Strasbourg, 30 September 2010 **CDL-JU(2010)016**

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with the
Constitutional Court of Georgia
and
«The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)»

BLACK SEA REGIONAL CONFERENCE

ON

"THE IMPORTANCE OF DISSENTING AND CONCURRING OPINIONS IN THE DEVELOPMENT OF JUDICIAL REVIEW"

17-18.09.2010, BATUMI, GEORGIA

REPORT

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

by
Mr Arne Marjan MAVČIČ
(Professor of Human Rights at the School of Government and European Studies, Brdo, Slovenia)

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

CONTENTS

1. The Dissenting/Concurring Opinion – General Observations

There is an essential difference between 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 by a majority of votes; moreover, it is absolutely not clear 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 recognized only in the USA as well as in other Common Law based or American tradition 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 the countries with Continental (European) legal systems. Although individual European systems of constitutional/judicial review departed from the decision-making mode characteristic of the Austrian model, they remained half-way to an American type of decision that introduced the dissenting/concurring opinion into Constitutional Court decisions (especially in systems of constitutional/judicial review introduced by new democracies).

As far as publication is concerned, a distinction may be made between 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 judges[1]. The dissenting/concurring opinion is known above all in Croatia[2], Germany[3], Greece[4],

1 *e.g.* Austria, Belgium, France, Ireland, Italy.

2 Para. 4 of Article 19 of the *Constitutional Court Act*.

Hungary[5], Portugal[6], Slovenia[7], Chile[8] , Spain[9], Georgia [10], explicitly as well as in Argentina, Canada, Norway, Macedonia, Montenegro, Serbia, Bosnia and Herzegovina, at the Interamerican Court, in Poland, Estonia, Romania, Moldova, Bulgaria, Azerbaijan, Turkey, Ukraine, Armenia etc. In Portugal, however, the publication of votes including names is a matter of judicial tradition because the decisions issued by the Constitutional Court strictly include names also. 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 recognized by the Court of Justice of the European Community in Luxembourg, but was recognized by the European Commission[11] and is recognized by the European Court of Human Rights in Strasbourg[12].

2. Some National Systems in Details

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 has become more unpredictable in its entirety. Finally, from the theoretical point of view it should be important that to the area where the law provides the judge discretion (which is particularly true for the constitutional justice), where the judge must then exercise its discretion in a legitimate manner, such personal views should be also disclosed. In a democratic system, the creation of open decision-makers will it is of a fundamental, because only in this way we can achieve more responsible behavior, which mostly means the behavior can be controlled.
The **Court of Justice in Luxembourg**, although not allowed for separate opinions, but some reform efforts within the court has been also spoken in favor 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 in a relatively broad extend. The (European) Convention for the Protection of Human Rights and Fundamental Freedoms (signed in Rome on 4/11-1950):

---

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

4 Para. 3 of Article 93 of the *Constitution*; Articles 35 to 38 of *Act* No. 184/1975.

5 Article 22 of the *Constitutional Court Act*.

6 Para. 4 of Article 42 of the *Constitutional Court Act* No. 28/1982.

7 Para. 3 of Article 40 of the *Constitutional Court Act*; Articles 48 to 50 of the *Rules of Procedure of the Constitutional Court*.

8 Para. 2 of Article 31 of the *Constitutional Court Act*.

9 Para. 2 of Article 90 of the *Constitutional Court Act* No. 2/1979.

10 Para. 5 of Article 40 of *Rules of the Court.*

11 Para. 1 of Article 31 of the *European Convention on Human Rights and Basic Freedoms.*

12 Para. 2 of Article 51 of the *European Convention on Human Rights and Basic Freedoms*.

- introduced the separate opinion to the decisions of the European Commission on Human Rights (Para. 1 of Article 31): If the Commission have 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 members of the Commission.
- It is currently reflected in the decisions of the European Court of Human Rights (Para. 2 of 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 above mentioned European courts and their composition did not allow direct consequences of their practices to be reflected in the consideration of separate opinions in the national legal orders.

In **Germany**, separate opinion (abweichende Meinung) has not been unknown in the judicial history. However, the introduction of a separate opinion welcomed the overwhelming majority in the constitutional courts and a clear majority of all federal supreme courts. But the separate opinion was refused from collegiate courts with a narrow majority, but 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 the separate opinion (Para. 2 of Article 30 of the Federal Constitutional Court Act). A separate opinion may give any judge or as dissenting opinion to the individual decision of the Chamber or, where appropriate, as a concurring opinion to the reasoning of the decision. Additionally, it may be published names of the vote and judges who gave separate opinions. From the separate opinion some people expected the improvement of the image of the Constitutional Court, arguing that in this way will comprehensively set out the legal aspects, while others pointed to the weakening of the court, because there could be a danger for the public respect.

