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IMPORTANCE OF DISSENTING AND CONCURRING OPINIONS (SEPARATE OPINIONS) IN THE DEVELOPMENT OF CONSTITUTIONAL AND JUDICIAL REVIEW WITH SPECIAL REFERENCE TO SLOVENIAN PRACTICE[2]

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1. DISSENTING/CONCURRING OPINION – GENERAL OBSERVATIONS

There is an essential difference between the decisions issued by constitutional courts in Europe and those of the Anglo-American type. The former are issued "impersonally" by the court as a whole, whereas in the latter, individual judges make their personal contributions. In the first case, the decision itself does not show whether it was adopted unanimously or

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by a majority of votes. Moreover, it is absolutely unclear in any decision the way an individual judge actually voted. In the second case, however, it is not only evident when a majority or unanimous decision was adopted and how individual judges voted, and the judges who do not agree with the majority add their interpretation of the decision in either:

- a concurring opinion when a judge agrees with the ruling but differs as to its reasoning, or
- a dissenting opinion when a judge objects to the ruling itself.

At first, the dissenting/concurring opinion was recognised only in the United States, as well as in other Common Law- or American-based countries of the British Commonwealth, Central and South America, Scandinavia and Japan. After many theoretical and political objections, the dissenting/concurring opinion became gradually accepted in countries with Continental (European) legal systems. Although individual European constitutional/judicial review systems departed from the decision-making mode characteristic of the Austrian style, they remained half similar to an American type of decision-making that introduced dissenting/concurring opinion into Constitutional Court decisions (especially in constitutional/judicial review systems introduced by new democracies).

As far as publication is concerned, a distinction may be made between the two types of dissenting/concurring opinions:

- open, published together with the respective decision;
- anonymous, only added in writing to the internal part of the case.

Some constitutional judicial review systems do not accept dissenting/concurring opinions, but keep the voting results secret, without publishing either the voting results or the names of the judges[3]. The dissenting/concurring opinion is known above all in Croatia[4], Germany[5], Greece[6], Hungary[7], Portugal[8], Slovenia[9], Chile[10], Spain[11], Georgia [12], as well as in Argentina, Canada, Norway, Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, Poland, Estonia, Romania, Moldova, Bulgaria, Azerbaijan, Turkey, Ukraine, and Armenia,

[3] *e.g.* Austria, Belgium, France, Ireland, Italy.

[4] Paragraph 4, Article 19 of the *Constitutional Court Act*.

[5] Paragraph 2, Article 30 of the *Federal Constitutional Court Act*. In addition, some Provincial Constitutional Courts adopted the dissenting opinion, *e.g.* Bavaria (Paragraph 5, Article 25 of the *Constitutional Court Act*; Article 4 of the *Rules of Procedure of the Constitutional Court*), Berlin (Paragraph 2, Article 29 of the *Constitutional Court Act*), Bremen (Paragraph 3, Article 13 of the *Rules of Procedure of the Constitutional Court*), Hamburg (Paragraph 4 and 5, Article 22 of the *Constitutional Court Act*; Articles 27 and 28 of the *Rules of Procedure of the Constitutional Court*), Niedersachsen (Paragraph 2, Article 11 of the *Rules of Procedure of the Constitutional Court*).

[6] Paragraph 3, Article 93 of the *Constitution*; Articles 35 to 38 of *Act* No. 184/1975.

[7] Article 22 of the *Constitutional Court Act*.

[8] Paragraph 4, Article 42 of the *Constitutional Court Act* No. 28/1982.

[9] Paragraph 3, Article 40 of the *Constitutional Court Act*; Articles 48 to 50 of the *Rules of Procedure of the Constitutional Court*.

[10] Paragraph 2, Article 31 of the *Constitutional Court Act*.

[11] Paragraph 2, Article 90 of the *Constitutional Court Act* No. 2/1979.

