Comparative Legilinguistics
vol. 2025/64
DOI: https://doi.org/10.14746/cl.2025.64.1

Beyond the majority: Exploring the discourse of separate opinions

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1. Introduction

In many multi-member courts, separate opinions – dissents, concurrences, partial dissents, hybrid partly concurring and partly dissenting, unlabelled or even "dubitative" notes – generate a parallel layer of judicial discourse, a kind of meta-conversation running alongside the official majority lane. Unlike the majority opinion, which represents the official decision of the court, a separate opinion provides

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standpoints of a single judge or a group of similar-minded judges that diverge from the majority opinion, of those judges "who lost their case in camera" (Bruinsma 2006: 360), and want to disagree, clarify or expand on a particular point.

Through the genre of separate judicial opinions, judges make visible their interpretive choices, institutional aspirations, and conceptions of legitimacy. Far from marginal curiosity, these texts have come to the attention of a variety of scholars from different fields, who adopt diverse – although not necessarily mutually exclusive – methodological approaches to pursue different research objectives. At first blush, for lawyers and comparative lawyers separate opinions permit several familiar angles: doctrinal analysis remains possible (what alternative rule or precedent is invoked, what alternative interpretation is envisaged?), historical or contextual exposition (how does the judge frame institutional memory or past practice?), and comparative constitutional or judicial practices and policies (how do different jurisdictions allow for or constrain dissent?). Separate opinions also represent a fascinating terrain for an exploration from a comparative legal linguistics standpoint (Goźdź-Roszkowski 2020; McKeown 2021; Nikitina 2025a). Linguistic approaches to judicial discourse complement behavioural and institutional analyses by showing how the textual features of dissent – stance-taking, evaluative lexis, or intertextuality – materialise the very tensions between collegiality and autonomy that empirical scholarship identifies (Nikitina 2026, forthcoming). Linguistic approaches to separate judicial opinions open a window into the mechanisms of legal argumentation (Goźdź-Roszkowski 2024b) in its potentially purest form, as "dissident judges are not bound by the straightjacket of the majority judgment and its legal validity, [and can] […] express their opinions freely and follow their own convictions" (Bruinsma 2006: 360). Wigard (2023) posits that individual opinions at international courts, like the International Criminal Court (ICC), illuminate distinct judicial behaviours, as judges weigh the implications of their expressed positions. Separate opinions are thus pragmatically intriguing (Galdia 2022), as they must balance between some open confrontation and considerations of professional politeness (Breeze 2016; Kurzon 2001; Nikitina 2025a) in their evaluative sections. At an international level, these opinions may

become curious instances of legal rhetoric in a judges' second language, as those working in international courts must formulate their thoughts in the court's official language(s), frequently different from their native ones.

Collectively, the contributions gathered in this special issue apply legilinguistic lenses and ask how dissenting and concurring opinions operate between the poles of individuality and institutional collegiality as linguistic performances of voice, rhetorical instruments of persuasion, and behavioural artefacts revealing the dynamics of judicial politics.

2. A genre or not a genre?

Having outlined the broader pragmatic and behavioural significance of separate opinions, we now turn to the question of their textual identity. Separate judicial opinions have become the part and parcel of some courts, both domestic (such as the US Supreme Court, see Goźdź-Roszkowski in this special issue; Notari in this special issue; Szczyrbak 2014) and international (such as the European Court of Human Rights, see Giordano and Zottola in this special issue; Brambilla in this special issue; Nikitina 2025a, 2025b; Peruzzo 2024), while others continue to avoid this practice (e.g. the Court of Justice of the European Union).

Some international courts, such as the African Court of Human and Peoples' Rights or the Inter-American Court of Human Rights, portray separate opinions as a standalone genre, allocating a distinct search category in their databases for the search of these texts and thus recognizing their existence beyond majority judgments. At the same time, other courts, such as the European Court of Human Rights, do not recognize separate opinions as a standalone category: here opinions are tethered to the judgment existing thus on the margins of the majority, despite being acknowledged since the earliest days of the Court (White & Boussiakou 2009). This dichotomy warrants a question: do separate opinions represent a genre or not?

Genres can be defined as "typified rhetorical actions based in recurrent situations" (Miller 1984: 159). Genre theorists (Miller 1984;

Swales 1990; Bhatia 2017) define genre as a recognizable communicative event pursuing a set of communicative purpose(s), whose form is highly structured and conventionalized with constraints on the use of lexicogrammar and other patterns. Next to formal aspects (conventionalised forms), genres possess "sociocultural aspects (social occasions) and cognitive aspects (purposes of the participants)" (Borja Albi 2013: 36). While it is difficult to record the style of separate opinions, which frequently depends on the idiosyncrasies of the authors (Nikitina 2025a: 230; Peruzzo 2019: 69), research has identified a clear move and steps structure (Swales 1990) in these texts (Lavissière & Bonnard 2024; Goździ-Roszkowski in this special issue; Notari in this special issue), which would warrant their classification as a genre. At the same time, separate opinions would not exist in the absence of the relevant majority opinions, to which they are linked through dialogism (Garzone 2016; Etxabe 2022, 2024; Nikitina 2025b; Notari in this special issue). Canonical judicial discourse is plurally and unevenly voiced (see Etxabe 2024 and Nikitina 2025b on dialogism; see Peruzzo 2024, Giordano and Notari in this special issue, and Nikitina 2026 on issues of gender in judicial discourse). All court judgments are dialogically linked with legislation; yet, it is clear that these are distinct genres. Finally, separate opinions do not produce legal effects as judgments do as they are non-precedential.

