laws

MDPI

Article

The Separate Opinions of a Justice of a Constitutional Court: A Case of Lithuania

Dovilė Pūraitė-Andrikienė

Law Institute of the Lithuanian Centre for Social Sciences, LT 01109 Vilnius, Lithuania; dovile.puraite@gmail.com

Abstract: Although allowing justices of constitutional courts to publish their separate opinions has become a clear trend in Europe, until an amendment to the Law on the Constitutional Court in 2008, the justices of the Constitutional Court of the Republic of Lithuania did not have this possibility. However, after the introduction of this institution in Lithuania, criticism was voiced by the public regarding its legal regulation. Therefore, this article examines the legal regulation governing the institution of a separate opinion of a justice of the Constitutional Court, as well as the use of this institution in Lithuania. The article seeks to reveal the shortcomings of this regulation, as well as to provide proposals for its improvement. The issues in question are examined in the context of the legal framework governing the institution of a separate opinion in other European Union countries (with a particular focus on Eastern and Central European countries). In order to provide a basis for this research, the article also examines the institution of a separate opinion in the context of the principle of the secrecy of the deliberation room and the secrecy of voting results in the decision-making process of constitutional justice institutions.

Keywords: separate opinion; Constitutional Court; dissenting opinion; constitution

Citation: Pūraitė-Andrikienė, Dovilė. 2023. The Separate Opinions of a Justice of a Constitutional Court: A Case of Lithuania. *Laws* 12: 11. https://doi.org/10.3390/laws12010011

Academic Editor: Patricia Easteal

Received: 12 December 2022
Revised: 16 January 2023
Accepted: 17 January 2023
Published: 18 January 2023

1. Introduction

The right to dissent derives from the principle of judicial independence, as a guarantee of judges' intrinsic independence, which ensures that a judge hearing a case in chambers can maintain his or her assessment of the case when it differs from the view of the majority of the chamber of judges and to record and publicize it (Kelemen 2011). Initially, a separate opinion[1] of a judge was only recognized in the United States, as well as in other countries of the common law tradition. After many political and theoretical disputes, separate opinions gradually became established in constitutional justice institutions of continental Europe. While European systems of constitutional review have their roots in the Austrian model, some European countries have also introduced a feature of American constitutional review—the institution of a separate opinion (European Commission for Democracy through Law 2010). The possibility for justices of constitutional courts to submit separate opinions is established in countries such as Spain, Portugal, and Germany. In particular, this institution has spread in the new democracies of Eastern and Central Europe, inter alia, Bulgaria, Croatia, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. It is often argued that the publication of reasoned separate opinions can strengthen the transparency and collegiality of the judiciary and encourage deeper and more detailed discussions in the deliberations of justices, which would lead to better reasoned and coherent decisions (European Parliament Directorate General for Internal Policies 2012).

However, some European countries, such as Austria, Belgium, France, Italy, Luxembourg, and Malta, do not recognize separate opinions in their constitutional review

[1] Separate opinions can take the form of dissenting opinions, as well as of concurring opinions, i.e., those expressing disagreement only with the reasoning of the final decision.

systems, and the results of the vote are kept secret, with neither the results of the vote nor the names of the justices made public. In Italy, the separate opinion is considered incompatible with the principle of the collegiality of the court; in France, it is considered that the individualization of a judicial opinion would give the judiciary too much influence (European Commission for Democracy through Law 2010).

Thus, the possibility for justices of constitutional courts to express separate opinions is not universal. And there is certainly no basis for claiming that the authority of the Austrian, Belgian, French, and Italian constitutional justice institutions in the eyes of the public is less than that of the constitutional justice institutions in those countries where this institution is established. Without going into a detailed discussion, it should be noted that the main arguments against the introduction of separate opinions are the following: preserving the authority of the courts and their decisions, preserving the external independence of judges from political pressures, preserving the clarity and irrefutability of the court judgment, and preserving the collegiality of the court. Meanwhile, the main arguments in favor of separate opinions are as follows: safeguarding the internal independence of judges and their freedom of expression, improving the quality and persuasiveness of court judgments, promoting transparency, and developing dialogue with the future composition of the court.[2]

While there is no strict correlation between constitutional justice and the publication of separate opinions, allowing the justices of constitutional courts to publish their dissents has become a clear trend in Europe (Kelemen 2013). In the majority of European Union (EU) Member States (namely, more than 20 States), constitutional judges have the right to submit separate opinions whenever they do not agree with the court judgment (this includes countries in which supreme court judges, to a certain extent, have functions similar to those of constitutional judges[3]) (European Commission for Democracy through Law 2018). This might be due to the increased need for transparency in constitutional adjudication and to the endless debate over the democratic legitimacy of constitutional courts; however, even if today the majority of European constitutional courts are allowed to publish separate opinions, there is much heterogeneity as to how they make use of this possibility (Kelemen 2013).

Although opinions differ on the need for separate opinions, a study summarizing the practice of EU Member States on the institution of separate opinions argues that a separate opinion only achieves its objectives when it is used in exceptional cases, when a dissenting opinion is circulated among the judges in advance, and when a dissenting opinion is written in a respectful style (European Parliament Directorate General for Internal Policies 2012). It is also argued that, if a separate opinion is exercised with restraint and is limited to matters of fundamental importance, it is a positive instrument: it encourages discussion and search for a compromise, while in the event of failure to reach a consensus, it forces the majority of the judges to reinforce their arguments in the light of the arguments of the minority and, in this way, it can also improve the quality of decisions (European Parliament Directorate General for Internal Policies 2012).

The formal condition for the correct expression of separate opinions is a well-founded and systematically coherent procedural legal framework, enabling the judge to exercise the right of separate opinions to a high standard (Valuta 2019). Until the amendment to the Law on the Constitutional Court[4] (hereinafter—LCC) at the end of 2008, the justices of the Constitutional Court of the Republic of Lithuania had no possibility of submitting a separate opinion; however, after the introduction of the institution in question, criticism was voiced in the public about the legal regulation concerning the separate opinions of a

[2] For more on the advantages and disadvantages of separate opinions, see: (European Commission for Democracy through Law 2018).

[3] For example, in Estonia, the functions of a constitutional court are performed by the Constitutional Review Chamber, which is a structural part of the National Court (the equivalent of the Supreme Court).

[4] "The Law on the Constitutional Court of the Republic of Lithuania" (in Lithuanian), 1993, *Lietuvos aidas* 24, Official Gazette *Valstybės žinios* (1993, no 6-120).

justice of the Constitutional Court, as it does not comply with the above-mentioned formal condition.

While there is an extensive literature in the United States regarding the use of separate opinions, comprehensive empirical research is still absent in Europe. However, an analysis of separate opinions in constitutional courts can offer a very instructive and eye-opening picture of continental European constitutional review. Thus, the object of this article is the legal regulation governing the institution of the separate opinions of a justice of the Constitutional Court of the Republic of Lithuania, as well as the use of this institution. The article aims to reveal the shortcomings of this regulation and to provide proposals for its improvement. To achieve this, the following tasks are undertaken and dealt with: (1) to analyze the institution of separate opinions, in the context of the principle of the secrecy of the deliberation room, and voting results in the decision-making process of constitutional justice institutions; (2) to analyze the legal regulation on the separate opinions of a justice of the constitutional court in the EU Member States; and (3) to disclose the development of the legal regulation on the separate opinions of a justice of the Constitutional Court as well as statistics on the use of this institution in Lithuania.

Some of the problematic aspects of the institution of the separate opinion of a justice of the Lithuanian Constitutional Court were analyzed by Staugaitytė (2008), Kūris (2012a, 2012b), and Valuta (2019). These authors analyzed the need and circumstances for the introduction of separate opinions of a justice of the Constitutional Court in Lithuania, and its relationship with the principle of judicial independence. In some of the above-mentioned works (Kūris 2012a; Valuta 2019), the issue of adjusting the legal regulation governing the institute of separate opinion was also raised. However, these issues have not been examined in the broader comparative context of the legal regulation of other European countries and the recommendations of the European Commission for Democracy through Law. These works also did not analyze the statistics on the use of the institute in the Lithuanian Constitutional Court.

