

COLLEGIALITY AND DISSENT IN POLISH ADMINISTRATIVE COURTS: EXPLORING JUDICIAL INTERACTIONS / Maciej Wojciechowski

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Abstract: *This article addresses a gap in existing research by focusing on the often-neglected realm of judicial interactions and internal dynamics within specific courts concerning the phenomenon of *votum separatum*. We examine the forms and practices of collegiality within Polish administrative courts and their influence on judges' decisions to file dissenting opinions. Additionally, we investigate the reactions of fellow judges when a dissent is announced.*

Our qualitative research methodology relies on in-depth interviews to prevent the imposition of predefined categories. Participants were encouraged to recount their experiences related to composing or participating in decisions involving dissenting opinions. This approach led to the emergence of categories related to collegiality, its functions, and inherent tensions.

Our findings reveal that collegiality manifests in various forms beyond panel deliberations. Notably, our research uncovers the existence of departmental meetings in provincial administrative courts where issues addressed in dissenting opinions are discussed. Furthermore, judges' perspectives indicate that the most common scenario leading to dissenting opinions arises when judges from different panels reach opposing decisions. This dilemma prompts judges to choose between adhering to the initial panel's decision or voting for a divergent position proposed by the second panel.

Finally, our observations within courtrooms highlight that the ideal of the dispassionate judge does not exclude subtle expressions of surprise or disappointment. These findings enrich our understanding of judicial interactions, shedding light on the complexities of collegiality and dissent within the context of Polish administrative courts.

Key words: *Dissent; Dissenting Opinion; Collegiality; Judges; Judicial Independence; Law and Emotions*

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1. INTRODUCTION

Dissent is omnipresent in society and is a fundamental component of human interaction (Kissent, 2011 p. 17). Indeed, the history of the world is a collective story of dissent against the existing social order (slave uprisings and peasant revolts) or legal

authority (e.g., national uprisings). Individual dissent may take tragic forms, such as the self-immolation of Ryszard Siwiec in 1968 in protest against the intervention of the Warsaw Treaty's armies in Czechoslovakia, or it may occur in form of organisational settings (Kissent, 2011, p. 22), as in 1976, when the Polish Parliament passed the amendment of the Constitution of 1952 on the leading role of the Polish United Communist Party and only one member of Parliament (Stanisław Stomma) abstained from the vote. Judicial dissent is an example of an objection taken in organisational settings allowed by legal rules against decisions made by the collegial body by one of its members.

Judicial dissent constitutes a theoretical challenge for legal scholars based on the assumption that the law is predictable, determined, and objective. It is also a challenge for the lawmaker to deal with undermining official authority (Mistry, 2023, p. 6). There are legal systems in which dissenting opinions are not allowed (e.g., France) or concealed (e.g., Spain) (Nadelmann, 1959, p. 420). The prohibition of the judges' right to dissent is associated with civil law countries (Ginsburg, 2010, p. 2). Judicial dissents are allowed in countries like Denmark, Germany, Estonia, and Poland, to name only a few (Laffranque, 2003, p. 165). Generally, judicial dissent is a feature of the common law culture, with its British origin of opinions separately announced by each judge (Ginsburg, 1990, p. 133; Henderson, 2007, p. 294). This diversity is reflected by discussions of the legitimacy of judges' rights to dissent (Lynch, 2016). On the one hand, dissenting opinions impair the credibility of the court (Donald, 2019, p. 323) and its judgments, endanger its authority and reduce its persuasiveness (Laffranque, 2003, p. 170). On the other hand, dissent guarantees that the case is fully considered (Fuld, 1962, p. 927). It also protects judicial independence and helps point out errors made by the court (Ginsburg, 1990, p. 4). Dissenting opinions can help disclose inconsistencies in the legal system (Hettinger, Lindquist and Martinek, 2003, p. 217) and thus "make the law better" (Henderson, 2007, p. 217).

Judicial dissent is a legal phenomenon also of interest to political science. These studies primarily focus on explaining judges' decisions to dissent, assuming that legal doctrines do not fully explain judicial votes (Brace and Hall, 1993, p. 914). Different factors have been hypothesised to explain judges' decision to dissent: political and ideological preferences (attitudinal model) and structural factors such as the presence of an intermediate appellate court, opinion assignment, workload, or the number of judges sitting on the panel (institutional model). The attitudinal model was identified with reference to the U.S. Supreme Court (Segal and Spaeth, 2002) and U.S. Courts of Appeal, where the cautious conclusions of one study stated that female judges were more likely to support victims of discrimination (Songer, Davis and Haire, 1994, p. 435). For some time, integrated approaches have been tested, such as the neo-institutional perspective, which assumes that judges' decisions are the result of the interaction of preferences, legal rules, and structures (Brace and Hall, 1993, p. 915). As an integral approach, we might consider the "collegial political model of dissent" that views dissent as a function of political, institutional, and legal (in the form of ambiguity and complexity of issues) factors, but also of the style of leadership of chief justices (Songer, 2011, p. 394). This model was tested in relation to cases decided by the Supreme Court of Canada, showing that factors such as political and legal salience, both reversal and complexity of the issue, and panel size (i.e., dissent is more likely to appear in larger panels) had an impact on the likelihood of dissent (Songer 2011, p. 404). Another approach that could be labelled integral is based on the assumption that judges' decision to dissent mirrors their policy goals within an institutional environment and within legal constraints in the form of legal doctrine.