Recent empirical work on international adjudication (Wigard 2023) reinforces the view of separate opinions as deliberate acts of judicial agency – and standalone genres – rather than incidental by-products of disagreement or misalignment. At the ICC, the issuance of an individual opinion functions as a strategic choice through which judges balance the benefits of expressing a distinct stance – visibility, reputational capital, and influence on future jurisprudence – against institutional costs such as collegial tension or potential erosion of authority. In this sense, a dissent or concurrence is both a textual and behavioural performance, or – to rephrase Borja Albi (2013: 36) – it is fuelled by both formal and socio-cognitive factors. It externalises individual judicial reasoning while revealing patterns of decision-making, self-restraint, and institutional negotiation. Wigard (2023) also reflects on the specific lexicogrammar choices made in separate opinions, noting how the adoption of first-person stance, evaluative

lexis, and personal tone mirrors the shift from the collective judicial "we" to the singular "I", foregrounding the tension between the court's unity and the autonomy of its members (see also Nikitina 2026).

The growing number of separate opinions at international courts raises new questions about legitimacy and judicial fragmentation. Rivière's (2005) study of separate opinions at the ECtHR between 1960s and 1998 revealed 908 texts, amounting to roughly 24 separate opinions per year. Bruinsma (2008), covering the following period between 1998 and 2006, provided different statistics, which nonetheless testify to the judicial fragmentation. Instead of looking at judgments vs. separate opinions, he disaggregated data into single judge's positions, finding that 70% were majoritarian and 30% engaged in separate opinion drafting, concluding that the "elected judge separates in almost one of the three controversial Grand Chamber cases" (Bruinsma 2008: 36). Overviewing the types of opinions issued, Nikitina (2025b: 205) notes that in contrast to Rivière's data (2005), when 10.5% were left unspecified (i.e. without indicating whether the judge was concurring or dissenting), modern judges prefer to attribute a clear label to their opinions, leaving only 1.3% unspecified (Nikitina 2025a: 205), which shows a potential policy shift. Wigard (2023: 29) expresses concern about the ICC appeals chambers issuing opinions in every case "because it indicates that judges are not able to convince each other of certain issues and find compromise". This special issue thus could not have been timelier.

3. Towards methodological reflexivity

As mentioned in the Introduction, separate opinions lend themselves to multiple explorations depending on the disciplinary perspective from which they are approached. All the authors contributing to this special issue adopt a legilinguistic viewpoint, devoting their endeavours to the linguistic analysis of judicial discourse as entextualised in separate opinions, constantly bearing in mind that they are the written

manifestation of a judicial practice that is not universal and that features characteristics that depend on the relevant legal system. In legilinguistic studies like the ones presented here, two notions occupy centre stage: argumentation and rhetoric.

Argumentation is at the very core of separate opinions. By representing "a type of legal writing that is used by judges to convey their individual views on a legal case" (Nikitina 2025a: 195), and regardless of the type (concurring, dissenting, etc.), separate opinions are expected to provide justification for the divergence expressed. Although the notion of legal justification has been generally applied to majority decision-making, where it is meant to refer to "the reasons and rationale given by courts in rendering their decisions" (Goźdź-Roszkowski 2024a), it can be extended to separate opinions, given that both majority judgments and separate opinions involve a conspicuous argumentative activity. In the case of majority judgments, such activity is aimed at revealing "the motives and the reasoning of those judges who have provided the disposition of a particular case, in order to convince the legal community and the public that the disposition is correct" (Goźdź-Roszkowski 2024a). When it comes to separate opinions, and depending on their type, argumentation is necessary either to show why and to what extent a judge or a group of judges disagree(s) with the majority judgment (dissenting opinions), or to provide a different or alternative view leading to the same outcome as the majority opinion or even to expand on the reasoning of the majority (concurring opinions). However, drawing on Rzucidło (2020) and Goźdź-Roszkowski (2024a), and extending their observations beyond majority opinions to separate opinions, several different functions of judicial justification can be identified. Among these, the most significant for separate opinions are the rationalizing function and the persuasive function. The former serves – as its designation suggests – to rationalize the outcome of the decision-making process and, given the type of opinion, to confirm or question such outcome. For instance, Bruinsma (2008: 33) explains that a concurring opinion issued by a national judge, who is more familiar with the legal order of a particular state, often represents "an effort to justify the majority judgment in terms domestically understood". The persuasive function is meant to convince that the decision is either correct or inappropriate and, to do

so, relies on a variety of rhetorical devices solely by demonstrating the reasoning behind the decision (Goźdź-Roszkowski in this special issue; 2024a).

