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Separate and Dissenting Judicial Opinions and Their Significance for a Democratic Society. Reflections Against the Background of Polish Law

1. Introduction

Legal conflicts are inherent in the functioning of any community, and the responsibility for their peaceful resolution is borne by public authorities. Nowadays, this task is carried out by properly formed judicial bodies, whose composition and the competences required of judges differ depending on the difficulty and importance of the dispute to be resolved. Consequently, specialized courts and tribunals are often set up to deal with cases of greater factual or legal complexity, and usually the administration of justice is then entrusted to a judicial panel consisting of several, a dozen or even dozens of persons. In such cases, it becomes necessary to determine how the content of the judgment is decided. Theoretically, possible solutions include, on the one hand, the requirement of a unanimous decision,[2] and, on the other, resorting to qualified or simple majority voting.

If the legislature allows a particular court or tribunal to make decisions by a majority vote, it means that it accepts the possibility of outvoting at least one member of the panel. Depending on the procedural model adopted, the lack of unanimity of the panel may remain undisclosed to the parties, it may be disclosed only at the request of the dissenting judge, or it may be transparent to the parties and the public.[3] In addition

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2 From the historical perspective, rulings should have been unanimous since originally it was the ruler who exercised judicial power. In the course of time, when the rulers were overburdened by other state duties, they were relieved by judges. Yet, since the ruler could express only one determination to settle a dispute, the judges adjudicating on his behalf should also do so unanimously. However, the historical rationale has lost its appeal in the case of contemporary procedures, thus, hardly any norm under the contemporary Polish law requires unanimity; see also D. Dudek, *Votum separatum sędziego – człowiek czy instytucja* [Eng. *The Judicial Dissenting Opinion – A Personal or an Institutional Entity*], "Palestra Świętokrzyska" 2020/51–52, p. 23.

3 Poland's Code of Criminal Procedure of 1969 (the Act of 19 April 1969 – Journal of Laws [Dziennik Ustaw] 1969, No. 13, item 96 as amended) leads to conflicting views as to the admissibility of disclosing a dissenting opinion. See in particular: F. Prusak, *Dopuszczalność ujawnienia zdania odrębnego* [Eng. *Admissibility of the Disclosure of Dissenting Opinions*], "Nowe Prawo" 1964/1, pp. 63–65; Z. Najgebauer, *Instytucja „zdania odrębnego" a jego publikacja* [Eng. *The Institution of the 'Dissenting Opinion' and its Publication*], "Nowe Prawo" 1964/7–8, pp. 760–763; F. Prusak, Z. Najgebauer, *Ujawnienie zdania odrębnego w procesie karnym* [Eng. *The Disclosure of Dissenting Opinions in Penal Proceedings*], "Nowe Prawo" 1965/4, pp. 398–407; A. Kaftal, *Glosa do wyroku Sądu Najwyższego z 23 listopada 1965 r.,*

to the right to overtly express their dissent with the content of the judgment through the voting act, it is possible to grant the outvoted judge the right to formally write down their dissent with a certain resolution, along with the right or obligation to justify the dissent.[4] This latter case is called a dissenting opinion (*votum separatum*, *contravotum*),[5] which is most often defined in the legal literature as a formal written report outlining

I KR 256/65 [Eng. *An Annotation to the Judgement of the Supreme Court of 23 November 1965, I KR 256/65*], "Nowe Prawo" 1968/11, pp. 1488, 1491; F. Prusak, *Glosa do postanowienia składu 7 sędziów z dnia 20 marca 1967 r. (U 1/67)* [Eng. *An Annotation to the Decision of the Panel of Seven Judges of 20 March 1967*], "Nowe Prawo" 1968/4, pp. 694–698; E. Skrętowicz, *Glosa do wyroku Sądu Najwyższego z 19 maja 1971 r., IV KR 83/71* [Eng. *An Annotation to the Judgement of the Supreme Court of 19 May 1971, IV KR 83/71*], „Orzecznictwo Sądów Polskich i Komisji Arbitrażowych" 1972/6, pp. 273–274; J. Bratoszewski, *Zdanie odrębne w procesie karnym* [Eng. *The Dissenting Opinion in Penal Proceedings*], Warszawa 1973, pp. 13–17, 87–105; A. Bojańczyk, *Zdanie odrębne w postępowaniu karnym* [Eng. *The Dissenting Opinion in Penal Proceedings*], "Forum Prawnicze" 2012/6, pp. 4–6.

4 F. Prusak, Z. Najgebauer, *Ujawnienie…*, pp. 403–405; E. Skrętowicz, *O jawności zdania odrębnego w postępowaniu karnym* [Eng. *On the Disclosure of Dissenting Opinions in Penal Proceedings*], "Nowe Prawo" 1971/3, pp. 391–393; M. Grochowski, *Uzasadnienie voti separati a prawo do sądu. Zależności i gwarancje* [Eng. *Justifying Dissenting Opinions and the Right to Justice. Dependencies and Guarantees*], "Studia Prawnicze" 2014/4, p. 51.

