Access to Justice in Eastern Europe
ISSN 2663-0575 (Print)
ISSN 2663-0583 (Online)
Journal homepage http://ajee-journal.com

Research Article

THE PHENOMENON OF THE JUDGE'S SEPARATE OPINION EUROPEAN COURT OF HUMAN RIGHTS

Serhii Kravtsov*, Svitlana Sharenko, Iryna Krytska and Vladyslava Kaplina

ABSTRACT

Background: *The authors of the article refer to the institution of separate opinions of the judges of the European Court of Human Rights (hereinafter referred to as the European Court, the Court or the ECtHR). They emphasise that this phenomenon has not been sufficiently studied in the legal literature. However, given the leading role of the European Court, its progressive views and authority – primarily on the European continent, where it serves as an umbrella for those who have not found protection at the national level – a judge's opinion should not merely be an appendix to the Court's decision. Instead, it should be regarded as the driving force for the development of the doctrine, warranting academic study, consideration by practitioners at the national level, and a possible reference point for forecasting and shaping future interpretations of the provisions of the European Convention on Human Rights in ECtHR future decisions.*

Methods: *In the article, the authors present the points of view of scientists and practitioners on the phenomenon of separate opinions, illustrating specific examples of what they consider to be the most interesting separate opinions attached to the decisions of the European Court of Human Rights. Based on substantive analysis, they formulate conclusions, emphasising the prospective doctrinal importance for world science, law-making and law-enforcement perspective for national legal systems, as well as unconditional axiological importance, because they play the role of a catalyst for creative judicial search, contribute to the support of judicial independence and personal responsibility. The special importance not only of the decisions of the European Court of Human Rights but also of individual opinions, according to the authors, stems from the fact that those key problematic issues that bring citizens before the ECtHR are a priori difficult for the entire European community.*

The authors analysed separate opinions, such as that of ECtHR Judge Elósegui, which was expressed in the ECtHR case Mortier v. Belgium, regarding the ratio of the provisions of Article 2 "Right to Life" ECHR and euthanasia. The authors also focused on the key conclusions made by the Portuguese ECtHR Judge Paulo Pinto de Albuquerque, who, in his nine-year tenure, independently or with colleagues, formulated more than 150 separate opinions. The authors particularly explore his opinions in two well-known cases, Bărbulescu v. Romania and Svetina v. Slovenia. Notably, in the former case, although the judge remained in the section in the minority, his separate opinion later turned into the opinion of the majority of the Grand Chamber of the ECtHR.

Results and conclusions: *The authors consider the phenomenon of a separate opinion of a judge of the European Court as a result of independent and deep thinking, an expression of the judge's individual legal awareness. This perspective is based on the author's immersion in the problems that were the subject of consideration by the panel of judges and found or, on the contrary, did not find their expression in the court decision.*

In examining separate opinions, the authors also pay attention to the specifics of their structural construction often employed by ECtHR judges. These skillfully structured opinions can serve as a valuable example for national courts, many of which are still in search of their individual legal style.

1 INTRODUCTION

In the context of Ukraine's ongoing integration into the European community, the penetration of European values into Ukrainian legal consciousness, the processes of global convergence, and the adaptation of Ukrainian legislation to European standards for the protection of human rights and fundamental freedoms, it is entirely natural for Ukrainian legal scholars to show increased interest in the influence of precedent practice of the ECHR on the development of Ukrainian legislation. This interest is evidenced by a considerable number of scientific works on the subject.[1] The European Court of Human Rights serves as a guiding beacon in the stormy sea of reformation processes, providing impetus for national changes and inspiring improvements among legislators, scientists and law enforcers - judges, prosecutors, and lawyers alike. At the same time, it is noteworthy that most scientific works focus primarily on analysing the legal positions outlined in the Court's main

1 Mykhailo Buromenskyi and Vitalii Gutnyk, 'The Impact of ECHR and the Case-Law of the ECtHR on the Development of the Right to Legal Assistance in International Criminal Courts (ICTY, ICTR, ICC)' (2019) 9(3) TalTech Journal of European Studies 188, doi:10.1515/bjes-2019-0029; Oksana Kaplina and Anush Tumanyants, 'ECtHR Decisions that Influenced the Criminal Procedure of Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 102, doi:10.33327/AJEE-18-4.1-a000048; Nina Karpachova and others, 'Impact of Direct Effect of Constitutional Norms and Practice of the European Union on the Efficiency of Human Rights Realization and Protection' (2021) 24(1spec) Journal of Legal, Ethical and Regulatory Issues 1; Vyacheslav Komarov and Tetiana Tsuvina, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 79, doi:10.33327/AJEE-18-4.1-a000047.

decisions. In contrast, the arguments given in individual or special opinions of ECtHR judges, often rich in weight and scientific applied value, may not be inferior to the motives and arguments set forth in the main text of the majority.

A logical explanation for this phenomenon is offered in the preface to the collection of translations of individual opinions attached to the decisions of the *ECtHR*, written by Paulo Pinto de Albuquerque, an ECtHR judge elected from Portugal. In particular, he highlights several factors contributing to the unexplored nature of a separate opinions by ECtHR judge, including the "lapidity of the normative regulation of the institution of a separate opinion of a judge", "the insufficient prevalence of the phenomenon of a separate opinion itself", and "the absence of binding legal force in a separate opinion, since its presence, as a general rule, does not have legally significant consequences, which is more to a certain extent inherent in the countries of the Romano-Germanic legal system". However, this work rightly points out the importance of a judge's separate opinion, which can be considered as "a product of the judge's independent and deep thinking, an expression of his individual legal awareness", which "facilitates immersion in the problems that were the subject of consideration in the court decision, and helps to realise their legal significance the essence".[2]

2 SEPARATE OPINION OF A JUDGE OF THE EUROPEAN COURT OF HUMAN RIGHTS: COURAGE FOR JUSTICE

Despite the positive characteristics of separate opinions mentioned above, even on the European continent, at the level of regional judicial institutions, there is no uniform attitude towards this phenomenon. In particular, Article 45 of the European Convention on Human Rights, as well as Paragraph 2 of Rule 74-1 of the Rules of the ECtHR, allow judges participating in the consideration of cases at the level of the Chamber or the Grand Chamber to express their separate opinions. These opinions can either coincide with the court's decision (concurring opinions), when a judge or judges agree with the decision of the ECtHR, seek to further explain their position, clarify it, provide additional arguments or emphasise some nuances of their position, or dissent (dissenting opinion), where judges disagree with the reasons of the Court and/or the decision on the case.[3] In practice, separate opinions can be partially coincident (partly concurring) or partially non-coinciding (partly dissenting), and it is common for one ECtHR judge's separate opinion to be joined by several other judges.

2 Paulo Pinto de Albuquerque, *Separate Opinion: The Way to Fairness* (Vladyslava Kaplina tr, Oksana Kaplina ed, Pravo 2020) 13.

3 Council of Europe, *European Convention on Human Rights* (Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols) (ECtHR 2013) <https://www.echr.coe.int/documents/d/echr/convention_eng> accessed 10 May 2024; ECtHR, *Rules of Court* (Registry of the Court 22 January 2024) <https://www.echr.coe.int/documents/d/echr/rules_court_eng > accessed 10 May 2024.

In contrast to this approach outlined in the European Convention on the Protection of Human Rights and Fundamental Freedoms, the publication of individual opinions of judges is not allowed in the Court of Justice of the EU.

The differing approaches of these highly respected institutions prompt an analysis of the arguments *pro et contrary to* the phenomenon we are considering, namely the judge's separate opinion.

