Dissenting opinion as creators of legal idea in the period of the legal system collapse

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Abstract

The publication is devoted to the study of the individual opinion as a subsidiary legal source. The author of the article has come to the conclusion that the dissenting opinion of judges forms an independent runaway among the subsidiary legal sources. It adjusts legislation and takes the form of the indicator of the change in court practice (case-law) by offering a constructive criticism to the majority opinion and that of initiator by significantly influencing further practice. Furthermore, the dissenting opinion of judges interactively influences the law theory and practice as a constituent part of the development of the judge made law.

Keywords: law theory, court practice, judicature, doctrine, dissenting opinion.

Introduction

The subsidiary legal sources (or secondary legal sources) are as follows: court practice (judicature), law science (doctrine), materials for designing laws and regulations.[1]

In the report it must be found out what the role of the individual (dissenting) opinion of judges is as well as its connection and place among the subsidiary legal sources.

The legal culture is to be percieved as a reflection of mental and material social useful values in the legal life and way of thinking ... (as a part of general culture) one of the expressions of which is the professional legal culture. [2]

Besides the legislator perceives the spirit of its age through the legal consciousness and reflects it in the legal acts.

The legal consciousness relates to the legislation, surrounding events, law-enforcement institutions, self-assessment and value orientation in a gnostic, evaluating and regulative way. Furthermore, in the legal consciousness widely binding conclusions and their comments are stored.

The author fully shares the opinion of the judge of the European Court of Human Rights Boštjan M. Zupančič that for the purpose of the transparency of law enforcement the publishing of individual opinions plays a significant role: "Moreover, as a result of publishing individual (also affirmative) opinions attention is paid to the flaws in the considerations of the majority of judges that have been included in the court judgement."[3]

Genuinely useful conclusions are stored in the theoretical legal consciousness that represents a source for making laws (as it has been indicated by Hegel – nothing is as practical as good theory) as well as in the professional legal consciousness (*the ability to apply the acquired knowledge and enforce* a legal norm).

Both expressions of legal consciousness simultaneously influence and store the analysis and criticism of judgements. This facilitates the improvement of the judgment quality and the formation of a unified judicature.

The doctrine interpretation may also be included in individual opinions (*the Election case* of the Constitutional Court)[5], as well as in judicature (the majority opinion in the *Election case*) and as the prevailing opinion strongly influence all three previously mentioned subsidiary sources.

This mutual interaction has feedbacks that allow the individual opinions of judges approach the status of the subsidiary legal sources.

Besides the legal system maintains the link with the reality through the legal culture which deals with the assessment of the disagreements among the individual opinions of judges, for example, the discussion on the ethics in the human rights dimension in the individual and majority opinion in the *Election case*.

European Court of Human Rights and Dissenting Opinions

When considering selectively the dissenting opinions of the judgments of the European Court of Human Rights as the alterators of the court practice direction in the future it must be concluded that the predicting of the result in a similar case is becoming less certain in comparison with the previous trends in judicature.

For example, in the case *Airey v. Ireland* (Judgment of 9 October 1979) the majority opinion states that the applicant was not provided with effective rights to appeal to the Supreme Court to maintain the legal separation claim. Ireland had been obliged to safeguard effectively the family and private life in this situation. In the constructively critical dissenting opinions (one of the thesis: *the European Convention on Human Rights and Fundamental Freedoms*, hereinafter Convention, does not provide for free-of-charge legal aid in a civil

case) where, for example, judge O'Donoghue states that the breachs of Articles 6, 8, 14 and 13 have not taken place in the particular case and indicates that the reference to the "vagrancy" case is not in place as in the case the court inactivity has not been found and the court has been accessible. The case circumstances are said to differ from the Golder case as Mrs Airey has not been placed any obstacles or other bans regarding ensuring the legal representation in a civil case and coverage of expenses.

Also the opinion of judge Tor Williamson regarding whether the government has to provide financial assistance in connection with the breach of the respective articles of the Convention is renunciative in relation to the applicant. The judge indicates that in the argumentation of the application the reference to the case *Klass and others* would suit better and the breach of articles 6, 8, 14 and 13 of the Convention has not taken place in the particular case.

Concerning the same case judge Evrigenis considers that in relation to the analysis of rights provided for by article 8 of the Convention it is not possible to detect a breach and the case materials indicate that the case is not to be related to this article in substance.

The dissenting opinions of judges in this case largely explain the application of the Convention provisions and interpretation in connection with the potential change of judicature in the future relating this to the case *Golders vs the United Kingdom* where the court has judged that the rights to apply to the court are not absolute and can be restricted only as far as they are not deprived in their substance.

