some demographic characteristics of the sample can be reported where doing so does not compromise confidentiality. Such information is provided only in aggregate form and is intended to assist readers in assessing the diversity and composition of the sample while maintaining the highest possible level of anonymity for participants.

The study included 8 judges, of whom two were female and six were male. Three participants were serving judges of the ECtHR, while five were former judges. Three had experience as Section Presidents, four as Vice-Presidents of a Section, and one had never held either position. The judges' professional backgrounds varied considerably and included experience in academia, the judiciary, legal practice, and diplomacy, with many participants having pursued careers across multiple sectors through their professional lives. All quotations reproduced in this thesis are authentic and are enclosed in quotation marks. Each quotation is accompanied by the judge's randomly anonymized designation (Judge A–H), gender, and an indicator of whether the judge is currently serving or a former member of the Court. [121]

I was aware that snowball sampling could lead me to interact only with judges who share similar backgrounds, experiences or attitudes towards separate opinions.[122] To mitigate that risk, I compared the data collected with information about the judge's background to help ensure diversity within the sample. Since the judges typically recommended one to four additional colleagues for me to interview, I selected interviewees with the following considerations in mind: (1) the number of dissenting opinions the judge had issued – with the sample including judges who had written both relatively many (around 150) and relatively few (around 20) separate opinions; (2) representation from different member states; and (3) variation in periods of service, so that the sample included judges from different periods of the Court's history who had not served together.[123]

A short reflection is also warranted regarding the judges who declined to be interviewed in my first wave of recruitment. Two judges apologised and explained that their current professional commitments did not allow them to set aside the time required for an interview. One former judge of the ECtHR declined on different grounds. Their refusal was motivated by the view that judicial deliberations preceding the adoption of a judgment formed a confidential part of the Court's decision-making process, stating that: 'I see no reason whatsoever for the public to be made aware

[121] Where relevant, I draw on previously published interview material from Bruinsma's study (n 11) of ECtHR judges, as these quotations have already been published with the judges' identities disclosed, they are reproduced without anonymisation in this thesis.

[122] Patricia Leavy (ed), *The Oxford Handbook of Qualitative Research* (Oxford University Press 2014) 542 <https://doi.org/10.1093/oxfordhb/9780199811755.001.0001> accessed 20 June 2026.

[123] One limitation may be that my sample does not include ad hoc judges. However, this was intentional, as I wanted to know the positions of the elected judges to the ECHR. The previous chapter suggested that ad hoc judges may be motivated in their dissenting behaviour by future career prospects (which I wanted to avoid).

of any of the individual judges' deliberations that precede the final text of the judgment, including the content of dissenting and concurring opinions.' According to this judge, only the final judgment and published separate opinions should be subject to public scrutiny, whereas the internal discussions, reasoning, and considerations leading to those outcomes should remain private. That said, the use of snowball sampling may have introduced a degree of selection bias. It is possible that judges who were more willing to discuss judicial decision-making processes may have been overrepresented among those who agreed to participate, while judges holding more restrictive views about the confidentiality of judicial deliberations may have been less accessible through the referral network.

3. Interviews

A semi-structured interview guide was developed in advance, informed by the literature review. The guide organised questions around three principal themes: (1) the drafting and internal practice of dissenting opinions, (2) the functions and significance of dissent within the Court, and (3) the institutional role and legitimacy of the Court. However, after the first interview, a new topic emerged regarding institutional restrictions on separate opinions at the ECtHR. This topic revealed two subthemes. The first concerned a meeting of the full bench of judges with the Court's Registry, during which restrictions on the length, tone and style of separate opinions were discussed – as an attempt to self-regulate the dissents by the ECtHR judicial body. The second theme concerned the legal debate over whether separate opinions could be issued in decisions — as separate from judgments[124] — in accordance with Article 45(2) of the Convention. Consequently, I incorporated both these issues into subsequent interviews with other judges. This enabled me not only to gather additional perspectives on these topics, but also to corroborate factual accounts provided by earlier interviewees that could not be independently verified through documentary sources. For example, when one judge recalled a discussion concerning the limitation of separate opinions and outlined the principal arguments advanced during that debate, I asked other judges what they remembered from the same discussion and compared their recollections.

Interviews were conducted online between January and March 2026. Since the interviewees included both current and former ECtHR judges from a range of member states, conducting interviews in person was not considered feasible. The geographical dispersion of participants,

[124] Decisions determine whether an application is admissible, whereas judgments determine whether the Convention has been violated.

combined with the financial costs and time constraints associated with international travel, rendered face-to-face interviews impracticable within the timeframe of this research project.

Thus, six interviews were carried out online by videocall via Microsoft Teams, one was an online phone call via WhatsApp, and one participant chose to provide written responses to the interview questions. With the exception of the participant who provided written responses, judges were not given the questions in advance. However, two of the interviewees provided documents for me to refer beforehand. These included: an excerpt from one of the interviewees' dissertations, in which a chapter was devoted to separate opinions; an academic article on dissenting opinions[125]; and a summary statistic relating to one judge's separate opinions. All interviews were conducted in English except one, which was conducted in the judge's native language.[126] Interviews ranged in length from approximately 30 minutes to one hour.

4. Analysis

Except for one interview, all interviews were audio-recorded with participants' consent. In the remaining case, the participant declined to be recorded, and detailed handwritten notes were taken during the interview.

The interviews were initially transcribed using the audio function in Microsoft Word. I then listened to the interview recordings multiple times and manually corrected mistakes in the automated transcripts to ensure verbatim transcription.[127] Particular attention was paid to preserving features of the interaction that might be relevant for interpretation, including interruptions, pauses, overlapping speech, and laughter. Contextual notes were also inserted in square brackets to capture notable non-verbal cues observed during the interviews, such as signs of amusement, hesitation, restraint or disengagement. Words that interviewees pronounced with particular emphasis or increased volume were transcribed in capital letters to preserve salient features of vocal emphasis. These annotations were based on observations and were recorded either during or immediately after the interviews. At the same time, verbal repetitions, self-corrections and occasional slips of the tongue were intentionally retained in the transcripts to preserve the authenticity of the participants' responses and the conversational character of the interviews. The final dataset consists of 108 pages and a corpus of over 35,919 words of qualitative data.

[125] Stiansen and Voeten (n 10).

[126] Not mentioned to preserve anonymity - the author of the dissertation is fluent in four languages.

[127] Blake D Poland, 'Transcription Quality as an Aspect of Rigor in Qualitative Research' (1995) 1 Qualitative Inquiry 290 <https://doi.org/10.1177/107780049500100302>.

Before commencing the coding and analysis process, I deliberately imposed a two-week interval following the completion of transcription. This period of distance from the data was intended to reduce the risk of premature interpretation and to facilitate a more reflective and systematic engagement with the interview material during the subsequent stages of analysis.

The analysis was conducted using NVivo 15 software (version 15.4.0). The data were examined using thematic analysis, defined as 'a method for identifying, analysing and reporting patterns (themes) within data'.[128] An inductive approach to coding was adopted, allowing themes to emerge from the data rather than being imposed a priori. Following the initial coding, related codes were grouped into broader thematic categories to facilitate the identification of recurring patterns across the interviews.

Based on the data, I identified two main themes. The first concerned judge's stances towards separate opinions. Judges at the ECtHR appeared to hold an 'internal' position towards dissenting opinions, which I identified through in vivo coding.[129] By 'internal' position, I refer to a judge's underlying stance towards separate opinions. These stances reflect fundamentally different understandings of both the role of the individual judge and the role of the Court as an institution. I found that this internal position was not unitary and could be further divided into three positions: (1) the instrumental dissenter, (2) the responsibility dissenter, and (3) the academic dissenter. Although these positions represent, to some extent, ideal types, they sometimes came into conflict during deliberations, as judges sought to legitimise their own approach in relation to colleagues who held different stances. The second theme I identified concerned the practices and internal debates through which separate opinions are performed within the Court. The data revealed different ways in which judges expressed their disagreement during deliberations, formed dissenting coalitions, and used separate opinions to express themselves with greater freedom than was possible in majority judgments. Majority judgments – what judges can say and how their judgments are written or structured – tend to be constrained not only by the Rules of the Court, but also by established institutional traditions. These findings support the argument that separate opinions have developed into a distinct genre of judicial writing that is performed both textually and behaviourally by judges.

[128] Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 Qualitative Research in Psychology 77, 79 <https://doi.org/10.1191/1478088706qp063oa>.

[129] Johnny Saldana, *The Coding Manual for Qualitative Researchers* (Second edition, SAGE 2013) 94–95.

CHAPTER 3 WHAT MOTIVATES JUDGES TO ISSUE A SEPARATE OPINION AT THE ECTHR?

1. Introduction

This chapter presents empirical material that helps address my first research question: What motivates judges at the European Court of Human Rights to issue a separate opinion? The analysis identifies two layers of motivation answers given by the judges.

The first refers to the familiar arguments on the advantages and disadvantages of separate opinions discussed in the existing literature[130] and that were reviewed in Chapter 1. To reiterate, judges repeatedly advanced two main arguments: (1) the dissenting opinions enhance the Court's transparency and, thus, its legitimacy; and (2) they may contribute to future developments in the Court's case law and, consequently, help develop human rights jurisprudence more broadly. My interviews also revealed a deeper, second layer of motivation relating to a judge's internal, perhaps even more personal, position towards separate opinions. I refer to these as 'internal positions'. They reflect a judge's long-term stance towards separate opinions and are shaped by his or her understanding of both (1) the role of a judge at the Court, and (2) the role of the Court. My empirical data reveals that judges may already hold an internal position towards separate opinions when they take office in Strasbourg, but that this position may be reinforced, re-established, or consolidated during their judicial term. My analysis demonstrates that these positions are influenced by judges' personality, previous career experience and expertise.[131]

I identified and named three internal positions using in vivo codes from the judges' own language: (1) the instrumental dissenter, (2) the responsible dissenter, and (3) the academic dissenter. These three positions help validate previous findings of Bruinsma,[132] especially his research concerning specific judicial identities. However, rather than attributing these positions to judges based solely on their prior professional experiences (via a judge's curriculum vitae), I instead attribute them more dynamically through reflecting on a judge's own understanding of their individual role and the role of the Court.

These positions are therefore neither static nor mutually exclusive but represent shifting orientations that may be shaped by institutional contexts and situational discretion. This chapter first considers the two layers of motivations behind dissenting opinions, before turning to an examination and discussion of each of the three internal positions.

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[130] Alder (n 8); Dunoff and Pollack (n 4); Hogg and Amarnath (n 26); Kelemen, *Judicial Dissent in European Constitutional Courts* (n 26); Gregor Maučec and Shai Dothan, 'Judicial Dissent at the International Criminal Court: A Theoretical and Empirical Analysis' (2022) 35 Leiden Journal of International Law 945, 948–950 <https://doi.org/10.1017/S0922156522000103>.

[131] Similar argument was made by Bruinsma Bruinsma (n 9). and in a study on dissenting judges at the International Criminal Court Maučec and Dothan (n 130) 953..

[132] Bruinsma (n 9).

2. Scholarly arguments: dissenting for transparency and future change

The scholarship on dissenting opinions (or *votum separatum* in the continental tradition) has broadly produced a two-part explanation as to why judges dissent: (1) enhancing transparency of the Court; and (2) contributing to the development of future case law.[133] These arguments can often cut both ways: each has been invoked both to justify separate opinions and, conversely, to question their value or necessity. Turning first to the argument concerning *transparency,* there is a strong consensus that dissents are healthy[134] for the Court. In an earlier study, White and Boussiakou concluded that: 'judges were overwhelmingly in favour of the use of concurring and dissenting opinions, because it demonstrated the nuances of human rights protection, promoted debate among the Strasbourg judiciary, indicated that questions of interpretation and application were not always clear-cut, could provide consolation for the losing party who would know that some judges appreciated their position and arguments, and demonstrated openness and transparency'.[135] A similar view emerged from my interviews. One judge emphasised the important of recognising that the Court is not a one-sided institution with a single view on the interpretation of human rights, but rather an institution in which many different viewpoints coexist. In the judge's view, making this disagreement visible to the public was important to him:

> 'For me I always looked at [dissent] it as something that was healthy for the whole Court. People should realise that the Court is not a monolithic institution. There are differences of opinions. Just like you have differences of opinions in the Parliament or in the Government. Well in the Court it's the same and if you can show that the issue has been thoroughly discussed and yet there is a majority in one direction and a minority in another direction, yeah so be it. But at least it shows that the decision has not been taken lightly. At least that's what I would hope. That the majority didn't take the decision lightly and so the reader can then say, ok these were all the issues that have been discussed. Think in a way that normally speaking I would say that enhances the legitimacy of the court as a decision-making body' (Judge E, male, former judge).

[133] Alder (n 8) 239–344; Dunoff and Pollack (n 4) 344–350; Kelemen, *Judicial Dissent in European Constitutional Courts* (n 26) 158–162.
[134] At the ICC only the interviewees with professional judicial experience agreed that dissents are healthy for the Court Maučec and Dothan (n 130) 956..
[135] White and Boussiakou (n 7) 57.