2. Separate Opinions and the Secrecy of the Constitutional Court's Deliberation Room and Voting Results: A Comparative Perspective

There are two types of procedural practice in drafting decisions of constitutional justice institutions. In the common law tradition, it is always clear from the decision of the constitutional justice institution which justice is the author of the respective doctrine and which justices have joined it[5]; in the countries of the continental legal tradition, the authorship of judicial decisions (including in constitutional justice cases) is much more disguised[6] than in the common law tradition; in such jurisdictions, it is almost impossible to ascertain the contribution of individual justice to the outcome of a particular case (Kūris 2012b).

As Kelemen points out, there may be different degrees of transparency within the final stage of the decision-making process. The first degree is to allow judges to publish their dissent. The rule is that they cannot simply state their disagreement, but also have to give reasons for it, even if their disagreement just takes the form of joining another judge's separate opinion. The second degree of transparency is the possibility of additionally revealing the number of votes in favor and against the decision. This is implemented in Germany, albeit in a limited way, since there it is not a duty, but a possibility. Finally, the third degree of transparency is represented by the American (and English) practice in which the vote of every judge is public, whether or not they choose to write their dissent (Kelemen 2013).

---

[5] Common-law countries offer judges the highest level of transparency and freedom of expression. Decisions are taken by the majority, and the responsibility of drafting the majority judgment is assigned to a judge in the majority. His or her name and the names of those judges who agree will be disclosed.

[6] With some exceptions, e.g., in the Hungarian Constitutional Court (as in the US Supreme Court), the decision in a constitutional justice case is written by the judge whose position is supported by the largest number of judges (Kūris 2012b).

The secrecy of the deliberations is an important principle of procedural law. The justices of the Constitutional Court must be free to express their views on every issue in the case without the risk that their "intermediate" opinions will be used by someone outside the court's walls for purposes unrelated to the search for a decision in the case (because the search is already over—the decision has been given) (Kūris 2012b).

The secrecy of the deliberations is directly linked to the secrecy of the voting results in the decision-making process of constitutional justice institutions. In this respect, EU countries can be divided into three main groups: (1) countries where the absolute secrecy of the deliberation room and the voting results are respected, and the justices of constitutional courts do not have the possibility of submitting separate opinions; (2) countries where the voting results are secret, but the justices of constitutional courts have the possibility of submitting separate opinions; and (3) countries where the voting results are not secret.

The first group of countries includes inter alia Austria, Belgium, France, Italy, Malta, and Luxembourg. In some of these countries (Belgium, Italy) any violation of this principle is even regarded as a criminal offense punishable under the Criminal Code and the publication of separate opinions is considered a violation of this principle.

In Belgium, it is recognized that the secrecy of the deliberation room and the results of the vote is a principle of Belgian law and that judges are obliged to protect it. Any violation of this principle is a criminal offense and is punishable under the Criminal Code. The Belgian Constitutional Court strictly adheres to this principle; the results of the vote are kept secret, without publishing the names of the judges, and the institution of dissenting opinions is not recognized (Laffranque 2003).

France also maintains the absolute secrecy of the deliberation room. The French Constitutional Council has stated that the principle of the secrecy of the deliberations is a principle of French public law, which even prohibits the presentation of the Council's decisions as unanimously adopted, as this could lead to the discovery of how the judges voted. The justices of the French Constitutional Council take an oath to protect the secrecy of the deliberation room and the results of the vote. There is no possibility of publishing a separate opinion (European Parliament Directorate General for Internal Policies 2012).

In Italy, it is a criminal offense to disclose the secrecy of the deliberation room and the results of the vote. The justices of the Italian Constitutional Court and judges of the ordinary courts may not publish separate opinions (European Parliament Directorate General for Internal Policies 2012). However, at the level of doctrine, Italian commentators have discussed both the desirability of introducing separate opinions and the appropriate regulatory instrument for introducing them (Tega 2021).

According to Article 30 of the Austrian Constitutional Court Act, the results of voting are not public. No separate opinion is possible. Luxembourg has the tradition of the secrecy of the deliberation room and the vote. This principle has also been interpreted as prohibiting separate opinions by judges; in Malta, all courts observe the principle of the deliberation room and voting secrecy: decisions are taken by the majority and presented as having been taken by the whole court, while separate opinions are not allowed (European Parliament Directorate General for Internal Policies 2012).

The second group consists of countries whose legislation on constitutional justice institutions requires the secrecy of the deliberation room and the results of the vote, but where the justices of the constitutional court have the possibility of submitting separate opinions, i.e., in which the expression of a separate opinion does not constitute a violation of the principle of the secrecy of the deliberation room and the vote. In Spain, judges may reflect their disagreeing opinion in a separate opinion (voto particular), which has been defended in the deliberation. Separate opinions will be incorporated into the judgment and will be published in the official gazette, together with the judgment, order, or statement to which they refer.[7] In Portugal, the Law of the Constitutional Court provides that the judges of the Constitutional Tribunal have the right to table their reasons for a dissenting vote (voto

[7] Art. 90 of the Organic Law of the Constitutional Court of Spain.

vencido; defeated vote).[8] In Germany, the German Constitutional Court takes its decisions in the secrecy of the deliberation room, but the chambers of that court may announce the results of the vote in their decisions. The Federal Constitutional Court Act explicitly grants minority judges the right to publish their separate opinions (Sondervotum).[9]

In Eastern and Central Europe, the second group of countries consists of Estonia, the Czech Republic, Poland, Romania, and Slovakia. In Estonia, where constitutional review is carried out by one of the Supreme Court divisions (the Constitutional Chamber), judgments are adopted by simple majority votes while safeguarding the confidentiality of deliberations. A judge or several judges who disagree with the judgment or the reasons may append a (joint) dissenting opinion to the judgment.[10] In Romania, deliberations and voting are secret, but justices who have given a negative vote may formulate a separate opinion. Concerning the reasoning behind the decision, they may also write a concurring opinion.[11] In Poland, the Constitutional Tribunal adopts its final acts in camera[12]; a judge who disagrees with the majority may, before the delivery of the ruling, submit a dissenting opinion, providing a written statement of grounds for his or her dissent.[13] In the Czech Republic, the Constitutional Court Act establishes categories of questions on which voting is secret. A judge who disagrees with the decision of the Plenary or with its reasoning has the right to have his or her individual opinion noted in the record of discussions and appended to the decision with his or her name stated.[14] The Slovak Constitutional Court Act provides that only judges and a member of the court's staff may take part in the vote and that the vote on the matters provided for in Article 136(2) and (3) of the Constitution shall be by secret ballot; a judge who disagrees with a decision (either of the plenary or of a senate) has the right to have his or her separate opinion briefly noted in the record on voting and published as the other parts of the decision.[15]

The third group includes countries that do not respect the principle of the secrecy of voting results. It should be noted that this group includes only Eastern and Central European countries. The Bulgarian Constitutional Court adopts most of its final acts by open vote: judges who disagree with the final act sign it but have to submit a dissenting opinion[16]. However, in Bulgaria, a separate opinion is not permitted when a decision is adopted by secret ballot.[17] The Rules of Procedure of the Slovenian Constitutional Court stipulate that decisions and orders generally contain, among others, a statement of the composition of the court having reached the decision; that statement includes the results of the vote, the names of the judges who voted against the decision, and the names of those who submitted separate opinions.[18]

Thus, European countries have very different approaches to ensuring the secrecy of the deliberation room and voting results. On one extreme, there is the approach where any violation of this principle is a criminal offense punishable under the Criminal Code (Belgium, Italy) and the publication of separate opinions is considered a violation of this principle; on the other extreme, there is the approach where the names of the justices who have voted against the final act of the court are published in this act (Slovenia) and a justice who has voted against the final act is not only allowed, but also obliged, to submit

8 Art. 42 (4) of the Law of the Portuguese Constitutional Court.
9 Art. 30(1)(2).
10 Arts. 57 (5) and 59 (5) of the Constitutional Court Review Procedure Act of the Republic of Estonia.
11 Arts. 58(1) and 59 (3) of the Law on the Organization and Operation of the Constitutional Court of Romania.
12 *In camera* is a latin term, which describes court cases, parts of it, or process where the public and press are not allowed to observe the procedure or process.
13 Arts. 67 and 68 (3) of the Constitutional Tribunal Act of the Republic of Poland.
14 Arts. 12(5), 14 and 22.
15 Art. 32.
16 According to Article 32 of the Regulations on the Organisation of the Activities of the Bulgarian Constitutional Court, justices who do not agree with a decision, or with a resolution with which a motion is denied review, may sign them but attach a written dissenting opinion.
17 Arts. 30 and 32(4) of the Regulations on the Organization of the Activities of the Constitutional Court.
18 Arts. 66 (6) and 71.

