

УДК 341.98

Judicial Dissents: Legal and Linguistic Aspects

Olga A. Krapivkina*

*Irkutsk National Research Technical University
83 Lermontova Str., Irkutsk, 664074, Russia*

Received 10.06.2016, received in revised form 22.07.2016, accepted 17.09.2016

Attention to the issue of judicial dissenting is caused by growing popularity of this type of writing among the judges of the Russian Constitutional Court. The article has investigated the nature of the dissenting opinion, its main traits and functions from legal and linguistic points of view, arguments for and against this genre of judicial writing. The author attempts to find out why judges dissent – to lay out an alternative legal theory, to convince the majority of their errors or to express disagreement. The author concludes that the dissenting opinion is an individualistic genre of judicial discourse where the judge is free to use a great variety of language units to mark their own identity. The author also argues that the rationale and usefulness of dissents in the judiciary depend on the legal traditions of the nation.

Keywords: Dissenting opinion, decision, majority opinion, judge, individualistic voice, institutionalism.

DOI: 10.17516/1997-1370-2016-9-10-2449-2459.

Research area: law.

Introduction

One of the main principles of the judiciary is the independence of judges. According to Article 120 of the Constitution of the Russian Federation, judges shall be independent and submit only to the Constitution and the Federal Acts. Among the tools to provide the independence of judges, one can mention the institute of dissenting opinions – a possibility for the judge who has remained in the minority in the voting to add his/her individual voice to the institutional position of the majority. However, questions arise over the dissenting opinion. Does it endanger the unity of the court, undermine its

authority, or does it democratize the judiciary, make it more transparent? Does it weaken the objectivity of the majority opinion, or does it strengthen its authority and credibility?

Although the right of Russian judges to dissent is deeply rooted, Russia generally disallowed publishing of dissenting opinions, principally because of their emphasis on collegiality in the dispensation of justice. Thus, the issue of dissension in the judiciary has largely escaped Russian academic attention. This issue has only seldom appeared in contemporary academic research (see Basangov, 2006; Kononov, 2006; Vereshchagin, 2007).

After all, the introduction of dissenting opinions is a sign of how far thinking about the judiciary has changed in Russia over the past decade. It is a sign of the stability and effectiveness of judicial power, the independence of courts and judges.

Roots of the Dissenting Tradition

Roots of dissents can be found in common law countries. The British collegial common law courts decide *seriatim* (Latin: separately) – they present not only one judgment but make collective judgments. Each judge says in an order how he/she would decide the case at hand (Rupp, 1966, p. 532). Such a style of decision making, as Laffranque (2003) writes, was adopted in the United States, but it was abandoned there at the end of the 18th century (p. 164). The US courts formed a new tradition according to which judges who maintained a different opinion could add to the opinion of the court their dissenting opinion or concurring opinion, which was also published (Rupp, 1966, p. 532). Rupp sees the roots of the dissents in the fact that Anglo-American judges are not “career judges” like judges in continental Europe who begin from the first instance in order to reach the highest court. The second reason of such popularity of dissenting opinions in the US and England is that the tradition of public debate belongs among the fundamental building blocks of the organization of state in the common law (legal) system (*ibid.*, p. 535-536). In common-law countries, the court judgment is a result of public debate. In continental Europe, however, the decision of collegial courts is anonymous, and the secrecy of deliberations is not subject to disclosure. There is fear that the disclosure of the dissenting opinion may endanger the judge’s independence (David, 1973, p. 134). Common law countries, in contrast, consider the disclosure of the judge’s dissenting opinion

to be the main criterion of the independence of a judge (Laffranque, 2003, p. 164).

In Russia, the submission of dissents in writing was established by Catherine the Great (1762-1796) in her *Institutions for the Government of Provinces* (1775). But today, it should be noted, that the practice of publishing dissents is limited to the area of constitutional proceedings. Other judges have a right to write a dissenting opinion if they disagree with the decision of the majority. However, other persons cannot be informed about the dissenting opinion of a judge and its content. So, in Russia, the institute of judicial dissents exists only within the context of constitutional judiciary.

Definition and Types of Judicial Opinions

A judicial opinion is an opinion of a judge or a group of judges that accompanies and explains an order or ruling in a controversy before the court, laying out the rationale and legal principles the court relied on in reaching its decision. Its primary function is to challenge the arguments upon which the majority opinion is based. It presents arguments for interpreting a legal text in a different way than the majority of the Court interprets the legal text.