The above studies, based mostly on quantitative methodologies, do not include factors described as "interpersonal environment" (Donald, 2019, p. 328) or the "internal dynamics of the court" (Kelemen, 2013, p. 1346). These labels refer to all types of interactions between judges before delivering a decision. Interactions among judges within organisational settings have rarely been investigated (MacFarlane, 2010, p. 394). Disagreements during deliberation do not always lead to dissenting opinions. One of the reasons is a dissent aversion, "which sometimes causes a judge not to dissent even when he disagrees with the decision" (Posner, 2010; Epstein, Landes and Posner, 2011, p. 102). Therefore, one can distinguish between the reasons for disagreement between judges on the panel and the reasons that lead a particular judge to dissent. The former are usually laid out in the court's and dissenting opinions, and the latter may lie, at least in part, in some factors in the interactive space (Donald, 2019, p. 328). This space includes behaviour prescribed by legal norms, such as judicial conferences but also informal conversations among judges, which are merely a consequence of proximity in the workplace. Insofar as these engagements are directed towards the collective determination of a course of action, the formulation of a stance, or the examination of a legal problem, they align with the principle of collegiality. I draw a distinction between two facets of collegiality: the formal and the functional. In the formal sense, collegiality merely signifies that a particular decision is rendered through the involvement of multiple individuals. Besides the formal meaning of collegiality, this term can also be understood functionally as constituting a set of expectations that a decision, within certain limits, will be reached jointly by members of a given body, meaning that points of view of all members of the panel will be taken into account. As Judge Edwards has put it (Edwards, 2003, p. 1643), collegiality is a "process that helps to create the conditions for principled agreement". This meaning of collegiality focuses on interactions among members of a group (Cross, 2008, p. 257). It is the willingness to listen to and consider the views of other members (Tacha, 1995, p. 587).

The act of judicial dissent challenges the foundational tenets of collegiality, both in its formal and functional dimensions. In the formal sense, dissent manifests as a member of the panel distancing themselves from the majority's decision. However, the correlation between judicial dissent and collegiality in the functional sense is nuanced and contingent upon the nature of interactions during deliberations. If not, every argument advanced by each member of the panel receives equitable consideration from their peers, and if certain judges fail to demonstrate openness to alternative viewpoints and the potential fallibility of their own positions, then a dissenting opinion may emerge as a consequence, potentially undermining the functionally understood principle of collegiality. Nevertheless, this form of collegiality remains uncompromised when the discourse adheres to the criteria of what J. Habermas famously coined as an "ideal speech situation" (Habermas, 1984), even in instances where the judges fail to converge on a shared stance. This article seeks to elucidate the dynamics of collegiality within the context of the institution of dissenting opinions. Specifically, it endeavours to explore the extent to which aversion to dissent can be elucidated by these collegial practices.

The article also aims at exploring the reactions of other judges to the announcement of the dissent. Judge Brennan famously stated, "Very real tensions sometimes emerge when one confronts a colleague with a dissent. Therefore, collegiality is an important factor. (...) Feelings must be respected" (Brennan, 1985, p. 429). One of the objectives of this study was to analyse whether and what kind of tensions arise when a judge announces their dissent. The claim that judges sometimes display feelings as a result of dissent announcements may seem to undermine the traditional ideal of a dispassionate judge. According to this ideal, a judge makes decisions free from emotional

factors that may influence his judgment (Hobbes, 1997, p. 147). This idea mainly concerns the relationship between the judge and the case. One can argue that, in relation to other judges, the attitude of professional indifference regarding judicial dissent is required as the derivative of the ideal of a dispassionate judge. This attitude is a set of relatively constant dispositions toward another judge's dissent, expecting such a decision to be respected. As we shall show, respect does not exclude displaying discreet and subtle reactions, which we claim to be consistent with the attitudes of professional indifference.

The first section of this paper examines the functions and various manifestations of collegiality, as it represents an essential prerequisite for submitting a dissenting opinion. It illustrates why collegiality is a crucial value for judges while also addressing the tensions that may arise regarding judicial independence. The second part of the paper attempts to outline the reasons for dissent, utilizing the distinction from the philosophy of action between normative and motivational reasons. The third section of this paper outlines the reasons contributing to judges' dissent aversion. In the final part, the article examines the internal workings of judicial deliberations by providing a glimpse into situations where judges' reactions to the announcement of a dissenting opinion were observed. The article concludes with a depiction of a situation challenging the prevalent agonistic understanding of dissent, in which the adjudicating panel adopted a separate opinion as a joint agreement.