a dissenting opinion, in which he must disclose the reasons for his disagreement with the majority decision (Bulgaria). However, most European countries take a somewhat intermediate view on these issues—the requirement of the secrecy of the deliberation room and the results of the vote is respected, but the expression of separate opinions is not considered a breach of this principle. Thus, the approach to the scope of the principle of the secrecy of the deliberation room and the need to ensure it, at least in part, depends on the legal traditions of the state concerned. To some extent, States' approaches towards the secrecy of the deliberations have also been influenced by historical circumstances. For example, in France, the tradition of secrecy of deliberations bears the imprint of the Napoleonic era, which tended towards centralism, thus putting an end to the years of chaos under the Revolution's flag; in such a perspective, the courts are seen as a depersonalized authority that expresses a single will and a possible right of judges to a separate opinion would represent a threat to the court's authority (Malenovský 2010). The origin of principle of the secrecy of the deliberation room is also sometimes linked to the secrecy arising from the relationship between the state and religion[19] (European Parliament Directorate General for Internal Policies 2012). This analysis of foreign legislation on these issues shows that the more liberal approach to the secrecy of the deliberation room is taken in the countries of Eastern and Central Europe, i.e., relatively new democracies.

As Kelemen points out, after the breakdown of their socialist regimes, most Eastern and Central European countries adopted an enriched and somewhat modified German model, which at the time of the creation of these new constitutional courts already included the use of separate opinions. Even though there was no extensive debate over the introduction of separate opinions in the formerly socialist countries, the German practice certainly exercised great influence on the new rules. Romania is a good example of this. The Romanian Constitutional Court is a curious cross-breeding of the Italian and the traditional French models, exercising both abstract a priori and concrete a posteriori control. Neither Italian nor French constitutional justice allows for the publication of dissents and, indeed, at its establishment, the Romanian Constitutional Court could not publish separate opinions. Later, however, the practice was recognized by a 2004 legislative reform (Kelemen 2013). Today every constitutional court in Eastern and Central Europe allows for the publication of separate opinions. There are no more exceptions. However, there are some differences in the modalities of publication.

In the Member States of the Venice Commission, which allow for separate opinions, the level and density of regulations concerning such opinions offer a wide range of variations. In most countries, regulations or rules on separate opinions are found in the ordinary laws on the organization and functioning of the constitutional or supreme court. In some countries, regulations or rules on separate opinions are provided in the constitution or the organic law on the constitutional court (Spain).[20] In others, regulations or rules are provided exclusively by the court itself (Bulgaria, Croatia) or in addition by the court (Germany, Latvia, Slovenia) (European Commission for Democracy through Law 2018).

Laffranque considers separate opinions instructive commentaries, which are especially important for legal culture and are not yet fully developed, as was the case of her own country, Estonia (Laffranque 2003). Her observation can be extended to all transitional contexts, where interpretive gaps are frequent, and an established interpretation of the new rules has not yet emerged. This is especially true for constitutional law, which is much more affected by political regime changes than other, more technical, branches of law. This may be a potential explanation for the introduction of separate opinions in the formerly socialist countries of Eastern and Central Europe. However, as mentioned above, in all

[19] The principle of secrecy of deliberations was strictly correlated to a culture of secrecy, arguably deriving from the entanglement between the State and religion; thus, even in a strictly secular state such as France, judges still take the traditional oath to "religiously" preserve the secrecy of deliberations (European Parliament Directorate General for Internal Policies 2012).

[20] The Spanish Constitution explicitly provides that separate opinions are to be published together with the judgment of the Tribunal Constitutional in the Official State Gazette (Art. 164).

likelihood the influence of the German model is the more probable reason for this (Kelemen 2013).

3. Separate Opinions and the Secrecy of the Deliberations in the Lithuanian Constitutional Court

Following the restoration of the independence of Lithuania in 1990, the Constitution of the Republic of Lithuania was adopted in 1992, and for the first time in the history of the State, it provided for the constitutional justice institution—the Lithuanian Constitutional Court. The Lithuanian Constitutional Court began its activity in 1993, so this year marks the 30th anniversary of the Constitutional Court's activity. Constitutional courts in Central and Eastern European states, including Lithuania, were established to ensure democratic constitutional stability to avoid the denial of democratic values (Pūraitė-Andrikienė 2021). The Lithuanian Constitutional Court has already for three decades successfully carried out this mission in Lithuania. The jurisprudence of the Constitutional Court significantly contributed to the successful transition from the former regime to a new legal–political system, which is harmonized with European and international legal standards and is based on the rule of law and the protection of human rights and freedoms. The Lithuanian Constitutional Court has been changing the national legal system not only through direct intervention in the results of the law-making process, i.e., by ruling that the contested legal act or its part is contrary to the Constitution or another higher-ranking legal act, but also through the creation of the consistent official constitutional doctrine[21]. According to the most recent public opinion polls, the Lithuanian Constitutional Court is among the most trusted institutions. Overall, 46.7% of respondents have full confidence in the Constitutional Court. Confidence in the Constitutional Court is highest among all the classical public authorities (legislative, executive, judicial) and twice as high as in the other courts (Constitutional Court of the Republic of Lithuania 2021b).

However, constitutional justice had never existed in Lithuania for a single day before the time the constitutional justice model was created; this determined that a cautious approach was adopted by the creators of this model to this institution. Constitutional law studies highlight that the conception of jurisdiction assigned to the Constitutional Court under Chapter VIII of the Lithuanian Constitution is minimalist[22] (in particular, until 2019, when an amendment to the Constitution was adopted on the establishment of individual constitutional complaints) (Sadurski 2005; Pūraitė-Andrikienė 2021). Before the constitutional amendments of 2019, the Lithuanian constitutional justice model had undergone no substantial changes. Although the LCC had previously been more than once amended and supplemented, these modifications produced no profound changes in the constitutional justice model[23]. Nevertheless, some of the amendments certainly constituted rather significant changes, such as the introduction of a separate opinion of a justice of the Constitutional Court. As a result of the above-mentioned cautious approach of the creators of the constitutional justice model, Lithuania has long been an exception to the principle of the secrecy of the deliberation room among the countries of Eastern and Central Europe.

[21] These aspects are analyzed in more detail in another manuscript by the author of this article "Towards an Effective Constitution in Lithuania: The Role of the Constitutional Court". The manuscript is submitted to the journal Review of Central and East European Law and is currently under review.

[22] Article 105(1–2) of the Constitution consolidates the powers of the Constitutional Court to assess the constitutionality of laws and other legal acts. It is stipulated that the Constitutional Court considers and adopts decisions on whether the laws of the Republic of Lithuania or other acts adopted by the Seimas are in conflict with the Constitution; and whether the acts of the President of the Republic and the acts of the Government of the Republic are in conflict with the Constitution and laws. In addition, Article 105(3) of the Constitution lays down other objects falling within the scope of constitutional review exercised by the Constitutional Court. Under Article 105(3), the Constitutional Court gives conclusions on: (1) whether election laws were violated during the elections of the President of the Republic or the elections of the members of the Seimas; (2) whether the state of health of the President of the Republic allows him/her to continue to hold office; (3) whether the international treaties of the Republic of Lithuania are in conflict with the Constitution; and (4) whether concrete actions by the members of the Seimas and state officials against whom an impeachment case has been instituted are in conflict with the Constitution.

[23] For more on the Lithuanian constitutional justice model and its development see (Pūraitė-Andrikienė 2021).

Until the end of 2008, this principle was absolute in the Lithuanian constitutional justice procedure. Article 53 of the LCC stipulates that, during deliberation and the adoption of a ruling or conclusion, only the justices of the Constitutional Court may be present in the deliberation room. Neither the justices of the Constitutional Court nor the official who participated in the hearing shall have the right to disclose the opinions voiced in the deliberation room or in which way the justices voted[24]. Until 2008, the LCC did not provide for the possibility for justices of the Constitutional Court to express separate opinions.

