Comparative Legilinguistics
vol. 2025/64
DOI: https://doi.org/10.14746/cl.2025.64.5

Etiamsi omnes, ego non: an exploratory study of argument types in separate opinions [1]

Emanuele Brambilla, Professor

Department of Legal, Language, Interpreting and Translation Studies (IUSLIT)
University of Trieste, Italy
emanuele.brambilla@units.it

ORCID: https://orcid.org/0000-0002-1547-7341

Abstract: This paper explores the nature of argument types in separate opinions, both concurring and dissenting, by analysing a corpus of ten judgments issued in English by the European Court of Human Rights (ECtHR) between 2020 and 2024. The qualitative analysis primarily draws on the pragma-dialectical categorisation of argument schemes (van Eemeren and Garssen 2019) to investigate whether the separate opinions at issue reveal a predilection by ECtHR judges for symptomatic, comparison or causal arguments. The results suggest that the three argument types are invariably used, in that they enable ECtHR judges to shape the complex argumentative defence of their standpoints. Symptomatic arguments mostly occur as arguments from authority; comparison arguments are mainly harnessed to

[1] This study contributes to the national research programme *Rights and Prejudice: Linguistic and Legal Implications of Gendered Discourses in Judicial Spaces [GenDJus]*, financed by the Italian Ministry of University and Research for 2023-2025 (No P2022FNH9B).

establish analogies with previous judgments; and pragmatic arguments are used primarily to warn against the detrimental legal consequences of the majority decisions. Although the latter occur less frequently, the three argument types all appear functional to enhancing the acceptability of contra-argumentation in separate opinions.

Keywords: argument types; contra-argumentation; ECtHR; Pragma-dialectics; separate opinions.

Etiamsi omnes, ego non: uno studio esplorativo delle tipologie di argomentazione nelle opinioni separate

Abstract: Nel presente studio viene esplorata la natura delle tipologie di argomentazione nelle opinioni separate, sia concorrenti sia dissenzienti, attraverso l'analisi di dieci sentenze emesse in inglese dalla Corte europea per i diritti dell'uomo tra il 2020 e il 2024. L'analisi qualitativa attinge prevalentemente alla categorizzazione pragma-dialettica degli schemi argomentativi (van Eemeren e Garssen 2019) per scoprire se le opinioni separate in questione rivelino una predilezione da parte dei giudici della Corte per l'argomentazione sintomatica, comparativa o causale. I risultati indicano che tutti e tre i tipi di argomentazione vengono ampiamente usati, poiché permettono ai giudici della Corte di plasmare la complessa difesa argomentativa delle proprie opinioni. L'argomentazione sintomatica si presenta prevalentemente sotto forma di argomentazione di autorità; l'argomentazione comparativa viene sfruttata soprattutto per istituire analogie con sentenze precedenti; e l'argomentazione pragmatica viene impiegata principalmente per sottolineare le deleterie conseguenze legali delle decisioni della maggioranza. Anche se quest'ultima tipologia si osserva meno di frequente, tutti e tre i tipi di argomentazione appaiono funzionali ad aumentare l'accettabilità della contro-argomentazione nelle opinioni separate.

Parole chiave: tipi di argomentazione; contro-argomentazione; Corte europea per i diritti dell'uomo; Pragma-dialettica; opinioni separate.

1. Introduction

The Latin phrase *Etiamsi omnes, ego non* is an abbreviated form of a passage drawn from the Gospel of Matthew (26,33) that can be translated as "Even if all others, I will never". These are the words whereby Peter, on the Mount of Olives, assured Jesus that he would never fall away or disown him; the expression echoed throughout history, especially when it was used in reference to brave political characters who opposed totalitarian regimes, such as Philipp von Boeselager and Joachim Fest in Nazi Germany. Although this famous quote might look out of place or irrelevant in a journal dedicated to legal linguistics and discourse, it captures the essence of the legal text type whereby judges strive to maintain their own integrity and "voice their disagreement with a majority opinion" (Goźdź-Roszkowski 2020: 382), i.e. separate opinions.

> At its simplest, separate opinion, also referred to as *votum separatum* in the civil law tradition, can be understood as a statement made by a judge which differs from the position taken by the majority. (Goźdź-Roszkowski 2020: 383)

Separate opinions can be either concurring with or dissenting from the judgment issued by the court at issue. The distinction boils down to "the common law dichotomy of disagreeing with the ruling (dissenting opinion) and disagreeing with the justification (concurring opinion)" (Goźdź-Roszkowski 2020: 384).

Although "there has been surprisingly little research into separate opinions in the legal linguistics literature" (Goźdź-Roszkowski 2020: 383), the study of their discursive aspects has gained momentum over the last few years. For instance, McKeown (2021) investigated self-focused and other-focused reflexive metadiscourse in both majority and dissent opinions of the U.S. Supreme Court through a corpus-based approach. Similarly, Boginskaya (2023) examined metadiscourse in a corpus of separate opinions produced by judges of the Russian Constitutional Court, highlighting an extensive use of boosters to express disagreement with the majority opinion. Goźdź-Roszkowski (2020) also proposed a corpus-based analysis of

separate opinions, adopting a contrastive perspective. By examining data drawn from the Constitutional Tribunal judgments in Poland and the United States Supreme Court opinions, he revealed the highly formulaic expressions used by judges to signal their disagreement and the predictable lexico-grammatical patterns that characterise judicial justification. A corpus-based approach also underlies Nikitina's (2025) study, which additionally drew on Critical Genre Analysis, Discourse Analysis and pragmatics to scrutinise the discursive and rhetorical aspects of human rights discourse, including a series of separate opinions issued at the European Court of Human Rights (ECtHR) between 2013 and 2023. Over the past few years, therefore, these studies have contributed significantly to shedding light on "one of the most intriguing and least researched types of judicial expression related to the process of making and justifying judicial decisions" (Goźdź-Roszkowski 2020: 381).

