

**DISSENT AVERSION  
AT THE COURT OF JUSTICE OF THE EUROPEAN UNION**

Submitted by Marsha C. Erb <sup>1</sup>

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<sup>1</sup> Marsha C. Erb of Calgary, Canada is a justice of the Court of Queen's Bench of Alberta, the superior trial court for the province.

## **ABSTRACT**

The Court of Justice of the European Union has jurisdiction over 28 politically, culturally and linguistically disparate member states in the interpretation and application of EU law. Throughout its 60-year history, the Court has banned publication of the separate opinions of its judges and their voting records favouring instead brief unsigned unanimous decisions achieved by majority vote. The CJEU defends its practice in the interests of protecting judicial independence and its own authority and legitimacy. The Court's critics call for greater transparency by publishing dissenting opinions along the lines of the United States Supreme Court. The CJEU is one of the world's most influential courts as well as a trusted EU institution with everything to lose if it lost authority and legitimacy. Introducing dissenting opinions exposing the CJEU to the challenges of non-compliance with its rulings and its judges to endemic corruption would put its independence, authority and legitimacy at serious risk. Non-compliance and corruption have not been previously linked to the issue of how the Court would be affected in a new judicial environment of this kind. There has been no comprehensive analysis about how EU member state corruption, recently described as 'breathtaking' in scope, would affect the Court's judicial independence. Equally absent is scholarly discourse about fragmented opinions in the context of the nascent issue of member state non-compliance with CJEU judgments. Until multi-disciplinary research and in depth analysis identify a safe path for the Court to follow free from destructive elements, a different route to greater transparency needs to be pursued. At the present time, no such research and analysis exists.

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# 1 INTRODUCTION

The Court of Justice of the European Union (CJEU)<sup>2</sup> has had a long-standing case of dissent aversion. After six decades of successfully resolving disputes and enforcing European community law among a growing number of EU member states, the Court continues to issue only unsigned institutional judgments. These judgments are the result of a simple majority vote presented as the collective voice of the Court. Minority opinions are never disclosed to the public or even recorded.

Despite being part of the remarkable success of supranational adjudication in Europe,<sup>3</sup> the Court appears to be at odds with its sister transnational judicial institutions<sup>4</sup> and a majority of member state national courts which publish dissenting opinion to some extent.

Although the debate about whether the CJEU should publish the separate opinions of its judges in the common law way has been ongoing for decades,<sup>5</sup> it appears to have acquired new interest because of a recent amendment to the Treaty of the European Union (TEU).<sup>6</sup> Article 13 now contains what is arguably specific citizen-inclusive language suggesting that the interests of the people are to be served by

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<sup>2</sup> The European Union's Court has had periodic name changes since its inception in 1952, also known as the European Court of Justice (ECJ) it is now formally called the Court of Justice of the European Union (CJEU).

<sup>3</sup> Laurence R. Helfer, Anne Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication* (1997), 107 Yale L.JU. 273.

<sup>4</sup> The International Court of Justice (ICJ) and the European Court of Human Rights (ECtHR).

<sup>5</sup> Julia Laffranque, *Dissenting Opinion and Judicial Independence*, Juridical International, VII (2003)162.

<sup>6</sup> Also known as the Lisbon Treaty.

the EU's institutional framework not just the national governments of the member states. That the amendment may have been meant to address a transparency deficit at EU institutions including the CJEU has not resonated at either the Court in Luxembourg or at the European Parliament in Brussels.<sup>7</sup> There is little acknowledgement of it except for the work of a respected academic at the University of Leeds in England whose writing suggests that Article 13 is meant to engender trust in EU institutions of which the CJEU is one of the most powerful.<sup>8</sup> To enhance trust, transparency is a prerequisite and dissenting opinion is offered as the means to achieve it.<sup>9</sup> This linking of transparency and trust to authority and legitimacy arises because citizens appear to have greater faith in the ability of institutions to serve them if they are able to examine all aspects of them.

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<sup>7</sup> Interviews with Court and parliamentary officials in both Luxembourg and Brussels in November 5 and 6, 2013 disclosed no indication that Article 13 is being considered along these lines at the present time. Officials at the secretariat for the European Parliament Constitutional and Legal Affairs Committee viewed the change as a “housekeeping” amendment broadening out the language but adding nothing new.

<sup>8</sup> Lyiola Solanke, *The Advocate General—Assisting the CJEU of Article 13 TEU to Secure Trust and Democracy*, Cambridge Yearbook of European Legal Studies, Vol 14 (2011-2012) Article 13: “The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the member states, and ensure the consistency, effectiveness and continuity of its policies and actions.” (emphasis added) EU institutions include the CJEU.

<sup>9</sup> Solanke, *supra*. Dr. Solanke presents Article 13 as a signal to the EU's institutions that the interests of citizens are equal to the interests of the member states themselves implying that the door has been left ajar for greater transparency in judicial decision making at the CJEU as a key EU institution. Citing: D. Gambetta cited in Susan Rose-Ackerman, ‘Trust, Honesty and Corruptions: Reflection on the State-Building Process’: [www.digitalcommons.law.yale.edu/lepp\\_papers/255](http://www.digitalcommons.law.yale.edu/lepp_papers/255).

The pursuit of institutional transparency is a central theme of those favouring dissenting opinion. So is the premise that judicial independence would be enhanced if judges were able to voice their independent thoughts publicly. In fact, the original premise for this thesis was that the CJEU should publish dissenting opinion for those reasons. However, in the course of exploring the issue, an unexpected and opposite conclusion emerged – the risks to CJEU independence, authority and legitimacy are too substantial for the Court to pursue this perceived route to greater transparency at this time.

By following the research, it became apparent that the CJEU is a complex judicial institution; the only one in the world which delivers judgments binding on the better part of a continent of sovereign nations. Those nations are distrustful of each other and operate at uneven levels of democracy. What would happen to the independence, authority and legitimacy of the CJEU if dissenting opinion and public exposure to judges were introduced in its present environment is a question which has not been adequately explored. That ‘present environment’ includes widespread institutional corruption among EU member states.<sup>10</sup>

Endemic corruption is the proverbial elephant in the room during discussions about introducing separate opinion practice at the CJEU and thereby exposing its judiciary to public and other pressures. The CJEU is a youthful judicial institution with 13 new states having joined the EU in the past decade alone.<sup>11</sup> The member

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<sup>10</sup> *European Union Anti-Corruption Report*, (2014); Christopher Walker, *The Perpetual Battle, Corruption in the Former Soviet Union and the New EU Members* (2011), Centre for Public Policy, Freedom House. See also Nations in Transition survey 2013.

<sup>11</sup> The six original states: France, the Federal Republic of Germany, Italy, Belgium, The Netherlands and Luxembourg (1951), 22 other states have joined at various times: Denmark, Ireland and the United Kingdom (1973); Greece (1984); Spain and Portugal (1986); Austria, Finland and Sweden (1995); Cyprus, the Czech

state national courts fuel the EU law legal engine and give it authority and legitimacy.<sup>12</sup> With nearly half of the member states in transition as emerging democracies, a change at the Court would produce unpredictable consequences. Part of the unpredictability is how member states would respond to minority opinions more favourable to their national interests. One possible outcome is the use of dissenting opinions to legitimize non-compliance with adverse judgments.

Although dissenting opinion is at the centre of the pursuit of greater transparency at the CJEU, safe, viable options with predictable outcomes have not been fully explored either.

## 1.1 Rationale and Scope

This thesis explains why the CJEU is not ready to publish the separate opinions of its judiciary as proponents suggest it should. It also explores whether introducing dissenting opinion is even capable of resolving the perceived transparency deficit at the CJEU<sup>13</sup> since the value of transparency itself has been questioned.<sup>14</sup>

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Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia (2004); Bulgaria and Romania (2007); Croatia (2013).

<sup>12</sup> Michal Bobek, “*Of Feasibility and Silent Elephants: The Legitimacy of the Court of Justice Through the Eyes of National Courts*,” in *Judging Europe’s Judges, the Legitimacy of the Case Law of the European Court of Justice*, edited by Maurice Adams, Henri de Waele, Johan Meeusen and Gert Strattmans, Hart Publishing, 2014.

<sup>13</sup> John Adler, *Dissents in Courts of Last Resort* (2000) Oxford Journal of Legal Studies Vol. 20, No. 2, p.221... both U.S. Supreme Court Chief Justice Taft and Justice Brandeis regarded dissenting opinion as unacceptably weakening the doctrine of *stare decisis*, an underpinning of the common law and increasingly important in the civil law system.

While there is enthusiasm among proponents about the prospect of introducing separate opinions in terms of benefits, the risks of forging ahead in the absence of empirical research and analysis disclosing probable not possible outcomes militate against doing so. Before any steps toward introducing dissenting opinion practice can be taken, meaningful interdisciplinary research is required. This thesis does not provide that research. It focuses on far more modest tasks – identifying the risks associated with introducing a change in practice at the CJEU in its present circumstances and exploring where an invitation to publicly disagree might lead.

While there has been extensive, comprehensive empirical research on dissenting opinion from many perspectives in the United States, this is not the case in Europe.<sup>15</sup> Few have waded into the murky waters of consequences for the CJEU, a Court with a unique history, purpose and constituency.<sup>16</sup>

This thesis explores in juxtaposition judicial decision making practices at two internationally respected institutions – the CJEU and the United States Supreme Court. They are Courts with different legal traditions and practices operating on

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<sup>14</sup> Alberto Alemanno, *Unpacking the Principle of Openness in EU Law, Transparency, Participation and Democracy*, *European Law Review* (forthcoming) 2014 @ p. 14 noting that the effects that transparency may have on legitimacy have been little explored and dependent on the use made of disclosed information and by whom.(cites also D. Curtin and A.J. Meijer, *Does Transparency Strengthen Legitimacy?*)

<sup>15</sup> Katalin Kelemen, *Dissenting Opinions in Constitutional Courts*, *German Law Journal* Vol. 14 No. 98 @ 1345. The author states that while there is “an extensive literature in the United States regarding the use of dissenting opinion, comprehensive empirical research is still absent in Europe.”

<sup>16</sup> Some work has been done by the European Parliament through a study on consequential issues but not on non-compliance and corruption.

opposite sides of a common ocean. American common law and continental civil law inform the practices of each Court.

Despite differences and the peculiarities of the CJEU, the American experience provides insight into what the European Court might expect from separate opinion practice if it were to embark on a similar journey.

## **1.2 A Note on Structure**

Before considering the CJEU as a judicial institution and what it has at stake if it decided to introduce separate opinion practice in its present circumstances, the nature, origins and capacity of dissenting opinion requires examination.

This thesis is divided into five chapters including its Introduction as Chapter 1. Chapter 2: “Judicial Writing” offers an overview of practices and styles; why divergent opinion developed deep roots in America and why unanimity became entrenched in continental Europe; the advantages and disadvantages of dissenting opinion and insights from the American experience. Chapter 3: “The Court in Luxembourg” places the EU and the CJEU in historical context; identifies the peculiarities of the Court; member state national court practices and points to the uncertainties inherent in a change of practice. Chapter 4: “Judicial Independence” discusses the challenges dissenting opinion poses for CJEU independence including non-compliance and corruption as well as implications for CJEU authority and legitimacy. Chapter 5: “Opening Pandora’s Box” offers reflections and options.

## **2 JUDICIAL WRITING**

The communication of rights and remedies arising from judicial adjudication has been dominated by practices and styles rooted in history and circumstance throughout the democratic world. Until the mid-19<sup>th</sup> century, two judgment styles

dominated – ‘seriatim’ the multiple judgment practice of England and ‘per curiam’ the unanimous decision style of continental Europe.

In its early years, the United States Supreme Court blended per curiam and seriatim creating a ‘hybrid’ style which is uniquely American.<sup>17</sup> This hybrid is characterized by publication of a majority opinion of the Court together with any dissenting and concurring opinions of individual judges.<sup>18</sup> The CJEU issues per curiam institutional judgments resulting from a majority vote.