5 The issue of dissenting opinion is sometimes analysed in relation to the specific nature of those particular proceedings where a *votum separatum* may be expressed: criminal procedure (M. Szerer, *Votum separatum*, "Nowe Prawo" 1956/7–8, pp. 127–131; Z. Kubec, *Votum separatum*, "Nowe Prawo" 1960/2, pp. 198–205; J. Bratoszewski, *Zdanie odrębne*, "Nowe Prawo" 1961/11, pp. 1386–1397; H. Kempisty, *Votum separatum*, "Państwo i Prawo" 1963/2, pp. 271–281; F. Prusak, *Dopuszczalność…*, pp. 63–65; F. Prusak, Z. Najgebauer, *Ujawnienie…*, pp. 398–407; F. Prusak, *Glosa…*, pp. 694–698; M. Lipczyńska, *Votum separatum we współczesnym polskim ustawodawstwie karnoprocesowym, oraz w praktyce* [Eng. *The Dissenting Opinion in the Contemporary Polish Legislation for Penal Proceedings and Legal Practic*], in: J. Fiema, W. Gutekunst, S. Hubert (eds.), *Księga pamiątkowa ku czci prof. dra Witolda Świdy* [Eng. *A Festschrift for Prof. Dr. Witold Świda*], Warszawa 1969, pp. 210–225; J. Bratoszewski, *Zdanie…*; E. Skrętowicz, *Zdanie odrębne w procesie karnym. Kwestie wybrane* [Eng. *The Dissenting Opinion in Penal Proceedings. Selected Issues*], "Annales UMCS" 1984, Sectio G 31, pp. 103–111; E. Skrętowicz, *Zdanie odrębne sędziego w polskim procesie karnym* [Eng. *The Judicial Dissenting Opinion in Polish Penal Law*], in: *Zagadnienia wybrane w kręgu teorii i praktyki prawa karnego. Księga poświęcona pamięci Profesora Andrzeja Wąska* [Eng. *Selected Issues in Theory and Practice of Penal Law. A Festschrift for Professor Andrzej Wąsek*], L. Leszczyński, E. Skrętowicz, Z. Hołda (eds.), Lublin 2005, pp. 703–707; A. Bojańczyk, *Zdanie…*, pp. 3–13; J. Gujda, *Zdanie odrębne jako forma „krytyki" wyroku sądowego w procesie karnym* [Eng. *The Dissenting Opinion as a Form of Critical Appraisal of the Court Judgement in Penal Proceedings*], "Iustitia" 2015/3, pp. 141–149; P. Mazur, *Ujawnienie zdania odrębnego z perspektywy filozoficznoprawnej* [Eng. *The Disclosure of Dissenting Opinions from the Perspective of Philosophy of Law*], "Acta Universitatis Lodziensis. Folia Iuridica" 2017/79, pp. 75–87); civil procedure and Constitutional Tribunal proceedings (e.g. F. Rymarz, *Zdanie odrębne w przepisach i praktyce orzeczniczej Trybunału Konstytucyjnego* [Eng. *The Dissenting Opinion in the Legislation and Judicature of Poland's Constitutional Tribunal*], in: J. Trzciński, A. Jankiewicz (eds.), *Konstytucja i gwarancje jej przestrzegania. Księga pamiątkowa ku czci prof. Janiny Zakrzewskiej* [Eng. *Constitution and Guarantees for Compliance. A Festschrift for Prof. Janina Zakrzewska*], Warszawa 1996, pp. 157–175; B. Zdziennicki, *Zdania odrębne w orzecznictwie polskiego Trybunału Konstytucyjnego* [Eng. *Dissenting Opinions in the Judicature of Poland's Constitutional Tribunal*], in: M. Zubik (ed.), *Księga XX-lecia orzecznictwa Trybunału Konstytucyjnego* [Eng. *An Anniversary Book to Commemorate 20 Years of Judicature by Poland's Constitutional Tribunal*], Warszawa 2006, pp. 135–157; M. Wojciechowski, *Uzasadnienie zdania odrębnego jako wypowiedź dialogiczna na przykładzie wybranych orzeczeń Trybunału Konstytucyjnego* [Eng. *A Justification for a Dissenting Opinion as a Dialogical Speech Act: The Case of Selected Judgement by Poland's Constitutional Tribunal*], "Archiwum Filozofii Prawa i Filozofii Społecznej" 2018/1, pp. 69–82; M. Wojciechowski, *Integralność sędziowska a praktyka votum separatum w Trybunale Konstytucyjnym* [Eng. *Judicial Integrity and the Practice of Dissenting Opinion in Poland's Constitutional Tribunal*], "Krytyka Prawa" 2021/3, pp. 114–128); canon law (see e.g. M. Królik, *Zadanie votum separatum w procesie poszukiwania prawdy obiektywnej* [Eng. *The Dissenting Opinion as a Task in Seeking the Objective Truth*], "Kościół i Prawo" 2012/1, pp. 195–208). The most interesting, however, are the considerations relating to dissent in the legal systemic context (see e.g. B. Pogoda, *Zdanie odrębne* [Eng. *The Dissenting Opinion*], "Gazeta Sądowa Warszawska" 1932/24, pp. 333–334; J. Wróblewski, *Votum separatum w teorii i ideologii sądowego stosowania prawa* [Eng. *The Dissenting Opinion in the Theory and Ideology of the Judicial Application of Law*], "Studia Prawno-Ekonomiczne" 1975/15, pp. 7–30; Z. Tobor, *Spór o zdania odrębne* [Eng. *The Dispute of Dissenting Opinions*], in: J. Czapska, M. Dudek, M. Stępień (eds.), *Wielowymiarowość prawa* [Eng. *The Multidimensionality of Law*], Toruń 2014, pp. 215–229; M. Wojciechowski, *Epistemologia sporu w kontekście instytucji sędziowskiego zdania odrębnego* [Eng. *The Epistemology of Dispute in the Context of the Institution of the Judicial Dissenting Opinion*], in: M. Jabłoński, M. Paździora (eds.), *Przegląd Prawa i Administracji* [Eng. *Review of Law and Administration*], Vol. CII, Wrocław 2015, pp. 253–263; R. Pankiewicz, *Votum separatum w prawie kanonicznym i prawie polskim* [Eng. *The Dissenting Opinion in Canon Law and Polish Law*], "Kościół i Prawo" 2016/2, pp. 107–126; M. Wojciechowski, *Spory sędziowskie. Zdania odrębne w polskich sądach* [Eng. *Judicial Disputes: Dissenting Opinions in Polish Courts*], Gdańsk 2019.