The dissenting opinion of the judge Valtikos in the case *Kokkinakis v. Greece* (judgment on 19 April 1993) regarding the propagation of one's faith and the substance of article 9 of the Convention and the assessment of the case state of affairs states that the freedom to devote oneself to one's faith or beliefs both in solitude as well as together with others … does not represent an attempt to continuously fight and change the faith of others, influence their minds with active and often not motivated propaganda. It is meant to ensure religious peace and tolerance rather than allow religious fights and even wars because particularly in the time when many sects manage to tempt simple and naïve souls with dubious means. He adds that even if the Chamber considers this not to be the goal, in any case it represents the direction where the majority opinion can lead. (The majority expressed the opinion that the sentencing of the applicant has not been socially necessary and the action of the state is not to be considered commensurate for achieving the legitimate aim and the breach of article 9 of the Convention has taken place).

This represents a very serious criticism of the majority opinion implying that the court judgment gives rein to proselitism – with the only condition that it is said not to be unacceptable. The judge questions whether the Convention may allow this kind of intervention in the human belief even if the intervention does not take place by force.

The combined dissenting opinion of the judges Foighel and Loizou that … the efforts of some fanatics to convert others to their belief by using unacceptable psychological methods that in fact lead to coercion to our mind cannot be subsumed under the natural framework of the notion propagation in part 1, article 9 and deny that the breach of article 9 of the Convention has taken place. [6]

It is possible that these dissenting opinions of the judges to a large extent influenced the direction of the judgement in the case Valsamis v. Greece; (judgment of 18 December 1996**)** in relation to the interpretation of the notion "religious freedom" and the limits of the state responsibility *(Substance of the case: exclusion from school for one day for not participating in a parade due the religious beliefs of the pupil and her parents).*[7]

Mutual influences can be observed in dissenting opinions in cases (in relation to serious debates on choosing the precedents for the case argumentation; ECHR judgment of 8 July 2003) *Hatton and others v. United Kingdom,* Hethrow night flight case, article 13 of the Convention (judges Kosta, Turmen, Zupančič) as well as *Ezeh and Connors v. United Kingdom* regarding prison disciplinary procedures (ECHR 9 October 2003), judges Pellonpaa,

Zupančič, Maruste and others regarding the attributability of disciplinary procedure to article 6 of the Convention. [8]

Thus, for example, as the researcher of the Faculty of Law of the West Indian University Margaret De Merieux indicates that namely the dissenting opinions in the *Balmer-Schafroth* case outlined the ways in the area of alieniation of new rights in connection with the application of the environment law principles – how rights become subjective rights.

In the minority dissenting opinion in the *Balmer - Schafroth* case the instructions were presented how the international environment law principles (sustainable development, environment protection, good management etc.) with the court mediation as a continuous international creation of legal norms can be used in promoting the ECHR interpretation as well as further development of the rights. [9]

The Convention does not envisage these rights, however in the above-mentioned case the authors of the dissenting opinions progressively used the international principles of environment law for the alienation of the subjective human rights and the interpretation of the contents of articles 6 and 8 of the Convention.

Consequently we can state that the ECHR interpretation of the Convention depends on the willingness of judges to oppose the previouws trends in judicature. The prevailing opinion is gradually developing from sufficiently persuasive minority opinions and is becoming a subsidiary source for further argumentation. Genuinely well argumented individual opinions help interpret legal norms and derive new rights (further development of rights).

Constitutional Court of Latvia and Dissenting Opinion of its Judges

There are not very many dissenting opinions in the judicature of the Constitutional Court of Latvia. However, from 1997 up to now individual thoughts in six cases have been published. Chronologically listed they are the individual thoughts of judges Aivars Endzins, Juris Jelagins and Anita Usacka in case no. 2000-03-01 "On the Compliance of points 5 and 6, section 5 of the Law on Parliamentary Election and points 5 and 6, section 9 with the articles 89 and 101 of the Constitution of Latvia, article 14 of the European Convention on Human Rights and Protection of Fundamental Freedoms and article 25 of the International Pact on Civil and Political Rights", where the opinion is expressed that one of the proportionality components of a legitimate goal is a social necessity that according to the judges has not been assessed in the judgment. In their dissenting opinions the judges indicate that in their opinion the proportionality of the applied levers and the goal (the kinds of threat to the democratic state system, national security and territorial integrity). In the dissenting opinions references to the ECHR judicature in the Dadgeon case (1981), Handyside case (1976), (legitimate goal of the restriction proportionality), Barthold case (1985) in relation to the notion "pending social necessity" are extensively used.

