THE ROLE OF DISSENTING AND CONCURRING OPINIONS IN THE CONSTITUTIONAL JURISDICTION

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Abstract

The Judges' possibility to submit dissenting / concurring opinions is disputed as arguments are brought both for and against it in the context of the obligation to ensure the secrecy of deliberations. This study, bringing landmarks of the European Constitutional Courts' legislation and case-law on the subject, demonstrates the role of the dissenting and concurring opinions in the development of the law, emphasizing the idea of balance for their formulation and grounds.

Keywords: *dissenting opinions, concurring opinions, constitutional review, independence of judge*

JEL Classification: K10, K41

1. Introduction

The regulation of the Judges' possibility to publish dissenting or concurring opinions in relation to the rendered decisions appears in many laws of the EU states. The conducted studies reveal, moreover, a growing trend on the regulation of this possibility, at least for constitutional judges, to submit dissenting / concurring opinions[2].

This study proposes to examine such practice within the constitutional courts, especially within those in the Member States of the European Union, and particularly in Romania, and to identify its role in the development of the law, respectively in its process of constitutionalisation which equally concerns business law.

2. Terminological clarifications

From a legal point of view, dissenting opinion means a different opinion in relation to the majority opinion, of one judge / some of the judges making up the panel, regarding the final solution which is to be delivered in a certain case.

Concurring opinion means the different opinion of one judge / judges on the recitals of the solution delivered in a case. Therefore, given the situation, the divergence does not bear on the delivered solution, but on the reasoning of the judgment.

As it can be noted from reading the examples which we are to explain below, some legislations use the term of "dissenting opinion" in a broad sense that includes equally the concurring opinions. From this perspective, a dissenting opinion appears as a different opinion in relation to the majority opinion, either regarding the solution or the recitals that substantiates it.

The regulation / practice on the formulation of dissenting opinions constitutes a derogation from the principle of secrecy of deliberations, enabling the public disclosure of other opinions expressed during the deliberations, likely to provide a more complete view on their nature and subject of matter. Precisely in view of this aspect, the issue on the admissibility regarding the formulation of such opinions is controversial.

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[2] See the Study prepared by the Directorate General for External Policies of the European Parliament, entitled Dissenting opinions in the Supreme Courts of the Member States http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT6 4963/20130423ATT64963EN.pdf (consulted on October 10, 2016).

3. Applicable regulations in the EU states and the European Court of Human Rights

The Romanian law allows the formulation of both dissenting opinions and concurring ones, both by the judges of the courts and by the judges of a Constitutional Court.

Thus, the Code of Civil Procedure establishes, in Article 426 (2) - *Drafting and signing decisions*, that, "*If one of the judges or of the judicial assistants remains in the minority during the deliberations, he/she shall draft a separate opinion, which will include the presentation of recitals, the solution he/she proposes and his signature. Likewise, the judge who agrees with the solution, but for different reasons, will separately draft a concurring opinion*". The doctrine[3] signaled the novelty of regulation through the New Code of Civil Procedure, regarding the judges' possibility to formulate concurring opinions; the old Code did not contain such provisions. Likewise, according to Article 401 (1) of the New Code of Civil Procedure, "*After a decision has been rendered, a minutes shall be immediately drawn up, containing the solution and presenting, when appropriate, the dissenting opinion of judges in the minority.*"

As concerns the constitutional judge, its ability to formulate dissenting and concurring opinions is governed by specific rules, respectively by the provisions of Article 59 (3) of Law no. 47 / 1992 on the Organization and Operation of the Constitutional Court[4], according to which "*Judges who have given a negative vote may formulate a separate opinion. With regard to the reasoning of the decision, it is also possible to write a concurring opinion. The dissenting opinion and, as the case may be, concurring opinion shall be published in the Official Gazette of Romania, Part I, together with the decision."*

As for other EU states where the constitutional judge is allowed to formulate dissenting opinions, we should note, similarly to the rules in the Romanian legislation, *Rules on the organization of the activities of the Constitutional Court[5] of the Republic of* ***Bulgaria*** which provides for in Article 32 that judges who do not agree with the decision adopted by the Court may formulate a dissenting opinion, setting out their opinion in writing. Likewise, judges who make up the majority may formulate concurring opinions. The signing of a dissenting opinion shall not be permitted when a decision is taken by secret ballot, namely the decisions concerning immunity/inability of judges and impeachment of the President. Constitutional Court decisions, together with the dissenting and concurring opinions, shall be published in the Official Gazette within fifteen days of their adoption.