When the Lithuanian model of constitutional justice was being developed, the institution of separate opinions was not envisaged, because the authors of the draft LCC assessed the rather weak legal and political culture, i.e., there was a fear that there would not be enough social, psychological, and other safeguards against the classification of judges as "good" and "bad" justices based on of whether or not they joined the "majority" in a given case or whether or not they had their own opinion (Kūris 2012a). The principle of secrecy of deliberations was considered to be more important to the Constitutional Court than the possibility of expressing separate opinions. It was considered that it was essential that the decisions taken by the Constitutional Court express the will of the majority of the justices, and that the possibility of expressing a separate opinion would prevent the principle of secrecy of the deliberations from being maintained. This could lead to political pressure on the justices and could affect the independence of the Constitutional Court (Valuta 2019). Thus, by the end of 2008, Lithuania could be included in the first group of countries where the principle of the absolute secrecy of the deliberation room and the voting results are respected and where the justices of constitutional courts are not allowed to express separate opinions.

However, the 2008 amendments to the LCC, inter alia, by introducing the institution of the separate opinions of a justice of the Constitutional Court, which had not existed in Lithuania before, changed the situation. Article 55(5) of the LCC was supplemented to provide that "A justice of the Constitutional Court who disagrees with an act adopted by the Court shall have the right to state in writing his or her separate opinion, stating his or her reasons in writing, not later than 3 working days after the pronouncement of the act in question in the courtroom of the Court. A separate opinion of justice shall be annexed to the case file and notified to the persons involved in the case and to the media. The procedure for acquaintance with the separate opinion of justice shall be laid down in the Rules of Procedure of the Constitutional Court". Thus, Lithuania is currently in the second group of countries where the legislation governing constitutional justice procedure requires the secrecy of the deliberation room and the results of the vote, but where the expression of a dissenting opinion does not constitute a violation of the principle of the secrecy of the deliberation room and the results of the vote.

This position is likewise supported by the provision of Art. 53(3) of the LCC, which was also introduced by the above-mentioned amendments: " The expression of a separate opinion shall not be considered to be the disclosure of the said opinions[25]." However, is it really so? Although the expression of a separate opinion does not in itself mean that the justice who has submitted it has voted against it, just as a failure to submit a separate opinion does not automatically mean that the justice has voted in favor of the final act, it is certainly more probable that the justice who has submitted a separate opinion (especially if that opinion is not a concurring opinion, but a dissenting opinion) has voted against rather than in favor of the final act of the court (Kūris 2012b). It is also more likely that the justices who have not expressed separate opinions have voted in favor of the final act rather than against it.

[24] These provisions remained unchanged even after the 2008 reform when the institution of separate opinions was introduced.

[25] The rest part of this article says that "Neither the justices of the Constitutional Court nor the official who participated in the hearing shall have the right to disclose the opinions voiced in the deliberation room or in which way the justices voted".

The fact that separate opinions can also reveal the outcome of a vote in a rather unambiguous way was well illustrated by one specific case. Following the Constitutional Court's ruling of 11 December 2013,[26] four justices issued a joint separate opinion.[27] In this context, it should be noted that, at that time, the Constitutional Court consisted of only eight judges (the Constitutional Court of the Republic of Lithuania is normally composed of nine judges) as, following the earlier termination of the mandate of one justice, another justice had not yet been appointed to fill the vacant seat of a justice of the Constitutional Court. The separate opinion, thus, revealed that the Constitutional Court's ruling of 11 December 2013 was adopted by four justices of the Constitutional Court voting against the ruling and four justices (including the President of the Constitutional Court, who had a casting vote) voting in favor of the decision. This case caused some resentment among the political authorities, which was also reflected in some initiatives to amend the LCC in this respect. It should, therefore, be acknowledged that the expression of a separate opinion allows for an indirect disclosure of the voting results. It is important to mention that, in 2014, draft amendments to the LCC were registered, which sought to completely abolish the secrecy of the voting results in the constitutional justice process and proposed to make the results of the vote on the final acts of the Constitutional Court publicly available.[28]

Disclosing the number of votes constitutes the middle way between the traditional secrecy of deliberations and conducting them in public. As stated by the Venice Commission, arguments in favor of disclosure are that the mandatory publication of the actual number of votes brings greater insight into the voting and, therefore, also enables better prediction and assessment of possible changes in the case law. It can also be an important mechanism of control provided to the public, which enables it to monitor coherence in the decision making of the court and individual judges. Finally, it might be argued that disclosing the number of votes could contribute to greater consistency in the case law (European Commission for Democracy through Law 2018).

However, proposals of this kind to abandon the principle of the secrecy of the deliberation room and the voting results should be very well considered. It is important to note that the secrecy of the deliberation room and the results of the vote is considered to be an important means of avoiding possible influence on the justices and, thus, safeguarding the independence of the Constitutional Court. The secrecy of the voting results ensures that justices can be free from fear of consequences for their decisions (e.g., that they will not be appointed to another important position following the term of office of a constitutional justice because they have voted in favor of a decision of the Constitutional Court that is unfavorable to the political authorities) and that they will be able to vote following their convictions. The secrecy of the deliberation room is also important for the public perception of the independence of the Constitutional Court, because, if the results of the vote are not made public, the public has fewer reasons to doubt that justices are making decisions based on legal arguments rather than on political preferences, thus avoiding the unjustified politicization of judicial decisions[29]. In light of these arguments, it is not advisable to

[26] The ruling of the Constitutional Court of the Republic of Lithuania of 11 December 2013. Official Gazette *Valstybės žinios* (2013, No. 128-6529).

[27] The separate opinion of Justices Toma Birmontienė, Gediminas Mesonis, Algirdas Taminskas, and Dainius Žalimas of 11 December 2013. Available online: http://www.lrkt.lt/data/public/uploads/2015/02/2013-12-11_n_atsk_nuomone.pdf (accessed on 8 December 2022).

[28] The Draft Law Amending Article 19 of the Law on the Constitutional Court of the Republic of Lithuania No. XIIP-1134. Available online: http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=458441&p_tr2=2 (accessed on 8 December 2022); The explanatory memorandums to these draft laws state that "facts have emerged in the public domain that the justices of the Constitutional Court do not always reach decisions by consensus when deliberating on very important issues, which raises doubts about the transparency of the process, and that is why these drafts are intended to ensure the transparency and openness of the proceedings in the Constitutional Court".

[29] Of course, this does not mean, that common law practice, which offers judges the highest level of transparency and freedom of expression, necessarily brings to the politicization of judicial decisions. In this context, the level of political and legal culture, as well as legal traditions, in a given country must be taken into account. In the common law tradition, where the judge has always been the central figure in the legal institutional system, such "individualization" of judicial decisions is commonplace.

abandon the secrecy of the voting results in constitutional justice, as various challenges to the external independence of the judiciary are not rare in Lithuania and are particularly accentuated in periods of various societal crises, such as economic or epidemiological ones.

During such periods, the Constitutional Court is subject to particularly intense and usually legally unjustified criticism from politicians, while political initiatives aimed at limiting the court's powers and otherwise hampering its activities are on the rise. Political pressure on the Constitutional Court and its justices concerning existing and future decisions in constitutional justice cases are much stronger than on other courts, as the Constitutional Court is the main instrument for monitoring the constitutionality of the actions of the political authorities. During the economic crisis of 2008–2014, when some austerity measures (legislative provisions aimed at tackling the economic crisis) were declared unconstitutional, not all rulings of the Constitutional Court were welcomed by some politicians. There have been some initiatives by the political authorities to abolish the Constitutional Court, limit its powers, and make it more difficult for the court to operate (Masnevaitė et al. 2015). During the 2020–2021 epidemiological crisis, the Lithuanian Constitutional Court faced challenges in appointing justices to the court.[30] In such a political environment, it is advisable to have as many safeguards as possible to ensure the independence of the Constitutional Court.

Of course, as mentioned above, the very possibility of expressing a separate opinion allows for the indirect disclosure of voting results. However, the possibility of submitting a separate opinion is far from being used in all constitutional justice cases. In recent years, the Constitutional Court has made rather restrained use of this institution. Allowing justices to publish their separate opinions, thus, poses far less of a threat to the independence of the Constitutional Court than does the publication of the results of votes on the acts of the Constitutional Court in all cases.

