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FORMATION OF THE INSTITUTE OF SPECIAL OPINION IN THE PRACTICE OF THE CONSTITUTIONAL COURT OF THE AZERBAIJAN REPUBLIC¹

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The institute of special opinion in the constitutional control system is regarded in two contrasting ways. Supporters of the “positive approach” assert that special opinions maintain the independence of a Constitutional Court judge, as well as the versatile, comprehensive consideration of a particular case. The “negative approach” in regards to the issuance of special opinions is based on the notion that special opinions as a whole undermine the authority of constitutional court decisions and negatively affect the efficiency of constitutional control.

The role of special opinions in the legal system directly depends on the effect of constitutional court decisions on the legal system as a whole. The Constitutional Court’s decisions have a depersonalised, imperative character, and, to a certain degree, influence legal relationships. The Constitutional Court’s decisions do not reflect results of voting, since voting is made on behalf of all of the court’s members. Unlike a court decision, the special opinion of an individual judge has no legal power. However, special opinion allows a particular case to be approached from a different perspective. Although special opinion is not used in the decisions of general courts and in law enforcement practice, it indirectly influences the legal system as a whole.

¹ This paper was prepared for the Black Sea Regional Conference on the Importance of Dissenting and Concurring Opinions in the Development of Judicial Review, organised by the Constitutional Court of Georgia in cooperation with the Venice Commission of the Council of Europe and the German Society for Technical Cooperation (GTZ), September 17-18, 2010, in Batumi, Georgia.

In constitutional law, special opinion is classified taking into account its relationship with the common decision. There are two types of special opinions:

- a judge disagreeing with the decision expresses his special opinion with a relevant argumentation in the form of a special document;
- a judge agreeing with the position of the court majority on the decision's substance expresses his own opinion about its argumentation.

Public expression of special opinions is not always allowed. For example, in the constitutional control systems of Austria, Belgium, Ireland and Italy, special opinions are not expressed publicly. However, European constitutional courts give preference to the institute of special opinion, and make it legally binding to publish them, such as in Germany, Spain, Portugal, Russia, Slovenia and Azerbaijan.

According to Article 77 of the Law of the Azerbaijan Republic "On the Constitutional Court", dated October, 21, 1997, a Constitutional Court judge is granted the right to issue a special opinion and to attach it to the court's main decision. The new Law "On the Constitutional Court", dated December 23, 2003, specifically defined the obligation of promulgating a judge's special opinion. Article 64 stipulates that in the case of a disagreement with the descriptive, motivational or resolution section of the Constitutional Court's decision, a Constitutional Court judge may issue a written special opinion. Thus, the special opinion should be published alongside the Constitutional Court's decision.

Therefore, it is possible to conclude that a Constitutional Court judge has the right to issue a special opinion concerning the decision's descriptive and motivational sections. However, the law does not limit judges in terms of the purpose for issuing special opinions, i.e. special opinions can be issued in support of the Constitutional Court's common decision, or express disagreement with the general opinion.

The issuance of special opinions is always conjugated with the divergence of the judges' opinions. However, special opinions should not belittle or put to question the entire validity and justice of the Constitutional Court's decisions. Special opinions basically express the position of an individual judge or a group of judges, but this opinion should not belittle the authority of the judges' joint decision. Thus, the use of direct, unreasoned and open forms of criticism towards a court's common decision is inexpedient in the judge's special opinions.

A special opinion should be argued. A judge, choosing an individual position on a particular case, should justify his reasoning and give an exhaustive explanation of his position. In the special opinion, the judge's position should be presented taking into account the results of a legal investigation. In other words, the special opinion must be based on a legal investigation.

To a certain degree, special opinions are the result of special scientific research. Hence, if research is based on scientific methods, its results may advance jurisprudence. For ex-

ample, in his special opinion, a judge may explain certain terms, offer the most reasonable qualification to certain delicto relations, and express any typology or classification, etc.

An important question is the time when the special opinion is issued and publication. Azerbaijani legislation does not limit Constitutional Court judges by setting a time frame for issuing special opinions. However, as there is a requirement for the special opinion to be published together with the Constitutional Court's decision, the special opinion should be issued before the promulgation of the court's common decision. Taking into account the practice and requirements of the Internal Charter of the Azerbaijani Constitutional Court, the opportunity to issue a special opinion is announced when the court takes its common decision. According to Article 38, the special opinion should be given to the court within five days after the announcement of the Constitutional Court's decision. This term is necessary to guarantee the special opinion's timely promulgation.

A special opinion should not be confidential. Other judges and members of the court sanctioning the special opinion serve to increase the quality of the judicial deed. Openly discussing the special opinion, on one hand, will allow judges to familiarise themselves with an alternative opinion before taking a decision. On the other hand, it will allow the author of the special opinion to find supporters for his position and also substantially affect their position regarding the main decision.

We need to note here that the institute of special opinion has certainly received active dynamics in the Azerbaijani Constitutional Court's practice in recent years. The court has been functioning since 1998, but the practice of applying special opinions is relatively new. Special opinions were issued individually, and also by groups of judges. However, there have been no cases of ties in constitutional jurisprudence when an equal number of judges expressed different opinions.

Such prospective procedural complexities in the issuance of special opinions highlight the importance of a remedially procedural regulation of the mechanism for issuing special opinions. There is no certain required order for issuing and publishing special opinions in European constitutional legislation. However, general practice underlines several basic requirements applicable to special opinions. These requirements include the individual right of each judge to issue a special opinion, the obligatory acknowledgement of the presence of a special opinion during the announcement of the court's decision, and its public promulgation.

