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OPINION 2/13 OF THE CJEU: WHOSE OPINION?

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While the U.S. Supreme Court, in a widely publicized case, is deciding on the states' duty to recognize lawfully licensed same-sex marriages (Obergefell v. Hodges, judgment expected at the end of this month), the Court of Justice of the European Union (CJEU) delivered its opinion (Opinion 2/13) on a constitutional question of equally fundamental importance in last December. In the first case the judgment has not been delivered yet, but from the oral hearings and numerous comments we can already learn the possible personal position of all nine Supreme Court Justices participating in the decision. At the same time, six months after the publication of Opinion 2/13, we still know nothing about the personal position of the judges composing the CJEU. This striking contrast calls for a reflection.

Opinion 2/13, opposing the EU's accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), is the most extensively commented decision of the CJEU of the last years. It has been harshly criticized by virtually all EU law scholars since the very moment of its publication on 18 December 2014, with a few notable exceptions. It has been called a "Christmas bombshell" by Sionaidh Douglas-Scott, a "clear and present danger to human rights protection" by Steve Peers, and a "giant step backwards" by Jed Odermatt, among others.

One is naturally led to wonder: who endorsed this opinion then?

Stian Oby Johansen, who writes about an ”outrage in the academic blogosphere”, is the only one among the commentators who makes a guess about the presence of dissent in the CJEU. Johansen observes that the CJEU is, surprisingly, clearly hostile to the accession agreement. According to him it may be due to the fact that there was a dissent among the judges, and they were not able to reach a compromise. As he explains:

”Because dissents are not to be made public, the judges will usually attempt to come to a compromise solution that is acceptable to them all. This allows judges that would otherwise dissent a strengthened opportunity to water down the judgment, or make its reasoning more ambiguous. However, if a compromise cannot be reached, then the majority will write the judgment. Given the hostile approach of the CJEU in Opinion 2/13, I believe that we are reading a majority opinion. How big or small that majority is we will probably never know.”

Johansen’s explanation seems to confirm Hjälte Rasmussen’s hypothesis, according to which “judicial activism feeds on the ban of dissenting opinions” and there is a group of “first class judges” within the Court who, as permanent members of the Grand Chamber, have the opportunity to “persuade the second class Brethren to cast their votes from following the directions of the leadership”. These “first class judges” are chosen from among the Court’s “most teleologically minded, federalist membership” (see Rasmussen, p. 1381-82). Considering Rasmussen’s findings, the clearly hostile approach to the accession agreement and the harsh language used in Opinion 2/13 are not so surprising anymore.

The CJEU has been from time to time criticized for the lack of dissenting opinions. According to many, this secrecy is to be blamed for the poor quality of the CJEU’s reasoning in many judgments. As Johansen pointed out, in most cases the decision represents a compromise solution, therefore the reasoning is less clear and straightforward. The CJEU’s practice can be traced back to the origins of the Court, modelled after the French *Conseil d’Etat*, as demonstrated by the presence of Advocates General, also introduced on the initiative of France. In France, judges have

never been allowed to publish their dissent, and they are still not allowed to do so. The CJEU is far from its original model today, both in jurisdiction and in composition, but its decision-making practice has not been adapted to the latest developments in European constitutional justice. Today the vast majority of European constitutional courts and the European Court of Human Rights (ECtHR) allow the publication of dissenting opinions. And it is far from being inappropriate to compare the CJEU to a constitutional court or to the ECtHR, as it functionally performs constitutional review and is "reputed for activist rewriting and reconstructions of the high Laws meant to protect and guard" (see Rasmussen, p. 1374). If so, how long can the CJEU uphold this practice of obscurantism?

What can we learn about the CJEU's decision-making process from its decisions? Not much. It is of public knowledge that Opinion 2/13 was delivered by the full court composed, in that occasion, of 25 judges. We can deduce from the list of names in the heading of the Opinion that three members of the Court did not participate in the decision: the Finnish, the Estonian and the Cypriot judges. The heading also indicates that Judge Antonio Tizzano acted as rapporteur in this case. Thus we may assume that he is the principal author of the Opinion. But we cannot be sure of it.

However, even if we do not know the position of the single judges, it is possible to reconstruct the debate that might have taken place within the Court. Notwithstanding the lack of separate opinions, only by reading the Opinion we can find several arguments opposing the CJEU's findings. First, the Court points out that it gave its opinion after hearing the Advocate General. It makes no more mention of the AG's view in its Opinion, but it is a public document available on the official website of the Court. If we read AG Kokott's view, written in June 2014 but published together with the Court's Opinion in December, we understand that she did not share the judges' hostility towards the draft agreement on the EU's accession to the ECHR. In the majority of the cases the CJEU follows the AG's opinion. But it was not the case here.

Second, before taking a stand, the Court presents the Commission's assessment in its request for an Opinion (par. 71-107 of the Opinion) and summarizes the main observations submitted by other EU institutions and (twenty-four) Member State Governments (par. 108-143). So the Opinion resembles the structure of a judgment, considering the Commission and the Member States as parties to the case. This, however, does not allow us to understand better what the members of the Court think, as the Opinion expresses only one, apparently unanimous, standpoint.

Considering the ever more often raised criticism of the CJEU's decisions and the role the Court has played in the EU legal system for nearly six decades, isn't the time ripe for lifting the ban on dissenting opinions?