



Judicial Loyalty Through Dissent or Why The Timing is Perfect for Belgium to Embrace Separate Opinions

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Table of Contents

Introduction

- I) Some Contours of “Judicial Loneliness” in Belgium
 - a) Secrecy of Deliberation: “When It’s Raining in Paris...”
 - b) *Unus Iudex* Jurisprudence or “Judging Alone”
 - c) Open-hearted Judges and “Public Scorn”
- II) Judicial Loyalty in an Altered Context
 - a) Loyalty to the “Law” and the Inherent “Political” Role of the Judiciary
 - b) Leaders Deserve Trust over Monitoring
 - c) Judges as People with Faces *and* Voices
- III) Separate Opinions or How to Honor “the Law’s Voice”
 - a) A Well-established Practice in the USA and beyond
 - b) The European Court of Human Rights as Righteous In-between
 - c) Belgium’s *Momentum*

Concluding Remarks

Introduction

1. Belgian judges may well be among the loneliest of their peers due to Belgium’s legal framework. In an attempt to counter this unfortunate situation, we will start by outlining some contours of “judicial loneliness” in Belgium through a brief discussion of secrecy of deliberations, the wide-spread *unus iudex* practice, as well as a more recent phenomenon: judges who ventilate certain aspirations and/or frustrations often end up being the epicenter of fierce public polemics (I). Secondly, we will emphasize that the judicial function and its prerogatives have undergone significant change over the last decades thus justifying a new concept of loyalty in order to adequately approach the spreading of critical outcries by magistrates (II). In a final third part we will briefly state how the introduction of separate opinions – a well-known common law phenomenon – in the Belgian system could alleviate,

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to a certain extent, judicial loneliness while boosting public appreciation for the hard work judges are expected to deliver on a daily basis in a growingly pluralist society. The European Court of Human Rights (ECHR) constitutes a valuable example in this respect (III).

I) Some Contours of “Judicial Loneliness” in Belgium

a) Secrecy of Deliberations: “When it’s Raining in Paris ...”

2. Belgium’s legal system is thoroughly impregnated by the underlying principles of French revolutionary law, the influence of Napoleonic Codes reaching far beyond its today’s neighboring countries such as Belgium and Holland. It is also commonly accepted that France’s leading *Enlightenment* philosopher MONTESQUIEU saw only the legislative and the executive powers as political(ly relevant) in the narrow sense of the word, judges, according to the popular lecture of his *De l’Esprit des Lois* (1748), being “no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor”.² It follows that a mere syllogistic application of pre-established legal instructions is the sole task of a dutiful judge, colorfully depicted by WEBER as “a vending machine into which the pleadings are inserted together with the fee and which then disgorges the judgment together with the reasons mechanically derived from the Code”.³

3. The secrecy of deliberation is supposed to support this aura of mechanically derived conclusions from all-foreseeing legal texts. This outlook on the judicial function has not changed much, at least when we only look at the current texts of the French Codes of civil and criminal procedure. Article 448 of the former stipulates that the judge’s deliberations are secret (“*Les délibérations du juge sont secrètes*”), whereas article 357.2 of the latter imposes that at the end of the deliberation the judge writes, or has secretly done so, the word ‘yes’ or ‘no’ on a table at his disposal in such a way that nobody can see his vote (“*Il écrit à la suite, ou fait écrire secrètement, le mot ‘oui’ ou le mot ‘non’ sur une table disponible de manière que personne ne puisse voir le vote inscrit sur le bulletin*”). Prior to their entering into office, French judges more overly have to take an oath according to which the secrecy of deliberations is to be kept religiously (“*garder religieusement le secret des délibérations*”), a choice of words that may indeed surprise in a country wishing to be exemplary lay.⁴

² MONTESQUIEU, *Spirit of Laws*, Book VI, Chapter 2, as consulted through: <http://press-pubs.uchicago.edu/founders/documents/v1ch17s9.html>. For an interesting reinterpretation of his teachings, see however R. FOQUÉ, “De rechter is het sprekende recht” in F. EVERS (ed.), *Kiezen tussen recht en rechtvaardigheid*, Brugge, die Keure, 2009, (79) 82, where the author suggests a much more sophisticated vision on the judge’s role below the surface of this commonly accepted conception. According to this author, Montesquieu, who designated the judge as “*un pouvoir invisible et nul*”, meant to raise the fundamental insight that the judicial function consists in ventilating continuously and without any political voluntarism the so-called *esprit général* of which a legal order is the representation and the crystallization.

This reminds of DWORKIN and his *Right Answer Thesis* according to which a judge (Hercules) is supposed to find the unique, legally correct answer to a legal dispute from a reinterpretation of *law as a whole* (cf. R. DWORKIN, *A Matter of Principle*, Cambridge, Harvard University Press, 1985, 119).

³ Cf. L. A. COSER, *Masters of Sociological Thought: Ideas in Historical and Social Context*, New York, Harcourt, 1977, 231.

