



Strasbourg, 30 November 2018

CDL(2018)037*

Opinion No. 932 / 2018

Or. Engl.

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

DRAFT REPORT

ON SEPARATE OPINIONS OF CONSTITUTIONAL COURTS

on the basis of comments by

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I. INTRODUCTION

1. At the 115th Plenary Session in June 2018, the Venice Commission endorsed the initiative of its Scientific Council to prepare a report on separate opinions of constitutional courts.
2. For the present report, the Venice Commission invited Mr Christoph Grabenwarter, Ms Monika Hermanns and Ms Kateřina Šimáčková to act as rapporteurs.
3. The present report was prepared on the basis of contributions by the rapporteurs.
4. *This report was adopted by the Venice Commission at its ... Plenary Session (Venice, ...).*

II. GENERAL REMARKS AND SCOPE

5. There is a growing trend among constitutional courts to allow separate opinions, although their implementation varies from one state to the next. Separate opinions can take the form of dissenting, but also of concurring opinions, i.e. expressing disagreement only with the reasoning of the final decision. Even in continental, civil law systems, separate opinions are no longer considered to be an exception to the rule of secrecy of individual votes.¹
6. Among the Member States of the Council of Europe, 36 explicitly regulate separate opinions (including supreme courts in states in which there are no constitutional courts) and eleven do not permit them or have no relating provisions.
7. Among the Council of Europe Member States, in the majority of European Union (EU) Member States (namely, more than 20 States), constitutional judges have the right to submit separate opinions whenever they do not agree with the court's judgment (this includes countries in which supreme court judges – to a certain extent – have similar functions to those of constitutional judges). Some EU Member States prohibit separate opinions, or have no relating provisions, and reject this practice (Austria, Belgium, France, Italy, Ireland, Luxembourg and Malta).²
8. As regards the European Court of Human Rights, the European Convention on Human Rights and the Rules of the Court (i.e. of the European Court of Human Rights), expressly mention separate opinions (see below). Moreover, these opinions play an important role in the Court's jurisprudence.
9. The situation is very different at the Court of Justice of the European Union where dissenting opinions are not allowed.³
10. This report will, as far as possible, cover all Member States of the Venice Commission which have a separate constitutional court/council or a supreme court that is entitled to exercise constitutional review at least in some aspects, be it with or without a specialised constitutional chamber or section. It will also consider the European Court of Human Rights.

¹ Study prepared by the Directorate General for External Policies of the European Parliament, *Dissenting Opinions in the Supreme Courts of the Member States* (2012), 30f (henceforth *European Parliament Dissenting Opinions* (2012)).

² *Safta*, *The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction*, 5(1) *Perspectives of Business Law Journal* (2016), 207; *European Parliament Dissenting Opinions* (2012), in particular 6, 17.

³ *Laffranque*, *Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System*, *Juridica International*, IX 2003, p. 14.

11. Countries with legal systems that are based on the continental European model, such as most of Europe, Latin America and parts of the Far East, have constitutional courts that are separate from ordinary courts. In common-law countries, which includes most of the English-speaking world (Ireland, United Kingdom, United States) as well as Cyprus⁴ and Israel, constitutional questions (or, in the case of Israel, quasi-constitutional questions⁵) are usually – but not exclusively – decided by the ordinary courts in the context of concrete cases. The scope of examination also includes the following Scandinavian (and Nordic) countries: Denmark, Finland, Norway and Sweden, where supreme-court judges have – to a certain extent – similar functions to those of constitutional court judges.⁶ The same applies to Greece.⁷

12. Common-law countries, which follow the British practice of deciding *seriatim*, offer judges the highest level of transparency and freedom of expression. Deciding *seriatim* means that a series of opinions are written by each judge on the bench, individually, and decisions are taken by the majority. Separate opinions are virtually disclosed automatically in this system, which is used for instance by the Supreme Court of the United Kingdom, the US Supreme Court, the Supreme (Constitutional) Court of Cyprus⁸ and the Supreme Court of Israel⁹. The Irish legal system serves as a rare exception, since – although the legal system is based on the common law – the Constitution explicitly prohibits the publication of separate opinions in most constitutional matters. While ordinary judges, and the Supreme Court in the exercise of its ordinary jurisdiction, may issue separate opinions,¹⁰ constitutional cases follow a restrictive procedure. According to Articles 26 and 34 of the Constitution, the Supreme Court, when deciding on the constitutionality of any law upon the President's request, or upon appeal from a lower court, issues a single opinion. No other opinion, "*whether assenting or dissenting, shall be pronounced, nor shall the existence of any such other opinion be disclosed.*"¹¹