4. The Development of the Legal Regulation of Separate Opinions and Statistics on the Use of This Institution in Lithuania

In times when the court's authority and legitimacy are still weak, the publication of seemingly unanimous decisions can serve to protect the newly established court; consequently, in a transitional period, it may be also argued that a ban on separate opinions would serve the same goal as permitting dissents (Kelemen 2013). This apparent contradiction was solved in different ways by different countries. In Lithuania, the publication of dissents was not allowed in the first period because it might compromise the authority of the newly established court. It took approximately two decades to acknowledge that the Constitutional Court's authority was sufficiently established to introduce separate opinions. Other Eastern and Central European countries with the exceptions of Lithuania and Romania, on the other hand, allowed constitutional justices to publish their dissents from the very beginning. Therefore, in these countries, the institution of separate opinions has "grown up" together with the Constitutional Court itself, and it is more difficult to examine whether dissenting opinions had a negative effect on the court's authority (Kelemen 2013).

The need for the introduction of separate opinions in Lithuania in 2008 was based on the prevalence of separate opinions in most European constitutional courts, as well as on the fact that separate opinions would help to develop the constitutional doctrine and the science of law, encourage the justices of the Constitutional Court to be more active in

[30] During the epidemiological crisis, the Parliament had to appoint three new justices on 19 March 2020; however, on the grounds of the quarantine declared in the state due to the COVID-19 pandemic, no new justices were appointed in due time. When the vote finally took place in the Seimas on 23 April 2020, none of the three proposed candidates for the positions of new justices to the Constitutional Court was approved. Such a situation emerged in Lithuania for the first time. The LCC provides that, in cases where a new justice is not appointed at the fixed time, the justice whose term of office has expired acts for him or her until the new justice is appointed and takes the oath (Art. 4). Therefore, the justices whose term of office had expired continued to hold their office as justices of the Constitutional Court. Only two of the three candidates for the Constitutional Court were appointed in the vote on 14 January 2021. Thus, the term of office of the President of the Constitutional Court, Dainius Žalimas, as a justice was prolonged by 1 year and 2 months longer than it should have been, as his replacement was finally appointed only in May 2021.

defending their position and, thus, improve the work of the Constitutional Court. It was considered that the regulation of separate opinions would not violate the secrecy of the vote of the justices, as the right to express a separate opinion would not be linked to the voting position of the justices on the decision taken.[31]

After the introduction of separate opinions in 2008, criticism was voiced in the public sphere (including in the works of legal scholars (Kūris 2011)) against the legal regulation on the separate opinions of a justice of the Constitutional Court, inter alia, against the provision of Article 55(5) of the LCC, which was in force until 2013 and prescribed that a justice who disagrees with an act adopted by the Constitutional Court may file his or her separate opinion within three working days after the pronouncement of the act in the courtroom. In 2012, two drafts were registered to improve such legal regulation, by proposing to amend Article 55(5) of the LCC to provide that a separate opinion of a justice of the Constitutional Court would be published together with the act adopted by the Constitutional Court (or even in the act itself).[32] The explanatory memorandum to one of the drafts argues that this situation, where a justice of the Constitutional Court can file a separate opinion within three working days after the pronouncement of the act in the courtroom of the court, may give rise to reasonable doubts that the reasoning of the separate opinion may have been influenced by the debate or criticism that followed the court's ruling and that the Constitutional Court's decision has not been thoroughly discussed to address the arguments of the justice holding the separate opinion. It is, therefore, necessary to provide in the law that a separate opinion should be taken more into account in the adoption and publication of the decision, thus improving the quality of the Constitutional Court's act. This is important because the acts of the Constitutional Court are not subject to appeal, and the public needs to know that the arguments of the minority have also been seriously debated and that a separate opinion is respected in the same way as the majority opinion.[33]

However, in 2013, amendments to the LCC changed the procedure for the submission of a separate opinion by a justice of the Constitutional Court in such a way that according to Article 55(5) of this law, a justice of the Constitutional Court who has a different opinion regarding an act adopted by the Constitutional Court has the right to set out his or her reasoned separate opinion in writing within five working days of the pronouncement of the act in the courtroom, instead of the three working days specified in the previous version of that article. Article 55(5) of the LCC also provides that, where such an opinion is received before the pronouncement of the act of the Constitutional Court in the courtroom, the chairperson of the hearing makes the fact about the existing separate opinion known after the act adopted by the Constitutional Court is pronounced in the courtroom. Article 55(6) of the LCC also provides that a separate opinion of justice is published on the website of the Constitutional Court and is attached to the case. Thus, that amendment has not improved the situation in any way, but on the contrary, the legislator further extended the period within which a justice of the Constitutional Court may be influenced by discussion or criticism arising after the court's ruling and react accordingly by submitting a separate opinion. The legislator does not give reasons for these amendments in the explanatory memorandum of the drafts of these amendments, so their purpose is not clear.

---

31 The ninth session of the Seimas of the Republic of Lithuania. Transcripts of the sittings of 6 October 2008, No. 249, 13.

32 The Draft Law Amending Article 55 and Supplementing Articles 56, 57, and 84 of the Law on the Constitutional Court of the Republic of Lithuania (No. XIP-4058). Available online: <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=417492&p_query=&p_tr2=2> (accessed on 8 December 2022); The Draft Law Amending Article 55(5) of the Law on the Constitutional Court of the Republic of Lithuania (No. XIP-4095). Available online: <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=418652&p_query=&p_tr2=2> (accessed on 8 December 2022).

33 The Explanatory Memorandum to the Draft Law Amending Article 55 and Supplementing Articles 56, 57, and 84 of the Law on the Constitutional Court of the Republic of Lithuania, Available online <http://www3.lrs.lt/pls/inter3/dokpaieska.showdoc_l?p_id=417495&p_query=&p_tr2=2> (accessed on 8 December 2022).

Legal scholars have also made other proposals for improving the institution of separate opinions, such as setting certain requirements for the content and form of a separate opinion (Kūris 2012a, 2012b). It should be noted that the legal regulation of separate opinions has been improved, inter alia, in these respects in the new wording of the Rules of the Constitutional Court of the Republic of Lithuania (hereinafter—the Rules) approved by the Constitutional Court in 2015. It was laid down that separate opinions may be submitted by the justices who participated in the consideration of the constitutional justice case concerned[34]; also, separate opinions may set out objections and arguments only regarding the act adopted in the particular case and may include information only directly related to the adopted act and the considered case.[35] The new wording of the Rules also states the following: (1) a separate opinion must clearly indicate those parts or provisions of the act of the Constitutional Court on which the justice disagrees with the position adopted by the majority of the justices,[36] (2) a justice may submit a concurring opinion regarding the reasoning of an act of the Constitutional Court and/or a dissenting opinion regarding the operative part of this act,[37] and (3) separate opinions are drawn up in conformity with the rules of the common Lithuanian language[38]. Separate opinions are documented according to the requirements established under the Procedure for Documenting the Rulings, Conclusions, and Decisions of the Constitutional Court of the Republic of Lithuania, approved by the order of the President of the Constitutional Court.[39]

The introduction of these requirements in the Rules was prompted, at least in part, by the separate opinion of Justice Egidijus Šileikis of 14 March 2014, which was published on the internet (Račas 2014). This opinion was not published on the website of the Constitutional Court, because the current legal regulation does not allow for a justice to submit a separate opinion on the Constitutional Court's decision to refuse to accept a petition. It should also be mentioned that Justice Egidijus Šileikis did not take part in the adoption of the Constitutional Court's decision of 20 March 2014,[40] which gave rise to the provision in the Rules that "separate opinions may be submitted by the justices who participated in the consideration of the constitutional justice case concerned".[41]

As can be seen from the Table 1, in recent years, the justices of the Constitutional Court have published separate opinions much less frequently than at the time when this possibility was introduced. In 2009–2021, the justices of the Constitutional Court submitted a total of 40 separate opinions. In 2009–2021, the acts of the Constitutional Court on which separate opinions were published accounted for 16.5% of the total number of acts of the Constitutional Court. However, this percentage fluctuated considerably. As can be seen from the table, the most frequent publishing of separate opinions by justices of the Constitutional Court took place between 2009 and 2012, and from 2013 onwards, it started to decrease significantly, then it rose again a little in 2020. It is difficult to name the concrete reasons for the high number of separate opinions in the period between 2009 and 2012. This may be because this was the first years after the introduction of this possibility, and there was no established practice and tradition of using separate opinions, so perhaps they were often expressed in haste and without thinking about whether it was necessary. Such

34 Art. 144.
35 Art. 145.
36 Art. 147.
37 Art. 148.
38 Before these provisions were introduced in the Rules, were there some separate opinions published which were not written in the correct Lithuanian language. It was considered that in order to protect the prestige and authority of the Constitutional Court, separate opinions have to be drawn up in conformity with the rules of the common Lithuanian language.
39 Art. 149.
40 The decision of the Constitutional Court of the Republic of Lithuania of 20 March 2014 (No. KT12-S8/2014). See at the end of the decision, the names of the justices who signed the decision do not include the name of Egidijus Šileikis.
41 For more on this, see (Pūraitė-Andrikienė 2017, pp. 238–50).

numbers of separate opinions were also influenced by the individual personalities who composed the Constitutional Court during that period.