The inherently argumentative nature of legal justification (Goźdź-Roszkowski 2024: 19) has been the object of various studies including, for example, Feteris's (1999) and Walton's (2002) seminal investigations into legal argumentation, research into argument types and fallacies (Bustamante and Dahlman 2015) and Mazzi's (e.g. 2018; 2022) case studies of argumentation in Irish judicial discourse. As these studies suggest, the study of legal argumentation is thriving, because "the purpose of any legal justification is to define the reasons and arguments for reaching a particular decision" (Goźdź-Roszkowski 2018: 61). However, despite the strides made recently in fostering the description and understanding of the discursive features of separate opinions, the *argumentative* nature of these texts remains largely unexplored, with the exceptions of the pragma-dialectical studies carried out by Plug (2020) and Goźdź-Roszkowski (2024).

The former "made a first attempt to characterise separate opinions as an argumentative activity type in the domain of legal communication" (Plug 2020: 277), outlining – chiefly from an argumentation theoretical perspective – their differences with judicial decisions. As to the latter, Goźdź-Roszkowski harnessed a mixed corpus linguistics and pragma-dialectical method to explore the argumentative role of evaluative language in a corpus of judicial opinions from the U.S. Supreme Court and Poland's Constitutional

Tribunal. In this comprehensive study of argumentation in judicial discourse, which offers theoretical and empirical insights alike, the author did not overlook separate opinions (Goźdź-Roszkowski 2024: 12). Indeed, the uniqueness of separate opinions as an argumentative activity type cannot be overlooked, as they are the textual instrument whereby judges voice their dissent and express their overarching standpoint, i.e. "I do not agree with the majority", which is defended by means of a series of topic-related arguments.

As the argument strategies whereby judges formulate their disagreement in judicial opinions have yet to be fully explored (Goźdź-Roszkowski 2020: 399), the present paper turns to Pragma-dialectics to further illustrate the argumentative nature of separate opinions. Building on a corpus of ten judgments issued by the European Court of Human Rights (ECtHR), it aims at investigating qualitatively the *argument types* or "categories of argument schemes" (van Eemeren and Garssen 2019: 311) that are predominantly present in the separate opinions annexed to the judgments. In a nutshell, the objective of the study is to enquire into the discursive and argumentative ways whereby judges claim "Even if all others, I will never".

2. Corpus and methodology

2.1 Corpus selection and criteria

The analysis described in the following pages is part of the broader *GenDJus* project[2], which examines the way judges express their decisions about sexual, reproductive and parental rights. It builds on a corpus of ten judgments issued in English by the ECtHR between 2020 and 2024. The texts were retrieved from the *GenDJus* corpus[3] by limiting the thematic scope to the judgments concerning sexual rights and by selecting only those containing separate opinions, which at the

[2] More information on the *GenDJus* project can be found at https://gendjus.it/ (last accessed 23rd April 2025).

[3] The ECtHR judgments can be downloaded from the *GenDJus* corpus at https://gendjus.it/case-law (last accessed 23rd April 2025).

ECtHR are "written by the dissenting or concurring judges themselves" (Peruzzo 2019: 36). They "are published at the end of the judgment, after the Closing section" (Peruzzo 2019: 68), "with concurring opinions generally preceding dissenting opinions" (Peruzzo 2019: 69). Table 1 provides an overview of the ten judgments, showing the names of the cases, the days on which the judgments were issued and the presence of separate opinions, be they concurring or dissenting.

Judgment	**Date**	**Separate opinions**
[1] W.W. v. Poland	11 July 2024	- Dissenting opinion of Judge Wojtyczek
[2] Fedotova and others v. Russia	17 January 2023	- Partly dissenting opinion of Judge Pavli, joined by Judge Motoc - Dissenting opinion of Judge Wojtyczek - Dissenting opinion of Judge Poláčková - Dissenting opinion of Judge Lobov
[3] Przybyszewska and others v. Poland	12 December 2023	- Dissenting opinion of Judge Wojtyczek
[4] Semenya v. Switzerland	11 July 2023	- Concurring opinion of Judge Pavli - Partly concurring, partly dissenting opinion of Judge Serghides - Joint dissenting opinion of Judges Grozev, Roosma and Ktistakis
[5] Valaitis v. Lithuania	17 January 2023	- Dissenting opinion of Judge Krenc
[6] J.I. v. Croatia	8 September 2022	- Partly dissenting opinion of Judge Wojtyczek - Partly dissenting opinion of Judge Derenčinović
[7] A.M. and others v. Russia	6 July 2021	- Joint concurring opinion of Judges Ravarani and Elósegui - Concurring opinion of Judge Elósegui

[8] Association Accept and Others v. Romania	1 June 2021	- Partly dissenting opinion of Judges Grozev and Harutyunyan
[9] X v. Poland	16 September 2021	- Dissenting opinion of Judge Wojtyczek
[10] S.M. v. Croatia	25 June 2020	- Concurring opinion of Judge Turković - Joint concurring opinion of Judges O'Leary and Ravarani - Concurring opinion of Judge Pastor Vilanova - Concurring opinion of Judge Serghides

Table 1. Corpus.