13. Of the remaining 56 countries (61 Member States of the Venice Commission minus Cyprus, Ireland, Israel, the United Kingdom and the United States), 12 have no provision on separate opinions or explicitly forbid separate opinions, as far as constitutional jurisdiction is concerned (Algeria, Andorra, Austria, Belgium, France, Italy, Liechtenstein, Luxembourg, Malta, San Marino, Switzerland, Tunisia). The vast majority of the Member States of the Venice Commission allow separate opinions in constitutional jurisdiction.

⁴ The Supreme Court has jurisdiction to examine the constitutionality of any law or any conflict of power or competence which arises between any organs or authorities of the Republic. In addition the Supreme Court hears and determines any recourse by the President of the Republic regarding the compatibility with the constitution of any law enacted by the House of Representatives, see http://www.supremecourt.gov.cy/judicial/sc.nsf/DMLSCourt_en/DMLSCourt_en?OpenDocument.

⁵ Israel does not have a written Constitution, but so called Basic Laws, and the Supreme Court has held that other laws can be struck down if they are inconsistent with these laws; see *United Bank Mizrahi v Migdal Cooperative Village* [1995] IsrSC 49(4) 221, <http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>.

⁶ See *Bårdsen*, The Nordic Supreme Courts as Constitutional Courts; main features as seen from the Norwegian perspective. Joint seminar between the Constitutional Court of Austria and the Supreme Court of Norway (Vienna, October 2015), 1, stating that the Nordic countries do not have particular constitutional courts, however, the Courts have features denoting that they should in certain respects be considered as constitutional courts or as supreme courts with functions similar to constitutional courts. For Finland and Sweden see CDL (2000) 89, Replies to the questionnaire on the execution of constitutional review decisions, p. 51, 155; for Denmark see CDL-JU(2006)034, Supreme Court of Denmark, p.4, and European Parliament, Study on Dissenting opinions in the Supreme Courts of the member States, p. 21 fn. 70.

⁷ European Parliament, Study on Dissenting opinions in the Supreme Courts of the member States, p. 23.

⁸ For the application of the traditional common law system see *Nicolatos/Parparinos/Hadjiprodmou*, Administrative Justice in Europe, The Supreme Court of Cyprus (2018), 2; at http://www.aca-europe.eu/en/eurtour/i/countries/cyprus/cyprus_en.pdf, p. 27.

⁹ See e.g. *United Bank Mizrahi v. Migdal Cooperative Village* [1995] IsrSC 49(4) 221, <http://versa.cardozo.yu.edu/opinions/united-mizrahi-bank-v-migdal-cooperative-village>.

¹⁰ In some cases, they may even follow the practice of *seriatim* opinions: see McGinley, The Search for Unity: The Impact of Consensus Seeking Procedures in Appellate Courts, in *Adelaide Law Review*, n. 11/1987, 203-214; *Laffranque* (2003), op. cit., at 165.

¹¹ Article 26(2)(2°) of the Constitution.

14. Another option to reveal that a decision has not been adopted unanimously is to disclose merely the distribution of votes in the decision.¹² This will be considered in more detail below.

III. ANALYSIS

A. Advantages and disadvantages of separate opinions

1. Safeguarding the authority of the court and the quality of judgments

15. There are arguments for and against separate opinions. Critics fear, among other things, that separate opinions endanger the unity of the court and undermine its authority; whereas according to proponents, separate opinions democratise the judiciary, make it more transparent and thus strengthen its authority and credibility.¹³

16. In common-law countries, traditionally, the independence of judges to speak in their own voice and the transparency of the judicial process play an important role; the judgment is a result of public debate. In continental Europe, however, great value is placed on the secrecy of deliberations.¹⁴ Notwithstanding this, many civil-law countries allow the publication of separate opinions, and there are common-law countries in which this is not permitted (e.g. Malta; the Supreme Court judges in Ireland).¹⁵ In practice, there are different degrees of transparency that can be identified within the decision-making process: from revealing the number of votes in favour and against a decision (cf. Germany) and (additionally) allowing judges to publish their separate opinions to – as represented by the common-law practice – making the vote of every judge public, whether or not they choose to write a dissent.¹⁶

17. It is often said that dissenting opinions help to better understand the position and individual motivation of the members of the court and to ensure that the final decisions are clear and unambiguous.¹⁷ As the deliberations take place behind closed doors, separate opinions reveal contradictory debates. They thereby illustrate that the court has also dealt with counter-arguments and completed the reasoning of the decision rendered.¹⁸ They also mirror reality,

¹² See for instance § 30 (2) of the Act on the Federal Constitutional Court of Germany.