[12] Paragraph 5, Article 40 of *Rules of the Court.*

as well as at the Inter-American Court. In Portugal, however, the publication of votes with names is a matter of judicial tradition as the decisions issued by the Constitutional Court also strictly include names. On the other hand, much attention was aroused by the frequent occurrence of the dissenting/concurring opinion in Spain, where this practice appeared in both forms (dissenting opinion, concurring opinion). The dissenting/concurring opinion is, however, not recognised by the Court of Justice of the European Community in Luxembourg, but was recognised by the European Commission[13] and is recognised by the European Court of Human Rights in Strasbourg[14].

2. SOME NATIONAL SYSTEMS IN DETAIL

In **Austria**, some scholars advocate the introduction of a separate opinion in order to improve the legal quality of decisions with the possibility of separate opinions, and that the majority of relationships open to hearing the court have become more unpredictable in their entirety. Finally, from the theoretical point of view, it is important to note that in areas where the law provides discretion to the judge (which is particularly true for constitutional justice), where the judge must exercise discretion in a legitimate manner, such personal views should also be disclosed. In a democratic system, the creation of open decision-makers is fundamental because only in this way can we achieve more responsible behaviour, which mostly means that behaviour can be controlled.

The **Court of Justice in Luxembourg**, although not allowed for separate opinions, but some reform efforts within the court, has also spoken in favour of imposing a "dissenting opinion".

Rather, it is permissible to use the separate opinion at the **European Court of Human Rights** and it is used in practice to a relatively broad extent. The European Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4/11-1950):

- introduced a separate opinion to the decisions of the European Commission on Human Rights (Paragraph 1, Article 31): If the commission had not reached a solution, it drew up a report on the facts and its position on whether the facts show that the affected state violated its obligation under this convention. The report may indicate the views of all of the members of the commission.

[13] Paragraph 1, Article 31 of the *European Convention on Human Rights and Basic Freedoms.*

[14] Paragraph 2, Article 51 of the *European Convention on Human Rights and Basic Freedoms*.

- It is currently reflected in the decisions of the European Court of Human Rights (Paragraph 2, Article 51): If a judgment does not reflect the same opinion of the judges in whole or in part, each judge is entitled to create a separate opinion.

The theory concludes that the specific functions of the both the abovementioned European courts and their composition did not allow direct the consequences of their practices to be reflected in the consideration of separate opinions in national legal orders.

In **Germany**, separate opinion (abweichende Meinung) is not unknown in judicial history. However, the overwhelming majority in constitutional courts welcomed the introduction of separate opinion, as did a clear majority of federal supreme courts. But separate opinion was refused from collegiate courts with a narrow majority. Regardless, separate opinions were nevertheless considered to be desirable for the future. Despite some high expectations, the practice of separate opinions was not extended so much. In the German constitutional judicial system, only the amended Federal Constitutional Court Act of 21/12-1970 formally introduced separate opinion (Paragraph 2, Article 30 of the Federal Constitutional Court Act). Any judge may give a separate opinion or dissenting opinion to the individual decision of the chamber or, where appropriate, a concurring opinion regarding the reasoning of the decision. Additionally, the names of the judges who gave separate opinions and their votes may also be published. From separate opinion, some people expected an improvement in the Constitutional Court's image, arguing that in this way legal aspects will be comprehensively set out, while others pointed to the weakening of the court by endangering public respect for the institution.

The regulation of separate opinions in **constitutional courts in the German states** (Laender) is as follows:

At the **Bavarian Constitutional Court,** each member of the court was able to deliver a separate opinion on the grounds of the concrete adopted decision. The opinion was attached to the intern part of the file. If the decision was published, the separate opinion was also published, but without giving the names of the judges (Article 7 of the Rules of Procedure of the Bavarian Constitutional Court of 23/5-1948). However, this option was only rarely used. Under the Law of the Constitutional Court of Bavaria of 19/5-1990, every judge is entitled to give his separate views on the decision or his reasoning in writing. Separate opinions without noting the author are published together with the decision (Paragraph 5, Article 25). A judge who wants to give a dissenting opinion is obliged to inform the court about his intention as soon as possible – at the latest before the signing of the decision by the participating judges (Paragraph 1, Article 4 of the Rules of Procedure of 18/12-1990). Any separate opinion should be submitted to the president of the court three weeks after the delivery of the decision. At the request, the president may extend this period for a further three weeks (Paragraph 2, Article 4 of Rules of Procedure).

