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# The dissenting opinion: a tool of accountability, ideological conflict, and legal innovation

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# The dissenting opinion: a tool of accountability, ideological conflict, and legal innovation

di Matteo Vecchi*

**Abstract (Ita):** Il contributo analizza il ruolo dell'opinione dissenziente nella giustizia costituzionale, mettendo in luce come essa operi al tempo stesso come strumento di trasparenza, luogo di conflitto ideologico e motore di innovazione interpretativa. Attraverso un confronto tra sistemi di common law e di civil law, con particolare attenzione ai casi statunitense, irlandese e italiano, l'articolo mostra come il dissenso rafforzi la qualità argomentativa delle decisioni e costruisca una memoria giuridica alternativa, ma al contempo esponga le corti al rischio di politicizzazione e indebolimento della collegialità. Nelle conclusioni si sostiene che, in una democrazia matura, la vera questione non è se ammettere opinioni dissenzienti, bensì come disciplinarle per bilanciare apertura democratica e autorevolezza istituzionale.

**Abstract (Eng):** The article examines the role of the dissenting opinion in constitutional adjudication, showing how it simultaneously operates as a tool of transparency, a site of ideological conflict, and a driver of interpretive innovation. Through a comparison between common law and civil law systems, with particular focus on the United States, Ireland and Italy, the article argues that dissent strengthens the quality of judicial reasoning and helps to build an alternative legal memory, while at the same time exposing courts to risks of politicisation and a weakening of collegial unity. In its conclusions, it contends that, in a mature democracy, the key issue is not whether dissenting opinions should be admitted, but how they should be regulated so as to reconcile democratic openness with the institutional authority of constitutional courts.

**Parole chiave:** Opinione dissenziente; Giustizia costituzionale; Repubblica d'Irlanda

**Keywords:** Dissenting opinion; Constitutional justice; Republic of Ireland

**Sommario:** 1. Introductory remarks; 2. Dissent: a continuous overlap between arguments for and against; 3. Comparative notes in Europe: The Republic of Ireland; 4. Conclusions: an imbalance

## 1. Introductory remarks

The institution of the individual opinion – whether dissenting or concurring – within supreme and constitutional courts represents one of the most delicate and controversial aspects of contemporary constitutional law. Although it appears, at first sight, to be far removed from civil law systems[1], the long-standing question of its admissibility and usefuln-

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[1] The origin of the institution is generally traced back to common law systems and, in particular, to the use of *seriatim opinions*. In the Anglo-American context, *seriatim opinions* refer to the once prevailing practice whereby each judge delivered his or her own individual reasoning, rather than a single judgment issued by the court as a collegial body. In the United Kingdom, this practice was widespread in the House of Lords until the creation of the UK Supreme Court. However, with the 2009 reform establishing the new Supreme Court, a gradual shift towards a more collegial style, with court judgments and consolidated majorities, can be observed. As in M. T. Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, John M. Olin Program in Law and Economics Working Paper No. 363, 2007, and, for an historical perspective, J.M. Austin, *The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?*, Northern Illinois University Law Review: Vol. 31: Iss. 1, Article 5, 2010. This should not obscure the fact that, especially in pre-Napoleonic Italy, there already existed, if not a fully-fledged institution, at least an idea of dissenting opinion, often delivered orally or in writing, for instance before the Rota Fiorentina or in relation to the decisions of the Sacro Regio Consiglio of Naples. For a comprehensive reconstruction see A. Di Martino, *Le opinioni dissenzienti dei giudici costituzionali. Uno studio comparativo*, Napoli, Jovene Editore 2016, and V. Denti, *Per il ritorno al "voto di scissura" nelle decisioni giudiziarie*, in C. Mortati (Ed), *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, Milano, 1964, as well as S. Panizza, *L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale*, Torino, Giappichelli, 1998.

ess, together with the problems connected with its application, affects not so much the merely technical dimension of constitutional procedure as the very manner in which the role of supreme and constitutional courts is conceived within the architecture of public powers. In particular, this contribution focuses on the individual opinion – or *dissenting opinion* – as the highest expression of judicial dialogue. To speak of dissenting opinions ultimately means asking what a constitutional court actually is: a monolithic body, guardian of the unity of the Constitution, or rather an institution composed of multiple voices – wisely steered by a helmsman – expressing different sensibilities and visions, called upon to reconcile divergences through dialectical engagement. Once the basic contours of this first question have been outlined, it then becomes necessary to ask in what space dissent operates. If one looks at European countries, the likelihood of encountering a dissenting opinion, even if only briefly reasoned, is far lower than in English-speaking countries that are, or formerly were, members of the Commonwealth. Historically, in the former, the decision is single and collegiate and therefore prevents individual judges from bringing their personal convictions to the surface, whereas in the latter the decision is the product of the aggregation of individual opinions, subsequently issued by each judge[2]. It follows that in common law systems and, in particular, in the United States experience, the dissenting opinion has assumed a structural role in constitutional dynamics, becoming an ordinary mode of expressing interpretive pluralism. It does not merely represent the minority voice within a judicial panel but also serves as an instrument for constructing a genuine alternative legal memory[3], capable of influencing both the future development of case law and political-institutional debate, not only prospectively but also contemporaneously with the delivery of judgments and their respective *dissents*[4]. It is therefore unsurprising that some of the most celebrated pages in the history of the U.S. Supreme Court were written precisely in the space opened by *dissents*: from the opinions of Holmes and Brandeis in the early twentieth century[5] to more recent dissents in cases of great social significance. From this perspective, *Dobbs v. Jackson Women's Health Organization* (2022) is particularly emblematic. In that case, the Supreme Court carried out the historic *overruling* of *Roe v. Wade* (1973), thereby putting an end to the constitutional protection of the right to abortion. The joint dissents of Justices Breyer, Sotomayor, and Kagan did not merely express legal disagreem-