The American Supreme Court’s ‘hybrid’ and the CJEU’s ‘per curiam styles are grounded in two different legal systems – American adaptation of English common law; and continental civil law.<sup>19</sup> The vast majority of the EU member states are

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<sup>17</sup> In a seriatim court, each judge writes an individual opinion which collectively comprise the judgment. This practice eliminates risk to collegiality caused by dissenting opinion<sup>17</sup> since there are no proverbial feathers to ruffle. However, seriatim writing can be confusing since it is not always easy to discern what principle the court is endorsing. In a per curiam court, a unanimous, single unsigned majority decision is issued and published, the result of a vote among participating judges comprises the opinion of the court as an institution. In a hybrid court, individual opinions of the sitting judges’ are published as part of majority judgments as the overall decision of the Court.

<sup>18</sup> Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, Minnesota Law Review lecture. Seriatim and per curiam are brought closer together by the middle ground used prominently in North America.

<sup>19</sup> The common law is based on statutory law and *stare decisis* established by judicial decisions made in similar cases which over time have been compiled in case reports. The common law is an adversarial system in which opposing parties contest positions and judges adjudicate. A jury of one’s peers untrained in the law decides the facts cases in which trial by a jury is available and the judge determines the law to be applied, instructs the jury on it and any sentence. Continental civil law is investigative or inquisitorial in nature. In a civil system, the judges’ role is to

civil law jurisdictions; the most widely employed legal system in the world.<sup>20</sup> However there is evidence of some blurring between the lines with the common law and civil law systems borrowing from each other.<sup>21</sup>

American separate writing is widely accepted as part of the common law decision-making process.<sup>22</sup> Publishing alternate judicial opinion is not a general feature of continental civil law. Common law judgments are detailed and expansive. Some of them approach literary eloquence and both majority opinions and dissents are still remembered if not cited many decades later. Common law judgments make precedent-setting law which other lower judicial institutions must understand, interpret and apply.

The civil law judgment is brief and ‘magisterial’ because judges engage in a ‘recitation’ of codified law. CJEU judges contribute less to shaping the law than

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establish the facts of the case and apply the provisions of the relevant codified law. In a common law system, the judge’s decision is instrumental to the shaping of law enacted by legislators; in the civil law system, law is shaped by the actual decisions of legislators and legal scholars who draft the codes that determine the law; judges interpret (or recite) the codified law.

<sup>20</sup> BrightKnowledge.org. Civil law systems evolved from Roman law which was used throughout the Roman Empire. Civil Law is used in most of Europe, Asia, South America and most of Africa.

<sup>21</sup> Common law separate opinions and more literary written reasons appear in the national courts of the EU member states; Civil law codes such as uniform commercial codes and labour codes are now in regular use in common law systems.

<sup>22</sup> M. T. Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*; (2007), Sup. Ct Rev. 283 (292-308).

their common law counterparts and accordingly less attention appears to be paid to their content and style.<sup>23</sup>

CJEU judgment writing has been described as “shallow, bland and unclear.”<sup>24</sup> Despite this perspective, judicial brevity has its positive elements: “Writing that makes its point briefly is more likely to be understood than writing that is lengthy...

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<sup>23</sup> Guy Canivet, Premier president honoraire de la Cour de cassation française, member du Conseil constitutionnel, The civil law system operates from a comprehensive, continuously updated set of legal codes, with procedures and appropriate penalties for offences clearly written and available explaining the way civil law courts, unlike those in common law systems, give brief reasons for judicial decisions. Using an example of an appellate court in the civil law system, the French Court of Cassation, Monsieur Canivet explains: “The parties put a number of questions called grounds of appeal to the court in a very formal manner according to very precise rules and the court responds only to those questions...a cassation judgment is a collection of responses to purely legal grounds of appeal drawn from a decision given by a court of first instance or a court of appeal, known as the *juge du fond* The Court of Cassation does not recount the facts of the case. The cassation decision is not a narrative, nor does it provide a global statement of reasons in response to the litigation. Instead it is a series of logical replies to legal questions put to the court. . . . When interpreting the law, the court does not have to give the reasoning of the legislature; it cannot substitute itself as the legislature in order to explain the meaning of the law in either a critical or probative manner. Since the law is the expression of the general will, the court cannot add to, transform or justify the general will. That is why, when the court interprets the law, it reveals its meaning by purely and simply repeating the law.

<sup>24</sup> Roger Alford, “Inferior Quality of ECJ Decisions” in *Opinio Juris*, (2007) web blog dedicated to reports, commentary and debate on current developments and scholarship in the fields of International law and politics.

and forces the writer to think with precision by focusing on what he or she is trying to say.”<sup>25</sup>

Accordingly, the objectives of American and European judgment writing reflect the legal traditions and systems in which they operate.

## 2.1 Deeply Rooted Practices

The long era of European monarchical governance forms the underpinning for per curiam practice<sup>26</sup> still well represented in CJEU judgments.<sup>27</sup> In a per curiam court, a single unsigned majority decision is published, the result of a majority vote. Other judges on the judicial panel who may have disagreed during deliberations remain silent and defer to the majority opinion as required by their oath of office.

Although per curiam practice was adopted at the Court’s inception largely because it was the practice of all six founding nations at the time, 21 member states, no

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<sup>25</sup> Judicial Writing Manual (1991), United States Federal Judicial Center, page 23.

<sup>26</sup> “The will of the sovereign” is the underpinning of per curiam style - because the sovereign could have but one will, unanimous judgments were required: Rosa Raffaelli, *Dissenting Opinions in the Supreme Courts of the Member States* (2012) citing: S. Cassese, Leone sulla cosiddetta opinione dissenziente, in *Quaderni costituzionali*, n. 4/2009, pp. 973-986. J. Malenovsky supra. Kings could accept or reject findings of courts as a matter of right (eg. French Conseil d’Etat and the UK Privy Council).

<sup>27</sup> This historical monarchical element of continental civil law was not foreign to England. Until 2009 when the judicial function of the British House of Lords was replaced with the Supreme Court of the United Kingdom, the link with the sovereign was direct. Although appeals were heard in the House of Lords, they were technically heard by “the Queen-in-Parliament.”

doubt influenced by the Americans, now allow dissenting opinion as part of their majority judgments. The CJEU continues publishing its judgments in per curiam primarily because it produces a form of certainty as to result (which party prevails). It leaves room for little, if any, interpretation which would arguably differ among the 28 member states resulting in an uneven application of the Court's rulings.

In the early years of the American Supreme Court, judgments were issued seriatim in the English way of individual judges writing separately even when they agree.<sup>28</sup> Seriatim judgments are notoriously confusing; it is often difficult to discern what principle the court as an institution is endorsing.<sup>29</sup>

In America, Chief Justice John Marshall put an end to seriatim practice at the Supreme Court concluding that individual reasons posed a risk to the Court's authority.<sup>30</sup> He wanted a strong Supreme Court unlike his contemporary, President Thomas Jefferson. Distrustful of judicial power,<sup>31</sup> the President believed that

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<sup>28</sup> *Law and Custom in Early Britain*, Part I.

<sup>29</sup> Lady Justice (Baroness) Brenda Hale (Deputy President of the Supreme Court of the United Kingdom) *Judgment Writing in the Supreme Court*, UKSC internet blog (2010). The practice at the new Supreme Court of the United Kingdom, which opened in 2009, issues decisions in a variety of ways, seriatim, per curiam and American hybrid. In its first year, the Court delivered 57 decided cases in which 20 were "judgments of the court" in which all the justice agreed; 11 in which there was a single judgment with other justices agreeing, or a single majority with which all majority judges agreed with separate views simply expressed as footnotes or observations.

<sup>30</sup> Chief Justice Marshall served from 1801 to 1835.

<sup>31</sup> David N. Mayer, *The Constitutional Thought of Thomas Jefferson*, University Press of Virginia, 1994, in which Thomas Jefferson is presented as distrustful of the judicial power and opposing the judicial branch as final arbiter of the

unanimous judgments would empower the Court beyond what the founders had intended.<sup>32</sup> What evolved is something in between. Now the practice of publishing judgments identifying the authors of majority, dissenting and concurring views is entrenched at the United States Supreme Court and has been adopted in courts all over the world to varying degrees.<sup>33</sup>

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Constitution. In his mind this was not consistent with federalism. His view was not shared by Chief Justice John Marshall who saw the United States Supreme Court as “a guardian of the republic. Jefferson saw the role of the Supreme Court as decider of what was good for Americans as too close to playing God. CJ Marshall went on to decide the seminal case of *Marbury v. Madison* which established the power of judicial review of government action and effectively empowered the court and struck down the constitutionality of the *Judiciary Act 180* during Jefferson’s presidency. See also references to the American legal community and general public skepticism about a powerful Supreme Court during Chief Justice John Jay’s era fuelled in part by the majority decision in *Chisholm v. Georgia* which did not favour State rights and led to the remedy of the Eleventh Amendment to the Constitution (as it was at that time). See also Roscoe Pound’s comments in *The Causes of Popular Dissatisfaction with the Administration of Justice*, 14 Am. Law 445 (1906).

<sup>32</sup> Henderson, *supra*. President Jefferson had four reasons for preferring seriatim, it: (i) increased transparency which led to more accountability (ii) ensured that each judge had considered all the issues (iii) weighed the precedential value based on the vote of the judges and (iv) acted as anti-precedent allowing future judges to correct bad law.

<sup>33</sup> The American hybrid developed initially at a slow pace and picked up momentum during Justice Oliver Wendell Holmes’ long tenure as an associate justice of the Court. He became the “great dissenter” despite his reputed dislike of judicial disagreement. Judges appointed during President Roosevelt’s administration enthusiastically issued dissenting opinions although for perhaps more political reasons than the “important principles” which are said to have inspired Justice Oliver Wendell Holmes to dissent in *Lochner v. New York* (2005) 198 US 45.

Although separate writing practice has grown exponentially since the 1940s, both seriatim and per curiam have retained a presence at the American Supreme Court. Per curiam has been described as a method of disposing of “controversial cases without resolving controversial issues.”<sup>34</sup> The unanimous judgment has authority. President Jefferson and Chief Justice Marshall thought so in the early chapters of America judicial experience. However, the Supreme Court has been criticized for using these “nameless” judgments to do more than expressing “a narrow set of opinions and dispositions in which formulaic, boiler plate language leaves no legitimate room for individual expression” and for “hiding behind the cloak of invisibility.”<sup>35</sup> This language could be associated quite legitimately with the judgments of the CJEU.

What per curiam sacrifices in insight into the decision-making process and transparency, it gains in bringing “institutional strength to a controversial decision.”<sup>36</sup> This use of per curiam “demonstrates the justices’ awareness that

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<sup>34</sup> Laura Krugman Ray, *The History of the Per Curiam Opinion: Consensus and Individual Expression on the Supreme Court*, vol. 27, issue 2, July 2002, p.187. Brief appearances have been noted by seriatim in the early 1970s and again in 2000.<sup>34</sup> Per curiam has remaining in regular use all along for limited purposes.

<sup>35</sup> Ira P. Robbins, *Hiding Behind the Cloak of Invisibility: The Supreme Court and Per Curiam Opinions*. *Tulane Law Review*, Vol. 86, (2012). The U.S. Supreme Court’s use of per curiam opinion in recent years indicates a relatively consistent pattern: In 2009, the Court recorded 19 institutional, unsigned decisions; 10 in 2010; 13 in 2011 and 5 in 2012.

<sup>36</sup> Michelle Friedland, David Ham, Jeff Bleitch, Dan Ress and Aimee Feinberg, *Opinions of the Court By Anonymous*, Supreme Court Watch, (2008). One of the most prominent decisions of the United States Supreme Court requiring this level of authority in the political and social circumstances of its day is the civil rights decision in *Brown v. Board of Education* in 1954. Had consensus not been achieved addressing the highly divisive issue of desegregation in American schools, the issue might have lingered causing ongoing domestic disruption and

anonymity can enhance institutional credibility.”<sup>37</sup> This is one reason why the CJEU favours writing in per curiam – it delivers authoritative judgments which leave no room for member states to interpret and apply decisions differently.

## 2.2 Opposing Opinions

Dissenting (opposing) opinion may be the most researched and analyzed issue in the American judicial system second only, perhaps, to the way judges do their work and think about it.<sup>38</sup> A substantial amount of empirical data has been drawn from the American federal appellate judiciary, in particular, the Supreme Court. Yet, the practice is controversial even in America.