the rationale that a member of the panel relied on when voting against the majority opinion and in favour of a dissenting resolution, also outlining this resolution.[6]

The institution of dissenting opinion is not universally endorsed. For this reason, the advantages and disadvantages of filing the judge's dissent from the court judgment are worth investigating. Consequently, the aim of this article is to establish if there is a rationale available to assess decisively whether it is the advantages or disadvantages for the judges, parties and, more broadly, for the functioning of justice that prevail. The ultimate objective of the study is to pinpoint the role that transparent justice has for a democratic society, including the transparency resulting from public disclosure of the reasons for dissent.

Among European countries, Belgium, France, Italy, Luxembourg, Malta, the Netherlands, and Austria are clearly averse to the solution. Other European states allow dissenting opinions, although this institution was introduced into their legal systems at various times and the detailed regulations of the issue are extremely diverse.[7] In the Polish legal system, the institution of dissenting opinion is applicable in ordinary courts, administrative courts, the Supreme Court, and the Constitutional Tribunal.[8] The right to file a dissenting opinion is also provided for in the Code of Canon Law.[9] As far as international tribunals are concerned, dissenting opinions are allowed in the European Court of Human Rights,[10] the International Court of Justice,[11] the African Court on Human and People's Rights,[12] and the Inter-American Court of Human Rights.[13] Nonetheless, the regulations on the Court of Justice of the European Union do not provide for the possibility to file dissent,[14] which is in order to safeguard the authority of this institution – still considered insufficiently established.[15]

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[6] J. Bratoszewski, *Zdanie*…, p. 1389.

[7] F. Rymarz, *Zdanie*…, pp. 162–166; R. Raffaelli, *Dissenting opinions in the Supreme Courts of the Member States* [no publication place available] 2012, pp. 17–30 and the literature cited therein; M. Wojciechowski, *Spory*…, pp. 48–52. See also Report on separate opinions of constitutional court adopted by the Venice Commission at its 117th Plenary Session, pp. 4–6 and the literature cited therein, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e, accessed on: 21 October 2022.

[8] The regulations on filing dissenting opinions are determined primarily by two procedural laws: the Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws [Dziennik Ustaw] of 2021, item 1805, hereinafter: 'k.p.c.') and the Act of 6 Juni 1997 – Code of Criminal Procedure (consolidated text: Journal of Laws [Dziennik Ustaw] of 2022, item 1375, hereinafter: 'k.p.k.'). Pursuant to Article 324(2) k.p.c.: 'The presiding judge shall collect the votes of the panel judges according to their seniority in office, and of the jurors according to their age, beginning with the youngest. The presiding judge shall vote the last. The rapporteur, if appointed, shall vote the first. Judgment shall be by a majority vote. A judge who dissents with the majority holding may file a dissenting opinion when signing the operative part of the judgment, and shall be obliged to justify it in writing before signing the reasons for judgment. On filing a dissenting opinion no reasons for judgment shall be read'. However, pursuant to Article 114(1) of k.p.k., when signing the judgment, a member of the panel may indicate their dissenting opinion, stating the part of the judgment and the direction in which the judgment is challenged.

[9] A dissenting opinion must not be disclosed to the parties, but must be forwarded to the appeal court. For a broader discussion, see: R. Pankiewicz, *Votum*…, pp. 108–111.