2. METHODOLOGICAL NOTE

As the research objective was to learn about judges' deliberations, decision-making dilemmas, feelings, and interactions with other judges, qualitative research methods in the form of in-depth interviews were used. Sixteen interviews were conducted with 17 administrative court judges. Of these, 12 interviews were conducted with judges of the Provincial Administrative Courts (PAC) and 4 with judges of the Supreme Administrative Court (SAC). Interviewees were selected based on their accessibility, and judges constitute the professional elite and are part of a hard-to-reach research environment (Jaremba and Mak, 2014, p. 7; Pierce, 2002, p. 133). There were requirements to be fulfilled to have an opportunity to ask the judges for their consent to converse. Requesting the judges' consent was preceded by obtaining approval from the Chief Judge. In the case of PAC, letters were directed to the Chief Judges of the courts that had the highest number of dissenting opinions. Together with the "formal" path, the judges' consent to the interview was sought using personal recommendations, which was the most effective method. In some cases, the interviewed judges offered help reaching another judge. In a few cases in which a formal path was sufficient, the information that the judge agreed to hold the interview came from the relevant court registry. Requests were directed to judges who had submitted a dissenting opinion or sat in a panel, one of whose members dissented at least once. All the judges interviewed submitted at least one dissent in their careers. The interviews were conducted in person by the author between 2015 and 2017 and lasted between one and two hours. Conversations were recorded and transcribed by a third party. The interviews were mostly conducted at the judge's workplace. Skype was used twice. The interviews were transcribed verbatim to depict the judges' statements better. The interviews were analysed using the QDA Miner program, which encoded the content of the statements. Coding was performed through manual word selection after a careful analysis of the transcripts and by listening to the recordings (Kaufmann, 2007, p. 122). Based on the interviews, a questionnaire was developed and sent to all judges of the administrative

courts. A total of 600 questionnaires were sent, and 140 were returned. Most came from PAC judges (over 80%).

3. COLLEGIALITY - MODES OF DELIBERATION

There are different modes of deliberating legal matters in Polish administrative courts. The first and most fundamental are meetings of adjudicating panels. Both PACs and SAC rely on three-judge panels. Polish law provides for two types of conferences for adjudicating panels: The first takes place before the hearing (pre-session meeting) and the second after the hearing. Three-person adjudication panels operate in the "session mode." The term "session" means the date on which the panel hears matters. The judges call the preliminary conferences "session conferences," "pre-session conferences," and "the eve of the conference." The cases to be heard are discussed at these conferences. Usually, a pre-session conference takes place the day before the session. A session day is a day on which several or even a dozen cases are heard. This group of cases is divided so that each panel member acts as a rapporteur in some cases. For example, if a session comprised 12 cases, there were 4 cases for each of the three bench members. Thus, the pre-session conference consisted of each rapporteur presenting his cases.

Of the two types of meetings of the adjudicating panel, the one that takes place after the hearing is crucial in public perception. It is commonly believed that the decision on the verdict is made during this meeting. The pre-session meeting is not commonly known. Its significance is the subject of legal knowledge of representatives appearing in administrative courts, but rather not of those without legal training. In practice, pre-session meeting is at least equally critical for the judges themselves as the meeting after the hearing. One of the judges (PAC) compared the role of the pre-session meeting to address rehearsal and presentation: "The hearing is just a presentation. Everything should already be prepared." This preparation also includes the draft judgment. Moreover, one of the judges considered the lack of such a proposal "unimaginable" and a crucial element of substantive preparation for the trial. A crucial role of a pre-session meeting does not mean that the panel session after the hearing cannot change the findings from the pre-session meeting. Judges admit that such situations do occur, for example, due to an attorney's argumentation, but they do not seem to be expected. In a situation where the hearing did not bring anything new to the case, the meeting afterward may often be reduced to a brief exchange of views or confirmation that the pre-session meeting agreements are still valid.

"(...) After the closed hearing, there is a final discussion where we summarize everything that has been said so far and ensure everyone agrees. That is how it technically works. I remember that is when I changed my mind, which led to a separate opinion." (PAC)

The statement pertains to a situation in which a judge decided to dissent only during the final meeting. In the presented situation, the change of opinion was probably a surprise for the other two judges. We do not know the reasons for this change (the judge stated that even if he remembered, he could not say), but this is an example of a situation in which collegiality did not prevent a judge from dissenting. More often, collegiality plays a role as a factor in improving the quality of decisions by triggering the reflexivity of a judge.

"You open the files, you look at these files and think: Yes, I've had a similar case before. Well, I can go in that direction. That is why there is a three-person panel that will

say, (...) listen, but have you thought about this and that. I think to myself, thank God that someone has brought it to my attention. That is what is valuable in this job. Very valuable." (PAC)

For this judge, work experience had produced specific patterns of reasoning and behaviour that made it easier to deal with many cases. Nevertheless, the established patterns developed thus far may foster a tendency towards oversimplification, potentially blinding us to the intricacies of individual cases. Within the judge's statement, there is a discernible sense of gratitude for the involvement of fellow judges in drawing attention to these specifics. However, it is worth noting that this collaboration does not always transpire, partly due to the sheer volume of cases under consideration.

From the vantage point of an external observer, it becomes challenging to distinguish between scenarios in which judges on the panel actively voices their perspective and instances where other judges passively endorse the proposed resolution set forth by the rapporteur judge. One possible indicator that this has occurred may be a divergence in case law.

"Here, someone has already issued a judgment sloppily because he did not notice the problem. It also happens. (...) I have already experienced something like this, for example, as a rapporteur. I have done something like this on the panel. As I did not notice the problem, it ended poorly." (PAC)

The problem referred to by the PAC judge, whether in terms of the applied legal rules or facts of the case, is the possibility that a different panel of the same court could decide a similar case in a different way. The said neglect is merely a matter of failing to notice additional possibilities for interpretation. For a rapporteur, this oversight can be compared to a move in chess, which is not the best choice in the eyes of a colleague observing the game. Sometime later, the judge from the same or another PAC can decide on a similar case and see other possibilities for interpretation. Such a situation is a symptom of imaginable divergence in the case law. Such oversight is therefore a failure to recognise the "potential for disagreement" among panels of the court.