In their study on the relationship between the growing number of separate opinions among the decisions of the ECtHR and the level of human rights protection that this judicial institution declares at the present stage, Laurence R. Helfer and Erik Voeten reach a rather significant concern that this phenomenon may be a manifestation of the politics of dissent in the ECtHR. This is, in particular, the assumption that some opinions implicitly express disagreement or generally "accuse" the Court of refusing protection, trying to "silently cancel" its precedents, thereby lowering the standards of rights protection and/or significantly expanding the autonomy of states in the field of legal regulation.[4]

In contrast, Alec Stone Sweet, Wayne Sandholtz, and Mads Andenas challenge this rather radical opinion, pointing out the lack of empirical support in Helfer and Voeten's analysis, which is based on just 23 ECtHR decisions. They note that while the internal policy of the ECtHR is usually expressed in individual opinions, these opinions deserve analytical attention. Moreover, they contend that individual opinions can indicate the direction of the development of law and politics.[5]

In his speech at the Annual Seminar of the European Court of Human Rights held in Strasbourg on 25 January 2019, the judge of the Federal Constitutional Court of Germany, having accumulated existing opinions on this issue, cited a number of important functions performed by separate opinions in the practice of the Court. Among other things, he emphasised that separate opinions:

(1) can contribute to greater transparency of court hearings in a democratic society;
(2) assist in understanding the constitutional issues at stake and the reasoning behind the underlying decision;
(3) encourage the majority to provide the best possible justification for its conclusions, and the threat of their appearance may also facilitate the achievement of a compromise within the court, preventing the majority from simply imposing its will on the minority;
(4) allow the losing party to see that its arguments have been adequately considered;

4 Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law 797, doi:10.1093/ejil/chaa071.

5 Alec Stone Sweet, Wayne Sandholtz and Mads Andenas, 'Dissenting Opinions and Rights Protection in the European Court : A Reply that Laurence Helfer and Erik Voeten' (2021) 32(3) European Journal of International Law 905, doi:10.1093/ejil/chab057.

(5) give a special role to the judge ad hoc or national judge in clarifying the internal position;
(6) indicate deficiencies in the main decision, misinterpretation of norms, going beyond the jurisdiction of the Court;
(7) may be an indicator of differences between established case law and a new decision, thereby preventing potential precedents from emerging;
(8) may assist the Grand Chamber in deciding whether to accept the lower court's decision on review;
(9) represent a kind of current commentary of the ECHR.[6]

The given list seems to be close to exhaustive, as it allows us to reveal the meaning and value of individual opinions of ECtHR judges from different sides.

For the sake of fairness, it is important to address the arguments of sceptics against judges exercising their right to a separate opinion. Angela Huyue Zhang presents some of these arguments in her study, which, while primarily focused on judges of the Court of Justice of the EU, nevertheless explores broader aspects of the nature and functional purpose of the phenomenon of separate opinions in the legal sphere. Therefore, it is relevant to our work.

One argument posited that the absence of such a right might contribute to preserving judges' independence, as judges might fear that disclosing voting information could put them under political control during reassignment.[7] However, this concern is irrelevant to judges of the ECtHR, as Article 23 of the ECHR stipulates that they are elected for a term of nine years without the right to re-election. Furthermore, Article 22 of the Convention states that the decision to elect a specific judge from a list of three candidates proposed by the state is made by the Parliamentary Assembly of the Council of Europe.

At the same time, some other counterarguments regarding the existence of such a judicial instrument as a separate opinion can be extrapolated to the judges of the ECHR, such as:

(1) preservation of the authority of the Court, in particular for the governments of the states that have to implement the relevant decision;
(2) the "collegial" decision-making process indicates that the Court holds together, the minority is not excluded from the deliberation process;
(3) increasing the legitimacy of the Court - contributes to public perception of law as reliably stable and protected.[8]

6 Andreas Paulus, 'Judgments and Separate Opinions: Complementarity and Tensions' (Opening of the Judicial Year: Seminar, Strasbourg, 25 January 2019) <https://www.echr.coe.int/documents/d/echr/Speech_20190125_Paulus_JY_ENG> accessed 10 May 2024.

7 Angela Huyue Zhang, 'The Faceless Court' (2016) 38(1) University of Pennsylvania Journal of International Law 111.

8 ibid.

Interestingly, the researcher immediately gives additional arguments in support of the expediency of the existence of the right of judges to publish a separate opinion, some of which can fully complement the above list, in particular: first, the existence of a single decision that takes into account different opinions can inevitably tend to blur differences, which will reduce the clarity of judgment, make it more abstract and rhetorical; secondly, judges are deprived of the opportunity to "build" their individual reputation, to form an audience of "supporters" among colleagues, practising lawyers, academics and the general public.[9]

In continuation of the above-mentioned counter-argument regarding the authority of the Court, it is appropriate to include some clarifying explanations from Kateřina Šimáčková, a current Judge of the ECtHR from the Czech Republic. She highlights an important perspective on this issue: when a lack of a common position among judges becomes publicly recognised, there is a fear that the decision made by the minimum by the majority – accompanied by detailed, meaningful and well-argued separate opinions – reduces the authority of the Court as a body. Such a decrease in authority might lead to reduced confidence among states in the Court's powers to issue binding decisions.

Although the Court's decisions are formally legally binding, opponents of the presence of special opinions raise the question of whether a decision made by a minimum majority of votes has a morally binding effect.[10] However, Šimáčková disagrees with such a line of reasoning since it is the plurality of opinions that is a sign of the legitimacy of the law. She contends that the transparency of the ECtHR's work is a guarantee of its authority; the principle of publicity and the authority of the Court are inseparable concepts, and therefore, it is impossible to build their hierarchy because transparency increases authority.[11]

Empirical studies from the relevant aspect demonstrate several factors that can encourage judges to more actively express their disagreement with the majority through separate opinions. These factors include personal qualities – such as reluctance to seek compromises or, on the contrary, efforts to defend their views in the struggle and ensure their victory – along with professional experience. Researchers have noted that judges who have previously served in national courts often do not object to the frequent and wide use of judicial disagreements in their decisions. Other influential factors include previous career growth and the field of competence, for example, the presence of special knowledge in the issue being resolved in a specific case.[12]

9 ibid 112.

10 Kateřina Šimáčková, 'Dissenting Opinions in Constitutional Courts: A Means of Protecting Judicial Independence and Legitimizing Decisions' (The Rule of Law in Europe - Vision and Challenges: Seminar, Strasbourg, 15 April 2021) 2 <https://www.echr.coe.int/documents/d/echr/Intervention_20210415_Simackova_Rule_of_Law_ENG> accessed 10 May 2024.

11 ibid 1.

12 Gregor Maučec and Shai Dothan, 'Judicial Dissent at the International Criminal Court: A Theoretical and Empirical Analysis' (2022) 35(4) Leiden Journal of International Law 960, doi:10.1017/S0922156522000103.

Commenting on the latter factor, we tentatively note that in the case of *Mortier v. Belgium*, which will be analysed in the future, Spanish judge María Elósegui's prior experience in the field of bioethics enabled her to approach the complex aspects of the case from a different angle.

3 SEPARATE OPINIONS OF THE JUDGES OF THE EUROPEAN COURT OF HUMAN RIGHTS: FROM THE DEVELOPMENT OF THE DOCTRINE TO CHANGING TRENDS IN LAW ENFORCEMENT PRACTICE

One notable example of a recent case considered by the ECtHR where a dissenting opinion reflects the inner independent conviction of a judge and provides a fresh perspective on the circumstances is the case *Mortier v. Belgium* (application No. 78017/17), decision dated 4 January 2023, considered as part of the Chamber, the level of importance of the case is key.[13]

The cited case holds both scientific and practical relevance, especially concerning possible improvements to national legislation, as it marks the first time the ECtHR considered the compliance of euthanasia that had already been carried out. The Court clarified that its focus was not on the existence of a right to die (or the right to euthanasia) under Article 2 but rather on whether the euthanasia performed in relation to the applicant's mother could occur without violating Article 2 of the ECHR, given certain conditions and guarantees.