In Anglo-Saxon judiciary, there are two types of judicial opinions – *concurring opinions* (*concurrences*), and *dissenting opinions* (*dissents*). In brief, a concurrence is a written opinion by one or more judges, which agrees with the decision made by the majority, but states different reasons as the basis for the decision. A dissent is an opinion in a legal case written by one or more judges expressing disagreement with the majority opinion of the court which gives rise to its judgment. The dissent is different from the concurrence, which agrees with the Court’s decision but provides an explanation that differs from the majority

opinion. The dissent is more expressive and emotional.

The Russian legislation, for example, distinguishes between a “dissenting opinion” (*osoboe mnenie*) and an “opinion” (*mnenie*). In the Constitutional Court Act of the Russian Federation (1991), the latter are called the “opinions concerning disagreement with the majority of judges” when a dissenter votes for the essence of the final decision but challenges the reasoning of the majority opinion. As a matter of fact, they are equivalent to the concurring opinions of common law courts. As I have noticed, concurring opinions are not popular among the judges of the Russian Constitutional Court.

Dissenting Opinions vs. Majority Opinions

The specific character of the dissent, its individualistic tone, special purposes, and functions in legal setting are the traits differing from the majority opinion.

In contrast to the majority opinion, the dissenting opinion is not a prescriptive document. It serves different purposes. According to my analysis of dissenting opinions written by judges of the Russian Constitutional Court and the US Supreme Court, they are as follows:

- 1) supplementing, interpreting, or challenging the reasoning of the majority opinion,
- 2) evaluating the majority opinion,
- 3) revealing its errors,
- 4) disagreeing with the Court’s final decision.

One more difference between the dissent and the majority opinion is the nature of author’s position. According to R. Ferguson (1990), judicial opinions are characterized by four features: “the monologic voice, the interrogative mode, the declarative tone, and the rhetoric of inevitability” (p. 202). The monologic voice enables the Court composed of several individuals to speak in one

voice. The interrogative mode frames the case’s question and then responds within the established framework. The declarative tone answers the legal question and the rhetoric of inevitability creates the sense that that the Court decided the case in the only manner possible.

Dissents’ authors express their personal points of view and values, speak on their own, while majority opinion’s authors speak for the position of the court and the institutional body.

The second difference follows directly from the first one – rational and logical elements in the majority opinion against emotional and expressive features in the dissent. Formal style of writing typically used in the majority opinion gives place to the metaphorical language of the dissent. A judge becomes a semiotically central category of discourse, positioning him or herself as a person freed from institutional constraints, revealing personal feelings on the matter at issue.

The right to voice an individual viewpoint challenging the position of the Court gives the sense of freedom, independence, and personal responsibility.

C.L. Langford following Ferguson’s lead argues that dissenting opinions are characterized by four features: “an individualistic tone, a skeptical voice, a democratic standard, and an advocacy medium” (Langford, 2009, p. 1).

In the dissent, the judge is allowed to position themselves as a subject of free will deliberately determining discourse. The judge expresses the opinion in a tone that is reflective of their personal view about the legal issue. The first-person singular pronoun helps them to produce a phenomenological personalized statement. Having the purpose to undermine the authority of the Court and its members as keepers of the Constitution, they attack their decision, challenge the validity of their reasoning and position, question their peers’ legal expertise. They oppose

their own views to the majority opinion, which they deem to be untrue and incorrect.

Let us look at the issue of tone in dissenting opinions in more detail.

Tone of Dissenting Opinions

In the judicial dissent, the judge is allowed to position themselves as a subject of free will deliberately determining discourse.

To step away from the dry theory, let me focus on one example. The example I would like to cite is the statement of Judge V. Luchin (the Constitutional Court of the Russian Federation) derived from his landmark opinion where he challenges the constitutionality of the “Chechen” *ukazy* [executive orders] issued by B. Yeltsin., the first Russian President. V. Luchin writes:

(1) *Конституционный строй, замешанный на крови, людском горе и бедах, как дорога, не ведущая в храм, теряет свое основное предназначение – служить человеку. Вся пирамида основных конституционных ценностей оказалась перевернутой. Указ Президента не столь безобиден, как пыталась представить его президентская сторона. Я полагаю, что им допускалось использование Вооруженных Сил при разрешении внутреннего конфликта* (Luchin, 1995).