¹³ Cf., for instance, *Schäffer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, JRP 1999, 33; *Schernthanner*, Der Verfassungsgerichtshof und seine Unabhängigkeit. Verfassungspolitische Gedanken zu ausgewählten Problemen, ÖJZ 2003, 621; *Hiesel*, Gedanken zur Diskussion über die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus dem Blickwinkel des Supreme Court der Vereinigten Staaten von Amerika, JRP 2000, 22, 23-28; *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 163, 170 (stating that the principle of democracy is seen to be characterised by publicity of decision-making).

¹⁴ *Bader Ginsburg*, The Role of Dissenting Opinions (Lecture), 95(1)Minnesota Law Review (2010), 1, 2f; *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, at 164. For a historical overview, cf. *Machacek*, Die Einrichtung der „Dissenting Opinion“ im internationalen Vergleich, JRP 1999, 1, 2-8. For elaborations about the differences in common and civil law countries, see further *Terris/Romano/Swigart*, Toward a Community of International Judges, 30 Loy. L.A. Int'l & Comp. L. Rev. 419 (2008), 452 (stating that in the Anglo-Saxon legal tradition, the judgment is conceived as the sum of the decisions of the individual judges, whereas in civil law countries, a court is seen as a uniform entity taking decisions by a majority that remains anonymous after deliberating *in camera*).

¹⁵ European Parliament: Dissenting Opinions (2012), 29 f.

¹⁶ *Kelemen*, Dissenting Opinions in Constitutional Courts, 14(8) German Law Journal (2013), 1345, 1363.

¹⁷ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 170; *Kelemen*, Dissenting Opinions in Constitutional Courts, 14(8) German Law Journal (2013), 1345, 1359. further *Terris/Romano/Swigart*, Toward a Community of International Judges, 30 Loy. L.A. Int'l & Comp. L. Rev. 419 (2008), 452; *Sternberg/Shikano/Sieberer*, Explaining Dissenting Opinions in the German Federal Constitutional Court. Paper submitted for presentation at the European Consortium for Political Research 2016, 8; *Safta*, The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction, 5(1) Perspectives of Business Law Journal (2016), 207, 210 f.

¹⁸ *Wittig*, The Occurrence of Separate Opinions at the Federal Constitutional Court. An Analysis with a Novel Database (Dissertation, University of Mannheim) 2016, 72, with further references. *Safta*, The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction, 5(1) Perspectives of Business Law Journal (2016), 207, 211.

because separate opinions demonstrate that there is a plurality of opinions and not always a consensus in courts.¹⁹

18. On the other hand, it is deemed important that the court speak with one voice.²⁰ Consensus decision-making may enhance legitimacy in the eyes of the public; decisions with separate opinions might be regarded as less credible and persuasive than (seemingly) unanimous ones.²¹ Separate opinions, consequently, have the potential of weakening the court's authority, legitimacy and credibility (particularly when a given decision was adopted by a narrow majority²²).²³ It is even said that separate opinions may cause uncertainty in the law and give the impression of a court that is falling apart.²⁴ This might possibly, but not necessarily, happen when the settled case law of a court is criticised in a separate opinion.²⁵ Hence, separate opinions are also associated with negative effects, such as the weakening of the court's authority, the distortion of legal certainty, as well as the excessive individualisation and politicisation of judicial decision-making. For example, John Roberts, the current Chief Justice of the US Supreme Court, remarked that separate opinions lead to judges behaving like *prima donnas*, which weakens the court as an institution.²⁶

19. As an argument against separate opinions, these may be seen as providing their authors with the opportunity to demonstrate flaws perceived in the majority's legal analysis. However, as an argument for separate opinions, these may be seen as forcing the majority to refine its reasoning or opinion, dissents increase the court's responsibility and may work as a corrective mechanism. One of the advantages of separate opinions is that they enhance the debate on legal issues and lead to the improvement of majority opinions. Antonin Scalia, a former US Supreme Court judge renowned for his dissents, said that he prefers when someone disagrees with a majority opinion he wrote, because unanimous decisions often have the lowest quality of argumentation.²⁷ A dissent establishes a benchmark against which the majority's decision can