The interest of the case is actualised by the lack of consensus on euthanasia regulation at the legislative level across Europe. Moreover, the previous practice of the Court in several similar cases, such as *Pretty v. United Kingdom,*[14] does not indicate a well-established and developed approach by the ECtHR to this problem.

In summarising the circumstances of *Mortier v Belgium*, it is crucial to highlight its relevance to Article 2 (Right to Life) of the Convention in its material and procedural aspects from the position of positive obligations of the state. The applicant contended that the Belgian Euthanasia Act procedures were not followed, arguing that the legally established guarantees were illusory and insufficient to ensure effective protection of his mother's right to life. The case also raised concerns about the failure to ensure an effective investigation into the circumstances surrounding the euthanasia of the applicant's mother. In particular, the applicant questioned the independence of the investigation, noting that the doctor (Professor D.) who performed the euthanasia procedure was the co-chair of the Federal Commission for Monitoring and Evaluation of the Law on Euthanasia, which checked and evaluated its legality post-factum, and the criterion of reasonable speed.

13 *Mortier v Belgium* App no 78017/17 (ECtHR, 4 October 2022) <https://hudoc.echr.coe.int/eng?i=001-219988> accessed 10 May 2024.

14 *Pretty v United Kingdom* App no 2346/02 (ECtHR, 29 April 2002) <https://hudoc.echr.coe.int/fre?i=002-5380> accessed 10 May 2024.

Separately, the applicant claimed a violation of Article 8 of the ECHR from various angles. However, the ECtHR narrowed the scope of its review, focusing solely on the applicant's assertion that his lack of prior notification and involvement in the euthanasia decision-making process constituted a violation of his right to respect for private life and family life.

With regard to the material aspect of Article 2 of the ECHR, the Court stated that the Law "On Euthanasia " can meet these requirements, as it can protect the right to life, as required by the article. In addition, the ECtHR noted that the provisions of the Law on Euthanasia were observed. For instance, the Court determined that the patient's donation to the fund headed by the doctor who performed the euthanasia (Professor D.) did not constitute a conflict of interest. This assessment was based on the size of this donation and the timing of its contribution.

Additionally, the Court addressed the concerns about the independence of the doctors consulted by Professor D., who were members of the LEIF association[15] he headed. The Court concluded that this affiliation was insufficient to imply their dependence on Professor D., as many doctors in Belgium who participate in euthanasia procedures have been trained and/or are members of this organisation. Thus, the Court concluded no violation of Article 2 ECHR in the material aspect.

At the same time, the Court acknowledged the existence of a violation of Article 2 in its procedural aspect, recognising that, at least under the circumstances of this case, the examination of *ex post facto* (that is, one that has an a posteriori nature) in the Federal Commission did not meet the required independence standard. This was particularly concerning because Belgian law allows a doctor involved in euthanasia to participate in the commission's meetings, even if they observe the rule of silence.

Also, the ECtHR found no violation of Article 8 of the Convention since the legislation in the case ensured a fair balance between the competing interests. The doctors took all possible reasonable measures to encourage the patient to notify her relatives in advance, yet ultimately acted in accordance with her wishes, thus fulfilling the legal requirements regarding the preservation of confidentiality and medical secrecy.

It is clear that this debatable, ambiguous question could become a catalyst for the search for hypothetical errors potentially made in the decision and possible legislative deficiencies that need to be corrected in the future. Judge Elósegui, in her separate partially dissenting opinion, concurred with the Court's conclusion concerning the violation of the procedural aspect of Article 2 of the Convention but added an important additional legal argument. She suggested that the relevant violations were not just an isolated case of incorrect application of the Belgian legislation on euthanasia; instead, they could reflect a systemic problem affecting certain categories of persons.

15 *Levens Einde Information Forum* <https://leif.be/home/> accessed 10 May 2024.

In particular, the judge emphasised that postmortem (a posteriori) reviews of performed euthanasia, alongside the procedure for the formation and functioning of the Federal Commission overseeing the law, are practically incompatible with the guarantees provided for in Article 2 of the ECHR for vulnerable groups. Thus, the dissenting opinion, in contrast to the Court's decision itself, points to a systemic flaw in Belgian legislation regarding euthanasia for people with mental illness (since, as pointed out in the dissenting opinion, there are significant medical disagreements about the true incurability of certain mental illnesses, e.g. chronic depression). The crux of the issue lies in the fact that verification only occurs post-factum, e.g. after the person's death. The opinion suggests that Belgium may have violated the substantive aspect of Article 2 in this case and warns of the threatening consequences that could occur in the future if the relevant legislation is not reviewed and updated.

Judge Elósegui also disagrees with the ECtHR's conclusion that there is no violation of Article 8 of the Convention due to maintaining a balance between competing interests, in particular, the predominance of the applicant's mother's right to the autonomy of her decision to end her life. The judge, taking into account her five-year experience as deputy chairman of the Bioethics Committee of the Autonomous Community of Aragon, gives additional justification to confirm that the principle of autonomy has no legal meaning without taking into account the other three principles of bioethics, especially when vulnerable individuals are involved, as their ability to make autonomous decisions may itself be questionable. In a separate opinion, the current significant risk of abuse of respect for the dignity and rights of the patient is noted, as a defenceless and vulnerable person can simply be left alone in the hands of a doctor, isolating him from his family and loved ones. That is why, referring to a number of conclusions of non-governmental organisations, the judge disagrees with the majority of judges that a mentally ill person is endowed with complete freedom in this matter and can express his own will.

Based on the above, we can note that the given separate opinion of Judge Elósegui, which is partially inconsistent, can claim to express an alternative, reasoned vision of the problem of guaranteeing the standards arising from the provisions of Article 2 of the ECHR, cases of the application of the euthanasia procedure to persons with mental illnesses, and also have an important meaning to analyse possible defects of national legislation in this aspect.

Another significant example where a judge's separate opinion does not coincide with the majority is *Hassan v. United Kingdom, decided on* 16 September 2014 (application No. 29750/09).[16] It is also appropriate to immediately note that the partially dissenting opinion of Judge Robert Spano, joined by Judges Nicolaou, Bianku and Kalaydjieva, may have an important doctrinal significance. It addresses several theoretical and practical issues: first, the possibility of applying extraterritorial jurisdiction in the context of the provisions of Article 1 of the ECHR; second, the adequacy of the interpretation of the provisions of Article 31 Para. 3 (b) of the Vienna Convention on the Law of International

16 *Hassan v The United Kingdom* App no 29750/09 (ECtHR, 16 September 2014) <https://hudoc.echr.coe.int/fre?i=001-146501> accessed 10 May 2024.

Treaties in matters of taking into account the subsequent practice of applying the treaty (in particular, the European Convention on Human Rights), which establishes the agreement of the participants regarding its interpretation; and third, the problems of correlation between the provisions of international human rights law and international humanitarian law, as well as the correctness of the application of the European Convention on Human Rights in the conditions of an international armed conflict.

Thus, the case referred to, among other things, the actions of the British armed forces in Iraq, the capture of the applicant's brother by the British armed forces and his subsequent detention in a camp on the territory of Iraq in April 2003 as part of the internment procedure regulated by the provisions of the Third and Fourth Geneva Conventions.

It is important to emphasise that, based on the circumstances of the case, the British authorities did not *de jure* carry out the derogation procedure from the state's obligations defined by the Convention, in particular the right to freedom, because such a critical formal requirement of this procedure as notification was missing.

Furthermore, the British government argued before the Court that the state's contractual obligations under Article 5 of the ECHR should either be deemed inapplicable or assessed in light of international humanitarian law rather than the European Convention on Human Rights.