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unrest. Other important decisions decided per curiam include: *New York Times v. the United States*<sup>36</sup> - an important First Amendment case about freedom of news agencies to publish the so-called “pentagon papers” during the Vietnam war; *Furman v. Georgia*<sup>36</sup> in which the Court issued a four-year moratorium on capital punishment; *United States v. Nixon*<sup>36</sup> which led to the first resignation of a sitting president under threat of impeachment. In contrast the Supreme Court in *Bush v. Gore*,<sup>36</sup> decided the outcome of the 2000 presidential election by a one-vote margin. In that case, the Court was criticized for not ‘speaking with one voice’ and in failing to do so, “undermined its authority’ with the outcome described as a political not a judicial decision. (Alan Dershowitz, *Supreme Injustice: How the High Court Hijacked Election 2000*, (2001) Oxford University Press.). See also, E. MacFarlane, *Consensus and Unanimity at the Supreme Court of Canada*, (2010), 52 S.C.L.R. (2d) 379 at p. 380. Per Curiam was used by the Supreme Court of Canada in the Quebec Referendum issue on whether the province could legally secede from the rest of the country.

<sup>37</sup> James Markham, *Against Individual Signed Judicial Opinions* (2006) Duke Law Journal Vol. 56:923

<sup>38</sup> In particular, Richard A. Posner *How Judges Think* (2008) Harvard University Press which discusses various theories of judicial behavior. Also Epstein, Landes and Posner, *supra* writing statistically about judicial behaviour.

For every word in attribution, there is another in criticism. Lauded for their capacity to incite thoughtful responses to the majority reasoning, dissents are also described as “unfortunate,” even “tragic” occurrences.<sup>39</sup> Judges who choose to write separately are sometimes thought to be “out of step” with the views of the times.<sup>40</sup> Yet their opinions may be vindicated as social attitudes, economic climates and political environments change and ultimately contribute to the development of the law.<sup>41</sup> In this way, such opinions become the “voice of the future,”<sup>42</sup> strengthening political resolve to effect change<sup>43</sup> by inspiring forward thinking

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<sup>39</sup> John Adler, *Dissents in Courts of Last Resort: Tragic Choices?* *Oxford Journal of Legal Studies*, Vol. 20, No. 2 (2000) @ 221 citing Justice Brennan, 37 Hastings LJ 427 (1986) 427; and Lord Mansfield in *Millar v. Taylor*, (1769) 4 Burrows 2303 at 2395.

<sup>40</sup> Mark Tushnet, *I Dissent, Great Opposing Opinions in Landmark Supreme Court Cases*, (2008) Beacon Press, Boston.

<sup>41</sup> Orr Larsen, *supra* citing: Lewis F. Powell, Jr. *Stare Decisis and Judicial Restraint*, 47 Wash. & Lee L. Rev 281, 288 (1990) and Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 Minn. L. Rev 1173 (2005); Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 Yale L.J.2235 (1996). See also, Andrew Lynch, *Taking Delight in Being Contrary, Worried About Being a Loner or Simply Indifferent: How Do Judges really feel About Dissent?* *Federal Law Review* Vol. 32, p. 311, (2004) in which he reviews a book by Cass R. Sunstein, *Why Societies Need Dissent* (2003), Cambridge: Harvard University Press.

<sup>42</sup> Claire L’Heureux-Dubé, former puisne (associate) justice, Supreme Court of Canada, *The Dissenting Opinion Voice of the Future?* No stranger to dissenting opinion, she described dissenting opinions as rich sources of all that is possible in the law; they play three roles (i) prophecy (ii) dialogue (iii) safeguard the integrity of the judicial decision-making process and ultimately the law.

<sup>43</sup> Tushnet, *supra* @ p. 92

legislators to enact progressive or corrective legislation. However, there is scholarly research suggesting this occurs “with minimal frequency.”<sup>44</sup>

Dissenting opinion has also been described as an antidote to conformity unchecked by contrarian views resulting in “astonishing outcomes.”<sup>45</sup> They can also “cancel the impact of monolithic solidarity on which the authority of a bench of judges so largely depends.”<sup>46</sup> They may also be “symptoms of dysfunction” by “exposing internal divisions publicly.”<sup>47</sup>

Separate opinion writing on the one hand invites open disagreement on a judicial panel even if the opinions are framed respectfully.<sup>48</sup> They may endanger the

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<sup>44</sup> Andrew Lynch, *The Intelligence of A Future Day*, (2005) 33 Federal Law Review 485. An empirical study on activity over a 22-year period (1981 to 2003) on the impact of dissenting opinion in the Australia’s highest court may provide some insight. Dissenting opinion in the High Court of Australia is focused on the hope that eventually the question at issue will be revisited. The opinions themselves speak directly to a comprehensive justification for an alternative resolution by “appealing to the intelligence of a future day”. The Study concludes that “redemption of minority opinion occurs with minimal frequency—far less often than is popularly believed.” However, the study did demonstrate that dissenting opinion “exerts some level of influence” over the law.

<sup>45</sup> Cass R. Sunstein, *Why Societies Need Dissent*, (2003) 1 Harvard University Press.

<sup>46</sup> Henderson supra referring to Justice Learned Hand, *The Bill of Rights* (1958).

<sup>47</sup> Henderson supra, referring to the commencement address U.S. Supreme Court Chief Justice John Roberts delivered to the Georgetown University Law School, Class of 2006, indicated he believes dissent is a “symptom of dysfunction”.

<sup>48</sup> Harvard, *From Consensus To Collegiality: The Origins of the “Respectful” Dissent*, supra.

authority, prestige<sup>49</sup> and legitimacy of the Court or at least the decision rendered.<sup>50</sup> On the other hand, publishing dissents brings “clarity and authority to judgments and have the power to “move ordinary people.”<sup>51</sup>

On a global plane, general principles of international law appear to support publication of dissenting opinions<sup>52</sup> because of the substantial contribution to be made to transparency which permeates all institutional structures and maintains a prominent focus.<sup>53</sup>

With all of its divided support, advantages and disadvantages, separate opinions have a not necessarily welcome companion – concurrences. These lead to fragmented judgments with pluralities (no-clear majorities). “When a concurring justice endorses the Court’s judgment but elects to offer an independent opinion, the result may be a judgment unsupported by a majority rationale.”<sup>54</sup>

Plurality opinions most often arise in civil rights and civil liberties cases which, because of the human element and societal implications, are the most ‘emotionally

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<sup>49</sup> Prestige of the court is expressed as public confidence in some common law jurisdictions, Canada for example.

<sup>50</sup> The argument of the CJEU canvassed in the 2012 Study conducted on behalf of the European Parliament.

<sup>51</sup> Lani Guinier, *The Supreme Court 2007 Term*, Harvard Law Review Vol. 122:4 (2008).

<sup>52</sup> Raffaelli, supra citing Malenovsky, *Les opinions separees et leurs repercussions sur l’indpendence du juge international*, in *Anuario Colombiano de Derecho Constitucional*, 2010, at 39 and p 31 with respect to the “growing trend”.

<sup>53</sup> Carlos I. Fuentes, “*Transparency as a Global Goal: Towards a Unity of Principles in Global Administrative Law*,” Research Gate (2008).

<sup>54</sup> Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court* [1990] University of California, Davis Vol. 23-777 @ 811.

charged and uniquely revealing of the justices' personal feelings'.<sup>55</sup> The CJEU equivalent would be social issues involving values, culture and perhaps history.

CJEU judges are no more immune to judicial disagreement related to personal or national ethos than judges of the American Supreme Court. American judges are protected from judicial interference in a variety of ways including life tenure. The equivalent protection for CJEU judges reposes in the fact that differences in their opinions are not disclosed. That protection would disappear if dissenting opinion was introduced without being replaced with something of equal strength.

### 2.3 Lessons From America

As the great home of the dissenting opinion, the American Supreme Court's long history and experience with separate judicial writing offers insight to the CJEU.<sup>56</sup> Judicial dissenting opinion has had general public acceptance in America for generations even in decisions of national importance.<sup>57</sup> Levels of consensus at the

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<sup>55</sup> Markham, *supra* citing the 1989 flag burning case *Texas v. Johnson*, (1089) 492 US 397 in which Justice Kennedy wrote a concurring note about the personal toll of such an issue. Markham also notes the more recent decision of *Lawrence v. Texas* (2003), 539 UD 558 in which Scalia J. "tempered his dissent with a personal disclaimer: 'Let me be clear that I have nothing against homosexuals, or any other group, promoting their agenda through normal democratic means.' See also Pamela C. Corley, Udi Sommer, Amy Steigerwalt & Artemus Ward, *Extreme Dissensus: Explaining Plurality Decisions on the United States Supreme Court*, The Justice System Journal.

<sup>56</sup>The first 'true dissent' was penned in 1806: James Markham, *Against Individual Signed Judicial Opinions* (2006) Duke Law Journal Vol. 56:923 citing Paterson J's dissent in , *in Simms & Wise v. Slacum*, (1806) 7 US (3 Cranch) 300.

<sup>57</sup> Recent examples include *Bush v. Gore* 1 148 L. Ed. 2<sup>nd</sup> 388 (2000) resolving the dispute between the parties in the presidential election that year; *District of*

Supreme Court have reached 50% fairly routinely<sup>58</sup> prompting some scholars to conclude that America's top judicial institution is becoming a seriatim court.<sup>59</sup>

What motivates judges in courts of final review to write separately is linked to the choices that must be made from a platter of 'competing yet compelling' solutions<sup>60</sup>

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*Columbia v. Heller*, 554 U.S. 570 (2008) in which the Supreme Court held that a citizens have a right to possess a firearm for lawful purposes, which right is protected by the second Amendment; and the 2010 *Affordable Health Care Act* decision in which the *Act* was substantially upheld although four judges did so on the basis of commerce and taxation, the Chief Justice on taxation and four would have struck it down.

<sup>58</sup> A recent study tracks in percentiles dissenting practices between the commencement of the court of Chief Justice John Marshall (1801) and Chief Justice John Roberts (2005). The proclivity rates disclose that the lowest dissenting period of all time was during Chief Justice Marshall's 34 years on the Supreme Court (1801-1835) at 4%. This was followed by 10% on average over the next century until Chief Justice Stone's era (1941-1945) at 27%; followed by a sharp increase to 48% under Chief Justice Vinson (1946-1952); 50% under Chief Justice Warren (1953-1968); 59% under Chief Justice Burger (1969-1985); 56% under Chief Justice Rehnquist (1986-2005); and 47% during the two-year-period of the study (2005-2007) under Chief Justice Roberts.

<sup>59</sup> Thomas G. Walker, *Seriatim Opinions* in the Oxford Companion to the United States Supreme Court; Henderson, *supra* See also Markham, *supra*, who notes the "shift from the institutional to the personal nature of opinion writing ...evidence in Justice Breyer's subtle and inadvertent rhetorical slip in *South Central Bell v Alabama*, (1999) 526 US 160 when he used the pronoun 'I' instead of 'we' in a majority opinion.

<sup>60</sup> Lynch, *supra* @ p. 320. Professor Lynch cites: Ian Greene, Peter McCormick, George Szablowski, Martin Thomas, Carl Baar, *Final Appeal, Decision-Making in Canadian Courts of Appeal* (1998) in which empirical data from Canadian judges confirmed four such factors: the law in the context of the issues to be resolved,, the

and maximizing public policy preferences.<sup>61</sup> There is also the dilemma in which a judge firmly believes in ‘one true answer’ and therefore must dissent.<sup>62</sup>

Whatever the motivation for the decision to write separately (a subject beyond the scope of this thesis and fully analyzed elsewhere)<sup>63</sup> no one seriously advocates stifling the exercise of freedom of expression through contrarian views at the Supreme Court. However, there is a call in some quarters for the elimination of concurring and plurality opinions because they contribute to dissension on the Court.<sup>64</sup> Others advocated restraint<sup>65</sup> while recognizing that dissenting opinions often make an important contribution. However, either restricting or limiting dissenting opinion may undermine judges’ rights of freedom of expression just as much as not allowing them at all.

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personal values of the judges, the procedures developed by the court in question, the nature of interpersonal judicial relations in the court.

<sup>61</sup> Lee Epstein, Jack Knight, *The Choices Judges Make*, Congressional Quarterly Press (1998).