¹⁹ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 170; *Kirby*, Judicial Dissent—Common Law and Civil Law Traditions, UKHL 27, [2007] 3 WLR 112, 36-75 (excerpted from 23 L.Q. REV. 379 (2006)); in: *Global Constitutionalism*, Yale Law School, 2008, 1-32; *Wittig*, Separate Opinions at the Federal Constitutional Court, 59; *Krapivkina*, Judicial Dissents: Legal and Linguistic Aspects, *Journal of Siberian Federal University* 10 (2016 9), 2449, 2456. Cf. *Schäffer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, JRP 1999, 33, 38 (stating that the procedural rules of the Austrian Constitutional Court adequately guarantee that the plurality of opinions come into effect).

²⁰ *Brennan*, In Defense of Dissents, 37 *The Hastings Law Journal*, 1986, 427, 432.

²¹ *Bierlein*, Separation of Powers and Independence of Constitutional Courts and Equivalent Bodies, 2nd Congress Of the World Conference on Constitutional Justice (Brazil, January 2011), 9, at https://www.venice.coe.int/WCCJ/Rio/Papers/AUT_Bierlein_E.pdf; *Ginsburg/Garoupa*, Building Reputation in Constitutional Courts: Political and Judicial Audiences, 28 *Arizona Journal of International and Comparative Law* 539, 547 (2011). For details about the decision-making process in Austria, see *Schäffer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, JRP 1999, 33.

²² Venice Commission, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia (CDL-AD(2009)042) of 13 October 2009, para. 18, *Safta*, The Role Of Dissenting And Concurring Opinions In The Constitutional Jurisdiction, *Perspectives of Business Law Journal* Vol. 5(1) 2016, 207, at 210 f.

²³ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 163; *Terris/Romano/Swigart*, Toward a Community of International Judges, 30 *Loy. L.A. Int'l & Comp. L. Rev.* 419 (2008), 454; *Matscher*, Zur Frage der Einführung von Sondervoten im Verfahren vor dem Verfassungsgerichtshof. Erfahrungen aus der internationalen Gerichtsbarkeit, JRP 1999, 24.

²⁴ *Wittig*, Separate Opinions at the Federal Constitutional Court, 59 f; *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 170; *Krapivkina*, Judicial Dissents: Legal and Linguistic Aspects, *Journal of Siberian Federal University* 10 (2016 9), 2449, 2456.

²⁵ Cf. for instance, separate opinion of judge *Grimm*, BVerfGE 80, 137, 164 ff. For critiques on this decision of the Federal Constitutional Court, cf. *Kunig*, Der Reiter im Walde. BVerfGE 80, 137, *Jura* 1990, 523; *Rennert*, Das Reiten im Walde. Bemerkungen zu Art. 2 I GG, NJW 1999, 3261; *Pieroth*, AöR 115 (1990), 33.

²⁶ *Rosenm*, Roberts' Rules. In: <https://www.theatlantic.com/magazine/archive/2007/01/robertss-rules/305559/>.

²⁷ *Senior*, Conversation: Antonin Scalia. In: <http://nymag.com/news/features/antonin-scalia-2013-10/>.

be evaluated.²⁸ In a nutshell, proponents argue that dissents help in supplementing, interpreting or challenging the reasoning of the majority opinion, evaluating it and revealing its errors.²⁹

20. The above reflects what may be referred to as the *paradox of dissent*, i.e. judicial dissent undermines the authority of a judgment, but simultaneously – precisely by doing so – plays a constructive role in strengthening the legitimacy of courts.³⁰ According to the proponents of separate opinions, practical examples illustrate that a court's authority and acceptance does not depend on the unanimity of its decisions.³¹ In addition, separate opinions improve the quality of judgments, because those delivering a concurring or dissenting opinion must explain why they do not agree with the majority.³²

2. Preserving the independence of judges

21. In the context of the independence of judges there are, once again, arguments for and against separate opinions. It is said that anonymity guarantees the independence of judges, who should act as one unit towards the exterior.³³ Constitutional court decisions are often politically significant. Separate opinions may reflect the political views of their authors and facilitate the categorisation of judges into, for instance, conservative or progressive judges.³⁴ Although once appointed, constitutional court judges enjoy guarantees of independence, it is possible that a judge, appointed by a particular political actor, feels obliged to signal loyalty, to dissent (or not dissent) in order to please those who nominated him or her.³⁵ Due to potential political pressure, but also to pressure exercised by the media and other actors, opponents of separate opinions fear that a judge's impartiality may be compromised.³⁶ Moreover, the career of a judge could be endangered and, especially when judges have a chance of being re-elected, such a risk could prevent them from presenting or, on the contrary, encourage them in