⁴ For a more elaborate approach of the topic, see: Y. LECUYER, “Le secret du délibéré, les opinions séparées et la transparence”, *Rev. trim. dr. h.* 2004, Iss. 57, (197) 202 et seq.

4. The old saying “when it’s raining in Paris, drops of rain are falling in Brussels” also proves its worth in our context: there is, indeed, no doubt as to whether secrecy of deliberation holds under Belgian law.⁵ This may surprise since the Belgian Code of civil procedure (CCP) does not impose it as such and since its counterpart in criminal law only does so in article 343 when it comes to trials before a *Court d’assises*.⁶ Moreover, the oath formula that Belgian judge have to take before entering into office only comprises fidelity to the King, obedience to the Constitution and to the Laws of the Belgian people and does not *expressis verbis* deal with secrecy of deliberations.⁷ To a great extent, the current state of affairs can therefore be said to follow directly from judicial practice itself given the fact that both the Belgian and the French *Cour de cassation* have been hammering rigorously on the principle for ages. In France for example, the Court stated that mentioning that a verdict was unanimously reached already amounted to a violation of secrecy of deliberations.⁸

5. It must be stressed, however, that a judge does not violate this secrecy by simply giving the reasons for a verdict.⁹ The (constitutional) obligation under Belgian law to motivate judgments (art. 159 Const.) would otherwise remain dead letter. A complicating factor is nevertheless that neither the French, nor the Belgian *Court de cassation* are known for allowing much insight into the precise motives that support their case-law.¹⁰

6. In spite of its pedigree going back to *guillotine era* and, even further, to canon law,¹¹ hopeful signals can be found in more recent work of some of Belgium’s most renowned legal scholars who have criticized the above-mentioned principle. Doing so, Professor STORME¹² pleaded for a revision, at least at the highest judicial level, of the concept that *in se* prevents the acceptance of separate opinions.¹³ Professor MARTENS, the former French-speaking president of the Belgian Constitutional Court, had already suggested about a decade earlier that secrecy of deliberations should be revised, albeit only modestly.¹⁴

⁵ See e.g. L. ARNOUT, *Strafrecht en strafprocesrecht*, Mechelen, Kluwer, 2006, 413, nr. 9; C. VAN DEN WYNGAERT, *Strafrecht en strafprocesrecht in hoofdlijnen*, Antwerpen-Apeldoorn, 2009 (7th revised edition), 1192;

P. MARTENS, “Sur les loyautés démocratiques du juge” in J. VERHOEVEN (ed.), *La loyauté. Mélanges offerts à Etienne Cerexhe*, Brussels, 1997, (249) 264 et seq.

⁶ An albeit rather seldomly assembled *ad hoc* jurisdiction where e.g. murder cases are judged with the help of a jury. The vast majority of criminal cases are tried before the *Tribunaux de police* and *Tribunaux correctionnels*.

⁷ Cf. Art. 2 Decret 20 juillet 1831 concernant le serment à la mise en vigueur de la monarchie constitutionnelle représentative, *MB* 20 juillet 1831: “*Je jure fidélité au Roi, obéissance à la Constitution et aux lois du Peuple belge*”.

⁸ Cass. fr. 9 November 1945, *Gazette du Palais* 1948, nr. 1, 223, as cited in Y. LÉCUYER, *o.c.*, 199.

⁹ See e.g. Cass. 14 October 2009, nr. P.09.1196.F, accessible through www.cassonline.be.

¹⁰ Inspirational comparative reflexions concerning the argumentative and motivational practice of the highest courts in Belgium and France can be found in: M. ADAMS, “De argumentatieve en motiveringspraktijk van hoogste rechters: rechtsvergelijkende beschouwingen”, *RW* 2008-09, 1498-1510.

¹¹ Y. LÉCUYER, *o.c.*, 201 et seq.

¹² M.E. STORME, “Pleidooi voor separate opinions in de rechtspraak”, *De Juristenkrant* 187 (April 8th, 2009), 10.

¹³ P.J. REES and P. ROHN, “Dissenting Opinions: Can they Fulfill a Beneficial Role?”, *Arbitration International* 25/3 (2009), (329) 337.

¹⁴ P. MARTENS, *o.c.*, 268, where the author emphasizes that secrecy of deliberation should be upheld when it comes to judging persons and the choice of a solution. (“[...] *c’est sur l’appréciation des personnes et sur le choix de la solution qu’il [i.e. le délibéré] doit rester secret*”).

b) *Unus Iudex* Jurisprudence or “Judging Alone”

7. If secrecy of deliberations and its correlate, namely that judges are not allowed to express disagreement or even reserves regarding the verdict that was collegially delivered, exacerbates rather than mitigates judicial loneliness, then the practice of *unus iudex* jurisprudence, with a single judge presiding the trial and deciding alone, seems to do so *a fortiori*.

