

Modality and Linguistic Features of Dissenting Opinions

Olga A. Krapivkina

National Research Irkutsk State Technical University,
664074, 83, Lermontov St., Irkutsk, Russia

Abstract: The attention to the issue of judicial dissenting is caused by growing popularity of this discourse genre among the judges of the Russian Constitutional Court. The article has investigated the nature of the dissenting opinion, its tone and main features from linguistic points of view. 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 his or her own identity.

Key words: Dissenting opinion • Majority opinion • Judge • Individualistic Voice • Institutionalism
• Linguistic Marker • Speaking Subject • Pronoun

INTRODUCTION

One of the main principles of 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 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. So the issue of dissension in judiciary has largely escaped Russian academic attention. This issue has only seldom made appearance in contemporary academic researches [1, 2, 6, 11, 20].

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

the courts and judges. The growing popularity of dissenting opinions as a judicial genre requires more researches on its linguistic and pragmatic nature. Unfortunately, there are only few studies on genre peculiarities of dissents [4-12]. So this issue is relevant and calls for comprehensive study.

MATERIALS AND METHODS

The methods applied for this study are based on qualitative and comparative analysis of linguistic features of dissenting opinions written by Russian judges. The qualitative approach aims to investigate the pragmatics of dissenting discourse, its tone and find out its linguistic features. The comparative approach has been applied to see the differences in the ranges of linguistic units Russian judges use to express their views and opinions.

For the linguistic analysis of dissenting opinions, more than 70 texts authored by Russian judges have been thoroughly examined. The texts have been selected at random. From the Information Legal Database *Garant* <http://base.garant.ru>.

RESULTS

Roots of dissents can be found in common law countries. The British collegial common law courts decide *seriatim* (separately)-they present not only one judgment

but make collective judgments. Each judge says in an order how he would decide the case at hand [16]. That style of decision making, as Laffranque [12] writes, was adopted in the United States, but it was abandoned there at the end of the 18th century [12]. 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 [16]. 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 in the fact that the tradition of public debate belongs among the fundamental building blocks of the organization of state in the common law (legal) system [16]. 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 [3]. 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 [12].

In Russia, the submission of dissents in writing was established by Katherine the Great (1762-1796) in her Institutions for the Government of Provinces (1775).

A judicial opinion can be defined as an opinion of a judge or a group of judges accompanying and explaining 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, judicial opinions are of two types—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 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.

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:

- Supplementing, interpreting, or challenging the reasoning of the majority opinion,
- Evaluating the majority opinion,
- Revealing its errors,
- Voicing disagreement 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 [4], judicial opinions are characterized by four traits: “the monologic voice, the interrogative mode, the declarative tone and the rhetoric of inevitability”. The monologic voice enables the Court composed of several individuals to speak with 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 voice the position of the court and speak for 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 traits: "an individualistic tone, a skeptical voice, a democratic standard and an advocacy medium" [13].

In the dissent, the judge is allowed to position him/herself as a subject of free will deliberately determining discourse. The judge expresses his/her opinion in a tone that is reflective of his personal view about the legal issue. The first-person singular pronoun helps him 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, challenges the validity of their reasoning and position, questions his peers' legal expertise. They oppose their own views to the majority opinion which they deem to be untrue and incorrect.

Modality of Dissenting Opinions: To step away from the dry theory, let us focus on the statement from the dissenting opinion of a Russian Constitutional Judge:

- The constitutional regime based on blood, people's grief and trouble doesn't 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 [15] (Translation mine).

Judge 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 *I* labels the statement as a personal opinion that does not claim to be the ultimate truth. The lexical marker of the subjective modality *believe* helps Luchin 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:

- 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 [18]. (Translation mine)

Judge 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 [13: 30] claims that dissenters are freed 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 in the statement from his dissenting opinion below 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:

- 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 [10]. (Translation mine)

Having the purpose to undermine the authority of the Court and its members as keepers of the Constitution, Judge 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 *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 himself if it is possible to voice your 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 [11] 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.

- Such a position is unacceptable to me. I am convinced 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 in Article 10 of the Constitution [15]. (Translation mine)

Judge Luchin uses the personal pronouns *I* and *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 *I* combined with the mental process construction *am convinced* helps the author personalize his statement signaling that it is his individual voice, juxtapose himself as a person against the institutional body.

- According to the information available to the Constitutional Court, the situation that had arisen in the Chechen Republic should indeed be termed extraordinary and on this point I am in full agreement with the Court's decision. [19]. (Translation mine)

Judge Zorkin uses I-pronoun to express his personal agreement with the Court's agreement. If Judge Luchin uses I to oppose himself to the Court, Zorkin on the contrary expresses solidarity with the help of *I*.

Judge Ametistov like judge Luchin uses the first-person pronoun to juxtapose himself against the majority whose opinion he criticizes:

- The above said makes me disagree with the Resolution of the Court. It makes me state violations of Article 184 by the majority opinion [1]. (Translation mine)

The opposition effect is made by the contrastive use of two lexical units-me-Court. The pronoun *me* helps Judge 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:

- Vyrzhayu svoyo osoboe mnenie [(I) express my personal opinion] [9]. (Translation mine)

The rules of the synthetic Russian language admit omitting the pronoun *I* before the verb. After all, the end of the verb *vyrzhayu* [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 our 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 *I* 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, we have concluded that the personal pronoun *I* 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):

- To identify the judge as a person with the majority as an institutional body;
- However sense restoration and prima facie evidence were beyond the scope of our duty [10]. (Translation mine).