The phenomenon of legal disagreement is an integral part of legal practice. It can be explained by a characteristic of legal systems, which is the indeterminacy of their legal systems. The sources of indeterminacy are general (the presence of vague predicates and family resemblance concepts) and specific to the law, i.e., the inconsistency and contradiction of legal sources or the fact that the sets of legal reasons are "too impoverished or too rich" (Coleman and Leiter, 1993). The sources of legal indeterminacy are related to the sources of legal disagreement but are not limited to them. The legal disagreement may be caused by more subjective factors, such as divergent views on the fundamentally correct mode of legal interpretation. In the situation to which the judge refers, it is not clear whether the issue is one of legal interpretation, evaluation of evidence, or something else. However, the failure to see another way of looking at the case may be due to the fact that "sets of legal reasons are (...) too rich".

A manifestation of disagreement, which is an undesirable phenomenon in an administrative court, is the divergence of the case law. This divergence can appear on various levels:

- between panels of the same PAC or panels of the SAC,
- between panels of different PACs, and
- within a panel itself.

Dissenting opinions result from the last type of argument.

Disagreement within a panel does not concern judges as much as disparity among the panels of a given PAC. One interviewee stated that the critical issue was to avoid them.

"The whole point is that there should be uniformity among the panels of a court. The judges (on a panel) may differ." (PAC)

The distinction between disparity among panels of the same PAC (SAC) and disagreement within a panel became the content of one of the questions in the survey. Most judges (59%) supported the preferences mentioned above. These results suggest that, for judges of administrative courts, the image of the judiciary as the uniform has a greater value than uniformity within panels. The importance of consistency is also evident in responses to one of the questions in the questionnaire, what caused their resignation not to dissent when they were outvoted. Most judges (63%) reported that they had experienced this situation. Among the factors identified in the interviews and indicated in previous studies like a feeling of futility (Bratoszewski, 1973) that led to the relinquishment of the right to dissent (time taken to write an opinion, discomfort related to undermining collegiality), the presence of two or more lines of precedent regarding the same type of legal problem that a dissenting judge had in hand was also noted. The data show that this last factor was the most important for 76% of the respondents. In comparison, the factor of lack of time was important for only 22% of the judges in the survey, the feeling of pointlessness of the act for 15% of the judges, while discomfort was indicated by 14% of the judges. The data indicating that the factor of divergent jurisprudence possibly prevents judges from dissenting may indicate the responsibility of judges and their concern for the value of uniformity in the judiciary. Not submitting a dissenting opinion in such a situation is a decision not to worsen an already undesirable state of affairs. One of the informal methods employed to establish consistency within a specific court involves judicial deliberations conducted at the departmental level.

3.1 Departmental Conferences as a Deliberative Effort to Maintain Uniformity of Case Law

In the Polish administrative courts, formal collegiality is manifested not only in the work of the adjudicating panels but also in judicial discussions, in which judges of the entire department or, in case of smaller courts, judges from the entire court participate. The internal administrative court rules provide for the possibility of arranging such conferences by either the chairperson of the department or the chief justice. The rules remain silent, however, on the criteria for their organisation. During one of the interviews, an interviewee declared that it is his responsibility as chief justice to promote uniformity among the decisions of adjudicating panels. Thus, the interviewee referred to a crucial value at the system-wide level. The uniformity of courts judgments is an instrumental value enabling the realization of the value of predictability of judicial decisions. The uniformity of courts decisions is referred to "as the paramount of blind justice." The general problem with realizing this postulate is that in civil law countries, including Poland, the principle of stare decisis is not formally binding. In practice, uniformity is ensured, among other things, by following precedents of high courts. This goal is essential for judges in managerial positions. Thus, the organisation of department-wide judge conferences can be seen from their perspective as an attempt to ensure this uniformity. They are organised, for example, when it is known that there will be more complicated cases of a particular type, which means that different panels may decide differently on cases of a similar type. In practice, judges themselves initiate such deliberations.

"In the practice of the department I head, if the rapporteur sees that a case may have a broader dimension, which means that we expect similar cases to arise, for example, in connection with a change in the law, the judge rapporteur comes to me and asks me to arrange a meeting. We sit informally. This does not exempt the adjudicating panel from holding a conference because it is a set of specific judges who decide. We can express our opinion as judges of the department." (PAC)

Judges who initiate those meetings aim to reduce decision-making uncertainty by discussing the issue at hand and establishing, if possible, the best interpretation of the legal provisions. In judges' statements regarding these meetings, defensive reservations can be noticed (*"we sit informally"; "no one here forces anyone to... we are just saying: Tell me what opinion you have"*), in which concern for the image of judicial independence is resonating. Interviewees seem to feel anxious that the meetings of judges of a given department may be perceived as gatherings where approaches to types of legal cases later heard by the panels are predetermined. The description of the judges' meetings of a given department assumes a distinction between the predetermination of the legal decision and the presentation of possible approaches to the legal problem. Thus, if the above distinction is neglected, one can observe some tension between collegiality and independence. In this situation, the benefits of collegiality transform judicial independence into a constraint that necessitates the judge's formulation of such a statement.