²⁸ *Limbach*, Das Bundesverfassungsgericht und das Sondervotum JRP 1999, 10, 11; *Brennan*, In Defense of Dissents, 37 *The Hastings Law Journal*, 1986, 427, 430, 435; *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International VIII/2003*, 162, 170; *Krapivkina*, Judicial Dissents: Legal and Linguistic Aspects, *Journal of Siberian Federal University* 10 (2016 9), 2449, 2456.

²⁹ *Krapivkina*, Judicial Dissents: Legal and Linguistic Aspects, *Journal of Siberian Federal University* 10 (2016 9), 2449, 2451.

³⁰ *Mistry*, The Paradox of Dissent: Judicial Dissent and the Projects of International Criminal Justice, 13(3) *Journal of International Criminal Justice* (2015) 449, 450 f.

³¹ *Hiesel*, Gedanken zur Diskussion über die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus dem Blickwinkel des Supreme Court der Vereinigten Staaten von Amerika, JRP 2000, 22, 27 (referring to the US Supreme Court); *Limbach*, Das Bundesverfassungsgericht und das Sondervotum JRP 1999, 10, 11 (in relation to Germany); *Wittig*, Separate Opinions at the Federal Constitutional Court, 63 f (referring to Germany; on pages 60 f referring to courts of other countries).

³² *Mayer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, JRP 1999, 30, 31; *Hiesel*, Gedanken zur Diskussion über die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus dem Blickwinkel des Supreme Court der Vereinigten Staaten von Amerika, JRP 2000, 22, 23 f; *Jakab*, Judicial Reasoning in Constitutional Courts: A European Perspective, *German Law Journal* Vol.14(8), 1228, 1229.

³³ *Matscher*, Zur Frage der Einführung von Sondervoten im Verfahren vor dem Verfassungsgerichtshof. Erfahrungen aus der internationalen Gerichtsbarkeit, JRP 1999, 24; *Holzinger/Frank*, Die Verfassungsgerichtsbarkeit – Essenz und Wandlung; in: Jabloner (ed.), *Festschrift 150 Jahre Wiener Juristische Gesellschaft* (2017), 169, 183 f.

³⁴ *Roellecke*, Sondervotum, in: *Global Constitutionalism*, Yale Law School, 2008, I-17 (excerpted from *Bardura/Dreier* [eds.], *Festschrift 50 Jahre Bundesverfassungsgericht* 363 (2001)); *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International VIII/2003*, 162, 163.

³⁵ Venice Commission, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia (CDL-AD(2009)042) of 13 October 2009, para. 19; *Ginsburg/Garoupa*, Building Reputation in Constitutional Courts: Political and Judicial Audiences, 28 *Arizona Journal of International and Comparative Law* 539, 548 (2011).

³⁶ *Holzinger/Frank*, Die Verfassungsgerichtsbarkeit – Essenz und Wandlung; in: Jabloner (ed.), *Festschrift 150 Jahre Wiener Juristische Gesellschaft* (2017), 169, 183 f; *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International VIII/2003*, 162, 168 (with further references); *Garlicki*, Note on Dissent in the European Court of Human Rights, in: *Global Constitutionalism*, Yale Law School, 2008, I-8; *Safta*, The Role Of Dissenting And Concurring Opinions In The Constitutional Jurisdiction, *Perspectives of Business Law Journal* Vol. 5(1) 2016, 207, at 210 f.

expressing their separate opinions. Furthermore, it could result that judges pursue their personal goals instead of striving for the best decision.³⁷

22. In order to counter this fear of political pressure, emphasis is laid on the fact that judges are appointed for life or until a certain advanced age (70 years for instance in Austria, Hungary, Israel, Ireland [72 in some cases], Portugal, Republic of Moldova, Russian Federation, Ukraine, United Kingdom, 65 years in the Republic of Korea and Turkey) or, for a certain period of time, without the chance of being re-elected,³⁸ they may not be removed or transferred from office except on specific grounds,³⁹ they have a legally determined salary and no worries except for a possible decrease in their popularity among certain groups.⁴⁰