8. Remaining but a rather rare phenomenon until the mid-nineties of last century, the *unus iudex* practice has spread intensely ever since in order to do away with Belgium’s considerable judicial delay and to comply with budgetary rationalization. A second section to article 195 of the Code of civil procedure (CCP) was indeed adopted to allow for an even swifter assignment of single judges to adjudicate cases.¹⁵ Worries that were raised in the Senate concerning its possibly negative impact on the verdicts’ quality as well as on the working atmosphere for the judges themselves – who are no longer able to confer with colleagues, for instance – could not prevent the proposition from making it through the legislative procedure.¹⁶ Even a perfectly reasonable suggestion to require at least some seniority in the judiciary can be easily overturned. The judge only has to be deemed fit for the job by the tribunal’s president – regardless of the number of years spent on the bench – who previously has to consider the motivated, written opinion of both the King’s prosecutor (*procureur du Roi/ procureur des Konings*) and the president of the local bar (*bâtonnier/ stafhouder*). Unsurprisingly, judges who have to deliver verdicts on their own have become (very) numerous as a result.¹⁷

c) Open-hearted Judges and “Public Scorn”

9. Just as the judges working in team are not allowed to express even their most profound dissent, and the judges who are *de facto* prevented to even confer with peers prior to their verdict due to generalized *unus iudex* practice, Belgian magistrates whose opinions both inside and outside court have given rise to sharp debates in the Parliament, are becoming increasingly numerous:¹⁸ acquitting a thief because previous, unexecuted convictions had “provoked” the new facts; ordering a Jewish citizen to leave the courtroom because he would not take off his *kippá*; stating that Catholic schools are far superior to others; asking out loud whether homosexual couples sharing the same roof are not *ipso facto* disrupting public order and morality; considering that people who expose wealth in impoverished neighbourhoods should expect to be home-jacked; demanding that judges be once more “labelled” politically, to name but these examples. It is obvious that these expressions are difficult if not impossible to reconcile with the traditional image of a judge as a passive being and the mere mouth of the law. Judges are indeed no longer lost in collegial anonymity when they have to decide alone.¹⁹

¹⁵ Law of 21 January 1997, *MB* 25 March 1995.

¹⁶ The report of the discussion in the Senate’s Justice Commission (7 January 1997) can be found via www.senate.be.

¹⁷ For a critical discussion of the issue, including a historical overview, see: P. TRAEST, “Enkele bedenkingen over de alleenzettelende rechter in strafzaken” in F. DERUYCK et al. (eds.), *De wet voorbij. Liber amicorum Luc Huybrechts*, Antwerp, Intersentia, 2010, 415-428.

¹⁸ For a more elaborate outset of the topic see our: B. NELISSEN, “Deontologische codes of deugden voor (te) openhartige magistraten?”, *RW* 2011-12, 806-823.

¹⁹ P. MARTENS, *o.c.*, 255, with references.

10. What worries, however, is that a judge who discretely fulfilled her duties was (conditionally) sentenced for violation of, *in casu*, her *professional* secrecy, yet another instrument that can be used, be it only in a malicious way, to further isolate the men and women having to end conflicts in a socially acceptable way. This striking case was part of the highly controversial *Fortis-saga*²⁰ where one of the three judges, Christine Schurmans, was condemned for having conferred with a trusted and retired colleague prior to the verdict. The Court of Appeals (*Court d'appel / Hof van beroep*) found that by (partly) communicating a draft judgment with the names of the parties involved, whether or not the sole aim was linguistic verification, she had committed an imprudence amounting to a violation of her professional secrecy.²¹ According to her own words,²² judge Schurmans had sought the advice as a result of insupportable tensions within her three-headed bench which eventually led to her refusal to sign the verdict adopted by her two peers, thus jeopardizing – yes indeed – secrecy of deliberations...

II) Judicial Loyalty in an Altered Context

a) Loyalty to the “Law” and the Inherent “Political” Role of the Judiciary

11. Traditionally, judges are foremost supposed to be loyal to the law.²³ The aforementioned oath clearly indicates that such remains the case for Belgian judges, implying at first sight a subaltern position with respect to the King, the Constitution, and statute law. *De facto* however, it is the judge – whether constitutional, judicial or administrative – who has a considerable discretion due to elastic formulations of the laws allowing for its guardians to simultaneously determine their meaning²⁴ thus playing a truly political role, at least when we define politics as “the art of dealing with conflict, power and incomplete information”.²⁵ So-called *catch-all notions* are indeed omnipresent in the wording of legislation, which subsequently has to be interpreted by judges. Moreover, the European Court of Human Rights (Strasbourg) confirmed in its leading *Sunday Times-case* that not only statute law, but also established case-law falls under the scope of “law”.²⁶ Had she decided otherwise, the Court would most surely have endangered its authority in the eyes of the most important common law system within the Council of Europe which is already known for its critical attitude towards Strasbourg case-law.²⁷

²⁰ The *Fortis*-case led i.a. to the fall of the Belgian federal government in 2009 after the leading magistrate of Belgium's *Cour de cassation* had sent a letter to the President of the Parliament signalling what seemed to be political attempts to alter an imminent verdict in the case surrounding the take-over of the Belgian branch of a major bank (Fortis) by its Dutch competitor (ING). An instructive overview of judgments, surrounding press releases and coverage by leading newspapers can be found through: <http://fortisgate.wordpress.com/>

²¹ Ghent (1st Chamber) 14 September 2011, nr. 129/23/2010, accessible through:

<http://fortisgate.wordpress.com/public-documents/15-judgment-ghent-court-of-appeal-14-september-2011/>

²² Interviews on 17 September 2011 in both *De Morgen* (www.demorgen.be) and *De Tijd* (www.tijd.be).

