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RIGA GRADUATE
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Ineta Ziemele

SEPARATE OPINIONS AT THE EUROPEAN COURT OF HUMAN RIGHTS

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The Nature and Role of Separate Opinions

Ineta Ziemele

Article 45 of the European Convention on Human Rights requires the European Court of Human Rights to reason its judgments and decisions. Reasoning of the courts is considered as one of the main sources for their authority and legitimacy. This is especially important for international courts since their mandate stems from State consent, which is a different source of legitimacy as compared to national courts.

Point 2 of Article 45 of the ECHR states the following: "If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion". The question has been raised in the practice of the Court whether a judge may also attach a separate opinion in relation to a Court's decision.

It is to be noted that Article 45 mentions two types of document adopted by the Court, i.e., judgments and decisions. The Court can adopt a separate decision either on the inadmissibility or admissibility of a case. The latter has become a rare procedural step since, even when the Court determines that most complaints are inadmissible, and, for example, only one is admissible, the Court will decide on issues of admissibility and merits in the same judgment. In view of the high number of applications submitted to the Court each year, the Court has had to optimize its procedures. As a result, unlike in the past, when the Court first decided on admissibility and later took a decision on the merits, today the decision on admissibility has become an integral part of a judgment.

This has given rise to the question whether a judge can also express a separate opinion on admissibility issues since these have become part of the judgment. The Rules of the Court (Rule 74[1] point 2) provide that: "Any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent."[1] It has to be noted that this Rule belongs to the Section on Judgments in the Rules of the Court.

1 http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (consulted on 6 March 2017).

Interpretation of Article 45 of the Convention and Rule 74[1] of the Rules of the Court in accordance with the ordinary meaning of the terms and in view of their internal consistency, indicates that the drafters of the Convention meant to accept separate opinions regarding interpretation of substantive rights. In their view, doubts should not arise concerning technical requirements for the inadmissibility of a case. The existence of such a doubt in a human rights system should be read in favour of the applicant, an approach which would be consistent with another fundamental principle of the Convention, i.e., effective protection of Convention rights.[2] In other words, it is fair to say that in the interests of effective protection of human rights in Europe and the authority of the Court separate opinions from judges were only permitted in relation to interpretation of substantive rights in the Convention but not the admissibility criteria. At the same time, it is also true that the criterion of manifestly ill-founded application is an open-ended criterion and often depends on how judges interpret the limits of the Convention. There is room for a difference of opinion. Practice shows that different views have also arisen in relation to the other criteria for admissibility of applications, including the criterion on exhaustion of domestic remedies. It is therefore no surprise that separate opinions of the judges annexed to a judgment which inter alia deals with admissibility questions may reflect some views on admissibility. In principle, there is agreement within the Court that this should not happen but it cannot be excluded completely.

In accordance with the Rules of the Court it is clear that separate opinions may take several forms. These include opinions that agree with the outcome but may disagree as to part or the entirety of the reasoning. There are dissenting opinions or partly dissenting opinions. One can also have partly concurring and partly dissenting opinions. A judge is entitled to annex a simple statement of dissent when deciding not to disclose the reasons for dissent or when a judge had already stated reasons for dissent in another case.[3] Practice at the European Court of Human Rights shows that judges may write their opinions individually or the minority may write a joint separate opinion, or a judge may decide to join his or her views to the separate opinion of another judge. All these options are exemplified in the collection of separate opinions published in this book.

The main question for any jurisdiction that allows separate opinions of judges is the legal character of these opinions. In the system of the ECHR, the opinion is annexed to the judgment.[4] In fact, it forms part of the judgment; it is also published

2 See Harris, O'Boyle & Warbrick, *Law of the European Convention on Human Rights*, 3rd ed., Oxford University Press, 2014.

3 See, for example, Judge Ziemele's opinions on just satisfaction.

4 For example, the Latvian Constitutional Court has a very different approach. Separate opinions of the judges are not part of the judgment. When the judgment is published the public does not know whether it is a unanimous or majority decision since the operative part does not disclose it. Only two months later are separate opinions published.

together with the judgment. However, the opinion does not have legally binding force. It is only the majority opinion that becomes binding on the parties. What, then, is the reason for and the purpose of separate opinions?