Another judge similarly described dissent as healthy for the Court: 'But for me dissenting opinion is very healthy thing. You know that in some other court, like the Luxembourg court, no separate opinions are allowed? That is against transparency'[136] (Judge C, male, former judge). The argument that separate opinions promote transparency is closely linked to the claim that they enhance the Court's legitimacy by demonstrating that dissenting views were vocalised and taken seriously.[137] As one former judge explained:

> 'As for legitimacy, I firmly believe that the practice of separate opinions enhances it. It shows that the Court operates in a pluralistic environment where serious legal debate takes place. The Convention is a living instrument, and dissent is one of the mechanisms through which its interpretation evolves and adapts to new challenges' (Judge D, female, former judge).

Nevertheless, the literature also suggests that separate opinions may undermine the Court's legitimacy. For example, Dunoff and Pollack cited concerns expressed by SCOTUS Chief Justices, international judges and officials that dissent could weaken a court's authority and legitimacy, while unanimity could lend greater weight to judicial decisions.[138] This concern was echoed by several of my interviewees as well. However, judges generally associated potential reputational risks not with separate opinions themselves, but specifically with dissents that were overly personal or emotionally charged:

> 'Of course, if you have a separate opinion that is disrespectful towards the majority and say 'what a stupid opinion it is' or 'how could they come to that conclusion' yeah, that puts the majority in a difficult position, and I think that is not what the separate opinion should do. So even if you fundamentally disagree, you have to accept that there was a majority that had another opinion. So, you can express your disagreement in very harsh words, but still not in such a way that the reader thinks how stupid the majority was' (Judge E, male, former judge).

Another judge argued that dissents using harsh and emotional language were better avoided, and presented the case of *Drėlingas v. Lithuania* (2019, application no. 28859/16) as an example. In this

[136] It was previously argued in the literature that allowing separate opinions can potentially improve the quality of judgments at CJEU Kelemen, *Judicial Dissent in European Constitutional Courts* (n 26) 107–112; Vlad F Perju, 'Reason and Authority in the European Court of Justice' (2009) 49 Virginia Journal of International Law 307, 366–369..
[137] Dunoff and Pollack (n 4) 346.
[138] ibid 348.

case, a former Soviet security officer was convicted of genocide for helping arrest Lithuanian anti-Soviet partisans in 1956, whose subsequent imprisonment and execution formed part of the Soviet campaign to destroy a significant part of the Lithuanian nation. The ECtHR held, by five votes to two, that the conviction did not violate Article 7 of the Convention (no punishment without law), because the applicant could have foreseen that targeting partisans could amount to genocide against a protected national group. Judge Iulia Motoc was one of the dissenting judges and she opened her dissent with a quotation attributed to Albert Camus: 'Les faits sont les faits. Et qui dit que le ciel est bleu quand il est gris prostitue les mots et prépare la tyrannie.' Translated to English, the quote reads: 'Facts are facts. And whoever says that the sky is blue when it is grey debauches words and paves the way for tyranny.' The judge I was interviewed commented that someone should have advised Judge Motoc against using the word 'prostitue':

> 'She wrote an epigraph to that opinion. And that epigraph was a quotation from Albert Camus, one of the French writers. I don't know, or Sartre, maybe Camus. And she, in that epigraph used the word prostitue. Which was sort of an insult to the judges. I wish that somebody told her, that please don't write that. Because that sounds nasty. But for some reason nobody said that. I wasn't aware of that until the opinion was published. So that's one of the bad examples I believe' (Judge G, male, former judge).

These examples highlight the concern among some judges that emotionally-charged dissents may undermine the Court's legitimacy. Scholars have previously examined the role of emotion in the drafting of separate opinions.[139] Judge Patricia Wald of the US Court of Appeals for the District of Columbia Circuit wrote that 'the typical tone of a dissent is troubled, outraged, sorrowful and puzzled'.[140] However, relatively little research has analysed how emotion shapes the language used in dissenting opinions, leaving open the door for future research.[141]

The second argument, commonly found in the literature, is that dissent can contribute to *future changes in case law* and thus to the *development of human rights jurisprudence.*[142] Scholars have argued that

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[139] Jakub Stádník, 'Umění Nesouhlasu: Disenty v Kontextu Legitimity Soudních Rozhodnutí' [2021] Jurisprudence 5–6 <https://www.jurisprudence.cz/cz/casopis/umeni-nesouhlasu-disenty-v-kontextu-legitimity-soudnich-rozhodnuti.m-498.html> accessed 2 June 2026; Vartazaryan and Paulík (n 100) 32–33, 37.

[140] Patricia Wald, 'The Rhetoric of Results and the Results of Rhetoric: Judicial Writings' (1995) 62 University of Chicago Law Review 1412 <https://chicagounbound.uchicago.edu/uclrev/vol62/iss4/8>.

[141] Brambilla (n 6); Stanisław Goźdź-Roszkowski, 'Values and Valuations in Judicial Discourse. A Corpus-Assisted Study of (Dis)Respect in US Supreme Court Decisions on Same-Sex Marriage' (2018) 53 Studies in Logic, Grammar and Rhetoric 61 <https://doi.org/10.2478/slgr-2018-0004>; Goźdź-Roszkowski, 'Mapping Rhetorical Dissent' (n 12) 440–442; Neha Jain, 'Radical Dissents in International Criminal Trials' (2017) 28 European Journal of International Law 1163 <https://doi.org/10.1093/ejil/chx072>; Stádník (n 139) 5–6.

[142] Alder (n 8) 238–239; Dunoff and Pollack (n 4) 346–347; Hogg and Amarnath (n 26) 127; Kelemen, *Judicial Dissent in European Constitutional Courts* (n 26) 160; Julia Laffranque, 'Dissenting Opinion in the European Court of Justice —

dissenting opinions can serve as precursors to future rulings, particularly as the composition of the Court changes over time.[143] One former ECtHR judge expressed this idea as follows:

> 'We say that today's dissent is tomorrow's majority opinion, and this has proven true on many occasions. Dissenting opinions contribute to the development of human rights law by introducing new legal arguments, highlighting evolving social realities, or pointing to emerging European consensus. They become part of the Court's intellectual heritage and are studied by academics, practitioners, and national courts' (Judge D, male, former judge).

Several judges explained that they often (sometimes) wrote separate opinions in the hope of influencing the Court's future case law. Judge A illustrated this motivation with a case arising from restrictions on access to abortion in Poland during the Law and Justice government. The applicant had obtained a lawful appointment for an abortion on the basis of a recognised foetal abnormality — one of the limited grounds on which abortion was then permitted under Polish law. Shortly before the scheduled procedure, however, a ruling of the Polish Constitutional Court eliminated this exception, leading the clinic to cancel the appointment. The applicant subsequently travelled abroad to obtain the procedure at her own expense. Before the ECtHR, the majority found a violation of Article 8 of the Convention, emphasising the unforeseeable nature of the interference with the applicant's private life and reproductive autonomy. Although the majority analysed the issue under Article 8, a minority of judges argued that the circumstances were sufficiently severe to engage Article 3 of the Convention. Judge A explained that the dissent was drafted with the hope that its reasoning might influence a Court's approach in a future case:

> 'That this was a bit of mental torture for her. That was a certain degree of suffering involved in being exposed to this and in panic like to travel a half of Europe to foreign country to have doctors performing quite intimate measure. So, we wrote extensively, believing that the next time this is being tried, by our Court, well drafted dissenting opinion could actually swing a Grand Chamber in favour, you just need one more vote, so different composition could have found a favour for the applicant also on the Article 3 claim. So, this is the light in which we drafted it. It was not because we wanted to get it out of our chest, but actually to pave the way for future change' (Judge A, male, current judge).

Estonia's Possible Contribution to the Democratisation of the European Union Judicial System' (2004) 9 Juridica International 15.

[143] Kelemen, *Judicial Dissent in European Constitutional Courts* (n 26) 160.

Some judges cited instances in which arguments initially advanced in separate opinions were subsequently adopted by the Court and incorporated into the majority's reasoning. From my interview data, I identified two types of examples. The first involved situations in which a dissenting opinion in a Grand Chamber case subsequently influenced the Court's reasoning in a similar Grand Chamber case concerning different applicants. The second involved instances in which a dissenting opinion in a Chamber judgment (Section) was later adopted by the Grand Chamber in the same case. The following examples illustrate each of these two patterns.

One dissent in *Georgia v. Russia II* (2021, application n. 38263/08) anticipated the Court's later shift towards accepting jurisdiction over the initial stages of armed conflict. In Judge B's view, the majority's refusal to exercise jurisdiction during the outbreak of the war risked undermining the Court's credibility, because, as he notes, the most serious human rights violations often occur precisely at that stage:

> 'Okay. And I said are we going to wash our hands and say that this has nothing to do with us and who triggered the war and who launched the war and what they did in initial state of the war has nothing to do with Human Rights Court? Is this the position? Do you think this is good for the reputation to the Court?' (Judge B, male, former judge).

Judge B presented the Court's subsequent approach in cases arising from Russia's invasion of Ukraine as evidence that the reasoning advanced in the dissent ultimately influenced the Court's position.

The second example concerned the Grand Chamber case *Bărbulescu v. Romania* (2017, Application no. 61496/08). The case concerned the scope of employees' privacy rights in the workplace and, specifically, the extent to which employers may monitor employees' electronic communications (emails) during working hours. At the Chamber stage, the Court found no violation of Article 8 of the Convention, effectively accepting that an employer could monitor work-related communications and rely on the information obtained when dismissing an employee. Following referral to the Grand Chamber, however, this approach was reversed using arguments from the separate opinion from Chamber stage. The Grand Chamber emphasised that employees retain a sphere of protected private life and correspondence in the workplace and any monitoring measures must be accompanied by adequate safeguards against abuse. According to Judge B, this development illustrates how arguments advanced in separate opinions may subsequently influence the Grand Chamber. As he observed, the Grand Chamber ultimately recognised that there is a core of privacy that should be respected by the employer. These examples were presented as further

evidence that dissenting opinions can preserve alternative legal interpretations that later become incorporated into the Court's case law.

To my knowledge, no study has systematically examined whether arguments advanced in separate opinions are subsequently adopted as majority positions in later case law, either in cases progressing from a Chamber to the Grand Chamber or across successive Grand Chamber judgments. As several judges remarked, 'the majority would never cite a separate opinion', making this type of research methodologically challenging. The interviews nevertheless suggest that the phenomenon could be investigated. In the context of Chamber–Grand Chamber proceedings around one specific case, researchers could compare voting patterns between the two judgments and identify cases containing dissenting opinions. The reasoning set out in those dissents can then be examined for indications that it might have influenced the Grand Chamber's eventual position as, for example, in *Güzelyurtlu and Others v. Cyprus and Turkey* (2017 and 2019, Application no. 36925/07). The task is considerably more difficult when assessing the possible influence of dissenting opinions on subsequent cases involving different applicants – since this requires identifying comparable cases and tracing the development of the Court's jurisprudence over time in order to detect whether arguments first articulated in dissent were subsequently adopted.

The interviews conducted in this project largely confirm the two dominant explanations for dissent identified in the literature: transparency and future legal development. However, while these arguments explain the functions that dissenting opinions may perform, they reveal less about why individual judges choose to dissent. The following section therefore shifts the focus from the external functions of dissent to judges' internal orientations towards the practice itself.

3. 'Internal' position towards separate opinions

The literature on separate opinions at the ECtHR provides several partial explanations for the motivations underlying judicial dissent. Existing studies suggest that separate opinions are not primarily driven by judges' nationality or legal-cultural background, but may be shaped by institutional factors, such as judicial tenure, as well as judges' professional backgrounds.[144] As discussed in Chapter 1, Bruinsma's previous research linked differences in judges' approaches to dissent to their professional experience and resulting 'judicial identities'[145], while White and Boussiakou's research, without further elaboration, referred to differences in 'judicial

[144] Bruinsma (n 7); Bruinsma and De Blois (n 7); Helfer and Voeten (n 5); Kuijer (n 49); Molbæk-Steensig and Quemy (n 13); Voeten, 'The Politics of International Judicial Appointments' (n 7); Voeten, 'The Impartiality of International Judges' (n 7); White and Boussiakou (n 7).

[145] Bruinsma (n 9).

temperament'[146]. These concepts point towards individual-level explanations for separate opinions, but pay relatively little attention to why judges dissent *as judges* — that is, how their decisions to dissent relate to their own self-perception and understandings of their judicial role.

My data suggest that judges may arrive on the Strasbourg bench with an established orientation towards the practice of issuing separate opinions. This orientation reflects two understandings: (1) the role of an individual judge at the Court; and (2) the role of the Court as an institution. During a judge's term in office, this orientation may be subsequently re-affirmed and consolidated, transforming a judge's dissent into a deliberate expression of this internal position. Similar arguments have been advanced in studies of individual separate opinions at the International Criminal Court[147] and among judges of the Czech Constitutional Court.[148] In other words, judges appear to have an internal answer to the questions: why should I dissent, and when should I do so? As the following section presents, judges often need to justify and legitimise their position in relation to their colleagues who may hold different views on the role and appropriate use of separate opinions.