The ten cases and the respective judgments all broadly concern sexual rights, but they all present their own thematic and legal specificities. Judgment [1] revolved around the refusal to allow the applicant, a transgender prisoner, to continue hormone therapy in prison. In [2], the ECtHR held that Russia had breached its obligation to secure the applicants' right to respect for their private and family life under Article 8 of the European Convention on Human Rights by failing to provide any form of legal recognition and protection for same-sex couples. Similarly, [3] saw five Polish same-sex couples complaining of a lack of any form of legal recognition or protection for their respective relationships. Case [4] stemmed from the application filed by international-level athlete Caster Semenya, who could no longer take part in international competitions after refusing to undergo hormone treatment to decrease her natural testosterone level, as provided by a set of international regulations. [5] saw a Lithuanian citizen claiming that his government failed to take measures to protect homosexual individuals from hate speech. The applicant in case [6] outlined the inadequacy of the Croatian authorities' response to her allegations of serious threats by her father, who had been convicted for multiple acts of rape and incest perpetrated against her. [7] "concerns the restriction of the applicant's parental rights in respect of her children and her being deprived of contact with them" (page 1 of the judgment). The application in [8] concerned the Romanian government's alleged failure

to protect the applicants from homophobic verbal abuse and threats, to conduct an effective investigation and to prevent the consequences of these incidents on the applicants' right to freedom of peaceful assembly. In [9], the applicant alleged that she had been discriminated against on the basis of her sexual orientation in proceedings for full parental rights and custody rights over her child, while case [10] originated after the application filed by a Croatian national, who alleged "that the domestic authorities failed to apply the relevant criminal-law mechanisms concerning her allegations of human trafficking and/or exploitation of prostitution" (page 2 of the judgment).

2.2 Analytical framework

From an argumentative point of view, separate opinions can be viewed as discursive instances of "contra-argumentation" (van Eemeren et al. 1996: 4). Given that they "express the view of single judges rather than the ECtHR and are drafted individually rather than by a panel of judges following a fixed structure, […] the tone is often much more personal than in the majority opinions" (Peruzzo 2019: 69); hence, the "stylistic idiosyncrasies of individual judges" (Goźdź-Roszkowski 2020: 389) might come to the fore during linguistic analyses. Similarly, argumentative idiosyncrasies might be observed in the present study, though its purpose is to uncover generalised or recurring recourses to given types of arguments.

The qualitative analysis primarily draws on the pragma-dialectical categorisation of argument schemes (van Eemeren and Garssen 2019) to investigate whether the separate opinions at issue reveal a predilection by ECtHR judges for *symptomatic*, *comparison* or *causal* arguments. These three main categories of arguments distinguished in Pragma-dialectics respectively harness a sign or symptom, a similarity and a causal or consequential relation to enhance the acceptability of a standpoint (van Eemeren and Garssen 2019: 311).

As Plug (2020: 273) maintains, analysing argumentation in separate opinions – as in any legal justification – starts from acknowledging that judges choose what theme to question, how to

question it and (to a lesser extent in the context of separate opinions, in that the majority is the target of most criticism), whom to question. In pragma-dialectical terms, the ways in which judges justify their standpoints can be analysed from the perspective of *strategic manoeuvring* (van Eemeren 2010: 93). The concept of strategic manoeuvring in the judicial context is explained by Goźdź-Roszkowski (2024: 168) as "the overall strategy adopted by judges to ensure that their argumentation is rhetorically effective and is accepted as sound". As the three aspects of strategic manoeuvring, i.e. topical potential, audience demand and presentational devices (van Eemeren 2010: 93), are inseparable, the present analysis will also not eschew – as in Goźdź-Roszkowski (2020; 2024) – relevant comments on lexical and phraseological items that determine the discursive implementation of argument schemes.

3. Discursive and argumentative features in the corpus of separate opinions

The pragma-dialectical analysis of the separate opinions included in the corpus reveals, first of all, the presence of "the formulaic performative expression routinely used to indicate a dissenting opinion (*I respectfully dissent*)" (Goźdź-Roszkowski 2024: 46). Other similar phraseological items aiming at expressing dissent include the following:

> (1) *I respectfully disagree* with the view that Article 8 has been violated in the instant case. [2]
>
> (2) *I am, very much to my regret, unable to agree* with the judgment's reasoning and conclusion to the effect that there has been no violation of Article 13 of the Convention in the present case. [5]

The verbal and adverbial expressions in examples (1) and (2) seem to serve the purpose of discursively mitigating the pragmatic force of dissent, as do the adjective, adverb and verb phrases in (3), (4) and (5), which can be viewed as hedges.

(3) *In my humble submission*, the Court has underestimated the complaint under Article 3 of the Convention by finding it manifestly ill-founded. [4]

(4) Lastly, I am unable to join my *esteemed* colleagues in seeing "no grounds to depart from the (…) assessment by the Committee of Ministers". [5]

(5) However, I voted against points 3 and 6 of the operative provisions, disagreeing with my *eminent* colleagues in the majority. […] *I would argue* that the Article 3 complaint was admissible. […] *I would also argue* that the Court ought to have examined the Article 8 complaint separately. [4]

The lexical and phraseological items highlighted in the examples above serve to minimise the pragmatic force of the rhetorical move that is inherent in separate (and, especially, dissenting) opinions. Indeed, irrespective of the specific presentational devices used (which also include *With all due respect*), the judge writing a separate opinion takes "an individual stance separate from the majority opinion", making "a rhetorical move intended to create a sense of necessity, or even a sense of duty, to rebut an argument that the judge regards as erroneous" (Goźdź-Roszkowski 2024: 46).

Besides the occasional presence of hedges and strategies of dissent mitigation, the nature of a separate opinion is often revealed by "its strongly worded evaluation" (Goźdź-Roszkowski 2024: 46) which, in the corpus, is frequently determined by the bioethically challenging nature of the topics addressed. In the texts analysed, evidentials, understood as "any linguistic expression of attitudes towards knowledge" (Chafe 1986: 271), often crop up to highlight the judges' stances, especially in dissenting opinions.

(6) The risks which this substitution poses for the integrity of the Strasbourg case-law […] are *glaringly obvious*. […] This ought to be *abundantly clear* from the existing case-law. [2]

> (7) I am *convinced* that the foregoing thorough examination of the continuous and forced choice imposed on the applicant […] *leaves no room* for *any doubt whatsoever* that the proposed conclusion is correct. [4]

> (8) At any rate, *no conjecture is necessary*; *it is enough to observe* that the Prosecutor General's Office itself pointed out the failings of the nearly three-year-long investigation. […] And yet *it is clear beyond dispute* from the record of the case that… [5]

Together with evidential devices, metaphoric language also occasionally contributes "to pragmatically manifest[ing] a higher level of credibility and reliability of the information presented" (Cruz García 2017: 1). Though sporadic, metaphors are used in concurring and dissenting opinions alike, where they rhetorically enhance the acceptability of the judges' standpoints.