[The constitutional regime **based on blood, people’s grief, and trouble** does not serve humans. The pyramid of basic constitutional values has been overturned. The Presidential Executive Order is not as harmless as it was presented by President’s supporters. **I believe** he ordered to use armed forces to settle internal conflicts].

Luchin expresses his opinion in a tone that is reflective of his personal view about the legal issue. In the above stated example, we see emotionality, metaphoricalness of his writing. The first-person singular pronoun helps him produce a phenomenological statement personalizing his opinion. A belief-predicate following the pronoun я [I] labels the statement as a personal opinion that does not claim to be the ultimate truth. The lexical marker of the subjective modality

полагаю [believe] helps Luchin to express his personal opinion independent of the institutional voice of the Court.

Judge V. Yaroslavtsev’s dissent is expressed with the same emotional and expressive power. The judge delivers the opinion to criticize the Constitutional Court’s Decree breaching the Constitutional provisions. He contends:

(2) *Хотелось бы выразить озабоченность тем обстоятельством, что государство, создаваемое на основе «управляемой» демократии и «властной» вертикали, о чем свидетельствует новый порядок надделения полномочиями глав субъектов Российской Федерации, все больше преобразуется в ‘мегамашину’, то есть в общество, которое, включая всех своих членов, уподобляется огромной централизованно управляемой машине.* (Yaroslavtsev, 2005).

[**I am concerned** about transformation of the state based on the exercise of ‘managed’ *democracy* and ‘power vertical’ (the sign of which is the new procedure of vesting the powers in the heads of the Russian regions) into a mega-machine, i.e. a society including all its members becoming more and more similar to a huge centre-manageable machine].

Judge V. Yaroslavtsev challenges the provisions of the Russian Act on *General Principles Governing the Organization of Legislative (Representative) and Executive Bodies of State Power in the Constituent Entities of the Russian Federation*. Having an alternative legal position, he questions the decision of the Court disregarding how his voice would affect the credibility of the Russian Government including the President who ratified the amendments to the Act. Voicing his personal view, he demonstrates the unwillingness to submit to the will of the majority.

Langford (2009, p. 30) claims that dissenters are free to express themselves unrestrained by majority structures. Some dissents are very short, while others are even more extensive than the majority opinions. Dissenters can use any tone – polite, diplomatic, caustic, sarcastic, or even

hostile, as they voice the individualistic position liberated from the constraint of speaking for the institutional body. Whereas Kononov's tone is disdainful, ironic, often hostile, and superior, Yaroslavtsev's tone is always respectful. He opts for less confrontational language, never criticizes the majority limiting his reference to their decisions. Judge Kononov is quite to the contrary. He attacks his colleagues, the arguments their opinion is based upon, and their final decision:

(3) *Суд между тем выдвигает новое и не известное закону основание прекращения дела. Исследуя и оценивая акты Президента Российской Федерации, касающиеся известных событий в Чеченской Республике, Конституционный Суд отступил от требований статьи 71 Закона о Конституционном Суде о необходимости учитывать не только буквальный смысл рассматриваемого акта, но и смысл, придаваемый ему толкованием или правоприменительной практикой, а также исходя из его места в системе правовых актов.* (Kononov, 1995)

[The Court states a new illegal reason to drop an inquiry. Analyzing 'Chechen' executive orders of the Russian President, the Constitutional Court violated Article 2 of the Constitutional Court Act of 1991 which reads as follows: The Constitutional Court of the Russian Federation shall adopt a decision on a case by evaluating both the literal sense of the act being considered and the sense given by official and other interpretation or established practice of legal application as well as based on its place in the system of legal acts].

Having the purpose to undermine the authority of the Court and its members as keepers of the Constitution, A. Kononov attacks their decision, challenges the validity of their reasoning and position, questions his peers' legal expertise. He opposes his own views to the majority opinion, which he deems to be untrue and incorrect. His use of the lexeme Суд [Court] helps distinguish himself from the majority, mark the limits of his personal opinion and the Court's decision.

One of the issues discussed by the legal community is to what limits can the content of the dissent be censored to prevent offences and

direct criticism of dissenters. However, one can ask themselves if it is possible to voice personal position, disagreement in a different way not criticizing emotionally someone's opinion. As a matter of fact, criticism is an obligatory element of any dissent. It is worth, however, mentioning that the Russian Code of Judicial Conduct prohibits offences and direct verbal attacks against the Court and judges.