Interestingly, the majority of the judges of the Grand Chamber sided with the government's position, agreeing that the applicant's brother was not within the jurisdiction of the United Kingdom from the time of his arrest by the British military until he disembarked from the bus that transported him from the camp. Also, the ECtHR found no violation of Article 5 (1-4) because it determined that international humanitarian law could be applied in this case. Therefore, the European Convention on Human Rights could implicitly accommodate these provisions, which meant that the detention of the applicant's brother was not considered arbitrary and adhered to the requirements of international human rights law, in particular, Article 5 of the ECHR. Furthermore, it should be noted that, in its reasoning, the Court referenced the rule of subsequent state practice under the Convention, which the majority of judges interpreted as demonstrating an agreed common and consistent intent among member states to modify the fundamental rights guaranteed by the ECHR.

However, in their separate opinion, the aforementioned judges offered quite relevant, logical and sufficiently convincing arguments and criticised the main conclusions made by the majority of the judges of the Grand Chamber. They specifically highlighted key points regarding the given case. In particular:

(1) the appropriateness of the application of the rule on the subsequent practice of the signatory states provided for in Article 31 (para. 3) (b) of the Vienna Convention on the Law of International Treaties with reference to three key reasons:
    a) the inconsistency of the Court in the issues of the existence of extraterritorial jurisdiction of the state in situations related to armed conflict and the presence of the fact of occupation of part of the territory by a member state of the Council of Europe;

b) the given rule should be applied exclusively when the relevant practice meets the criteria of consistency and is common to all parties to the international agreement, which, according to the judge, could not be established in the case under consideration. In addition, in a separate opinion, it is emphasised that such subsequent practice in matters of interpretation of the foundations of legal rights should be directed towards expanding the normative content of such rights and not towards narrowing their meaning, as was the case in this case;
c) the irrelevance of the references of the majority of judges to the practice of states refraining from derogating from Article 4 of the ICCPR in the context of actions to restrict freedom through internment, since Article 9 of the Covenant, in contrast to Article 5 of the ECHR contains only a general prohibition of arbitrary deprivation of liberty without an exhaustive list of grounds for such actions;

(2) the possibility of an expansive interpretation of the list of grounds for deprivation of liberty under Article 5-1 of the ECHR due to an attempt to "inscribe" provisions of other norms of international law into it (in particular, provisions of the Third and Fourth Geneva Conventions) is denied. The opposite approach, according to the judge, would simply make Article 15 obsolete and unnecessary in the structure of the Convention;
(3) significant methodological and structural differences in the norms of international human rights law and international humanitarian law are indicated, which determines different judicial approaches to the assessment of individual rights and testifies to the impossibility of automatic assimilation of these two different legal regimes. This is especially relevant, according to the judge, in the case of Article 5 of the ECHR, since the indefinite and preventive internment permitted under international humanitarian law is completely inconsistent with the exhaustive list of grounds established by paragraphs of Article 5-1 and other guarantees of the same article of the ECHR;
(4) the approach of the majority of judges regarding the "adjustment" of the convention rights of Article 5 to the internment of prisoners of war and civilians in accordance with the prescriptions of international humanitarian law in the absence of a formal derogation in accordance with Article 15 of the Convention. As noted, such "adjustment" absolutely contradicts the compositional structure of Article 5 of the ECHR, which contains an exhaustive list of grounds.

In conclusion, we note that the above partially inconsistent opinion raises many interesting issues for practice and doctrine. It contains weighty legal arguments on each outlined issue and claims to be the result of the judge's internal independent conviction and his creative scientific research.

Another example of a separate opinion, which seems to be worthy of attention within the framework of the covered topic, is one expressed by Judge Iulia Motoc in the case of *N. v. Romania (No. 2)*, the decision of 16 November 2021 (application No. 38048/18).[17] This merits attention as it extends beyond the arguments presented by the ECtHR, significantly expanding the scope of debatable issues that could potentially be the subject of analysis by the Court. By doing so, it has the potential to contribute to the development of future ECtHR practices and legal positions,

The case concerned the decisions of the national courts of Romania, by which the applicant was completely deprived of legal capacity based mainly on the opinions of medical experts who transferred him under the full supervision of a legal guardian appointed by the state. The absence of close relatives to assume this role further complicated the situation. Additionally, the applicant was unable to initiate proceedings to challenge the appointed legal guardian, leaving him completely dependent on state institutions and their representatives. The corresponding procedure also did not give the applicant the opportunity to express his actual needs and wishes regarding the appointment of a legal guardian. Thus, the existing legal framework of Romania in this aspect did not leave any space for the individual situation of the person.

In the ECtHR's opinion, these circumstances constituted a significant interference with the applicant's right to respect for his private life, lacking adequate guarantees. Notably, the entire proceedings, which concerned, first of all, the fate of N., took place between the social protection authorities and two legal guardians. The applicant himself was excluded from the proceedings on formal grounds - exclusively due to the relevant medical documentation, without any consideration of his actual current state of health and ability to understand the situation and express his personal opinion. Based on this, the ECtHR found a violation of the applicant's right guaranteed by Article 8 of the ECHR.

However, in the context of our research, it is notable that the applicant' referred not only to the violation of Article 8 (Right to Respect for Private and Family Life) but also Article 6 (Right to a Fair Trial) and Article 14 (Prohibition of Discrimination). However, the Court, in its one-paragraph judgment, indicated that since a violation of Article 8 had been established, there was no need to separately examine and analyse the violations of other articles in this case. This aspect prompted Judge Motoc's dissenting opinion, which highlighted the possible violation of Article 14 of the ECHR and its complete neglect by the majority of judges. In her opinion, she compared Article 14 to "Cinderella" and "Hamlet" of the Convention, suggesting that it is very often wronged by other "characters" (that is, violations of other articles of the ECHR).

In particular, the judge drew attention to the dangerous situation when people with mental illnesses are discriminated against and stigmatised because of the presence of these

17 *N v Romania* (no 2) App no 38048/18 (ECtHR, 16 November 2021) <https://hudoc.echr.coe.int/rus?i=001-213207> accessed 10 May 2024.

disorders, which causes a high risk of violation of their fundamental rights - especially in circumstances when this already vulnerable category of persons is under long-term supervision from state institutions. From the point of view of the analysis of the signs of the phenomenon of discrimination, the given separate opinion is of scientific and applied interest since it examines in detail the issue of discrimination without a "comparator" (that is, without the presence of another identical group of persons). Thus, the judge carefully analysed the question of whether discrimination is even possible under such initial circumstances - it is emphasised that Article 14 is aimed at protecting against different treatment "without objective and reasonable justification/ justification with persons who are in similar or *similar situations* situations", which, according to the judge, indicates the absence of an imperative requirement about the identity of the comparison groups.

After analysing the circumstances of the case once again, Judge Motoc was convinced that N.'s presence of a mental disorder was automatically equated with his complete civil incapacity. She noted that such an approach contradicts both the national legislation of Romania (the "Law on Psychiatric Care") and international treaties (for example, the UN Convention on the Rights of Persons with Disabilities, to which the respondent state in this case is a party), as well as the previous practice of the ECtHR, which indicated that "the treatment of persons with intellectual or psychiatric disorders as a separate class is questionable classification, and the restriction of their rights should be subject to strict control."

Based on the above, Judge Motoc, in her separate opinion, summarised the evidence of the applicant N. *prima facie* discrimination against him based on the presence of a mental disorder. She noted the Romanian government's failure to refute the presumption of discrimination, which bears the burden of proof. This could indicate a violation of Article 14 (Prohibition of Discrimination) and Article 8 (Right to Respect for Private and Family Life) of the ECHR in this case.