[2] From a comparative perspective, it has been noted that many Central and Eastern European countries introduced individual opinions only after the German legislator had recognised the *Sondervotum* (dissenting or separate vote) in 1970 through an amendment to Article 30(2) of the *Bundesverfassungsgerichtsgesetz*. By contrast, in Western Europe the civil-law tradition of confidentiality of the deliberation still prevails, with significant exceptions such as Spain (Article 164 of the Spanish Constitution) and Portugal (Article 42(4) of Law No. 28/1982). On this, see C. Mortati, *Le opinioni dissenzienti dei giudici costituzionali ed internazionali*, Milano, Giuffrè, 1964, and G. Zagrebelsky, *Intervento*, in A. Anzon (Ed), *L'opinione dissenziente, Atti del seminario svoltosi in Roma, Palazzo della Consulta, 5–6 novembre 1993*, Milano, Giuffrè, 1994.

[3] See E. Carrère, *Le Détroit de Behring. Introduction à l'uchronie*, Paris, Editions P.O.L., 1986, where the author offers a refined definition of "ucronia" as more than a literary game, namely a subtle tension towards an altered past, a «paradoxical intellectual game» born of a conscious sense of defeat, suspended between irony, melancholy and obsession. A similar mindset can be seen in the practice of some judges who collect their dissents over the course of their careers. One may think of the well-established US tradition, exemplified by A. Scalia, *Scalia Dissents: Writings of the Supreme Court's Wittiest, Most Outspoken Justice*, Washington D.C., Regnery Publishing, 2012, or by the recent Italian "experiment" of N. Zanon, *Le opinioni dissenzienti in Corte costituzionale*, Bologna, Zanichelli, 2024.

[4] See P. Passaglia, *La struttura delle decisioni dei giudici costituzionali: un confronto fra la tradizione di civil law e quella di common law*, in D. Dalfino (Ed), *Scritti dedicati a Maurizio Converso*, Roma, Roma Tre Press, 2016, 419 – 429, on the use of legal arguments in public debate.

[5] See *Abrams v. United States*, 250 U.S. 616 (1919), and *Gitlow v. New York*, 268 U.S. 652 (1925), on freedom of expression and the early formulation of the "free market of ideas".

ent with the majority's reconstruction of American constitutional history; they took the form of an extraordinarily visible political-constitutional act, denouncing the radical nature of the break effected by the majority and fueling an intense political and cultural debate in the United States and beyond[6]. The case clearly shows how the dissenting opinion, at least in the U.S. context, is not merely a physiological element of the deliberative phase but also a powerful instrument of communication between jurisdiction and society, one that is now slowly beginning to emerge with increasing relevance in Italy as well[7]. In *civil law* systems, by contrast, the introduction of the *dissenting opinion* proves more problematic, insofar as it is perceived as a disruptive element with respect to the traditional model of the judge as the "*mouth of the law*" and guardian of the impersonality of adjudication. Yet the evolution of constitutional justice systems in countries such as Germany and Spain shows that even in *civil law* contexts dissent may be integrated without compromising the authority of constitutional courts, thus signalling a progressive convergence between the two models. As already noted, the debate over the value of dissenting opinions cannot be isolated from the institutional context in which they operate. The configuration of the court, the method of appointing judges, the powers attributed to them, and the very conception of constitutional adjudication all deeply influence the assessment as to whether dissenting opinions should be admitted. In systems in which judges are appointed by different bodies – as in Italy, where the President of the Republic, Parliament, and the higher courts all play a role – there is a tendency to recognise the plurality of "voices" coexisting within the panel; accordingly, the *dissenting opinion* may be read as the natural expression of that pluralism. Conversely, if one privileges the idea of the court as a unitary organ entrusted with guaranteeing the coherence and stability of the legal order, written dissent appears as a disaggregating factor, capable of undermining the image of institutional compactness.

