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Dissenting Opinion and Judicial Independence^{*1}

1. Introduction

The stability and effectiveness of judicial power in implementing the rule of law is guaranteed by the independence of the courts and the judges. Independence of the courts has been an object of legal and political debate in Estonia for quite a while, especially in connection with Estonia's aspirations towards membership of the European Union. The subject has been covered in various studies.^{*2} It is inevitable, though, that the studies cannot deal in detail with all the aspects of the independence of the courts, and focus mainly on the institutional independence of the courts.

According to § 146 of the Estonian Constitution^{*3}, the courts shall be independent in their activities and shall administer justice in accordance with the Constitution and the laws. Independence of the judges is guaranteed with the procedures for the administration of justice established by laws and with the secrecy of deliberations in the process of making the judgment. But how is the latter in conformity with the possibility guaranteed in a collegial court to judges who have remained in the minority in the voting to add, on certain conditions, their dissenting opinion to the majority opinion of the court? Does the dissenting opinion undermine the authority of the court and violate the principle of secrecy of deliberations, or does it strengthen the court's reputation and make the administration of justice more transparent? Is it in conflict with the principle of the independence of a judge, or does it, on the contrary, add to the independence of a judge?

Until now, legal literature in Estonia, with some exceptions^{*4}, has dedicated regrettably little attention to the

¹ The article (shorter version of a research project) was prepared in the framework of the Estonian Constitutional Law Institute. The author wishes to thank the European Commission's EUSSIRF programme for the possibility to use the library of the European University Institute in Florence.

² Among others, the EU Accession Monitoring Program carried out by the Open Society Institute. *Judicial independence in the process of accession to the European Union. Judicial independence in Estonia*. Tartu: Iuridicum, 2001 (hereinafter Open Society Institute's report).

³ Riigi Teataja (the State Gazette) 1992, 26, 349.

⁴ Separate treatment: E. Kerganberg. *Kohtuniku eriarvamusest (On Dissenting Opinion of a Judge)*. – *Õigus Teada*, 1998, No. 4 (24), pp. 6–7 and 1999, No. 5 (25), pp. 6–7 (in Estonian) and Bachelor's Thesis: H. Mägi. *Nõupidamistetoa saladus ja kohtuniku eriarvamus (Deliberation Room Secrecy and Dissenting Opinion of a Judge)*. University of Tartu Law Faculty, 1999 (in Estonian). The dissenting opinion is dealt with also in E. Kergandberg. *Kohtuotsus kriminaalasjas, selle kujunemine ja kriitika (Judgment in a Criminal Case, Its Development and Critique)*. Tallinn: Juura, 1999 (in Estonian); T. Raudsepp. *Kohtuliku rippumatuse tagamise teisene tasand (Second Level of Guaranteeing*

institute of judicial dissent. This gap in the Estonian legal doctrine needs to be filled also because recently the topic has gained currency in different European countries (discussions on the introduction of the dissenting opinion in the Italian and French legal orders) as well as in the European Court of Justice where expressing of the dissenting opinion is not allowed.⁵

The present article deals, from the legal point of view, with the dogmatic, historical, comparative and political aspects of the dissenting opinion.

2. Judicial dissent

2.1. Definition of the dissenting opinion — what is a dissenting opinion?

An opinion in the administration of justice is understood as the judge's or court's position on a certain legal issue or with regard to a pending case, which also provides an explanation of the reasoning behind the position. The opinion of the majority of the court is drawn up as the court judgment. The minority opinion, or the dissenting opinion or dissenting vote (German *abweichende Meinung*, *Sondervotum*, French *opinion dissidente*), is the opinion expressed by one judge or jointly by several judges who disagree with the decision reached by the majority in the case. Such a separately expressed opinion can differ from the majority opinion for its reasoning, or reasoning and the conclusion.⁶ Anglo-American legal literature distinguishes between the dissent and the dissenting opinion. Dissent in the administration of justice can mark the direct disagreement of one or several members of the bench with the majority opinion.⁷ A dissent by a judge can, but does not need to, give rise to a dissenting opinion, *i.e.* formulating of the disagreement as a dissenting opinion. In Germany, in the Federal Constitutional Court (*Bundesverfassungsgericht*, *BverfG*), distinction is made between the substance of the dissenting opinion (*abweichende Meinung*) and its presentation as an opinion, *i.e.* its procedural form (*Sondervotum*).⁸ The concurring opinion (German *abweichende Meinung nur in der Begründung*, French *opinion concordante*) is an opinion where the judge agrees with the result of the judgement but not with the reasoning.

2.2. History and reasons of the dissenting opinion — where and why the dissenting opinion originated. Why would a judge maintain a dissenting opinion?

Roots of the dissenting opinion can be found in common law countries. England, where the results of reaching the judgement are public, has two legal systems: continental law, which does not recognise dissenting opinions by judges, and common law, which allows not only dissenting opinions but in all court cases also the individual expression of each judge's opinion. The first, the continental system, included for a long time the Judicial Committee of the Privy Council where the dissenting opinion did not occur for historical reasons.⁹ However, the House of Lords is part of the common law system. The House of Lords (the same applies to the Court of Appeal) presents not only one judgment but makes collective judgments.

Judicial Independence). – *Juridica*, 1999, No. 9 (in Estonian); T. Raudsepp. Kohtuniku otsustuslik sõltumatus (Independence of Judicial Decision-making). – Kohtute sõltumatus ja kohtusüsteemi toimimise efektiivsus Eestis (Independence of the Courts and the Effectiveness of the Functioning of the Court System in Estonia). Tartu: SA Iuridicum, 2002, p. 34 (in Estonian).

⁵ About Italy and France, see, for example: *Etudes et doctrines. Contribution au débat sur les opinions dissidentes dans les juridictions constitutionnelles. Propos introductifs par Dominique Rousseau.* – Cahiers du Conseil constitutionnel. Available at: <http://www.conseil-constitutionnel.fr/cahier/ccc8/etudes.htm> (17.6.2002). About the Court of Justice, see, for example: *Delegation des barreaux de France. Conference intergouvernementale 1996. Suggestion dans les domaines juridictionnel et quasi-juridictionnel. La question des opinions dissidentes dans les arrêts.* (Parlement européen: 1997). Available at: http://www.europarl.eu.int/hearings/igc2/doc75dfr_fr.htm (1.7.2002).