²³ C. MATRAY, “La réforme de la discipline judiciaire”, *JT* 2003, 821 et seq.

²⁴ P. MARTENS, *o.c.*, 249.

²⁵ G. DIERICKX, *De logica van de politiek*, Antwerp/Apeldoorn, Garant, 2005, 302-303.

²⁶ ECHR (Plenary) 16 April 1979, *The Sunday Times vs. UK*, §47-49, www.echr.coe.int, where the Court stresses that “[...]the word ‘law’ in the expression ‘prescribed by law’ covers not only statute but also unwritten law. [...] It would clearly be contrary to the intention of the drafters of the Convention to hold that a restriction imposed by virtue of the common law is not ‘prescribed by law’ on the sole ground that it is not enunciated in legislation: this would deprive a common law State which is Party to the Convention of the protection of the protection of Article 10 (2) (art. 10-2) and strike at the very roots of that State’s legal system”.

²⁷ See e.g. the opinion of British Law Lord HOFFMANN: “We can’t allow Strasbourg to lay down the law”, *The Times*, 6 April 2009, accessible through

12. More fundamentally, judges in liberal democracies are increasingly forced to fill the gap left by authorities who should legitimately occupy it (i.e. the legislative and the executive branch) with considerable psychological insecurity due to the loss of identifying guidelines.²⁸ Both the legislative and the executive branch are often incapable to resolve social disputes, the task of producing the necessary law shifting to the judiciary as a result, a phenomenon the French call “*la judiciarisation du droit*”.²⁹ Although the law is necessarily incomplete, judges are indeed supposed to act as if such were not the case.³⁰ What is problematic from this perspective is that under current Belgian law judges are, so to speak, “left on their own” to detect applicable instructions in a set of vague rules. The absence of clear boundaries may lead to an imperialistic attitude by some magistrates since “all jurisdictions tend to liberate themselves from the barriers one thought could limit their autonomy”,³¹ especially since the Belgian judge was found competent to censor both activity and inactivity of the executive (1921), the judicial (1991), and even the legislative (2006) branch.³² What *does* surprise however in this altered context, is that society continues to expect clear-cut solutions from judges in the absence of all-foreseeing law and that Belgian judges remain punishable when they refuse to adjudicate, even when the law is unclear, tacit or obscure (art. 5 CCP and art. 284 Criminal code).

13. Duly aware of the multiple meanings the concept of loyalty can have, the aforementioned MARTENS distinguished five of them, linking each kind to a different aspect of judicial functioning: the magistrate’s statute (“*loyauté statutaire*”), the social context (“*loyauté sociologique*”), the deliberation in which judges are engaged (“*loyauté délibérative*”), the way a verdict is “sold” to the public (“*loyauté argumentative*”), and the preservation of liberties and fundamental rights enacted in European treaties (“*loyauté européenne*”). This instructive distinction already corroborates in itself the changes we have just come to mention.

www.timesonline.co.uk/tol/comment/columnists/william_rees_mogg/article6040951.ece.

²⁸ P. MARTENS, *o.c.*, 254-55, quoting C. CASTORIADIS, *La montée de l’insignifiance*, Paris, Seuil, 1996, 2.

²⁹ Cf. J. VANDERLINDEN, “Ouverture” in X., *Convictions philosophiques et religieuses et droits positifs*, Brussels, Bruylant, 2010, 99: “*Le phénomène de la judiciarisation du droit – dans le sens étroit du transfert de la production du droit du pouvoir législatif au pouvoir judiciaire – est souvent perçue comme l’une des caractéristiques contemporaines de l’évolution des systèmes juridiques. Elle est tout autant perçue comme un signe de la faiblesse du pouvoir politique incarné dans le parlement et dont l’outil de production du droit est la loi. Dans son incapacité à trancher les grands débats de société, le législateur en transfère facilement la tâche au juge, que ce soit en demeurant silencieux ou en lui demandant un avis préalable à l’adoption d’une législation qui sera le plus souvent conforme à cet avis.*”.

³⁰ Or as the French put it: “*La loi est incomplète, mais le juge doit faire comme s’il n’en était rien*” (J.-L. GARDIES, “Spécificité du dialogue juridique”, *Archives de philosophie du droit*, Paris, Sirey, 1984, (169) 173, quoted in I. PARIENTE-BUTTERLIN, *Le droit, la norme et le réel*, Paris, PUF, 2005, 162).

³¹ P. MARTENS, *o.c.*, 254 (our translation).