Before addressing this specific question a few words need to be addressed to the issue of the legal nature of the Court's judgments. Views have evolved over the years, ranging from the view that a judgment of the Court is only binding inter partes to the view that the Court's case law is a source of law. Saying that something is a source of law does not guarantee clarity of meaning. Further observations will be provided concerning the legal nature of the Court's case law. In the case of *Mamatkulov and Askerov v Turkey* the Court said: "While the Court is not formally bound to follow its previous judgments, in the interests of legal certainty it should not depart, without good reason, from its own precedents".[5] In light of the Court's position, former judge of the Court, Dragoljub Popovič, has come to the conclusion that "following precedents has been and still remains a firm and unchanged attitude of the Court".[6] As far as I can see, engagement with the common law doctrine of precedent is of limited value in answering the question whether decisions of international courts are a source of law and more specifically the question of the Court's case law as a source of law. Even if some scholars have suggested that the stare decisis doctrine exists in the practice of the European Court of Human Rights, that reading of the Court's position is not entirely correct.[7] The Convention does not spell out the theory of precedent and the Court itself has stated that it is not legally bound to follow its previous case law, although it normally follows its case law for reasons of legal certainty.

It could be argued that the European Court of Human Rights is even more inspired by the concept of *jurisprudence constante*. Thisshould not be surprising given that the Court is dominated by judges coming from civil law jurisdictions. The Court indeed takes particular care not to change its case law without good reason and if it does so, it attempts to provide an explanation.[8] In the majority of cases, however, it does not consider that it changes the case law. The Court often resorts to distinguishing the facts of cases, a method which is of great importance in common law. All in all, the Court has undoubtedly been inspired by the principles and methodology that domestic courts follow in both common law and civil law traditions.

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5 *Mamatkulov and Askerov v Turkey*, ECHR 2005-I.

6 D. Popovic, "The Role of Precedent in the Jurisprudence of the European Court of Human Rights", in D. Spielmann et al. (eds) *La Convention européenne des droits de l'homme, un instrument vivant/ The European Convention on Human Rights, a living instrument. Essays in Honour of Christos L. Rozakis*, Bruylant, 2011, p. 482.

7 Compare G. Sniedzīte, *Tiesnešu tiesības* [Judge made law] Latvijas Vēstnesis, 2013, p. 86 with references.

8 *Kudla v Poland*, ECHR 2000 –XI.

The difficulty with application of the *jurisprudence constante* doctrine to the Court's function and its case law is linked to the difference between the nature and operation of the constitutional order and international order and is related to the difficulties that the doctrine of *jurisprudence constante* still has even in domestic legal systems. In international law, unlike in domestic legal systems, the exercise of any public authority by international courts beyond the mere dispute resolution function within the limits of the attributed competence has to be carefully argued because, as Donald H. Regan has put it, "in the international sphere the problems are magnified by the absence of a legislature or a true world community".[9]

According to Article 38. 1 (d) of the Statute of the International Court of Justice (hereinafter – the ICJ), the ICJ "shall apply" "[..] judicial decisions as subsidiary means for the determination of rules of law". It has been generally accepted that "international courts and tribunals as a rule are not considered to have norm-creating functions, although the line between interpretation and law-making is sometimes fluid".[10] Such a careful interpretation of the provision corresponds to the nature of the judicial function in the international sphere just described. At the same time, in the context of customary international law, the ICJ as well as the other international courts, including the ECHR, would very often have a particularly important role to play because it is the courts that would identify State practice which makes law. In view of the customary nature of international law, the role of international courts cannot be underestimated.[11] It is therefore a fair summary to say that "a judicial decision, in almost all cases, by definition adds something to the corpus of law on the subject of the dispute: if the law had been crystal clear before the decision, it is reasonable to suppose that the case would never have been fought."[12] In this context, it has to be recalled that the ECHR has developed several methods of adjudication which are the basis for the Court's appreciation of State practice. These are: the living instrument doctrine and European consensus. Often judgments based on the appreciation of State practice give rise to conflicting comments, especially where as a result the Court finds a basis for further expanding the scope of a Convention right. Very often these are the judgments where judges are not unanimous.

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9 See Donald H. Regan, "International Adjudication: A Response to Paulus – Courts, Custom, Treaties, Regimes, and the WTO", in S. Besson (eds) *The Philosophy of International Law* (Oxford University Press, 2010) p. 229.

10 See R. Wolfrum, "Sources of International Law", in R. Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press 2012) volume IX, pp. 307-308.