Regulation of separate opinions in **the constitutional courts of 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 a 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/her separate views on the decision or its reasons in writing. Separate opinions without giving the author are published accompanied by decision (Para. 5 of Article 25). A judge who wants to give a dissenting opinion is obliged to inform the Court about his/her intention as soon as possible, latest before signing the decision by the participating judges (Para. 1 of Article 4 of the Rules of Procedure of 18/12-1990). Any separate opinion should be submitted to the President of the Court in three weeks after delivery of the decision. At the request, the President may extend this period is extended for a further three weeks (Para. 2 of 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 (Para. 2 of 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 (Para. 3 of Article 13). In principle,

such written opinions are not component parts of procedural documents. But any judge may request his/her separate opinion to be delivered together with the opinion of the plenary court.

According to the **Hamburg Constitutional Court Act** of 2/10-1953 the separate opinion of any member of the court is allowed. The separate opinion shall be attached to the decision (Para. 4 of Article 22). In its decisions, the Constitutional Court may indicate the proportion of votes (Para. 5 of 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 in three weeks after finding the reasons 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 be also 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 in the reasoning of the decision - at the request of a member of the court outvoted – his/her opinion shall be repeated, without giving names (Para 2. of Article 11).

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

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

The German prevailing literature is the richest in this area, trying to establish general principles 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 collegiality of the court. This does not exclude the possibility that in the 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 a separate opinion in Italy and in Germany, are mainly of political in 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 (Para. 2 of 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 organization, 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 (Para. 4 of Article 42).

Greece: The Constitution of 1995 allows a separate opinion. Judicial minority opinion is published without indicating the identity of the judge - the author of such opinion (Para. 3 of 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 third Article 93 of the Constitution and in this regard issued implementing laws (the Law no. 184/1975, Articles 35 to 38) provide for the record of the minority opinion to the decision (Para. 2 of Article 19 of the Act). Constitutional command to publish a dissenting opinion has been also considered as the expression of the principle of publicity.

Constitutional Law on the Constitutional Court of the Republic of Croatia states that the Constitutional Court judge, who expressed a dissenting opinion shall give it in writing (Para. 4 of Article 19 of the Law).

The **French legal system** does not allow 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 personalizing the opinions of judges would give to the judiciary itself to much authority. Of course, courts are now the creators of law and they have very strong power at the 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 from the period after the 1937th.

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

3. Dissenting and Concurring Opinion in the Slovenian Practice

3.1 The Slovenian Practice until 1991

According to past legal theory, the dissenting opinion of the Constitutional Court judge had no power of decision and did not affect the normative act, which was a subject to a review of the 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 all members of the Constitutional Court the task to discuss again and try all the facts and reasons for adopting the appropriate decision. This was almost the preventive importance of separate opinions, which was realized during the court sessions. When the then 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 the adoption of appropriate decisions and of separate opinion. Through such separate opinion also reflected the willingness of members of the Constitutional Court to accept the public responsibility for its position expressed in this opinion, especially if this position has not met with public approval. Separate opinion, it was considered as important for the legal sciences in order

to create certain positions to individual legal institutions and principles. In addition, it was welcomed to help to ensure that the constitutional decision may be taken with greater care and interest. The reasons given in a separate opinion, not (in any way) reduced the importance and impact of the (main) decision of the Constitutional Court.

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

The Slovenian Constitution of 1974 i(Para. 2 of Article 420) provided that a member of the Constitutional Court, which expresses a dissenting opinion, has the right and duty to express that opinion in writing and submit it to the court. In the then Law on Proceedings before the Constitutional Court of Republic of Slovenia (Official Gazette, Nos. 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 of 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 with the main decision only once.

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

From 1974 to 1990 in practice of the Slovenian Constitutional Court had not been the case the separate opinion to be published together with the decision of the Constitutional Court.