Table 1. The number of separate opinions in the Lithuanian Constitutional Court each year. See (Constitutional Court of the Republic of Lithuania 2020, 2021a, 2022).

The Year	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	2021	Total 2009–2021
Number of separate opinions	6	8	4	8	2	1	2	2	2	0	1	3	1	40
Percent of the decisions of the Constitutional Court on which separate opinions were published, %	33.3	40	26.6	38.1	7.4	4.2	8.7	10.5	16.7	0.0	6.3	16.7	6.3	16.5

In total, 34 separate opinions were submitted regarding the rulings of the Constitutional Court,[42] 4 separate opinions were presented regarding conclusions of the Constitutional Court[43], and 3 separate opinions were rendered regarding decisions interpreting the provisions of the previous Constitutional Court's acts. Specifically, 6 separate opinions were submitted by two or more justices of the Constitutional Court rather than a single judge; 6 separate opinions were submitted not on the operative part of the act, but on the reasoning part of the act (concurring opinions); and the remaining 35 opinions were delivered both on the operative and on the reasoning parts of the act (dissenting opinions).[44]

It is likely that the above-mentioned amendments to the Rules, as well as a certain established tradition of expressing separate opinions, have led to a much more restrained use of separate opinions in recent years than at the beginning of their introduction. However, despite the favorable assessment of the introduction of separate opinions in constitutional justice procedure, separate opinions themselves have received only episodic attention from the media or legal scholars, with the exception mainly when they are published in cases with strong political resonance. For example, mention can be made of the separate opinion of Justice Ramutė Ruškytė[45] on the Constitutional Court's ruling of 28 September 2011[46] on the definition of the concept of family. This ruling has continued to spark debate in society as to how the family should be understood under the Constitution and how it should be defined by law. The resonant nature of the ruling led to doubts concerning the motives for the separate opinion since it was issued five days after the adoption of the ruling, at the height of the public debate, and in the light of the reactions of the general public, politicians and the media to the act adopted by the Constitutional Court (Valuta 2019).

[42] The Constitutional Court shall decide cases regarding the constitutionality of legal acts on their merits by adopting rulings (Art. 22(1) of the LCC).

[43] Conclusions ir a term used in the official English translation of the Lithuanian Constitution and LCC. Under Article 105(3) of the Constitution of the Republic of Lithuania, the Constitutional Court gives conclusions on: (1) whether election laws were violated during the elections of the President of the Republic or the elections of the members of the Seimas; (2) whether the state of health of the President of the Republic allows him/her to continue to hold office; (3) whether the international treaties of the Republic of Lithuania are in conflict with the Constitution; and (4) whether concrete actions by the members of the Seimas and state officials against whom an impeachment case has been instituted are in conflict with the Constitution.

[44] These statistics are based on the data provided in the Annual Report of the Constitutional Court for 2019 and take into account the dissenting opinions submitted in 2020 and 2021.

[45] The separate opinion of Justice Ramutė Ruškytė of 3 October 2011. Available online: http://www.lrkt.lt/dokumentai/2011/atsk_nuom_20110928_n20111003_RRuskyte.pdf (accessed on 8 December 2022).

[46] The ruling of the Constitutional Court of the Republic of Lithuania of 28 September 2011. Official Gazette *Valstybės žinios* (2011, No. 118-5564).

5. The Legal Regulation on the Timing of the Publication of the Separate Opinions of a Justice of the Constitutional Court in the EU Member States

In most EU countries that have introduced the separate opinions of a justice of the constitutional court, a separate opinion has to be submitted before the publication of the act in question and is published together with the act or even as part of it. The Spanish Constitution explicitly provides that separate opinions are to be published together with the judgment of the Tribunal Constitutional in the Official State Gazette.[47] The German Federal Constitutional Court Act provides that, if a judge expressed a differing view on the decision or its reasoning during the deliberations, he or she may express this view in a separate opinion; the separate opinion shall be annexed to the decision.[48] The Rules of Procedure of the German Federal Constitutional Court stipulate that a separate opinion has to be submitted to the chairman of the senate within three weeks after the decision. A separate opinion is announced together with the decision.[49]

Similar trends are also prevailing in Eastern and Central European countries. The Rules of Procedure of the Bulgarian Constitutional Court stipulate that court decisions are published in the Official Gazette, together with the reasons, dissenting opinions, within 15 days of their adoption.[50] The Czech Constitutional Court Act provides that judge who disagrees with the decision of the Plenary or with its reasoning has the right to have his or her individual opinion noted in the record of discussions and appended to the decision with his or her name stated. However, separate opinions are published in the court's own reporter, not in the Collection of Laws, where a mere note at the bottom of the judgment mentions their existence.[51] The Estonian Constitutional Review Procedure Act stipulates that a separate opinion shall be submitted by the time of the pronouncement of the judgment and signed by all the judges.[52] The Polish Constitutional Tribunal Act provides that a judge who disagrees with the majority may, before the delivery of the ruling, submit a dissenting opinion, providing a written statement of grounds for his or her dissent. The dissenting opinion shall be mentioned in the ruling.[53] The Slovak Constitutional Court Act provides that a separate opinion is published together with the relevant decision as part of it.[54] The Rules of Procedure of the Slovenian Constitutional Court stipulate that a separate opinion must be submitted within 7 days of the date on which the judges of the Constitutional Court received the text of the decision, approved by the Drafting Committee and signed by the Secretary General. Immediately after the last vote, the judges of the Constitutional Court may decide to shorten or lengthen this time limit. The judges of the Constitutional Court who receive the separate opinion may comment on it within 3 days, and the judge who delivered the dissenting opinion may reply to these comments within 3 days.[55] The separate opinion is sent together with the decision on which it is based. If the decision is published in the Reports of Judgments of the Constitutional Court, on the court's website, or in computer databases, the dissenting opinions are published together with the decision.[56] The Romanian Law on the Organization and Functioning of the Constitutional Court stipulates that the dissenting or concurring opinion is published in the Official Gazette of Romania, together with the decision.[57] The Hungarian Constitutional Court Act stipulates that separate opinions may be delivered in a period of four days after

47 Art. 164.
48 Art. 30(2).
49 Art. 55.
50 The Directorate General for Internal Policies, Policy Department, *supra note* 4.
51 Arts. 14 and 22.
52 Art. 57(5).
53 Art. 68.
54 Art. 32(1).
55 Art. 72.
56 Art.73.
57 Art. 59.

the final decision has been adopted: the judgment is only published after this period has elapsed so that any dissenting opinion can be attached to it.[58]

The only exception in the EU context is Latvia's legislation on the timing of separate opinions. The Rules of the Latvian Constitutional Court provide that dissenting opinions must be presented in writing to the chairperson within two weeks from the announcement of the judgment.[59] A dissenting opinion is published in accordance with the procedure defined by the Constitutional Court law. This means that according to Article 33 of the Constitutional Court law, it is published within two months, while judgments are published in the Official Gazette within five days of their adoption.[60] Thus, as in Lithuania, a separate opinion in Latvia can be submitted after the publication of the relevant act, but the time limit for its publication is even longer—two weeks following the publication of the relevant act of the court; however, in the Latvian context, the situation is somewhat different because a separate opinion can be published within two months after the adoption of the relevant act, i.e., when passions regarding the content of the relevant act in the public have already calmed down. It should be noted that the provisions of the Law on the Constitutional Court of Latvia, until the end of 2009, allowed for an even longer period for the publication of separate opinions, as all separate opinions were published only once a year in the court's official journal. The Venice Commission, in its assessment of the amendments to the Law on the Latvian Constitutional Court at the end of 2009, noted that such a shortening of the publication period was welcome, but also pointed out that the amendments still allowed for the publication of separate opinions after the publication of the relevant act, and stressed that a dissenting opinion should be published together with the act on which it is delivered (European Commission for Democracy through Law 2009).