⁶ K.-H. Millgramm. *Separate Opinion und Sondervotum in der Rechtsprechung des Supreme Court of the United States und des Bundesverfassungsgerichts.* Berlin: Duncker & Humblot, 1985, p. 59, see also O. Peltzer. *Die Dissenting Opinion in der Schiedsgerichtsbarkeit.* Frankfurt am Main: Lang, 2000, p. 17.

⁷ *Black's Law Dictionary.* 5th ed. St Paul, Minn.: West Publishing Co, 1979.

⁸ G. Roellecke. *Sondervoten.* – FS 50 Jahre Bundesverfassungsgericht. Vol. I. Tübingen: Mohr, 2001, p. 365.

⁹ Namely, the decisions of the Privy Council were meant as an opinion to His Majesty, and the king could not be misled by presenting different opinions. K. Nadelmann. *The Judicial Dissent: publication v. secrecy.* – *American Journal of Comparative Law*, 1959, vol. 8, p. 417. However, Heyde notes that the regulation of 4. March 1966 clearly gives each member of the Privy Council the right to express a dissenting opinion: W. Heyde. *Das Minderheitsvotum des überstimmten Richters.* Bielefeld, 1966, p. 22.

Namely, judges in the collegial common law courts in England decide *seriatim* (Latin: separately, individually, one after another), so that each judge says in an order how he would decide the case at hand.^{*10} This makes adjudication extremely complicated and it is often difficult to understand what the court's final opinion is.

Such a style of decision-making was initially also adopted in the United States, but it was exactly in the US where at the end of the 18th century the decision-making *seriatim* was abandoned, and under the Supreme Court Chief Justice Marshall (Chief Justice 1801–1835) the tradition of the opinion of the court was started. Votes of all the judges who participated in making the judgment were added up and the opinion was formed. Judges who maintained a different opinion could add to the opinion of the court their dissenting opinion or concurring opinion, which was also published.^{*11}

In common law countries, the dissenting opinion became quickly a completely normal part of the decision-making process. It was accepted that all judges cannot be of the same opinion in collegial decision-making and the openness of the administration of justice includes the publication of the dissenting opinion. Rupp sees the roots of the dissenting opinion, on the one hand, in the fact that Anglo-American judges are not “career judges” like judges in continental Europe who begin from the first instance in order to reach the highest court, and, on the other hand, in the fact that the tradition of public debate belongs among the fundamental building blocks of the organisation of state in the common law (legal) system.^{*12} The existence or non-existence of the dissenting opinion is connected with the different visions of the lawyer's qualification, principles of the administration of justice and the style of court judgments in the continental European and common law systems. In common law countries, the court judgment is a result of public debate. In continental Europe, however, the decision of collegial courts is anonymous, and the secrecy of deliberations is not subject to disclosure. There is fear that the disclosure of the dissenting opinion may endanger the judge's independence.^{*13} Common law countries, on the other hand, consider the disclosure of the judge's dissenting opinion to be the main criterion of the independence of a judge.^{*14} However, it is impossible to draw a strict line between the development of the common law and continental European legal traditions. Openness of the administration of justice was known not only in England but also elsewhere. According to Feuerbach^{*15}, the Germanic tribes in Germany administered justice publicly, thus in principle also not hiding dissenting opinions although they were not directly favoured.^{*16} Later, as the law became more complicated and Roman law was recognised, the old Germanic traditions of the administration of justice were replaced with the canonical procedure characteristic of collegial courts equipped with professional advisers, where the deliberations took place hidden from the public and the secrecy of deliberations applied.^{*17}

In addition to the question about how the dissenting opinion originated historically, we also need to answer the question why a judge would maintain a dissenting position and decide to express it as a dissenting opinion.

The dissenting opinion can, on the one hand, derive from the judge's personality, the character differences of the judges on the bench, and, on the other hand, from the organisation of decision-making — the course of deliberations.^{*18} The dissenting opinion can be knowingly directed at changing the court practice in the future and drawing the public attention to it. It is good if the dissenting opinion is impelled by the need to make “the right judgment” and not by the judge's desire to gain prominence.

¹⁰ See H.-G. Rupp. Zur Frage der Dissenting Opinion. – Die moderne Demokratie und ihr Recht. FS für Gerhard Leibholz. Vol. II. Tübingen: Mohr, 1966, p. 532.

¹¹ H.-G. Rupp (Note 10), p. 532; K.-H. Millgramm (Note 6), p. 60.

¹² H.-G. Rupp (Note 10), pp. 535–536.

¹³ About France, see, for example, R. David. Les grand systèmes de droit contemporains. Paris: Dalloz, 1973, p. 134.

¹⁴ M. Grünhut. Das Minderheitsvotum. – P. Boeckmann, W. Gallas (eds.) FS für Eberhard Schmidt zum 70. Geburtstag. Göttingen: Vabdehboeck & Ruprecht, 1961, p. 622; D. Homberger-Stäheli. Das Minderheitsvotum des überstimmten Richters. Diss. Zürich, 1973, p. 14 ff.

¹⁵ See references K. Nadelmann (Note 9), p. 415, reference No. 2.

¹⁶ See G. Roellecke (Note 8), pp. 370–371.

¹⁷ W. Heyde. Dissenting Opinions in der deutschen Verfassungsgerichtsbarkeit. – Jahrbuch des öffentlichen Rechts (der Gegenwart), 1970, No. 19, p. 204; G. Roellecke (Note 8), p. 366; K. Zweigert. Empfiehlt es sich, die Bekanntgabe der abweichenden Meinung des überstimmten Richters (Dissenting Opinion) in den deutschen Verfahrensordnung zuzulassen? Gutachten für den 47. DJT 1968. Verhandlungen des 47. DJT. Nürnberg, 1968. Vol. I. München: C.H.Beck'sche, 1968, p. D 45 ff.