> (9) If forced choices between rights guaranteed by the Convention are allowed to exist, then they will eventually extinguish the rights concerned; this would be *catastrophic* for the machinery of protection of human rights in general, the aim of the Convention and the role and credibility of the Court. [4]

Besides the large presence of rhetorical appeals to reliability as to the information presented, the credibility of concurring and dissenting judges is especially built on the selection of appropriate arguments, which are meant to rebut the arguments advanced and the conclusions reached by the majority (Goździ-Roszkowski 2020: 396).

3.1 Symptomatic arguments

The first argument type identified in the pragma-dialectical theory of argumentation is symptomatic argumentation:

> Symptomatic argumentation […] is a type of argumentation in which an argument scheme is used that is based on the pragmatic principle of something being symptomatic of something else, i.e. the one being a token or a sign of the other. Symptomatic argumentation involves a relation of concomitance between the reason advanced and the standpoint defended. (van Eemeren and Garssen 2019: 311)

Symptomatic arguments can easily be observed in the justification of judicial decisions (Feteris 2017b) and the separate opinions drawn from the *GenDJus* corpus provide further empirical evidence.

> (10) The reasoning followed by the majority, according to which the exact role and responsibility of an alleged assailant should be established before proceedings are initiated, is no longer convincing. *It is precisely the purpose of such proceedings to establish the personal role and liability for the alleged violations of each and every one of the alleged assailants*. To require that their role and responsibility is established in advance, before a complaint is filed, means to declare any civil or administrative remedy ineffective by definition. [8]

In their partly dissenting opinion annexed to judgment [8], Judges Grozev and Harutyunyan criticise the reasoning of the majority, according to which the exact role and responsibility of an alleged assailant should be established before proceedings are initiated, by specifying, instead, that establishing the role and liability of an alleged assailant is the purpose of such proceedings. In pragma-dialectical terms, this can be considered an instance of symptomatic argumentation, whereby the arguer defends a standpoint (The reasoning of the majority is not convincing) "by citing in the argument a certain sign, symptom, or distinguishing mark of what is claimed in the standpoint" (van Eemeren and Snoeck Henkemans 2017: 84); and "on the grounds of this concomitance, the arguer claims that the standpoint should be accepted" (van Eemeren and Snoeck Henkemans 2017: 84). In light of these theoretical remarks, the symptomatic argument set forth in (10) can be represented as follows:

1. Standpoint: The reasoning of the majority is not convincing.

1.1 Because: The majority claimed that the exact role and responsibility of an alleged assailant should be established before proceedings are initiated.
(1.1') (And: Establishing the role and liability of an alleged assailant is the purpose of/symptomatic of such proceedings).

In Pragma-dialectics, 1. is the standpoint, 1.1 is the argument supporting the standpoint and (1.1') is the premise of argumentation. In the separate opinions under analysis, numerous, different and more complex implementations of the argumentation scheme of symptomatic argumentation can be observed.

In his partly dissenting opinion in judgment [6], Judge Wojtyczek agrees with the majority that "death threats should be thoroughly investigated, prosecuted and punished" but raises the issue that "a complaint addressed to the authorities by a private party alleging that someone has committed a criminal offence has to meet certain minimum requirements of substantiation and seriousness". After recalling that the applicant alleged that her father had conveyed indirect death threats to her via her aunts, the arguer notes that the Croatian authorities considered that the evidence provided was insufficient and "the allegations did not fulfil the minimum requirements for triggering an investigation". Excerpt (11) shows that he then advances a symptomatic argument, in which the lack of evidence is presented as a sign that the assessment by the Croatian authorities might not have been incorrect, unlike the decision of the majority to hold "that there has been a violation of Article 3 of the Convention in respect of the lack of an effective investigation".

(11) I do not exclude the possibility that this assessment by the domestic authorities might have been unjustified; however, in the proceedings before the Court *there is insufficient evidence* to demonstrate that the assessment in question was incorrect, let alone that the domestic authorities acted in bad faith. […] For the reasons set out above, I consider that it has not been established that the Croatian authorities have violated their obligations under Article 3 of the Convention. [6]

Most instances of symptomatic argumentation in the corpus coincide with instances of authority argumentation, which harnesses actions or opinions of a person or a group of people as a means to support a thesis (Perelman and Olbrechts-Tyteca 1958: 410-411). Notably, the argument from authority is a sub-type of symptomatic argument.

> The argument from authority is a subtype of argumentation based on a 'symptomatic argument scheme', in which the argument provides a sign that the standpoint is acceptable. In the case of an argument from authority, the sign consists in a reference to an external source of expertise. (van Eemeren and Houtlosser 2003)

As Feteris (2017b: 131) maintains, "a kind of symptomatic argumentation that can be used to support the facts is for example proof by means of written documents, testimonies, expert reports". The external sources of expertise that are used by the concurring and dissenting judges to enhance the acceptability of their standpoints include the European Convention on Human Rights, the "living instrument" that the Court interprets and applies "in the light of the current situation" (Peruzzo 2019: 14). In this regard, the Convention can be viewed as the main among the "authoritative documents" (van Eemeren 2017b: 173) that are referred to in order to support symptomatic arguments:

> (12) *Pursuant to Articles 19 and 34 of the Convention*, the Court's task is to decide whether there has been a violation of the Convention in the concrete case put before it by the applicant, not to determine whether and how the national authorities have given effect to one of its previous judgments. [5]

In (12), Judge Krenc uses Articles 19 and 34 of the Convention as an authoritative source enhancing the acceptability of his standpoint, namely that "the judgment embarks on a review of the execution of the judgment given in *Beizaras and Levickas v. Lithuania* […] rather than dealing with the specific case of the applicant whose complaint was before the Court". The same comments hold true for example (13), which sees Judge Serghides defending his standpoint (There has been a substantive violation based on issues of inequality and discrimination

arising from the DSD Regulations[4].) by leveraging Articles 3 and 8 of the Convention in defence of Caster Semenya.