3.1. Instrumental dissenters

The analysis revealed three distinct positions reflecting how judges understand both their role and the role of the Court, and how these understandings inform their decisions about whether to write separately. The first internal position identified through my analysis is that of the *instrumental dissenter*. For these judges, disagreement alone did not provide sufficient reason to write separately; dissent was instead approached *instrumentally*, as something to be used when it could serve a particular purpose. Judge A articulated this approach particularly clearly:

> 'I mean, yeah, I would say in 90% instances when I disagreed, I have not written a separate or dissenting opinion. I just voted and left it like that. So that what I do most of the time. I have more instrumental approach to dissenting opinions. I don't need it for my consciousness… I think that some dissenting opinions are reasons for the personal conscience of the of the writer and there's no hope in hell that it's going to change anything, but they just need to get it off their chests or they feel they haven't been entirely honest' (Judge A, male, current judge).

[146] White and Boussiakou (n 7) 59.
[147] Kyra Wigard, 'Matter of Opinion: Assessing the Role of Individual Judicial Opinions at the International Criminal Court' (2023) 23 International Criminal Law Review 387, 393 <https://doi.org/10.1163/15718123-bja10144>.
[148] Vartazaryan and Paulík (n 100) 29–31.

Instrumental dissenters share an understanding that judges should dissent only sparingly, and only on issues of significant importance to them. Frequent expressions of disagreement may be regarded as detrimental to the Court's legitimacy. These judges therefore dissent only when they believe that the benefits of issuing a separate opinion outweigh the associated costs.[149] In most instances of disagreement, they will not issue a separate opinion. The perceived benefits of issuing a dissent differ among judges. For Judge A, the principal benefit, or motivation, was the possibility of influencing future developments in the Court's case-law, as was discussed in the previous section. For Judge F, the motivation was to express a view that he considered as having fundamental theoretical or jurisprudential significance. He explained that a minor disagreement should not, in itself, justify write a dissenting or concurring opinion:

> 'You see, if it is a minor thing - why should you write? It is not theoretical or jurisprudential value in doing so. So, this is very much a matter of circumstances. It's not a principle' (Judge F, male, former judge).

Judge F also noted that time was an important factor: 'if you don't have time, then you don't have time to write.'[150] He considered not only the time required of the judge to write the opinion, but also the parties' interests in having a timely delivery of the judgment:

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[149] This logic is commonly used to explain judicial behaviour - the rational-choice model Lee Epstein and others, 'Introduction to the Study of Comparative Judicial Behaviour' in Lee Epstein and others (eds), *The Oxford Handbook of Comparative Judicial Behaviour* (Oxford University Press 2024) 12 <https://doi.org/10.1093/oxfordhb/9780192898579.013.49> accessed 2 June 2026; Caroline Wittig, 'The Occurrence of Separate Opinions at the Federal Constitutional Court. An Analysis with a Novel Database' 89–91.. In the literature on separate opinions, scholars have examined a range of potential costs and benefits associated with the decision to write separately Marie-Claire Belleau and Rebecca Johnson, 'Judging Gender: Difference and Dissent at the Supreme Court of Canada' (2008) 15 International Journal of the Legal Profession 57 <https://doi.org/10.1080/09695950802439700>; Lee Epstein, William M Landes and Richard A Posner, 'Why (And When) Judges Dissent: A Theoretical And Empirical Analysis' (2011) 3 Journal of Legal Analysis 101 <https://doi.org/10.1093/jla/3.1.101>; Nuno Garoupa, Laura Salamero-Teixidó and Adrián Segura, 'Disagreeing in Private or Dissenting in Public: An Empirical Exploration of Possible Motivations' (2022) 53 European Journal of Law and Economics 147 <https://doi.org/10.1007/s10657-021-09713-6>; Nuno Garoupa and Peter Grajzl, 'Spurred by Legal Tradition or Contextual Politics? Lessons about Judicial Dissent from Slovenia and Croatia' (2020) 63 International Review of Law and Economics 105912 <https://doi.org/10.1016/j.irle.2020.105912>; Chris Hanretty, 'Dissent in Iberia: The Ideal Points of Justices on the Spanish and Portuguese Constitutional Tribunals' (2012) 51 European Journal of Political Research 671 <https://doi.org/10.1111/j.1475-6765.2012.02056.x>; Sergio Muro and others, 'Exploring Dissent in the Supreme Court of Argentina' (2020) 63 International Review of Law and Economics 105909 <https://doi.org/10.1016/j.irle.2020.105909>; Paulík and Vartazaryan (n 100); Wittig..

[150] An interesting strand of the judicial behaviour literature examines the relationship between judicial workload and the propensity to author separate opinions. The hypothesis that a higher workload reduces the likelihood of issuing a separate opinion has been confirmed in studies of the Czech Constitutional Cour Paulík and Vartazaryan (n 100) 247., the U.S. Supreme Court, and the U.S. Courts of Appeals Epstein, Landes and Posner (n 149) 133–134.. However, the relationship does not appear to be universal, as Donald R Songer, John Szmer and Susan W Johnson, 'Explaining Dissent on the Supreme Court of Canada' (2011) 44 Canadian Journal of Political Science/Revue canadienne de

> 'You don't want to delay the whole rendering of the judgment, that would be unfair to the parties. They waited already. 10 years took all those delays, it is really unpleasant…' (Judge F, male, former judge).

The instrumental dissenter aligns with Bruinsma's account of practitioners judges, who tended to see themselves as members of a 'collegiate body that delivers majority judgments' with separate opinions assuming only 'minor importance'[151]. Bruinsma illustrated this through reference to Judge Hedigan, who had practised at the Irish Bar for 21 years and rarely issued separate opinions. Judge Hedigan explained that he tended to dissent on procedural matters, an area which, given his professional background, he 'felt very much at home':

> 'At the end of the day there is only the majority judgment. I am not saying I always agree, but I have to accept that I am a member of a collegiate body. However, I have agreed to do a few dissenting opinions in cases where I was of the opinion that the Court was not going down the right road. As a former practitioner I feel very much at home in procedural matters and that might explain some of my dissenting opinions here.'[152]

3.2. Responsibility dissenter

In contrast to the instrumentalist dissenter, several judges described feeling personally compelled to write a separate opinion when they disagreed with the majority, framing this as a matter of *responsibility* rather than a legal obligation. Judge E explained this position as follows:

> 'No, never. When I disagreed, I felt that it was my responsibility to explain why. What could happen is that during the deliberation, that you start by saying I would like to go in that direction, then at the end of the deliberation you joined the majority in another direction but that is because you are somewhat convinced by the majority or that you say OK the difference is now so small that here I'm not going to oppose to the majority decision. That could happen then you don't try to separate opinion. But you could, but the chances that you are not going to write a separate opinion then' (Judge E, male, former judge).

science politique 389, 404 <https://doi.org/10.1017/S0008423911000151>. found no significant association between workload and dissent rates at the Supreme Court of Canada.

[151] Bruinsma (n 9) 222–223.

[152] ibid 217.

Judges within this group reported that they consistently issued dissenting opinions whenever they voted against the majority. They frequently described this practice in terms of responsibility, principle, duty or ethical obligation. Judge G, for example, stated that its 'a matter of principle. I always wrote a separate opinion.' (Judge G, male, former judge*),* while Judge H noted that: 'My view is that it is my duty to write it. As an Apex court Justice, I believe that I have a duty. If I think that the case should have been resolved differently and there is a legal basis for doing so, I see this as my ethical obligation to write it' (Judge H, female, current judge).

These judges understood the judicial role as requiring them to express their disagreement whenever they voted against the majority. They also associated the expression of their disagreement as a way of enhancing the Court's transparency and legitimacy. To demonstrate the strength and seriousness of this responsibility, one judge recalled a situation where the deadline for submitting a separate opinion coincided with the death of his mother. He returned to his home country to attend the funeral and consequently missed the deadline. Reflecting on the incident, he explained to me: 'And I was too late, simply. So, I didn't write it. Just because it happened so.' Yet, after returning and settling his personal affairs, he remained dissatisfied that no separate opinion had accompanied the judgment. Thus, he took it upon himself to issue a bare dissenting statement. As he recalled: 'the judgment had to be made public. I said no, it's not fine, I had to write at least a statement.' (Judge G, male, former judge)

For responsibility dissenters, writing and issuing separate opinions forms part of what they understand to be their judicial responsibility. When they disagree with the majority, they feel a professional or ethical obligation to explain why. Unsurprisingly, they understand the Court as an institution in which judicial disagreement should be made visible.

This pattern corroborates earlier findings by Bruinsma.[153] Judge Bonello, a former ECtHR judge and former President of the Constitutional Court of Malta, stated that issuing separate opinion was a *moral duty* for him: 'I always believed it is my moral duty to speak my mind'.[154] These accounts suggest that responsibility dissenters feel the duty to issue separate opinions every time they disagree and perceive themselves as operating within a broader (legal) environment. In this context, accountability is not limited to the outcome of a case but extends to the obligation to provide reasons and justify one's legal position. This understanding of dissent resonates with broader theories of judicial accountability[155], which conceptualise judges as actors who must justify their

[153] ibid 217–221.
[154] ibid 220.
[155] David Kosař and Samuel Spáč, 'Conceptualization(s) of Judicial Independence and Judicial Accountability by the European Network of Councils for the Judiciary: Two Steps Forward, One Step Back' (2018) 9 International Journal

decisions to multiple audiences, including fellow judges, legal professionals, scholars, and the public. Judicial accountability thus operates not only through formal review mechanisms but also through expectations of reason-giving and professional scrutiny. For these judges, a vote against the majority created a professional and ethical responsibility to explain the grounds of disagreement through a separate opinion.

3.3. Academic dissenters

A distinct approach to dissent emerged among *academic dissenters*. The interview data suggest that these judges also felt a responsibility to dissent when they disagreed with the majority. However, unlike responsibility dissenters, academic dissenters conceived of their separate opinions as part of a broader scholarly conversation that extended beyond the immediate dispute or case before the Court. Their concern was therefore not limited to the outcome of a particular case, but also included the articulation, preservation, and refinement of particular legal arguments – allowing those arguments to enter a wider scholarly debate. This orientation differentiates them from both instrumental and responsibility dissenters. As one interviewee explained, some judges prefer to publish separate opinions individually rather than jointly, mindful of authorship:

> 'There are judges who prefer that it is their own dissent. These are mostly academics, because they want to use this to assert solitary authorship. For me, authorship isn't that important. What's far more important is to show that there is a significant group of judges who disagree with the majority opinion' (Judge H, female, current judge).

These preferences reflected different understandings of the purpose and potential influence of separate opinions. Some judges considered that a jointly-authored dissent may have stronger influence on future case law – because it demonstrated that disagreement with the majority was shared by a significant number or group of judges. Judge A, for example, observed that in Chamber cases 'the dissenting opinion of three judges … is quite powerful, if it's well written and from a single judge, yeah, perhaps less powerful' (Judge A, male, current judge). He expressed a similar view in relation to Grand Chamber cases, noting that the number of dissenting judges could affect the perceived weight or influence of a separate opinion, stating that: 'I don't think that the

for Court Administration 41–42 <https://doi.org/10.18352/ijca.284> accessed 5 June 2026; Piotr Mikuli, 'Conceptualising Accountability of the Judiciary' *Accountability of Judicial Power* (Routledge 2025).

dissenting opinion is going to make any difference …, I think it was like a 14 to 3, so it didn't matter at all' (Judge A, male, current judge).

This understanding, however, was not shared by the academic judges. As Judge E observed: 'I would certainly not say that that was a shared idea by all the judges' (Judge E, male, former judge). Academic dissenters appeared to place greater importance on developing and advancing a distinct line of legal reasoning. This does not mean that such judges always preferred to write separate opinions alone, rather they appeared less willing to compromise their reasoning for the sake of presenting a unified dissent. These patterns also resonated with Bruinsma's research on the relationship between judges' professional backgrounds and their judicial identities and positions in controversial ECtHR cases. Although his research did not focus specifically on separate opinions, Bruinsma used them, alongside interviews with judges, to examine how different professional backgrounds were reflected in judicial behaviour.[156] In his interviews, judges with academic backgrounds expressed that they were more interested in broader theory rather than in technical details:

> Former Judge Kovler, academic: 'I am less interested in the technical details than in the conceptual framework of the decision whereas with some of my colleagues, who used to be trial judges, it is just the other way round'.[157]

The emphasis on developing a distinct line of legal reasoning was expressed by another former academic, Judge Zupančič, who said: 'There is a special motive for a dissenting opinion, namely you are angry at the majority or - and that holds more true for me - you have your own explanation for the problem at hand'.[158] The difference of positions between the academic and the responsibility dissenters is nicely articulated by former Judge Loucaides, who stated that: 'there seems to be two sorts of dissenters, the individualist like you [academic – GV] and the lobbyist, who tries to get support'.[159]

During one interview, I observed a noticeable shift in an academic judge's level of engagement when the discussion turned to the topic of my thesis. The judge suggested that the impact of separate opinions might best be studied through an examination of a single judge's dissents over time.[160] While it is not possible to determine the judge's intention with certainty, the enthusiasm

[156] Bruinsma (n 9) 207–211.
[157] ibid 221.
[158] ibid 218–219.
[159] ibid 235.
[160] There are not many scholarly articles analysing one particular judges dissenting opinions. In the context of ECtHR Hochmanns work on judges Yüksel's dissents is worth mentioning Thomas Hochmann, 'Judge Yüksel's Way: Bad-Faith Regimes and the Dangers of Subsidiarity' (2025) 4 European Human Rights Law Review 426..

with which he made the suggestion raised the possibility that the judge regarded his own history of separate opinions as a particularly relevant example:

> 'If it's important to see, if you really want to see how separate opinion impact on case law, you should pick one judge particularly and follow his work and then see how this work has subsequently impacted on the case law' (Judge B, male, former judge).