It seems that the logic and consistency of the judge's arguments, their weight, as well as her desire to not only express her disagreement with the opinion of the majority but also to significantly go beyond the issues examined by the ECtHR, makes the above separate opinion interesting. It contributes to both scientific developments in the aspect of studying various manifestations of the phenomenon of discrimination and the development of further practice of the Court on these issues.

We also suggest that you pay attention to the joint partially dissenting separate opinion of seven judges (Spano, Kjølbro, Turković, Yudkivska, Pejchal, Mourou-Mikström, Felici) regarding the decision of the Grand Chamber of 3 November 2022 in the *Vegotex case International SA v. Belgium* (application No. 49812/09).[18] The specified separate opinion may be interesting not only from the point of view of the fact that so many judges disagreed with the majority of the Grand Chamber of the ECtHR in the given case but also because it

18 *Vegotex International SA v Belgium* App no 49812/09 (ECtHR, 3 November 2022) <https://hudoc.echr.coe.int/eng?i=001-220415> accessed 10 May 2024.

raises important theoretical and practical issues of the relationship and harmonious application of the guarantees established in Articles 6 and 7 of the Convention, and also, as the judges themselves emphasise, is aimed at preventing confusion regarding the application of established principles, which, in their opinion, the majority of judges misinterpreted, which caused ambiguity in matters of taking into account previous case law and created the basis for possible negative consequences for the practice of the Court in the future.

Briefly analysing the relevant facts of this case, we note that the applicant was a Belgian company, and the case concerned tax assessment proceedings in which the applicant company was ordered to pay approximately €298,813 with 10 percent additional tax. While this extra tax did not fall within the scope of "criminal prosecution" under Article 6 of the ECHR, the tax surcharges, i.e. a fine, which, according to the relevant criteria, can be considered as a "criminal prosecution" under the relevant criteria, thus bringing the case under the protections of Article 6 of the Convention.

Proceedings were initiated in October 1995 when the tax authorities notified the applicant company of their intention to correct the company's 1993 tax return and impose an additional tax. These proceedings lasted until 2009, during which the applicant company contested the claim of the tax authorities as out of time. Thus, during the specified period in 2000, the tax authorities issued a demand for payment; however, according to the applicant, this demand did not interrupt or suspend the statute of limitations, and therefore, the claim was overdue. Such conclusions of the applicant were based on the decisions of the Administrative Court of Cassation dated 10 October 2002 and 21 February 2003. However, in July 2003, the Law "On Other Provisions" was adopted, which entered into force on 6 February 2007. The Court of Appeal of Antwerp ruled in favour of the tax authorities; however, in its motivation, it did not refer to the provisions of this law but to another reason. Instead, the Court of Cassation, to which this decision was appealed, left it unchanged but, at the same time, referred to the provisions of Article 49 of the above-mentioned law of 2003, indicating that the demand for payment in 2000 interrupted the limitation period. Therefore, this demand was not overdue.

In the end, the majority of the judges of the Grand Chamber of the ECtHR found a violation of Article 6-1 of the Convention in the aspect of non-observance of a reasonable time. However, on all other issues, they found no violation of the requirements of Article 6. According to the majority, the adoption of Section 49 of the Law was necessary to correct the judicial practice of the Administrative Court of Cassation and, thus, to ensure legal certainty. In addition, the Court noted that, in exceptional cases, retrospective legislation may be justified, especially for the purpose of interpreting or clarifying an old legal provision, filling a legal vacuum or levelling the effects of new judicial practice.

In contrast, Judges Spano, Kjølbro, Turković, Yudkivska, Pejchal, Mourou-Vikström, and Felici, in their joint separate opinion, criticised the Court's approach to resolving the case. In particular, they highlighted the failure to consider the previous practice of the ECtHR under Article 7 of the Convention, which states reinstating criminal (in its content)

responsibility for a crime for which the statute of limitations has expired would violate Article 7 of the Convention, regardless of whether responsibility will be restored through legislative intervention, as in this case, or through a change in judicial practice. The authors emphasised the need for harmonising Articles 6 and 7 of the ECHR in such cases.

Both scientific and applied interest from the point of view of the further development of the precedent practice of the Court may be part of a separate opinion devoted to the analysis of the connection between Article 6, which provides for procedural guarantees in criminal cases, and Article 7, which regulates material guarantees. Not limited only to the connection between these articles in terms of the autonomous interpretation of the concept of "criminal prosecution", the judges state that "Article 6 of the Convention cannot be interpreted in such a way as to allow the adoption of new legislation with retrospective effect, which extends the statute of limitations for criminal charges offences for which the statute of limitations has already expired under national law, thereby restoring or renewing criminal liability, as this would constitute a violation and, therefore, would be incompatible with Article 7 of the ECHR." Finally, the authors of the considered separate opinion not only disagree with the majority regarding the absence of violation of Article 6 in other aspects (except failure to observe reasonable time limits) but also point to the potential negative consequences of the Court's reasoning in the given case for its further practice, which can undoubtedly indicate an important applied meaning of this shared separate thought.

Continuing the analysis of individual opinions of ECtHR Judges, we cannot fail to pay attention to those added by Judge Paulo Pinto de Albuquerque. Serving as a judge for nine years (between 2011 and 2020), he independently or collaboratively formulated more than 150 separate opinions, which since have been translated into several languages and published in collections.[19]

Thus, in 2016, the Fourth Section of the ECtHR issued a decision in *Bărbulescu v. Romania* (application No. 61496/08), in which it acknowledged the absence of violation of Article 8 of the ECHR in the aspect of the right to respect for private life and the secrecy of correspondence.[20] In this case, Mr. Bărbulescu was fired by his employer, a private company, for using the Internet during working hours for personal purposes, contrary to internal rules prohibiting it.

19 See *inter alia*, the following collections of translation of Paulo's thoughts Pinto de Albuquerque: Paulo Pinto de Albuquerque, *I Diritti Umani in Una Prospettiva Europea: Opinioni Concorrenti e Dissenzienti (2011-2015)* (Davide Galliani ed, Giappichelli 2016) (in Italian); Paulo Pinto de Albuquerque, *Convenção Europeia dos Direitos Humanos: Seleção de opiniões* (Revista dos Tribunais 2019) (in Portuguese); Albuquerque (n 2) (in Ukrainian); Paulo Pinto de Albuquerque ve diğer (ed), *İçtihatlarla İnsan Hakları: Yargıç Pinto de Albuquerque'nin Seçilmiş Şerhlerinin ve İlgili AİHM Kararlarının İncelemeleri*, 3 cilt (OnİkiLevha 2021) (in Turkish).

20 *Bărbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016) <https://hudoc.echr.coe.int/eng?i=001-159906> accessed 10 May 2024.

Over a period of time, the employer monitored the applicant's messages on a Yahoo Messenger account, which was opened for the applicant to communicate with clients. The transcript of the messages presented in the national proceedings showed that he exchanged messages of a purely private nature with third parties, including his wife and brother.

In proceedings at the national and international levels, the applicant complained that the termination of his contract resulted from a violation of his right to respect his private life and correspondence and that the domestic courts had failed to protect that right.

The ECtHR, having considered the complaint, indicated that the applicant's case should be assessed from the point of view of the state's positive obligations. The Court noted that the applicant had the opportunity to put forward his arguments in the national courts, which had properly considered and recognised the existence of a disciplinary violation because the applicant had used Yahoo Messenger on the company's computer during working hours, in violation of the rules established by the employer.

The national courts attached particular importance to the fact that the employer had accessed the applicant's Yahoo Messenger account, believing that it contained professional messages. They did not give much weight to the actual content of the applicant's messages. Still, they relied on the transcript only to the extent that it proved that the applicant was using the company computer for personal purposes during working hours. There was no reference in their decisions to the specific circumstances under which the applicant communicated or the identity of the parties with whom he communicated. Thus, the content of the messages was not a decisive element in the conclusions of the national courts.