Linguistic Features of Dissenting Opinions

Dissenting opinions strengthen judicial independence, responsibility, being their guarantee, being a principle of justice, A. Kononov (2006) says.

The authors of dissents not only generate original ideas, but they control the systematic interaction of language units making up the structure of the text. The choice of language units and means to mark author's identity (personal, institutional, national, etc.) are determined by their need to express the emotional state, to demonstrate independency from the Court, to oppose themselves to the majority, or, on the contrary, to unite with the peers.

The first-person singular pronoun is the most effective way to position oneself as a person, not as a member of the Court, to express the individual opinion. "I" appears in dissents to indicate that dissenters assume responsibility for the choices they make, to mark their personal intentions different from those of the majority.

(4) *Такая позиция для меня неприемлема. Я убежден, что полномочия Президента не могут произвольно выводиться из его статуса. Президент единолично не располагает 'всеми имеющимися у государства средствами', не может использовать их бесконтрольно, по своему усмотрению, тем более — наделять такими полномочиями Правительство. Это противоречило бы статье 10 Конституции, устанавливающей разделение властей.* (Luchin, 1995)

[Such a position is unacceptable **to me**. **I am sure** Presidential authorities cannot arbitrarily result from his status. The President has no legal right to entrust the Government with authorities he doesn't possess himself. It violates the principle of separation of powers declared by Article 10 of the Constitution].

Judge V. Luchin uses the personal pronouns *я* [I] and *меня* [me] to assert his individualistic voice, to distinguish himself from the majority. He cannot agree with the majority and thus dissents. The use of the pronoun *я* combined with the mental process verb *убежден* [am sure] helps the author personalize his statement signaling that it is his individual voice, juxtapose himself as a person against the institutional body.

Judge E. Ametistov also uses the pronoun *меня* [me] in the statement below to juxtapose himself against the majority whose opinion he criticizes:

(5) *Все сказанное выше не позволяет мне согласиться с Заключением суда. Это, в свою очередь, побуждает меня констатировать, что заключение суда принято с нарушением статьи 184 Конституции...* (Ametistov, 1993)

[The above said makes me disagree with the Resolution of the Court ... It makes me state violations of Article 184 by the majority opinion].

The opposition effect is made by the contrastive use of two lexical units – *мне* – *Суд*. The pronouns *мне*, *меня* help E. Ametistov emphasize his individuality, demonstrate that the voiced position is Ametistov's alone, it is impossible for him to agree with the mistaken majority opinion, he is confident enough about his own views. The illocutive force of the statement can be expressed by the proposition as follows: *I am strongly objecting to the majority opinion violating the Russian Constitution*.

One more language tool of personalizing statements in Russian dissents is the morphological form of performative verbs in the first-person singular. It has the meaning 'attribution of the

action to the speaker/writer'. Inflectional verb endings help mark the ontological status of the unique personality:

(6) *Поддерживая решение большинства в целом, **выражаю** свое особо мнение.* (Кононов, 1995)

[Supporting the majority opinion in essence (I) express my personal opinion].

The rules of the synthetic Russian language admit omitting the pronoun *я* before the verb. After all, the end of the verb *выражаю* [express] describes the judge as an individual taking upon himself personal responsibility for his position, expressing his individual belief, willing to reject the views of the majority. Using this form of the verb Judge Ametistov emphasizes that this opinion is not that of the Constitutional Court. This opinion is Ametistov's alone.

According to my analysis, the ranges of language units judges use to mark themselves are not similar in American and Russian dissents. American justices use the personal pronoun *я* as the main tool to emphasize the role of personal agency in judicial decision-making. In Russian discourse, the first-singular pronoun is uncommon. The most common units used by the majority of the Russian judges to mark themselves in dissents are the first-plural pronouns. One can explain this distinction not only by tradition, but by the peculiarities of Russian and American mentality, cultures – Russian collectivism vs. American individualism. That is the reason why Russian authors avoid using *I-statements*. According to the analysis of Russian and American dissents, I have concluded that the personal pronoun *я* is used about 8-10 times more often in American discourse than in Russian one. US dissenters tend to make their personality more visible through the use of first-person singular references.

There is another means of marking the authors of dissenting opinions – the pronoun “we”.

The first-person personal pronoun “we” is able to express a wide variety of discourse functions. In dissenting opinions, one can mention the functions as follows (according to frequency of occurrence):

1) to identify the judge as a person with the majority as an institutional body:

(7) *Однако восстановление смысла и доказательство очевидного далеко выходило бы за рамки нашей задачи.* (Kononov, 2005)

[However sense restoration and prima facie evidence were beyond the scope of our duty].