My interviews further revealed that academic dissenters may maintain a stronger awareness of their authorship of separate opinions. Several judges reported keeping track of the number of dissenting and concurring opinions they had authored, in contrast to many other interviewees who were unable to recall such figures. Judge C, for example, stated: 'I wrote so far 150… Together with some joint opinions and some statements only.' (Judge C, male, current judge). One former judge sent me a statistical summary of all his separate opinions before our interview. This suggests that, for academic judges, separate opinions may constitute a particularly visible component of their professional and intellectual legacy.

Several judges also mentioned following the *Strasbourg Observer*[161], an academic blog that provides critical analysis and commentary on ECtHR case law. This blog runs an annual competition where its readers vote for the 'worst' and 'best' judgment and separate opinion. Some judges admitted that they regularly followed this blog, and several mentioned that their own separate opinions had been previously selected as the 'best' of the year.

These findings resonate with scholarship on the changing professional composition of the ECtHR.[162] This transformation may have implications not only for judicial reasoning, but also for attitudes towards separate opinions. While instrumental dissenters primarily viewed separate opinions as a means of influencing future case law or signalling disagreement to external audiences, academic judges appeared to attach value to dissent as an intellectual contribution to legal debate and jurisprudence. One judge speculated that some academic judges may enter deliberation having already prepared a separate opinion in a form of a new academic chapter or book contribution:

> 'There are a few judges who wrote very lengthy opinions sometimes some in an academic style, like a chapter of a book, yeah - I don't know, I think that they prepared that beforehand and

[161] Online available at: https://strasbourgobservers.com/.

[162] Kanstantsin Dzehtsiarou and Alex Schwartz, 'Electing Team Strasbourg: Professional Diversity on the European Court of Human Rights and Why It Matters' (2020) 21 German Law Journal 621, 641 <https://doi.org/10.1017/glj.2020.36>; Mikael Rask Madsen, 'The Legitimization Strategies of International Judges: The Case of the European Court of Human Rights' in Michal Bobek (ed), *Selecting Europe's Judges: A Critical Review of the Appointment Procedures to the European Courts* (Oxford University Press 2015) 270 <https://doi.org/10.1093/acprof:oso/9780198727781.003.0013> accessed 5 June 2026.

they went to the to the deliberation and no matter how the outcome would be they would write that separate opinion in order to have a sort of a new chapter for what could be called a book. With it could be a concurring or dissenting opinion that is one possibility. Others know they really took their time and maybe spent the whole 2 weeks' (Judge E, male, former judge).

In fact, some judges' separate opinions have subsequently been collected and published in book form, either by the judges themselves or by other scholars.[163] In some cases, these books were even translated and published in different languages.[164] One judge expressed reservations about this approach. Judge F opposed publishing articles or books about the development of the Court's jurisprudence after the end of a judicial term, since doing so could be perceived as an attempt to revisit legal disputes that had already been resolved through deliberation. In his view, such interventions risked undermining the collective nature and finality of the Court's decision-making process:

> 'When you discuss old cases or your past activity you have a tendency, and I'm not speaking for others, to fight lost wars again and that's stupid. I never wrote, and I never will write about the Court. Exactly because I don't want to look like someone who is starting a battle that was lost in the deliberation. So, there is a danger that one gets into that inevitably and that's why I am reluctant to get into this kind of activity' (Judge G, male, former judge).

This comments reflects a broader reluctance among some judges to continue discussing or contesting decisions once they had passed through the Court's deliberative process. For these

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[163] Nicolas Bratza, *Freedom of Expression: Essays in Honour of Nicolas Bratza, President of the European Court of Human Rights* (Council of Europe 2012); Leto Cariolou and others (eds), *Judge Loukis Loucaides: An Alternative View on the Jurisprudence of the European Court of Human Rights: A Collection of Separate Opinions (1998-2007): 5* (Brill Nijhoff 2008); P Lemmens and others (eds), *Human Rights with a Human Touch: Liber Amicorum Paul Lemmens* (Intersentia 2019) <https://lawcat.berkeley.edu/record/1149847> accessed 30 May 2026; Triestino Mariniello (ed), *Judge Pinto de Albuquerque and the Progressive Development of International Human Rights Law* (Brill Nijhoff 2021) <https://brill.com/edcollbook/title/58201> accessed 28 May 2026; Josep Casadevall Medrano and José Luis López Guerra, *El Tribunal Europeo de Derechos Humanos: una visión desde dentro : en homenaje al juez Josep Casadevall* (Tirant lo Blanch 2015) <https://dialnet.unirioja.es/servlet/libro?codigo=843115> accessed 30 May 2026; Mario Schiavone, European Court of Human Rights and Giovanni Bonello, *When Judges Dissent: Separate Opinions of Judge Giovanni Bonello at the European Court of Human Rights* (Institute of Maltese Journalists 2008); Ineta Ziemele, *Separate Opinions at the European Court of Human Rights* (Riga Graduate School of Law 2017).

[164] Paulo Pinto de Albuquerque, *I diritti umani in una prospettiva europea. Opinioni concorrenti e dissenzienti* (Davide Galliani ed, Giappichelli 2016); Paulo Pinto de Albuquerque, *Особое Мнение: В Поисках Истины* (Development of Legal Systems Publishing House 2021); Paulo Pinto de Albuquerque and others, *İçtihatlarla İnsan Hakları: Yargıç Pinto de Albuquerque'nin Seçilmiş Şerhlerinin ve İlgili AİHM Kararlarının İncelemeleri* (2nd edn, onikilevha 2021) <https://www.onikilevha.com.tr/yayin/2098/ictihatlarla-insan-haklari-yargic-pinto-de-albuquerquenin-secilmis-serhlerinin-ve-ilgili-aihm-kararlarinin-incelemeleri-3-cilt> accessed 31 May 2026; Bruna Capparelli and others, *Paulo Pinto de Albuquerque: Os Direitos Humanos Em Uma Perspectiva Europeia* (1st edn, Tirant Emporio do Direito Editorial LTDA 2024) <https://doi.org/10.53071/boo-2024-02-29-65e0df0ba4192> accessed 31 May 2026.

judges, preserving the authority and legitimacy of the majority's judgments outweighed the value of maintaining an alternative legal position. Their reluctance to dissent therefore reflected not only attitudes towards particular judgments, but also their broader understanding of judicial agency and their role within the institution. Conversely, judges who regularly dissented were bothered by colleagues who voted against the majority but did not publish a separate opinion, and some judges reported encouraging colleagues to make their disagreement public.

It is possible that some judges anticipated the later publication of their opinions while still serving on the Court, although such publications may also have arisen organically after the end of their term. These publications can contribute to a judge's post-ECtHR academic profile, but they may also provide a means through which former judges can continue to contribute to debates in human rights law. Since the ECHR is internationally recognised, written work by former ECtHR judges could circulate beyond a single national legal community, including through translation into other languages. Of course, this may not necessarily be the judge's own motivation. The mere fact that a judge has authored interesting or persuasive dissenting opinions can lead to scholarly interest regardless of the judge's intentions. However, the interviews I conducted suggest that it is often the judges' own interests that drive publications of their separate opinions.

4. Justifying one's internal position on separate opinions

Bruinsma observed that judges 'disagree fundamentally as to the mission of the Court and their role perception as a judge - a collegiate body delivering majority judgments or the search for a concise conceptual framework in human rights'.[165] A similar tension emerged from my interview data. My interviews revealed that judges, holding different positions, sought to justify and legitimise their internal positions towards separate opinions to colleagues who understood their judicial role, and the role of the Court, differently. These competing understandings became particularly visible during deliberations.

Starting with the instrumentalist dissenter, Judge A stated that on several occasions he did not feel a need to write a dissenting opinion for reasons of personal 'conscience'. He also described colleagues who would announce, at start of the deliberations, that they intended to write a dissenting opinion.[166] He referred to these judges as 'persistent objectors' and added that 'it doesn't

[165] Bruinsma (n 9) 217.

[166] Since the draft of the judgment can be sent to judges before they meet to deliberate judges may arrive with separate opinion already formed (as explained in the next subchapter).

come as a surprise, when they take a vote'. In his view, however, signalling their intention or position was not particularly effective:

> 'I don't think it's effective, but you can refer to the fact that you are going to write the dissenting opinion if you don't get things your way. I mean it's not a very potent threat [starts laughing]' (Judge A, male, current judge).

The need for judges to justify their 'internal position' was not limited to instrumental dissenters. Responsibility dissenters also sought to persuade fellow judges to issue written argumentation when they voted against the majority. One judge, whose views aligned more closely with the responsibility dissenter position, recalled a case in which he had persuaded a colleague, who had voted against the majority, to issue a dissenting statement. Judge G argued that, that if his colleague did not write a dissenting statement, the public would be unable to identify the dissenting judge, leaving the other members of the bench to explain how they had voted:

> 'Because there's a literal reading of the Convention, which says judges MAY write separate opinions. But I said that you SHOULD. And he said: Why? I said because then, the readership will not know who was the dissenter and then all others will be in the position that they have to explain that they were in the majority and not in the minority. And he said: Ok, I got it, I got it. And he made that one sentence dissenting statement – I declared that I dissented in this case. It doesn't provide reasons. That would have been a boring reading, because the case itself was boring. But actually, the judge understood my position' (Judge G, male, former judge).

This was a recurring argument articulated by several judges during the interviews: when a judge voted against a judgment but did not issue a separate opinion, readers had no means of identifying which member of the bench dissented. This places the judges in the majority in a difficult position, as they may be required to explain their stance despite not having been responsible for the dissenting vote. The example above reflects a concern with individual judicial accountability and suggests that judges understand their role within a broader framework of public responsibility and transparency. Occasionally, differing understandings of transparency generated open criticism among judges.

The following example illustrates how expectations regarding the publication of dissenting opinions could become a matter of dispute within the Court's professional community:

> 'And I remember a case, and it's called Schatschaschwili v. Germany (2015, application no. 9154/10). And its 10 to 7 judgment [sic – it was 9 to 8 vote – author's correction]. But if you look at the dissenters, you will find only 6 dissents [authors note – there are 7 dissenting opinions]. If I'm correct with numbers. I'm among the dissenters by the way. And that judge who dissented with others, he didn't join us, for some reason. He said no, I decided never to write separate opinions, for whatever reasons. And then there was a seminar, you know the Opening of the judicial year at the Court. And one of the previous judges, with whom I have not worked, who was judged much earlier, he stood up and referred to that case and publicly said: What the hell is going on? I want to know who voted for the judgment and who's against? And I count up, that there are only 6 dissenters but there should be 7. So who's the 7?" Of course, no answer was provided. But the fact is, that you can find only 6 dissenters' (Judge G, male, former judge).

This example is particularly revealing because it shows that the decision not to identify oneself as a dissenter could become subject to criticism within the Court's wider professional community. It suggests that, for some judges, transparency about individual voting was understood as a professional expectation — previously highlighted for responsibility dissenters — capable of being informally enforced by other members of the judicial community. Two judges, Judges E and H, even pointed out that in one Chamber case, which ended in a six-to-one vote, the six judges in the majority wrote concurring opinions in order to make public the identity for the judge who had voted against the majority.[167] By writing concurring opinions, the judges revealed the identity of the single dissenting judge, and according to the interviewees, this was the intention of the majority:

> 'Yeah, again and I'm not revealing any secrets here, when you read it, I noticed this twice in the section rulings that had already been written before I joined the Court, so you can actually see, for example, six concurring judges in a case with 6 to 1 votes to show which judges voted pro and against. Which, to be honest, doesn't seem appropriate to me. Because it's a right to dissent, not an obligation!' (Judge H, female, current judge).

Judge H's criticism demonstrates that the position on transparency was itself contested. While some judges regarded making individual voting positions publicly identifiable as a matter of judicial

[167] None of the judges was able to recall the name of the case in question, even after a follow-up email inquiry. Nor was I able to identify such a case through a search of the HUDOC database.

accountability, others understood the same practice as placing inappropriate pressure on judges to disclose their disagreement. The disagreement, therefore, concerned not simply whether to dissent, but whether dissent should be understood as a right that judges may exercise or as a responsibility arising from their judicial role.