According to the **Constitutional Court of the Land Berlin Act** of 8/11-1990 any member of the court may express a separate view on the decision or its reasoning in the form of a

separate opinion. Such separate opinion shall be attached to the decision's reasoning. The decision may indicate the proportion of votes (Paragraph 2, Article 29).

Separate opinion is admissible also at the **Constitutional Court of the Hanseatic Free City of Bremen**. According to the Rules of Procedure of 17/3-1956, each member of the court may give a separate opinion to the reasoning of the decision (Paragraph 3, Article 13). In principle, such written opinions are not component parts of procedural documents. But any judge may request his separate opinion to be delivered together with the opinion of the plenary court.

According to the **Hamburg Constitutional Court Act** of 2/10-1953, a separate opinion is allowed from any member of the court. The separate opinion shall be attached to the decision (Paragraph 4, Article 22). In its decisions, the Constitutional Court may indicate the proportion of votes (Paragraph 5, Article 22). The Rules of Procedure of the Constitutional Court of 11/2-1983 provide that any dissenting opinion shall be submitted to the president of the court within three weeks after hearing the reasoning of the decision (Article 27 of the rules). If the judge intends to give a dissenting opinion, this must be communicated in the consultations as soon as possible. The decision must also be signed by the judge who gave a separate opinion. The separate opinion shall be signed by the author himself. Other judges may join the separate opinion. The separate opinion is accompanied to a written decision (Article 28 of the rules). If given, the dissenting opinion shall be announced after the announcement of the decision. Also the name of the judge – the author – a separate opinion shall be called. The separate opinion is communicated to the participants and all interested in the same manner as the decision.

Following the Rules of Procedure of the **Constitutional Court of the Land Niedersachsen** of 19/10-1988 an outvoted judge's opinion may be provided anonymously at his own request (Paragraph 2, Article 11).

With the introduction of separate opinion, the independent personality of the judge shall be promoted, to whom the right is given to abandon the anonymity of secret consultations. Additionally, it should strengthen the reputation of the court itself on the basis of a comprehensive presentation of all legal aspects that are important for concrete decision. In such a way, different professional views come to light. The outvoted judge should not be limited to express his belief. Furthermore, theoreticians – proponents of separate opinion – expect from the judge a "separate explanation", some greater transparency and openness in constitutional jurisprudence. Finally, the submission of a separate opinion to the case presents itself as an open (democratic) process.

Although the institution of separate opinion, in practice, was exercised less than expected, we cannot ignore that this institution was welcomed especially among the younger generation of German judges who had the tendency to withdraw from the anonymity of the decision-making process. Moreover, the publication of separate opinions has not caused any serious crisis to the German Federal Constitutional Court.

The prevailing German literature is richest in this area, trying to establish general principles that are important for the publication of separate opinions and their contents:

- A separate opinion stated for publication should be limited to cases of principle interest;
- Dissenting opinions should not be wrongly interpreted as a means of polemics against the main plenary decision and its reasoning;
- A separate opinion has not a function of the contest and battle with the majority view, but it is intended to be presented against the majority opinion, his arguments convincingly and accurately as possible.

Italy: The dissenting opinion is considered to be incompatible with the principle of the collegiality of the court. This does not exclude the possibility that, in given cases, separate opinions of individual judges would not have come to the fore in scientific publications or in press releases. They say that the reasons for the different treatment of separate opinion in Italy and in Germany are mainly of a political nature.

