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THE DISSENTING OPINION OF CONSTITUTIONAL COURT JUDGES – ONE OF THE GUARANTORS OF THE COURT'S INDEPENDENCE[1]

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The suggested topic for discussion is in my view an actual, disputed and very interesting one.

Taking into consideration the fact that the Constitutional Court of the Republic of Moldova is not part of the system of common courts of the country and in accordance with the Constitution (Article 134) it is the single organ of constitutional jurisdiction, in my presentation I will focus basically on the role and place of dissenting opinions of Constitutional Courts' judges.

The institute of dissenting opinion is a peculiar institute of law. Special opinion is a vivid confirmation that there are *diverse opinions* among judges **while** interpreting the law. It is without question a guarantor of the independence, responsibility and **independenc**e of Constitutional Court judges.

The institution of **dissenting** opinion of judges is established by law or recognised in practice in many, if not in the majority of countries having constitutional justice. A given prescription is also enshrined in the second part of Article 45 of the Convention on Human Rights and Fundamental Freedoms, which stipulates that any judge should have the right to present a separate opinion, if a decision does not express **wholly** or **partly**, the unanimous opinion of judges.

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In some places**, dissenting** opinion is published together with the constitutional court decision, while in others it is presented as a personal summary in the text of the decision's motivational segment. Yet, in some **quite** civilized countries this public institution does not exist at all.

This fact can be explained partially by the fear that a judge's special opinion expressed publicly could disrupt the authority of the instance's decision, and disclose the secrets of the deliberations room as well as the voting results. Emphasis should also be placed on maintaining a cautious approach to dissenting opinion as such. As some critics say, inasmuch as dissenting opinion undermines the impression of a judicial body's solidarity, its number should be reduced. However, if it is still filed, then it should always be presented as a judge's personal view and not as a consolidated position of a minority of judges. Hence, there is the rejection of joint opinions. When a dissenting opinion filed by one judge is attached to the Constitutional Court's decision, we have to speculate whether he had been alone or was supported by some of his colleagues when deciding on a case. Obviously, a special opinion is considered a private matter for a judge. It is not viewed as an authoritative source for a doctrine which will be able to have some impact on the court's practice in the future.

The **authority** of a constitutional court's decision, as we view it, is not based on the number of judges voting in favour or against it. It is assessed on entirely different grounds, including the quality of a decision itself, its validity, persuasiveness and fairness, as well as its acceptability for popular and legal minds and so on. Clearly, the arguments in favour of any decision have different significance and weight.

The existence or non-existence of the institution of special opinion results largely from the country's legal tradition, and in our opinion its efforts to strengthen the right to express a dissenting opinion.

A constitutional judge's special opinion is a personal opinion (legal position) of a judge participating in court proceedings, which is expressed publicly and differs from the court's final decision made on the plenary session. It is the right of the minority to express a different point of view and to propose another decision. The fact that constitutional court judges argue and have a dissenting view about a case's resolution is normal and reflects the nature of constitutional justice. Constitutional judges deal exclusively with issues of law. Unlike other judges who **mus**t apply the norms of a law produced by legislators in standard situations, constitutional courts evaluate disputable provisions using higher criteria, that is, from the perspective of their compliance with constitutional provisions, applying principal considerations. The court acts in the sphere of subjective assessment, so-called "prescriptive thoughts" about legal rights founded on certain principles, norms and values. This complicates and limits the search and motivation of arguments which would justify the court's decision and make it more convincing and authoritative.

The right to **a dissenting** opinion protects the reputation of a judge. It is also a strong professional incentive and psychological guarantee that allows a judge to enjoy personal freedom and independence, and to be aware of his decision's significance and his responsibility for his choice.

Clearly, expressing and defending one's personal opinion is an emotional and psychologically tough mission – **always** a serious inner conflict. Defeating one's doubts is hard when left alone in the minority among exceptionally high-qualified colleagues.

Of course, special opinion is the last option for a judge when the price of a solution is high, when internal compromise is impossible, and while conviction in a judicial mistake is at its maximum. After all, the principles and values in need of vigorous verbal **protection** are at stake and, moreover, there is simply no other way left. However, if a court's position has strong reasoning, a judge's dissenting opinion may reinforce it by demonstrating that a court has taken into account and assessed the entire spectrum of controversial questions and doubts.