Taken together, these examples illustrate that the decision to dissent is not necessarily an individual decision made in isolation, but can itself emerge through deliberation between judges. Judges sought to persuade one another not only about the outcome and reasoning of a case, but also about whether disagreement should be made publicly visible. In doing so, they drew on competing understandings of the judicial role: for some, transparency and individual accountability created a responsibility to disclose dissent, whereas for others, the optional nature of separate opinions meant that judges remained free not to publicise their disagreement. The deliberative process therefore became a space in which these competing understandings of the judicial role were negotiated and performed.

5. Behavioural performance of separate opinions

The deliberation process before the ECtHR is governed by the Convention and the Rules of Court. Under Rule 22 of the Rules of Court, deliberations must be held in private and remain confidential. Judge Keller and Dr. Heri have provided one of the most comprehensive accounts of the ECtHR's deliberative process in their well-known chapter *Deliberation and Drafting: European Court of Human Rights*, in which they describe both the Court's formal rules governing deliberations and drafting, as well as a number of its informal practices.[168] In this subsection, I present deliberative process in Chamber and Grand Chamber proceedings, with a particular focus on the process of drafting separate opinions, drawing on my interview data.

In Chamber proceedings, each case is assigned to a judge rapporteur and a Registry unit, which together prepare a draft judgment before deliberations begin.[169] During deliberations, presided over by the Section President, the judge rapporteur and the national judge first present the case, after which the remaining judges discuss the draft and vote on it.[170] Hearings are exceptional at the Chamber level and are generally held only when further clarification of the facts is required. Decisions are adopted by a simple majority, and in most cases a single round of deliberations is sufficient. Where the majority cannot agree on crucial aspects of the reasoning, the Chamber may

[168] Keller and Heri (n 8).
[169] ibid 9–10.
[170] ibid 10.

either employ the pigeonhole procedure or, in exceptional circumstances, adjourn the case and order the preparation of a new draft. The pigeonhole procedure is a mechanism used in both Chamber and Grand Chamber formations when judges agree on the outcome of a case but cannot agree on the wording of particular passages of the judgment. In such situations, the Registry prepares a recommendation concerning the wording at issue, which is then circulated among the judges by e-mail until consensus is reached.[171]

Proceedings before the Grand Chamber differ in several important respects. Cases reach the Grand Chamber either through relinquishment by a Chamber (under Article 30 of the Convention) or following a successful referral request (under Article 43 of the Convention).[172] Grand Chamber cases usually involve a public hearing, and deliberations begin without a draft judgment. Instead, judges first discuss the case and cast an indicative vote, after which a drafting committee prepares a draft reflecting the views expressed during deliberations. Because Grand Chamber cases often raise particularly significant legal issues, two rounds of deliberations are normally held, and in controversial cases alternative draft judgments may be prepared.[173] A final vote is taken only after the judges have considered and discussed the draft text.

Judges who wish to issue a separate opinion[174] announce this intention during deliberations and briefly indicate the basis of their disagreement. Interviews revealed that judges used different strategies regarding *when* they indicated the basis of their disagreement. Dissent might be raised at the beginning of deliberations, during the discussion, or during or after the vote. Judge G explained that he sometimes informed his colleagues at the beginning of deliberations that, if he disagrees with the majority, he would issue a dissenting opinion. In his words:

> 'This works and other judges listened more attentively to my arguments and then perhaps I didn't need to write a separate opinion because my arguments were addressed or my thoughts were included in the judgment' (Judge G, male, former judge).

Judge A noted that he had experienced such behaviour from his colleagues; however, he tended to perceive it as a threat: '…they will enter the room knowing this [that they will be dissenting - GV] and also bring it [dissent - GV] into conversation as a sort of a threat.' In his view, however, it was not a potent threat because 'it's not likely to change anybody's else's mind during the negotiations' (Judge A, male, current judge).

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171 ibid 13–14.
172 ibid 10–11.
173 ibid 10–13.
174 Separate opinions may be attached to Chamber and Grand Chamber judgments, but not to decisions or judgments of three-judge Committees (Rule 74(2) of the RoC).

During deliberations, coalitions of dissenting judges could arise depending on the opinions and positions they formed in relation to the case. Whether a judge wrote alone or joined a coalition depended, in part, on the number of dissenting judges:

> 'If you are the only one who is dissenting or if you are the only one who has a separate view then there is no choice you've got solitary separate opinion and that happened regularly. In my case it happened regularly. If we were more than that I would always prefer to have a joint separate opinion' (Judge E, male, former judge).

As previously discussed in the section on 'internal positions', responsibility dissenters (and instrumentalist dissenters) generally preferred joint separate opinions because of the prevailing view that a separate opinion carried greater weight when signed by several judges.[175] Meanwhile, academic dissenters did not necessarily share this view, since developing a distinct line of reasoning was often considered important for them.

A judge's internal position may also help predict the role they would assume when drafting a separate opinion as part of a coalition, for example: (1) author (more commonly associated with the academic approach); (2) argument contributor (more commonly associated with the responsibility dissenter); or (3) signatory (more commonly associated with the instrumentalist approach). Judges, who identified with the academic approach, emphasised the importance of authoring the text in a separate opinions. For them, the extra workload was not necessarily a reason to abstain from writing; rather, some described being willing to take on the drafting work to help their colleagues out:

> 'There were other people who were not happy with even the motivation or the result of the voting. But they did not want to write it down, so they joined me. And for me it was always a pleasure to talk to the colleagues and have their back up, but it was a lot of work' (Judge B, male, former judge).

Judge E recalled a Grand Chamber case in which he was responsible for drafting a separate opinion on behalf of a large group of dissenting judges. After he had spent more than three weeks working on the draft, one member of the group, whom he described as an academic dissenter , unexpectedly

[175] In this logic the strongest separate opinion is one with three signatories in a 4-3 Chamber vote or 8 signatories in the 9-8 Grand Chamber vote.

send him a separate draft of his own. Until that point, the judge had given no indication that he intended to depart from the group's joint drafting process:

> 'In one case I remember we had a large group of dissenters and we agreed upon that I think that I would write a draft separate opinion and it took some time it was it was a very complicated case and it was more than three weeks in any event and while I was writing it one of these joiners sent us his own separate opinion which was largely what I was going to say. So, then it made it a bit difficult for me to continue in the way I was going to continue. OK that I was I was taken by surprise' (Judge E, male, former judge).

Contrary to the scenario outlined above, Judge H (in this case taking the position of a responsibility dissenter) emphasised that authorship and the order in which judges were listed in a separate opinion were irrelevant for her. What mattered was bringing together judges who shared the same arguments. For this reason, she would sign dissenting opinions in order of judicial seniority, even when she had authored the text of the dissent:

> 'My view is that it doesn't matter who authored the dissent, but rather who shares those ideas. And in such cases, the order is actually based on seniority, so for example, if you're writing this as a regular judge, the court president is listed first, followed by the members of the bureau, then the most senior judges so it's entirely possible that the author is the judge listed last' (Judge H, female, current judge).

Finally, Judge A explained that he generally joined separate opinions rather than authoring them himself, which is consistent with the instrumental dissenter position:

> 'I don't think I have written individual dissenting opinions ever. I always joined because that where I feel useful. I still need to explain that it was me who voted against than I just put a declaration' (Judge A, male, current judge).

Unlike in some judicial systems, draft separate opinions are not circulated before deliberations at the ECtHR.[176] Judges can therefore decide whether to circulate their draft to colleagues. This may give rise to strategic considerations. A judge may, for example, publish a separate opinion without

[176] Keller and Heri (n 8) 16.

circulating it for comment or, conversely, will circulate it in order obtain additional feedback or enable the judge rapporteur to incorporate certain views into the majority opinion.

Following the adoption of the judgment, judges prepare their separate opinions individually or in collaboration with others. Heller noted that the preparation of separate opinions is independent and takes place without substantive assistance from the Registry. However, the resulting opinion is submitted for an additional language check and translation.[177] Judge B, however, noted that he knew of a colleague who had received assistance from the Registry 'because they had good relationship with the members of Registry' (Judge B, male, former judge), but Judge B described this as an exception. I did not receive a precise answer from the judges on how much time they were given to prepare separate opinions. Their answers often differed, but the usual timeframe appeared to range from two to three weeks for a separate opinion in a Chamber case and around three weeks in a Grand Chamber case.[178]

6. Summary

This chapter addressed my first research question: What motivates judges at the ECtHR to issue a separate opinion? The interviews revealed two layers of motivation presented by judges: legal arguments and personal positions. The first layer comprised the two common legal arguments discussed for decades in doctrinal research.[179] Judges dissent because separate opinions demonstrate that the Court is transparent and because their opinions may contribute to future changes in the case law or in human rights jurisprudence. The primary concern raised in relation to transparency was that separate opinions could become overly personal or emotionally charged. These aspects were considered a potential reputational risk for the Court, as illustrated by the example of Judge Motoc's separate opinion, discussed above, in *Drėlingas v. Lithuania* (2019, application no. 28859/16). The second layer presented three different personal positions towards separate opinions, based on a judge's own understandings and perceptions of both their role and the role of the Court.

[177] ibid.
[178] Keller and Heri specifies the same deadline ibid.
[179] Alder (n 8); Dunoff and Pollack (n 4); Hogg and Amarnath (n 26); Kelemen, *Judicial Dissent in European Constitutional Courts* (n 26); Maučec and Dothan (n 130).

1) The first position, the *instrumental dissenter*, presents an understanding that judges should rarely dissent, and, if they do, they should only dissent when the issue is of major importance for them. They tend to hold the belief that the Court should not regularly express disagreement publicly.
2) The second position, the *responsibility dissenter*, reflects an understanding that judges should dissent whenever they disagree, because doing so is perceived as a responsibility, duty, or ethical or moral obligation. These judges also tend to regard joint separate opinions signed by a greater number of dissenting judges as stronger.
3) The third position, the *academic dissenter*, shares with the responsibility dissenter a broader interest in the benefits of separate opinions. The key difference, however, is that academic dissenters prioritised articulating a distinct line of reasoning over joining a collective separate opinion.

In my previous study of Czech Constitutional Court Justices, I observed a group of judges who explicitly and passionately disliked separate opinions.[180] I have not identified such a position at the ECtHR.[181]Although, in light of Bruinsma's work, it might seem appropriate to link these positions to judges' previous careers, I deliberately refrain from doing so. Such an approach would, in my view, oversimplify the complexity of the positions identified in this study. These positions are undoubtedly shaped by judges' prior professional experience as well as their individual characteristics, but they cannot be explained solely by career background or curriculum vitae. For instance, the academic approach does not necessarily imply that a judge has had an academic career (i.e. worked as a law professor in the academia). Moreover, contemporary judges frequently have professional experience across several areas of the legal profession, making categorical classification increasingly problematic. In my sample, all eight judges had worked in at least two of the following sectors: judiciary, academia, public administration, and legal practice. For these reasons, I do not attempt to associate the identified positions with judges' previous careers, as such positions cannot be determined with sufficient certainty from their résumés alone. I instead offer a much more flexible, dynamic and reflective approach: judges develop their positions across time, drawing on their previous experiences and careers, but also changing and adapting as they work and engage with colleagues at the Court.

[180] Vartazaryan and Paulík (n 100) 29–31.
[181] Judge E noted that he knew a colleague who wouldn't write separate opinion: 'While I was at the court, there was one judge that I knew, who said almost by definition I will never write a separate opinion' but this has not been confirmed by other judges. Consequently, I haven't found an ECtHR judge who hasn't written a single separate opinion in their career. As far as I know, no academic article has examined how many separate opinions have each judge written.

Different internal positions also generated tension between these groups, since judges sought to legitimise their own position to their colleagues. Instrumental dissenters faced pressure to reveal their vote, while the responsibility dissenters were confronted with the argument that too many separate opinions could undermine the Court's legitimacy — especially where dissents were disrespectful or emotionally charged. Judges who regarded dissent as a professional responsibility also placed greater care and emphasis on the strength of a dissent and argued that separate opinions signed by more judges carried greater weight. Academic dissenters, by contrast, did not necessarily share this view. For them, the opportunity to articulate their own distinct line of reasoning was more important than compromising with a broader dissenting group in order to produce a potentially stronger, collaboratively authored dissent.

Interviews revealed that judges employ various strategies regarding their intention to issue a separate opinion during deliberation, especially: (1) when they indicate to colleagues that they intend to dissent; (2) how they form dissenting coalitions; and (3) the role they play within those coalitions. Some judges announce their intention to issue a separate opinion at the outset of the deliberations, while others do so during deliberations or wait until the discussion has concluded. The deliberative process also gives rise to coalition making. Based on the interviews, three principal roles can be identified in the drafting of a separate opinion: (1) the author (common for academic dissenters); (2) the argument contributor (common for responsibility dissenters); and (3) the signatory (common for internal position instrumental dissenters). The interviews further revealed differing attitudes towards authorship. Some judges attached particular importance to having their authorship explicitly acknowledged, while others placed little emphasis on individual authorship, preferring instead that judges be listed according to seniority even where this does not reflect who drafted the opinion. In this chapter, separate opinions are therefore understood as a process: a deliberate act arising from judges' 'internal positions' and performed both textually and behaviourally.[182]

[182] Goźdź-Roszkowski, 'Mapping Rhetorical Dissent' (n 12) 435–437; Nikitina and Peruzzo (n 14) 397–399; Notari (n 6) 447–449.