In ***Croatia***, *The Constitutional Act on the Constitutional Court[6]* provides for in Article 27 that the judge of the Constitutional Court may issue a dissenting opinion, with an obligation to give the reasons for it in writing, within a reasonable time from the day the decision or ruling was written. According to *Article 51 of the Rules of Procedure of the Constitutional Court[7]*, a judge shall be obliged to announce the formulation of a dissenting opinions at a Session of the Constitutional Court, after the decision or ruling has been rendered, and he/she shall be obliged to provide written statement of reasons for the dissenting opinion and forward it to the President of the Constitutional Court within a period of eight days after the date on which the decision or ruling of the Constitutional Court is rendered. If the dissenting opinion is not forwarded to the President of the Constitutional Court prior to the expiry of the above-mentioned time limit, the decision or ruling shall be sent to the Official Gazette for publication, while the subsequently delivered dissenting opinion shall be bound in the Constitutional Court case file and become an integral component thereof.

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[3] see Viorel Mihai Ciobanu, Marian Nicolae (coordinators), *New Code of Civil Procedure, commented and annotated*, volume I, Universul Juridic Publishing House, Bucharest, 2013, p.936.

[4] Republished in the Official Gazette of Romania, Part I, No. 807 of 3 December 2010.

[5] http://www.legislationline.org/documents/action/popup/id/6197 (consulted on October 10, 2016).

[6] http://www.usud.hr/sites/default/files/dokumenti/The_Constitutional_Act_on_the_Constitutional_Court_of_the_Republic_of_Croatia_consolidated_text_Official_Gazette_No_49-02.pdf (consulted on October 10, 2016).

[7] http://www.usud.hr/sites/default/files/dokumenti/Editorially_revised_and_consolidated_text_of_the_Rules_of_Procedure_of_the_Constitutional_Court_of_the_Republic_of_Croatia.pdf (consulted on October 10, 2016).

The Constitutional Court Act[8] *of the* ***Czech Republic*** **establishes in Articles 14 and 22 that the judge who disagrees with an adopted decision has** the right to formulate a dissenting opinion, which will be noted in the minutes of discussions and appended to the decision.

In ***Germany***, *The Federal Constitutional Court Act*[9] provides for in Article 30 (2) that the judge who expresses a differing view on the decision or its reasoning, may set forth these views in a dissenting opinion, which shall be annexed to the decision. *Rules of Procedure of the Federal Constitutional Court*[10] provides for in Article 55 that the dissenting opinion formulated by a judge shall be submitted to the President of the Senate[11] within three weeks of the decision being finalised. The Senate may extend this time limit. The decision and the dissenting opinion shall be published together.

The Constitutional Court Law[12] *of the* ***Republic of Latvia*** provides for in Section 30 (6) that a judge who has voted against shall express in writing his dissenting opinion that shall be appended to the matter. The decision shall be written within 30 days after being rendered, and in three days after being written the decision shall be communicated to the participants (parties). Section 33 of the *Law* establishes that a decision of the Constitutional Court shall be published in the Official Gazette "Latvijas Vēstnesis" not later than within five days after making thereof. The dissenting opinions shall be published in the Official Gazette not later than within a period of two months after drafting the decision of the Constitutional Court. *The Rules of Procedure of the Constitutional Court*[13] establishes that, if a dissenting opinion regarding the decision of the Court has not been formulated, the President shall append to the case a written statement to this effect (Article 144).

The Law on the Constitutional Court[14] *of the* ***Republic of Lithuania*** provides for in Article 55 the judge's possibility to set forth in writing his reasoned dissenting opinion within five working days of the pronouncement of the decision. Article 55 (5) of the Law expressly provides that the parties and the mass media shall be informed about this fact. The dissenting opinion may be formulated about the recitals or the operative part of the decision of the Constitutional Court (therefore, also a concurring opinion).