The first-person plural pronoun serves as a tool of positioning the speaker as a member of the Court, helps them to demonstrate a unity of interests, purposes and tasks. It is so called exclusive we which helps construct solidarity with the author’s discourse community.

2) to identify the judge as an individual with the Russian nation or another community:

(8) *Мы у грани, за которой народы России просто могут исчезнуть в столь масштабных братоубийственных конфликтах и войнах. И мы не знаем, с чем конкретно имеем дело, что это было – мятеж, война ли нечто выходящее за рамки и этих понятий.* (Zorkin, 1995)

[The danger of extermination of the Russian people in so large-scale fratricidal conflicts and wars is threatening us. **We do not know what we are dealing with – whether it was a revolt, a war, or something beyond the scope of these concepts**].

In the above example, *мы* [we] is a sign of identification with Russian citizens who are not able to properly assess the events in Chechnya. It is an inclusive *we* which can construct intimacy and involvement with the audience. Hyland says (2001) says that the writer can use inclusive *we* to “guide readers through an argument and towards a preferred interpretation of a phenomenon” (p. 560). The ultimate aim of the writer is, after all, to secure ratification for their claims (Gilbert 1977; Latour 1987); and so one of the writer’s

motivations for inserting the readers’ anticipated objections, questions, or concerns into the discourse will be to enhance the persuasiveness of the text. The writer will be trying to get the readers to see things their way, and to accept their hypotheses (Harwood, 2005: 349).

3) to identify the judge with humanity:

(9) *Пройдет время, и мы пойдем всю мудрость фразы: ‘Свобода печати обеспечивает свободу народа’.* (Yaroslavtsev, 2003)

[As years pass by, we shall see the wisdom of the statement: ‘Freedom of the press ensures freedom of people’].

In the above example, we have a non-referential, so-called generic *мы* – a general quantifier *every S ..., for all S...* which unites all people, all human beings.

Arguments for and against Dissenting Opinions

One of the arguments against dissenting opinions as a legal genre is that they, C.L Langford (2009) states, “endanger the unity of the court, dismember the body of the court giving voice to alternative legal visions.” (p. 3) “Dissenting opinions are considered to endanger the integrity of the majority opinion, to cause confusion in understanding it, to dilute its obligatory force, to reveal judges’ political bias”, D.A. Basangov (2006) claims. Dissents endanger the authority, prestige and legitimacy of the court, weakening the court’s credibility (Laffranque, 2003, p. 163). They undermine the belief in objectivity of judicial decisions. Personalized judiciary cannot be objective, many researchers believe.

The belief that dissent is a symptom of dysfunction is shared with many US judges, the most famous of which is John Marshall who regularly curbed his own viewpoints, preferring to arrive at decisions by consensus. One of his arguments is that dissenting opinions weaken

the judicial body by exposing internal divisions publicly.

Dissents are a pernicious waste of time, they cause uncertainty in the law, shake the public's faith in the courts, and are fundamentally inconsistent with the nature of judicial authority, some other opponents believe. They claim courts should speak as anonymous institutions, not as groups of individual judges (Smith).

Some other arguments against the dissenting opinion are its individualistic nature and the breach of the secrecy of deliberations.

Thus, one can see that all arguments against dissenting opinions result from the individualistic and skeptical tone of discourse where judges are eligible tell people that it is their own unique point of view, to show their colleagues where they stand in relation to the issues.

Arguments in favour of dissenting opinions are as follows:

1) The dissent is a guarantee of judicial independence. It guarantees the dignity to judges who remained in the minority and enables them to decide by their conscience, and not by the majority (Laffranque, 2003, p. 170).

2) The dissent is a way to democratize the judicial system, a kind of a tuning fork of the judicial reform (Hadjiev, 1995). Dissents have a democratizing effect on the Court via the possibility to deliver different opinions which are not in conformity with the majority opinion. D. Cole claims, the existence of conditions "for rhetorical struggle in the structure of judicial decision-making gives the dissent its influence" (Cole, 1986, p. 857). The 'marketplace of ideas' belief holds that the truth arises out of the competition of various ideas in free, transparent public discourse. Different ideas and opinions are free to enter into the 'marketplace'.