> (13) In my view, the dilemma imposed on the applicant by the above ban, also confirmed by the CAS [Court of Arbitration for Sport], amounts to a simultaneous violation of her right to respect for her private life under *Article 8* and her right not to be subjected to inhuman or degrading treatment under *Article 3*. [4]

Although the Convention is the textual and legal hinge of the ECtHR and is often used within symptomatic argumentation patterns, scientific and especially medical knowledge is also widely used as an "external source of expertise" in the separate opinions analysed, owing to the fact that the judgments involve transgender applicants, victims of rape or violence or, in [4], a female athlete who had to take hormone treatment to decrease her natural testosterone level in order to keep competing at high levels.

Excerpt (14) is one of the different discursive implementations of Judge Wojtyczek's symptomatic argument, whereby he recurrently asserts that expert knowledge in medicine, "which the Court does not have", is symptomatic of a rational decision in case [1], concerning a transgender prisoner who was not allowed to continue hormone therapy in prison and whose application was declared admissible by the Court on the basis of a violation of Article 8 of the Convention.

> (14) Firstly, a *rational* assessment of the facts in the instant case requires *expert knowledge in medicine*, which the Court does not have. Without such expert knowledge it is impossible to assess *rationally* whether the authorities struck – or failed to strike – a fair balance between the competing interests. […] In my view, there are no sufficient grounds to conclude that the interruption, which followed medical advice, in the administration of *Estrofem* and *Luteina* from 18 July to 31 July 2020 amounted to a violation of the applicant's rights protected by Article 8. [1]

[4] The DSD Regulations are the regulations issued by the IAAF (International Association of Athletics Federations) in 2018 entitled "Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development)".

Excerpt (14) rests on an argument from authority, understood as a sub-type of symptomatic argumentation. According to the judge, "it is not possible to blame the prison authorities for not allowing the applicant to obtain a new delivery of the desired medicines" because "the situation was not clear"; different experts had "expressed divergent views concerning the appropriate treatment for the applicant", but the majority ignored the "clear indication issued by a physician" to interrupt the treatment "before a thorough medical examination", and "decided to take their own stance on medical issues, apparently following their intuitions".

In judgment [9], the judge distances himself again from the majority by resorting to a similar argument from authority. First, he claims that the expert opinion the Polish domestic courts relied upon was called into question by the Court without relying on "alternative expert knowledge". Second, by listing a series of studies concerning the role of the father for the development of children, he argues that relying on scientific knowledge is symptomatic of appropriate proceedings. In so doing, he challenges the acceptability of the decision of the majority, which declared admissible the application by a Polish woman alleging that she had been discriminated against on the basis of her sexual orientation in proceedings for full parental rights and custody over her child.

More broadly, symptomatic argumentation is often used in conjunction with other argument schemes enhancing the acceptability of the standpoint. In his dissenting opinion at the end of judgment [2], Judge Lobov complains that "the lack of a European consensus on the legal recognition of same-sex couples is [a] major obstacle that the majority attempt to overcome by resorting to the […] slippery concept of a '*clear ongoing trend*' in favour of such recognition". (15) shows that he reveals his fears through a symptomatic argument that subsumes a comparison argument, whereby he notes that the Court's silence and inaction during a similar case are a further sign of the Court's occasional inability to tackle sensitive issues boldly and comprehensively.

> (15) The deafening silence on the *A, B and C v. Ireland* judgment […], in which the Grand Chamber accepted the societal constraints of a single State

> in justifying the ban on abortion despite the existence of an impeccable European consensus to the contrary is *a further sign* of a malaise. [2]

Notably, (15) corroborates that that the language of separate opinions is not immune to metaphoric language (*deafening silence*, *malaise*) and highlights that making reference to other similar cases by means of comparison argumentation is not infrequent.

3.2 Comparison arguments

To paraphrase Perelman and Olbrechts-Tyteca (1958: 326), argumentation could not go far without resorting to comparisons, whereby two entities are evaluated one in relation to the other. In pragma-dialectical terms, comparison or analogy argumentation is one of the three main categories of argument types.

> Comparison argumentation is a type of argumentation in which an argument scheme is used that is based on the pragmatic principle of something being comparable to something else, i.e. the one resembling or being similar to the other. Comparison argumentation involves a relation of comparability between the reason advanced and the standpoint defended. (van Eemeren and Garssen 2019: 311)

Analogy argumentation is pervasive in ordinary and institutional communication alike; notably, "argument from analogy is very common in law" (Walton 2002: 35), where "it rests on a similarity between two cases" (Walton 2002: 35).

In the corpus, instances of analogy argumentation can precisely and especially be observed when concurring and dissenting judges advance their standpoints by establishing comparison between similar cases. (16) shows the excerpt of the concurring opinion by Judge Elósegui, where she makes reference to a previous case that saw a drug addict undergoing treatment who had been deprived of parental authority.

> (16) Precisely in the case of *Y.I. v. Russia* (cited above, § 87), in which I was also a member of the Chamber, on an issue related to Article 8 it was found that the applicant, a drug addict undergoing treatment, had been

> disproportionately deprived of parental authority over her two youngest children, who had been separated from their brother and placed in public care despite the grandmother's wish to provide care. *The Court concluded that* the domestic authorities had failed to consider less drastic measures in the children's best interests and had not taken into account the applicant's efforts to improve her situation after the children's removal. [7]

By mentioning the conclusion reached by the Court in the previous case (*The Court concluded that*), Judge Elósegui claims that the same conclusion was rightly reached by the Court in the current case, too. Her standpoint, which seems to be expressed implicitly, is stated explicitly later, in the conclusive section of the separate opinion, where she writes "Summing up, family mediation and friendly agreements could be a good practice in domestic proceedings and an even more efficient means for the execution of the Court's judgments in cases of this kind where several family members are involved".