¹⁸ See, for example, K.-H. Millgramm (Note 6), pp. 124 and 127.

2.3. Comparative review of the dissenting opinion in courts of other countries

Dissenting opinion and its disclosure is known mainly in the countries of the Anglo-American legal family — for example, England together with Wales and Northern Ireland, Ireland, the United States, Canada, Australia, New Zealand and such countries affected by the Anglo-American system as India, Pakistan, Israel, and some African countries.^{*19}

In the continental European legal systems, the dissenting opinion is allowed and disclosed only in some countries (in Western Europe: Germany, Spain, Portugal, Greece) and even there it is made available in the published form mostly only in higher or constitutional courts.

The dissenting opinion is completely unknown in such countries of continental European legal family as France, Italy, the Netherlands, Belgium and Austria, where the principles of collegiality and secrecy of deliberations are especially strongly rooted and the results of voting are not disclosed.

Central and Eastern European countries mainly stick to the principle of secrecy of deliberations that is prevalent in continental Europe, being of the opinion that society is not yet mature enough to accept the dissenting opinion.^{*20} However, dissenting opinions are allowed, although only in constitutional courts, in the Czech Republic, Hungary, Bulgaria and Croatia. These countries have (re-)built their system of constitutional review mainly in the beginning of the 1990s along the model of the German *BverfG* (the so-called Karlsruhe court), and, as at that time the dissenting opinions in Karlsruhe were already allowed, they were also taken over. Also the justices of the Russian federal constitutional court can express dissenting opinions.^{*21}

A separate phenomenon is the administration of justice in Switzerland because in some regions the complete publicity of deliberations and voting also guarantees the possibility of the dissenting opinion. But dissenting opinions in Swiss courts exist only in the oral form.^{*22}

In Nordic countries, the dissenting opinion was introduced in the Norwegian legal system in 1864; Sweden follows the example of Norway, which is actually based on the practice in the British House of Lords. On the example of the Scandinavian neighbours, an attempt to adopt the dissenting opinion was made in the Danish Supreme Court where it is now existent as a special version — as a description of counterarguments inside the court judgment itself.^{*23}

In conclusion, it could be said that in continental Europe the dissenting opinion is used relatively seldom and its function is to support legal debate and, in that way, indirectly the development of law, rather than by bringing about any particular changes in the court practice. In common law countries, on the other hand, we can find numerous examples of how the dissenting opinion has affected the subsequent court practice by turning into a majority opinion.^{*24}

¹⁹ About common-law countries and Central and South American countries, see in general K. Zweigert (Note 17), pp. D 50–52; W. Heyde (Note 9), pp. 19–45, 55–56; K. Nadelmann (Note 9), p. 418; about Canada, see C. L'Hereux-Dubé. The Length and Plurality of Supreme Court Decisions. – *Alberta Law Review*, 1990, 28 (3), p. 581; about Australia, see G. Rowe. Tensions in the Role of the Common Law Judge. The Problem of Formalist Reasoning and Political Activism. – *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1985, p. 607; about India, see M. Saint-Hubert. La cour supreme de l'Inde, garante de la structure fondamentale de la Constitution. – *RIDC* 3-2000, p. 637; about South-African Republic, see L. Holle. Das Verfassungsgericht der Republik Südafrika: Entstehung, Aufbau, Zuständigkeit nach der Übergangsverfassung vom 27. April 1994. 1st ed. Baden-Baden: Nomos, 1997, dissenting opinions pp. 201–202.

²⁰ Sometimes it is found (*e.g.* in Germany before the introduction of the dissenting opinion in *BverfG* and in Lithuania) that the court must first achieve authority before it can resist public influence that can be brought about by the dissenting opinion. See also K. Zweigert. Verhandlungen des 47. Deutschen Juristentages. Vol. II (Diskussion). München: C.H. Beck'sche, 1969, p. R 129.

²¹ V. O. Luchin, O. N. Doronina. *Zhaloby grazhdan v Konstitutsionnyi sud Rossiiskoi Federatsii*. Moskva, 1998, p. 142.

²² W. Heyde (Note 9), p. 54. About Switzerland in general, see also A. Morf. Das Prinzip der Öffentlichkeit in der schweizerischen Zivilrechtspflege. Diss. Zürich, 1951; M. Wittibschlager. Einführung in das schweizerische Recht. München: Beck, 2000, p. 28.

²³ About Scandinavia, see E. Hambro. Dissenting and Individual Opinions in the International Court of Justice. – *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1956/57, vol. 17, p. 232.

²⁴ See examples in W. Heyde (Note 9), p. 30, K.-H. Millgramm (Note 6), p. 60 ff.

2.4. Dissenting opinion in Estonian courts *de lege lata*

In an interesting way, in Estonia, which in general belongs to the continental European legal system, judges have the right to express a dissenting opinion and the dissenting opinions of the justices of the Supreme Court are also published. Maybe it can be explained by the structure of the court system in Estonia and with the fact that there is no separate constitutional court^{*25}, and, therefore, the Estonian Supreme Court is more similar, for example, to the US Supreme Court rather than to the German higher courts and constitutional court. Maybe a certain role is played here also by the use of the Convention for the Protection of Human Rights and Fundamental Freedoms when drafting the Estonian Constitution and the legislation^{*26} — namely, the Convention for the Protection of Human Rights and Fundamental Freedoms allows the judges of the European Court of Human Rights to hold a dissenting opinion.^{*27}

In Estonia, the legal meaning of the dissenting opinion is not entirely clear. The Constitution has no reference to the dissenting opinion of a judge, thus the dissenting opinion is not directly a constitutional principle in Estonian law. The general term “dissenting opinion” (in Estonian *eriarvamus*) is used to denote both the dissenting opinion and the concurring opinion. The Estonian Constitutional Review Court Procedure Act^{*28}, however, distinguishes between a judge who disagrees with the decision of the court and a judge who disagrees with the reasoning of the decision. Also, no terminological distinction is made between the content of the dissenting opinion and the procedural form of the dissenting opinion. It may be necessary in Estonia to introduce a new term to denote the dissenting opinion in its general meaning and to better distinguish between disagreement and dissenting opinion.