In this case, only the applicant's Yahoo Messenger account was monitored, and no data and documents stored on the applicant's computer were reviewed. The ECtHR found no indication that the national authorities had failed to strike a fair balance, within their discretion, between the applicant's right to respect his private life under Article 8 and the interests of his employer. Thus, the Court concluded no violation of Article 8 of the ECHR.

At the time of the decision, the forces in the Fourth Section were divided into six judges in favour of no violation and one against. Judge Paulo Pinto de Albuquerque, while sharing the opinion of the majority that there was no violation of Article 6 (Right to a Fair Trial) of the ECHR, argued that Article 8 (The Right to Respect for Private and Family Life) had been violated. In his partially dissenting opinion, the judge emphasised that the presented case was an excellent opportunity for the ECtHR to develop its practice in privacy protection in the field of employee communications on the Internet. The novelty of this case concerned:

(1) the non-existence of an Internet surveillance policy duly implemented and enforced by the employer;
(2) the personal and sensitive nature of the employee's communications that were accessed by the employer;
(3) the wide scope of disclosure of these communications during the disciplinary proceedings brought against the employee.

Judge Pinto de Albuquerque indicated that these facts should affect the assessment of the validity of the disciplinary proceedings and the sanction applied. Unfortunately, neither the national courts nor the ECtHR majority paid attention to these important factual features of the case.

After analysing the circumstances of the case and its specified features, as well as acts of hard and soft law which exist at the international level and provide guidance on respect for the right to privacy and protection of personal data of both ordinary users and workers, the judge concluded that employees must be made aware of the existence of an internet usage policy in force at their workplace. This includes policies that apply outside the workplace and during out-of-work hours, involving communication facilities owned by the employer, the employee or third parties, which, according to Judge Pinto de Albuquerque, was not properly done in the case of Mr Bărbulescu.

The judge pointed out that despite the Romanian government's claims that Mr Bărbulescu knew about the existence of these rules set out in Notice 2316 adopted by the employer in July 2007, and even the existing disciplinary proceedings against Mr Bărbulescu's colleague, the Government failed to provide evidence that the applicant was actually communicated this document. Its only copy, available in the Court's files, did not even contain the applicant's signature.

The judge also observed that even assuming that Notice 2316 did exist and was communicated to employees, including the applicant, before the events of the case, this would not be sufficient to justify Mr Bărbulescu's dismissal, given the extremely vague nature of this notice. A simple notification by the employer to the employees that "their activities have been monitored" is clearly insufficient to provide the latter with adequate information about the nature, scope and consequences of the implemented internet surveillance program. The author of the dissenting opinion emphasised that the majority of the Section judges did not care to consider the terms of communication to employees of the company's online surveillance policy despite the critical importance of this analysis to the outcome of the case.

After the ruling in the case, the applicant, dissatisfied with the position of the Section, invoked Article 43 of the ECHR and appealed to the Grand Chamber with a request to review his case. In September 2017, the Grand Chamber, after analysing the arguments of the parties and the case materials, adopted a decision that recognised the existence of a violation of Article 8 of the ECHR.[21] That is, this court opposed the earlier decision made by the Section.

Unlike the Section, the Great Chamber shared Judge Pinto de Albuquerque's reasoning regarding the need to analyse whether the employer properly communicated the extent and nature of his employer's monitoring activities or the possibility that the employer might

21 *Bărbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) <https://hudoc.echr.coe.int/eng?i=001-177082> accessed 10 May 2024.

have access to the actual content of his messages. The Grand Chamber highlighted that the domestic courts had failed to determine whether the applicant had been notified in advance about the possible introduction of monitoring measures and their scope. For such notice to qualify as prior notice, the warning from the employer had to be given before the monitoring activities were initiated, especially where they also entailed accessing the contents of employees ' communications.[22]

In addition, the Strasbourg Court indicated that neither court had considered the seriousness of the consequences of the monitoring and the subsequent disciplinary proceedings. In this regard, the applicant had received the most severe disciplinary sanction– dismissal.[23]

Thus, we can see how the opinion of a minority of judges (in our case, the opinion of one judge of the Section) can later evolve into the majority opinion of the Grand Chamber. The given example is an excellent embodiment of the position that the separate opinions of the judges of the ECtHR can have not only doctrinal significance but also practical value. In this case, the dissenting opinion helped the applicant strengthen his arguments for referring the case to the Grand Chamber, showcasing its applied law-enforcement relevance. Secondly, it contributes to developing new approaches in the dynamic interpretation of some provisions of the ECHR, ensuring their ongoing relevance to the current state of social development.

Finally, we would like to draw attention to one more separate opinion of Judge Pinto de Albuquerque, which is crucial not only for the doctrine but also for law enforcement practice in the field of criminal procedure. This opinion was added to the case *Svetina v. Slovenia* (application No. 38059/13).[24] In this case, Mr Svetina raised concerns about the lack of a court order granting access to his mobile phone data, evidence which was later allegedly used to convict him of murder.

Mr Svetina was convicted of aggravated murder in September 2009. He appealed the verdict to the Court of Appeal, the Supreme Court and the Constitutional Court. In particular, he claimed that the police had illegal access to his mobile phone data and the data of the victim as they had not obtained court orders to examine the devices. The Supreme Court of Slovenia found that the police had indeed examined his phone without a court order but decided that the evidence obtained would have been obtained anyway in other ways and did not rule it inadmissible.

Disagreeing with the decisions of national courts, Mr Svetina appealed to the ECtHR, believing that such actions of the police and courts violated his rights under Articles 6 and 8 of the ECHR. The Strasbourg Court, having considered the case, concluded that there was a violation of Article 8 but found no violation of Article 6(1).

22 ibid, para 133.
23 ibid, para 137.
24 *Svetina v Slovenia* App no 38059/13 (ECtHR, 22 May 2018) <https://hudoc.echr.coe.int/eng?i=001-183124> accessed 10 May 2024.

The court indicated that "the applicant was able to challenge the legality of the examination of his mobile phone and admissibility of related evidence in the adversarial procedure before the first-instance court and in its grounds for appeal. His arguments were addressed by the domestic courts and dismissed in well-reasoned decisions. The applicant made no complaints in relation to the procedure by which the courts reached their decision concerning the admissibility of the evidence." Additionally, the ECtHR mentioned that "the crux of [the] complaint lies in [appl and cant's] disagreement with the domestic courts' legal assessment of the admissibility of evidence […] which is essentially based on the view that evidence which resulted from an unlawful examination or search but would have inevitably been discovered even in the absence of such an examination could be admitted to the criminal file […] This disagreement, however, concerns a question of interpretation of domestic law, which is primarily a matter to be resolved by domestic courts. The Court accordingly does not draw any conclusion as to the compliance of the "inevitable discovery doctrine" with the Convention requirements".[25]

Finally, the Court expressed that the conviction of the applicant "was based on a number of other items of incriminating evidence, not related to the unlawfully obtained data, such as (i) his own acknowledgment that he had run over X, (ii) the results of the reconstruction of events undertaken in order to test the applicant's version of events, (iii) biological traces found on the applicant, his car and on X, and (iv) material evidence, such as a rubber tube belonging to the applicant's car found at the scene, and (v) the testimony of witnesses".[26]

Judge Pinto de Albuquerque, agreeing in general with the decision of the Court on the absence of violation of Article 6(1) of the ECHR, added a concurring separate opinion to the decision, in which he disagreed with the use of the doctrine of "inevitable discovery" by domestic courts. This dissenting opinion is of extraordinary doctrinal importance as the judge analysed the history of the creation of this theory by the US Supreme Court in 1984 in the case of *Nix v. Williams* and provided some critical remarks regarding its application. In particular, he indicated that "the inevitable discovery of the evidence would have to take place within a short period of time after the State misconduct had occurred and in "essentially the same condition" as it was actually found, but it remained unclear how short this period should be and to what extent the conditions of the possible future findings could differ from the actually uncovered evidence. Factual considerations unique to each case could lead different courts to distinguish between degrees of "inevitability" based on arbitrary factual distinctions."