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

- To identify the judge as an individual with the Russian nation or another community;
- 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 [19]. (Translation mine)

In the above example, *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 [8] says that the writer can use inclusive *we* to "guide readers through an argument and towards a preferred interpretation of a phenomenon" [ibid: 560]. The ultimate aim of the writer is, after all, to secure ratification for their claims [5-16]; 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 [7].

To Identify The Judge With Humanity:

- As years are passing by, we shall see the wisdom of the statement: 'Freedom of the press ensures freedom of people' [18, 19]. (Translation mine)

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

CONCLUSION

The article has investigated the nature of the dissenting opinion, its main traits and functions in judiciary from linguistic point of view.

It has been proved that 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. The present analysis has shown that there is a "higher tendency among dissenters to make explicit their authorial presence in the texts. One of the most evident tools signaling the freedom of dissenters is I-pronoun which is used:

- To position themselves as persons, not as members of the Court, to express their individual opinion;
- To indicate that they assume responsibility for the choices they make;

- To show that their personal intentions differ from those of the majority, to juxtapose themselves against the majority.

REFERENCES

1. Ametistov, E.M., 1993. Osoboye Mnenie K Zaklucheniyu Konstitutsionnogo Suda RF #Z-1 [Dissenting Opinion to the RF Constitutional Court's Conclusion, 1. Date views 23.04.2010. <http://base.garant.ru>.
2. Basangov, D.A., 2006. The Legal Nature of the Dissenting Opinion of the Judge of the Constitutional Court of the Russian Federation [Pravovaia priroda osobogo mneniia sud'i Konstitutsionnogo Suda Rossiiskoi Federatsii]. *Journal of the Russian Law*, 1: 24-34.
3. David, R., 1973. *Les grand systems de droit contemporains*, Paris, Dalloz, pp: 553.
4. Ferguson, R.A., 1990. The Judicial Opinion as a Literary Genre. *Yale Journal of Law and Humanities*, 2: 201-219.
5. Gilbert, G.N., 1977. Referencing as persuasion. *Social Studies of Science*, 7: 113-22.
6. Hadjiev, G.A., 2005. Publication of dissenting opinions [Publikatsiia osobykh mneni]. Date views 05.02.2009. www.medialaw.kiev.ua/zmisud/sudanalyka/195/.
7. 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.
8. Hyland, K., 2001. Bringing in the reader: Addressee features in academic articles. *Written Communication*, 18(4): 549-574.
9. Kononov, A.L., 1995. Osoboye Mnenie K Postanovleniyu Konstitutsionnogo Suda RF #10 [Dissenting Opinion to the RF Constitutional Court's Ruling #10] Date views 23.04.2010. <http://base.garant.ru>.
10. Kononov, A.L., 2005. Osoboye Mnenie k Postanovleniyu Konstitutsionnogo Suda RF #13 [Dissenting Opinion to the RF Constitutional Court's Ruling No 13] Date views 25.04.2010. <http://base.garant.ru>.
11. Kononov, A.L., 2006. Right to dissenting opinions [Pravo na osoboe mnenie]. *Zakon*, 11: 26-34.
12. Laffranque, J., 2003. Dissenting Opinion and Judicial Independence. *Juridica International*, 8: 162-172.
13. Langford, C.L., 2009. Toward a Genre of Judicial Dissent: Lochner and Casey as Exemplars. *Communication Law Review*, 9(2): 1-12.
14. Latour, B., 1987. *Science in Action: How to Follow Scientists and Engineers through Society*. Milton Keynes: Open University Press, pp: 274.
15. Luchin, V.O., 1995. Osoboye Mnenie k Postanovleniyu Konstitutsionnogo Suda RF #10 [Dissenting Opinion to the RF Constitutional Court's Ruling #10]. Date views 05.05.2010. <http://base.garant.ru>.
16. Rupp, H.G., 1966. Zur Frage der Dissenting Opinion. *Die moderne Demokratie und ihr Recht. FS für Gerhard Leibholz*, Tübingen Mohr, ss, 531.
17. Vereshchagin, A.N., 2007. *Judicial Law-Making in Post-Soviet Russia*, NY. Routledge, pp: 288.
18. Yaroslavtsev, V.G., 2003. Osoboye Mnenie K Postanovleniyu Konstitutsionnogo Suda RF #15 [Dissenting Opinion to the RF Constitutional Court's Ruling #15]. Date views 05.05.2010. <http://base.garant.ru>.
19. Zorkin, V.D., 1995. Osoboye Mnenie K Postanovleniyu Konstitutsionnogo Suda RF #10 [Dissenting Opinion to the RF Constitutional Court's Ruling #10]. Date views 06.05.2010. <http://base.garant.ru>.