3) The right for a dissent individualizes judges, helps them position themselves as independent and responsible members of

the judiciary. Dissents increase the Court's responsibility by forcing the majority to refine its opinion. Dissents augment the Court's stature by forcing "the majority to refine its opinion" and making the Court "not just the central organ of legal *judgment* . . . [but] center stage for significant legal *debate*", Justice Scalia (1994, p. 39) writes.

4) The dissenting opinion provides alternative interpretations of the Constitution. It compromises "the authoritarian character of the law" (Posner, 1990, 461). Dissent is considered "a healthy, and even necessary, practice that improves the way in which law is made" (Brennan, 1986, p. 134).

5) The availability of dissents to the public makes the majority of judges better feel their responsibility for their decision.

6) The dissenting opinion 'ensures the effective functioning of the courts and promotes public debates, it opens a dialogue among the judges and legal scholars, between the commentators of court judgments and the legislators' (Laffranque, 2003, p. 164).

7) The dissenting opinion creates the necessary prerequisites for scientific doctrines. Dissenting opinions communicate legal theories to other justices, lawyers and politicians, and have sometimes turned into good law later on as a result of this.

Conclusion

The article has investigated the nature of the dissenting opinion, its main features and functions in judiciary from legal and linguistic points of view, arguments for and against this genre of legal writing.

The issue of the judicial dissent has been discussed for many decades and is still a debatable problem. Arguments are being suggested both for and against the dissenting opinion.

On the basis of the foregoing, it can be concluded that dissents fulfill the following functions:

- 1) they guarantee judge's independence, their freedom to speech;
- 2) they enhance judge's responsibility for decision-making;
- 3) they democratize the judiciary;
- 4) they serve as an alternative interpretation of the law;
- 5) they attract public attention to legal issues;
- 6) they influence lower courts decisions.

Will this genre of judicial writing gain popularity in Russian judiciary in the next ten years? The question is difficult to answer. I can suggest only two factors which can result in decreasing the number of dissents – growing caseload which leaves judges little time to write individual opinions, and a totalitarizing influence inside democracy.

The answer to the question concerning the rationale and usefulness of dissents in

the judiciary depends on the legal tradition of the nation – the tradition to extend powers of the judge and democratize the judiciary, or to limit judge's independence by prohibiting any forms of individualistic writing that dismember the integral body of the court in which “the individual members are merged into a unit constituting a distinct department” (Smith).

From linguistic point of view, the dissenting opinion is an individualistic genre of judicial discourse where judges are allowed to use such language units as first-person singular pronouns, means of subjective modality, metaphors, and other tools to express their identity. My analysis showed that there is a “higher tendency among Russian dissenters to make explicit their authorial presence in the texts by taking full responsibility for their claims using I-pronoun.

References

- Ametistov, E.M. (1993) *Osoboe Mnenie k Zaklucheniuu Konstitutsionnogo Suda RF No. Z-1* [Dissenting Opinion to the RF Constitutional Court's Conclusion №Z-1] (March, 20), available at: <http://infopravo.by.ru/fed1993/ch02/akt13736.shtm> (accessed 23 April 2010)
- Basangov, D.A. (2006). Pravovaia priroda osobogo mneniia sud'i Konstitutsionnogo Suda Rossiiskoi Federatsii [The Legal Nature of the Dissenting Opinion of the Judge of the Constitutional Court of the Russian Federation]. *Journal of the Russian Law*, 24-34.
- Brennan, W.J., (1986). In Defense of Dissents. *HASTINGS Law Journal* (37), 427-438.
- Cole, D. (1985). Creative Misreadings in the First Amendment Traditions. *Yale Law Journal* (95), 857- 905.
- David, R. (1973). *Les grand systems de droit contemporains*. Paris: Dalloz. 553 p.
- Ferguson, R.A. (1990). The Judicial Opinion as a Literary Genre. *Yale Journal of Law and Humanities* (2), 201-219.
- Gilbert, G.N. (1977). Referencing as persuasion. *Social Studies of Science* (7), 113–22.
- Hadzhiev, G.A. (2005). *Publikatsiia osobykh mnenii [Publication of dissenting opinions]*, available at: <http://www.medialaw.kiev.ua/zmisud/sudanalitika/195/>, (accessed 5 February 2009).
- Harwood, N. (2005) We Do Not Seem to Have a Theory ...The Theory I Present Here Attempts to Fill This Gap: Inclusive and Exclusive Pronouns in Academic Writing. *Applied Linguistics* (26/3), 343-375.
- Hyland, K. (2001a). Bringing in the reader: Addressee features in academic articles. *Written Communication* (18/4), 549–74.