11 See J. Crawford, *Chance, Order, Change; The Course of International Law*, The Hague Academy of International Law, 2013, p. 57.

12 See H. Thirlway, The Sources of International Law (Oxford University Press, 2014), p. 118 with references.

It should be recalled that the European Court of Human Rights was established "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto [..]".

Article 32 of the European Convention on Human Rights delimits the jurisdiction of the European Court of Human Rights. It provides that:

"1. The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

2. In the event of dispute as to whether the Court has jurisdiction, the Court shall decide."

The wording regarding the competence of the ECHR and the ICJ in their respective texts is not identical. The ECHR text focuses on interpretation of the Convention and the Court's function to ensure observance of Convention obligations through the complaints mechanism. In other words, the primary aim, at least according to the relevant wording, is to ensure that Convention provisions, i.e., human rights in Europe, are respected. Resolving the dispute as such is not the sole aim but is the means of achieving the primary aim, which arguably is broader than dealing with individual or inter-State complaints. This contrasts with the primary aim of the ICJ, i.e., to decide upon disputes submitted to it and in that process to apply international law. The approach by the drafters of the Convention confirms that the Convention sets a value system in Europe and that it reflects an agreement on that system.

At this stage it is appropriate to engage with the argument that the Convention is a "constitutional instrument of European public order in the field of human rights", creating a "network of mutual bilateral undertakings (and) objective obligations".[13] This qualification per se does not grant the Court law-making powers. Moreover, it is the result of the Court's interpretation of the Convention which the Court is mandated to carry out but as such it does not bestow upon the Court a law-making function. No agreement exists among the States parties to the Convention that it would be a constitutional instrument in the meaning normally assigned to the notion of a constitution. While it is true that the Convention has been named a constitutional instrument of European public order and that this offers a potentially new way of reflection on the role and even the legal nature of a Convention-based legal regime, at this stage the Court's principal method of work is based on its acceptance that international law remains the basis for carrying out its function. This is why domestic law analogies in explaining the legal nature of the Court's case law are of limited value. It is primarily the nature of the Convention and its Protocols that determines the legal nature of the case

[13] See S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge University Press, 2006), p. 195.

law of the Court. There is an agreement that the Court creates case law which is binding on States parties beyond individual judgments. This understanding stems from the fact that the Convention belongs to "those multilateral treaties the rights and obligations of which are integral in the sense that they constitute an indivisible whole and have to be performed by every party vis-à-vis every other party."[14] In other words, the Convention sets an objective legal regime, a value system. Over the years, it has become apparent that the Court has developed human rights law through interpretation. Moreover, the Court uses the general rule of interpretation as set forth in international treaty law but it has also developed its own methods of adjudication as pointed out earlier. In this context its case law is a source of law. It is with this understanding that the debate among judges as reflected in majority and minority opinions is of particular interest and importance since this debate shows the stage of development of law.

Several studies have looked into the opinions of the judges of the European Court of Human Rights. Even though opinions as such is generally an area which has not earned too much attention in scholarly research, interest in the behaviour of ECHR judges can almost qualify as an exception because books and articles are obtainable on voting patterns, statistics, nationalities, backgrounds, and the like. The available literature confirms the difficulty of such research. For example, one should be cautious about reading too much into statistics since the data collected would most certainly cover all cases over a certain period. This approach would ignore the fact that cases are very different, that dynamics in Chambers may be different. The scope for collecting statistical data ought to be identified very carefully. I might suggest looking at Grand Chamber decisions among more or less similar compositions. Among the available studies Robin C.A. White and Iris Boussiakou's study had to recognize the inherent problem with any statistical study of separate opinions in the ECHR system. The researchers admitted that: "One of the objectives of our project was to see whether simple quantitative analysis of a significant body of Strasbourg case law revealed patterns in its decision-making that were not apparent from a case by case analysis. We have failed to identify any such patterns".[15] The researchers concluded: "[I]t is judicial temperament which determines the extent to which a judge appends his or her own individual voice to the judgment … . Judicial temperament is shaped by a judge's prior experience and by the value set which that judge brings to his or her judicial work".[16]

In other words, White and Boussiakou view separate opinions as embodying pluralism within the Court. It is true that especially in the field of human rights

[14] Cited in International Law Commission Report, p. 384. http://legal.un.org/docs?symbol=A/66/10/Add.1 (accessed on 21 March 2017).