However, an alternative yet correct and acceptable version of the solution can be substantiated in special opinion. Judges also appeal by special opinions to their colleagues. Despite the court's final decision, the possibility of its revision by a judge may not be ruled out if there are new conditions and circumstances available or if a judge's position has been taken into account in new cases. Such examples have been observed in constitutional court practice in cases when the legislator's position coincided with the special opinion, resulting in an amendment to the disputed norm recognised as constitutional by the judge.

As mentioned above, the right to special opinion is a highly **controversia**l issue. The key issue is to determine the level of accessibility of dissenting opinions.

Some authors of scientific research on this institution state that there are four options (models), namely – complete closure (secrecy), the uncertainty model, the partial accessibility model and the complete openness model (publicity).

The most liberal option is the complete (universal) openness model which has been implemented **merely** in the practice of constitutional proceedings.

Undoubtedly, the judge's right to ***publicity*** **expresses** his special opinion is directly linked to the basic freedoms of expression and speech, and the inadmissibility of one's coercion to **waiv**e his right to express his personal opinions and beliefs. These freedoms acquire great values in court practice, as justice is based on consciousness and reasonableness, a judge's personal and independent evaluation, his inner convictions and on a judge's strictly determined intransigent sense. Any **externa**l influence, any blind compliance with an authority and majority opinion, as well as conformism, may lead to the absence of freedom and the loss of independence as often happens in everyday life.

Considering the Convention on Human Rights and Fundamental Freedoms' Article 10 (Part 2) and similar norms enshrined in the constitutions of various countries, it is necessary to determine the scope or limits of a judge's right to publish and disseminate his dissenting opinion. In our view, it is necessary to **seek** these limits, as in the course of exercising the right to disseminate a dissenting opinion it is important to take into account such a public interest as "securing judge's authority and impartiality".

Considering the "restrictions ... needed in a democratic society" it is inadmissible to use special opinions for political announcements, as by virtue of the imperative requirements of law, judges of the Constitutional Court should remain apolitical.

It is also important to remember that limits to the right to express and disseminate dissenting opinions are also linked to and result from the need to "prevent the spread of information obtained confidentially."

It is inadmissible to reveal what was going on in **the deliberations** room via special opinion, how judges reasoned or what positions they took. This information is confidential and is covered by a legal regime for official **discretion.**

The legislations of most countries on organising and operating constitutional courts regulate the issue of a constitutional judge's right to file a dissenting opinion.

Moldovan Constitutional Court judges have their right to **a dissenting** opinion, **as well.**

Hence, according to Article 67 of the Law on Constitutional Jurisdiction, a Constitutional Court judge disagreeing with the adopted regulation or resolution has the right to express his /her dissenting opinion in written form. The judge's special opinion, *upon his /her request*, is attached to the adopted act (regulation or resolution).

Considering the essence of the given norm, the court is not bound to present **a dissenting** opinion **upon rendering** its final decision since the Law on the Constitutional Court (articles 26 and 27) requires it to publish decisions in the ***Official Monitor (Gazette)*** within 10 days **from their adoption**. A judge's dissenting opinion is attached to the decision upon his /her request.

However, considering the Moldovan Constitutional Court's practice, **dissenting** opinions **of judges** are simultaneously published together with the Constitutional Court's decisions (regulations or resolutions).

It is not a judge's obligation to make his opinion public – it is rather his right. However, Moldovan constitutional judges do not often exercise this right. As figures show, **there were** filed 68 dissenting opinions from 1995-2010, **out of which** 46 refer to regulations, 10 to opinions and the remaining 12 to decisions.

These figures reveal that Constitutional Court judges file special opinions even when they disagree with the court's rulings although the Law of the Constitutional Jurisdiction

of the Republic of Moldova (Article 67) stipulates that a judge is empowered to express his special opinion only in case of disagreement with the court's findings and decisions.

This issue triggers disputes. From our point of view, this is a gap in legislation. In our court's practice, when the court refuses to hear an appeal on the substance of a decision, it is issuing a reasoned ruling on inadmissibility which is also a court's act and has no less potential for **discords.**

In conclusion, I would like to note that, in our view, the right to special opinion individualizes the position of a judge. It also recognizes him as an autonomous and responsible person in the body of constitutional jurisdiction, gives meaningful sense to his personal decision and provides him with the rights equal to those of the majority of judges. **Dissenting** opinions should not be **underestimated**.