## 2. *Dissent*: a continuous overlap between arguments for and against

The arguments in favour of and against the individual opinion and, more specifically, the dissenting opinion, possess a peculiar feature: the same reasons may be used both in support of and in opposition to it, showing how the institution is characterised by a marked figurative ambivalence. This section therefore sets out the principal considerations concerning the institution of *dissent*, bearing in mind the constant gestalt-like reorientation associated with it. First, there is the function of stimulating the evolution of case law. Dissents may in fact anticipate orientations which, although minority positions at the time

[6] On this, see V. Barsotti, *Not only Dobbs v. Jackson. Abortion laws and private enforcement*, DPCE Online, 56 (2023), Spec. 1, which offers a critical reconstruction of the most recent decisions of the US Supreme Court on abortion and, more generally, of the Court's role in shaping the horizon of unenumerated rights. See also A. Sperti, *Il diritto all'aborto ed il ruolo della tradizione nel controverso overruling di Roe v. Wade*, in Rivista Gruppo di Pisa, 3/2022, 23 ff.

[7] For an overview of these developments, see L. Pesole, *La Corte costituzionale oggi, tra apertura e interventismo giurisprudenziale*, *Federalismi.it*, 12/2021, 2021, and, as regards more recent initiatives, the official website of the Italian Constitutional Court here *https://www.cortecostituzionale.it*, which already offers, on its homepage, access to podcasts, press releases and explanatory videos on its decisions.

isprudential interpretations, whether explicitly foreshadowed or merely suggested[8]. Yet the same argument can be reversed. The presence of radical dissents may harden internal confrontation and slow down the formation of new shared solutions, fuelling polarisation rather than opening the way to innovation. A second profile concerns transparency. Making dissenting opinions public means revealing the articulation of the legal debate within the court, removing the risk that the decision appears as a monolithic and impenetrable act, as well as the product of obvious and natural compromises. By exposing the limits of the deliberative process, the dissenting opinion would offer the public a more realistic image of a court that debates, confronts itself, and at times divides internally. Such a condition could undoubtedly increase the legitimacy of the institution, especially in contexts in which it exercises a counter-majoritarian function, although it would also expose it to criticisms of excessive protagonism. At the same time, greater transparency may blur the distinction between the political and the judicial fields. If it is to accept the initial premise that dissents reveal the complexity of constitutional interpretation, it is equally true that they may be instrumentalised in political debate, fuelling the perception of a divided and partial court, with some of its members linked to a particular political area rather than acting *super partes*[9]. A third aspect concerns the dynamics within judicial panels themselves. In the Italian experience, it is not uncommon for scholars who were initially favourable to *dissent* to modify their position once they became constitutional judges and experienced first-hand the importance of collegiality and the value of the secrecy of internal discussion.

The former President of the Constitutional Court Giuliano Amato, for example, acknowledged that he had progressively changed his position on the institution of the dissenting opinion. At first, he had shown himself favourable to its introduction, participating in the debate that developed, among other things, around Costantino Mortati's well-known 1964 essay[10]. At that time, President Amato shared the view that publishing minority opinions could serve as a stimulus for the future, encouraging those who disagreed with the majority to raise the same issue again at a later stage. In this way, the existence of dissent within the Court would make perceptible – both inside and outside the institution – the persistence of problematic knots that would otherwise remain hidden behind the apparent

[8] The Portuguese experience is illustrative: both constitutional and ordinary judges may issue dissenting opinions. Judges of the Constitutional Court may provide reasons for their minority vote (technically referred to as *voto vencido*, literally "defeated vote"), as provided by Article 42(4) of Law No. 28/1982, the Organic Law of the Portuguese Constitutional Court, or simply add the word *vencido* alongside their signature. Moreover, where the dissenting judge had been appointed as rapporteur for the case, the President of the Court will designate another judge as drafter, in a manner not dissimilar to the Italian practice. See B. Caravita, *Ai margini della dissenting opinion. Lo "strano caso" della sostituzione del relatore nel giudizio costituzionale*, Torino, Giappichelli, 2021.

[9] Reference is made to the composition of the Italian Constitutional Court under Article 135 of the Constitution and Law No. 87/1953. On the tensions between the Court's "political" and "judicial" souls, see R. Romboli, *Le oscillazioni della Corte costituzionale tra l'anima "politica" e quella "giurisdizionale". Una tavola rotonda per ricordare Alessandro Pizzorusso ad un anno dalla sua scomparsa*, in *Ricordando Alessandro Pizzorusso. Il pendolo della Corte. Le oscillazioni della Corte costituzionale tra l'anima "politica" e quella "giurisdizionale"*, Torino, Giappichelli, 2017, 1 ff.

[10] C. Mortati, *Le opinioni dei giudici dissenzienti*, Milano, Giuffrè, 1964, 42.