³² P. MARTENS, “Les juges ne gouvernent pas: ils gèrent tant bien que mal une démocratie du ressentiment, de la controverse, et de la défiance”, 1-2, accessible through:

http://dev.ulb.ac.be/droitpublic/fileadmin/telecharger/theme_2/contributions/MARTENS-2-20070429.pdf.

See also STORME, M., “Onafhankelijkheid van de rechterlijke macht: een inleiding”, in F. FLEERACKERS en R. VAN RANSBEECK (eds.), *Recht en onafhankelijkheid. Gerechtigkeitsmacht in perspectief*, Brussels, De Boeck en Larcier, 2008, 20 and 32. In the Netherlands the situation is not fundamentally different: P.P.T. BOVEND’ERT et al., *Rechterlijke organisatie, Rechters en Rechtspraak*, Deventer, Kluwer, 2008, 6, with numerous references. An important nuance difference is however to be stressed between judicial and legislative creation of law insofar as a judge doesn’t have the right of initiative and furthermore has to limit himself to the case before him:

M. ADAMS, “‘A government of laws, not of men?’ Over recht, macht en de democratische legitimiteit van rechtsvorming door de rechter. Een toepassing in de context van trias politica en vage normen”, *CDPK* 1999, (173) 190.

b) Leaders Deserve Trust over Monitoring

14. Now that judges are perhaps more than ever able to free themselves from the revolutionary straitjacket used to designate them as mere “*bouches de la loi*”, tokens of trust seem more welcome than manifestations of mistrust among which we count the harshly imposed, but somewhat outdated, secrecy of deliberations, the public polemics resulting in stricter professional codes of judicial conduct being advocated once magistrates *do* speak out and, more in general, the numerous pleas to do away with “political interventions” by magistrates. Empirical research in contemporary management literature indeed illustrates that ‘trust’ usually works better than monitoring.³³ Or as former managing director (JP Morgan) and bestselling author Chris LOWNEY put it not long ago:

Everyone knows that children learn and perform more productively when they are raised, taught, and mentored by families and teachers and coaches who value them as important and dignified, who set high standards, who create environments of love rather than fear. *Why have we somehow convinced ourselves that our adult needs are so different?* The best teams I’ve been on have thrived precisely because there was trust, mutual support, real respect for each other’s talents, real interest in helping others succeed, and a willingness to hold each other accountable to high standards so that each of us might realize our fullest personal and team potential.³⁴

15. LOWNEY describes ‘love’ in this context as ‘engaging others with a positive attitude that unlocks their potential’. It follows that we should cherish rather than intimidate people who are willing to take up responsibility within a system that has lost its obviousness. Their willingness to continuously improve themselves will turn out to be most useful in a society which can only benefit from judicial loyalty to the ideas that shape our institutions (i.e. institutional loyalty) rather than *personal*³⁵ loyalty (to superiors etc.).

c) Loyal Judges as People with Faces and Voices

16. Even fierce criticism by judges does not necessarily indicate disloyalty entailing inability to further assume the great responsibilities that come with judicial office. Quite the opposite, we would say. When judges ventilate discontent and when they propose ways in which the deficiencies they perceive as public authorities – and therefore privileged witnesses – could be mended, this rather seems to demonstrate a loyal commitment society should embrace.

17. Loyalty in this respect (i.e. loyalty towards an institution) presupposes, according to Professor PATTYN, a critical identification with the objectives of the institution one is committed to. As a consequence, the modification of the institution’s objectives will entail

³³ C.W. LANGFRED, “Too Much of a good Thing? Negative Effects of High Trust and Individual Autonomy in Self-Management Teams”, *Academy of Management Journal* 2004, Vol. 47, 385–399, accessible via <http://mason.gmu.edu/~clangfre/Negativeeffects.pdf>. This author nuances however the generalized preference for trust over monitoring when it comes to achievements *within* groups.

³⁴ (Our accentuation) The quote comes from the transcript of a lecture the author gave at the 20 November 2010 UCSIA symposium on Leadership and that was subsequently published in Dutch: C. LOWNEY, “Wat leiders uit de eenentwintigste eeuw kunnen leren van Jezüeten uit de zestiende eeuw”, *Streven* November 2011, (910) 920-21.

See more in depth: C. LOWNEY, *Heroic Leadership. Best Practices from a 450-Year-Old Company that Changed the World*, Chicago, Loyola Press, 2003, 330 p.