Under the **Spanish Law No. 2 / 1979 of the Constitutional Court** of 3/10-1979, the president and judges may create separate opinions, which were represented in the consultation both in terms of the decision and its reasoning. Dissenting opinions are part of the main decision and are together with the main decision published in the Official State Gazette (Paragraph 2, Article 90). Such practice has been welcomed because it shall contribute that the decision-making process has become easier to understand. Furthermore, it should help to consolidate the court's authority.

The **Portuguese Law No. 28/1982 on the Organisation, Work and Proceedings of the Constitutional Court** of 15/11-1982, provides that judges who were outvoted in the decision or its reasoning have the right to create a separate opinion (Paragraph 4, Article 42).

Greece: The Greek Constitution of 1995 allows for separate opinion. The judicial minority opinion is published without indicating the identity of the judge – the author of such an opinion (Paragraph 3, Article 93 of the Constitution). The Greek Law No. 345/1976 on the Special Supreme Tribunal under the 110th Article of the Constitution states that in terms of the third Article 93 of the Constitution and implementing laws issued in this regard (Law No. 184/1975, Articles 35-38) provide for the recording of the minority opinion (Paragraph 2, Article 19 of the act). The constitutional command to publish a dissenting opinion has also been considered as the expression of the principle of publicity.

The **Constitutional Law on the Constitutional Court of the Republic of Croatia** states that a Constitutional Court judge who expressed a dissenting opinion shall provide the opinion in writing (Paragraph 4, Article 19 of the law).

The **French legal system** does not allow for the publication of separate opinions. The court decisions are not a source of law because such collective decisions are taken when implementing the law. The personalization of the opinions of judges would give to the judi-

ciary itself too much authority. Of course, courts are now the creators of law and they have very strong power in terms of legal interpretation, but their own constitutional position has not changed.

In **Ireland**, the publication of separate opinions is not allowed with regard to decisions concerning the constitutional validity of regulations since 1937.

The possibility of a separate opinion is explicitly determined by the **Act on the Constitutional Court of Chile** (Paragraph 2, Article 31).

3. DISSENTING AND CONCURRING OPINION IN SLOVENIAN PRACTICE

3.1 Slovenian Practice until 1991

According to past legal theory, the dissenting opinion of a Constitutional Court judge had no power of decision and did not affect the normative act, which was subject to review of constitutionality and legality. However, the separate opinion was nevertheless important for the legal system and social relations as a whole. Separate opinion was taken as a tool – calling upon all members of the Constitutional Court to discuss once again and to try all of the facts and reasons for adopting the appropriate decision. This was almost the preventive importance of separate opinions realised during court sessions. When the separate opinion was published in the Official Gazette, it was also possible to talk about its broad and general sense. The Constitutional Court decision and dissenting opinion as well should contain the grounds for adopting the appropriate decisions and of separate opinion. Through such a separate opinion, the willingness of the members of the Constitutional Court to accept public responsibility for the position expressed in the opinion is also reflected, especially if this position has not met public approval. Separate opinion was considered important for the legal sciences to create certain positions to individual legal institutions and principles. In addition, it was welcomed to help ensure that the constitutional decision may be taken with greater care and interest. The reasons given in a separate opinion do not (in any way) reduce the importance and impact of the Constitutional Court (main) decision.

The federal, republican and provincial constitutions of the Yugoslav Federation of 1974 stipulated that a member of the Constitutional Court has the right and duty to express a dissenting opinion in writing, and to explain and to justify it.

The Slovenian Constitution of 1974 (Paragraph 2, Article 420) provided that a member of the Constitutional Court who expresses a dissenting opinion has the right and the duty to express that opinion in writing and to submit it to the court. In the then Law on Proceedings

before the Constitutional Court of the Republic of Slovenia (Official Gazette, No. 39/74 and 28/76), there were no provisions relating this matter. In the Constitutional Court of Slovenia Act (Official Gazette, No. 39/63), which expired on 8/1-1975, the last paragraph, Article 67 provided that the court may decide to publish a dissenting opinion with the consent of the judge who gave it. Based on the legislation of 1963, separate opinion was published only once with the main decision.