In current law, the dissenting opinion finds its legal basis in the Constitutional Review Court Procedure Act that was passed on 13 March 2002 and came into effect on 1 July 2002. According to § 57 (5) of the Act, a judge who disagrees with the judgment or its reasoning has the right to add a dissenting opinion to the judgment. The dissenting opinion must be presented by the time of pronouncement of the court judgment and it is signed by all the judges who maintained the dissenting opinion. A novelty in the law is the explicit possibility that several judges who remained in the minority can write a joint minority opinion. The Constitutional Review Court Procedure Act lacks, however, a provision on the publication of the dissenting opinion. It is debatable whether the legislator’s will can be interpreted to mean that the dissenting opinion is part of the judgment, *i.e.* whether it is sufficient that the law says that court judgments are published (Constitutional Review Court Procedure Act § 62). In the current Code of Civil Procedure^{*29}, according to § 16 (6), a judge or a lay judge who remained in the minority in the voting can present a dissenting opinion. It is interesting to note that, unlike in many other countries, in Estonia lay judges are also allowed to present a dissenting opinion. Subsection 230 (1) of the Code of Civil Procedure says that it should be indicated in the judgment which judges maintained dissenting opinions, and also a summary of the dissenting opinion is set out after the signatures and the judge who maintained the dissenting opinion will sign it. In criminal court procedures, in accordance with § 266 of the Code of Criminal Procedure^{*30}, a judge who remains in the minority has the right to submit his or her dissenting opinion in writing and the opinion will be included in the file but will not be disclosed upon the pronouncement of the court judgment.

Unlike the Code of Civil Procedure, the Code of Criminal Procedure rules out the possibility of treating the dissenting opinion as part of the judgement because the dissenting opinion is included in the file but it is not disclosed upon the pronouncement of the court judgment. The Code of Misdemeanour Procedure^{*31} that came into effect on 1 January 2002 does not regulate the dissenting opinion. The term dissenting opinion is used only in the meaning of disagreement. As concerns the current Code of Administrative Court Procedure^{*32}, it is lacking any provision on the dissenting opinion. Subsection 25 (3) of the Code provides that upon making a judgment or ruling, the provisions of civil procedure apply in issues not regulated by this Code, which allows us to conclude that to the extent that § 25 of the Code of Administrative Court Proce-

²⁵ In addition to ordinary courts (Constitution §§ 15 and 152) and the Constitutional Review Chamber of the Supreme Court, the Supreme Court *en banc* can also exercise constitutional review (Constitution § 149), see R. Maruste. Põhiseadus ja selle järelevalve: võrdlevad selgitused. Kommentaarid. Tekstid (Constitution and its Review, Comparative Explanations. Commentaries. Texts). Tallinn: Juura, Õigusteabe AS, 1997, p. 170 (in Estonian).

²⁶ See Põhiseadus ja põhiseaduse assamblee. Koguteos (Constitution and Constitutional Assembly. Compilation). Tallinn: AS Juura, 1997 (in Estonian).

²⁷ See Convention for the Protection of Human Rights and Fundamental Freedoms (4.11.1950). Article 51 par. 2. – European Treaty Series, No. 5, 1.

²⁸ Riigi Teataja (the State Gazette) I 2002, 29, 174 (in Estonian).

²⁹ Riigi Teataja (the State Gazette) I 1998, 43/45, 666 (in Estonian).

³⁰ Riigi Teataja (the State Gazette) I 1995, 6/8, 69; 2000, 56, 369 (in Estonian).

³¹ Riigi Teataja (the State Gazette) I 2002, 50, 313 (in Estonian).

³² Riigi Teataja (the State Gazette) I 1999, 31, 425 (in Estonian).

ture is applicable to collegial decisions, also the provision of the Code of Civil Procedure on the dissenting opinion is applicable to these decisions. The Courts Act that was passed by the *Riigikogu* on 19 June 2002 and came into effect on 29 July 2002 is silent about the dissenting opinion.^{*33} Therefore, in the case of the Supreme Court we can talk about the legality of the dissenting opinion only in the context of constitutional review procedure because other procedural codes do not provide a basis for the judge's dissenting opinion in its complete meaning, and even in the case of constitutional review there is no provision on the obligation of publication of the dissenting opinion.

Despite the incompleteness of the legal bases, the practice of maintaining a dissenting opinion in Estonian courts differs from the written law. In reality, not only members of the Supreme Court Constitutional Review Chamber who maintain a different opinion but also members of the Supreme Court Administrative, Civil and Criminal Chamber present their dissenting opinions. The same is true of the dissenting opinions presented to the judgments made by the Supreme Court *en banc*. The dissenting opinions of the justices of the Supreme Court are published together with the judgments both in the *Riigi Teataja* and in the compilation of the Supreme Court judgments and rulings and they are available in the Internet on the homepage of the Supreme Court. However, the dissenting opinion in other collegial courts, *i.e.* second instance courts — circuit courts — is not especially widespread although it exists. Certainly, the less frequent use of the dissenting opinion in the circuit court is related to the heavy caseload of the judges. It can also be due to the fact that the issues of principle, in which case the likelihood of maintaining a dissenting opinion is higher, are in the last instance settled by the Supreme Court.