³⁵ Cf. S.S. SOURYAL, and B.W. MCKAY, “Personal Loyalty to Superiors in Public Service”, *Crim. Just. Ethics* 1996, (44) 52, where the authors highlight that no evidence had been found to support the view that supererogatory acts are products of personal loyalty. Moreover, they believe that those acts may have nothing to do with personal loyalty but everything with professional commitment.

reflexion by the individual as to whether the new ideal(s) still respond(s) to the motivation that enabled the subject's loyalty in the first place. If such is not the case, than the individual will ventilate his discord by scrutinizing the arguments that have led to the new point of view. Loyal people have, in other words, faces and voices: they will not allow themselves to be taken for a ride. Their genuine commitment makes them the best servants one can imagine but at the same time prevents them from being considered like pawns that can be used to any purpose.³⁶

18. Assuming furthermore that the value of loyalty becomes particularly clear when people are confronted with uncertainty regarding the decision that is to be taken,³⁷ from a mere transposition of these valuable findings to our context follows that judges ought to be motivated in stead of intimidated if we want to avoid them – the “Law’s voices” – to loose their strive for excellence when such is probably needed more than ever. After all, judges are constantly working with rules that *per se* require interpretation prior to adjudication. Their discord should therefore be honoured, rather than suppressed.

III) Separate Opinions or How to Honor “the Law’s Voice”

a) A Well-established Practice in the United States and beyond

19. One of the ways to recognize the individuality of judges could be to embrace an already well thought out concept to express judicial findings, should these differ from their (direct) peers: separate opinions. Although their adoption has already been suggested in Belgian doctrine,³⁸ only very limited enthusiasm, if any, has yet been expressed in their favor. This surprises when we look at the fertile scholarship as a result of their existence in common law countries and particularly in the United States with their highly influential Federal Supreme Court as well as their judicial activism throughout history.

20. Taking into account the considerable number of fragmented decisions, scholars who are studying the precedential value of Supreme court case-law have also begun analyzing the separate opinions in this respect and not only those expressing *dissent*. Considerable scholarly efforts have indeed been undertaken to analyze the meaning, the added value and the influence of *concurring* opinions. In his lucid article, KIRMAN for example deplors that:

[e]arly defenders of the separate opinion blurred the sound distinction between concurrences and dissents. They argued that separate opinions reflect judicial responsibility, improve the quality of opinion writing, and moderate the influence of an erring majority.³⁹

21. He therefore convincingly contends that more scholarly attention should go to concurring opinions and that a distinction ought to be made between concurring opinions from the majority (“simple concurrences”) and those from the minority (“concurrences in judgment”). Doing so, both scholars and lower courts could minimize the precedential chaos that would

³⁶ The line of thought in this paragraph is borrowed and freely translated from: B. PATTYN, “Loyaliteit, motivatie en erkenning”, *Ethische Perspectieven* 2007, Vol.4, (35) 44-45.

³⁷ *Ibid.*, 35.

³⁸ Cf. *supra*, footnote 12.

³⁹ I. KIRMAN, “Standing apart to be a part: the precedential value of Supreme Court concurring opinions”, *Colum. L. Rev.*, 1995, Iss. 8, (2083) 2019, footnote 3.

rise when decisional force were to be given to a concurring opinion contradicting its corresponding majority opinion – the one that *does* have such force.⁴⁰

22. Fully realising that a judge's personality and his power to convince ultimately has considerable impact on the outcome of deliberations in which he or she is engaged, it is most interesting to see that analyses are available of a single-judge's 'trajectory' throughout the years, both highlighting constant features as well as restatements.⁴¹

b) The European Court of Human Rights as Righteous In-between

23. Closer to home, Belgium might easily convince itself of the beneficent role of separate opinions when considering the importance they have had since the very beginning of Strasbourg case-law. As a founding Member State of the Council of Europe, Belgium agreed upon the provision enabling the ECHR judges to add separate opinions to the Court's verdicts.⁴²

24. Although secrecy of deliberations is also honoured within the ECHR,⁴³ the possibility to attach a separate opinion has given rise to very interesting research, as shown for instance in a British study conducted by WHITE and BOUSSIAKOU.⁴⁴ These authors conclude that the extent to which a judge joins his/her individual voice to a Court's verdict through a separate opinion, is largely determined by his/her temperament, shaped both by his/her prior experience and his/her value set. They furthermore estimate that it are the differential views of the requirements of a democratic society, reflecting the value pluralism at the heart of the Convention, that account for most of the dissenting opinions. Research by the Dutch scholar BRUINSMA has furthermore shown a connection between the background of the judges composing the Court's Grand Chambers (academia, judiciary, etc.) and their *a priori* favorable attitude towards either the *Raison d'Etat* (i.e. the defending Member State) or the applicant.⁴⁵

25. Remaining the most developed scheme of international human rights protection with the Court as the most active judicial organ in the field,⁴⁶ it is evident that its guidance shall not be neglected when looking for inspiration on how to adapt a judicial system to contemporary challenges. One of these challenges is to deliver tailor-made verdicts that simultaneously transcend the matter of the facts brought before the Court. Given its ever-increasing

⁴⁰ *Ibid.*

⁴¹ An impressive example of such undertaking is to be found in: R.F. BLOMQUIST, "Concurrence, Posner-Style: Ten Ways to Look at the Concurring Opinions of Richard A. Posner", *Alb. L. Rev.* 2008, 37-113, where the author didn't limit himself to an analysis of the opinions of this renowned scholar and Court of Appeals Judge (7th Circuit) but also explored some larger goals of judicial concurring opinions, in a broader perspective.