Through logical and linguistic analysis, Pinto de Alburquerque identified the shortcomings of the "inevitable detection" doctrine, asserting that the certainty called for by the "inevitable source" exception is purely virtual, echoing the sentiment of an English court that stated, "nothing is so easy as to be wise after the event".[27]

25 ibid, para 49.

26 ibid, para 50.

27 ibid, concurring opinion, para 12.

Lastly, the judge emphasised that even assuming for the sake of argument that the examination of the applicant's telephone had contributed to the discovery of the tainted evidence (the telephone records of the communication between the applicant and the victim), it could be argued that the defect relating to the telephone search had later been purged because the applicant admitted, of his own accord, that he knew the victim and had run him over. Hence, the "purged taint" exception to the exclusionary rule could have been invoked, but indeed not the "inevitable discovery" exception. Its use by the Supreme Court was wrongful, both on Convention law grounds and the facts of the case.[28]

The separate opinion presented above compels lawyers to recognise the role the court plays as a "deterrent" against law enforcement agencies in their operational and investigative activities. The active use of such a doctrine can push these agencies to disregard the criminal procedural norms, especially those related to the right to protection. In support of this thesis, Judge Pinto de Albuquerque cited the following case:

Imagine the situation, "when there are numerous, lawfully obtained indicia that a person may be hiding a prohibited substance in her house, police protocol may indicate that a home search be conducted after obtaining a judicial warrant. The police, however, skip the warrant and search the house directly, finding the prohibited substance. When the evidence is challenged in court, the prosecution may invoke the "inevitable discovery" doctrine and argue that, under the circumstances of the case, the warrant would have been asked for and obtained, and the evidence would have been found in any case. Even if one concedes that this were true, the seemingly automatic application of this doctrine in this type of cases deprives the police of any incentive to actually request a warrant. More generally: the surer the police are that in a routine procedure they will find what they are looking for, the more likely they are to halt the formal procedures and the less likely they are to behave in a lawful way."[29]

The doctrine applied by Slovenian courts and mentioned in the *Svetinac case* challenges the entire established system of criminal procedural law among Council of Europe member states, leaving readers with more questions than answers. Instead, the judge's dissenting opinion sheds some light on this doctrine of "inevitable discovery" and why law enforcement should be doubly careful when it comes up in a particular case.[30]

28 ibid, concurring opinion, para 23.

29 ibid, concurring opinion, para 17.

30 For example, in 2022, the Ukrainian Supreme Court mentioned the doctrine of "inevitable discovery" in its decision, stating that " ...the appellate court should take into account that according to the content of part 1 of Art. 87 of the Criminal Procedure Code, the evidence must be declared inadmissible only if it was obtained exclusively as a result of actions that constituted a significant violation of human rights and freedoms. At the same time, if the relevant evidence would inevitably have been obtained regardless of such violation of the suspect's rights, such evidence may be considered admissible (the doctrine of "inevitable discovery" is one of the exceptions to the doctrine of "fruit of the poisonous tree"). Therefore, in order to resolve the issue of admissibility or inadmissibility as a whole of the report of the inspection of the scene of the incident and physical evidence discovered during this inspection, the court of appeal must, taking into account the specific circumstances of this criminal proceeding, find out whether there are objective grounds to believe that

4 CONCLUSIONS

The research indicates that the phenomenon of a separate opinion can have a direct, immediate meaning, which can appear almost simultaneously with the appearance of a corresponding separate opinion and a prospectively mediated one - the manifestation of which is possible in the future. In particular, we can talk about direct meaning in several ways: first, as a manifestation of the judge's independence; second, its impact on improving the quality of the reasoning of the majority of ECtHR judges in this decision since the arguments presented in individual opinions are discussed during ECtHR sessions and influence the decisions of the majority; third, in the professional development of the judge who expressed a separate opinion (contributes to his creative search, allows him to show his responsibility, etc.); fourth, in enabling the losing party to see that its arguments were also considered and were not without merit; and finally, it may be of decisive importance when the Grand Chamber decides to accept the case for its proceedings.

Regarding the indirect prognostic value of a separate opinion of a judge, several directions can be distinguished:

- *doctrinal* (a separate opinion prompts the emergence of a scientific discussion on a certain aspect and can reveal the essential features of some categories, allowing us to see the pluralism of approaches to the analysis of a certain phenomenon);
- *law-making* (a separate opinion can indicate legislative defects and serve as a model for their correction. In addition, the presence of regular disagreements can indicate that the law in a certain field does not work properly or is outdated, which potentially makes separate opinions a "bridge" between yesterday and tomorrow;
- *law-enforceable* (a separate opinion most often points to weaknesses and shortcomings in the judge's reasoning and, therefore, can influence the improvement of its level and serve as a model for correcting the judges' mistakes in the future. In addition, a separate opinion can contribute to a correct understanding and interpretation of the majority decision itself);
- *axiological* (both in a personal and general aspect. So, directly for the judge or judges - authors of a separate opinion, its preparation is a catalyst for creative judicial search and contributes to the support of judicial independence and personal responsibility. For the ECtHR, in general, the phenomenon of a separate opinion gives the opportunity to be transparent, thereby democratising the Court).

the location the corpse would inevitably be discovered regardless of PERSON_1's testimony..." See, Case no 737/641/17 (Cassation Criminal Court of the Supreme Court of Ukraine, 26 September 2022) <https://reyestr.court.gov.ua/Review/106598651> accessed 10 May 2024.

REFERENCES

1. Albuquerque PP de, *Convenção Europeia dos Direitos Humanos: Seleção de opiniões* (Revista dos Tribunais 2019).
2. Albuquerque PP de, *I Diritti Umani in Una Prospettiva Europea: Opinioni Concorrenti e Dissenzienti (2011-2015)* (D Galliani ed, Giappichelli 2016).
3. Albuquerque PP de, *Separate Opinion: The Way to Fairness* (V Kaplina tr, O Kaplina ed, Pravo 2020).
4. Albuquerque PP de ve diğer (ed), *İçtihatlarla İnsan Hakları: Yargıç Pinto de Albuquerque'nin Seçilmiş Şerhlerinin ve İlgili AİHM Kararlarının İncelemeleri*, 3 cilt (Onikilevha 2021).
5. Buromenskyi M and Gutnyk V, 'The Impact of ECHR and the Case-Law of the ECtHR on the Development of the Right to Legal Assistance in International Criminal Courts (ICTY, ICTR, ICC)' (2019) 9(3) TalTech Journal of European Studies 188, doi:10.1515/bjes-2019-0029.
6. Huyue Zhang A, 'The Faceless Court' (2016) 38(1) University of Pennsylvania Journal of International Law 71.
7. Kaplina O and Tumanyants A, 'ECtHR Decisions that Influenced the Criminal Procedure of Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 102, doi:10.33327/AJEE-18-4.1-a000048.
8. Karpachova N and others, 'Impact of Direct Effect of Constitutional Norms and Practice of the European Union on the Efficiency of Human Rights Realization and Protection' (2021) 24(1spec) Journal of Legal, Ethical and Regulatory Issues 1.
9. Komarov V and Tsuvina T, 'The Impact of the ECHR and the Case law of the ECtHR on Civil Procedure in Ukraine' (2021) 4(1) Access to Justice in Eastern Europe 79, doi:10.33327/AJEE-18-4.1-a000047.
10. Laurence R Helfer and Erik Voeten, 'Walking Back Human Rights in Europe?' (2020) 31(3) European Journal of International Law 797, doi:10.1093/ejil/chaa071.
11. Maučec G and Dothan S, 'Judicial Dissent at the International Criminal Court: A Theoretical and Empirical Analysis' (2022) 35(4) Leiden Journal of International Law 945, doi:10.1017/S0922156522000103.
12. Paulus A, 'Judgments and Separate Opinions: Complementarity and Tensions' (Opening of the Judicial Year: Seminar, Strasbourg, 25 January 2019) <https://www.echr.coe.int/documents/d/echr/Speech_20190125_Paulus_JY_ENG> accessed 10 May 2024.
13. Šimáčková K, 'Dissenting Opinions in Constitutional Courts: A Means of Protecting Judicial Independence and Legitimizing Decisions' (The Rule of Law in Europe - Vision and Challenges: Seminar, Strasbourg, 15 April 2021) <https://www.echr.coe.int/documents/d/echr/Intervention_20210415_Simackova_Rule_of_Law_ENG> accessed 10 May 2024.