[10] Articles 45(2) and 49(2) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws [Dziennik Ustaw] of 1993, No. 61, item 284 as amended).

[11] Article 57 of the Statute of the International Court of Justice, https://www.icj-cij.org/statute, accessed on: 18 March 2023. See also R. Raffaelli, *Dissenting*…, pp. 31–32.

[12] Article 28.7 of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and People's Rights, https://www.refworld.org/docid/3f4b19c14.html, accessed on: 8 March 2022.

[13] Article 66(2) of the American Convention on Human Rights, https://treaties.un.org/doc/publication/unts/volume%201144/volume-1144-i-17955-english.pdf, accessed on: 18 March 2023.

[14] See: Article 36 of the Statute of the Court of Justice of the European Union, which does not mention a legal option to file a dissenting opinion, https://curia.europa.eu/jcms/upload/docs/application/pdf/2016–08/tra-doc-en-div-c-0000–2016–201606984–05_00.pdf, accessed on: 19 March 2022. See also: R. Raffaelli, *Dissenting*…, pp. 33–38.

[15] R. Raffaelli, *Dissenting*…, p. 11 and the literature cited therein.

2. The essence of dissent

From a logical point of view, a dissenting opinion may be filed only if a judgment is made by a collegial body, and when the dispute is so significant and the arguments on both sides so strong that it cannot be resolved in the course of investigation and mutual negotiating of the views held by the judges.[16] At the same time, the outvoted member of the panel deems it imperative to unequivocally mark their dissenting position in the form prescribed by procedural law.[17] A prerequisite for being able to file a dissenting opinion is voting against a particular ruling.[18] However, a vote against alone cannot qualify for filing a dissenting opinion.[19] At the same time, it is not always (unless the law provides otherwise) required that a judge who disagreed with the majority opinion, and was therefore 'outvoted' in the judgment, file a dissenting opinion.[20] It seems that the use of this instrument is extremely rare,[21] and concerns a stark, fundamental disparity of opinions (e.g., as to whether to find a person guilty or acquit; as to whether to accept a motion, or to dismiss it altogether; as to whether to declare a particular provision consistent or inconsistent with a higher-order act). Occasionally, dissent may also serve to satisfy the offended ambition of the outvoted person(s).[22]

As regards the reasons for the judgment, in principle, the author of the reasons is not overtly stated, since the document is a collective act of the court. In contrast, it is a characteristic feature of a dissenting opinion that it unambiguously identifies its author, both as regards expressing dissent and drafting the reasons.[23] Consequently, one may argue that dissent has a highly individualized character.[24] The reasons for a dissenting opinion may in practice take the form of a shorter or longer statement, but the right to dissent may also be executed by merely joining the dissenting opinion presented by another dissenting judge. It is difficult to ignore the fact that the author of a dissenting opinion enjoys much greater freedom of expression – associated with much less responsibility[25] – than the author of the reasons for the judgment. The reasons for the judgment provide evidence of a decision-making compromise, weighing of pros and cons, reaching a golden mean, while the reasons for a dissenting opinion show that a compromise was simply and obviously unreachable. Hence, dissent is used to outline

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16 A. Bojańczyk, *Zdanie*…, p. 4.

17 M. Grochowski, *Uzasadnienie zdania odrębnego* [Eng. *Justifying a Dissenting Opinion*], in: I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia decyzji stosowania prawa* [Eng. *Justifying Decisions in Applying Law*], Warszawa 2015, p. 139.

18 It should be noted, however, that from the theoretical point of view, a dissenting opinion may challenge both the judgment and its justification (reasons). In the former case, dissent challenges the essence of the judgment, while in the latter, it presents an alternative path of reasoning leading to the same conclusion. In the common law tradition, an objection to the judgment is referred to as a *dissenting opinion*, while an objection to the reasons for judgment is referred to as a *concurring opinion*. See also M. Grochowski, *Uzasadnienie*…, p. 141.

19 J. Bratoszewski, *Zdanie*…, pp. 42–46.

20 M. Grochowski, *Uzasadnienie*…, p. 146.

21 Following the Polish legal practice, one can observe that in the judicature of the Polish ordinary courts, dissenting opinions are extremely rare. They are noticeably more frequent in the Supreme Court, and probably most frequent in the Constitutional Tribunal.

22 J. Bratoszewski, *Zdanie*…, pp. 1392–1393; J. Gujda, *Zdanie*…, p. 144.

23 I. Rzucidło-Grochowska, *„Część historyczna" uzasadnienia orzeczenia sądowego* [*Eng. The 'Historical part' of the Justification for the Judgment*], in: I. Rzucidło-Grochowska, M. Grochowski (eds.), *Uzasadnienia*…, p. 196.

24 For example, see dissenting opinions by D. Kala, Z. Korzeniowski, W. Kozielewicz, P. Mirek, Z. Myszka, K. Staryk challenging the resolution of the Supreme Court of 23 January 2020 (BSA I-4110–1/20), LEX No. 2784794; dissenting opinions by B. Janiszewska, J. Widło challenging the judgment of the Supreme Court of 2 September 2021 (III CZP 11/21).