<sup>62</sup> Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, *California Law Review*, *Coll. 100:519*, discussing different types of judicial self-restraint.

<sup>63</sup> Posner, *supra* and in various other books and publications.

<sup>64</sup> Linas Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, (2009), *Penn State Law Review* vol. 113:3, 899 @920.

<sup>65</sup> Allison Orr Larsen, *supra* citing: Lewis F. Powell, Jr. *Stare Decisis and Judicial Restraint*, 47 *Wash. & Lee L. Rev* 281, 288 (1990) and Daniel A. Farber, *The Rule of Law and the Law of Precedents*, 90 *Minn. L. Rev* 1173 (2005); Kevin M. Stack, *The Practice of Dissent in the Supreme Court*, 105 *Yale L.J.*2235 (1996). Also, Justice Ruth Bader-Ginsburg referring to Justice Brandeis’ comments: “random dissents” weaken the institutional impact of the Court and handicap it in the doing of its fundamental job....need to be saved for major matters if the Court is not to appear indecisive and quarrelsome”. . . “his shots[were] all the harder because he chose his ground.”

The Court's low level of consensus remains a source of uneasiness because of its implications for the Supreme Court's credibility and legitimacy.<sup>66</sup> The steady diet of one-vote majorities and pluralities are particularly troublesome for institutional legitimacy.<sup>67</sup>

The Supreme Court's plurality opinions create muddled and fragmented decisions; have the potential to raise more questions than they answer; and confuse the current state of the law.<sup>68</sup> They have been blamed for a "divisive and weakened Court,"<sup>69</sup> creating uncertainty for the bench and bar. They routinely leave the lower

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<sup>66</sup> Chief Justice John Roberts in the *New Republic* interview with Jeffrey Rosen, 2006. Although Chief Justice Roberts has expressed hopes of achieving greater consensus on the Court, even at 47%, the present level of dissent is not the highest in the Court's history. During Chief Justice Burger's term, the rates rose to nearly 56% as the statistics disclose (Henderson, *supra*). The task of reversing the trend may be an uphill battle since dissent, once reserved for profound differences of opinion, are now routine.

<sup>67</sup> Bader Ginsburg, *supra*. Even during Justice Holmes' tenure, dissents were recognized as taking a toll on institutional legitimacy. See also Markham, *supra* discussing Justice Brandeis' penchant for withholding separate opinions from publication 'so as not to inhibit the Court's decisiveness.'

<sup>68</sup> Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*. *Journal of Law & Policy* [2000] Vol. 4:261 @ 284. *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*; *Harvard Law Review* (2011) Vol. 124: 1305@ 1306. Hochschild, *supra*. John F. Davis, & William L. Reynolds, *Juridical Cripples: Plurality Opinions in the Supreme Court*, (1974) *Duke L.J.* 59, 62.

<sup>69</sup> Ledebur, *supra*. David Paul Kuhn, Chief Political Correspondent for *RealClearPolitics* writing online: "The Polarization of the Supreme Court, 2 July 2010:"The "supreme" authority of the high court rests on its legitimacy. The more absent consensus is from the high court, the more diminished its legitimacy and the

courts at their own devices on how the judgments should be interpreted or applied, if at all, and with what authority.<sup>70</sup> The Supreme Court itself has declared a solution although not one which is fully effective.<sup>71</sup>

Although the Supreme Court operates in a “polarized” and “politicized” environment, there is no question that it still commands the trust of the American people.<sup>72</sup> However, the “supreme authority” of the Court rests on its legitimacy and scholars point out that the more consensus is absent, the more diminished is its legitimacy and the more each decision will come to be viewed through a “political lens.”<sup>73</sup> Considering the fact that a common law court’s principal function is to set binding, uniform precedent, the question arises as to whether the Court is failing to do so when it issues a plurality opinion making it difficult if not impossible to discern its governing rationale.<sup>74</sup>

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more each decision will come to be viewed through a political lens”. Kuhn also opines that 5-4 decisions which are routine at the Court are also those most likely to be overturned by later Supreme Courts.

<sup>70</sup>.James F. Spriggs & David R. Stras, *Explaining Plurality Decisions*, (2011) The Georgetown Law Journal Vol. 99:515. The authors point to the comments by Chief Justice Rehnquist [Remarks on the Process of Judging, 49 Wash. & Lee L. Rev. 263, 270, (1992)] and Justices Lewis Powell and Ruth Bader Ginsburg.

<sup>71</sup> *United States v. Marks* (1977) 430 U.S.188, 193. (The holding of the Court may be viewed as that position taken by those judges who concurred on the narrowest grounds). The application of this principle has its own challenges.

<sup>72</sup> Gallup poll- 63% of participating Americans in 2011 disclosed that they had a “great deal” or “fair amount” of faith in the Court.<sup>72</sup> It was however, the lowest statistical percentile on the same questions since 1976.

<sup>73</sup> Kuhn, *supra*. Ledebur, *supra*.

<sup>74</sup> Corley, Sommer, Steigerwalt & Ward, *supra*.

Although dissents at their best improve the quality of a court's judgments, increase transparency and enhance freedom of judicial expression, in the CJEU's judicial environment they could be destructive.<sup>75</sup> A track record of low consensus similar to the experience of the United States Supreme Court could be alarming at a Court which delivers binding judgments to a continent of nations.<sup>76</sup> Nevertheless, dissenting opinions do demonstrate that more than one result is possible.<sup>77</sup> They can give judges a wide berth of expression<sup>78</sup> in the right case and in the right court. However, the 'right court' at the present time does not include the CJEU.

### 3 THE COURT IN LUXEMBOURG

History provides context for almost everything. The EU and the CJEU were created for the specific purpose of pursuing European integration in a post war era.

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<sup>75</sup> Remi van de Calseijde, "*Improvement or Gilding the Lily?*" – *The desirability of Introducing Judicial Dissent at the European Court of Justice*, in Vol. 1, *The Institutional Functioning of the EU, 2010-2011*, Maastricht Centre for European Law, Maastricht University Faculty of Law.

<sup>76</sup> In the case of the CJEU, rates of dissent such as recorded in the recent past at the U.S. Supreme Court might actually destabilize a legal system which was crafted to promote a collegial framework to avoid the kinds of conflict which have in other eras (pre WWII) torn Europe apart.

<sup>77</sup> Michael Boudin, *Friendly, J., Dissenting*, *Duke Law Journal* Vol. 61:881. Judge Friendly was a highly respected member of the U.S. Court of Appeals for the First Circuit and a frequent dissenter.

<sup>78</sup> Chief Justice Bora Laskin of Canada (1972-1984) spoke of dissenting opinion this way: "A judge never writes more freely than when he writes in dissent, *The Constitutional Character of the Judge*, *Israel Law Review* 7 (1972):340. He also recorded more dissenting opinions than any Chief Justice in Canada's history-Philip Girard, *Bora Laskin: Bringing Law To Life* (2005), The Osgoode Society for Canadian Legal History, University of Toronto Press: Toronto, Chapter 20.

Treaties have empowered the Court by making its decisions binding on all of the member states uniformly thereby creating a hierarchy in EU judicial adjudication with the CJEU at the apex. However, the Court also draws its authority and legitimacy from the member states individually and collectively through their acceptance of its judgments. Because of this, the Court is vulnerable to member state refusal to comply with them.

### **3.1 A Blueprint for Peace**

The European Union and the CJEU owe their very existence to the devastating destruction of Europe caused by two world conflicts 21 years apart. Instrumental in their establishment were the efforts of two French political figures who understood the potential for a renewed cycle of war and revenge in Europe that a re-built Germany and an anxious France might present. They devised a plan to make war “not only unthinkable but materially impossible.”<sup>79</sup> The blueprint for peace they devised integrated the coal and steel industries which were the primary commodities used for the production of war munitions at that time.<sup>80</sup> The establishment of the European Coal and Steel Community by the Treaty of Paris in 1951 was the first step towards not only integration of commodities but Europe

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<sup>79</sup> In addition to Jean Monnet and Robert Schuman of France, there was a substantial list of European leaders identified as the EU “Founding Fathers.” See Franco Piodi, *From the Schuman Declaration to the Birth of the ECSC: the Role of Jean Monnet*, Archive and Documentation Centre, directorate-general for the Presidency European Parliament, specifically from text of the Schuman Declaration, 9 May 1950, Paris.

<sup>80</sup> The blueprint design named the “Shuman Plan” was to place Franco-German production of coal and steel under a common “High Authority” (since 1961, the European Parliament) within the framework of an organization open to the participation of other European states. The handling of coal and steel production was meant to level the playing field shifting focus among participating nations to economic unification and wellbeing among the member states.

itself into the present European Union.<sup>81</sup> Today there are 28 EU member states comprising a population in excess of 500 million. The EU is now on its way to becoming a new superpower.<sup>82</sup>

In addition to the formation of what became the EU as a political entity, a mechanism was required to resolve disputes. It was predicted at the time that the EU Court would “eventually become the Supreme Court of a European Federation”<sup>83</sup> enabled by Treaties, the rule of law and democratic principles. The CJEU takes claim to that legacy.

### **3.1 No Ordinary Court**

The CJEU has been described as “no ordinary court” because of its unique circumstances.<sup>84</sup> One of the Court’s more remarkable features is the fact that 28 independent countries have relinquished some of their sovereignty to join the EU. By doing so, they accepted the hierarchical authority of the CJEU over their national supreme courts in the interpretation and scope of EU law. Treaties link and legally bind these sovereign nations to each other politically, financially and

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<sup>81</sup> European Integration started with six original nations and has now grown to 28, with Croatia the most recent member state joining in July 2013. The treaty arrangements continued after 1951. See also Desmond Dinan, *Ever Closer Union? An Introduction to European Integration*, (1999), Basingstoke: Palgrave MacMillanFranco Piodi, *supra*.

<sup>82</sup> T. R. Reid, *The United States of Europe: The New Superpower And the End of American Supremacy*, Penguin Group (USA) 2005. Reid is a syndicated columnist and investigative journalist for the *Washington Post*.

<sup>83</sup> Werner Feld, *The Judges of the Court of Justice of the European Communities*, Villanova Law Review Vol. 9, p.37 (1963).

<sup>84</sup> Mai Sloth, *The European Court of Justice: The right institution to safeguard legal predictability?* Aarhus University, Denmark, Department of Business Law, (2009).

socially as well as to a judicial tribunal which might, and often does, issue rulings contrary to their individual national interests.<sup>85</sup>

Because the CJEU was not created by a national constitution, it cannot be evenly compared to other international courts.<sup>86</sup> Unlike the United States, the EU is neither a federation nor a sovereign state.<sup>87</sup> Its members retain and exercise sovereignty of their own. Many come from different legal traditions and remain states in transition with the durability of their emerging democracies in question.<sup>88</sup> Although the experience of other Courts offers insight, there is little to share about how a change in Court practice might be received by such a diverse group of member states.<sup>89</sup> Even the ICJ and ECtHR offer little insight because the decisions

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<sup>85</sup> The CJEU differs from other courts because of the broad reach of its decisions binding on all member states not just the disputing parties and the fact it belongs to a political community which do not exist outside the supranational environment See also Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, (2005), 93 Cal. L. Rev.

<sup>86</sup> The International Court of Justice and the European Court of Human Rights which are also supranational courts do not provide good comparisons either since they deliver judgments and rulings binding only on the parties not multiple states.

<sup>87</sup> Anna Bundzen, *The United States Supreme Court and the European Court of Justice, A Comparative Study of Compliance*, Orebro University, (2011). The EU has been described as something in between a federation and a confederation.

<sup>88</sup> Christopher Walker, “*The Perpetual Battle – Corruption in the Former Soviet Union and the New European Union Members*”

<sup>89</sup> Raffaelli, supra. Dr. Raffaelli conducted the study for the Directorate-General of Internal Policies, European Parliament on whether the CJEU statute should be amended to allow its judiciary to publish separate opinions along with majority judgments.

that make affect only the parties to the dispute, not multiple disparate sovereign states.