23. Dissenting opinions can be misused to attract public attention.⁴¹ When it is a right, and not a duty, for judges to write a separate opinion, there is room for strategic behaviour.⁴² Although the most important reason for filing a separate opinion is fundamental disagreement with the majority's result or reasoning – minor differences are usually not deemed sufficient for a dissent – there may also be personal reasons, such as the desire not to be associated with a certain judgment in certain circles.⁴³ Under such circumstances, possible tensions may emerge between fellow judges.⁴⁴

24. On the other hand, it is argued that separate opinions are an expression of a judge's freedom of speech and independence from his or her fellow judges.⁴⁵ This could prevent those judges, who are often outvoted, from becoming frustrated as a result of not having the opportunity of expressing their opinion.⁴⁶ Separate opinions guarantee personal integrity and

³⁷ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 168 f; *Wittig*, Separate Opinions at the Federal Constitutional Court, 60; *Kelemen*, Dissenting Opinions in Constitutional Courts, 14(8) *German Law Journal* (2013), 1345, 1359 f (stating that it should rather be used as an argument to ban re-election, as introduced at the ECtHR (2010 with ECHR, Protocol 14, Article 2), accompanied by an extension of the term of office).

³⁸ See (CDL-AD(2005)003) Joint opinion on a proposal for a constitutional law on the changes and amendments to the Constitution of Georgia by Venice Commission and OSCE/ODIHR, para.105; see also CDL-AD(2005)005, Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia, para.8; (CDLAD(2013)028) Opinion on the draft amendments to three constitutional provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro, para.24.

³⁹ See (CD-LAD(2014)033) Opinion on the Draft Law on the Constitutional Court of Montenegro, para.21; CDLAD(2017)011 Opinion on the Draft Constitutional Law on the Constitutional Court of Armenia, para.29.

⁴⁰ *Mayer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, *JRP* 1999, 30, 32 (in relation to the Austrian Constitutional Court). Cf. also *Hiesel*, Gedanken zur Diskussion über die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus dem Blickwinkel des Supreme Court der Vereinigten Staaten von Amerika, *JRP* 2000, 22, 27 f (also referring to the protected position of judges at the Austrian Constitutional Court).

⁴¹ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 170; *Wittig*, Separate Opinions at the Federal Constitutional Court, 71 f.

⁴² *Kelemen*, Dissenting Opinions in Constitutional Courts, 14(8) *German Law Journal* (2013), 1345, 1364.

⁴³ *Grimm*, Some Remarks on the Use of Dissenting Opinions in Continental Europe, in *Global Constitutionalism*, Yale Law School, 2008, I-1.

⁴⁴ *Brennan*, In Defense of Dissents, 37 *The Hastings Law Journal*, 1986, 427, 429; *Wittig*, Separate Opinions at the Federal Constitutional Court, 72 (with further references); *Safta*, The Role Of Dissenting And Concurring Opinions In The Constitutional Jurisdiction, *Perspectives of Business Law Journal* Vol. 5(1) 2016, 207, at 210 f.

⁴⁵ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 169. *Wittig*, Separate Opinions at the Federal Constitutional Court, 59; *Kelemen*, Dissenting Opinions in Constitutional Courts, 14(8) *German Law Journal* (2013), 1345, 1360; *Schermers/Waelbroeck*, Dissenting Opinions; in: *Global Constitutionalism*, Yale Law School, 2008, I-5 (excerpted from *Schermers/Waelbroeck*, *Judicial Protection in the European Union* 736 (2001)). Cf. further *Terris/Romano/Swigart*, *Toward a Community of International Judges*, 30 *Loy. L.A. Int'l & Comp. L. Rev.* 419 (2008), 452.

⁴⁶ *Scherthanner*, Der Verfassungsgerichtshof und seine Unabhängigkeit. Verfassungspolitische Gedanken zu ausgewählten Problemen, *ÖJZ* 2003, 621, 626; *Schermers/Waelbroeck*, *Dissenting Opinions* I-5.

dignity to those who remain in the minority and enable judges to decide in accordance with their conscience, and not in accordance with the majority.⁴⁷

3. Development of the law and legal culture

25. Proponents of separate opinions argue that these enrich public, academic and political debate.⁴⁸ They can play an important role in the future development of the law; in certain cases, a (well-founded) dissenting opinion may become a majority opinion.⁴⁹