3.2 Departmental Conferences as a Result of Judicial Dissent

The present research has identified another purpose and cause for holding departmental meetings within the PAC. Instances of dissent within the PAC resulted in letters from the Office of Case Law in the SAC to Chief Justices of relevant PACs. These letters contained requests or proposals to arrange a departmental discussion about a legal problem that gave rise to a dissenting opinion submitted by a PAC judge. Some judges have raised concerns regarding the merit of such letters and their potential to threaten their independence.

"At the beginning, when I got this type of letter, I took it as a bit of pressure (...). After all, a judge is independent. Later, it was explained that discussing the legal matter in a larger forum was just a suggestion." (PAC)

The same judge hesitated on how to describe the objective of the Office request.

"(Then) such a letter (from the Office) comes asking to re-examine such a case and not to allow such a... (pause) I don't mean "not to allow", only to re-examine whether it (disparity) actually takes place." (PAC)

A characteristic feature of this judge's statement is the hesitation in describing the purpose of such additional departmental meetings: "Re-examining and not allowing" or merely "re-examining" discrepancies. Finally, the judge opted for a non-controversial description from the perspective of judicial independence.

In the survey, one question focused on judges' attitudes toward the practice of organising departmental conferences in court to discuss legal problems and review dissenting opinions. Judges were asked to provide feedback on the statement: 'I consider

the organisation of faculty meetings, during which the dissenting opinion of a member of one of the panels is discussed, as (1) justified; (2) redundant; or (3) doubtful.' The survey results revealed that the majority of participating judges (73%) had no reservations about the relevance of such conferences. In contrast, 10% of respondents found them definitively or somewhat unnecessary, while 40% considered them entirely unnecessary. A smaller portion (23%) viewed these meetings as potential threats to judicial independence, while the majority (60%) believed that these deliberations did not raise any concerns about judicial independence.

The actions undertaken by the Office aim to achieve uniformity in case law, also understood as unanimity among adjudicating panels. The judge's statement ends with a possible goal of the potential discussion: "Whether there is a divergence (...)." The underlying assumption is the possibility of distinguishing between two types of situations. In the first case, the difference of opinions among judges can be avoided, and any dissents result from a failure to exhaust all possibilities of seeking a compromise and finding apparent or insignificant differences. Oliver Holmes had this very situation in mind when he wrote, "*The judge was not doing his sums right, and, if he had taken more trouble, agreement would inevitably come*" (Holmes, 1897, p. 465). The second situation involves a difference of opinions, which can be labelled as deep interpretative disagreements. The judge's concern about their independence would be justified if the Office's efforts related to the latter kind of disagreement. At the same time, attention should be drawn to the different roles of the value of independence in this situation. It is no longer a factor that triggers the judge's additional reservations. It traditionally appears to protect the judge against "extraneous influences and as immune to outside pressure" (Lubet, 1998, p. 61).

4. NORMATIVE AND MOTIVATIONAL REASONS FOR DISSENTING

Despite the benefits and functions of collegiality, judges do dissent. It is assumed that the written dissenting opinion does not fully explain the act but instead provides reasons for the judge's disagreement with the decision made by the panel. Other factors, besides the disagreement with the content of the decision, may influence the decision to dissent. An explanation of why judges dissent requires differentiating between the question of "What caused them to do it?" and "With what aim did they do it?" (Rescher 1966, p. 217). The contemporary causal theory of action distinguishes between normative reasons ("reasons that rationally or morally justify a particular course of action) and motivating reasons (the agent's reasons for doing something). (Davis, 2010, p. 34; O'Connor, 2010, p. 129)

It can be challenging to distinguish between those types of reasons for specific actions, such as judicial dissent. The organisational specificity of administrative courts' work associated with the panel variability can be considered a normative reason for dissent. The scenario described pertains to a situation in which a judge who had previously served as a rapporteur on a panel that rendered a decision on a particular case type (Ct) finds himself on a subsequent panel where two other judges take a different stance on the same case type, ultimately outvoting him. In schematic terms, the original decision can be denoted as D1[Ct(a, b, c)], where Ct represents a case of type t, and the letters from "a" to "c" correspond to the judges who rendered the decision. The subsequent decision can be represented as D2[Ct(a, e, f)], and if these two decisions are considered to be incompatible, the judge who initially supported D1 in the same case type (Ct) may feel compelled to issue a dissenting opinion concerning D2.

"If someone was on the panel that decided differently, and then the same thing [the same type of case] happens... Now, in order to avoid confusion, he or she submits a dissenting opinion (...)." (SAC)

The fact that a judge adjudicates in panels with different judges and that other members may adopt different interpretive positions can be regarded as normative reasons. The desire to avoid confusion is already a motivation-based reason. Other reasons of this type pointed out by judges include the need to signal a legal problem. The addressee of this type of communication may be judges of a higher court, but they can also be judges from the same court.