Owing to their crucial role in judicial proceedings, arguments from analogy proliferate in the corpus and can be found embedded in passages that are more concise than excerpt (16).

> (17) The standards established by the Court in *Vallianatos and Others v. Greece* ([GC], nos. 29381/09 and 32684/09, ECHR 2013), a case decided primarily on the basis of Article 14 read in conjunction with Article 8, will be of particular importance in my view. [2]

> (18) In relation to the first provision, a case like *Mustafa Tunç and Fecire Tunç v. Turkey* provides a good example of what would generally confront the authorities in an article 2 case ([GC], no. 24014/05, 14 April 2015, § 133). [10]

Also owing to the presence of the phrase *a good example* in (18), excerpts (17) and (18) might look like arguments by example, where "specific facts are presented as special cases of something more general" (Garssen 2017: 113). After all, "the likeness of the argument by example with the argument by analogy" is at times problematic, as "it is not always directly clear which argument scheme is employed"

(Garssen 2017: 117). However, reference to a specific case in (17) and (18) leads the readership to acknowledge the similarity between two cases and, therefore, to infer that the conclusion of the two cases should also be similar. This also holds true for (16) and for most instances of analogy argumentation in the corpus, which qualify as examples of argument from *statutory* analogy (Walton 2002: 8).

> For example, it may be argued that a word should be interpreted in a particular way because that would treat similar cases similarly. (Walton 2002: 8)

An example of this specific implementation of the argument from statutory analogy can be observed in (19), where Judges O'Leary and Ravarani discuss the exact interpretation that should be given to the noun phrase *human trafficking* and its related concept, on the basis of the precedent established by a previous case.

> (19) Human trafficking, as the Court already clarified in previous cases, is dependent on the presence of three constituent and cumulative elements: action, means and purpose (see the elaboration of the principles in *Rantsev v. Cyprus and Russia*, no. 25965/04, §§ 277-89, 7 January 2010). [10]

More broadly, the instances of argument by analogy that stand out in the corpus could also be viewed as intertextual references that judges make in an attempt to "transfer" the conclusions reached in previous cases to the current cases that are being discussed. Interestingly, excerpt (20) shows that previous separate opinions can also be harnessed as precedents to establish analogies between past and present cases, even though "separate opinions […] do not lead to any legal effect that would impact the legal status of any entity" (Goździ-Roszkowski's 2020: 384).

> (20) I respectfully disagree with the majority's view that the application is admissible and that Article 8 has been violated in the instant case. *I refer in this respect to the views I expressed in my dissenting opinion appended to the judgment in Fedotova v. Russia* ([GC], nos. 40792/10 and 2 others, 17 January 2023), which were further developed *in my joint dissenting opinion with Judge*

> *Harutyunyan in Buhuceanu v. Romania* (nos. 20081/19 and 20 others, 23 May 2023). [3]

In this excerpt from his dissenting opinion, Judge Wojtyczek produces a sort of "bare statement of dissent" (Peruzzo 2019: 36) accompanied by a concise argument by analogy, which cross-references his current dissenting opinion with two previous and lengthy ones, whose arguments and conclusions can be said to be "copied and pasted" in the current case.

3.3 Causal arguments

The third pragma-dialectical category of argument types concerns causal arguments.

> Causal argumentation is a type of argumentation in which an argument scheme is used that is based on the pragmatic principle of something being causal to or consequential of something else, i.e. the one being instrumental to or leading to the other. Causal argumentation involves a relation of instrumentality or consequentiality between the reason advanced and the standpoint defended. (van Eemeren and Garssen 2019: 311)

The most widely used causal arguments in the corpus are pragmatic arguments, "a prominent subtype of causal argumentation" (van Eemeren and Garssen 2019: 313) including those arguments that enable the audience to judge an event or action by its purportedly favourable or unfavourable consequences (Perelman and Olbrechts-Tyteca 1958: 358). According to van Eemeren (2017a: 23), the argument scheme of pragmatic argumentation can be represented as follows:

1. Standpoint: Action X should/should not be carried out.
   1.1 Because: Action X leads to positive/negative result Y.
   (1.1') (And: If action X leads to a positive/negative result such as Y it must/must not be carried out).

As regards the legal context, Feteris (2017a: 71) specifies that "in the justification of their decisions it is not uncommon for courts to use *pragmatic argumentation* in which they refer to the consequences of applying a legal rule in a specific case". Goźdź-Roszkowski (2024: 50) also highlights passages in legal judgments in which the positive or negative consequences of statutory interpretation are foregrounded as arguments for fostering or rejecting a particular reading of a statutory text. In the corpus, too, it is not uncommon to observe concurring and dissenting judges putting forward pragmatic arguments. In (21), Judge Wojtyczek's reiterates and reformulates, by means of a pragmatic argument, his symptomatic argument that expert knowledge in medicine is symptomatic of a rational decision:

> (21) Thirdly, in the instant case the Court indicated an interim measure under Rule 39 of the Rules of Court, dictating a detailed treatment to be administered (see paragraph 23). In my view, it is *problematic* to issue such measures without consulting any experts. Furthermore, the measure was imposed in spite of an explicit previous warning, issued by a physician, of *possible serious risks* of such a treatment (see point 3 below), and in the context of the subsequent assessment by other physicians that one of the medicines indicated by the Court (*Luteina*) was inappropriate for the applicant (see point 3 below). There is a *risk* that interim measures prescribing medical treatments without a thorough and comprehensive medical assessment of the patient's situation *may cause irreparable harm*. [1]

The lexical and phraseological items *problematic*, *possible serious risks* and *may cause irreparable harm* are all discursive indicators of a pragmatic argument, enabling the judge to conclude that not relying on scientific knowledge is not only symptomatic of an irrational decision but could also lead to negative consequences for the applicant. The negative version of pragmatic argumentation is often found in the corpus when dissenting judges highlight the legal consequences of the majority decision.