26. Opponents, however, say that – on the contrary – it is not the role of the court to contribute to academic debate. Rather, it is the court's task to give final judgments to disputes.⁵⁰ In other words, the demonstration and acceptance of the court's legal opinion should be of central concern, rather than the self-portrayal of single judges.⁵¹ In addition, drafting separate opinions can be time consuming.⁵² One author stated that non-compulsory separate opinions would not be issued very often due to the judges' workload; whereas compulsory ones would constitute too much of a burden on all judges and would delay the administration of justice.⁵³

27. Theoretical arguments in support of separate opinions can also be based on current analytical philosophy, which values plurality of opinions and "reasonable disagreement". Reasonable disagreement means that rational, well-informed people, aware of values, do not agree on a particular issue, and their disagreement withstands even the most vigorous argumentation. This term was introduced as an expression of the fact that there is a decreasing number of philosophers who believe that rational discourse tends to converge towards consensus, and that, on the contrary, the number of those who think rational discourse tends to diverge into plurality is rising.⁵⁴

⁴⁷ *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 168-170. *Krapivkina*, Judicial Dissents: Legal and Linguistic Aspects, *Journal of Siberian Federal University* 10 (2016) 9, 2449, 2456.

⁴⁸ *Limbach*, Das Bundesverfassungsgericht und das Sondervotum JRP 1999, 10, 11 (stating that the mere announcement of a dissenting opinion has the potential to invigorate the debate and to rethink the majority opinion); *Wittig*, Separate Opinions at the Federal Constitutional Court, 59; Venice Commission, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia (CDL-AD(2009)042) of 13 October 2009, para. 20; *Gorlani*, La dissenting opinion nella giurisprudenza della Corte Suprema degli Stati Uniti: un modello importabile in Italia? in: *Global Constitutionalism*, Yale Law School, 2008, 1-27 (excerpted from *Forum di Quaderni Costituzionali*); *Krapivkina*, Judicial Dissents: Legal and Linguistic Aspects, *Journal of Siberian Federal University* 10 (2016) 9, 2449, 2457.

⁴⁹ *Grimm*, Some Remarks on the Use of Dissenting Opinions in Continental Europe, in: *Global Constitutionalism*, Yale Law School, 2008, 1-1; *Matscher*, Zur Frage der Einführung von Sondervoten im Verfahren vor dem Verfassungsgerichtshof. Erfahrungen aus der internationalen Gerichtsbarkeit, JRP 1999, 24; *Safta*, The Role of Dissenting and Concurring Opinions in the Constitutional Jurisdiction, *Perspectives of Business Law Journal* Vol. 5(1) 2016, 207, at 211; *Schermers/Waelbroeck*, Dissenting Opinions; *Ginsburg/Garoupa*, Building Reputation in Constitutional Courts: Political and Judicial Audiences, 28 *Arizona Journal of International and Comparative Law* 539, 548 (2011); in the Czech Republic, this was, for example, what happened in cases concerning the protection of the political minority when it comes to political party funding.

⁵⁰ *Schernthanner*, Der Verfassungsgerichtshof und seine Unabhängigkeit. Verfassungspolitische Gedanken zu ausgewählten Problemen, *ÖJZ* 2003, 621, 626.

⁵¹ *Schäffer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, JRP 1999, 33, 38 f (adding that the formal acceptance is undoubtedly higher when a decision is presented as a uniform verdict).

⁵² *Schernthanner*, Der Verfassungsgerichtshof und seine Unabhängigkeit. Verfassungspolitische Gedanken zu ausgewählten Problemen, *ÖJZ* 2003, 621, 627; *Hiesel*, Gedanken zur Diskussion über die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus dem Blickwinkel des Supreme Court der Vereinigten Staaten von Amerika, JRP 2000, 22, 26.

⁵³ *Schäffer*, Die Einführung der „dissenting opinion“ am Verfassungsgerichtshof aus Sicht der österreichischen Verfassungslehre, JRP 1999, 33, 38 f.

⁵⁴ *Besson S.*, *The Morality of Conflict – Reasonable Disagreement And The Law*, Oxford 2005; *McMahon Ch.*, *Reasonable Disagreement, A Theory of Political Morality*, Cambridge 2009.

28. Even the Czech legal philosopher, Jiří Přibáň, stresses the paradox that the most important source of legitimacy for current liberal democracies based on the rule of law is the plurality of legitimation strategies. Instead of a consensus, there is a conversation, the purpose of which is not to determine the winners and losers of the political debate, but instead to reinforce and lead to the recognition of a multitude of voices participating in it.⁵⁵ In other words, we perceive this discourse and the plurality of interpretations as legitimising the result, rather than challenging it.