compactness of the collegiate decision[11]. Conversely, judges who were initially sceptical have changed their minds after observing the benefits of more open confrontation[12]. This shows how decisive the atmosphere of the deliberation room is: the possibility of discussing freely, without the pressure of immediate public exposure, represents a precious good that is difficult to reconcile with the systematic publication of individual opinions. From the foregoing points it follows that the arguments against the introduction of dissent are no less significant than those in favour. The principal objection concerns the rupture of collegiality: a constitutional court derives its strength from its ability to speak with a single voice, capable of orienting the legal order and guaranteeing legal certainty. If decisions were regularly accompanied by separate opinions, the risk would be that the court's guiding function would be weakened, reducing it to a mere sum of individual legal personalities and undermining its *standing* in the eyes of public opinion[13]. To this must be added the fear of politicisation. In systems in which judges are appointed according to logics of political balance, dissenting opinions might be perceived as reflections of party-political opposition, transforming the deliberation room into the "second round" of parliamentary debate[14]. There is also the question of the secrecy of deliberations. In the civil law tradition, secrecy in the deliberation room guarantees freedom of discussion and protects judges from undue external pressure. The introduction of dissent might weaken this sphere of confidentiality, exposing individual judges to media and political pressure and thereby making compromise increasingly difficult. It should not be forgotten that even today information concerning internal divisions within courts sometimes leaks to the press before the official publication of decisions: the formalisation of dissent would risk amplifying this phenomenon and undermining the authority of the court. Moreover, the assessment of the dissenting opinion cannot disregard the powers attributed to the courts. It is

[11] As for G. Amato, G. Zagrebelsky was initially a supporter of dissenting opinions, which he saw as a tool to prevent the crystallisation of constitutional interpretations and to legitimise the pluralism of positions. See L. Pesole, *Riflettendo sulla recente riproposizione della questione dell'opinione dissenziente*, in *Costituzionalismo.it*, 2/2022, n. 14. At the end of his term on the Court, however, he adopted a more cautious stance, stressing the risks associated with the introduction of dissent in the Italian system and favouring a conception of constitutional justice centred on collegiality. Well-known is his remark on the institutionalisation of dissenting opinions: «There are many unknowns; the outcome of these unknowns is uncertain; the influence of cultural factors is significant; the experiences of others cannot be relied upon as a model; and the predictability of the effects is minimal. In this context, sticking to what we have, upholding the principle of collegiality as it has been structured to date, and not paying too much heed to supposed demands for modernisation: all this still seemed to be the most prudent course of action». See G. Zagrebelsky, V. Marcenò, *Giustizia costituzionale. Vol. II. Oggetti, procedimenti, decisioni*, Bologna, 2018, p. 47.

[12] By way of example, one may recall N. Zanon (see the interview "*È tempo che la Corte faccia conoscere l'opinione dissenziente*", *il manifesto*, available at *https://ilmanifesto.it/e-tempo-che-la-corte-costituzionale-faccia-conoscere-lopinione-dissenziente* and S. Cassese, *Dentro la Corte. Diario di un giudice costituzionale*, Bologna, Il Mulino, 2015, pp. 53–54 and 95.

[13] See the concluding remarks in the 2023 Annual Report of the Constitutional Court delivered by President Barbera, where he stated that «[there has been no perceived need to introduce forms of dissenting opinion, also in light of the negative effects observed in other countries, first and foremost the weakening of the authority of the decision. All opinions are legitimate – he stressed – but, in the absence of a different legal framework, dissenting views expressed a posteriori by individual judges must be absolutely avoided, and the "secrecy" of the deliberation room must in any case be safeguarded, as it is necessary to ensure the very independence of the Constitutional Court»]. The full text is available at *https://www.cortecostituzionale.it/annuario2024/bilancio-annuale.html*.

[14] G. Amato, D. Stasio, *Storie di diritti e di democrazie*, Milano, Feltrinelli, 2023. At page 24, the author recalls the difficult decision on the so-called *ergastolo ostativo*, noting that, as President of the Council of Ministers, he had signed the decree-law introducing Article 4-bis into the Prison Administration Act in 1991, and explaining how the case produced a deep split within the Court, with the vote ending 8 to 7 and resulting in an Ordinanza No. 97/2021.

one thing to admit dissents in decisions concerning abstract questions of principle, and quite another to do so in proceedings directly affecting the relations between the powers of the State or fundamental rights. In the former case, the transparency brought about by dissent may enrich legal debate without excessive systemic costs; in the latter, it may generate institutional tensions that are difficult to manage. Lastly, as Giuliano Amato has observed, the idea that dissent might undermine the cohesion of the institution belongs to an "immature democracy", unable to accept that conflict may exist even within the walls of the Court. In a mature democracy, by contrast, the *dissenting opinion* becomes a physiological rather than pathological element, one that signals the complexity of the issues addressed and returns a more authentic image of internal debate. The matter, however, is not exhausted by the opposition between democratic immaturity and maturity. It touches upon the central issue of the legitimacy of constitutional decisions. The mere numerical fact of the majority is not in itself sufficient to guarantee the binding force of a judgment; what truly legitimises the decision is the quality of the reasoning supporting it. From this perspective, the existence of a minority opinion may play a fundamental role: it acts as a "spur"[15], a constant reminder to the majority that it must elaborate solid reasoning, capable of withstanding not only technical scrutiny but also public debate and the judgment of history. The presence of a dissent forces the majority to confront alternative arguments, to strengthen its own reasons, and to articulate its decision more deeply. This stimulating function, however, is not without risks. Some commentators – and Amato himself in later stages of his reflection – have drawn attention to the danger that dissent may become a form of individual protagonism, concerned more with the visibility of the judge than with the overall coherence of jurisprudence. From this perspective, the risk is not only the weakening of collegiality, but also the gradual politicisation of the Court, which, instead of being perceived as an "island of reason" in the troubled sea of politics, may come to appear as an institution exposed to the same conflictual dynamics that characterise the parliamentary arena. On the other hand, denying the possibility of dissent in the name of collegiality may prove a remedy worse than the disease. If the Court always presents itself as a monolithic body, incapable of admitting internal plurality, it fosters an artificial representation of judicial decision-making that does not correspond to the reality of actual judicial confrontation. In this way, the transparency of the decision-making process is sacrificed, and public opinion is deprived of the opportunity to understand the complexity of the issues at stake. This is particularly problematic in contemporary democracies, in which the broad legitimacy of institutions depends not only on their legal function but also on their ability to communicate with civil society[16].