Statutory support enables the Court to set its own rules of procedure. If, for example, the Court chose to introduce dissenting opinion, it would generate draft amendments to its own governing legislation for consideration by the European Parliament. The Court has not yet sought any such amendment.<sup>90</sup>

The CJEU was originally established as an administrative tribunal. However, the Treaty of Rome in 1957 enlarged the Court's role<sup>91</sup> by giving it full adjudication capacity including the power to make preliminary rulings on the scope and meaning of European Law and hearing allegations against member states for non-compliance with Treaty and other obligations.<sup>92</sup> The Court's judgments legally

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<sup>90</sup> Interviews conducted November 5, 6, 2013 in Luxembourg and Brussels with senior officials at the Office of the Registrar of the CJEU at the Secretariat of the European Parliament's Committee on Constitutional and Legal Affairs.

<sup>91</sup> Article 220, the Treaty of Rome.

<sup>92</sup> The Treaty of Europe (Lisbon) (2010) amended (but did not replace) the Treaty on the European Union and the Treaty Establishing the European Community, 2007. It came into force two years later. The principal Treaties from which the CJEU draws its authority are: The Treaty on European Union (TEU) and the Treaty of the Functioning of the European Union (TFEU). See Europa.eu for a full outline of the basis for EU law. Treaties also include: Brussels Treaty 1948; Paris Treaty 1951; Modified Brussels Treaty 1954; Rome Treaties 1957; Merger Treaty 1965; European Council Conclusion 1975; Schengen Treaty 1985; Single European Act 1986; Maastricht Treaty 1992; Amsterdam Treaty 1997; Nice Treaty 2003; Lisbon Treaty 2007 (also known as the TEU) See consolidated treaty 2010. The TEU and TFEU constitute the treaties on which the EU was founded. Notable EU Treaties: The Treaty of Paris (1951) (the Coal and Steel Treaty – the foundation treaty); The Treaty of Rome (1957) signed by the six founding Nations leading to the European Economic Community (1958); Maastricht Treaty (1992)

binding on the national courts of all member states provides uniformity of law throughout the EU.<sup>93</sup> The CJEU has also bolstered its own jurisdiction by establishing legal concepts previously unknown in either common or civil law – the doctrines of “supremacy”<sup>94</sup> and “direct effect.”<sup>95</sup>

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formally created the EU and laid the foundation for Eurozone (the world’s largest trading area); Amsterdam Treaty (1997) defined EU citizenship and individual rights to justice, freedom and security and commenced reforms of the EU (ongoing); Treaty of Lisbon signed in 2007; ratified( 2009), in furtherance of Amsterdam Treaty reform out of which came the Treaty on the Functioning of the European Union (TFEU) which organizes the functioning of the EU and arrangements for exercising its areas of competence.

<sup>93</sup> A request for a preliminary ruling is required by Article 234. National supreme courts are not permitted to rule on the interpretation or scope of EU law. If an issue arises in a national court proceeding on a question “necessary to give judgment” in the case, that court must request a ruling from the CJEU and once the ruling is made, apply it in the case before it. Requests for a preliminary ruling empower the CJEU to rule on the interpretation of treaties; the validity and interpretation of statutes and acts of the institutions of the EU.

<sup>94</sup> The Supremacy doctrine was established by the European Court of Justice (as it then was called) in response to Article 220 of the TEU, requiring the Court to “ensure that in the interpretation and application of this Treaty the law is observed”. This was interpreted to mean ECJ decisions take precedence over Member State national courts in the areas in which it has jurisdiction, most often resolving conflicts between State and EU law.

<sup>95</sup> The doctrine of Direct Effect requires member states to apply EU law domestically and allow individual citizens to invoke EU law against each other and not just the State. This has been interpreted to mean ECJ decisions take precedence over member state national courts in the areas in which it has jurisdiction, most often resolving conflicts between State and EU law. The doctrine of “supremacy” grants CJEU and EU law precedence over any and all conflicting member state legislation including both constitutional and general domestic law.

To be accepted into the EU sphere, new countries must demonstrate a commitment to the rule of law and democracy by establishing and maintaining democratic institutions. There is little doubt that the CJEU has become an “unusually influential international court.” Its work is essential for the application of the rule of law in Europe and helps knit the member states more tightly together.<sup>96</sup> Unlike other courts, the CJEU has the authority to strike down both EC and member state national law which it determines to be inconsistent with EU Treaties.<sup>97</sup>

Although the Court has an important role to play in the EU, the way it carries out its business has not engendered acceptance in all quarters because its proceedings and judgments are not subject to greater scrutiny. Further, the CJEU has been criticized for failing to achieve greater legal certainty and predictability in Treaty interpretation and application.<sup>98</sup>

The CJEU is comprised of three separate tribunals which convene in Luxembourg.<sup>99</sup> However, it is the work of the Court of Justice which produces the

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<sup>96</sup> Garrett, Kelemen & Schulz, *supra*.

<sup>97</sup> Karen J. Alter, *Who are the “Masters of the Treaty”?: European Governments and the European Court of Justice*, (1998) *International Organizations*, 52, 1, Winter, (998) p. 121-47. Fritz Scharpf interviewing Hans Bockler Stiftung, online.

<sup>98</sup> Sloth, *supra*. See also Hjalte Rasmussen, *On Law and Policy in the European Court of Justice: A Comparative Study in Judicial Policymaking*, Martinus Nijhoff Publishers (1986).

<sup>99</sup> Robert O. Keohane, *Power and Governance in a Partially Globalized World*, Routledge: London (2002) fn. 68. The present CJEU comprises three courts: the Court of Justice (1952) the General Court (1989) and Civil Service Tribunal (2005), references here to the CJEU refer to the Court of Justice in its distinct capacity as the EU’s highest court. The largest percentage of CJEU work comes from mandatory referral from national courts on a ‘preliminary reference.’ The national

vast majority of judgments contributing to the development of EU law and the focus here. The judicial complement is comprised of judges nominated by each of the member states who are then appointed to six-year renewable terms.<sup>100</sup> Each judge is required to sit as an independent member of the Court and not as a home state representative.<sup>101</sup> Decisions are made by the full (plenary) court; a Grand Chamber of about 13 judges who hear the important preliminary references; and chambers of three to five judges.<sup>102</sup> The Court structure includes the Office of the Advocates General. AGs are quasi-judicial officers who analyze the cases and present arguments as the Court's *amici*.<sup>103</sup> There are presently eight AGs serving

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supreme courts have no jurisdiction to resolve an issue about EU law including treaty interpretation or scope. They must await and apply a CJEU ruling.

<sup>100</sup> With the admission of Croatia to the EU in July 2013, the Court complement rose to 28. Because the Court sits in an uneven number, the tradition is that one judge stands down, usually the most junior member of the court present.

<sup>101</sup> Niamh Nic Shuibhne, *The Court of Justice of the European Union*, (2013) Oxford Studies in European Law, Chapter 7.

<sup>102</sup> *The European Court of Justice* – Governance Watch website. The full court hears cases of “exceptional importance” such as proceedings to dismiss the European Ombudsman, Member of the European Commission (the EU governing body), or removing a judge who is not fulfilling his/her duties. The Grand Chamber hears preliminary rulings on treaty interpretations and scope and direct actions (alleged failure of a state to fulfil obligations). Of the 544 cases completed between 2007 and 2011, the full court heard one case, the Grand Chamber heard 62; Chambers courts of five judge heard 300; chambers of three heard 177 cases and the president of the court determine the result in four cases.<sup>102</sup> Most of the decisions made by the CJEU are heard by courts comprised of five and three judges (87.69%).

<sup>103</sup> Mitchel de S.-O-l'E Lasser in *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy*, Oxford University Press, (2004) fn 42. AGs have been part of the court structure since 1957 when the Court's jurisdiction was expanded by the Treaty of Rome.

the Court. The AG role is defined using similar language in various EU treaties: “to present the public with complete impartiality and independence, reasoned conclusions on cases submitted to the court of justice with a view to assisting [judges] in the performance of their duties” and to function only in the “interests of justice.”<sup>104</sup>

The AG opinion is the personal view of the lawyer writing it and is therefore considered to be independent. Nevertheless, these opinions are not generally considered to be a ‘true substitute’ for separate opinions as they are sometimes viewed.<sup>105</sup> Unlike the Court’s brief and stilted writing practice, the AG opinion is similar to the more expansive reasoning of the American Supreme Court.<sup>106</sup> Although the AG opinion may be a filtering process in which opinions are independently given with no requirements that the judges adopt or follow them, they provide insight into decisions of the Court.<sup>107</sup> They are released to the public in advance of the Court’s published judgment. A high percentage of AG opinions

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<sup>104</sup> The AG role is defined in various treaties: Euratom Treaty Article 138; European Economic Community Treaty, Article 166; European Coal and Steel Community Treaty Article 32a, Treaty on the Functioning of the European Union, Article 252.

<sup>105</sup> Raffaelli, *supra*.

<sup>106</sup> M. Rosenfeld, *Comparing constitutional review by the European Court of Justice and the U.S. Supreme Court*, *International Journal of Constitutional Law*, Article 252, Vol 4.2006, 616-651. It is also seen as a less confrontational and more respectful style.

<sup>107</sup> Solanke *supra*, discussing the role of advocates general in assisting the Court by preparing opinions about how the issues might be resolved as a first level of problem solving. The role of AGs is sometimes likened to the role fulfilled by trial courts. The judges review the opinions along with other materials before the Court and are not required to rely on them although they are often important to the ultimate decision.

mirror the conclusion of the Court. With or without AG advance opinion, CJEU decisions are presented as majority judgments of the Court whether there has been true consensus or otherwise. The working language of the Court is French and many judgments are translated into as many as 23 different languages.<sup>108</sup> In a multi-lingual and transnational environment, the production of thousands of pages of Court documents and judgments annually is “a necessary fact of life” at the Court.<sup>109</sup> Practicalities often determine outcomes. Introducing separate opinion in the judgments of the CJEU has a financial implication reflected in the substantial cost of translation services.

### **3.2 An Odd Phenomenon**

The CJEU’s practice of disallowing dissenting opinion in its judgments has been described as “an odd phenomenon in an era [of] visible and communicating governments, judicial institutions included.”<sup>110</sup>

Despite the apparent lack of interest in the subject in Luxembourg, the European Parliament commissioned a study to assess the suitability of introducing dissenting

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<sup>108</sup> The official language of the Court is French. There are 23 languages use in the EU. While many languages are used from time to time, it is more common for three to five to be translated: Interviews with officials in the Office of the Registrar, CJEU, Luxembourg, November 5, 2013.

<sup>109</sup> Advocate General Eleanor Sharpston, Q.C., during European Union Committee hearings on the workload of the CJEU (2011), reported on line.

<sup>110</sup> Rasmussen, *supra*. Dr. Rasmussen has described the “frequent poor reasoning” of the Court as one of its defects which is not acceptable in an era in which the right to know is important in governance and governmental institutions. The Court’s ‘unanimous’ opinions are also question as to whether there is true unanimity, a simple majority or forced consensus is a question without an answer given the structure and practices of the Court.

opinion.<sup>111</sup> Released in November 2012, the study focused on the advantages and disadvantages of separate opinions and the experience of member states supreme courts and other international courts to some extent. Fifteen member states were polled on whether they would favour introducing dissenting opinion at the CJEU.<sup>112</sup> A separate survey on the practice of the (then) 27 EU member states disclosed that seven national courts do not allow separate opinions at all; one state allows it only in non-constitutional cases; six allow it only in constitutional cases; but only 13 allow it in all cases.<sup>113</sup>

The study acknowledges that transparency and openness are values favoured within the EU institutional structure but concludes that publishing dissenting opinion at the CJEU would have to be undertaken only “with restraint and with respect in a way that maintains collegiality of the Court.” This might be what is

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<sup>111</sup> Raffaelli, *supra*.

<sup>112</sup> Solanke, *supra*. Dr. Solanke conducted a partial poll among the member states which indicates that nine favoured it (Germany, Finland, Sweden, Denmark, Spain, UK, Ireland, Greece, Portugal; and six did not (France, Italy, Netherlands, Belgium, Luxembourg, Austria). The division of thought falls between those countries which allow dissenting opinion and those who strictly follow the continental civil law and do not. Not surprisingly, five of the original six founding states were against it choosing to adhere to the favoured civil law tradition. Although most member states allow their Supreme Court judges to issue separate opinions, practices vary widely with some restricting the dissents to constitutional issues and others allowing it only in non-constitutional cases.