CHAPTER 4 HOW DO JUDGES' MOTIVATIONS SHAPE THE PERFORMANCE OF SEPARATE OPINIONS AT THE ECtHR?

1. Introduction

The previous chapter established the central argument of this thesis: judges' motivations for issuing separate opinions are shaped by their internal position. These positions results not only from their personality, previous professional experience and expertise, but are also shaped by how judges understand their role within the Court and the role of the Court itself as an institution. In other words, judges may arrive in Strasbourg with an existing internal position towards separate opinions, which may then be reinforced, reconsidered or consolidated during their judicial term. Building on this argument, the present chapter examines the processes through which separate opinions are produced and performed. Separate opinions are understood here as deliberative expressions of judges' internal positions, performed both behaviourally and textually.[183]

This chapter first considers the legal and institutional constraints governing separate opinions, beginning with a survey of the debate surrounding Article 45(2) of the Convention and the prevailing view that separate opinions cannot be issued in decisions. I will then examine the internal discussions among ECtHR judges about regulating separate opinions, particularly their length and the tone. Finally, I will consider the textual performance of dissent and the ways in which judges use the greater freedom afforded by separate opinions to articulate disagreement.

The central argument of this chapter is that judges' internal positions affect not only whether they choose to dissent, but also how separate opinions are performed and negotiated within the Court. Instrumental dissenters appear more open to regulating separate opinions (especially length and tone), while responsibility and academic dissenters oppose regulation and tend to place greater importance on preserving a judge's freedom to express their disagreement fully.

2. The debate surrounding Article 45(2) of the Convention

For a separate opinion to be issued, it must first be legally permitted. Under Rule 74 of the Rules of Court, judges may issue separate opinions in Chamber and Grand Chamber judgments. However, in speaking to judges during my interviews, I learned that there is an ongoing legal debate concerning whether separate opinions may also be issued in decisions. This debate centres on the wording of Article 45 of the Convention (emphasis added):

[183] Nikitina and Peruzzo (n 14) 398.

(1) 'Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible',
(2) '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.'

This wording raises the question of whether separate opinions can be issued in relation to decisions. Although Article 45(1) refers to both judgments and decisions, Article 45(2) refers to the entitlement to deliver a separate opinion *only* in relation to judgments.[184] At the ECtHR, decisions commonly concern procedural and admissibility questions, including whether an application may proceed before the Court. Judgments, by contrast, generally set out the Court's reasoning on the merits of a case, including whether the Convention has been violated. This distinction, together with the wording of Article 45, is significant because a decision may resolve an important legal question without giving a dissenting judge the opportunity to publish a separate opinion.
The judges I interviewed generally agreed that the Court's ongoing practice is that separate opinions cannot be attached to decisions, reflecting the textual interpretation of Article 45 described above. However, most of my interviewees expressed dissatisfaction with this practice:

> 'So, they interpreted that only judgments can be there, but this interpretation is absurd. It's against logic, because the most important cases are inadmissibility and about jurisdiction of the Court. So why not to have opinions in them? I think that the paragraph two also covers judgments and the decisions. What variations there are on dissent?' (Judge C, male, current judge).

The judges agreed that the fact that a case was resolved by a decision (rather than a judgment) did not necessarily make the case less significant. Several judges argued that the legal issues determined in a decision could, in some circumstances, be just as important, or even more important, than those addressed in a judgment:

> 'And if you then read decision adopted by a majority without indication of how many votes there were for and against, it is frustrating and I definitely know that there have been a few cases where there was a fierce debate on inadmissibility. Perhaps where I was also in the

[184] Mark Eugen Villiger, 'Handbook on the European Convention on Human Rights' *Handbook on the European Convention on Human Rights* (Brill Nijhoff 2022) 115–117 <https://brill.com/display/title/58950> accessed 23 June 2026.

> dissent and where if I would have had the opportunity to write the separate opinion, I would definitely do it but yeah - can't for such a decision' (Judge E, male, former judge).

Interviewees agreed that allowing separate opinions in decisions could be beneficial. At the same time, they acknowledged that the prevailing practice reflects the established interpretation of the ECHR and that, if any change were to occur, it would likely require an amendment to the Convention's text:

> 'So there are various debates about this, but we all keep coming back to the idea that we have to stick to the language interpretation, and until that's changed, it'll stay divided this way. It's just that the convention doesn't actually define exactly what a "decision" is [starts laughing]' (Judge F, male, former judge).

Although there was broad agreement on the prevailing interpretation and practice, the issue remained a subject of continuing debate within the Court. As Judge H explained: 'So we're still debating this, because essentially a very significant and, of course, crucial aspect of this is that it's not fair to keep the legal opinions of those judges who disagreed unpublished' (Judge H, female, current judge).

Although not Convention's drafters' intention,[185] the present dispute appears to have arisen by interpretation of Article 45(2) following the restructuring of the Convention under Protocol No. 11. Before the establishment of the permanent Court, the European Commission of the Human Rights determined admissibility of applications under Article 26 of the 1950 Convention, while the European Court of Human Rights decided on the merits of the case (after it had been referred to the Court by the Commission). Under the original 1950 Convention,[186] separate opinions were allowed for both the Commission's reports under Article 31(1), and for the Court's judgments under Article 51 (emphasis added):

Article 31(1)	Article 51
'If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose	'(1) Reasons shall be given for the judgment of the Court.

[185] Council of Europe, *Collected Edition of the `Travaux Preparatoires' of the European Convention on Human Rights* (n 20) 154–156.

[186] See the chapter 1. Separate opinions in the European Convention on Human Rights.

a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.'	(2) If the 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.'

Following the entry into force of Protocol No. 11, a new dichotomy between decisions and judgments was introduced because the permanent Court absorbed the functions previously exercised by the Commission. Protocol No. 11 also renumbered Article 51 (from the 1950 Convention) as Article 45 (of the current Convention) and amended the provision so that reasons were required not only for judgments, but also for decisions declaring applications admissible or inadmissible. Notably, however, the entitlement to deliver a separate opinion remained expressly confined to judgments. During my interviews, Judge H suggested that this omission had not been deliberate:

> 'I think it's unfortunate that separate opinions aren't allowed [in decision]... So actually, I think that the drafters of the Convention, or rather, the states, didn't really have any actual intention, but simply that after the commission was dissolved, this dichotomy remained' (Judge H, female, current judge).

The prevailing interpretation of Article 45(2) gives rise to further issues, as explained by Judge H:

> 'You have surely noticed that when the Court rules in the Grand Chamber, it has essentially decided that the form of a judgment will remain even if Grand Chamber overturns a Chamber judgment to an inadmissibility' (Judge H, female, current judge).

This exact issue occurred in the case of *Communauté genevoise d'action syndicale (CGAS) v. Switzerland* (application no. 21881/20) in 2023. In the Chamber judgment, the Court found a violation of Article 11 of the Convention. Following referral, the Grand Chamber which upheld the Government's objection and found the complaint under Article 11 inadmissible. The Grand Chamber ruling nevertheless took the form of a judgment and included a dissenting opinion by Judges Bošnjak, Wojtyczek, Mourou-Vikström, Ktistakis and Zünd.

The interpretation precluding separate opinions in decisions therefore creates an apparent inconsistency. Where a Chamber disposes of a case by way of a decision, a separate opinion cannot

be attached. By contrast, where the Grand Chamber reaches an inadmissibility conclusion – which would ordinarily be dealt with by way of a decision – the ruling nevertheless takes the form of a judgement, to which separate opinions can be attached. My interviewees suggested that judges have developed an informal collegial practice to address this problem in some Chamber cases. As Judge A explained:

> 'Sometimes there is an understanding for the national judge, who will have hard time explaining to this home country or national colleagues why the case was decided as inadmissible. 'In such instances, it is perfectly possible to suggest: could we not let this be a decision? We will make it a judgment and inside the judgment we decide to declare the claims inadmissible. We found no violation and the rest is inadmissible. Because this will permit the national judge to write dissenting opinion and bla bla bla' (Judge A, male, current judge).

Interestingly, the judges agreed that formally changing this practice would require an amendment to the text of the Convention and that, in the absence of such an amendment, the current interpretation would continue to prevail. At the same time, however, the interviews suggested that judges had developed alternative routes that allows them, in certain circumstances, to circumvent the Court's established practice. As Judge A and others explained, this 'collegial' understanding does not apply automatically. It required a degree of flexibility on the part of the majority, which had to be willing to allow a separate opinion to be issued. As Judge A suggested, this might be appropriate, 'for instance, [in] a decision that marked the end of a long-standing dispute in national law that need[s] some explanation' (Judge A, male, current judge).

Having established these institutional and legal rules governing separate opinions, I now turn to the Court's internal practices. Several judges recalled a particular debate over whether separate opinions should be subject to greater institutional regulation. The following section examines this debate and its outcome.

3. Internal rules for separate opinions at ECtHR

Interviewed judges recalled an important debate concerning the regulation of separate opinions that had taken place during a preliminary meeting of the Court – although the precise year in which it occurred could not be established. Several judges provided contradictory information or were unable to recall the debate fully. Meanwhile, other judges admitted they had not participated in the

discussion themselves, but confirmed that they had heard about it from colleagues who had already been at the Court before their term. I have therefore attempted to reconstruct the debate in a manner that most plausibly reflects the events as they occurred.

Judge A explained that the debate arose amidst discussions between judges and the Registry about the efficiency of the Court's work. As he put it, 'Writing dissenting opinion is a factor that consumes time and energy of the Court.' He explained that the Court had to coordinate the publication of judgments and press releases following the final decision in each case – which in turn affected the amount of time available for judges to prepare their separate opinions:

> 'So, the president will say, you have two weeks to write it but 'whoooo but there's a Christmas coming' or 'we have a long break and I need more time and it's a complicated case and it's handling' is sometimes not in the best interest of the Courts image. It's takes longer than it needs to and the whole purpose is to present the platform for the dissenting judge' (Judge A, male, current judge).

According to Judge A, it was also in the Registry's interest 'to have work efficiency discussed', which may have spurred on the debate. In her article on the drafting of judicial decisions at the ECtHR, Helen Keller, a former ECtHR judge, noted that lengthy separate opinions could contribute to delays in the Court's processes.[187]

Based on the information I gathered from my interviews, the debate appeared to focus on three principal issues: (1) the length of separate opinions; (2) the extent to which judges could refer to matters discussed during deliberations without violating their confidentiality; and (3) the appropriate tone to adopt when criticising the reasoning of the majority. Judge E recalled that 'during this debate some people felt very strongly about it.' This intensity may also reflect the different internal positions towards separate opinions discussed in the previous chapter – especially the tendency of responsibility and academic dissenters to perceive the issuance of separate opinion as a professional obligation.

The purported motivation for regulating the length of separate opinions appears to have been a practical consideration, relating to the speed with which the Court could issue its rulings. Later, however, the discussion also turned to the relationship between the length of the majority's opinion and that of any separate opinions. Judge G recalled an argument that, in his words, 'worked because no one ever proposed to limit the length of separate opinions again':

[187] Keller and Heri (n 8) 16.

> 'When he [another judge who proposed a limit to the length of separate opinions - GV] proposed that opinions should not be longer than I don't recall I think 10 pages or so. I said that I cannot agree with that. I said OK, what if we, in the case at that time in the Grand Chamber case there were 7 dissenters. Can we write 70 pages, if it's 10 pages per opinion? Then there are 7 dissenters gathered right seventy pages. Of course there was no rational answer to that question' (Judge G, male, former judge).

The interviews revealed that there was no consensus on either the desirability or the outcome of these discussions. Some judges recalled that proposals to regulate separate opinions were ultimately abandoned. Judge A, for example, recalled concerns about excessively long opinions, the risk of disclosing confidential deliberations, and the limits of permissible criticism of colleagues. However, according to his account, the debate 'didn't boil down to any hard rules' and did not result in any significant changes to the existing practice'. Similar recollections were offered by Judges E and F, both of whom remembered discussions and proposals, but understood them as informal recommendations rather than binding rules:

> 'I remember that while I was there, we had discussions on this and in the end, if I'm not mistaken, the conclusion was we are not going to regulate it. During discussions and some people felt very strongly about it' (Judge E, male, former judge).

By contrast, Judge B maintained that internal rules governing separate opinions were eventually adopted after his departure from the Court. According to his account, these non-public rules regulated issues including the length of separate opinions, the use of academic citations, and other aspects of judicial writing. He described the introduction of these measures as controversial because these rules were imposed on newly appointed judges who had not participated in their discussion or adoption. Judge B suggested that the Court had been deeply divided over these issues:

> 'Especially the new judges. They did not vote for these rules. So, they come to the Court where there are rules that were previous colleagues and these rules are imposed and implemented against them and this is a limitation of judicial discretion and judicial independence. That does not resolve from the Convention or the Rules of the Court' (Judge B, male, former judge).