"If the regular panel is not convinced that there is a need to ask a formal legal question to the enlarged panel of the Supreme Administrative Court in this case because the regular panel believes that the existing line of case law should be upheld, and one of the members of the panel disagrees, then by submitting a dissenting opinion, the member is essentially preparing material or signaling to colleagues that this case is not as straightforward as it may seem. He/she says: There are other issues besides the arguments that have been raised so far that are also important. I am dissent. If you agree with me, we could either change the line of case law, since other panels would follow our understanding, or some panel will apply for an en banc review." (SAC)

In this case, submitting a separate opinion in the Supreme Administrative Court is an action motivated not only by the desire to signal a problem but also by the desire to make a particular legal issue "visible," whether due to a firm conviction of the inadequacy of previous case law, constitutional concerns or merely doubts as to whether all reasons have been considered. As we have seen above, the legal problem on which the separate opinion is based is often discussed in the broader forum of the court, so the judge making this decision may hope that other judges will adopt their reasoning and arguments in their judgments. This adoption may take the form of a direct change, where the panel of judges in certain types of cases takes a slightly different position than before due to the arguments presented, or it may take an indirect form through the issuance of *en banc* resolutions by the SAC. In this case, the signal through the separate opinion was directed at other judges of the Supreme Administrative Court.

There are also judicial dissents in which judges intent to signal constitutional doubts regarding statutory provisions the judge was forced to apply. In such a case, the dissent is, of course, directed against the decision of the majority of the panel, but in substantive terms, it challenges the content of the applicable provisions by raising doubts as to their compatibility with the Constitution.

Judges may dissent for normative and motivational reasons together. A statement containing normative and motivational reasons is from a PAC judge delegated to the Supreme Administrative Court at the time of adjudication.

"So, I was delegated, which put me in a sort of worse position. That's how the judges from the PAC who go on delegations are perceived, even to this day. They're not always treated equally. (...). I had two judges from the SAC on my panel. They believed that the view... was well-established and grounded. But I thought that was a wrong view. I wanted to change it. I tried to persuade them, but they were closed-minded. They thought it had been rehearsed enough. So, I hit a wall there. (...) That's when I wrote my separate opinion and I thought it was the right thing to do because it just can't be that the party is deprived of the opportunity to defend her rights in an administrative procedure." (PAC)

The closure to the discussion by the remaining members of the adjudicating panel has been compared to hitting a wall. The situation described above is an example of a situation where disagreement on substantive issues did not have a chance to be discussed. This highlights the importance of the interactive aspect of deliberation as a framework for a decision to dissent. The normative reasons for this judge were based on the fact of disagreement on substantive issues, the belief in the significance of the contentious issue, as well as situational factors related to the status of judges delegated from the PAC to the SAC, confirmed by the argumentative stance of the panel members who were SAC judges. As a motivational reason, the rights of the party, which justify a particular interpretation of the law, can be identified here.

5. COLLEGIALITY - A DISSENT RESTRAINING FACTOR?

Identifying why judges file dissenting opinions does not necessarily indicate the psychological difficulty involved in making this decision. How difficult it is for a judge to make such a decision is a personal characteristic beyond this article's scope. Nevertheless, it is possible to identify some structural determinants of such a decision. These determinants can be classified according to who they affect. One factor that affects judges when deciding to dissent is the time they must allocate to drafting their dissenting reasons. At the same time, if the dissenting judge is the reporting judge, the duty to prepare the court's opinion shifts to the presiding judge. Thus, this is a consideration for the other judges on the panel. As one judge said:

"More work is added to colleagues who need to draft court's opinion. Thus, dissent is not met with enthusiasm." (SAC)

This raises a question of how other panel members might react to a decision to dissent. Submitting a dissenting opinion is a relatively uncommon occurrence in Polish courts. Of the judges who participated in the survey, 88% found the concept of the *votum separatum* to be useful. However, there is a conceptual distinction between affirming a judge's right to dissent and evaluating its legitimacy in specific cases. Turning to the survey results, judges were asked about their feelings when a colleague dissented, and their responses tended to align with a normative pattern of legal discourse.

"A dissenting opinion is a sacred right of a judge; therefore, if I am on the bench where someone submits a dissenting opinion, I do not feel any discomfort about it. That is, it does not cause any adverse reaction or discomfort in me toward the person, as far as it concerns such a judge." (PAC)

This statement concerned judge's feelings in response to dissent by another judge. It is impossible to imagine how a judge submitting such a dissenting opinion would describe this declared lack of adverse reactions. One may wonder about the function of such a declaration in situations where dissent is the statutory right of a judge. In legal discourse, utterances on someone's rights serve as a technique to answer questions about assessing a given behaviour. They may be interpreted merely as a reminder of the normative framework of the assessed behaviour and covertly exclude the possibility of assessing it in terms of approval or disapproval or as a means of hiding the judge's value judgments. Both strategies fit into the mold of an ideal dispassionate judge.

It can be said that dissenting in an administrative court, which typically does not decide high-profile cases with socio-political overtones (unlike constitutional courts), and where judges liken their work to standing at a conveyor belt in a factory, is not a trivial matter. Although the style of dissenting opinions in Polish administrative courts does not include the rhetorical apologies common in common law culture, some judges admit that making such a decision is not always straightforward.

„And sometimes it is difficult to dissent so as not to expose yourself to ... maybe ostracism is too big a word but to some anger from colleagues. In this respect, it was difficult for me.” (PAC)

Another judge acknowledged the concern that dissenting could affect the existing relationship between judges.

„It (dissenting) costs a lot. Because it is well, such a scratch on the monolith (...). At first, I thought that the first, maybe the second, dissent would influence our good relations here in this court. (...) It turned out that this was not the case at all. (...). After this dissent, we still talk to each other, and there is a very nice atmosphere. It (dissenting opinion) stays somewhere, I don't know, as an element or a judicial element, but does not transfer to other spheres.” (PAC)

Even if such cases are considered to be rare, it is worth asking about the reactions of the members of the composition to the announcement of a dissenting opinion. Descriptions of these reactions can only be subjective in the sense that they contain a representation of the situation as they remember it. One may doubt whether their depictions would have been more objective if the researcher had been present during deliberations, which is undoubtedly legally impossible given the prevalence of statutory secrecy.