<sup>113</sup> Raffaelli, *supra*. The study includes a table disclosing this information. Belgium, France, Italy, Luxembourg, Malta, the Netherlands, and Austria do not allow it at all; Ireland allows it for (ordinary) non-constitutional cases only; Czech Republic, Germany, Latvia, Hungary, Slovenia and Slovakia allow it only in constitutional cases and those which allow separate opinions in all cases are: Bulgaria Denmark, Estonia, Greece, Spain, Cyprus, Lithuania, Poland, Portugal, Romania, Finland, Sweden, United Kingdom.

often referred to as the “respectful dissent.”<sup>114</sup> It is unlikely that the practice of the United States Supreme Court with its one-vote margins and pluralities would be acceptable in either Brussels or Luxembourg.

The study also expresses a cautionary note. Although including published dissenting opinions could enhance the Court’s “level of democratization,” it might also have “unforeseen consequences.” These could include unexpected responses from member states leading to inconsistent application of the law in the national courts breaking down CJEU authority and conduct which would undermine judicial independence.

How member states would respond to fragmented judgments is unknown. The experience of other supranational courts, the ICJ and ECtHR, is not helpful either since the decisions of those courts bind only the parties to the dispute.

In addition to its odd phenomenon, the Court’s writing style has been criticized for its want of clarity.<sup>115</sup> One scholar suggests that by changing its single collegiate judgment style, the Court would be forced to rethink its written work which reads like “documents drafted by a committee” and are “overly abstract, vague and

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<sup>114</sup> Laura Krugman Ray in *Justice Ginsburg and the Middle Way*, Brooklyn Law Review Vol. 68:3 comments on the respectful dissent and : Justice Ruth Bader-Ginsburg’s approach: [Her] opinions “consistently demonstrate respect for her colleagues”. Her comments criticizing them were “couched in measured language that expresses bewilderment rather than anger or scorn”. See also another way to frame a ‘respectful dissent’ penned by one of greatest of American jurists: “I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent: (*Lochner v. New York*, (1905) 198 US 45. Justice Bader-Ginsburg and Justice Holmes appear to favour a more collegial approach than the confrontational style more recently notable.

<sup>115</sup> Rasmussen, supra.

elliptical.”<sup>116</sup> This is weighed against the argument that the purpose of a CJEU judgment is to provide a definite answer to a specific legal question; not to open up discussions about other ways to interpret the law.<sup>117</sup> In any event, whenever CJEU judgment writing arises, transparency is central to the discussion.

### 3.3 An Uncertain Path

Over the last few decades, transparency has become a democratic gold standard for political and public administration globally entrenched as it is in the understanding that it enhances trust in public institutions.<sup>118</sup> Transparency is a measure of the “quality of authoritativeness of an institution, action or actor.”<sup>119</sup> It has been identified as a remedy for the challenges of modern government: inefficiency, corruption and bad performance.<sup>120</sup>

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<sup>116</sup> Vlad Perju, *Reason and Authority in the European Court of Justice*, Virginia Journal of International Law Vol.49:2 (2009)

<sup>117</sup> Raffaelli, *supra*.

<sup>118</sup> Solanke, *supra*. It is a ‘self-evident’ social good. Amitai Etzioni, *Is Transparency the Best Disinfectant?* The Journal of Political Philosophy (2010), George Washington University.

<sup>119</sup> Basak Cali, Anne Koch and Nicola Bruch, *The Legitimacy of the European Court of Human Rights: The View From The Ground*, University College London,(2011) citing M. Weber 1978, *Economy and Society* 2 Vols. (trans. and ed. H.H. Gerth and C.W. Mills) Oxford University Press, New York; D. Beetham. 1993. *In Defence of Legitimacy*, Political Studies XLI:488-91.

<sup>120</sup> Jenny de Fine Licht, Daniel Naurin, Peter Esaiasson, Mikael Gilljam, *Does Transparency Generate Legitimacy? An experimental study of procedure acceptance of open-and closed-door decision making*, University of Gothenburg Working Paper Series 2011.

Although transparency is valued by the CJEU, the path to achieving it is tangled and uncertain. Proponents of greater transparency rely on the argument that the Court's present practices make the judiciary inaccessible. In addition, the Court is said to be at odds with member state supreme courts, the ICJ in The Hague and the ECtHR in Strasbourg. Proponents point to the example of the American Supreme Court which achieves the ultimate in judicial transparency by publishing separate opinions routinely; nonplussed by one-vote majorities and pluralities. Unlike the Supreme Court, an institution with a single national audience well-steeped in the rule of law and democracy, the CJEU speaks to a motley collection of states. Many of those states are emerging democracies with transition issues.

Although few dispute the benefits of transparency as a disincentive to bribery and other challenges in the general public sector, the judicial institution is a special case. The link between transparency and greater authority and legitimacy of the Court is less clear and little explored.<sup>121</sup> At the very least, it may simply facilitate the functional benefit of access to information, documents and records, thereby providing administrative openness.<sup>122</sup> Transparency's link to legitimacy may be

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<sup>121</sup> Alemanno, supra citing D. Curtin and A.J. Meijer, *Does Transparency Strengthen Legitimacy? A Critical Analysis of European Union Policy Documents* (2006), SSRN.

<sup>122</sup> The CJEU has embraced releasing court administrative documents and records on the internet but it has stopped of publishing the separate opinions of its judges and their voting records. This protection of the Court's authority and legitimacy is bolstered by Article 15 of the TFEU which exempts the CJEU and EU banking institutions except "when exercising their administrative tasks." Article 13 of the Lisbon Treaty may add to the transparency debate because of the reference to rights of citizens. Whether the intention was to clarify or expand rights, transparency and openness are sufficiently important concepts to appear in multiple treaties and other documents. The European Parliament's websites and those of its institutions make thousands of documents and transcripts available in multiple languages.

flawed because of “the use that citizens will make of the (now available) information. . .”<sup>123</sup> If information is used for nefarious purposes such as influencing judicial decision-making, transparency would become a tool to chip away at the protective shield which isolates judges from temptations, political and venal influence. If this occurred, the impact on the Court’s authority and legitimacy would be profound.

Greater transparency at the CJEU would be desirable. So would upgrades in the quality of the Court’s judgments which are frequently described as unclear and not well reasoned. On the surface, all of this seems to point to an easy remedy: Publish dissenting opinion like the Americans do and achieve greater clarity in judgments and transparency in judicial administration and proceedings.

However, that remedy has an uncertain path. Introducing separate opinions at the CJEU would resolve one set of problems only to create new larger ones: (i) producing new reasons to legitimize non-compliance with judgments; (ii) introducing new threats to judicial independence because of endemic institutional corruption.<sup>124</sup>

#### **4 JUDICIAL INDEPENDENCE**

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<sup>123</sup> Alemanno, *supra*: Other authors warn about the pitfalls of considering openness as panacea to the legitimacy problems of the EU and point out that the assumptions linking transparency and either output or social legitimacy are weak. (citing: T. Heuller, *Assessing EU Strategies for Publicity* (2007) 14 *Journal of European Public Policy* 563).

<sup>124</sup> It should be noted that transparency as a disincentive to corruption works well in government agencies in areas of public procurement, government contract bids where bribery is notoriously present. (*EU Anti-Corruption Report*).

Judicial independence is recognized the world over as a prerequisite for garnering trust in a judicial institution; it gives a court authority and legitimacy.<sup>125</sup> It is the *sine qua non* of the institutional setting in which judging takes place free of threats and venal or ideological considerations.<sup>126</sup> Judicial independence supplies the institutional matrix for democratic stability; protection of human rights and civil liberties.<sup>127</sup> A judicial institution maintains trust by upholding respect for the rule of law and fundamental principles such as independence, impartiality and fairness in its proceedings.<sup>128</sup>

Since inception, the CJEU has successfully shielded the work of its judiciary from the public domain.<sup>129</sup> It has done so by issuing unanimous institutional judgments without disclosing individual judicial opinions, voting preferences and keeping no

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<sup>125</sup> Solanke *supra*, citing T. Bingham, *The Rule of Law*, London, Allen Lane, 2010. *Bangalore Principles of Judicial Conduct* (2002), adopted by the Judicial Group on Strengthening Judicial Integrity, a United Nations sponsored program, during a meeting of Chief Justices at The Hague which acknowledge that a judge's duty is to serve the community in administering justice according to the law; a duty for which judicial independence is fundamental.

<sup>126</sup> John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence* (1999) Southern California Law Review Vol. 72:353.

<sup>127</sup> David S. Law, *Judicial Independence*, The International Encyclopedia of Political Science, Vol. 5, pp. 1369-1272 Social Science Research Network, (2010). *Bangalore Principles of Judicial Conduct*, 2002, developed through a UN programme, the Judicial Integrity Group, and subsequently adopted by chief justices globally.

<sup>128</sup> Solanke *supra* citing Bingham

<sup>129</sup> To avoid conflicts of interest and to protect the judicial process, the EU in its treaties requires the selection of judges whose independence is "beyond doubt."<sup>129</sup> The CJEU's judicial oath extracts complete secrecy about deliberations, voting tallies and anything that might disclose how a decision was arrived at by the undisclosed majority- whether it was wide or narrow.

records of opinions expressed during deliberations. Even the Court's decisions are sufficiently opaque that individual opinions of the judges are not conclusively detectable.<sup>130</sup> The judge's themselves are sworn to secrecy during and after their tenure on the Court. If judges were perceived to be buckling under to threats and outside influence, public confidence would quickly disappear along with the Court's authority and legitimacy. The EU itself would not be able to bear such an event.

The judiciary would lose its protective shield in the CJEU's present judicial environment with the introduction of dissenting opinion. That environment includes a Court which delivers binding judgments meant to articulate laws to be uniformly followed. It is a Court in which judges have only 'renewable' terms who are dependent on member state governments to reappoint them. It is a Court in which judges upon completion of those terms, however long or short, return to their home states to continue former careers. They may face reprisals about decisions made that may have displeased the national government.

It has been said that introducing separate opinions would allow member state governments to better evaluate the performance of their representative judges since they are not aware of judicial voting records and the positions that may have been taken adverse to the interests of the home state.<sup>131</sup>

However, performance evaluation of any kind in a court of last resort in which judges have only renewable terms would spell disaster; something akin to

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<sup>130</sup> A designated 'rappatour' does the writing on behalf of all the sitting judges, or at least the majority which support it.

<sup>131</sup> Roland Vaubel, *The Breakdown of the Rule of Law at the EU Level: Implications for the Reform of the EU Court of Justice*, (2013), a political economist, Universitat Mannheim, Germany. Dr. Vaubel also says that judges should be independent.

positioning a mallet over their heads. It would also undermine the very things the CJEU and courts all over the world work hard to achieve and protect – judicial independence. Since the judges have limited terms, some may be tempted to decide a case with an eye on their own future careers by favouring the home state in a kind of “principal-agency” relationship. There is some credence to this if the ICJ, a court which allows dissent, can be considered an apt example. At the ICJ, there is “a remarkable trend on the part of other national judges ...to publish dissenting opinions whenever the decision [of the majority] is against their national state.” This calls into question the degree of independence of judges hearing anything relevant to their home states.<sup>132</sup>

At the ECtHR, allegations of political pressure on national judges led to a statutory amendment setting fixed and non-renewable judicial terms of service. Although fixed terms and non-renewability is offered as a remedy, no one suggests it be particularly lengthy. This raises difficulties with attracting qualified candidates willing to interrupt a productive career for a short tour of duty in Luxembourg with the prospect of being frozen out afterwards. Fixing terms for judicial service is not the answer either unless support for lengthy appointments materializes. There is no evidence that long judicial careers are favoured for the CJEU by the European Parliament or scholars.<sup>133</sup>

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<sup>132</sup> Raffaelli, *supra*.

<sup>133</sup> Judges of the United States Supreme Court are appointed for life although many retire at great ages. Some countries legislate a mandatory age of retirement. For example, in Canada, the mandatory retirement age is 75 years for all superior court (federal) judges. As a basis for comparison, the ICJ has nine year fixed terms.