In his view, such restrictions represented an intrusion upon judicial independence by subjecting dissenting judges to increased institutional supervision. As he put it, 'These rules were enforced and the judges were kept under strict surveillance in writing separate opinions.' Judge B strongly urged me to try to obtain access these rules:

> 'This is extremely important. You should dedicate very attentively focus on this and don't give up on finding those informal rules because even if the registry didn't give you access, try to talk to the judges. Try to talk to the chief of the cabinet of the president. Do not give up at the first no that you get' (Judge B, male, former judge).

Despite these differing recollections, the Registry of the Court[188] indicated to me that what Judge B was referring to was probably a new version of 'Case Processing Manual - Chamber Procedure' an internal guideline used by the Court. The guideline is not publicly available and does not establish any enforceable legal rules; for judges, it operates as recommendation.

This internal debate provides yet another lens through which to understand how judges' internal positions and motivations shape the performance and negotiation of separate opinions. What began as a practical concern about efficiency of the Court, particularly the time required to prepare and publish separate opinions, developed into a broader debate about the extent to which the Court should regulate their use. This debate reveals competing understandings of both the judicial role and the function of separate opinions at the Court.

The three internal positions, identified in the previous chapter, help to explain why proposals for regulating separate opinions at the ECtHR generated such different reactions. From an instrumental perspective, restrictions concerning the length or deadlines may be relatively compatible with an understanding of separate opinions — as exceptional instruments whose benefits must outweigh their costs. This position already incorporates considerations of judicial time, delay and the interests of the parties to the decision. Responsibility dissenters, by contrast, may regard *explaining disagreement* as part of their judicial responsibility. Restrictions that substantially limit their ability to do so may therefore interfere with what they see as a core obligation arising from their role. The tension may be particularly acute for academic dissenters, for whom the ability to develop distinct and sometimes extensive lines of legal reasoning forms an important part of the purpose of writing separately. These internal positions, or orientations, should not be understood as mechanically determining a judge's view of this type of regulation, but they can provide an

[188] In an email communication from 11th February 2026.

analytical framework for understanding why apparently technical restrictions may carry different significance for different judges.

The debate consequently exposes a tension inherent in the Court's self-regulation. On the one hand, separate opinions are produced within an institution that has legitimate collective interests in efficiency, timely delivery, confidentiality and maintaining appropriate standards of judicial discourse. On the other hand, a separate opinion is precisely the textual space in which an individual judge is permitted to distance themselves from the collective position of that institution. Attempts to regulate that space can therefore be understood both as legitimate institutional coordination and as potential constraints upon individual judicial independence.

This analysis also complements the preceding discussion of Article 45(2). In both contexts, the production of separate opinions is shaped by a combination of formal law and informal practice. Article 45(2) of the ECHR establishes a legal boundary — the prevailing interpretation excludes separate opinions from Chamber decisions. Yet interviews suggest that judges have developed occasional collegial practices through which a case may instead be disposed of in the form of a judgment, thereby creating the possibility of a separate opinion. Similarly, where separate opinions are formally permitted, judges have debated additional internal constraints but appear to have stopped short of creating binding rules. In both instances, the formal framework therefore does not fully explain when and how dissent becomes publicly visible. Its practical boundaries are negotiated through collegial understandings, institutional conventions and judges' competing conceptions of their role. The following section turns from the negotiation of these boundaries to its textual expression, examining how judges use the freedom available within separate opinions to express and perform disagreement in the text itself.

4. Textual performance of separate opinions

Majority opinions – whether issued by a Chamber or the Grand Chamber — must comply with the formal requirements set out in Rule 74(1)a-l of the Rules of the Court: they start by identifying the composition of the judicial formation and the parties, set out the procedural history and relevant facts, summarises the parties' submissions, and present the Court's legal reasoning. They conclude with the operative provisions, including any decision on costs, and indicate the majority by which the judgment was adopted. My interviewees also shared two less formal practices governing the content and structure of majority judgments. Judges described these as unwritten rules or 'traditions' of the Court. The first tradition was that majority judgments should never

explicitly cite earlier separate opinions, even where the majority adopted arguments previously advanced in a dissent:

> 'They never cite the dissent. They [dissents – GV] are never mentioned. This is a tradition. This is a tradition inside the court. They never mention separate opinions' (Judge B, former judge, male).

A second judge suggested that a majority never cite a scholarly article in their judgement: 'Judges never cite academics, never. Because they will not consider them as a source of law. Only in dissenting opinions' (Judge C, male, current judge). However, existing research suggests that this may not be an absolute rule. Academic scholarship has been cited in majority judgments, albeit much lesser frequently,[189] including for the purposes of reviewing facts and interpreting international and domestic law. The frequency of such citations also appears to vary between individual judges.[190]

While majority judgments are governed by formal rules and informal traditions, my interviews revealed that there are very few comparable constraints on the style or content of separate opinions. The only real restriction, identified by judges, concerned the opinion's tone. Judges remarked that there was an expectation among members of the bench that separate opinions should be written in a manner that would not be perceived as "too critical" or "inappropriate" towards the majority opinion. Judge G recalled one situation in which he felt he had 'overstepped a certain limit':

> 'And I for example had encountered this twice, in my ten and a half years. Where I presented a separate opinion and then the president of the section, very politely, but asked me - do I really want to keep that sentence? And in both cases, I changed that sentence and in another case, I simply deleted that sentence. It was not necessary. But it was a sentence which could be read as, not as an attack, but too critical to the composition, instead of too critical to the judgment. So, I believe it's normal' (Judge G, male, former judge).

As noted in the previous chapter, however, judges do not always circulate their separate opinions to colleagues before publication. This may occur because of time constraints or because the judge does not wish to share it. Simply put, a separate opinion may be published without other judges

[189] Kanstantsin Dzehtsiarou and Niccolò Ridi, 'The Use of Scholarship by the European Court of Human Rights' (2024) 73 International & Comparative Law Quarterly 707, 728–730 <https://doi.org/10.1017/S0020589324000162>.
[190] ibid 721–722.

seeing it,[191] precisely the situation that occurred with Judge Motoc's dissenting opinion in the *Drėlingas v. Lithuania* case (2019, application no. 28859/16). Another judge I interviewed also alluded to the dissenting opinion of Judge Vehabović in the Grand Chamber case of *Kovacevic v. Bosnia and Herzegovina* (2025, application no. 43651/22) as being 'overly emotional'. In his dissenting opinion, Judge Vehabović included phrases such as 'this judgment is a big mistake which might overshadow the Court's unquestionable reputation and great achievements from the past'; 'the Court has accepted that the Agents do not need approval from the Government they represent, which is an absurd and impossible situation in any country'; and 'Grand Chamber has cherry-picked arguments'.

When it comes to separate opinions, judges enjoy a greater degree of flexibility and independence in terms of the structure of the text, the style, and the language used. This freedom also extends to the wide range of rhetorical and cultural references that a judge can employ to communicate their views. Separate opinions often include quotations from notable intellectuals[192] and scholarly articles[193] — but through my empirical research I discovered that judges have also mentioned and cited movies[194], fiction books[195], Bible[196], music[197], painting[198], poetry[199] and special symbols[200]. Given the scope (and word limit) of this thesis, it is impossible to provide an exhaustive account of all such instances, however I think it is worthwhile to focus on a select few examples.

The case of *Selahattin Demirtaş v. Turkey* (2015, application no. 15028/09) concerned an article published in a local newspaper that identified Selahattin Demirtaş and other members of the pro-Kurdish DTP (Party for a Democratic Society) as "the enemies of Turks" and potential targets of "civilian patriots," effectively calling for violence against them. Demirtaş complained that the

[191] As explained in chapter 2 Scholarly arguments: dissenting for transparency and future change.

[192] Judge Motoc cites Albert Camus in her dissenting opinion in the case of Drėlingas v. Lithuania (2019, application no. 28859/16). Interestingly Albert Camus is mentioned also in joint concurring opinion of judges Yudkivska, Tsotsoria and Vehabović in case of Merabishvili v. Georgia (2017, no. 72508/13) or dissenting opinion of judge Serghides in case of Anagnostakis v. Greece (2023, no. 26504/20).

[193] For more see the paper Dzehtsiarou and Ridi (n 190)..

[194] Judge Dedov mentions movie The Terminal in his dissenting opinion in the Case of Z.A. and others v. Russia (2017, no. 61411/15).

[195] For example, Process by Franz Kafka appears in the concurring opinion of judge Pinto de Albuquerque in the case of Centrum för Rättvisa v. Sweden (2021, 35252/08) or Albert Camus Stranger is mentioned in join dissenting opinion of judges Tsotsoria, Motoc and Mits in case of Correia de Matos v. Portugal (2018, no. 56402/12) .

[196] Joint dissenting opinion of judges Sajó, Vučinić and Kūris in the case of Károly Nagy v. Hungary (2015, no. 56665/09): Render unto Caesar the things that are Caesar's, and unto God the things that are God's" (Mt 22:21).

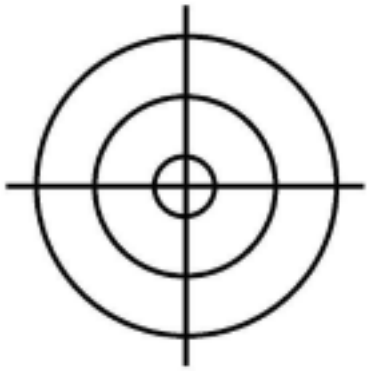
[197] Judge Kūris mentiones music of Bob Dylan or Pink Floyd. See the cases: Ahmet Hüsrev Altan v. Turkey (2021, no. 13252/17), Sabuncu and others v. Turkey (2021, no. 23199/17), Selahattin Demirtaş v. Turkey (2015, no. 15028/09).

[198] Judge Šimáčková mentiones Édouard Manet painting Le Déjeuner sur l'herbe in her concurring opinion in a case Buton v France (2022, no. 22636/19).

[199] Judge Hajiyev mentiones the epic poem Gulistan which was written in 1959 by Bakhtiyar Vahabzade in the case of case of Sargsyan v. Azerbaijan (2015, no. 40167/06). Judge Kūris cites poem of Archibald MacLeish "The Young Dead Soldiers Do Not Speak" in the case of Vasiliauskas v. Lithuania (2015, no. 35343/05).

[200] Judge Kūris used the symbol of infinity in his dissenting opinion in the case of Erményi v. Hungary (2016, no. 22254/14) or the target symbol in case of Selahattin Demirtaş v. Turkey (2015, no. 15028/09).

newspaper article amounted to incitement to violence and hate speech, but the Turkish authorities refused to prosecute the author of the article, arguing that the publication would likely be seen as a protected form of political expression and criticism. In its judgment, the ECtHR held by six-to-one vote that there had been no violation of Article 2 (right to life) because Demirtaş had failed to demonstrate the existence of a 'real and immediate risk' to his life, which the authorities knew or ought to have known. In his dissenting opinion, Judge Kūris included a drawing of a target and wrote 'Visually, the message sent by Mr I.E. [author of the article] is the following:'



Point [1], dissenting opinion of Judge Kūris, case of Selahattin Demirtaş v. Turkey (2015, no. 15028/09)

'So simple. Even primitive' he adds. The target was used by Judge Kūris to illustrate the violent implications of anti-Kurdish political rhetoric, which had been examined during the proceedings.
The case of *Erményi v. Hungary* (2016, application no. 22254/14) concerned the premature termination of a mandate issued by the Vice-President of the Hungarian Supreme Court, following a major judicial reorganisation introduced by the new Fundamental Law in 2012. The applicant argued that his removal from the bench, before the expiry of his six-year term, violated the principles of judicial independence and the rule of law. Hungarian authorities argued that it was justified in it steps to restructure the judicial system. In this case, Judge Kūris wrote a dissenting opinion where he repeatedly stated that the reorganisation of the Hungarian judiciary and the removal of judges was highly problematic and likely contrary to the Convention. His main argument, however, was that Article 8 was the wrong provision to apply in this situation**.** He believed that the Court had stretched the concept of "private life" too far — by treating the dismissal of a judge from a high public office as an "interference with private life." Judge Kūris explained his reasoning as follows: 'The perspective of examining privacy in terms of the right and value protected by Article 8 must be returned to its natural angle. To present it graphically, 8 should indeed be seen as 8 and not – as increasingly tends to be the case – like the sign of infinity:'

8 ∞

Point [14], dissenting opinion of Judge Kūris, case of Erményi v. Hungary (2016, no. 22254/14).