Article 69 (3) of the Constitutional Tribunal Act[15] *of* ***Poland*** rules that a judge who disagrees with the majority may submit a dissenting opinion, providing a written statement of grounds, before the delivery of the decision. The dissenting opinion shall be mentioned in the adopted decision.

Article 32 (1) of *the Act of the National Council*[16] *of the* ***Slovak Republic*** establishes that the judge who disagrees with the decision rendered may submit a dissenting opinion which shall be published together with the decision.

Article 40 (3) of *The Constitutional Court Act* [17] *of the Republic of* ***Slovenia*** is also similar. A procedural interesting aspect is given by *The Rules of Procedure of the Constitutional Court*[18] of Slovenia which rules in Article 72 that opinions must be submitted within seven days of the date on which the Constitutional Court's judges have received the text of the decision verified by the Drafting Commission which is confirmed and signed by the Secretary General (time limit which

[8]http://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Constitutional_court_act_182_1993.pdf (consulted on October 10, 2016).
[9]http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1 (consulted on October 10, 2016)
[10]http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/GO_BVerfG.pdf?__blob=publicationFile&v=2 (consulted on October 10, 2016)
[11] The Federal Constitutional Court consists of two *chambers* (English, the Senate), each consisting of eight members
[12] http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/ (consulted on October 10, 2016)
[13] http://www.satv.tiesa.gov.lv/en/2016/02/04/hello-world/ (consulted on October 10, 2016)
[14] http://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193 (consulted on October 10, 2016)
[15]http://trybunal.gov.pl/fileadmin/content/nie-tylko-dla-mediow/USTAWA_O_TK_z_22_LIPCA_2016_TEKST_ANG.pdf (consulted on October 10, 2016)
[16]https://www.ustavnysud.sk/documents/10182/992132/a_38_1993.pdf/8cb54500-9cc7-4b5c-8d98-ba3b7bc41d95 (consulted on October 10, 2016)
[17] http://www.us-rs.si/media/the.constitutional.court.act-zusts.pdf (consulted on October 10, 2016)
[18] http://www.us-rs.si/media/the.rules.of.procedure.of.the.constitutional.court.of.the.republic.of.slovenia.pdf (consulted on October 10, 2016)

may be shortened or extended by the Court). The opinions are also submitted to other judges of the Constitutional Court, who may comment on such within three days. The judge of the Constitutional Court who has submitted the dissenting opinion may reply to such comments within three days. If a dissenting opinion has not been formulated within the time limit provided for by law, it is deemed that such opinions are not submitted. Article 73 of the *Rules of Procedure of the Constitutional Court* establishes that the dissenting/concurring opinions shall be published together with the decisions of the Constitutional Court, in the Collected Decisions and Orders, on the website of the Constitutional Court, or in other computer databases.

Organic Law of the Constitutional Court[19] *of* ***Spain*** provides for in Article 90 that the President and the judges of the Court may express their disagreement regarding the solution adopted by the Court in the form of a dissenting opinion, which shall be included in the ruling and, in case of decisions, reasoned orders or declarations, shall be published together with them in the "Official *State Gazette*".

The Act on the Constitutional Court[20] of ***Hungary*** rules in Section 66 the possibility to submit both dissenting and concurring opinions, if a judge's reasons differ from those of the majority. The dissenting or concurring opinion shall be drawn up by the judge of the Constitutional Court within four working days of the date of the pronouncement of the decision and the time limit should be two working days within the procedure laid down. The dissenting and concurring opinions shall be published together with the decision.

Regarding the ***European Court of Human Rights***, we note that, according to Article 74^1 paragraph 2 of the Rules of Court, republished on 19 September 2016[21], Judges may submit dissenting or separate opinions which shall be annexed to the judgment delivered by the Chamber or by the Grand Chamber, or a bare statement in this regard.