⁴² Article 45, §2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: the Convention) indeed foresees that any judge shall be entitled to deliver a separate opinion if a judgment does not represent, in whole or in part, the unanimous opinion of the judges.

⁴³ The Court stressed this in article IV of its *Resolution on Judicial Ethics* as adopted by the plenary Court on 23 June 2008, accessible through www.echr.coe.int > 'How the Court works' > 'Judicial ethics'.

⁴⁴ R.C.A. WHITE and I. BOUSSIAKOU, "Separate Opinions in the European Court of Human Rights", *Hum. R. L. Rev.* 2009, (37) 59, with references.

⁴⁵ F.J. BRUINSMA, "The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006)", *Recht der Werkelijkheid*, 2007, Iss. 2, (7) 21, accessible through <http://igitur-archive.library.uu.nl/law/2008-0613-200337/UUindex.html>.

⁴⁶ Cf. J.G. MERRILLS, *The development of international law by the European Court of Human Rights*, Manchester, Manchester university press, 1993 (2nd Ed.), ix.

caseload⁴⁷ – a shared phenomenon throughout western democracies where judges also seem to take over the role once left to the clergy⁴⁸ – the Court risks to succumb to formalism in spite of its obvious and honorable commitments. In this respect, WHITE and BOUSSIAKOU welcome the efforts deployed in well thought out separate opinions, concluding their article with the observation that:

[s]eparate opinions have been symbolic in the creation of a European human rights discourse because they are personal voices in that discourse which qualify the institutional voice of the Court. Strasbourg judges respect each other's views and despite the workload do not shirk deeply held personal responsibilities to state their views where they disagree as to outcome or reasoning in cases coming before them. Those personal voices are to be welcomed as an antidote to an increasingly formulaic style of judicial reasoning in the judgments of the Court.⁴⁹

c) **Belgium's Momentum**

26. Numerous reasons can therefore be given as to why the actual Belgian context lends itself perfectly for a mentality change regarding separate opinions.

First, the Belgian justice system as a whole faces an enduring and well-documented crisis of confidence.⁵⁰ Secondly, the Belgian context does not drastically differ from that in other countries where parliamentary democracy as a whole is also suffering serious blows (e.g. the diminishing tension between the legislative and the executive branch). Thirdly, the aforementioned public outcries by magistrates have become very numerous over the last few years with fierce debates as a result. Fourthly, renowned Belgian scholars have already advocated the adoption of separate opinions,⁵¹ rightly problematizing the formality and conciseness “à la française” of the motivational practice of Belgium's highest courts.⁵²

27. Last but not least, Belgium already has a top-level judge within the ECHR whose separate opinions have deeply impressed the international legal community. Françoise TULKENS, one of the Court's actual Vice-Presidents, is known for her genuinely loyal – and therefore critical⁵³ – stance towards Strasbourg case-law. Doing so, she appended an extraordinary dissenting opinion to the final judgment in the *Leyla Sahin* case (2005) opposing a Turkish medical student to her government with regard to the ban on wearing Islamic veils that had

⁴⁷ On 31 October, no less than 153.850 cases were pending before one of the Court's judicial formation: www.echr.coe.int > 'statistical information' > 'pending cases'.

⁴⁸ Parallels are indeed drawn between judges on the one hand, and priests (P. LEGENDRE, *L'empire de la vérité*, Parijs, Fayard, 1983, 51-52; F. RIGAUX, *La loi des juges*, Parijs, Odile Jacob, 1997, 260, who mentions a “sacralité de la loi, jointe à la sainteté conférée aux prêtres du culte nouveau”) or even popes, on the other hand (R. DWORKIN, “The Judge's New Role: Should Personal Convictions Count?”, *International Journal of Criminal Justice*, 2003, 11-12, referring specifically to constitutional judges; R. DWORKIN, “The Secular Papacy”, in R. BADINTER, S. G. BREYER (eds.), *Judges in contemporary democracy: an international conversation*, New York, New York University Press, 2004, 67 et seq.).

⁴⁹ R.C.A. WHITE and I. BOUSSIAKOU, *l.c.*, 60.

⁵⁰ Three consecutive so-called Justice Barometers (*Justitiebarometers / Baromètres de la Justice*) were used to measure public confidence in Belgium's law enforcement machinery on a quantitative and qualitative level: S. PARMENTIER, G. VERVAEKE, J. GOETHALS et al., *Justitie doorgelicht. De resultaten van de eerste Belgische "justitiebarometer"*, Ghent, Academia Press, 2004, 118p.; HOGE RAAD VOOR DE JUSTITIE, *De Belgen en justitie in 2007. Resultaten van de tweede justitiebarometer*, Brussels, Bruylant, 2007, 76 p.; HOGE RAAD VOOR DE JUSTITIE, *De Belgen en justitie in 2010. Resultaten van de derde justitiebarometer*, Ghent, Story, 2010, 172 p.

⁵¹ Cf. *supra*, footnote 12. See also: M. VAN HOECKE, *Law as communication*, Oxford, Hart, 2002, 204.