Kononov, A.L. (1995) *Osoboye Mnenie k Postanovleniyu Konstitutsionnogo Suda RF №10* [Dissenting Opinion to the RF Constitutional Court's Ruling №10] (July, 31), available at: <http://www.referent.ru/7/15840> (accessed 23 April 2010)

Kononov, A.L. (2005) *Osoboye Mnenie k Postanovleniyu Konstitutsionnogo Suda RF No. 13* [Dissenting Opinion to the RF Constitutional Court's Ruling No. 13] (December, 21), available at: <http://iv.garant.ru/SESSION/PILOT/main.htm> (accessed 25 April 2010)

Kononov, A.L. (2006). Pravo na osoboe mnenie [Right for dissenting opinions]. *Zakon* (11), 26-34.

Laffranque, J. (2003). Dissenting Opinion and Judicial Independence. *Juridica International* (VIII), 162-172.

Langford, C.L. (2009). Toward a Genre of Judicial Dissent: Lochner and Casey as Exemplars. *Communication Law Review* (9-2), 1-12.

Latour, B. (1987). *Science in Action: How to Follow Scientists and Engineers through Society*. Milton Keynes: Open University Press. 274 p.

Luchin, V.O. (1995) *Osoboe Mnenie k Postanovleniyu Konstitutsionnogo Suda RF No. 10* [Dissenting Opinion to the RF Constitutional Court's Ruling No. 10], available at: <http://www.referent.ru/7/15840> (accessed 5 May 2010)

Posner, R.A. (1990). *The Problems of Jurisprudence*. Cambridge: Harvard University Press. 485 p.

Rupp, H.-G. (1966). *Zur Frage der Dissenting Opinion. Die moderne Demokratie und ihr Recht*. FS für Gerhard Leibholz. Tübingen: Mohr. 531 p.

Scalia, A. (1994). The Dissenting Opinion, Address Before the Supreme Court Historical Society. *Journal of Supreme Court History* (June 13), 33-41.

Smith, H. Individual and Institutional Authority: The-Turn-of-the Century Quest to Abolish the Dissenting Opinion, available at: <http://ssrn.com/abstract=1566673> (accessed 15 March 2011)

Vereshchagin, A.N. (2007). *Judicial Law-Making in Post-Soviet Russia*. NY: Routledge. 288 p.

Yaroslavtsev, V.G. (2003) *Osoboe Mnenie k Postanovleniyu Konstitutsionnogo Suda RF No. 15* [Dissenting Opinion to the RF Constitutional Court's Ruling No. 15] (October, 30), available at: http://main-law.ru/ksrf/15-p_ot_30-10-2003_oms2 (accessed 5 May 2010)

Zorkin, V.D. (1995) *Osoboe Mnenie k Postanovleniyu Konstitutsionnogo Suda RF No. 10* [Dissenting Opinion to the RF Constitutional Court's Ruling No. 10] (July, 31), available at: <http://www.referent.ru/7/15840> (accessed 6 May 2010)

Особые мнения судей: правовой и лингвистический аспекты

О.А. Крапивкина

*Иркутский национальный исследовательский технический университет
Россия, 664074, Иркутск, ул. Лермонтова, 83*

Внимание к проблеме особого мнения вызвано увеличивающейся популярностью данного письменного жанра среди судей Конституционного Суда России. В статье рассматривается природа особого мнения, его основные черты и функции как в правовом, так и в лингвистическом

аспектах, анализируются аргументы за и против данного правового института. Предпринята попытка найти ответ на вопрос, почему судьи все чаще выражают особые мнения. Автор приводит следующие объяснения: необходимо создать альтернативную правовую теорию; убедить коллег в том, что решение, вынесенное судьейским большинством, ошибочно, и предотвратить возможные ошибки; выразить несогласие с мнением большинства. Автор приходит к выводу, что особое мнение является индивидуализированным жанром судебного дискурса, субъект которого свободен в выборе языковых средств для маркирования своих дискурсивных ролей. Утверждается, что практическая значимость особых мнений в судебной системе определяется правовыми традициями государства.

Ключевые слова: особое мнение, судебное решение, решение, принятое большинством голосов, судья, индивидуалистский голос, институционализм.

Научная специальность: 12.00.00 – юридические науки.