3. Judicial independence and its connection to the dissenting opinion

3.1. Definition of judicial independence

According to the Estonian Constitution, the courts are independent in their activities, judges are appointed for life, they can be removed from office only by a court judgment and judges may not hold any elected or appointed office, except in the cases prescribed by law. The legal status of judges and guarantees for their independence are provided by law. Judicial independence is a postulate — not a matter for discussion^{*34}; however, it should not be taken as an aim in itself but as a tool that helps the judge in fulfilling legally the tasks arising from the administration of justice.^{*35} Only an independent judge can offer full, constitutional legal protection and guarantee the recognition of the principle of rule of law. Besides institutional independence, judicial independence also includes an internal factor of the decision-making, *i.e.* fair and just administration of justice by a judge, and it has to guarantee adjudication that is free from the external as well as internal influences of the court system.^{*36} Freedom from external influences means the independence of a judge from other powers and guidelines from the authorities above him, as a guarantee of judicial independence internally within the court system we could consider the judge's obligation to administer justice independently and impartially. The independence of the administration of justice and of the courts is guaranteed by § 2 of the Courts Act, according to which no one has the right to interfere with the administration of justice, and acts which are directed at disturbing the administration of justice are prohibited in courts and in the vicinity of courts. The main guarantees of judicial independence are established in § 3 of the Courts Act, by merely stating that judges are appointed to office for life and may be removed from office only by a court judgment. The judge's independence is concerned first of all with the judge's core professional activities, *i.e.* the administration of justice and the functions directly related to this.^{*37}

³³ See the *Riigikogu's* homepage (as a bill 607 SE III) in the Internet: <http://www.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674650&login=proov&password=&system=ems&server=ragne1> (15.1.2003) (in Estonian).

³⁴ Jackson H. Ralston about the Hague International Court of Justice. J. H. Ralston. Some suggestions as to the Permanent Court of Arbitration. – *The American Journal of International Law*, April 1907, pp. 321–329.

³⁵ W. K. Geck. *Wahl und Amtsrecht der Bundesverfassungsrichter*. 1st ed. Baden-Baden: Nomos, 1986, p. 108.

³⁶ T. Raudsepp. *Kohtuliku rippumatuse tagamise teisene tasand* (Note 4), p. 438.

³⁷ H. J. Papier. *Die richterliche Unabhängigkeit und ihre Schranken*. – *Neue Juristische Wochenschrift* (hereinafter NJW), 2001, 15, p. 1090.

3.2. Secrecy of deliberations as a guarantee of judicial independence

Although there is no legal definition of the secrecy of deliberations, it can be deduced from literature that the secrecy of deliberations includes the activities that take place in the course of judicial deliberation, *i.e.* the discussion with the aim to reach a decision and the subsequent voting.^{*38} The secrecy of deliberations does not, however, extend to the disclosing of people who participated in the deliberation, *i.e.* it does not prohibit mentioning of the names of the judges in the judgement.^{*39} Maintaining of the secrecy of deliberations is justified with guaranteeing the authority of the court, the collegiality and unity of the panel and the independence of the judge.^{*40} Subsection 57 (2) of the Constitutional Review Court Procedure Act establishes that the judgment is made by observing the secrecy of deliberations. In accordance with § 225 (3) of the Code of Civil Procedure, the disclosure of discussions which take place during the deliberations of judges is prohibited, a similar provision is also contained in the Courts Act. In the Code of Criminal Procedure, the confidentiality of deliberations of judges is established by § 261, according to which a court shall make judgments in chambers. Disclosure of debates which take place in chambers during deliberations is prohibited. Although the aim of the secrecy of deliberations is to prevent the presence of third persons in the deliberation room in order to ensure that the decision-making process is based on law^{*41} and a possibly good and uniform judgment is made, yet the secrecy of deliberations is seen first of all as the palladium (a sacred object which guarantees the protection of independence) of judicial independence.^{*42} Exceptions to judicial independence are possible only in special circumstances. The Courts Act prescribes that both the duty of confidentiality of a judge (§ 71) as well as the duty of confidentiality of deliberations (§ 72) are timeless and they remain in force also after the termination of the service relationship. Although the preparation of the judgment must take place independently, in peace, in secrecy, internally freely, and during the court proceedings there may be no external influences, the result, on the other hand, must be public.

3.3. Dissenting opinion as a threat to judge's independence

The dissenting opinion, secrecy of deliberations and the independence of a judge are in mutual, controversial correlation. These three notions are the main problem issues relating to the topic of the institution of the judge, and they have caused debates throughout history and will probably continue to do so. Disagreements here are also caused by differences in defining the independence of a judge. Judicial independence is used as an argument both in favour and against the dissenting opinion. Those who use judicial independence as a counterargument to the dissenting opinion relate judicial independence to the strictly guaranteed secrecy of deliberations and look at independence in terms of impartiality.^{*43} There is fear of political (and in some countries, in the case of constitutional courts where the judges belong to political parties, also party-related) pressure on the judge who maintains a dissenting opinion, or pressure by publicly influential economic, social or other interest groups and the media.^{*44} Here we can clearly see how the external as well as internal independence intertwine and overlap. First of all, however, it has to do with personal independence in the wider sense of the term. In addition to external political pressure, the dissenting opinion is also seen as a risk to personal internal independence in affecting the judge's career: according to the principle that if one does not like a particular judge's dissenting opinion the judge would not be promoted in office; the same is true of electing the judge on a panel and being re-elected. In the Open Society Institute's report on judicial independence in Estonia, it is noted: because members of the Constitutional Review Chamber are elected and re-elected by the Supreme Court sitting *en banc*, this creates an incentive for the Supreme Court Constitutional Review Chamber judges seeking re-election to rule in a manner that meets the expectations of their colleagues on the Supreme Court.^{*45} According to this conclusion, re-election of the members of the chamber by the Supreme Court *en banc* may thus affect the maintaining and presenting of the dissenting opinion by

³⁸ G. Schmidt-Ränsch. Deutsches Richtergesetz (Kommentar). München, 1988, p. 465.

³⁹ O. R. Kissel. Gerichtsverfassungsgesetz (GVG). Kommentar. 3th, revised ed. München: Beck, 2001, § 193, pp. 1232–1233.

⁴⁰ G. Schmidt-Ränsch (Note 38), § 43 paragraph No. 3; N. Michel. Beratung, Abstimmung, Beratungsgeheimnis. – Deutsche Richterzeitung (DriZ), 1992, p. 267; O. R. Kissel (Note 39), § 193, paragraph No. 4, p. 1234; O. Peltzer (Note 6), p. 29.

⁴¹ O. R. Kissel (Note 39), § 193, paragraph No. 35, pp. 1239–1240.