6. PANEL REACTIONS TO DISSENT ANNOUNCEMENTS DURING POST-HEARING DELIBERATIONS

An expectation that a judge will refrain from behaviour considered an expression of emotions constituting an ideal of a dispassionate judge (Maroney and Gross, 2014, p. 62) is imprecise because what is referred to as an “environment of an emotion” (Anleu and Mack, 2021) includes, among other things, attitudes toward various subjects such as trial participants, witnesses, legal representatives, and other judges. The ideal of a dispassionate judge mainly concerns actors other than judges and the case itself. During interactions between judges, particularly during conferences, emotional reactions seem more acceptable, and judges described them by using hyperbole.

“We'd better argue with each other to the blood here and convince ourselves of arguments before expressing a view outside. This is what our departmental meetings are for.” (PAC)

Despite the declaration of the judge's right to dissent, other interviewees admitted that emotions may arise when another panel member questions one's position. Nevertheless, they did not state this outright.

"(...) There are certainly some emotions: Are there? There's definitely a feeling...(...) I think each of us feels like he's a little bit right. So when the other judge says: I disagree with you to such extent that I would write something different, one certainly involuntary may think, hmm. You know what I mean. Nevertheless, I think these emotions become increasingly small over time. I think that they decrease with experience. Professionals should separate emotions from their professional work. Ideally, there should be no emotions." (PAC)

The judge spoke about the experience of being a rapporteur whose standpoint was challenged. He depicted his involuntary reaction to the single word "hmm" and eventually took a normative approach, affirming the rule of "separating emotions from one's professional work." Descriptions of the judges' reactions show that the latter is subtle but present.

(1) *"Well, unless we are already coming to a point where you can already see that... That there is no common ground here. There (...) falls a sacramental saying: "Well... do what you want."* (PAC)

(2) *"Well, most often from what I met, it was <<okay>>." (PAC)*

(3) *"In most cases, there were no special signs of embarrassment or surprise from other judges in the panel (...). In those (...) cases it was expected that I would submit a dissent. I think twice there could have been a surprise, especially on the rapporteur's face, that there is a dissent: "Really?" I say: "Yes, I dissent." It was such a surprise. It could have happened twice. And in other cases, it was peaceful."* (PAC)

(4) *"I have not encountered a situation where someone felt offended because I had dissented."* (PAC)

(5) *"Among others...there were various reactions, like, a colleague gave me this look and I don't know... was surprised or sad... But this is only my interpretation."* (PAC)

(6) *"Some people treat it so emotionally that... (...) In one case, I encountered reactions that my opinion was colloquially speaking: Yucky. (...) It happened to me that my dissent was treated as a defeat by the rest of my colleagues. Yes, as a failure, in the sense that I was not persuaded. Once, it was even... I felt treated like my opinion was given on a whim, a quirky caprice. Although these are individual cases."* (PAC)

The use of the word "sacramental" (1) may suggest the patterns of repetitiveness in the verbal reactions of the form of "well, do what you want?" It is also an admission that the judge simply exercises his right. Nevertheless, it can be interpreted as an expression of disappointment, either because a colleague decided to dissent or because of a feeling of the ineffectiveness of the judge's efforts to persuade the other members to take up their position. The use of the word "okay" (2) does not indicate its attitude. This seems to be the most neutral reaction, as it can express absolute indifference to the dissent of other judges. In this case, however, direct observation would have been necessary to recognise feelings that possibly appeared at the time. There are, also examples of reactions like the surprise of another judge in the panel, expressed through a short question, "Really?" (3) when the decision on dissent is communicated. This confirms the restraining features of these reactions. Statement (4) can be interpreted as a belief that what the judge considers an adverse reaction would have amounted to some kind of behaviour related to feeling offended. In the interlocutor's experience, however, the responses of other members on the panel to the announcement of dissent remain within the limits of the attitude of professional indifference, or at least that is how the judge perceives them. It cannot be ruled out that this judge's experience included

"weaker" reactions than being offended, such as those referred to in statements (1)–(3). A stronger reaction, as being offended, would mean crossing the line of an attitude of professional indifference. In (5), the judge mentioned reactions "among those others" that could be described as emotional, even though the word did not appear in the statement. The emotional feature is implied by the interpretation ("surprise or sadness") given by the judge himself to the gaze of a colleague against whose opinion he dissented. An utterance (6) is an exception. The dissenting judge experienced irritation from another member of the panel. Perceiving the dissent as given on a "whim, quirky caprice" implies the conviction that such objections are redundant. One may interpret this as an invalidation of legal reasons that lead the dissenting judge to his conclusion.