14. Stone Sweet A, Sandholtz W and Andenas M, 'Dissenting Opinions and Rights Protection in the European Court : A Reply that Laurence Helfer and Erik Voeten' (2021) 32(3) European Journal of International Law 897, doi:10.1093/ejil/chab057.

AUTHORS INFORMATION

Serhii Kravtsov*
PhD (Law), Researcher at The Luxembourg Centre for European Law (LCEL), University of Luxembourg
Department of civil justice, arbitration and international private law, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
serhii.kravtsov@uni.lu
https://orcid.org/0000-0002-8270-193X
Corresponding author, responsible for the conceptualization, methodology of the research, writing – original draft and data collection, supervision.

Svitlana Sharenko
Cand. of Legal Science (PhD in Law), Associate Professor, Department of Criminal Procedure, Yaroslav Mudryi National Law University, Kharkiv, Ukraine
s.l.sharenko@nlu.edu.ua
https://orcid.org/0000-0002-2623-1013
Co-author, responsible for methodology and sources, writing – original draft and data collection.

Iryna Krytska
Cand. of Legal Science (PhD in Law), Associate Professor, Department of Criminal Procedure, Yaroslav Mudryi National law University, Kharkiv, Ukraine
i.o.krytska@nlu.edu.ua
https://orcid.org/0000-0003-3676-4582
Co-author, responsible for responsible for methodology and sources, writing – original draft and data collection, writing - review & editing.

Vladyslava Kaplina
PhD in Law, Guest Lecturer, School of Law, University of Lisbon, Lisbon, Portugal
v.kaplina@fd.ulisboa.pt
https://orcid.org/0000-0003-0510-5402
Co-author, responsible for methodology and sources, writing – original draft and data collection.

ABOUT THIS ARTICLE

Cite this article
Kravtsov S, Sharenko S, Krytska I and Kaplina V, 'The Phenomenon of the Judge's Separate Opinion European Court of Human Rights' (2024) 7(4) Access to Justice in Eastern Europe 267-92 <https://doi.org/10.33327/AJEE-18-7.4-a000114>

DOI https://doi.org/10.33327/AJEE-18-7.4-a000114

Asisstant Editor – Mag. Bohdana Zahrebelna. **Managing editor** – Mag. Yuliia Hartman. **English Editor** – Julie Bold.

Summary: 1. Introduction. – 2. Separate Opinion of a Judge of the European Court of Human Rights: Courage for Justice. – 3. Separate Opinions of the Judges of the European Court of Human Rights: From the Development of the Doctrine to Changing Trends in Law Enforcement Practice. – 4. Conclusions.

Keywords: *European Court of Human Rights, separate opinion of the judge, legal position, human rights, judicial discretion, right to a fair trial, court decision.*

DETAILS FOR PUBLICATION

Date of submission: 15 May 2024
Date of acceptance: 19 Sep 2024
Date of publication: 15 Nov 2024
Whether the manuscript was fast tracked? - No
Number of reviewer report submitted in first round: 3 reports
Number of revision rounds: 1 round without revisions

Technical tools were used in the editorial process:
Plagiarism checks - Turnitin from iThenticate https://www.turnitin.com/products/ithenticate/
Scholastica for Peer Review https://scholasticahq.com/law-reviews

RIGHTS AND PERMISSIONS

АНОТАЦІЯ УКРАЇНСЬКОЮ МОВОЮ

Дослідницька стаття

ФЕНОМЕН ОКРЕМОЇ ДУМКИ СУДДІ ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ

Сергій Кравцов*, Світлана Шаренко, Ірина Крицька та Владислава Капліна

АНОТАЦІЯ

Вступ. *У статті автори посилаються на інститут окремої думки суддів Європейського суду з прав людини (далі – ЄСПЛ або Суд). Наголошують, що це явище недостатньо вивчене в юридичній літературі. Однак, з огляду на провідну роль Європейського суду, його прогресивні погляди та авторитет - насамперед на європейському континенті, де він слугує «парасолькою» для тих, хто не знайшов захисту на національному рівні, - окрема думка судді не повинна бути лише додатком до рішення Суду. Натомість її слід розглядати як рушійну силу розвитку доктрини, що потребує академічного вивчення, врахування практиками на національному рівні, а також як можливий орієнтир для прогнозування та формування майбутніх інтерпретацій положень Європейської конвенції з прав людини у майбутніх рішеннях ЄСПЛ.*

Методи. *У статті автори розглянули погляди науковців і практиків на феномен окремої думки, проілюструвавши конкретні приклади найбільш цікавих, на їхню думку, випадків, долучених до рішень Європейського суду з прав людини. На основі ґрунтовного аналізу вони сформулювали висновки, підкресливши доктринальне значення для світової науки, правотворчу та правозастосовну перспективу для національних правових систем, а також безумовну аксіологічну важливість, оскільки окрема думка відіграє роль каталізатора творчого суддівського пошуку, сприяє підтримці незалежності суддів та персональної відповідальності. Особлива важливість не лише рішень Європейського суду з прав людини, а й окремої думки, з погляду авторів, зумовлена тим, що ті ключові проблемні питання, з якими громадяни звертаються до ЄСПЛ, апріорі є складними для всієї європейської спільноти.*

Автори проаналізували окрему думку, наприклад, судді ЄСПЛ Елосегі, яка була висловлена у справі «Мортьє проти Бельгії», щодо співвідношення положень статті 2 «Право на життя» Європейської конвенції з прав людини та евтаназії. Автори також зосередили увагу на висновках, що зробив португальський суддя ЄСПЛ Пауло Пінто де Альбукерке, який за дев'ять років перебування на посаді судді самостійно або разом з колегами сформулював понад 150 окремих думок. Автори особливо досліджують його думку у двох відомих справах - «Барбулеску проти Румунії» та «Свєтіна проти Словенії». Варто зазначити, що в першій справі, хоча суддя залишився у складі меншості, його окрема думка згодом перетворилася на думку більшості Великої палати ЄСПЛ.

Результати та висновки. *Автори розглядають феномен окремої думки судді Європейського суду з прав людини як результат самостійного та глибокого мислення, вираження індивідуальної правосвідомості судді. Такий погляд ґрунтується на зануренні автора в проблеми, які були предметом розгляду колегії суддів, і знайшли або, навпаки, не знайшли свого вираження в судовому рішенні.*

Дослідивши окремі думки, автори також звертають увагу на особливості їхньої структурної побудови, яку часто використовують судді ЄСПЛ. Ці вміло структуровані висновки можуть слугувати цінним прикладом для національних суддів, більшість з яких все ще шукає свій індивідуальний правовий стиль.

Ключові слова: *Європейський суд з прав людини, окрема думка судді, правова позиція, права людини, суддівський розсуд, право на справедливий суд, судове рішення.*