An unconventional movie reference can be found in Judge Dedov's dissenting opinion in *Z. A. and Others v. Russia* (2017, applications no. 61411/15, 61420/15, 61427/15, and 3028/16). The case concerned four asylum seekers from Iraq, Palestine, Somalia, and Syria who were denied entry to Russia and became stranded in the transit zone of Moscow's Sheremetyevo Airport for periods ranging from several months to almost two years. Unable to enter Russia, unable to travel elsewhere, and repeatedly refused refugee status or temporary asylum, they lived in the airport transit zone under extremely poor conditions, sleeping on mattresses on the floor, relying on UNHCR food assistance, and lacking access to showers or adequate facilities. The Court found, by a six-to-one, vote that Russia had violated both Article 5(1) and Article 3 with respect to all four applicants. Judge Dedov wrote a dissenting opinion. He disagreed that the applicants were deprived of their liberty and dignity, and further suggested: 'As an example of action taken to preserve one's dignity, I would recommend seeing the great movie "The Terminal" starring Tom Hanks, whose character did not complain, but retained his dignity in difficult conditions, thanks to his personal qualities, his education and knowledge.' The 2004 film is about a traveller who becomes stranded in the international transit area of New York's JFK Airport after a political crisis in his home country renders his passport temporarily invalid. Unable either to enter the United States or return home, he makes a temporary life for himself inside the airport while waiting for his situation to be resolved.



The Terminal (DreamWorks Pictures, 2004)

Meanwhile, an artistic reference appears in Judge Šimáčková concurring opinion in *Bouton v. France* (2022, no. 22636/19). This case concerned freedom of expression and the criminal conviction of a feminist activist who staged a topless protest inside the Church of La Madeleine in Paris. The Court found a violation of Article 10 (freedom of expression). Although the Court accepted that France was entitled to regulate public nudity and that the interference was prescribed by law and pursued legitimate aims, it concluded that the criminal sanction imposed on the applicant was disproportionate to those aims. Judge Šimáčková agreed with the outcome but disagreed with majority's legal reasoning. In her view, the French authorities had relied on the wrong criminal provision. The applicant had been prosecuted under a law designed to punish sexual misconduct, even though her actions had not exposed anyone a sexual threat. Rather, the conduct at issue had caused offences to members of the church in a religious setting. Yet, French law contained no general offence of blasphemy. Judge Šimáčková therefore suggested that the authorities had effectively used a sexual-offence provision as a substitute for a blasphemy law.

To reinforce her argument, Judge Šimáčková wrote: 'As to the aim pursued by the applicant's performance, it should be added that French culture is replete with well-known examples of naked female breasts as an expression of freedom — from Manet's Déjeuner sur l'herbe to the bared breast of Marianne.' By invoking Manet's *Le Déjeuner sur l'herbe*, a painting displayed at the Musée d'Orsay in the heart of Paris and itself historically associated with debates over decency and public sensibilities, Judge Šimáčková situated the dispute within a broader cultural and historical context.



Édouard Manet, Le Déjeuner sur l'herbe (1863), oil on canvas, Musée d'Orsay, Paris. Source: Musée d'Orsay.

What these examples demonstrate is that separate opinions constitute a unique communicative space within and beyond the Court. Unlike majority judgments, which are constrained by the Rules of Court and institutional conventions, separate opinions permit judges to greater freedom to experiment with style, tone, and rhetorical technique. Interviewees repeatedly described separate opinions as a forum in which judges could express themselves more freely, including through references to literature, popular culture, and unconventional visual symbols.

The motivations for using these elements and devices varied among judges. For some, they served an expressive function, allowing them to convey the emotional dimension of a case. As Judge G explained: 'I decided to write it a little bit of emotional' (Judge G, male, former judge). Others viewed them [different expressive elements] as a stylistic device that could enhance the readability or aesthetic quality of an opinion: 'You have to make it beautiful also' (Judge F, female, current judge). A further argument was the motivations to visualise complex arguments and make their reasoning more accessible to readers.

The role of emotion in separate opinions has also been recognised in previous research. Former ECtHR Judge Zupančič, for example, suggested that one motivation for writing a separate judgment may be 'anger toward the majority'[201], while a judge of the Czech Constitutional Court described separate opinions as 'a safety valve so that we can all work together'.[202]

Comparable uses of unconventional rhetorical and visual devices can also be found in the Czech Constitutional Court. Former Judge Stanislav Balík used both a chess diagram[203] and pictures of snails[204] to visualise his arguments in separate opinions. In the decision of the CCC (No. II. ÚS 773/07, 2009) Judge Balík compared a restitution case to a chess position which, he argued, even Bobby Fisher could not win (because checkmate was unavoidable in a single move). In the decision of the CCC (No. II. ÚS 3634/11, 2013) Balík developed his legal argument through the image of a snail and its empty shell. Recalling how he and his son distinguished living snails, which they moved from the road to protect them, from empty shells, he asked whether the complainant company, which lacked both a shareholder and a registered managing director, should similarly be regarded as an 'empty shell', or as a legal structure that still contained persons whose rights the Constitutional Court was called upon to protect. The visual metaphor therefore frames the underlying question of whether a formally existing but organisationally hollow company remains a bearer of interests warranting constitutional protection. Whether such rhetorical and visual devices

[201] Bruinsma (n 9) 218.
[202] Vartazaryan and Paulík (n 100) 32.
[203] Decision of the Czech Constitutional Court, n. II. ÚS 773/07, 2009.
[204] Decision of the Czech Constitutional Court n. II. ÚS 3634/11, 2013.

reflect a broader phenomenon across different courts and legal cultures merits further comparative research.

The significance of these stylistic choices extends beyond individual judicial preference. By drawing on sources and forms of expression that would be unusual or inappropriate in a majority judgment, judges can signal that they are addressing audiences beyond the immediate parties to the case. Separate opinions may speak to future judges, legal scholars, domestic courts, governments, or the broader public. In this sense, the freedom of form available in separate opinions provides judges with a means through which to express, build, and perform their internal judicial positions. The examples discussed in this chapter support the broader argument of advanced by legal linguistic scholarship.[205] Separate opinions should not be understood simply as technical statements of legal disagreement. Rather, they can function as performative texts through which judges construct their professional identities, communicate values, and seek to influence legal and political debates beyond the immediate confines of the case itself. The stylistic diversity of separate opinions demonstrates how judges may use them, not only to record dissent or concurrence, but also to differentiate their individual judicial voice and perform a particular understanding of the judicial role. It is precisely because separate opinions are less constrained by institutional rules and traditions that they provide a particularly valuable site for observing judges' internal positions in action.

5. Summary

This chapter answered the second research question: How do judges' motivations shape the performance of separate opinions at the ECtHR? Before answering this question, I first had to establish the legal and institutional conditions under which judges could issue separate opinions.

While separate opinions at the ECtHR are allowed in Chamber and Grand Chamber judgments (Rule 74(2) of the RoC), interviews revealed an ongoing debate between judges on whether separate opinions should be allowed in decisions as well.

This debate surrounds Article 45(2) of ECHR. The prevailing consensus between judges is that separate opinions are not allowed to be issued in decisions, based on textual interpretation of Article 45(2). However, most of the judges I interviewed disliked this practice, since decisions on inadmissibility might not be adopted unanimously, leaving dissenting judges with no forum to express or publish their disagreement. Analysis of my interview data revealed that this omission was not the legislator's original intent, but rather a restriction introduced inadvertently after the

[205] Nikitina and Peruzzo (n 14) 398.

amendment made during the negotiations on Protocol No. 11. Interviews further suggested that judges have created a collegial mechanism for bypassing this interpretative restriction. This form of self-regulation and the arguments delivered by my respondents demonstrated that they were often implicitly governed by internal positions - those who treated the dissents as instrumental (instrumental dissenters) were less concerned with those debates, in contrast to responsibility dissenters and even more so academic dissenters who were against restrictions towards separate opinion because for them it represents a professional responsibility.

These debates support the broader argument of this thesis: judges' internal positions towards separate opinions affect more than only the immediate decision on whether to issue a separate opinion. They also shape how judges understand and negotiate the institutional conditions under which separate opinions can be permitted and performed. In this sense, separate opinions emerge from a negotiated space between individual judicial independence and the Court's collective interests in collegiality, efficiency, confidentiality and authority.

This chapter also examined the Court's internal practices governing the drafting of separate opinions. Neither the Convention nor the Rules of the Court imposed formal restrictions on separate opinion's style or content, although interviewees recalled discussions about possible limits on the length, tone and other aspects of judicial writing. Yet, these discussions appear not have resulted into binding rules. By contrast, the drafting of majority judgments are constrained by the formal requirements of Rule 74 (of the RoC) and a number of informal conventions, including the practice of not citing separate opinions and the relatively limited use of academic scholarship.

The absence of comparable constraints has allowed separate opinions to 'evolve into a distinct genre of judicial writing', thereby supporting the conclusions of recent legal-linguistic scholarship that separate opinions are a free genre.[206] My interviews further demonstrated that judges' internal positions shaped the ways in which this freedom was used. Judges deliberately employed different rhetorical devices and cultural references, which would have be considered unusual or inappropriate in majority judgments, including references to academic literature, quotations from prominent intellectuals, films, works of fiction, the Bible, music, paintings, poetry, and even the use of special symbols. From the judges' perspective, these devices served several purposes: they could convey the emotional depth of a case, visualise legal arguments through analogy and imagery, make opinions more engaging or accessible, and attract the attention of a broader audience beyond the Court.

[206] ibid.

CONCLUSION

This thesis examined the role of separate opinions at the ECtHR through a socio-legal study of judicial dissenting behaviour. While existing scholarship has largely sought to explain dissent through voting patterns, judges' national or professional backgrounds, and textual analysis, comparatively little attention has been paid to how judges themselves understand and conceptualise the practice of writing separate opinions. The thesis therefore asked two research questions: (1) What motivates ECtHR judges to issue separate opinions? and (2) How do these motivations shape the way separate opinions are performed? It addressed these questions through eight semi-structured interviews with current and former ECtHR judges, complemented by a broader contextual analysis of separate opinions.

In answering the first research question, the thesis identified two layers of motivation underlying judges' decisions to issue separate opinions. At the first level, judges reproduced two arguments familiar from the existing normative literature: (1) separate opinions promote the Court's transparency and legitimacy by making judicial disagreement visible; and (2) they can contribute to the future development of human rights jurisprudence by preserving alternative legal arguments that may subsequently influence the Court's case law. At a deeper level, however, the interviews revealed three distinct *internal positions* towards separate opinions. These positions reflect different understandings of both the judge's individual role and the institutional role of the Court, particularly in relation to the competing demands of transparency, legitimacy and judicial independence:

1. The *instrumental dissenter* regards separate opinions as exceptional instruments, to be used where there is a sufficiently important reason to dissent that outweighs the perceived costs of doing so. From this perspective, the Court should present itself as unified where possible in order to preserve its institutional legitimacy.
2. The *responsibility dissenter* regards issuing a separate opinion in cases of disagreement as a professional responsibility. Judges adopting this position also described dissent as an ethical or moral obligation or duty. From this perspective, the Court's legitimacy is best preserved through transparency: disagreement should be made visible because the Court is not, and should not present itself as, a monolithic institution.
3. The *academic dissenter* shares the responsibility dissenter's commitment to expressing disagreement but places greater importance on developing and preserving a distinct and independent line of legal reasoning. From this perspective, the Court should be transparent

about internal disagreement while also using separate opinions to communicate legal reasoning to a wider audience.

These positions should not be treated as fixed categories determined by judges' professional backgrounds. Rather, they represent dynamic orientations shaped by factors including personality, previous professional experience and expertise.

In answering the second research question, the thesis demonstrated that these different internal positions shaped how separate opinions are performed, both behaviourally during deliberations and textually in the resulting opinions. Behaviourally, judges differ in how and when they communicate their intention to issue a separate opinion, whether and how they form dissenting coalitions, and the roles they assume within those coalitions. The thesis identified three recurring roles: (1) author, (2) argument contributor, and (3) signatory. These roles correspond particularly, although not deterministically, to the three internal positions: academic dissenters are more commonly authors, responsibility dissenters were commonly argument contributors, and instrumental dissenters preferred to be just signatories. Separate opinions are therefore not simply finished texts appended to judgments; they are produced through processes of deliberation, negotiation and coalition-building that are themselves shaped by different understandings of the judicial role and of the Court.

The thesis further shows that dissent operates within a negotiated space between individual judicial independence and the institutional interests of the Court, particularly in relation to the competing demands of transparency and institutional legitimacy. Judges described an ongoing debate concerning Article 45(2) and the prevailing interpretation that separate opinions cannot accompany decisions, as opposed to judgments. They also described internal discussions about possible restrictions on the length, tone and content of separate opinions. At the same time, separate opinions afford judges considerably greater textual freedom than majority judgments. Judges made use of this freedom through unconventional rhetorical and cultural references, including references to academic scholarship, prominent intellectuals, films, literature, the Bible, music, paintings and poetry, as well as the use of distinctive symbols. These devices allow judges to express emotion, make arguments more accessible and develop an individual judicial voice.

The thesis ultimately argues that judges' motivations for issuing separate opinions can be understood through three internal positions, which in turn shape how dissent is behaviourally and textually performed. By connecting judicial motivations to the processes through which separate opinions are produced, negotiated and expressed, the thesis develops an empirically grounded account of separate opinions as a distinct genre of judicial writing and practice. Its principal socio-

legal contribution lies in shifting attention away from static categories of dissenting judges towards the social processes through which judicial dissent is produced and performed at the ECtHR, and towards the understandings of judicial and institutional roles that shape those processes.

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