The reactions portrayed here differ from the behaviours described in Justice Brennan's quote at the beginning of the article ("Very real tensions sometimes emerge (...)"). Nor do they resemble the behaviours depicted in (Maroney, 2012) with the telling title "Angry Judges," which depicts judges' feelings of anger, sadness, embarrassment, or sympathy. In (Maroney, 2012), these feelings were triggered by legal evidence and sometimes by the actions of plaintiffs and defendants. In case of our interviewees, the source of their discrete reactions is another judge's decision to dissent. The collected data reveals subtleties such as surprise, sadness, and disappointment. The degree of disappointment can be attributed to the expectation that a judge's dissent is unlikely to evoke strong emotions. Nevertheless, we can also consider that these reactions may be influenced by the internalisation of the ideal of the dispassionate judge, which emphasises emotional control. The content of this ideal is cultural, not prescribed by legal provisions. This results in less precise requirements. It explicitly prohibits judges from making decisions under the influence of emotion or making individual decisions during the trial, such as accepting or rejecting requests for evidence. However, it is not entirely clear whether these requirements also extend to conduct towards other judges in the deliberation room. Nevertheless, it would be challenging to argue that the reactions described above pose a threat to this ideal. On the contrary, they reveal judges in their human dimension, which encompasses emotions like disappointment. This disappointment may stem from a judges' sense that they were unable to persuade their colleagues of their reasoning or regret that the decision is not unanimous, driven by a concern for the Court's reputation.

7. A CURIOUS CASE OF "COLLEGIAL" DISSENT

In the preceding section, descriptions were provided of judges' reactions upon receiving announcement of the dissent. Such situations indicate dissent as an individual objection to the majority's decision, which is typically considered an inherently personal act (Donald, 2019, p. 323). Confirmation that the practice of collegiality does not constrain the judge in his or her decision to dissent may be provided by cases in which the entire panel decides that one of its members should file a dissenting opinion. In such a case, the dissenting opinion is not an expression of the lack of consensus originating from one member of an adjudication panel, but rather the manifestation of their responsibility toward maintaining the quality of the legal system.

"We had arguments on the pros and cons, and it was difficult for us to decide with certainty that this position was wrong and the other was correct. The panel, for example, agreed upon a judgment, but only if one of us submitted a dissent, to show outside that we see such a problem." (PAC)

A situation in which a judge encourages his colleague to dissent during a panel conference can also be recognised as a type of cooperation.

"I submitted this dissenting opinion to my colleague, whom I respect extremely (...). There was a moment when I considered giving up the idea of dissent. He said, then, submitted it because it was interesting." (SAC)

What is characteristic in this utterance is a designation as the addressee of a dissent one of the judges in the panel—most probably a judge-rapporteur. The rapporteur's encouragement is an example of an attitude in which the decision of the side judge to deliver a dissent does not cause any discomfort to the judge whose standpoint is being questioned. The statement "submit because it is interesting" can be read as the professional distance from the case and intellectual curiosity, possibly due to the belief that his position is not the only one possible in light of the rules of legal interpretation. In such cases, suggesting that dissenting opinions have agonistic origins is difficult (Mendenhall, 2017, p. xviii).

8. CONCLUDING REMARKS

The article explores the forms and practice of collegiality in Polish administrative courts. The interviews conducted revealed the existing tensions within this practice. On the one hand, the opportunity to discuss a case with other panel members is valued by judges because it reduces their decision-making uncertainty, takes them out of their routine way of thinking, and thus enhances judicial reflexivity. On the other hand, the collegial approach can pose challenges, particularly for rapporteur judges who strongly believe in their proposed decisions, as they may encounter resistance without understanding its rationale. In such situations, collegiality can become an obstacle, requiring judges to consider the perspectives of other panel members.

A related aspect of collegiality that extends beyond the panel of judges involves departmental deliberations to discuss the legal issues raised in dissenting opinions. Within this context, the article introduces a distinction between two types of dissents: avoidable dissents and deep interpretative disagreements. From a perspective of judicial independence, there are no concerns with the practice when it comes to avoidable disagreements. However, in cases of deep interpretative disagreements, assuming they are irreconcilable, the meetings of all department judges should focus on identifying this type of disagreement rather than attempting to reach a common position.

The judges who participated in the study described as a classic dissent the situation being the result of the organisation of the work of the panels. This factor is the variability of the panels and its consequences in the form of a judge's dilemma of whether to remain faithful to his decision made in the first panel or to vote for a decision that is not consistent with the first one, proposed by the members of the second panel. It also means that to the extent that a particular judge's position on a particular type of case is known to his or her colleagues, the judge's dissent can be expected. This may be a factor in explaining the institutional nature of the judges' emotions: mostly disappointment and sadness.

The chosen method of in-depth interviews also attempted to examine judicial reactions during post-trial deliberations in which a judge announces to his colleagues that he will file a dissent. The descriptions provided by the interviewees do not support the hypothesis of a link between their possible occurrence and the decision to file a dissent. In other words, collegial practices are unlikely to be associated with the decision not to

dissent. This aligns with the results of the survey, in which the majority of the participating judges indicated that such a factor is divergence in jurisprudence rather than psychological or interactional factors.

Nevertheless, the reactions observed in the courtroom enrich our understanding of judicial interactions by demonstrating that the ideal of the dispassionate judge does not preclude subtle expressions of surprise or disappointment. Classical philosophical and legal depictions of judges often portray them as mere mouthpieces of the law (Montesquieu) or as Judge Hercules (Dworkin, 1975). In these descriptions, it is challenging to discern elements that reveal the 'human side' of judges. The reactions mentioned in response to a judge's dissent on the bench, along with decision-making uncertainty, contribute to this portrayal.

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