As for the other constitutional courts of the EU states which have adopted the European model of constitutional review, namely ***Austria, Belgium, France and Italy***, the law does not allow the constitutional judges to use the instrument of dissenting/concurring opinions. Similarly, dissenting/concurring opinions are not permitted within the ***Court of Justice of the European Union.***

In relation to those mentioned above, it must be concluded that in the quasi-majority of the EU states which have embraced the European model of constitutional review it is regulated the constitutional judges' possibility to submit concurring/dissenting opinions, and for reasons of institutional transparency, in many of these states, even during news releases on the solutions adopted, the names of the judges who sign such opinions are mentioned[22]. However, they shall be published together with the adopted decision/ruling. Certain legislations establish timelines for drafting, as well as the obligation regarding the communication to the other judges, both in order to acknowledge them and to express the statement of reasons for the dissenting/concurring opinions.

4. Arguments *against* and *in favour* of formulating dissenting/concurring opinions by constitutional judges

We observe that the formulation and publication of such opinions is controversial.

Thus, the main arguments against dissenting opinions may be as follows: maintaining the authority of courts and their judgments which could be destroyed due to a delicate balance of power between the minority and majority; the protection of the independence of judges against undue political pressures, as long as the signing of dissident viewpoints they appear individually in the public eye; ensuring that the final decisions of the courts are clear and unambiguous; keeping

[19] http://www.tribunalconstitucional.es/en/tribunal/normasreguladoras/Lists/NormasRegPDF/LOTC-en.pdf (consulted on October 10, 2016).
[20] http://hunconcourt.hu/rules/act-on-the-cc (consulted on October 10, 2016).
[21] http://www.echr.coe.int/Documents/Rules_Court_ENG.pdf (consulted on October 10, 2016).
[22] See the example of the Czech Republic, Germany, Spain, Hungary.

collegial relations among judges, which could be strained by formulating/motivating certain opinions different from those embraced by the majority[23].

As the main arguments in favour of dissenting opinions, we should note: maintaining the moral integrity and independence, as well as the judges' freedom of expression; improving the quality of judgments delivered by the courts, meaning the concern regarding a solid substantiation of the solution and an accurate reasoning; promoting transparency; improving "the dialogue with the future" and with other courts[24].

Accepting the arguments in order to support the possibility of formulating dissenting/concurring opinions, we will particularly focus on two of the above-mentioned arguments. Therefore, we consider that the argument of transparency is particularly relevant for the constitutional courts, given their role as guarantors of the supremacy of the constitution. Moreover, citizens need to know the reasons for which a law passed by their representatives in Parliament is declared unconstitutional, as well as any minority arguments. As the "genesis" of a law is characterized by transparency, all debates and related documents, from the legislative initiative to the publication in the Official Gazette of Romania, being accessible to the persons concerned, in the same way the procedure by which a law is found to be unconstitutional must be known. The dissenting/concurring opinions shall complete, from this point of view, the reasoning of the rendered decisions, in the sense of revelling the contradictory debates (where they exist), contributing to the clarification of the debated issues, in accordance with the requirements of the rule of law[25].

As concerns the so-called dialogue with the future to which the Study invoked by us refers to, this means an appeal to the "to the intelligence of a future day"[26], when another decision, of the same court, may correct any error. Therefore, the dissenting opinions can play an important role in the future development of the law; in certain cases, it may become majority opinions. Such situations can be also found in the case-law of the Constitutional Court of Romania. Thus, for example, after a significant practice (Decision no. 952 of 25 June 2009, published in the Official Gazette of Romania, Part I, no. 571 of 17 August 2009, Decision no. 1.255 of 6 October 2009, published in Official Gazette of Romania, Part I, no. 783 of 17 November 2009, Decision no. 197 of 4 March 2010, published in the Official Gazette of Romania, Part I, no. 209 of 2 April 2010, Decision no. 399 of 13 April 2010 published in the Official Gazette of Romania, Part I, no. 334 of 20 May 2010, Decision no. 958 of 6 July 2010, published in the Official Gazette of Romania, Part I, no. 561 of 10 august 2010, Decision no. 1461 of 8 November 2011, published in the Official Gazette of Romania, Part I, no. 81 of 1 February 2012, Decision no. 283 of 27 March 2012, published in the Official Gazette of Romania, Part I, no. 366 of 30 May 2012, Decision no. 649 of 19 June 2012, published in the Official Gazette of Romania, Part I, no. 560 of 8 August 2012 and Decision no. 65 of 21 February 2013, published in the Official Gazette of Romania, Part I, no. 176 of 1 April 2013), which has consistently ruled on the constitutionality of Article 16 (3) of the Political Parties Law no. 14/2003, according to which "*Acquiring or losing membership within a political party is subject only to the internal jurisdiction of the respective party, according to the party's statute*", the Court declared their unconstitutionality in 2013. Decision no. 530 of 12 December 2013 rendered on that occasion, has, basically, made use of the recitals of the dissenting opinion submitted, for example, in relation to Decision no. 1461 of 8 November 2011, by two of the judges of the Court[27], which proved Article 16 (3) of the Political Parties Law no. 14/2003 of the constitutional provisions contained in Article 21 (1) and (2) regarding the free access to justice.