A vote against the proposed resolution did not automatically mean that the voter also expressed his dissenting opinion to the decision which was taken. A member of the Constitutional Court who voted for the proposed solution, but did not agree in whole or part, was able to express his dissenting opinion. The dissenting opinion was attached to the minutes of the deliberation and the voting in writing. The minutes, however, indicated that such a voter gave a dissenting opinion. According to the then-Slovenian constitutional and legal order, the court itself was not bound to publish such a separate opinion together with its decision.

From 1974 to 1990, the separate opinion did not have to be published together with the decision of the Constitutional Court in the practice of the Slovenian Constitutional Court.

3.2 Current Slovenian Practice

Separate opinion has been regulated by Paragraph 3, Article 40 of the Slovenian Constitutional Court Act (Official Gazette of the Republic of Slovenia, No. 64/07 – official consolidated text). Additionally, provisions of the Constitutional Court Rules of Procedure (Official Gazette of the Republic of Slovenia, No. 86/07) are relevant as well.

The Constitutional Court Act:

Chapter 5 (*Deciding*) (Paragraph 3, Article 40): A judge who does not agree with the decision or reasoning of a decision may declare that he will write a separate opinion that must be submitted within the period determined by the Rules of Procedure of the Constitutional Court.

The Constitutional Court Rules of Procedure:

Chapter 8 (*Separate Opinions*), Article 71 (Type and Purpose): (1) A Constitutional Court judge who does not agree with the decision adopted at a session of the Constitutional Court may submit a separate opinion that may be either a dissenting opinion if he disagrees with the operative provisions or a concurring opinion if he disagrees with the statement

of reasons. A separate opinion may be submitted by a group of judges, or a Constitutional Court judge may join the separate opinion of another Constitutional Court judge. (2) A separate opinion may only be submitted by a Constitutional Court judge who has declared after the voting on the decision that he will submit such an opinion. Joining a separate opinion is also possible without prior declaration thereof. (3) The purpose of a separate opinion is to present the arguments that the Constitutional Court judge stated in the discussion and decision of a case and which dictated his decision.

Article 72 (*Time Limit for the Submission of Separate Opinions*): (1) Separate opinions must be submitted within seven days from the day when the Constitutional Court judges receive the text of the decision determined by the Redaction Commission, which is confirmed and signed by the Secretary General. (2) The Constitutional Court may determine a time limit for submitting separate opinions, which is shorter or longer than seven days if so required by the nature of the matter decided upon. Immediately after the final vote, the Constitutional Court decides on the extension or reduction of such a time limit by a majority vote of the Constitutional Court judges present. (3) Separate opinions are submitted to other Constitutional Court judges, who may comment on such within three days. A Constitutional Court judge who has submitted a separate opinion may reply to such comments within three days. (4) If a separate opinion is not submitted within the time limit referred to in the first or second paragraphs, it is deemed that the Constitutional Court judge is not submitting a separate opinion.

Article 73 (*Serving and Publication*): (1) A separate opinion is sent together with the decision or order to which the separate opinion refers. If, in accordance with an order of the Constitutional Court, the decision or order is sent immediately, the section stating the composition states which Constitutional Court judges have declared that they would write a separate opinion; the separate opinions are then sent after the expiry of the time limits referred to in the preceding article. (2) If a decision or an order is published in the Collected Decisions and Orders of the Constitutional Court, on the website of the Constitutional Court, or in other computer databases, separate opinions thereto are published with the decision or order.

After 1991, separate opinion in the proceedings before the Slovenian Constitutional Court has been widely practised in different forms – as dissenting, as dissenting in part, as concurring, or as concurring in part, created by one judge or created by a group of judges. Although separate opinions have no legal force or legal effect, they represent a valuable complement to the decision. Through separate opinions, the public is informed of the argumentation or comments made by "the other side", minority arguments are articulated that may eventually become the majority opinion, and all of the arguments competing in the process of constitutional review are weighed.

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