The reference to the particular judgment is mentioned as arguments (from the minority opinion) in the speech of the deputy Agesin regarding the amendment to section 17 of the Law on the Storing and Use of the former KGB documents and finding the fact of the collaboration with the KGB" (the deputy believes that the aim of the legal norm is connected with unproportional restriction to run for the election).[10]

"However, in adopting the Law on the Election of the European Parliament the legislator has been led by the conclusions of the judgement in the Election case of the Constitutional Court of Latvia and has not envisaged the restriction of the passive election rights to the persons who have collaborated with the KGB" .[11]

This is how the interaction between the judgement and dissenting opinions might influence also the creation conditions and documents of another legal norm.

The author believes that in case of the Election Law the argumentation of the majority opinion regarding the above-mentioned restriction of election is strengthened by the court

substantiation announced in Podkolzina's case (Judgement of 9 April 2002 "I. Podkolzina v. Latvia") that regarding section 3, Protocol 1 any election law is always to be assessed in the light of the state political evolution as unacceptable regulations in one system may justify themselves in another system. This manoeuvre possibility that is recognized in relation to the state, however, is restricted by the duty to follow the core principle of article 3, i.e. "free expression of the people's opinion, in choosing the legislature" (see the judgement in the case Mathieu-Mohin and Clerfayt, 54th paragraph).[12]

In *the State Secret case* [13] judge Anita Usacka in her individual opinion motivates why the words of the legal norm "probationary materials" do not comply with the rights envisaged by article 92 of the Constitution of Latvia to a fair court. In the same case judge A. Lepse motivates in his dissenting opinion that words of section 11 "the decision of which is final and not to be reversible" does not comply with the rights guaranteed by article 92 of the Constitution of Latvia to a fair court.

In two cases[14] judge A. Lepse motivates his dissenting opinion with the unacceptability of the *action popularis* idea in the development of the judicature of the Constitutional Court of Latvia.

The expression of the legal culture and simultaneously a significant contribution to judicature and law science, persuasively motivated as interpretation of the legal norms of the Law on Constitutional Court is the dissenting opinion of judge Juris Jelagins in case "On the Compliance of Section 114.2 of the Code of Administrative Breaches to the Convention on Facilitation of International Maritime Traffic" of 9 April 1965. In his dissenting opinion the judge has deeply analyzed the place of the particular international agreement in the hierarchy of legal norms and indicates that the challenged legal norm and the Convention have equal legal force and, consequently, the assessment of the compliance of the legal norm to the Convention does not fall in the competence of the Constitutional Court of Latvia. The opinion is motivated by the German Law Doctrine (Lutz Treder) and the judicature of the Constitutional Court of Lithuania (judgment of 25 April 2002).

From the study of the aspects of the dissenting opinions of the judges and judicature expression the author concludes that these dissenting opinions to a large extent influence the application of the legal norms and represent an orienting medium in rights, they contain conclusions of abstract character connected with a rather high standing court institutions as well as with the reputation of the judge among law scholars and practitioners.

Collapse of the Legal System and Dissenting Opinions of Judges

The transformation processes of the legal system in Latvia in the period from 1990 to 2006 can be considered an expression of the legal system crisis and collapse.

The judge of the European Court of Justice Egils Levits stresses two collapses out of the nine shocks of the legal system: 1)1940-1941, repeatedly in 1944-1945 (when the substantive law changes, but the substance of the legal system does not) and in 2) 1990 and 2004 – the accession to the European Union when the substance and succession of the legal system changes.[16]

The period when the creative norms prevail over their application, the norms with the echo of different ages are in force (value identification problems). Characteristic to the legal norms of the periods of transition are short-term goals, not always smoothly proceeded legislation adjustment procedure, hard-to-interrupt judicature of the previous system and state prescription trying to prevail over the legal norm as well as the Constitutional norms that are hardly considered a useful instrument. Thus the period cannot be called an easy burden in the transformation of the legal system.

The author believes that the time from 1990 to the time of the EU accession, as well as after it, is to be considered a lasting crisis of the legal system that accounts for the period of

serious collapse. However, there can be seen some trends stabilizing the collapse. For example,

1) 1997-1998 – the Constitutional Court begins to work, the first judicature, sections of Fundamental rights of the Constitution of Latvia,

2) July, 2001 – a person's right for the Constitutional complaint provided for in the Law on the Constitutional Law,

3) February, 2004 – coming into effect of the Law on the Administrative Process and beginning of the operation of administrative courts.

The expressions of the application ability of legal forms are staying behind. In this area invaluable contribution is provided by the judgments of the Constitutional Court, which influence the Senate of the Supreme Court of Latvia as well as the newly established court of administrative jurisdiction as they use the judgments as subsidiary sources in their argumentation.