[15] The expression is used by N. Zanon in an interview by V. Stella, *Rivelare i dissensi interni può solo dare forza alla Consulta*, *Il Dubbio*, 21 April 2024.
[16] A "communication strategy" can already be discerned in the speech delivered by President Lattanzi before the German Federal Constitutional Court during an institutional meeting held in Karlsruhe from 26 to 28 June 2019. The speech addressed, inter alia, the communication strategy of the Italian Constitutional Court and its future developments, from the Court's establishment to the present day. It was noted that only 15% of Italians knew of the Court and its functions, highlighting a growing distance between citizens and institutions, which the Court sought to bridge through simple and direct communication.

### 3. Comparative notes in Europe: The Republic of Ireland

Within the European landscape of those States that provide for dissenting opinions within supreme and constitutional courts, the Irish experience represents a peculiar case of considerable comparative interest, insofar as it demonstrates the possibility of a gradual transition from a model without *dissent* – or, more precisely, with limited *dissent* – to one that allows it. For decades, the Irish Constitution imposed upon the *Supreme Court* the rule of the single judgment (*one-judgment rule*)[17], not only in proceedings initiated by the President of the Republic under Article 26 of the Irish Constitution[18], but also in cases in which the Court was called upon, by way of prior review, to assess the constitutionality of bills enacted after the coming into force of the 1937 Constitution under Article 34. In both cases, the Supreme Court was required to issue a single opinion, with the result that no other opinion, "whether concurring or dissenting", could be delivered or made manifest externally[19]. However, in 2013, following a constitutional referendum[20], the *Thirty-third Amendment of the Constitution (Court of Appeal) Act 2013* was approved, introducing two decisive innovations: the creation of the *Court of Appeal*, which assumed part of the workload of the *Supreme Court*, and the removal of the constitutional prohibition on publishing dissenting or concurring opinions in constitutional cases concerning laws enacted after 1937. For the first time, Irish judges were thus given the possibility of expressing their *dissenting opinions* openly, aligning Ireland with other *common law* jurisdictions and opening the way

[17] See G. Whyte, *Constitutional Law – the One Judgment Rule in Action*, *Dublin University Law Journal*, 5 (2016). See also N. L. Nóra, *Judicial Dissent in Ireland: Theory, Practice and the Constraints of the Single Opinion Rule*, in *Irish Jurist*, 2016, and M. De S.-O.-l'E. Lasser, *Judicial Deliberations. A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford, Oxford University Press, 2004.

[18] Under Article 26 of the Irish Constitution, the President may refer to the Supreme Court a Bill already approved by both Houses but not yet promulgated, in order for the Court to assess its compatibility with the Constitution. This is a form of ex ante constitutional review, which has two notable consequences: if the Court declares the Act to be constitutional, it is thereafter immune from any further constitutional challenge; and the decision must be delivered collegially and unanimously, with no possibility of separate opinions. A similar approach can be found in the practice of the Judicial Committee of the Privy Council (JCPC) in the United Kingdom, where, for reasons linked to its advisory nature, decisions have traditionally been delivered *per curiam*, i.e. as a single judgment. Following this model, Ireland also had its own Privy Council, an instrument at the disposal of the Lord Lieutenant of Ireland. The Irish Constituent Assembly maintained this tradition by requiring, in the context of presidential references for preventive constitutional review, a single judgment by the Supreme Court, so as to ensure legal certainty and institutional authority.

[19] This legislative choice was widely criticised in scholarship, as it was seen not only as an obstacle to the development of constitutional jurisprudence, but also as a constraint on dynamic and innovative interpretations of the Constitution. A paradigmatic example is the *X Case* (*Attorney General v. X*, 1992), which concerned a 14-year-old girl who became pregnant following rape and expressed suicidal intent. The High Court initially prohibited her from travelling abroad to obtain an abortion, relying on Article 40.3.3 of the Constitution (the Eighth Amendment, 1983), which protected the right to life of the unborn. The Supreme Court, by a 4–1 majority, reversed that decision, holding that abortion was permissible where there was a "real and substantial risk" to the life of the mother, including the risk of suicide. The sole dissenting opinion, delivered by Justice Hederman, adopted a restrictive approach, arguing that abortion could only be allowed where there was unequivocal medical evidence. The judgment marked a turning point in the Irish constitutional debate, opening a long cycle of reforms that began with the referendums of 1992 and culminated in the 2018 legalisation of voluntary termination of pregnancy. See A. Baraggia, *La regolamentazione dell'aborto in Irlanda: quale lezione per le democrazie polarizzate?*, in *Nomos*, 2/2022.