25 Z. Tobor, *Spór*…, p. 227.

the reasons that preclude agreement. The author of a dissenting opinion can afford a more personal tone (though not always emotional), much more direct criticism of errors in the interpretation or application of the law, unconventional means of expression, examples, references, etc. It is worth advocating for the stance that the reasons for a dissenting opinion should not boil down to simplistic criticism of the majority position, but should rather contain an outline of the dissenting judge's position on the contested problem.[26] Dissent should not be an expression of a kind of vanity, arrogance or a sense of infallibility, but should expound a rather unemotional and rational motivation. Ultimately, a dissenting opinion should not be used to prove who the better judge is, but which solution would be more advantageous.

To wrap up this brief outline of the institution of dissenting opinion, it must be clarified that dissent does not constitute an act of applying the law; in particular, it never represents a binding decision regarding the rights and obligations of a particular legal subject.[27] Despite this significant limitation, dissent plays an extremely significant role in a democratic society both at an individual level – in relation to the member of the panel filing dissent, and in relation to the parties to the proceedings – as well in a broader social perspective. This is because, as rightly pointed out by researchers, dissent serves to achieve a variety of objectives related primarily to the law, while the problematic aspects of dissent relate to the fact that these objectives may conflict with one another to a greater or lesser extent.[28]

3. The advantages of dissent for the outvoted judge

Legal researchers were the first to recognize the vital importance of dissenting opinions for the outvoted judges. They argue that dissent addresses the fundamental attributes of a judicial profession,[29] namely the judge's impartiality[30] and independence.[31] However, it cannot be inferred from the above that judicial independence and impartiality is determined by the power to file a dissenting opinion.[32]

Certainly, the institution of *votum separatum* is to a large extent judge-centred[33] since dissent allows them to express their convictions and ambitions, to manifest a personal view

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[26] M. Grochowski, *Uzasadnienie voti…*, p. 52.

[27] M. Grochowski, *Uzasadnienie…*, p. 142.

[28] Z. Tobor, *Spór…*, p. 215.

[29] R. Pankiewicz, *Votum…*, p. 121; D. Dudek, *Votum…*, p. 24.

[30] Judicial impartiality manifests itself through their unprejudiced attitude that makes them act as a neutral arbiter in particular proceedings, not bound by personal interest, involvement or any attitude that favours or disqualifies any party. The typical means of guaranteeing the impartiality of a judge are the institutions of disqualification by law (*judex inhabilis*) or recusal on request (*judex suspectus*).

[31] Judicial independence stands for freedom from any influence on the judge's decisions in the case under consideration, which might be wielded by external factors in the form of request, threat, suggestion, corruption etc. The judge's decision can only be influenced by the applicable law, motions, evidence, and arguments presented by the litigants, then freely and fairly evaluated by the judge according to their conscience. The subject literature rightly reports that the most significant threat to judicial independence does not come from political coercion or corruption. A more serious threat is judges seeking to subjugate their rulings to a formula that guarantees the ultimate stability of their decision-making since this is an important factor for career advancement opportunities. Equally detrimental are attempts to excessively delegate judicial duties to assistants, or a tendency to rely too much on previously issued rulings. D. Dudek, *Votum…*, p. 26.

[32] [32] M. Szerer, *Zdanie odrębne w świetle właściwego myślenia prawniczego* [Eng. *The Dissenting Opinion in the Light of Appropriate Legal Thought*], "Nowe Prawo" 1964/9, p. 841.

[33] There are voices in subject literature that go as far as to claim that dissenting opinions only serve to advance the interests of the judge (see: F. Prusak, Z. Najgebauer, *Ujawnienie…*, p. 406). Nevertheless, this view has attracted extensive criticism, see: M. Szerer, *Votum…*, pp. 127–131; A. Bojańczyk, *Zdanie…*, p. 6–8.

of the case, and to oppose the views of the majority on a particular decision or its justification.[34] Dissent allows the judge to maintain intellectual honesty and integrity, to avoid taking moral, and sometimes also legal responsibility for a ruling that they believe is wrong (*dixit et salvi animam meam*).[35] Filing a dissenting opinion proves personal courage and marks a 'rejection of the temptation of judicial conformity, opportunism or even servility, from which lawyers are not entirely free either'.[36] Finally, it is a manifestation of judicial pronouncement anchored in discretion, in accord with one's conscience; a manifestation of the complete autonomy of thought and decision-making.[37] A dissenting opinion makes a particular adjudicator more 'visible' because they no longer stand behind the majority, but disclose their position[38] and manifest their independence from the other panel members.

Dissenting opinions show not only that the ruling was not unanimous[39] but, more importantly, they show how the correct – in the legal sense – outcome may be achieved.[40] If so, dissent is in fact directed to accomplish much more important tasks than simply making the outvoted judge feel better.