Particularly important from the point of view of the application methodology of legal norms is the interaction between the dissenting opinion of judges with the other subsidiary sources. In the conditions of the transformation of the legal system the dissenting opinion simultaneously facilitates the coordination of the law science, judicature and circumstances of the legal norm creation with the Western sources of legal conclusions and the acting ability and re-birth of the legal system of Latvia.

This may also take the form of the fractility of the subsidiary legal sources. The notion *fractalis* is explained in the dictionary of foreign words as an irregular shape or surface that can be acquired by making a repetitive division in smaller parts according to some rules.[17] Fractality is connected with dynamic, mutually interactive movements in the nature. This kind of mutual connection among systems creates the phenomenon when stimulation in one part of the Universe causes reaction in another. This phenomenon can be attributed to the interaction of the existing legal systems with the interplay of the subsidiary legal sources. Every legal system is conditionally closed – it comes into contact with other systems and changes together with them. The fractality seen in the interplay of the subsidiary legal sources suggests dynamic processes that allow for faster rebirth and development of the legal system. The critical dissenting opinion of judges enhances the role of the subsidiary legal sources on all levels of the legal system, facilitating understanding about the fundamental principles of the democratic and law-based state system and searching the solutions to repeating legal problems over time and across borders.

Summary

The article examines some aspects of the interply of subsidiary sources and dissenting opinions of judges.

The author came to the following conclusions, analysing the dissenting opinion of the judges of the Constitutional Court of Latvia and European Court of Human Rights, that:

Wherewith dissenters opinion claims to the status of subsidiary sources intermediate doctrine, case-law (court practice, judicature) and creating material of legal norms.

The dissenting opinions of judges:

1) break a runway amid of the subsidiary sources;

2) with certainty perform as pointers of legislation (or law policy);

3) find expression as indicator (by constructive criticism of the majority opinion) and initiator of case-law alteration (significantly influences further practice);

4) leaves behind impress in the field of theory and practice (case-law) as element of evolution in the judge made law (from the rights in force).

Consequently **the dissenting opinions can claim for the status of independent subsidiary source**.

It would be useful to introduce the individual opinions also in the practice of the Senate of the Supreme Court as a significant contribution in the evolution of the judge made law.

The interplay consequences among the subsidiary sources of law in the supreme court in the decisions can be compared to formal sources and can be named – fractal phenomenon of interaction of subsidiary sources, particularly, in the period of legal system transformation.

References

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2. [9] De Merieux, Deriving Environmental Rights from the European Convention for the Protection of Human Rights and Fundamental Freedoms, Oxford Journal of Legal Studies, Vol.21, No.3 (2001), pp.521-561, 556**.**
3. [17] *Dictionary of Foreign Words*. Riga: Jumava, 237 pp; *Dictionary of Foreign Words*. 2005. Riga: Avots, 238 pp., also from word *fractalis*, Latin origin *fractus*, which as a common noun has been coined by Benoir Mandelbrot in his work "Geometry of nature fractals" in 1975 who indicated that it was a phenomenon met in sciences of nature, art, architecture and visualized computer science that is human systems with a high adjustment degree able to change as a result of both the external influence as well as internal dynamic processes. The basic feature of fractals is autosimilarity or similarity to oneself (the same structure elements repeat themselves on different scales) as a guarantor of the Universe structure symmetry and harmony. See [Internet source] Available at: http://en.Wikipedia.org/wiki/Fractal,
(also Mandelbrot B.B. The Fractal Geometry of Nature.-New York, 1983.).
4.[6] European Court of Human Rights. Selected Judgments. Riga, " Latvijas Vestnesis", 2003, pp. 152-226 (in Latvian).
5.[16] see History of Latvian Law (1914-2000), Foundation Latvian History, Riga 2000, in edition of prof. Dr.iur. D.A.Leber, p. 48.
6.[1] Iljanova D. Summary of the Promotional Paper. Riga, Methodology Office of the Faculty of Law, University of Latvia, p. 19.
7.[2] Lazarev V.V., General Doctrine and States. // Moscow, Jurist,, 1997, pp. 197-199 (in Russian)
8.[4] Lazarev V.V., General Doctrine and States. // Moscow, Jurist,, 1997, p. 197 (in Russian)
9.[15] see for more, Neimanis J., Judicature and its Binding Force. //Jurista Vards, 08.03.2005, No.9(364) (in Latvian) as well as Peczenik A. The Binding Force of Precedent. Interpreting precedents comparative study/edited by D. Neil MacCormick and Robert S.Summ Adlershot: Ashgate, 1997, pp.461-480.