⁴² M. Grünhut (Note 14), p. 621; H. Arndt. Gedanken von Richtern zum Richtergesetz. – DriZ, 1950, p. 150; see J. Fallner. Beratungsgeheimnis, "dissenting vote" und richterliche Unabhängigkeit. – Deutsches Verwaltungsblatt (DVBl), 1995, pp. 985–986.

⁴³ About this, see I. Berggreen. Die "dissenting opinion" in der Verwaltung. Berlin: Duncker & Humblot, 1972, p. 42.

⁴⁴ E. Paul. Für und Wider des Minderheitenvotums. – Die Öffentliche Verwaltung (DÖV), 1968, p. 515, H. Berger. Empfiehlt sich die Bekanntgabe abweichender Meinungen überstimmter Richter? – NJW, 1968, p. 965, A. Wagner. Zur Veröffentlichung des Votums des überstimmten Richters. – DriZ, 1968, p. 255.

⁴⁵ Open Society Institute's report (Note 2), p. 101 and also p. 96.

the members of the chamber. The Chief Justice of the Supreme Court who *ex officio* is anyway member of the Supreme Court Constitutional Review Chamber does not have this fear. As a counterargument to the effect of the dissenting opinion on the independence of the judge in the above areas, we could point to the fact that in such a case the reason of promotion, re-election or non-election to a chamber is known — the dissenting opinion — and the judge can invoke it for his protection in career disputes.^{*46}

3.4. Dissenting opinion as a guarantee of judge's independence

From the aspect of judicial independence within the court system, the dissenting opinion should first of all be seen as an expression of mutual independence of the judges, *i.e.* “independence of a judge from other judges”. The dissenting opinion is important for the judge who remained in the minority, because the dissenting opinion also expresses the judge's “mental independence” which surfaces thanks to the fact that both the results of the voting as well as different opinions are made public. The dissenting opinion guarantees dignity to the judge who remained in the minority and enables him to decide by his conscience, and not by the majority. A survey conducted among Estonian judges showed that the respondents saw the dissenting opinion as a right of a judge to express his opinion and freedom of conscience. It was also pointed out that a judge cannot sign a decision that he disagrees with and even that an absence of the possibility of a dissenting opinion would endanger judicial independence.^{*47} There are situations where not allowing the dissenting opinion would be unethical. For example, it would be unthinkable if in the United States the judges could not present a dissenting opinion to the majority opinion that supports the death penalty. On the other hand, the judge must also be independent of himself and this sets certain limits on the “mental independence” as well, because after all the judge is restricted by law and cannot leave an impression to the outside that he bases his opinions only on personal value considerations or his own personal view of the world.^{*48} The administration of justice must not only be independent and impartial but it must also seem as such.^{*49} Friesenhahn finds that the dissenting opinion is not a protection to the independence of the judge although it is a perfect expression of this independence.^{*50} The dissenting opinion of a judge increases the responsibility of all the judges in the court.^{*51} On the one hand, it motivates the majority to take larger responsibility and, on the other hand, it places responsibility also on the judge who maintains the dissenting opinion. The dissenting opinion causes restlessness and such restlessness provides a necessary stimulus for the future, and it helps to avoid routine and critique-free decision-making.^{*52} Also, the first instance judge who makes decisions single-handedly must bear public responsibility for his decision because in his case it is known anyway who the author of the particular decision is. Why couldn't a member of the court chamber do the same then?^{*53} The dissenting opinion makes judges become aware of this responsibility.

⁴⁶ See R. Lamprecht. Richter contra Richter: Abweichende Meinungen und ihre Bedeutung für die Rechtskultur. 1st ed. Baden-Baden: Nomos, 1992, p. 34.

⁴⁷ See T. Raudsepp. Kohtuniku otsustuslik sõltumatus (Note 4), p. 45.

⁴⁸ See G. Hager. Freie Meinung und Richteramt. – NJW, 1988, p. 1696.

⁴⁹ See T. Raudsepp. Kohtuniku otsustuslik sõltumatus (Note 4), p. 36.

⁵⁰ E. Friesenhahn. Refereat zum 47. DJT 1968. – Verhandlungen des 47. Deutschen Juristentags, Nürnberg 1968. Vol. II. München: C.H. Beck'sche, 1969, p. R 54.

⁵¹ S. Panizza. L'introduzione dell'opinione dissenziente nel sistema di giustizia costituzionale. Torino: Giappichelli, 1998, p. 8.

⁵² W. Geiger. Die Abweichende Meinung beim Bundesverfassungsgericht und ihre Bedeutung für die Rechtsprechung. – FS für Martin Hirsch. Baden-Baden: Nomos, 1981, p. 461.

⁵³ W. Steffani. Verfassungsgerichtsbarkeit und demokratischer Entscheidungs-prozeß. – P. Häberle (ed.). Verfassungsgerichtsbarkeit. Darmstadt: Wissenschaftliche Buchgesellschaft, 1976, pp. 394–395; critically see W. K. Geck. Sondervoten bei den Landesverfassungs-gerichten, de lege ferenda. Ch. Starck, K. Stern (ed.). Landesverfassungsgerichtsbarkeit. Vol. I. Baden-Baden: Nomos, 1983, p. 315 and p. 349.

4. Arguments for and against the dissenting opinion

4.1. Arguments against the dissenting opinion

Often the following viewpoints are expressed as arguments against the dissenting opinion^{*54}: The dissenting opinion endangers the authority, prestige and legitimacy of the court, it weakens the court's credibility and makes the judgments too closely connected to particular persons; the dissenting opinion endangers the unity and solidarity of the court chamber, legal peace and legal certainty. It causes unnecessary confusion in understanding the judgment, it reduces the persuasiveness of the judgment and the judgment no longer seems as a final decision by a court of law but as a majority or minority opinion.^{*55} The dissenting opinion conflicts the principle of secrecy of deliberations, posing a danger to it and therefore also to the judge's independence and impartiality. The dissenting opinion overburdens the courts as drafting the dissenting opinion takes much time. The dissenting opinion can potentially be misused because some judges tend to maintain a dissenting opinion to gain prominence and attract public attention.^{*56} The dissenting opinion is unsuitable for the continental European legal tradition and it constitutes adoption of foreign law^{*57}; it is also unsuitable for a constitutional court because constitutional law is too politically sensitive an area to allow various interpretations and dissenting opinions. In conclusion, the dissenting opinion is unnecessary because no one is interested anyway in the opinion of a judge who remained in the minority! The dissenting opinion can turn out to be a long, academic treatment without legal consequences, and it has no real and tangible application.