4. Parties to the proceedings and the judge's dissenting opinion

The systematic rise – over the centuries – of the admissibility of dissenting opinions, and as regards the Polish law, above all, the expansion of their availability to parties other than the judicial panels, shows the ultimate recognition of the fact that dissenting opinions have a vital role to play not only from the point of view of the judges expressing their beliefs, but also from a broader point of view. Dissent has thus gained prominence in the public sphere.[41]

It is worthwhile to start by pointing out that filing a dissenting opinion is a crucial factor in terms of psychological support for the losing party since it shows that their arguments were comprehensively considered, and that they had a chance of influencing the case.[42] Clearly, a dissenting opinion has no direct, ultimate effect on the legal position of the parties. However, it unveils to the parties the significant doubts and disagreements among the members of the judicial panel that emerged in making the ruling.

A dissenting opinion accumulates arguments against the position of the majority in the panel to justify an alternative judgment or alternative reasons for a particular judgment. The juxtaposition of the reasons for judgment with the reasons for a dissenting opinion may therefore be of fundamental importance for deciding whether to file an appeal, as well as for the content of objections raised in the appeal. In particular, it is not prohibited to refer to the reasoning outlined in a dissenting opinion when constructing the appeal.[43]

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[34] W.J. Brennan Jr., *In Defence of Dissents*, "The Hastings Law Journal" 1985, Vol. 37, pp. 428–430; Z. Tobor, *Spór*…, pp. 219–220.

[35] F. Rymarz, *Zdanie*…, p. 158; A. Bojańczyk, *Zdanie*…, p. 8.

[36] D. Dudek, *Votum*…, p. 35.

[37] J. Bratoszewski, *Zdanie*…, p. 1390.

[38] J. Gujda, *Zdanie*…, p. 143.

[39] Resolution of the Supreme Court of 27 January 2021 (II DIZ 1/21), LEX No. 3119804.

[40] M. Wojciechowski, *Integralność*…, p. 121.

[41] In addition to the discussed aspects of dissenting opinions, it is also worth mentioning the opinions on the political motivation of dissenting opinions challenging the resolution of the Supreme Court of 23 January 2020 (BSA I-4110–1/20), LEX No. 2784794.

[42] Z. Tobor, *Spór*…, p. 216.

[43] Z. Kubec, *Votum*…, p. 200; H. Kempisty, *Votum*…, p. 277; J. Gujda, *Zdanie*…, pp. 142, 147–148; Z. Tobor, *Spór*…, p. 222; A. Bojańczyk, *Zdanie*…, p. 7; M. Grochowski, *Uzasadnienie voti*…, p. 54; A. Bielska-Brodziak, Z. Tobor, *Zdania odrębne w orzecznictwie podatkowym* [Eng. *Dissenting Opinions in Tax Law Judicature*], "Przegląd Podatkowy" 2013/9, pp. 9–10.

5. Dissent as a crucial factor in shaping social perceptions of justice

Pointing out the advantages of a dissenting opinion in the context of the comfort of the judge and the party dissatisfied with the decision requires that we consider whether they are inferior to the repeatedly presented claims of the negative impact of dissent on how the functioning of the administration of justice. For it cannot be ignored that the disclosure of the lack of decision-making unanimity and the motivation behind dissent undermines the authority, prestige and legitimacy of the court and the judicial decisions. After all, a final, binding decision should be respected, regardless of the underlying motives. In contrast, the more valid arguments are presented in the reasons for a dissenting opinion, the more the perception of infallibility of the judiciary suffers.[44] The judgment seems as if less unambiguous, less definitive, like an invitation to a discussion rather than an exhaustive decision in a particular case. In fact, dissent creates confusion about the judgment issued, and it undermines the certainty as regards the future rulings in the same subject area.[45] And this seems in stark contrast with the view of Justice Louis Dembitz Brandeis that 'stare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right'.[46]

It is hard to ignore the argument that the very institution of dissenting opinion threatens the unity, solidarity, and collegiality of the panel, since it may encourage judges to abandon cooperation and mutual persuasion, to stiffen their position and to refuse to seek a common view. For in practice, it either discourages minority judges from discussion, and hence, the decision-making process becomes less collegial,[47] or it prompts some of them to turn the process into a performance in which they gain publicity by filing dissenting opinions.[48]

The filing of a dissenting opinion leads to the disclosure of individual judges' views, which can threaten judicial independence, especially in the context of independence from external pressures, or the prospects of a judge being elected for another term. If complete secrecy is maintained, a member of the panel need not fear potential professional consequences because of their views (e.g., denied promotion, demands for political declarations).[49]

Finally, it cannot be overlooked that there are several practical reasons against the institution of dissenting opinion. In particular, this is the fact that judges use their time to prepare lengthy reasons for dissenting opinions at the expense of hearing other cases; then the publication of those reasons – especially if they have to be translated into all the official languages of the court concerned – is time-consuming and costly.[50]

The discussion above might be read as an indication that the conclusion to this article boils down to a postulate to rationalize the judiciary procedures by removing the right of adjudicators to file and justify their dissenting opinions. Yet, it is quite the reverse that we want to advocate for here. This is because it turns out that the institution of dissenting opinion safeguards values that are critical to a democratic society.