[23] See also D. Edward, *How the Court of Justice works*, „European Law Review", no. 20/1995, pp.539-558.

[24] For details, see the Study prepared by the Directorate General for External Policies of the European Parliament, entitled Dissenting opinions in the Supreme Courts of the Member States http://www.europarl.europa.eu/document/activities/cont/201304/20130423ATT64963/20130423ATT64963EN.pdf (consulted on October 10, 2016).

[25] For details on the principle, see the latest document adopted in the matter – the Report approved at the 106th Plenary Session of the Commission (Venice, 11-12 March 2016) http://www.venice.coe.int/images/SITE%20IMAGES/Publications/Rule_of_ Law_ Check_ List.pdf (consulted on October 10, 2016).

[26] C. Hughes, *The Supreme Court of the United States*, cited in L'Heureux-Dubé, *The dissenting opinion: voice of the future?*, in „Oosgode Hall Law Journal", n.38/2000, 495-516.

[27] Professor PhD Tudorel Toader, Petre Lăzăroiu.

According to the reasons which essentially substantiated the admission decision of the exception, delivered in 2013, "the provisions of Article 16 (3) of Law no. 14/2003, establishing the exclusive competence of judicial bodies of the political party to decide upon statutory compliance by party members, eliminate, in fact, the judicial review regarding the observance by these bodies of their own status and thus prevent the free access to justice".

5. Conclusions

We consider that the development of legislations in order to establish the constitutional judges' possibility to submit dissenting/concurring opinions constitutes the result of a process of maturation and deeper understanding about the position and the role of the constitutional review and of the constitutional judge. At least in the Romanian law system, a judge has a representation conferred upon by its mode of appointment, by the main representative authorities of the state: Parliament and President of Romania. In this capacity, the judge has a great duty which must be exercised with balance and under institutional transparency.

Moreover, this maturation process is also emphasized in and the European Parliament Report on which we relied, referring punctually to the practice of the Federal Constitutional Court. Thus, if at the beginning (namely immediately after the settlement of this legal possibility) the right to express dissenting opinions was used extensively, the "enthusiasm" about it has decreased over time, currently dissenting opinions are submitted only in relation to the most controversial cases. The Federal Constitutional Court's judges are making efforts to find a common solution and to render decisions unanimously. If such efforts fail, dissenting opinions must be publicly revealed, for transparency in particular, but also in order to allow a better understanding of the coherence of the constitutional court's recitals[28].

The mentioned development illustrates the need for ensuring a balance on the authority of the rendered judgments and on the constitutional judges' freedom of expression. As concerns the Constitutional Court of Romania, we note that the possibility of using the instrument of dissenting/concurring opinions is slightly used. The vast majority of the decisions of this Court are adopted, therefore, unanimously, rarely being found "fragile" majorities (respectively 4 judges who sign dissenting opinions), likely to incite issues of those listed as arguments against formulation of dissenting/concurring opinions. Likewise, there are not identified situations of obvious disproportion between the statement of reasons of the Court's acts and of the dissenting opinions.

It should be noted that, while views on individual opinions vary, there is a general agreement that they serve their purpose only if they are limited in number, circulated in advance, and drafted in a manner that is not liable to cause tension between judges or to exhibit the existence of such tension. We consider that their role is to contribute to the development of the law by promoting certain legal judgments, opinions, which, revealing other aspects of the legal phenomenon, can be confirmed by further developments in the matter.

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