4.2. Arguments in favour of the dissenting opinion

Arguments in favour of the dissenting opinion are also counterarguments to counterarguments and can in brief be summarised as follows^{*58}: The dissenting opinion strengthens rather than endangers the authority of the court, it makes public what everyone knows anyway: there is no consensus in courts.^{*59} A good dissenting opinion can help to avoid embarrassment of the court; it can correct the court's mistakes and avoid mistakes in future judgments. In literature, views differ on the point whether the principle of democracy can be used to derive the right of the judge who remained in the minority to express his dissenting opinion.^{*60} In general, however, the principle of democracy is seen to be characterised by publicity of decision-making, the exceptions to which, like secrecy of deliberations, need to be justified.^{*61} The dissenting opinion helps to better understand the judgment and to raise the legal consciousness of society. It constitutes a guarantee to civil rights, having also a psychological value: a published dissenting opinion gives hope to the losing side that also among the judges there are those who share their views and take their arguments into consideration.^{*62} This strengthens the legitimacy of the court because otherwise the court is legitimate first and foremost for the winning side. Maybe even more important than the dissenting opinion itself is the possibility to present it, which is a test for judges. The dissenting opinion makes it possible to interpret the constitution dynamically, leaving it open for future interpretations. The dissenting opinion helps to integrate society, it ensures the effective functioning of the courts and promotes public debate, it opens a dialogue among the judges, between the judges and legal scholars, between the commentators of court judgments and the legis-

⁵⁴ In compiling the counterarguments, the following sources have been used (unless otherwise referenced): W. Richter. *Der Englische Richter – ein Fürst?* – Ch. Broda (ed.). FS für Rudolf Wassermann zum sechzigsten Geburtstag. Darmstadt, Neuwied: Luchterhand, 1985, p. 186; K.-G. Zierlein. *Erfahrungen mit dem Sondervotum beim Bundesverfassungsgericht.* – DÖV, 1981, p. 87.

⁵⁵ K. Stern. *Das Staatsrecht der Bundesrepublik Deutschland.* Vol. 2. München: Beck, 1980, pp. 1042–1043.

⁵⁶ *Delegation des barreaux.* Available at: http://www.europarl.eu.int/hearings/igc2/doc75dfr_fr.htm (17.6.2002); see also K.-H. Millgramm (Note 6), p. 185.

⁵⁷ See I. Berggreen (Note 43), p. 35; H.-G. Rupp (Note 10), p. 538.

⁵⁸ In compiling the arguments in favour of the dissenting opinion, the following sources have been used (unless otherwise referenced): K.-G. Zierlein (Note 54), p. 87; I. Berggreen (Note 43), pp. 35–57; H.-G. Rupp (Note 10), p. 532; *Sitzungsbericht – Verhandlungen des 47. Deutschen Juristentages.* Vol. II (Diskussion). München, C.H.Beck'sche Buchverhandlung, 1969, p. R 69 ff; for more literature see also W. Geiger (Note 52), p. 457.

⁵⁹ Ch. Pestalozza. *Verfassungsprozeßrecht.* 2nd ed. München: Beck, 1982, p. 36.

⁶⁰ Ch. Starck. *Sondervoten überstimmter Richter und Bekanntgabe des Abstimmungsergebnisses — de lege lata.* – Ch. Starck, K. Stern (ed.). *Landesverfassungsgerichtsbarkeit.* Vol. I. Baden-Baden: Nomos, 1983, p. 294; W. Heyde (Note 9), p. 150 ff.

⁶¹ See also W. K. Geck (Note 53), p. 369.

⁶² Ch. Walter. *En Allemagne. – Rousseau. Etudes et doctrines.* Available at: <http://www.conseil-constitutionnel.fr/cahier/ccc8/etudes.htm> (17.6.2002); I. Hussain. *Dissenting and Separate Opinions at the World Court.* Dodrecht: Martinus Nijhoff, 1984, p. 7; Ch. Landfried. *Bundesverfassungsgericht und Gesetzgeber.* Baden-Baden: Nomos, 1984, p. 231.

lator, but also on the international arena^{*63}, it contributes to the development of law, being a source of law for new majority opinions. The dissenting opinion helps to correct the legislator's mistakes and to look into the future; it can draw the legislator's attention to the circumstances which can be taken into account in future law-making and in the amendment and revision of laws.

4.3. Dissenting opinion in Estonian courts *de lege ferenda*

The dissenting opinion as an institute that guarantees judicial independence should definitely remain in the Estonian legal order into the future. Legitimation of the dissenting opinion in Estonian law, however, depends on how to interpret the Constitution: either as favouring the dissenting opinion, prohibiting it, or being neutral/silent. It also depends on the role of the dissenting opinion in the Estonian legal tradition. Although the Constitution is silent about the dissenting opinion, the necessity of the dissenting opinion can be interpreted as being inherent in the principle of the state based on democracy and the rule of law established in § 10 of the Constitution and as a guarantee of judicial independence, in accordance with § 147 of the Constitution. Maybe the Courts Act should be amended with a provision stating that the dissenting opinion is allowed and to provide it as the right of a judge which also guarantees judicial independence.

The dissenting opinion should be accepted uniformly in the case of all proceedings; otherwise it causes only confusion in the use of the right to present a dissenting opinion. If really necessary, different provisions could only be established for constitutional review, which by its nature deals with the issues that are essential for the development of law. What needs to be established is the time given to a judge for writing the dissenting opinion, and the requirement that the judgment should contain a reference as to which of the judges maintained the dissenting opinion, and the disclosure or publication of the dissenting opinion. If the dissenting opinion is allowed, it should also be disclosed together with the judgment and the name of the judge who maintained the dissenting opinion, in the case of Supreme Court judgments it should also be published.