[20] On 4 October 2013, two constitutional referendums were held in Ireland: one proposed the abolition of the *Seanad* (the upper house of Parliament), while the other provided for the establishment of a Court of Appeal and the (partial) removal of the one-judgment rule. According to the then Minister for Justice, Alan Shatter, the abolition of the rule would have enabled judges to affirm their independence vis-à-vis the political branches. See <https://www.thejournal.ie/shatter-one-judgment-rule-court-of-appeal-1101046-Sep2013/>.

to a richer jurisprudential debate. Subsequently, the same possibility was extended to the *Court of Appeal*, established on 28 October 2014. The reasons for this change of perspective lay, on the one hand, in the need to guarantee transparency and argumentative quality in the court's internal debate, making known both the modalities and the reasons of the logical path followed by judges even when they disagreed and it became necessary to overcome colleagues' objections; and, on the other hand, in the opportunity to align with the practice of other *common law* constitutional courts[21], abandoning the originally "univocal" approach that had been designed to project an image of certainty[22]. At present, therefore, once the oral hearing – during which the appeal is examined – has concluded, Irish judges meet in "*case conferences*" (similar to the Italian *camere di consiglio*), which may be more numerous as the complexity of the case increases. Within these *case conferences*, each judge reaches his or her own decision independently of the others. In any event, because the Court is composed of a panel with an odd number of members – three, five, or seven – the decision is taken either unanimously or by simple majority and is then formalised in written judgments (except for those delivered *ex tempore*), in which the reasons underlying the acceptance or rejection of the appeal are set out clearly. In practice, even though there is a tendency toward uniformity in the drafting of judgments, each judge retains the right to issue his or her "own" judgment. It follows that a judge who disagrees with the decision of the panel may issue a dissenting opinion. Conversely, where the court decides unanimously and drafts a single judgment, that judgment is attributed to the court as a whole, and it is customary for the most senior judge – who is also the President – to deliver it on behalf of the others as well.

## 4. Conclusions: an imbalance

The Irish experience shows that it is possible to implement a model of *dissent* limited by precise constitutional provisions and yet still capable, potentially, of seeing its scope expanded by subsequent reforms, as occurred with the 2013 referendum. If the evolution concerning the introduction of individual opinions is indeed influenced by the peculiar features of each legal setting, it is also possible to observe that, regardless of legal tradition, it is above all for the members of the judicial panel themselves to give concrete effect to their decisions. An important example is provided by the German experience of the *Sondervotum*, which represents a hybrid model in which the emergence of the dissenting opinion was initially the result of a practice internalised by the Court itself and only later

[21] See L. Besselink, P.Bovend'Eert, H. Broeksteeg, R. De Lange, W. Voermans, (Eds.), *Constitutional law of the EU member states*, Amsterdam, Kluwer, 2014.

[22] A notable example of dissenting opinion concerns a case on privacy and the relationship between EU regulations and Irish legislation, namely *Dwyer v. Commissioner of An Garda Síochána*. The case dealt with the constitutional validity of the regime governing the retention and access to mobile-phone metadata. In December 2018, the High Court had held that the practice in question violated EU law. The case forms part of the broader jurisprudence on conflicts of competence between Member States and the European Union. Mr Justice Charleton argued that assessments of the proportionality of legislative measures interfering with fundamental rights – in this case, the right to privacy – should be carried out directly by national courts rather than being referred to the Court of Justice of the European Union. He stressed that the devices at issue had been abandoned by their users, such that the collection and access to data were not separate operations but were intrinsically linked. He also rejected the idea that rights such as data protection – safeguarded at supranational level – could come into irreconcilable conflict with other fundamental rights, such as life or physical integrity, where national legislation provides adequate safeguards. For further discussion, see "Mr Justice Charleton gave two reasons for dissenting", available at *https://www.lawsociety.ie/gazette/top-stories/2020/02-feburary/mr-justice-charleton-gave-two-reasons-for-dissenting*.

formalised by ordinary legislation, which sought to remedy its original illegitimacy without altering the fundamental institutional balance[23]. Such methods of introduction have not been implemented in Italy, where constitutional discourse has thus far systematically pushed back any possibility of introducing individual opinions within the Constitutional Court, preferring the apparent preservation of the principles of collegiate unity and secrecy of deliberation. Today, however, those principles appear increasingly compressed by the growing demands for transparency and democratic openness, which are enjoying renewed vigour. In recent times, moreover, the Court itself has increasingly constructed and interpreted its decisions not so much as the concluding moment of a procedure, but rather as the instrument through which to initiate – or, better, to develop – jurisprudential debate around the most significant issues identified during internal discussion within the panel. One need only think, for example, of the well-known judgment no. 242/2019[24] and the recurring "invitations to legislate" addressed to Parliament. This type of evolution increases the Court's capacity to foster institutional and social dialogue, but it inevitably exposes it to the risk of politicisation, with the danger that individual judges will be perceived no longer as impartial interpreters of the Constitution, but as bearers of ideological agendas. Without dwelling here on the possibilities opened by the appropriation of judges' opinions by political actors – a phenomenon that, in truth, has already occurred[25] - it must at the same time be recognised that such evolution offers a more authentic representation of the dialogic character of constitutional justice, thereby strengthening the communicative circuit between Court, legislature, and public opinion.