Another proposed remedy is publishing dissents and separate opinions anonymously.<sup>134</sup> However, expert Court observers would have little difficulty identifying the author given the subject matter and even if not, public speculation would be equally problematic exposing judges to political influence and retribution.<sup>135</sup>

These kinds of issues help crystalize the reasons why the prospect of introducing dissenting opinion practice at the CJEU has been met with little enthusiasm. These matters are discussed openly with scholarly consideration. However, the two most troubling reasons why the CJEU should not introduce signed separate opinions are not openly discussed in the same way at all.

Judicial influence and pressure has not been linked to the threat posed by institutional corruption. Risks to the Court's authority have not been examined at all in terms of non-compliance with CJEU judgments when alternate opinions appear and are more favourable to member state interests. These two elephants in the room merit separate consideration.

#### **4.1 Troubled Waters**

When the Czech Constitutional Court figuratively thumbed its nose at the CJEU's decision in *Landtová* by declaring the Court's decision *ultra vires*, it had the earmarks of an "unprecedented display of judicial defiance."<sup>136</sup> In *Landtová*, the

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<sup>134</sup> WTO and NAFTA hearing panels addressed the issue of protecting judges from influence and pressure by allowing dissenting opinions to be published without disclosing the identity of the dissenter.

<sup>135</sup> Interviews conducted with officials with the CJEU Office of the Registrar and the Secretariat Legal Affairs Council, European Parliament November 2013.

<sup>136</sup> Arthur Dyeve, *Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach*.

CJEU addressed the issue of how old age pension claims would be honoured by the successor states of the former Czechoslovakia.<sup>137</sup> After the CJEU published its decision favouring citizen claims, the Czech national court announced it would not be implementing it. The national court justified its decision by stating that the CJEU judges simply got it all wrong.<sup>138</sup>

This was the first time that an EU member state national constitutional court had applied the doctrine of *ultra vires* to declare a CJEU decision outside the Court's conferred powers and therefore not applicable.<sup>139</sup> Ultimately, the CCC's "worrisome" conduct was deemed an anomaly rather than a 'terrible blow to the authority of EU law.' Of interest to the prospect of introducing dissenting opinion at the CJEU is the CCCs contribution to the question of member state response.

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<sup>137</sup> Christian Falvey, *Constitutional Court defies EU with ruling on Czech-Slovak pensions*, Radio Prague internet posting February 15, 2012. C-399-09 (CJEU (2012); PL US 5/12 (CCC). A CJEU judgment applying EU regulation 1408/71. Citizens of the Czech Republic who had worked were receiving lower pension rates because they had worked in the area now part of the Slovak Republic. The issue was brought to the CJEU by a 25-year veteran of the state-run Czechoslovak railways who had retired and applied for his old age pension. The Czech Republic reduced his pension by the 25 years he had worked in the present Slovak Republic part of the former Czechoslovakia. The CJEU held that the practice was discriminatory and required reinstatement of the full pensionable period.

<sup>138</sup> There are complicated issues surrounding the pension and similar questions arising from the dissolution of the former Czechoslovakia which are not relevant to the analysis here. There is no attempt here to diminish those issues. This case is meant to demonstrate potential member state response to adverse decisions in a CJEU which allows dissenting judicial opinion.

<sup>139</sup> Lenka Pitrová, *The Judgment of the Czech Constitutional Court in the Slovak Pensions Case and its Possible Consequences*, Vol 3, No. 2 (2013) The Law Quarterly. Slovak Pensions Case (Pl. US 5/12).

If member state defiance is forthcoming when the Court issues a single-result decision, it is not difficult to make the quantum leap to what might occur if multiple alternate opinions in a single judgment are in the mix. Troubled waters may be in store if national courts are presented with alternate arguments to the adverse decision of the majority. New and unforeseen consequences may emerge such use of the alternate arguments to legitimize non-compliance with adverse CJEU rulings.

The dissenting opinion appears most often in issues which strike an emotional chord as they do in the American civil rights and liberties cases. The CJEU equivalent would be national and local social issues similar to the issue in *Landtová*. These are the kinds of cases which would inspire member states to look for ways to make an adverse ruling inapplicable to themselves as *Landtová* demonstrates.

The member state national courts are the primary source of CJEU authority and legitimacy. The Court's judgments must be accepted by the member states and the CJEU's authority recognized.<sup>140</sup> Member state support of CJEU judgments is also critical to the operations of the EU law legal regime itself. The failure of member state national courts to comply with CJEU judgments would impair the effectiveness of EU law; the more severe and the longer the duration; the greater the erosion.<sup>141</sup> Neither the EU nor the CJEU have capacity (budget or bureaucracy) to enforce compliance with Courts judgments directly. They must rely on the member states and their national courts to fulfil their obligations.

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<sup>140</sup> Bundzen, supra citing: Anthony Arnall I *"The European Union and its Court of Justice"*, Oxford University Press (1999) @84: "only loyal acceptance will ensure that it (EU) achieves its intended objective."

<sup>141</sup> Diana Panke, *Why The ECJ Restores Compliance Faster in Some Cases Than in Others*, (2007), Freie Universitat Berlin. Berlin Working Paper on European Integration No. 4.

Although historically high levels of compliance have been recorded, there are strong indications that this does not necessarily mean the national courts have fully accepted the Court's decisions. At the same time there is little known about whether national courts are actually satisfied with CJEU rulings or accept them as authoritative. Interpreting silence as compliance is only assumed.<sup>142</sup>

In the early years of the EU, some countries took the position they would comply with Court rulings as long as they were not in conflict with their own national laws. This position changed over time as the Court evolved. While some states avoid collisions with the European Commission (EU governing body) and the CJEU by grumbling but complying with the Court's rulings, others must be forced to do so. The United Kingdom and Germany, for example, have had outstanding compliance issues for as long as 15 and 14 years, respectively.<sup>143</sup>

The reasons why member states fail to comply is as complex as the domestic judicial politics demonstrated in *Landtová* and as simple as state cost-benefit analyses and low political capacities.<sup>144</sup> Non-compliance is demonstrated by unilateral evasion, a push for secondary legislation, or a rallying cry among other EU Member States for Treaty revision.<sup>145</sup> Whatever the reason might be for

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<sup>142</sup> Bobek, *supra*.

<sup>143</sup> Panke, *supra*.

<sup>144</sup> Tanja A. Borzel, Tobias Hofmann, Diana Panke, *Who's Afraid of the ECJ? Members States, Court Referrals, and (Non-) Compliance* (2005) prepared for the ECPR Joint Sessions, Granada, April 14-19, 2005.

<sup>145</sup> Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union* (1998), The International Organization Foundation. This issue is not unique to the CJEU, the United Supreme Court has grappled with lower court non-compliance as well. See Robert McKeever, *The United States Supreme Court: A Political and*

member state non-compliance with Court rulings, the Commission must decide how it will react.<sup>146</sup> If the Commission decides to proceed, the first step is infringement proceedings through dialogue with the non-complying state.<sup>147</sup> If the Commission is unable to extract compliance, it may refer the case to the CJEU. The Court's work begins with an adjudication phase and hearings followed by a judgment. If non-compliance continues, the Court conducts enforcement proceedings<sup>148</sup> out of which substantial financial penalties may be levied. Because member states often waited until the 11<sup>th</sup> hour to fulfill their obligations, lump sum sanctions are now permitted covering all stages not just the conclusion of the proceedings.<sup>149</sup> This was intended to financially curb the propensity for last minute only response. While the "vast majority" of states are presently compliant, there appears to be evidence of a possible trend towards non-compliance in the Court's present judicial environment.<sup>150</sup>

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*Legal Analysis*, Manchester University Press, 1997, Chapter 6: *The power of the Supreme Court: constraints, compliance and impact*. p.148. "the pattern on non-compliance varies with the issue".

<sup>146</sup> Heather A.D. Mbaye, *Assessing Competing Explanations for Compliance and Non-Compliance and European Union Policies*, Mid South Political Science Review (2009) Vol. 10. 63.

<sup>147</sup> Article 258, TEU.

<sup>148</sup> Article 260 TEU.

<sup>149</sup> Article 228 TEU. Applications to sanction the member state for non-compliance include: a daily penalty from date of delivery of the judgment and a lump sum penalizing the continuation of the infringement between the date of the judgment confirming non-compliance and the date of the enforcement judgment.

<sup>150</sup> Borzel Hofmann, Panke supra, citing Maria Mendrinou, *Non-Compliance and the European Commission's Role in Integration*, (1996), *Journal of European Public Policy* 3 (1):1-22; Jonas Tallberg, *Paths to Compliance: Enforcement, Management, and the European Union*, *International Organization*,56,3,609-43,

Member state national courts expect CJEU decisions to contain “defensible and practical judicial reasons, clearly discernible, free of contradictions and reversals which can be implemented at the national level.”<sup>151</sup> How member states would respond to something less than a decisive result from the CJEU in terms of compliance is unknown.

There are many questions about new and unforeseen consequences which need to be explored before an informed decision could be made about introducing dissenting opinion at the CJEU. In the last decade alone, the list of EU member states has nearly doubled. These new entrants arrived with “rather strong ideas and often a strong set of historical grievances.”<sup>152</sup> Choosing non-compliance with adverse decisions of the CJEU on the basis of a preference for a minority opinion that suits them better would not be off limits.

The prospect of non-compliance threatening the Court’s authority is not the only major issue hovering in the background in the debate about introducing dissenting opinion at the CJEU. The other elephant in the room, institutional corruption poses a potential full frontal attack on judicial independence.<sup>153</sup>

## **4.2 Breathtaking Corruption**

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(2002); Talberg and Christer Jonsson, *Compliance Bargaining in the European Union*, in ECSA International Conference, Madison, Wisconsin (2001).

<sup>151</sup> Bobek, *supra*

<sup>152</sup> Melanie Feakins and Luiza Bialasiewicz, *Trouble in the East”: The New Entrants and Challenges to the European Ideal*, *Eurasian Geography and Economics*, 2006, 47, No. 6, pp. 647-661.

<sup>153</sup> Christopher Walker, *The Perpetual Battle, Corruption in the Former Soviet Union and the New EU Members* (2011), Centre for Public Policy, Freedom House, Nations in Transition.

BBC News Europe carried an eye popping headline on its internet news service on February 3, 2014: “Corruption Across EU ‘breathhtaking.’<sup>154</sup> The news report quoted from a comprehensive report released to the European Commission and Parliament that same day.<sup>155</sup> The Report covered all 28 member states and assessed the extent of corruption and its toll on the EU economy and society. A pervasive problem was identified across the entire EU with some states far more affected than others. Bribery in government procurement is one of the most rooted problem areas.<sup>156</sup>

Membership in the EU does not mean that all states are at the same level of development politically, socially or juridically. Some of the new EU member states are “struggling to meet high democratic standards of transparency and probity while saddled with incompletely reformed institutions”. There is also influence from neighboring authoritarian states as noted here: “The notion that the EU border will function passively as a sort of firewall against the corrosive influence of these

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<sup>154</sup> EU Home Affairs Commissioner, Cecilia Malmstroem.

<sup>155</sup> *EU Anti-Corruption Report* of the EU Home Affairs Commissioner to the EU Council and the European Parliament (3 February 2014). Data align with two major opinion polls by *Eurobarometer*, the Commission’s polling service on perceptions of corruption and experience with corruption. The study concludes that corruption has been described as ‘an obstacle to doing business in Europe.’ Bribery is identified as a pervasive problem and appears in all levels of public procurement; political party financing. Bulgaria, Romania and Italy were identified as ‘hotspots for organised crime gangs in the EU’. There are about 3,000 such gangs in the EU according to EU police agency Europol. White-collar crimes like bribery and sales tax fraud ‘plague many EU countries.’

<sup>156</sup> Counties most affected: Croatia, the Czech Republic, Lithuania, Bulgaria, Poland, Slovakia, Hungary, Romania and Greece; the country least affected: Sweden.

[autocratic] regimes is a dangerous illusion.”<sup>157</sup> As a result, the durability of the new found commitment by emerging EU democracies to the rule of law and democratic principles remains in question.

