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# DISSENTING AND CONCURRING OPINIONS IN THE PRACTICE OF THE BULGARIAN CONSTITUTIONAL COURT[1]

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According to the basic law of the Republic of Bulgaria and the Constitutional Court Act (hereinafter – CCA), Constitutional Court ensures supremacy of the Constitution. Besides these two normative documents, organization and legal proceedings of the Court are also regulated by the Rules of Organization and Activities of the Constitutional Court (hereinafter – ROACC).

Constitutional Court of the Republic of Bulgaria is composed of 12 judges. Four judges are appointed by the President of the Republic; four are elected by the National Assembly, and the remaining four – by judicial authorities for nine-year terms. The Constitutional Court acts on an initiative from not less than 1/5 of the entire composition of the National Assembly, the President, and the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court and the Chief Prosecutor (Constitution, Article 150).

The Constitutional Court may hold its sittings when 2/3 of its members or eight judges are present (CCA, Article 15,). In cases when the charge is brought against the president or vice-president, quorum of the Constitutional Court shall make up ¾ of the total number of its composition or nine judges (CCA, Article 24, par.1).

In accordance with the Article 151, par.1 of the Constitution, decisions and rulings (resolutions) require the consent of majority of the judges, i.e., not less than seven judges. Majority votes of 2/3 of the judges, i.e., eight judges, is needed only in cases when revoking

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judicial immunity or deciding on the inability of discharging the duties of the member of the Constitutional Court.

When the texts of the Constitution, Constitutional Court Act and Rules of Organization and Activities of the Constitutional Court mention a majority, it means a unanimous opinion of at least seven or eight judges taking part in making a decision or ruling on the admissibility of a specific case.

In some cases, it is impossible to make up such a majority. For instance, when eleven members of the Constitutional Court take part in hearing and only five or six of them vote for a specific opinion and the rest of them vote against it (the Bulgarian Constitutional Court has experienced similar occasions) an application submitted to the Court can not be regarded either satisfied or refused since there is no majority of judges required by the legislation which would have satisfied or refused a complaint.

According to the Constitution of Bulgaria, the Constitutional Court exercises its authorities and functions only when the majority of its composition has been secured when considering the issues admissible under the paragraphs 1-8 of the Article 149, after submission of complaints from the agencies envisaged in the paragraph 1 of the Article 150.

As the Article 149 of the basic law stipulates, the Constitutional Court delivers binding interpretations of the Constitution, makes decisions on either constitutionality or unconstitutionality of laws and other legal acts adopted by the National Assembly as well as those issued by the President; decides on compatibility of the international agreements with the Constitution before they are ratified by the National Assembly and it also determines whether domestic legislation is consistent with universally recognized norms of international law and international instruments to which Bulgaria is a party. The Constitutional Court also considers disputes on the constitutionality of political parties and associations, legality of the elections of the president, vice-president and a member of the National Assembly and resolves the disputes among the National Assembly, president and the Council of Ministers regarding their competences as well as disputes between local self-governance and the central executive bodies. Decisions on these issues are made by open ballot.

In cases when the Constitutional Court rules on charges brought by the National Assembly against the President or Vice-President or makes decision on revoking immunity of the Constitutional judge the decisions are made by secret ballot (Constitutional Court Act, Article 24 (pa 3) and Article 25 (pa 2). In these cases filing or signing a dissenting opinion is inadmissible (ROACC, Article 32 (par.4)).

Dissenting and concurring opinions become challenging when the Constitutional Court makes its decisions and rulings (resolutions) in an open ballot regime.

Brief analysis points out that the Constitutional Court is capable of exercising its authorities in accordance with the Constitution only when the Court achieves a majority opinion over the issue to be decided. This is equally relevant when it comes to the ruling on ad-

missibility of the case brought before the Court by the agencies listed in the Article 150 (par.1) of the Constitution. The practice of the Constitutional Court of Bulgaria shows that a great number of special opinions seriously impede gaining a convincing majority needed for adoption of decisions in the Constitutional Court.

Bulgarian Constitution and Constitutional Court Act do not set out any standards or norms concerning special and concurring opinions, consequently they do not stipulate any possibility for a constitutional judge to stick to his own opinion. The issue of special opinion and concurring opinions are regulated in a few words and somewhat vaguely only by the ROACC. The Article 32 (par.3) stipulates, "the judges who disagree with either the decision or ruling (resolution) on inadmissibility of a compliant shall have a right to file a dissenting opinion and they must state their own individual opinions in written form". At the same time, the 5th paragraph of the same article states that "each judge shall be empowered to state an individual opinion/viewpoint on the act adopted by the Constitutional Court in written form". In addition, the 1st paragraph of the Article 33 prescribes that "a decision made by the Constitutional Court together with motivations, dissenting and concurring (personal viewpoints) shall be published in an official gazette (Държавен вестник) within 5 days after their adoption". Consequently, they are made public.

However, the Court's Rules do not specify what is the difference between "dissenting opinion" and "written individual opinion/viewpoint", but, in any way, it is possible to define these two notions. Dissenting opinions of the Constitutional judges are of the individual or collective nature, which can be attached to a specific decision. Each judge is free to vote at his/her own discretion and with inner conviction either "for" or "against" the decision or ruling (resolution). For the Bulgarian Constitutional Court a special opinion expresses an opinion counter to the opinion of majority. The judge who opposed a decision or ruling (resolution) must deliver written reasoning for his rejection of the Court's given act only in cases when voting on a decision or ruling (resolution) is open. Opinions delivered by the constitutional judges are individual and possible acts which are attached to the decisions in cases when a judge supports the majority's opinion, but believes that additional considerations different from those reasons which were accepted by the majority could be put forward for further substantiating the dispositive.

Drawing up special/dissenting opinions in written form is mandatory and according to the Bulgarian legislation, it should be published with the Court's decision. Initially, in the first years after the Constitutional court has been established many of the judges filed dissenting opinions on almost every decision of the Court thinking it was natural. From theoretical point of view, it can be justified since conflicting opinions provide fertile soil for theoretical discussions and to some extent they enrich constitutional studies. Unfortunately, the current developments in Bulgaria are not favorable for development of the right of a constitutional judge to express his special opinion. Hence, regrettably dissenting opinions are unable to achieve their practical objectives for the benefit of public.

Not infrequently, the special opinions are being expressed inaccurately and as professor Zhivko Stalev (former chair of the Constitutional Court of Bulgaria) pointed out "in an unacceptable manner". As firmly established Bulgarian practice shows, the special opinion is actually a discussion on the majority opinion delivered. Dissenting opinions do not provide arguments for development a reasonable answer to the complaint submitted to the Court. A special opinion should be worded in a manner as if it were a decision on a case of its author if he were to be the only adjudicator of the case. Polemics with the majority opinion undermines reputation and authority of the Constitutional Court. Therefore, it should be avoided. Sometimes public opinion through mass media gets largely oriented to the interest towards special opinions rather than decisions themselves adopted by the court majority which are binding for the state agencies, legal entities and citizens alike.

Perhaps it is high time we learnt and accepted the practice established in the French and Italian Constitutional Courts, where constitutional judges do not have right to express publicly their dissenting opinions. However, current political situation in Bulgaria and legal circumstances are not suitable for solution of the problem through adopting a new law.

The Constitutional Court should speak with one harmonized voice. When decision is made by the narrow majority, i.e. seven votes against the rest of five, it is clear that in this and similar cases the prestige of a judge faces threat and weight of the decisions may be lost that is utterly undesirable for the court as it diminishes the importance and the role of the constitutional justice.

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