Moreover, unveiling the dynamics between internal majority and minority within the Court reflects a renewed interest in democratic openness and transparency, principles that constitute the essential core of a mature democracy. If one considers the method of composition of the Court seated in Piazza del Quirinale – constitutional judges are appointed one-third by the President of the Republic, one-third by the higher courts, and one-third by Parliament – it becomes evident that the Court is structurally destined to reflect a plurality of institutional origins and sensibilities. From this perspective, the publication of dissenting or concurring opinions would not constitute an anomaly, but rather the natural projection, on the level of decision-making transparency, of a pluralism already inscribed in the very composition of the Court and in its connection with the democratic logic of the legal order. Indeed, making individual judicial opinions accessible to public opinion would strengthen the principle of democratic openness, which does not find direct application in the popular election of judges. That the Constitutional Court has, in fact, alr-

[23] The *Bundesverfassungsgerichtsgesetz* of 1951 did not provide for the publication of separate opinions, in line with the German tradition of confidentiality of the deliberation. Practice, however, gradually departed from that model: in some decisions, the numerical outcome of the vote was disclosed, thereby piercing the veil of apparent unanimity without revealing the names or arguments of dissenting judges.

[24] See S. Catalano, *La sentenza 242 del 2019: una pronuncia additiva molto particolare senza "rime obbligate"*, in *Osservatorio AIC*, 2/2020.

[25] In the last year, there have been several instances in which political actors, both from the majority and the opposition, have "appropriated" Constitutional Court decisions. One may think of Judgments Nos. 10/2024 and 192/2024 on differentiated regional autonomy and referendums (see G.E. Vigevani, *La lezione della Corte sull'autonomia differenziata. Il "decalogo" della Corte non richiede solo interventi puntuali sulle norme dichiarate incostituzionali ma un ripensamento radicale dell'impostazione della legge*, Bologna, Il Mulino, 17 December 2024, available at *https://www.rivistailmulino.it/a/la-lezione-della-corte-sull-autonomia-differenziata*). Another example is Judgment No. 33/2025, which allowed international adoption by single persons and was welcomed by the opposition – highlighting its rights-expanding impact – while being criticised by the governing majority. On this, see L. Rossi, *Corte costituzionale: sì all'adozione internazionale per i single*, LaPresse, 22 March 2025.

eady opened itself to the publication of *dissents* also emerges from judgment no. 18 of 1989[26], through which the principle of secrecy of deliberation underwent a significant resizing[27], no longer viewed as an essential safeguard of judicial independence, but instead understood as connected with a set of guarantees of constitutional rank: from the autonomy of the judiciary vis-à-vis the other powers of the State, to the absence of any internal hierarchical structure[28], and up to the existence of a body of judicial self-government. Although that ruling concerned the judiciary in general, it appears to open a space for the Constitutional Court as well. Yet the latter has never fully pursued this path, preferring instead to maintain practices of implicit dissent, at times traceable in the reasoning of judgments, without ever making internal dialectics publicly visible[29]. Finally, it should be noted that Italy, despite not yet having formally introduced this instrument, already knows dissenting practices that demonstrate how the monolithic unity of reasoning is more a regulatory fiction than a substantial reality. One need only think of the numerous cases – more than ninety since 1987 – in which the reporting judge has been replaced as drafting judge, implicitly signaling the refusal of the former to take responsibility for writing a decision he or she did not share. To this must be added the extra-judicial dimension: on more than one occasion, constitutional judges have lifted the veil of unanimity through newspaper interviews or television appearances, thereby showing that internal plurality does not remain confined within the deliberation room. Despite this practice, the many regulatory amendments, the various legislative proposals – including the Lanzillotta bill and the

[26] The judgment examined several provisions of Law No. 117/1988 on the civil liability of judges for acts performed in the exercise of their functions. The core issues were twofold: first, whether imposing liability on judges could jeopardise their independence and impartiality, as guaranteed by Articles 101, 104 and 108 of the Constitution; second, whether the obligation to record collegial decisions might violate the principle of secrecy of the deliberation, regarded as essential to protecting judicial freedom. The Court held that Law No. 117/1988 strikes a constitutionally sound balance, safeguarding the autonomy and independence of the judiciary while allowing for accountability, without undermining the secrecy of the deliberation. Civil liability does not compromise judicial independence, since it arises only in cases of intent or gross negligence, narrowly defined by statute, thereby reconciling the need to protect citizens against judicial malpractice with the autonomy of judges. At the same time, the recording of collegial decisions, although making their content known, does not infringe the secrecy of the deliberation, whose function is to guarantee the independence and freedom of judicial reasoning, not to prevent decisions from being formally registered and made accessible where necessary to protect the rights of others.