10.[5] http://www.satv.tiesas.gov.lv, case no. 2000-03-01
11.[7] http:// www.humanrights.lv: The Court considered that it was not the breach of the pacifistic world view of the applicants to the extent determined by article 1 of the Convention Protocol 1. This kind of mentioning of international events serves both the aims of the pacifists as well as the general interests of society. The presence of the representatives of military orhganizations in these parades does not change their character. Furthermore, the requirement to participate in the parade does not prevent the child's parents from teaching and giving advice to their child as well as carrying out their regular parental functions in educating their child and promoting their children in the direction of the religious and philosophical beliefs of their parents. The court does not have to determine the usefulness of the education methods, which according to the applicants would be more appropriate by perpetuating historic memories in the new generation, however it did not deny that the punishment might have had a psychological impact on the pupil. Finally the Court judged that the breach of article 2, Protocol 1 has not taken place. Initially the Court pointed out that Victoria Valsamis had been freed from religion classes and orthodox church services. Participation in the parade did not abuse the religious belief

of her parents. Consequently the applied punishment had not been a voiolation of her freedom of religion. Thus the breach of article 9 of the Convention has not taken place.

12. [8] http://www.echr.coe.int

13. [10] http://www.saeima.gov.lv, transcript of the 6th meeting of the Parliament of Latvia spring session on 19 May 2004, additional information: Law "Amendments in the Law on the Storing and Using of the Documents of former KGB and Establishment of the Collaboration Fact with the KGB" adopted by the Parliament of Latvia on 19 May 2004. Returned for revision on 21 May 2004 and has not been revised yet. However, on 27 May 2004 the Parliament adopted other amendments in the above-mentioned law, which prolong the period when the collaboration fact with the KGB may be used in legal relations (restrictions of position, election rights etc.) for 10 years (all together 20 years). However, at the same time, taking into account the considerations given in the motivation statement by the State President, the Parliament has assigned the Cabinet of Ministers by section 7 of the Transition regulations to evaluate the need and grounds of the restrictions envisaged by the laws till 1 June 2005.

The Presidium of the Parliament suggests giving over the draft law submitted by the Cabinet of Ministers ***"Amendments in the Law on the Election of the Council of Town, Amalgamated Municipality and Parish"*** *to the Legal Committee and the State Administration and Municipality Committee and determine that the State Administration and Municipality Committee is the responsible Committee; passed to the Committees on 02.09.2004, also the Constitutional Court case no. 2004-13-01-06.*

14. [11] http://www.satv.tiesa. gov. lv, case no. 2004-13-0106 (pp. 17-18 in conclusions)

15. [12] http://www.humanrights.lv:"…The court reminds that article 3 of Protocol 1 indirectly envisages subjective rights: the rights to elect and be elected. However important they may be, they are not absolute. As article 3 of Protocol 1 recognizes the right without specific conditions and does not define the rights there are "indirectly indicated restrictions" possible. The states that have acceded to the Convention in their respective legal systems include the rights to elect and be elected in the conditions article 3 does not lay any obstacles to. These countries have a complete freedom of action in the above-mentioned issues, however the task of the last instance court is to decide on following the provisions of Protocol 1; it has to make sure that the conditions do not reduce the rights discussed so that they could be enjoyed in their full substance; so that it was possible to enforce the rights; the conditions had legal aims and the methods used would not turn out to be unproportionate (see judgment of 2 March 1987 in the case *Mathieu-Mohin and Clerfayt v. Belgium*, series A, No.113., p. 23, paragraph 52; decision of 1 July 1997 *Gitonas and others v. Greece*, *Recueil des arrots et decisions* 1997-IV, p. 233, paragraph 39; decision of 2 September 1998 *Ahmed and others against the United Kingdom*, *Recueil 1998 – VI,* paragraph 75 and *Labita v. Italy (GC),* No. 26772/95, paragraph 201, *CEDH 2000-IV).*
Especially states dispose of large freedom of action to determine the laws in their constitutional system attributed to the status of the parliamentarian, including the criteria for the persons who cannot be elected. Although these criteria are also aimed at one common concern – to guarantee the independence of the representatives as well as the freedom of electors, they change *depending on the specific historic and political factors of each state; the diversity of situations envisaged in the constitutions and election laws of the member states of the European Council proves the diversity of the possible choice in the issue".*

16. [13] http://www.satv.tiesas.gov.lv, case no. 2002-20-0103

17. [14] http://www.satv.tiesas.gov.lv, case no. 2003-04-01 and case no. 2003-05-01