In his separate opinion attached to case [4], Judge Serghides criticises the majority decision to declare Semenya's complaint concerning Article 3 of the Convention inadmissible by emphasising that "if those safeguards [guaranteed by Article 3] are not taken into consideration, then it will amount to a regression in the effective

protection of human rights". He later advances a similar pragmatic argument, reiterating the "catastrophic" legal consequences of overlooking certain Articles in specific cases (to read the excerpt in question, see example 9).

A further example of pragmatic argumentation used to level criticism against the majority decision is shown in (22), where Judges Grozev, Roosma and Ktistakis claim that the decision "will lead to a paradoxical result".

> (22) To equate such a complaint to a violation of one of the non-derogable rights is equivalent to *destroying the whole hierarchy of rights established by the Convention*. *It would lead to a paradoxical result*, where the respondent State would have higher obligations with respect to non-resident foreigners, about events having no link whatsoever with that State, than to individuals on its own territory. We find it difficult to accept that such an interpretation is consistent with the principles of the Convention. [4]

Just like symptomatic and comparison arguments, pragmatic arguments are also frequently found in association with the two other types of arguments, as suggested in (23).

> (23) General and discriminatory passivity on the part of the law-enforcement authorities in the face of allegations of domestic violence *can create a climate conducive to a further proliferation of violence committed against victims* (see *A and B v. Georgia*, no. 73975/16, § 49, 10 February 2022). [6]

In his partly dissenting opinion, Judge Derenčinović cautions against the violent consequences of discriminatory passivity by advancing not only a pragmatic but also a comparison argument, inviting the audience to acknowledge the similarity between a previous and the present case.

4. Conclusions

The pragma-dialectical analysis of a series of separate opinions annexed to ten ECtHR judgments concerning sexual rights has revealed a non-casual presence of symptomatic, comparison and causal arguments, owing to the nature of separate opinions as an argumentative activity type in the domain of legal communication (Plug 2020). The results suggest that the three argument types are invariably used, in that they enable ECtHR judges to shape the complex argumentative defence of their minority standpoints.

Symptomatic arguments proliferate in the corpus; most instances qualify as examples of authority argumentation, as the judges quote the Convention and other authoritative documents or make reference to expert knowledge to enhance the acceptability of their "contra-argumentation" (van Eemeren et al. 1996: 4).

In light of their ubiquity in argumentative discourse, comparison arguments are not avoided in judicial discourse either. In the texts analysed, they are mainly exploited to establish analogies with previous judgments, with a view to highlighting that the conclusions of two similar cases should be similar, as well.

Pragmatic arguments, shedding light on the consequences of given decisions or courses of action, appear to be used primarily to warn against the detrimental legal consequences of the majority decisions. In Goździ-Roszkowski's (2020: 399) terms, concurring and dissenting judges often justify their views "by assessing (negatively) the outcome of the judicial decision-making process and/or its rationale". Despite their presence, however, causal arguments can be observed less frequently than symptomatic and analogy arguments. This could be due to the nature of separate opinions which, however significant, "carry little authoritative legal force and, generally, have no precedential value" (Goździ-Roszkowski's 2020: 381) – even tough Nikitina (2025) highlights the conventionalisation of the ECtHR discourse and, in general, the discursive influence of supranational courts on national discourses of human rights; in this respect, separate opinions might be unlikely to include lengthy and detailed discussions on the *consequences* of existing judicial decisions that are binding in

international law (Peruzzo 2019: 15) and might centre more on criticising the *nature* of those decisions. In the light of which, the present study could be said to provide further evidence of the "context-dependency" (van Eemeren 2017a: 20) of argumentation, in spite of its limited and exploratory nature.

In this regard, the research described in the present paper is characterised by a series of limitations. First, the corpus analysed is too small to qualify the study as a quantitative one, also because the analysis of argumentation was merely qualitative. Second, the dimensions of the corpus do not enable the findings to be considered representative of the argument types used in separate opinions, because it is not possible to ascertain to what extent recourse to these arguments by the judges is casual or idiosyncratic. Third, the investigation focused exclusively on the empirical identification of the three main categories of argument types, as outlined in Pragma-dialectics. In this respect, further research is needed to uncover additional arguments that might be characteristic of the "genre" (Goźdź-Roszkowski 2020; Nikitina 2025) of separate opinions, ascertain the distribution of given arguments between dissenting and concurring opinions and identify which rhetorical devices tend to co-occur with each argument scheme; only thus will the linguistic and argumentative patterns whereby judges are used to formulating dissent be thoroughly described.

Conflict of Interest Statement

The author declares no conflicts of interest to disclose related to this manuscript. If any conflicts arise in the future, the Author will promptly inform the journal.

AI Use Statement

The author confirms that artificial intelligence (AI) tools were not used in any aspects of this research.

Bibliography

Boginskaya, Olga. 2023. Dissenting with conviction: Boosting in challenging the majority opinion. *International Journal of Legal Discourse 7*, no. 2: 257–279. DOI: https://doi.org/10.6035/clr.7656

Bustamante, Thomas, and Christian Dahlman, eds. 2015. *Argument types and fallacies in legal argumentation*. Cham: Springer.

Chafe, Wallace L. 1986. Evidentiality in English conversation and academic writing. In *Evidentiality: The linguistic coding of epistemology*, eds. Wallace L. Chafe and Johanna Nichols, 261–272. Norwood (NJ): Ablex Publishing.

Cruz García, Laura. 2017. Evidentials in advertising: A sample study. *Revista de Lingüística y Lenguas Aplicadas 12*: 1–12. DOI: https://doi.org/10.4995/rlyla.2017.7074

Feteris, Eveline T. 1999. *Fundamentals of legal argumentation. A survey of theories on the justification of judicial decisions*. Dordrecht: Springer.