[15] Robin C.A. White & Iris Boussiakou, "Separate opinions in the European Court of Human Rights" 9 *Human Rights Law Review* 1 (2009) p. 59.

[16] *Ibid.*

judges may bring to the Court their differences as to the scope and content of these rights. That difference may indeed be shaped by the judge's social and professional background. However, danger also exists in such a reflection since it appears to introduce considerable subjectivity linked to separate opinions which could be extended to the majority opinion too. Researchers have agreed that: "What is striking is how often there is agreement as to result ..". They also think that there are many separate opinions in the European Court of Human Rights.[17]

Internal and external reasons may motivate a judge to lodge a separate opinion. Among the external reasons I would count those that relate to disagreement on interpretation and methodology of the judgment while internal reasons are most likely linked to personal convictions. In order to minimize the impact of the latter on the decision making process, it is important to have a clear rule of interpretation and methodology on which to base a decision. Considerable literature is available regarding the manner in which cases are adjudicated at the Court. That literature too pays some attention to separate opinions by judges. Furthermore, I suggest that the entire theme of procedural fairness in international courts and the question of their legitimacy and authority is relevant to the study of separate opinions and assessment of their role.

In other words, separate opinions are part of the adjudication process. It has been suggested that there is a risk that they may disclose the secret of deliberations which would in return undermine the authority of the Court. Normally, judges are very well aware of that risk and try to avoid reflecting on the kind of discussions that have taken place in the deliberations room. There are various techniques for doing so. Of course, for a very attentive reader some of the discussion may transpire, which probably makes the reading of these opinions interesting in its own way.

Separate opinions as a rule enter into a discussion with the judgment. One can even say that the first commentary on a judgment is a separate opinion. Generally, one can learn from separate opinions about where the possible future development of the Court's case law might lie. Especially in matters of human rights law which are intrinsically linked with the evolution of society, interaction between majority and minority views is of great importance since it is likely to represent a snapshot of the state of European debate.

To sum up, in the Convention system separate opinions form part of the judgment but they are not legally binding. They are highly informative as to the state of law and debate in the European Court of Human Rights. Sometimes, what is a minority today becomes a majority tomorrow. It is doubtful that there can ever be too many separate opinions. Even in those cases which have been decided by 9:8 the majority view becomes legally binding but the minority view reflects

17 *Ibid.*

the controversy that the particular issue involves. In an area of law so intertwined with societal processes, such an outcome shows that law is a living instrument and is capable of reacting to change. That is a sign of the strength of the Convention system and its mechanism, the Court.

This is a collection of separate opinions by Judge Ineta Ziemele alone or together with other judges of the European Court of Human Rights over a period of ten years. These opinions have been grouped under several headings. They reflect some issues of conviction but the majority of the opinions raise questions about interpretation of the Convention within the broader context of international law since in the view of the judge the ECHR continues to be embedded in the international legal system despite references to the Convention as a constitutional instrument. It is noted in separate opinions that the Court experiences certain methodological difficulties when it interprets the Convention in the broader context of applicable international law. Cases in which these aspects do not arise are more straightforward. Cases of qualified rights, i.e., those that require a balancing of the interests of society against the rights of individuals appear to provide a particularly casuistic picture. One of the methods that the Court has developed in applying the Convention over time and in a changing context is the principle of the Convention as a living instrument and the search for European consensus. These are notions created by the Court and the question has been asked whether the Court was justified in developing such concepts characteristic of the Convention system but without an apparent connection to relevant concepts of international law. Within the framework of a wider debate about the legitimacy and authority of the system and the Court, much free-standing innovation may raise questions. The argument presented in the opinions below is that in fact even where the Court appears to have developed its own concepts, there are international law analogies and in the end it has been the issue of semantics which has overall played a positive role, probably allowing the Court to develop human rights law more effectively.

This book not only provides a collection of separate opinions. It also places them within a wider context. The reader is provided with information where, for example, cases have been referred to the Grand Chamber and where the outcome in the Grand Chamber has followed the view of the minority judges in the Chamber. The reader is also provided with information on scholarly debate that has followed the judgments and the separate opinions therein. This approach is meant to exemplify the interaction between the majority and minority judges in the Court and the effects of that interaction on the development of human rights. Above all, this way of presenting the separate opinions of a judge of an international court exemplifies that international law is a normative process with a plurality of actors influencing its development.