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[44] R. Raffaelli, *Dissenting*…, p. 10; Z. Tobor, *Spór*…, p. 216 and the literature cited therein.

[45] J. Wróblewski, *Votum*…, p. 16; Z. Tobor, *Spór*…, pp. 217–218 and the literature cited therein.

[46] Justice L. Brandeis, Dissent with the 11 April 1932 decision in *Burnet v Coronado Oil & Gas Co*., https://caselaw.findlaw.com/us-supreme-court/285/393.html, accessed on: 12 March 2022.

[47] Z. Tobor, *Spór*…, p. 217 and the literature cited therein.

[48] R. Raffaelli, *Dissenting*…, p. 10; Z. Tobor, *Spór*…, p. 218.

[49] Z. Tobor, *Spór*…, pp. 218–219.

[50] R. Raffaelli, *Dissenting*…, pp. 11–12.

6. The significance of dissent for a democratic society

A democratic society seeks justification for the prestige of justice not in its authoritarian status, not in the nimbus of unanimity (perhaps illusory, after all), not in mysterious rituals or secrecy,[51] but in the quality of jurisprudence based on knowledge and power of argument.[52] The reasons for a dissenting opinion demonstrate that in the judicial process various solutions were considered, discussed, and ultimately some of these were rejected.[53] This is how the discourse of legal practice converges with the essence of a democratic society.

The prospect of a dissenting opinion being filed indirectly enhances the level of jurisprudence, both in the context of the judgment against which it may be filed, and in the context of the future rulings in the same subject area.[54] The author of the reasons for the majority judgment – in view of the criticism expounded in the reasons for a dissenting opinion, which consistently and inexorably underlines all the inaccuracies and pitfalls in the majority position – pursues noticeably stricter legal requirements to make the reasons more convincing and better motivated. After all, 'there is nothing better than an impressive dissent to lead the author of the majority opinion to refine and clarify her initial circulation' (Justice Ruth Bader Ginsburg).[55] In addition, dissent features constructive criticism of the judgment from a person who has no particular interest in a favourable ruling.[56] Without being constrained by the requirement to conform to an agreed-upon majority position (the compromise reached), a dissenting opinion can become more explicit, thus more persuasive, than the reasons for the judgment. Consequently, the views expressed in a dissenting opinion may lay the foundation for the judicial decision and for building a line of argument in other judicial decisions, also leading to an abandonment of the line of case law imposed by the judgment with regard to which dissent was filed.[57]

The already mentioned spectrum of influence of dissent needs an even broader take, as in its essence, it constitutes an instrument of dialogue in the legal community. In this context, it is worth pointing out that the argumentation presented in dissenting opinions often provides an impulse for analysis and research in the field literature.[58] Sometimes, dissent can even become a clue for the legislator as to the possibility of a distinct interpretation of the law, and consequently, for its improvement or even radical change.[59]

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[51] The disclosure of the lack of unanimity is a break from the secrecy of decision-making; in typical settings, the only communication from the panel should be the judgment and the reasons composed collectively by all the members of the panel. For a broader discussion, see: Z. Kubec, *Votum*…, p. 198; M. Lipczyńska, *Votum*…, p. 218; M. Grochowski, *Uzasadnienie voti*…, p. 50.

[52] Z. Tobor, *Spór*…, p. 216; J. Gujda, *Zdanie*…, pp. 142–143.

[53] B. Zdziennicki, *Zdania*…, p. 136; R. Raffaelli, *Dissenting*…, pp. 13–14; Z. Tobor, *Spór*…, p. 216.

[54] [54] F. Prusak, *Glosa*…, pp. 696–697.

[55] R. Bader Ginsburg, *The Role of Dissenting Opinions*, "Minnesota Law Review" 2010/1, p. 3.

[56] J. Gujda, *Zdanie*…, pp. 142–148.

[57] W.J. Brennan Jr., *In Defence*..., p. 431, he even argued that '*the dissents... seek to sow seeds for future harvest*'. See also Z. Tobor, *Spór*…, p. 221.

[58] J. Gujda, *Zdanie*…, pp. 142.

[59] For a broader discussion, see e.g. B. Zdziennicki, *Zdania*…, p. 136; A. Bielska-Brodziak, Z. Tobor, *Zdania*…, p. 11; Z. Tobor, *Spór*…, pp. 220–221; M. Grochowski, *Uzasadnienie voti*…, pp. 56–57. See also, for example, judgment of the Supreme Administrative Court of 6 May 2010 (I FSK 760/09, LEX No. 594207), based on argumentation presented in judge B. Gruszczyński's dissenting opinion; judgment of the Regional Administrative Court in Opole of 19 January 2012 (I SA/Ol 650/11, LEX No. 1109638), and judgment of the Supreme Administrative Court of 28 June 2011 (II FSK 311/10, LEX No. 1083100), based on argumentation presented in judge K. Nowak's dissenting opinion; judgment of the Supreme Administrative Court of 21 January 2020 (II FSK 596/18, LEX No. 3010479), based on argumentation presented in judge K. Winiarski's dissenting opinion.