Feteris, Eveline T. 2017a. The role of pragmatic argumentation in the justification of judicial decisions. In *Prototypical argumentative patterns. Exploring the relationship between argumentative discourse and institutional context*, ed. Frans H. van Eemeren, 71–91. Amsterdam/Philadelphia: John Benjamins.

Feteris, Eveline T. 2017b. Argumentative patterns with symptomatic argumentation in the justification of judicial decisions. In *Prototypical argumentative patterns. Exploring the relationship between argumentative discourse and institutional context*, ed. Frans H. van Eemeren, 125–138. Amsterdam/Philadelphia: John Benjamins.

Garssen, Bart. 2017. Argumentative patterns with argumentation by example in legislative debate in the European Parliament. In *Prototypical argumentative patterns. Exploring the relationship between argumentative discourse and institutional context*, ed. Frans H. van Eemeren, 109–124. Amsterdam/Philadelphia: John Benjamins.

Goźdź-Roszkowski, Stanisław. 2018. Values and valuations in judicial discourse. A corpus-assisted study of (dis)respect in US Supreme Court decisions on same-sex marriage. *Studies in Logic, Grammar and Rhetoric 53*, no. 66: 61–79. DOI: https://doi.org/10.2478/slgr-2018-0004

Goźdź-Roszkowski, Stanisław. 2020. Communicating dissent in judicial opinions: A comparative, genre-based analysis. *International Journal for the Semiotics of Law – Revue Internationale de Sémiotique Juridique 33*, no. 2: 381–401. DOI: https://doi.org/10.1007/s11196-020-09711-y

Goźdź-Roszkowski, Stanisław. 2024. *Language and legal judgments. Evaluation and argument in judicial discourse.* Abingdon/New York: Routledge.

Mazzi, Davide. 2018. Phraseology, argumentation and identity in Supreme Court of Ireland's judgments on language policy. *Journal of Applied Linguistics and Professional Practice 11*, no. 3: 315–337. DOI: https://dx.doi.org/10.1558/japl.32729

Mazzi, Davide. 2022. "Without proof of negligence or a causative connection": On causal argumentation in the discourse of the Supreme Court of Ireland's judgments on data protection. In *Law, language and the courtroom: Legal linguistics and the discourse of judges*, eds. Stanisław Goźdź-Roszkowski and Gianluca Pontrandolfo, 112–125. Abingdon/New York: Routledge.

McKeown, Jamie. 2021. A corpus-based examination of reflexive metadiscourse in majority and dissent opinions of the U.S. Supreme Court. *Journal of Pragmatics 186*: 224–235. DOI: https://doi.org/10.1016/j.pragma.2021.10.019

Nikitina, Jekaterina. 2025. *Human Rights Discourse. Linguistics, Genre and Translation at the European Court of Human Rights*. Abingdon/New York: Routledge.

Perelman, Chaïm, and Lucie Olbrechts-Tyteca. 1958. *Traité de l'argumentation. La nouvelle rhétorique*. Bruxelles: Éditions de l'Université de Bruxelles (6th edition).

Peruzzo, Katia. 2019. *National law in supranational case-law: A linguistic analysis of European Court of Human Rights judgments in English*. Trieste: EUT.

Plug, José H. 2020. Separate opinions as argumentative activity type. In *Reason to dissent: Proceedings of the 3rd European Conference on Argumentation, Vol. III*, eds. Catarina D. Novaes, Henrike Jansen, Jan A. van Laar and Bart Verheij, 267–278. Rickmansworth: College Publications.

van Eemeren, Frans H., Rob Grootendorst, Francisca Snoeck Henkemans, J. Anthony Blair, Ralph H. Johnson, Erik C. W., Krabbe, Christian Plantin, Douglas N. Walton, Charles A. Willard, John Woods and David Zarefsky. 1996. *Fundamentals of argumentation theory. A handbook of historical backgrounds and contemporary developments*. Mahwah (NJ): Erlbaum.

van Eemeren, Frans H., and Peter Houtlosser. 2003. Fallacies as derailments of strategic maneuvering: The argumentum ad verecundiam, a case in point. In *Proceedings of the fifth conference of the International Society for the Study of Argumentation*, eds. Frans H. van Eemeren, J. Anthony Blair, Charles A. Willard and Francisca Snoeck Henkemans, 289–292. Amsterdam: Sic Sat. Available at https://rozenbergquarterly.com/issa-proceedings-2002-fallacies-as-derailments-of-strategic-maneuvering-the-argumentum-ad-verecundiam-a-case-in-point/ (last accessed 24th April 2025).

van Eemeren, Frans H. 2010. *Strategic maneuvering in argumentative discourse*. Amsterdam/Philadelphia: John Benjamins.

van Eemeren, Frans H. 2017a. Argumentative patterns viewed from a pragma-dialectical perspective. In *Prototypical argumentative patterns. Exploring the relationship between argumentative discourse and institutional context*, ed. Frans H. van Eemeren, 7–29. Amsterdam/Philadelphia: John Benjamins.

van Eemeren, Frans H. 2017b. The dependency of argumentative patterns on the institutional context. In *Prototypical argumentative patterns. Exploring the relationship between argumentative discourse and institutional context*, ed. Frans H. van Eemeren, 157–180. Amsterdam/Philadelphia: John Benjamins.

van Eemeren, Frans H., and Francisca Snoeck Henkemans. 2017. *Argumentation. Analysis and evaluation*. London/New York: Routledge.

van Eemeren, Frans H., and Bart Garssen. 2019. Argument schemes: Extending the pragma-dialectical approach. In *Proceedings of the ninth conference of the International Society for the Study of Argumentation*, eds. Bart Garssen, David Godden, Gordon R. Mitchell and Jean H. M. Wagemans, 308–318. Amsterdam: Sic Sat.

Walton, Douglas. 2002. *Legal argumentation and evidence*. University Park (PA): The Pennsylvania State University Press.