6. Proposals for Improving the Legal Regulation of the Separate Opinions of a Justice of the Constitutional Court of Lithuania

Lithuania, which together with Latvia is an exception to the timing of the publication of separate opinions in the EU legal framework, should also follow the advice of the Venice Commission. Moreover, for countries that decided to allow for separate opinions in constitutional courts, the Venice Commission made the following six general recommendations (European Commission for Democracy through Law 2018): (1) The law should treat separate opinions as a right of judges and not their duty. (2) Separate opinions should focus on explaining that the matter could be dealt with differently, perhaps in a better way, but not that the solution chosen by the majority was of poor quality. In other words, separate opinions should remain loyal to the court and its institutional role. (3) A separate opinion should be considered as an ultima ratio solution. Therefore, it is essential that judges debate and attempt to influence the majority opinion before opting to write a separate opinion. (4) It is important for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary. (5) The judges' code of conduct or ethics should deal with separate opinions and set out which lines should not be crossed, without impeding on the independence of the individual judge or harming the institution. (6) Separate opinions form part of the judgment and should, therefore, be published in every case together with the majority judgment and ex officio, not only upon request by the judges who formulated them.

Meanwhile, the current legal regulation provided in the LCC does not comply with at least several of these recommendations (3, 4, 6), as it does not allow the justices to take into account the arguments of the justice submitting a separate opinion and a separate opinion is not published together with the majority judgment. While it is generally accepted that a separate opinion of a justice of the Constitutional Court does not have the force of a judgment, it can be used as a powerful tool for convincing the justices of the Constitutional Court to reconsider the circumstances that led them to adopt a particular position in a

[58] Art. 66.
[59] Art. 145.
[60] Art. 33(1).

constitutional justice case. However, under the current legal regulation, according to which a justice who disagrees with an act adopted by the Constitutional Court may file a separate opinion within five working days from the pronouncement of the act in the courtroom, the said function of a separate opinion is rendered meaningless. If the opinion is submitted within five days from the pronouncement of the final act in the courtroom, it is no longer possible to find any compromise. If the dissenting justice did participate in the deliberations, it is possible that he or she attempted to convince the majority, but it is also possible that he or she did not try to do it[61] and decided to publish a separate opinion after the publication of the court's decision when the reactions of the politicians and the public to the published Constitutional Court decision were already known.

It is often highlighted as a destructive and dangerous regulation. The fact that justice can issue and publish a separate opinion after the publication of the court's act, when the reactions of the political class and the public to the published Constitutional Court act are already known, and when it may already be analyzed and commented on by legal professionals, politicians, and the media, creates the precondition for a situation where justice will be tempted to file a separate opinion to put himself in a better position at the end of the term of office (Kūris 2012a). Thus, such a regulation also creates preconditions to non-compliance with the aforementioned recommendations 2 and 5 of the Venice Commission.

How can this legal regulation be fixed? The legal framework of the LCC should be corrected systematically by distinguishing between the adoption of the final act of the court and its pronouncement to the public: the second procedure should not be carried out immediately after the first. Either the one-month time limit[62] laid down in the LCC, within which the final act of the Constitutional Court must not only be adopted but also made public, should be abolished, which is unlikely to be the case and is inappropriate, or a considerably longer period should be laid down for making it public: such that there should be a period between the adoption of the decision of the Constitutional Court (ruling, conclusion, decision) and the pronouncement of the decision in such a way as to ensure that a justice who is about to submit a separate opinion would have enough time to prepare a separate opinion to the highest standard (Kūris 2012b). So, there are two ways to solve this problem. First, this can be done by reducing the one-month time limit for the adoption of the act to, for example, 20 days, and leaving the remaining 10 days of 1 month for the drafting of a separate opinion to be published at a later date together with the act. The second way is to leave the one-month time limit for the adoption of the act unchanged and add additional days (e.g., 10 working days) for the preparation of a separate opinion and the pronouncement of the act concerned. The first way would shorten the time frame for the adoption of the decision (ruling, conclusion), which would leave a little less time for the justices' deliberations and the drafting of the act; the second one would mean that the persons involved in the case, and the public in general, would have to wait a little longer for the pronouncement of the relevant act of the Constitutional Court.

The second case would be less inconvenient, as the final act of the Constitutional Court must be thoroughly debated and drafted. It is also important that a justice who intends to submit a separate opinion should make this intention known before the vote on the final act of the court in question is completed, so that the other justices have the opportunity to react to the arguments put forward, otherwise the justice may, after the adoption of the act, declare that he or she does not agree with the act in question, even though he or she has not put forward any arguments in support of his or her position on the matter and may even have voted in favor of the act.

---

[61] As it was mentioned in the chapter No.3 of this article, this was the case of the separate opinion of Justice Egidijus Šileikis of 14 March 2014. Justice Egidijus Šileikis did not take part in the adoption of the Constitutional Court's decision of 20 March 2014, but decided to publish his separate opinion.

[62] This term starts from the completion of the consideration of the respective case. According to the LCC, a ruling must be adopted within one month of the completion of the consideration of the respective case (Art. 55(1)). Having adopted a ruling, the Constitutional Court shall return to the courtroom and the chairperson of the hearing shall pronounce the ruling of the Court (Art. 57(1)).

However, such a procedure for the submission of separate opinions would not be appropriate for the submission of a separate opinion on conclusions about whether the election laws were violated during the elections of the President of the Republic or the elections of the members of the Seimas. Such an inquiry must be considered within 120 h of its filing with the Constitutional Court.[63] It seems, therefore, that the procedure for submitting a separate opinion regarding this type of conclusion should provide for an exception—separate opinions should continue to be expressed on the court's acts after their publication.

In addition to the aforementioned timing of the publication of separate opinions, another aspect cannot be corrected without appropriate amendments to the LCC. Article 55(4) of the LCC provides that a justice of the Constitutional Court who has a different opinion regarding an act adopted by the Constitutional Court has the right to set out his or her reasoned separate opinion in writing within five working days of the *pronouncement of the act in the courtroom*. The wording *"pronouncement of the act in the courtroom"*, therefore, means that a separate opinion may be expressed only in respect of those acts of the Constitutional Court that are pronounced in the courtroom. However, is it certainly reasonable to distinguish in this way those acts of the Constitutional Court that are pronounced in the courtroom from other acts of the Constitutional Court, i.e., is it appropriate to establish in the LCC that a separate opinion may be submitted only regarding acts pronounced in the courtroom?

For example, decisions to discontinue a case and decisions to discontinue proceedings differ in substance only in that the former are taken when the constitutional justice case has already been heard by the Constitutional Court, while the latter are taken when the relevant application has been accepted by the Constitutional Court and the constitutional justice case has been prepared for a hearing before the Constitutional Court.[64] However, the former are pronounced in the courtroom, while the latter are not. Thus, decisions to discontinue a case may be the subject of a separate opinion, whereas decisions to discontinue proceedings may not. It is questionable whether this distinction is based on any objective reasons. It is open to debate whether it should also be possible to express separate opinions on decisions taken in the area of the admissibility of applications.[65] After all, some of these decisions are even described in the jurisprudence of the Constitutional Court as final acts (e.g., decisions refusing to examine an application).[66] It, therefore, can be proposed that the LCC should explicitly state which acts of the Constitutional Court may be the subject of a separate opinion, as the current wording of the LCC, i.e., "within five working days of the *pronouncement of the act in the courtroom*", leaves many doubts as to its reasonableness.