⁵² See also the aforementioned M. ADAMS, *l.c.*, 1498-1510 and R.C.A. WHITE and I. BOUSSIAKOU, *l.c.*, 60.

⁵³ Cf. *supra*, § 17.

caused her expulsion from university.⁵⁴ In its Grand Chamber judgment, the Court unanimously decided that articles 8, 10 and 14 of the convention had been violated, and furthermore judged with sixteen votes to one – that of the Belgian judge – that article 9 of the Convention and article 2 of its First Additional Protocol were not violated. No wonder, this judgment and its dissenting opinion received worldwide scholarly attention in the following years.⁵⁵ After more than a decade of Strasbourg experience, judge TULKENS remains relentlessly committed to her quest for justice as her separate opinions – often endorsed by her peers – continue to show.⁵⁶

Concluding Remarks

28. On the past pages, we have made the case for separate opinions to be introduced in Belgium's legal framework. After pointing out both the institutional and political reasons for what can be considered "judicial loneliness", we have shown that judicial loyalty as conceived in French revolutionary law no longer constitutes an adequate response to the obvious reality of Belgian judges standing up for what they deem to be necessary criticisms to a system that has undergone significant change. After proposing an alternative concept of loyalty, we have then contended that the time for Belgium to adopt a well-known feature of (not only) common law has never been better.

29. When it comes to judges assuming a more prominent role in guiding their *polis*, common law systems have a considerable advantage. Despite the controversy as a result of the recently appointed USSC Justice SOTOMAYOR who stated that "Courts [of Appeal] is where policy is made",⁵⁷ a lot of truth lays in it. Ethically speaking, the issue is indeed not who delivers the message but what the message is.⁵⁸ Next to focussing on how the French judicial system will evolve, it is therefore commendable that Belgian authorities start by drawing more inspiration from countries with a laudable experience when it comes to cherishing judges whose opinions constitute a true enrichment of the public debate (e.g. the aforementioned judge POSNER).

30. If judges resign as a result of defeatism – which, by the way, increasingly often seems to be the case in Belgium – what do ordinary citizens have to think? And although it may not be necessary for a society to have each of its members being fully committed to its institutions, HART already showed us more than half a century ago (1961) how those who play a pivotal role – and judges surely do – cannot chaotically despair without threatening society's sustainability (cf. the author's famous distinction between the internal and external points of

⁵⁴ For an elaborate discussion of this case in its broader context, see: R. REBOUCHÉ, "Substance of Substantive Equality: Gender Equality and Turkey's Headscarf Debate", 24 *Am. U. Int'l L. Rev.* 2009, 711-737.

⁵⁵ See among many others: A. ULUSOY, "The Islamic Headscarf Problem before Secular Legal Systems: Factual and Legal Developments in Turkish, French and European Human Rights Laws", *European Journal of Migration and Law* 2007/4, 419-433; D.L. RHODE, "The Injustice of Appearance", *Stanford L. Rev.* 2008-09, (1033) 1094; R. REBOUCHÉ, *l.c.*, 722-724; V.K. VOJDIK, "Politics of the Headscarf in Turkey: Masculinities, Feminism, and the construction of collective identities", *Harv. J.L. & Gender* 2010, (661) 670; M.H.Th.D. TEN NAPEL and F.H.K. THEISSEN, "The Judicial Protection of Religious Symbols in Europe's Public Educational Institutions: Thank God for Canada and South Africa", *Muslim World Journal of Human Rights* October 2011, 1-24;

⁵⁶ For a recent example: ECHR (Grand Chamber) 3 November 2011, *S.H. and others vs. Austria*, where TULKENS's dissenting opinion was joined by judges HIRVELÄ, TRAJKOVSKA and TSOTSORIA.

⁵⁷ The observation was recorded during a conference at *Duke University Law School* (*The Washington Post*, 27 mei 2009, www.washingtonpost.com).

⁵⁸ Cf. S.S. SOURYAL, and B.W. MCKAY, *l.c.*, 55.

view of law and rules).⁵⁹ By somehow institutionalizing judicial dissent, thus honouring the alternative opinions held by those who are called upon to alleviate social tensions where the two other branches of MONTESQUIEU's *Trias Politica* often seem to forfeit, Belgium could, in other words, demonstrate a truly democratic attitude which unavoidably has to boil down to tolerating and even cherishing the impure.⁶⁰

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⁵⁹ H.L.A. HART, *The Concept of Law*, Oxford, Clarendon, 1997 (2nd. Ed.), 328 p.

⁶⁰ A. VANDEVELDE, "Is het kapitalisme ethisch?", *Streven* October 2005, 805 et seq. The author concludes his contribution with the contention that "however contemporary social criticism may sprout from a desire towards purity, it must nevertheless lead to accepting ambivalence" (our translation). See also the constant feature of ECHR jurisprudence according to which pluralism, tolerance and broadmindedness are the characteristics of a democratic society (R.C.A. WHITE and I. BOUSSIAKOU, *l.c.*, 59).

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