If we consider the primary function of the dissenting opinion to be the development of law and generating scholarly debate, it is sufficient that the dissenting opinion is allowed in the court that carries out constitutional review where the interpretation of constitutional norms can have law-making significance. But if we look at the dissenting opinion as an expression of the principle of democracy and publicity and freedom of speech of the judge, we should support permitting the dissenting opinion in all collegial courts, the more so if the dissenting opinion added to the judgment can become an incentive for appeal.^{*64}

It needs to be decided whether to allow dissenting opinions also to court rulings and whether to accept also concurring opinions. In the case of a concurring opinion, there can be more danger of a generalised theoretical debate that may be external to the pending case and, therefore, concurring opinions could be allowed only to judgments passed within the constitutional review procedure or, in the extreme case, also to other Supreme Court judgments. Usually, it is considered necessary to treat only issues of law in the dissenting opinion, this is due to the fact that only in issues of law the significance extends beyond the single case. In such case, it cannot be considered justified in Estonia that the right to present the dissenting opinion is also extended to lay judges as is provided for in § 16 (6) of the Code of Civil Procedure. On the other hand, in literature the attention is drawn to the complicity of separating facts from issues of law, the decision as to whether something is a factual circumstance or a point of law is made by the judge who maintains the dissenting opinion.^{*65}

It is equally debatable whether the justices of the Supreme Court should be allowed dissenting opinions which have *obiter dicta* meaning. Ginsburg has said that the yardstick of a good dissenting opinion is its existence and intelligibility independently of the majority opinion.^{*66} This does not mean that the dissenting opinion should repeat the description of the whole case and the main issues. The independent value of the dissenting opinion lies in the value of its argumentation, because, after all, it cannot replace the judgment. The judge who maintains the dissenting opinion is in his dissenting opinion bound by the constitution and the law and the requirements of justification in the same way as the judges who wrote the judgment. It is not possible to set limits of scope to the dissenting opinion; however, it should be observed that the opinion should not be disproportionately long.^{*67} This can be ensured by avoiding derogatory criticism of the major-

⁶³ An example: Taking a dissenting opinion of a justice of the Canadian Supreme Court into consideration in the judgment of the President of the Republic of South Africa and another v. Hugo (South-Africa, constitutional court), 18 April 1997, CCT 11/96, see L'Hereux-Dubé. Au Canada. – Rousseau. Etudes et doctrines. Available at: <http://www.conseil-constitutionnel.fr/cahier/ccc8/etudes.htm> (17.6.2002).

⁶⁴ G. Zweigert (Note 17), p. D 11; M. Baring. Wider die dissenter. – Deutsches Verwaltungsblatt (DVBl), 1968, p. 612 ff.

⁶⁵ G. Zweigert (Note 17), p. D 41; E. Friesenhahn (Note 50), p. R 56.

⁶⁶ R. B. Ginsburg. Speaking in a Judicial Voice. – New York University Law Review, 1992, p. 1185.

⁶⁷ About this, see also Th. Ritterspach. Gedanken zum Sondervotum. – W. Fürst (ed.). FS für Wolfgang Zeidler. Vol. 2. Berlin, New York: Walter de Gruyter, 1987, p. 1386.

ity, self-promotion, unnecessary and emotional expressions, general philosophical deviations and digressions to the areas outside the scope of law. A good dissenting opinion should remain decent and respect the majority, which does not rule out presenting the argumentative opinion and constructive criticism. A dissenting opinion can make a substantive contribution to the development of law by its input to developing the methodology of interpreting law.

5. Conclusions

The problem of the institute of judicial dissent has been subject to debates throughout history and it is still an important issue of principle. Arguments both for and against the dissenting opinion can be divided into those having to do with the internal work of the court (collegiality, unity) and those which are external to the court (authority of the court, legal certainty, development of law). Subjective arguments in favour of the dissenting opinion are related to the judge's individual right to the freedom of conscience and inner independence. Objective arguments in favour are related to general interests and collective welfare, and the principle of democracy and effectiveness of the administration of justice. The stronger arguments in favour of the dissenting opinion mostly tend to be the objective considerations. The meaning of the dissenting opinion depends on which criteria are used to assess the dissenting opinion, *i.e.* on whether the institute of the dissenting opinion is viewed as an issue of constitutional law, trying to find an answer to the question whether abolishing the dissenting opinion would be in contradiction with the spirit of the constitution and constitutional principles, or whether it is viewed as an issue of legal policy. Depending on which criterion is used as a basis, the strict secrecy of deliberations can be considered either (un)proportional with the constitution or (un)advisable from the legal policy point of view. Does the principle of democracy, even when it does not fully extend to the dissenting opinion, not outweigh the secrecy of deliberations, making the dissenting opinion legitimate, especially considering that the dissenting opinion is the expression of the judge's independence? If we view both the secrecy of deliberations as well as the dissenting opinion as a guarantee of judicial independence, we will have to find a solution for the co-existence of them both without them being mutually exclusive.

On the basis of the foregoing, it can be concluded, that the dissenting opinion is essential in guaranteeing judicial independence; the biggest risk of the dissenting opinion is its misuse, the dissenting opinion must not become a dissenting opinion *per se*.⁶⁸ The right to a dissenting opinion should remain in the Estonian legal system also in the future and the Estonian procedural codes should unify and more specifically establish the possibility of the dissenting opinion and its disclosure. A dissenting opinion can become a basis for the future development of the legal doctrine and court practice: it is an instructive commentary which is especially important for a legal culture that is not yet fully developed, as is the case in Estonia where sometimes a clear and precise provision of a law is lacking, or established interpretation and legal theories in certain issues have still not emerged. The dissenting opinion prepares the ground for changing the court practice.

⁶⁸ H.-G. Rupp (Note 10), p. 546.