3.1 The Current Slovenian Practice

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

The Constitutional Court Act:

Chapter 5 (*Deciding*) (Para. 3 of Article 40): A judge who does not agree with a decision or with the reasoning of a decision may declare that he will write a separate opinion, which must be submitted within the period of time 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 a decision adopted at a session of the Constitutional Court may submit a separate opinion, which 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 opinion. Joining a separate opinion is possible also 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 deciding on 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 on. Immediately after the final vote, the Constitutional Court decides on the extension or reduction of such 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, the separate opinion in the proceedings before the Slovenian Constitutional Court has been widely practiced in different forms: as a dissenting, as a dissenting in part, as a concurring, as a concurring a part, created by one judge or created by a group of judges. Although the separate opinions have no legal force and legal effect, represent a valuable complement to the decision. Public to be informed of the argumentation or comments made by “the other side”, which remained in the minority, remain articulated arguments, which may eventually become a majority, the legal doctrine and practice to enable itself weighing all the arguments that are competing in the process of constitutional review.

4. Reference:

MAVČIČ, Arne. *The constitutional review*. The Netherlands: BookWorld Publications, cop. 2001. 240 p., ISBN 90-75228-18-X. [COBISS.SI-ID 152063]

www.us-rs.si

www.concourts.net

5. Bibliography:

Akzeptanz durch Qualitaet foerdern, DRIZ 1987, str. 210–211

Čok Vida, *Vrste i dejstvo odluka ustavnih sudova*, Beograd, 1972, str. 24

Geiger Willi, *Die abweichende Meinung beim Bundesverfassungsgericht und ihre Bedeutung fuer die Rechtsprechung,* Die Freiheit des Anderen, Festschrift fuer Martin Hirsch, 1981, str. 455

Kelemen Katalin, *Decision-making process of the constitutional courts of EastCentral Europe with special regard to the use of dissenting opinions and comparative law, Firenze, October 2007*,
http://www.academia.edu/People/Justice/Judicial_Separate_Opinions

Krbek Ivo, *Ustavno sudovanje*, Zagreb, 1960

Luther Joerg, *Die italienische Verfassungsgerichtsbarkeit*, Nomos Verlagsgesellschaft, Baden-Baden, 1990

Maunz-Duerig, *Grundgesetz Kommentar*, Verlag Beck, Muenchen, IX. Abschnitt, Art. 94 GG, No. 17

Mavčič Arne, *Ločeno mnenje v ustavnem sojenju*, Pravna praksa, št. 14/92, str. 17

Mavčič Arne, *Obrazložitev odločitve Ustavnega sodišča*, Podjetje in delo, št. 5/90, str. 495

Mavčič Arne, *Ustavno sodstvo v Španiji*, Pravna praksa, št. 1/92, str. 16

Mavčič Arne, *Ustavno sodstvo v Zvezni Republiki Nemčiji*, Pravna praksa, št.6/90, str. 11

Noll J. Alfred, *Verfassungsgerichtsbarkeit und Gewaltenteilung*, Oesterreichische Juristenzeitung 1992, str. 148, tč. c)

Ritterspach Theodor, *Gedanken zum Sondervotum*, Festschrift fuer Wolfgang Zeidler, Band 2, 1987, str. 1379

Saecker Horst, *Das Bundesverfassungsgericht*, Muenchen, 1981, 3. Auflage, str. 63 in nasl.

Spanner Hans, *Zur Praxis des Sondervotums beim Bundesverfassungsgericht*, Menschenrechte und freiheitliche Rechtsordnung, Festschrift fuer Willi Geiger, 1974, str. 891

Starck C. – Weber A., *Verfassungsgerichtsbarkeit in Westeuropa*, Nomos Verlagsgesellschaft, Baden-Baden, 1986

Tinnefeld Marie-Theres, *Datenschutz in Ungarn*, RDV 1990, str. 241

Veljković Tomislav, *Izdvojeno mišljenje sudije Ustavnog suda*, Naša zakonitost, št. 7–8/1988, str. 931

Verfassungen der deutschen Bundeslaender, Gesetze ueber die Landesverfassungsgerichte, Geschaeftsordnungen, Grundgesetz, BverfGG, 4. Auflage, Beck-Texte im dtv, Muenchen, 1991

Welan, *Plaedoyer fuer die dissenting opinion beim VfGH*, IndRME 1971/3, 1971/21 in 1971/41

Zierlein Karl-Georg, *Erfahrungen mit dem Sondervotum beim Bundesverfassungsgericht*, Die Oeffentliche Verwaltung, Februar 1981, Heft 3, str. 83