The organization, Nations in Transition, which establishes annual scores for new democracies, identifies corruption as: Bribery, graft, conflicts of interest, influence pedaling, dubious legal decisions and a wide range of allegations of corruption against senior government officials.<sup>158</sup> Among the EU states, Bulgaria has been singled out as a country with one of the most corrupt legal systems in the world and Romania has similar challenges.<sup>159</sup> Slovakia and Estonia had downgraded democracy scores to reflect ‘backsliding’ in solidifying their democratic institutions since joining the EU. The Czech Republic improved its score on ‘judicial framework and independence’ through an increase in anti-corruption activity in the prosecutor’s office. Despite problems in other categories, Hungary improved its ‘judicial framework and independence’ score by issuing judicial decisions ridding the country of bad laws.

Efforts towards remedies vary among the EU states since judicial institutions in previous authoritarian regimes were appendages of government. Long serving

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<sup>157</sup> Walker, supra citing Nations in Transit 2013 which paints a disturbing portrait of democratic development in Central Europe and Eurasia over the past year. Democracy scores are based on seven rating categories: Civil society, Independence of the Media, National Democratic Governance, Local Democratic Governance, Judicial Framework, and Independence and Corruption. The democracy scores for former autocratic states which are now part of the EU show that seven EU member states experienced declines: Bulgaria, Estonia, Hungary, Lithuania, Poland, Romania and Slovakia, all former Warsaw Pact member states.

<sup>158</sup> Walker supra. *EU Anti-Corruption Report*, supra.

<sup>159</sup> Stephanie A. Littlehale, *A Study of Corruption in the Bulgarian Legal System* (2012) Honors College 66.

judges in the national courts may “retain old habits of venality, equivocation or deference to the political establishment may contribute to the phenomenon” [of corruption].

However, “there is reason to hope that a younger generation of jurists may prove more effective.”<sup>160</sup> Nevertheless, it may take a long time before that new juristic influence takes hold sufficiently to counteract the historical pattern.

The challenge of corruption is not restricted to new entrants to the EU member state family. In Italy, one of the EU founding member states, legal measures had to be instituted to aid autonomy and independence of the judiciary.

Until the Italian prime minister, Silvio Berlusconi, was stripped of his parliamentary seat after he was convicted of criminal charges including abuse of office, in June 2013, efforts to isolate the judiciary from political influence had been unsuccessful. As noted at the time “the campaign run by Berlusconi against the judiciary seriously undermined public confidence in the judiciary.”<sup>161</sup>

This snapshot of corruption among EU member states raises issues about how a move by the CJEU away from the present high level of protection of judicial independence would play out. Introducing dissenting opinion identifies judges and exposes them to threats and pressures through unscrupulous or nefarious activities. This challenge compounds the problem earlier identified – the prospect of judges looking over their shoulders when term renewal time arrives.

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<sup>160</sup> Walker *supra* @ p. 13.

<sup>161</sup> John Adenire, *Judicial Independence in Europe, the Swedish, Italian and German Perspectives*. (2012) University College London, Constitution Unit.

The potential for pressure from national governments on “their” judge and from national public opinion is substantial.<sup>162</sup> The effect on the Court’s authority in the event the public perception of its judiciary became associated with susceptibility to external pressure would be profound. Its authority would most certainly be diminished if not obliterated.

It is not difficult to imagine that both old and new members would act in unpredictable ways to a change in judgment practice at the CJEU. With corruption so endemic among many EU member states, it is more than likely that responses to a change of judicial practice would expose CJEU judges to threats, influence and political whim.

### **4.3 Risking Authority**

It should be clear at this point that introducing separate writing practice at the CJEU and publishing judicial voting records would amount to risk taking of the highest order.

As the impartial interpreter of EU Law, the CJEU requires solid authority.<sup>163</sup> Although respect for the Court is strong throughout the EU at the present time, there is also a perception that the CJEU has become remarkably powerful as a result of its own development of previously unknown legal doctrines such as supremacy and direct effect. This scooping up of power is viewed by some member states as a chipping away of their sovereignty.<sup>164</sup> There is a desire to

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<sup>162</sup> Remi van de Calseijde, *supra*.

<sup>163</sup> Garrett, Kelemen, and Schulz, *supra*.

<sup>164</sup> Messerschmidt, *supra*.

constrain what some member states regard as the Court's expansive lawmaking.<sup>165</sup> One way to constrain the expanding power of the Court would be to introduce dissenting opinion thereby effectively weakening judicial decisions and neutralizing the power of the Court. It would have the added effect of slowing the pace of what is perceived to be the Court's relentless march towards EU integration at the expense of member state interests. A desire to slow the pace of integration by weakening the Court's power may have more currency than other reasons for introducing dissenting opinion such as achieving greater transparency.<sup>166</sup>

Morten Messerschmidt,<sup>167</sup> a member of the European Parliament (Denmark) and Vice Chair of its Committee on Constitutional and Legal Affairs, has called for adoption of separate opinion practice at the CJEU for that very reason. He suggests, as others have, that the practice should follow "along the lines of the United States Supreme Court." The MEP's interest in introducing dissenting opinion has a political focus — containing the power and authority of the Court to slow the pace of European integration in the interests of member state sovereignty.

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<sup>165</sup> Anthony Arnall, *Me and My Shadow: The European Court of Justice and the Disintegration of European Union Law*, Fordham International Law Journal, Vol 31, Issue 5 (2007). Alter, *supra*. The CJEU unlike other courts can strike down both EC law and national law which is inconsistent with treaty obligations and it boldly rules against the interest of the member states.

<sup>166</sup> Except for academic commentary, attitudes toward separate opinion writing depend on whether one views the role of the Court as a strong proponent of the EU and its integration objective against a desire to slowing the pace of integration achievable by weakening its judgments through introducing separate opinions.

<sup>167</sup> Messerschmidt has made the case for dissenting opinion practices and disclosing voting patterns of judges in a book published in his native Danish. He also expressed his views about dissenting opinion's potential contribution to the CJEU during an interview at his parliamentary office in Brussels on November 4, 2013.

Pointing out that the EU is not a country and that member states have no common ethos, he sees dissenting opinion as a tool for limiting CJEU authority and reach. It is also his view that the CJEU favours integration over member state sovereignty and by doing so demonstrates a political bias. He is not alone in his take on the Court's integration pace. It has been suggested that the CJEU should 'soften' its pro integration stance.<sup>168</sup>

Efforts to constrain integration by weakening the Court's authority and legitimacy may only have the effect of inciting the Court to cater to the demands of member states.<sup>169</sup> The political elements of the debate are well beyond the scope of this thesis but are relevant for at least the purpose of demonstrating that separate opinions are perceived as weaker judgments.

Unanimous opinions have been recognized as more powerful because they bring authority to the judgment. For that reason, President Jefferson favoured the seriatim style of England – to make the Court the weak institution he believed the founders had intended. Chief Justice Marshall discouraged divergent opinion because he wanted to build a strong Court. Today, the United States Supreme Court relies on unanimous unsigned per curiam institutional judgments when it wishes to convey a definitive and strong statement to the American people and to bring “institutional strength to a controversial decision.”<sup>170</sup>

Proponents of dissenting opinion at the CJEU argue that great strides in transparency and clarity of the Court's processes and judgments “might, could or

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<sup>168</sup> Henri de Waele, *The Role of the European Court of Justice in the Integration Process: A Contemporary and Normative Assessment*, [2010] *Hanse Law Review* Vo.. 6, No. 1. Suggested that the CJEU ought to 'soften' its pro-integration stance.

<sup>169</sup> Garrett, Kelemen, and Schulz, *supra*

<sup>170</sup> Friedland, Ham, J Bleitch, Ress and Feinberg, *supra*. *Brown v. Board of Education*, *supra*.

should” be achieved.<sup>171</sup> This language of uncertainty frequently appears in academic literature discussing the potential advantages of dissenting opinion at the CJEU; yet nothing can be clear about uncertainty. Those same proponents are not discussing the full implications of dissenting opinion either.

By having disallowed separate opinions all along, the CJEU may have been quietly protecting its own authority and legitimacy. Among the Court’s stated reasons for keeping dissenting opinion and the voting records of judges private is that very thing – risks to the Court’s authority and legitimacy and exposing the CJEU judiciary to public influence and political pressure. Insight into how that might play out is already nearby.

If multiple opinions in a single judgment are presented to member state national courts, some may adopt the Czech Republic’s brazen approach in *Landtová* and challenge the CJEU’s decision despite their lower positions in the EU judicial hierarchy. Refusing to comply with a CJEU judgment on the premise that the dissenting judge(s) got it right and the majority got it all wrong would be a direct strike at the heart of the Court’s authority. Risk to its authority is not something the CJEU has invited at any time throughout its history.

## **5 OPENING PANDORA’S BOX**

The CJEU is one of the world’s most influential courts as well as a trusted EU institution with everything to lose if its authority and legitimacy were undermined. Introducing dissenting opinion with its one-vote margins and pluralities in the Court’s present judicial environment has potentially insurmountable risks. The

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<sup>171</sup> Justice Mary Arden (member of the Court of Appeal of England and Wales, The Sir Thomas More Lecture, Lincoln’s Inn, 10 November 2009 *Peaceful or Problematic? The Relationship Between National Supreme Courts and Supranational Courts in Europe*).

result could be a Pandora's Box of unwanted contents which once opened cannot be closed.

It has been demonstrated in the foregoing analysis that fragmented judgments at the CJEU would be interpreted by member states in any way that advanced their own interests through legitimizing noncompliance with Court rulings. With judicial voting records publicly exposed, there is a high probability that member states would engage in unprincipled behaviours which would threaten judicial independence and the Court's authority and legitimacy. It may take generations for the EU member states to come to grips with the level of institutional corruption recently identified. It may take the emerging democracies just as much time to settle into a new state of being where the rule of law prevails absent historical grievances and other distractions.

Publishing separate opinions and judicial voting records appears to be the only option seriously considered so far in the push for greater transparency at the CJEU. Rather than putting its authority and legitimacy at risk, another direction could be followed. The Court could revise its present practices to illicit greater transparency drawing from the best of the common and civil law traditions in two important areas: (i) oral hearings and (ii) written judgments.

The oral hearing is an under-utilized feature of the Court and is governed by its own Rules of Procedure.<sup>172</sup> Hearings could be publicized and expanded well beyond the current abbreviated process lasting scant minutes with little general public awareness that they are even taking place. Allowing the kind of judge-

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<sup>172</sup> *Rules of Procedure of the Court of Justice*, Chapter III, Article 55 "Oral Procedure". "The President [of the Court] may in the course of the hearing put questions to the agents, advisers or lawyers of the parties. The other Judges and the Advocate General may do likewise."

lawyer discussion, banter and debate familiar in common law appellate courts would go a long way toward fleshing out all aspects of the case. Lawyers, litigants and citizens generally would see and hear for themselves what the Court considered in arriving at its decision thereby going a long distance towards greater transparency. Doing so would also provide a window into the decision-making process which citizens could come to understand and trust as they listen to the discussion of the issues relevant to their case. Even if their legal point did not win the day, they would at least come to understand that it was considered and understood.<sup>173</sup>

The CJEU has been criticized for delivering shallow, bland and unclear judgments which lack transparency. The Court could enhance its judgments through quality-control and refraining from “one-sided systematic and teleological reasoning” and “making a visible attempt at more balanced interpreting.”<sup>174</sup> Informing and educating litigants and EU citizens in plain language about what its decisions mean for them would contribute greatly to transparency and respect for the process. Writing more expansively in a clear and compelling fashion similar to the Court’s Advocates General opinion style would be an option as well. Although more expansive judgment writing would command greater resources for translation services, the cost would be modest compared to the prospect of publishing the many potential separate opinions of its judiciary.

In summary, the CJEU’s juristic umbrella provides a canopy for member states from both common law and civil law traditions. There is blurring of the lines between the traditions already. It would not be too great an exercise for the Court to draw more from the common law tradition by expanding its oral public hearings

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<sup>173</sup> Justice Sandra Day O’Connor, (ret’d), *The Majesty of the Law: Reflections of a Supreme Court Justice* (2002): Random House.

<sup>174</sup> De Waele, *supra*

into something more meaningful and to produce better written decisions for a wider audience in a more expansive, informative and educational way.

Changes along these lines would create a refreshing new profile for the CJEU and give meaning to the EU's legislative commitment to maximizing transparency for its citizens without placing the Court's own authority at risk.

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