The variety of reasons for writing a separate opinion, combined with the constraints of the genre in general as well as those of the genre as embedded in a specific judicial system, leads to the employment of diverse linguistic strategies and devices, all of which are intertwined in the argumentative structure of the texts. This makes separate opinions a complex and multifaceted textual reality most often requiring the employment of a multidimensional, mixed-methods approach. Traditionally, attention has been given to the argumentative strategies employed by judges to defend their standpoints (as is the case with Brambilla's article in this special issue), which – given the freedom offered by separate opinions – may well differ from those used in the body of majority judgments (McKeown 2021; Goźdź-Roszkowski 2020). Studies of the kind cannot prescind from incorporating reflections on rhetorical and discursive moves, thus integrating genre in the analytical framework (Goźdź-Roszkowski 2020), which allow for the unveiling of the ways in which judges structure their arguments in an attempt to strike a balance between their commitment to their subjective position and the necessary – though not necessarily genuinely – respectful attitude towards their peers and the institution they represent. One major strand of research builds on models of evaluative language, stance and metadiscourse (Notari in this special issue; Vass 2017; McKeown 2021, 2022a; Boginskaya 2022; McKeown 2022b), and the core methodology associated with these types of analyses, which allows for both qualitative and quantitative investigations, is corpus linguistics analysis, as is also the case with all the papers included in this special issue.

Yet it should not be overlooked that, beyond argumentation and rhetoric, separate opinions can also be scrutinised from other perspectives. For example, a less explored though relevant strand of research foregrounds the sensitive topics that separate opinions frequently revolve around and the controversial debates that may be reflected in the texts, and this is certainly the case of gender. Giordano and Zottola's paper in this special issue, for instance, apply Feminist Critical Discourse Analysis (FCDA) to examine intertextuality as well

as the influence of linguistic choices on the representation of gender-based violence and stereotypical representations in separate opinions. Other studies (Peruzzo 2024, 2025) approach gender identity labels from a terminological standpoint, aiming at identifying the possible use of offensive and derogatory expressions in separate opinions which, being drafted by judges who are assumed to be impartial, are generally expected to employ respectful language.

4. Overview of contributions

The special issue assembles four studies that approach separate judicial opinions through distinct yet complementary methodological lenses, illustrating how separate judicial opinions can serve as productive sites for examining the interplay between language, ideology, and institutional practice, spanning critical discourse analysis, rhetorical, genre, and argumentation studies.

Giordano and Zottola investigate dissenting opinions in European Court of Human Rights (ECtHR) cases concerning gender-based violence. Using Feminist Critical Discourse Analysis (FCDA) as their framework, they explore how linguistic and intertextual strategies in dissent construct or resist gendered representations of victims and perpetrators. Their qualitative examination of ECtHR dissents from 2012 to 2024 highlights citation practices as powerful ideological tools, capable of either perpetuating or challenging harmful narratives. The authors identify four recurring discursive pathologies – victim blaming, prioritisation of defence rights over victim protection, minimisation of trauma, and delegitimisation of prior court decisions – thus exposing the persistence of gender bias in judicial reasoning even within ostensibly progressive forums.

Goździ-Roszkowski turns to the US Supreme Court and provides a rhetorical analysis of the four dissenting opinions in *Obergefell v. Hodges* (2015), the case that constitutionalised same-sex marriage. Employing a ten-dimensional framework grounded in classical rhetoric and modern linguistic theory, the study maps how each justice – Roberts, Scalia, Thomas, and Alito – constructs a distinctive rhetorical and ideological persona. Their dissents reveal

sharply divergent conceptions of law, democracy, and civic identity, showing that judicial dissent functions as a performative rhetorical act.

Notari offers a comparative analysis of dissenting opinions from the ECtHR and the US Supreme Court, combining rhetorical move analysis with metadiscourse analysis in a mixed-methods design. Based on a corpus of 112 opinions, the study identifies nine recurrent rhetorical moves common to both courts but realised differently according to their respective legal traditions. US dissents rely on transitions, evidentials, and explicit thesis statements to foreground individual stance, while European opinions emphasise doctrinal elaboration and self-mentions, signalling a more interpretive ethos. The comparison demonstrates how judicial voice is mediated by institutional culture and how dissent balances personal authorship with collective judicial authority.

Brambilla analyses ECtHR separate opinions through the lens of pragma-dialectics, focusing on the types of argumentation judges deploy to defend their minority positions. Drawing on a corpus of ten judgments concerning sexual and reproductive rights, the study identifies three dominant argument schemes – symptomatic (often arguments from authority), comparison (analogical reasoning with precedent), and causal or pragmatic (arguments highlighting likely consequences). By situating these within broader argumentative strategies, the paper illuminates how dissenting judges craft legitimacy and coherence within the constraints of non-precedential reasoning.

Statement of Contributions

The contributions of each author to this manuscript are as follows: Jekaterina Nikitina drafted Sections 1 and 2. Katia Peruzzo drafted Sections 3 and 4. Both authors revised the manuscript critically for important intellectual content and approved the final version.

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