7. Conclusions

European Union countries have very different approaches to ensuring the secrecy of the deliberations and the voting results in the decision-making process of the constitutional justice institutions. In this respect, EU countries can be divided into three main groups: (1) countries where the absolute secrecy of the deliberation room and the voting results is respected, and the justices of constitutional courts do not have the possibility of submitting separate opinions; (2) countries where the voting results are secret, but the justices of the Constitutional Court have the possibility of submitting separate opinions; and (3) countries where the voting results are not secret.

In the first years of the Constitutional Court's activity, Lithuania could be included in the first group of countries where the principle of the absolute secrecy of the deliberation

[63] Art. 77 (3) of the LCC.

[64] The decision of the Constitutional Court of the Republic of Lithuania of 8 August 2006. Official Gazette *Valstybės žinios* (2006, No. 88-3475).

[65] For example, a separate opinion of Justice Egidijus Šileikis of 14 March 2014, was not published on the website of the Constitutional Court, because the current legal regulation does not allow a justice to submit a separate opinion on the Constitutional Court's decision to refuse to accept a petition.

[66] See note 64.

room and the voting results are respected and where the justices of constitutional courts are not allowed to express separate opinions. However, the 2008 amendments to the LCC, by introducing the institution of separate opinions of a justice of the Constitutional Court, changed the situation. Lithuania is currently in the second group of countries where the legislation governing constitutional justice procedure requires the secrecy of the deliberations and the results of the vote, but where the expression of a separate opinion does not constitute a violation of the principle of the secrecy of the deliberation room and the results of the vote. When the possibility of expressing separate opinions was introduced, the justices of the Constitutional Court were very active in exercising it, but the amendments to the Rules adopted in 2015, together with a certain well-established tradition of expressing separate opinions, have led to a much more restrained use of this possibility.

A separate opinion of a justice of the Constitutional Court can be used as a powerful tool for convincing the justices of the Constitutional Court to reconsider the circumstances that led them to adopt a particular position in a constitutional justice case. In most European Union countries that have introduced separate opinions by a justice of the Constitutional Court, a separate opinion has to be delivered before the publication of the act in question and is published together with the act or even as part of it. However, under the legal regulation established in the LCC, according to which a justice who disagrees with an act adopted by the Constitutional Court may file a separate opinion within five working days of the pronouncement of the act in the courtroom, the said function of a separate opinion is rendered meaningless. A separate opinion is not effective if it is submitted within five days from the pronouncement of the final act in the courtroom, as it is no longer possible to find any compromise. Such a legal regulation also does not comply with the recommendations of the Venice Commission.

The LCC should be corrected systematically, by distinguishing between the adoption of the final act of the court and its pronouncement to the public: the second procedure should not be carried out immediately after the first one. It can be proposed to leave the one-month time limit for the adoption of the act and add additional days (e.g., 10 working days) for the preparation of a separate opinion and for the pronouncement of the act concerned. The LCC should explicitly state which acts of the Constitutional Court may be the subject of a separate opinion.

Funding: This research received no external funding.

Conflicts of Interest: The author declares no conflict of interest.

References

Constitutional Court of the Republic of Lithuania. 2020. Annual Report of the Constitutional Court for 2019. Available online: https://www.lrkt.lt/data/public/uploads/2020/03/_metinis-2019-web.pdf (accessed on 8 December 2022).

Constitutional Court of the Republic of Lithuania. 2021a. Annual Report of the Constitutional Court for 2020. Available online: https://www.lrkt.lt/data/public/uploads/2021/04/metinis-2020-web.pdf (accessed on 8 December 2022).

Constitutional Court of the Republic of Lithuania. 2021b. Visuomenės pasitikėjimas Konstituciniu Teismu išlieka aukštas. Available online: https://lrkt.lt/lt/naujienos/ivykiai/visuomenes-pasitikejimas-konstituciniu-teismu-islieka-aukstas/1837 (accessed on 5 January 2023).

Constitutional Court of the Republic of Lithuania. 2022. Annual Report of the Constitutional Court for 2021. Available online: https://lrkt.lt/data/public/uploads/2022/04/metinis-2021-web__pdf (accessed on 8 December 2022).

European Commission for Democracy through Law. 2009. Draft Opinion on Amendments to the Law on the Constitutional Court of Latvia. Available online: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2009)042-e (accessed on 8 December 2022).

European Commission for Democracy through Law. 2010. Black Sea Regional Conference on the Importance of Dissenting and Concurring Opinions in the Development of Judicial Review. Available online: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-JU%282010%29016-e (accessed on 8 December 2022).

European Commission for Democracy through Law. 2018. On Separate Opinions of Constitutional Courts. Available online: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2018)030-e (accessed on 8 December 2022).

European Parliament Directorate General for Internal Policies. 2012. Policy Department C: Citizens Rights and Constitutional Affairs. Dissenting Opinions in the Supreme Courts of the Member States. Available online: http://www.Europarl.Europa.Eu/Document/Activities/Cont/201304/20130423att64963/20130423att64963en.Pdf (accessed on 8 December 2022).

Kelemen, Katalin. 2011. The Road from Common Law to East-Central Europe: The Case of the Dissenting Opinions. In *Legal and Political Theory in the Post-National Age*. Edited by Cserne Peter and Könczöl Miklos. Frankfurt: Peter Lang Publ., pp. 118–34.

Kelemen, Katalin. 2013. Dissenting Opinions in Constitutional Courts. *German Law Journal* 14: 1345–71. [CrossRef]

Kūris, Egidijus. 2011. Konstitucinės justicijos proceso teisės klausimu. *Teisė* 78: 7–27. [CrossRef]

Kūris, Egidijus. 2012a. Atskiroji nuomonė Konstituciniame Teisme. Pirmosios patirtys. In *Nepriklausomos Lietuvos teisė: Praeitis, dabartis ir ateitis: Recenzuotų mokslinių straipsnių rinkinys Liber Amicorum profesoriui Jonui Prapiesčiui*. Vilnius: Vilnius Universitety Press, pp. 163–82.

Kūris, Egidijus. 2012b. Apie Konstitucinio Teismo teisėjų atskirąsias nuomones: Keli bihevioristiniai aspektai. *Jurisprudencija* 19: 1031–58.

Laffranque, Julia. 2003. Dissenting opinion and judicial independence. *Juridica International* 8: 162–72.

Malenovský, Jiri. 2010. Les opinions séparées et leurs répercussions sur l'indépendance du juge international. *Anuario Colombiano de Derecho Constitucional* 3: 27–70.

Masnevaitė, Elena, Dovilė Pūraitė-Andrikienė, and Dainius Žalimas. 2015. The Independence of Courts and Legal Dispute Resolution. In *Crisis, the Rule of Law and Human Rights*. Edited by Egidijus Kūris. Šiauliai: Titnagas, pp. 234–328.

Pūraitė-Andrikienė, Dovilė. 2017. Konstitucinės Justicijos Procesas Lietuvoje: Optimalaus Modelio Paieška. Doctoral dissertation, Vilnius Universitety, Vilnius, Lithuania, September 15; pp. 1–536.

Pūraitė-Andrikienė, Dovilė. 2021. *The Development and Prospects of the Lithuanian Constitutional Justice Model, in Legal Developments during 30 Years of Lithuanian Independence*. Edited by Gintaras Švedas and Donatas Murauskas. Berlin: Springer Nature, pp. 225–45.

Račas, Artūras. 2014. Atskiroji E. Šileikio nuomonė, kurios KT kažkodėl skelbti nenori. Available online: http://racas.lt/atskiroji-siliekio-kazkodel/ (accessed on 8 December 2022).

Sadurski, Wojciech. 2005. *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Dordrecht: Springer.

Staugaitytė, Viktorija. 2008. Atskiroji nuomonė konstitucinėje justicijoje: Teismo kolegialumas vs. teisėjo vidinis nepriklausomumas. *Jurisprudencija* 9: 125–31.

Tega, Diletta. 2021. Collegiality Over Personality: The Rejection of Separate Opinions in Italy. In *Dialogues on Italian Constitutional Justice*. New York and Torino: Routledge, pp. 107–22.

Valuta, Andrius. 2019. Atskirosios nuomonės institutas Lietuvos konstitucinės justicijos procese: Raida ir tobulinimo perspektyvos. *Teisė* 110: 132–46. [CrossRef]