One cannot forget that there is yet another level of judicial dialogue inspired by dissent. Since a court judgment must be an act of applying the law – an unbiased drawing of legal consequences from the rules of law applicable to particular facts – the filing of a dissenting opinion may be regarded as evidence that there is an error in reasoning either in making the decision, or in formulating a dissenting opinion. Thus, dissent constitutes a *sui generis* 'alert that there may be a defect in the judgment',[60] and it encourages a party dissatisfied with it to file an appeal. At the same time, it significantly facilitates appellate and external review of the judgment, if only because a dissenting opinion may be the only source of information about certain defects in the judgment.[61] Adopting the optics and the particular axiology of a democratic society allows one to see the advantages of detecting a flawed ruling and removing it from circulation before it serves as a basis for structuring social relations.

Dissenting opinions reveal that a road to the judgment can be a bumpy one, and show that the position taken by the judges is not fully – or even not at all – convincing, even to all the members of the adjudicating panel. Of course, the mere prospect of a dissenting opinion being filed can boost efforts to reach a common position, often keeping the majority from imposing its view; on the other hand, it makes it more difficult to reach agreement and unanimity. If, however, the majority manages to impose their views (more than half of the panel) on the minority (less than half of the panel), dissent becomes the only means of unveiling the 'relativity' of the court's decision: it shows that had the proportions of judges arranged differently, the decision might have been entirely different. For this reason, the institution of dissenting opinion is critical with respect to those judgments that are final and not subject to review. It represents the only procedural moment when alternative resolutions can be presented, when it can be argued that no unambiguous wording of the law in a given area is available, and therefore that the legislator has not conclusively regulated the given issue. This is why in such contexts the judges follow the practice described as 'judicial activism': they create the law instead of applying it.

7. Conclusions

The impact of the institution of dissenting opinion has been growing for many years now, gaining recognition and significance in numerous legislative frameworks. Attempts to balance the arguments against disclosing that a judicial decision was not reached unanimously, along with the reasons for objecting to the majority position, against the rationale for justifying a breach of the confidentiality of proceedings, have their outcome in a growing number of filed and justified minority report cases. For it appears that a democratic society no longer believes unreservedly in the infallibility of judges and courts, but attaches critical significance to the transparency of their reasoning. Societies demand that courts construct their authority on overt reasoning behind their decisions, on open-mindedness, and on the ability to turn back from a mistakenly taken path. A well-crafted dissenting opinion challenges the reasons for judgment, and it testifies to the active dialogue between the majority and the outvoted judges. It proves the judge's independence and their concern for the legal appropriateness of the judgment. It thus becomes an essential component of justice in its broadest sense as a component of legal culture.

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[60] M. Szerer, *Funkcja zdania odrębnego* [Eng. *The Function of Dissenting Opinion*], "Państwo i Prawo" 1968/2, p. 286; E. Skrętowicz, *Glosa*…, p. 274; F. Rosengarten, *Zdanie odrębne w procesie karnym* [Eng. *The Dissenting Opinion in Penal Proceedings*], "Nowe Prawo" 1984/1, p. 59; M. Grochowski, *Uzasadnienie*…, p. 145.

[61] M. Szerer, *Votum*…, p. 130; J. Bratoszewski, *Zdanie*…, pp. 57–60; M. Grochowski, *Uzasadnienie voti*…, p. 55.

Separate and Dissenting Judicial Opinions and Their Significance for a Democratic Society. Reflections Against the Background of Polish Law

Abstract: In most legal systems, the administration of justice in complex and difficult cases is, entrusted to panels composed of multiple judges. In practice, rarely does it happen that this designated group of judges is required to reach a unanimous decision. The subject under scrutiny in the article is the issue of the possibility and significance of disclosing the fact that the judgment was not reached unanimously, along with the rationale that the judge(s) pursued in opposing the majority position. The analysis of this issue requires reaching not only for the legal dogmatic method, but also the legal comparative and axiological methods.
The presented research leads to the conclusion that legislators (although not in all countries and not in all international organizations) are increasingly open to allow for the disclosure to the parties and the public of the fact that not all judges voted for a particular decision, along with the reasons for the dissenting position. Despite several objections to the institution of dissenting opinion (*votum separatum*) connected with undermining the authority of the court and the judgment issued, it turns out that democratic society, which values transparency and the power of substantive arguments, approves of this institution. Dissenting opinion safeguards the judge's right to express their view, as well as the right of the parties and the public to know the reasons for an alternative solution, including their creative use for the benefit of the judiciary and legal science. Consequently, one can claim that dissenting opinions and the reasons for them constitute a crucial factor in shaping the perceptions of justice.

Keywords: dissenting opinion, democratic society, administration of justice, authority of judicial decisions, justification of the acts of applying the law

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