[27] For further analysis, see D. Camoni, *L'opinione dissenziente nelle Corti costituzionali: un formante giurisprudenziale con influenza sul procedimento legislativo?*, *DPCE Online*, Special Issue "I sistemi normativi post-vestfaliani", 2021, 102 ff.

[28] On the possibility of introducing dissenting opinions through practice, see R. Romboli, *L'introduzione dell'opinione dissenziente nei giudizi costituzionali: strumento normativo, aspetti procedurali e ragioni di opportunità*, in *op. cit. L'opinione dissenziente*, *Atti del seminario svoltosi in Roma, Palazzo della Consulta, 5–6 novembre 1993*.

[29] On the practice of replacing the reporting judge with a different drafting judge, see B. Caravita, *in op. cit. Ai margini della dissenting opinion. Lo "strano caso" della sostituzione del relatore nel giudizio costituzionale*, and S. Panizza, *I recenti casi di discrepanza (meramente episodici?) tra giudice relatore e giudice redattore*, in *Quad. cost.*, 3/2007.

Pagano proposal[30] - and even the existence of an agreement among the judges concerning the desirability of introducing the institution[31], the Constitutional Court has never formally implemented the dissenting opinion, thereby leaving intact the principle of the indissolubility of the judicial panel and the unity of judicial reasoning. This dimension is connected to a further relevant aspect: the tendency of various judges, over time, to develop a genuine *judicial philosophy*, that is, an interpretive philosophy of law that guides their positions and that, even in the absence of formalised dissenting opinions, emerges through writings, public interventions, and academic statements. This helps restore an image of courts that is far removed from the idea of aseptic collegial bodies anaesthetised by the passage of time. On the contrary, they appear as living institutions, traversed by interpretive tensions and conflicts of vision that provide vital nourishment for constitutional law. The dissenting opinion should not be regarded as a disintegrating factor, but rather as a valuable resource for the quality of judicial reasoning, for the transparency of the decision-making process, and for the legitimacy of the Court in the eyes of society[32]. A mature democracy, as Amato observed, does not fear dissent; it recognises it as an integral part of the "game". Considering these considerations, the issue for Italy is not so much whether to introduce the dissenting opinion, but rather how to regulate it: whether by means of an intervention on the Court's supplementary rules or through a constitutional amendment under Article 138 of the Constitution. The latter hypothesis, constrained by the procedural aggravations provided by the Constituent Assembly in order to protect the Constitution, appears less effective than the former. Quite apart from the fact that the constitutional text itself explicitly grants the Court broad regulatory autonomy – one need only think of the wide range of decisions developed over the years from the concrete case (for example, manipulative rulings, interpretive decisions, and warnings) - so as better to enable it to exercise its function of guaranteeing respect for the Constitution by adapting its decisional techniques to the questions that arise from a historical, political, and social context in constant evolution. The supplementary rules therefore represent an adequate source, at least in the abstract, for regulating the dissenting opinion. Indeed, they have already been used in the past as the normative ground upon which more recent working methods of the Court have taken root and been formalised, from the signing of judgments by the President and the drafting judge (Article 17(6) of the Supplementary Rules) to the President's power to replace a reporting judge who refuses to draft the reasoning (Article 17(4) of the Supplementary Rules). A reform in this direction would not represent a rupture, but rather the natural outcome of a path already initiated by judicial practice

[30] The Bill introduced by Senator Lanzillotta (A.S. 1952, 9 June 2015) proposed amendments to Law No. 87/1953 and Law No. 196/2009, including the possibility for judges to issue dissenting opinions in constitutional proceedings. In particular, the draft would have allowed judges to set out the reasons for their dissent in opinions published after the judgment. On 4 October 2020, Bill A.C. 2560, sponsored by MP Alessandro Pagano and others, was introduced to amend Article 18 of Law No. 87/1953 by specifying the majority required for Constitutional Court decisions and providing for the possibility of expressing dissenting opinions. On this, see M. D'Amico and S. Panizza, *Il forum sull'introduzione dell'opinione dissenziente nel giudizio di costituzionalità*, *Gruppo di Pisa*, 1/2021.

[31] At certain points in the Court's history, the introduction of dissenting opinions has come close to fruition. Following Mortati's proposal in 1965, another proposal was advanced in 1997 by a Commission composed of Judges Cesare Ruperto, Riccardo Chieppa and Valerio Onida, and voted on in 2002. It envisaged "softened" dissenting opinions, anonymous and accompanied by the signatures of all judges.

[32] A. Sperti, *Corte costituzionale e opinione pubblica*, *Dir. soc.*, 4/2019, 735 ff.

and constitutional jurisprudence, in full respect of the independence and autonomy of constitutional judges. Through the introduction of *dissent* by means of the supplementary rules, the Court would not diminish its own authority; on the contrary, it would strengthen it, offering a more authentic and vital image of its work, improving the quality of reasoning, and increasing its legitimacy in the eyes of a civil society that is ever more attentive and demanding.