29. Canadian Supreme Court judge Claire L'Heureux-Dubé compares separate opinions to polyphony in music, as they allow law to speak in a plurality of voices. According to her, separate opinions make an important contribution to the development of the law and legal culture.⁵⁶

4. Summary

30. The risks associated with separate opinions may be avoided if separate opinions are used only as a last resort (*ultima ratio*) and are prepared with respect to the majority opinion. The use (or abuse) of separate opinions is indeed a matter which should not be driven by selfish motives.⁵⁷ A separate opinion should not be a defiant reaction to having been overruled.⁵⁸ Their role should be to contribute to the development of the law by promoting certain alternative legal opinions.⁵⁹

31. Even proponents of separate opinions admit that dissent for its own sake has no value and can be detrimental to the collegiality among judges and the credibility of a court. Yet, it is argued that where significant disagreement exists, members of the court have a responsibility and an obligation to articulate it.⁶⁰ In this context, it could be debated whether or not anonymously drafted separate opinions should be permitted in order to guarantee the independence of judges. This shall be considered below.

32. The above shows the appeal of the arguments of the proponents of and of the opponents to separate opinions of constitutional courts or courts with equivalent jurisdiction. This report will now consider the rules that govern separate opinions in the Member States of the Venice Commission.

B. Rules governing separate opinions

33. In Member States of the Venice Commission, which allow separate opinions, the level and density of regulations concerning such opinions offers a wide range of variations.

1. Level of regulation

34. In most countries, regulations or rules on separate opinions are found in the ordinary laws on the organisation and functioning of the constitutional or supreme court. In some countries, regulations or rules on separate opinions are provided in the constitution or in the organic law on the constitutional court (Chile, Georgia, Peru, Spain). In others, regulations or rules are

⁵⁵ Přibáň, *Disidenti práva*, SLON, Praha 2001, p. 15.

⁵⁶ L'Heureux-Dubé, *The Dissenting Opinion: Voice of the Future?* Osgoode Hall Law Journal [online]. 2000, vol. 38, no. 3, p. 496

⁵⁷ Cf. Brennan, *In Defense of Dissents*, 37 *The Hastings Law Journal*, 1986, 427, 438; Terris/Romano/Swigart, *Toward a Community of International Judges*, 30 *Loy. L.A. Int'l & Comp. L. Rev.* 419 (2008), 454.

⁵⁸ Matscher, *Zur Frage der Einführung von Sondervoten im Verfahren vor dem Verfassungsgerichtshof. Erfahrungen aus der internationalen Gerichtsbarkeit*, JRP 1999, 24, 26.

⁵⁹ Safta, *The Role Of Dissenting And Concurring Opinions In The Constitutional Jurisdiction*, *Perspectives of Business Law Journal* Vol. 5(1) 2016, 207, at 5 f.

⁶⁰ Cf., for instance, Brennan, *In Defense of Dissents*, 37 *The Hastings Law Journal*, 1986, 427, 434 f.

provided exclusively by the court itself (Bosnia and Herzegovina, Brazil,⁶¹ Bulgaria, Croatia, Kosovo⁶², “The former Yugoslav Republic of Macedonia”, Serbia) or in addition, by the court (Germany⁶³, Kazakhstan⁶⁴, Latvia, Moldova, Peru, Slovenia, Turkey).

2. Differences according to the types of proceedings

35. In Bulgaria, dissenting opinions are not permitted when a decision is adopted by secret ballot.⁶⁵ This concerns the decisions pursuant to Article 148, paragraph 2 and Article 149, paragraph 1 item 8 of the Constitution (judge’s immunity and impeachment of President or Vice-President).

36. Article 62 paragraph 10 of the Law of the Republic of Armenia on the Constitutional Court⁶⁶ provides for separate opinions on cases falling under paragraphs 1-4 and 7 of Article 168.⁶⁷

3. Time limits

37. In order to prevent unreasonable delays as a result of separate opinions, some countries have set time limits for writing these.

38. Deadlines vary between five working days to three weeks from the final judgment by the majority (Article 42 paragraph 2 of the Rules of the Constitutional Court of *Bosnia and Herzegovina*; Article 51 paragraph 3 of the Rules of Procedure of the Constitutional Court of the Republic of *Croatia*; section 55 (1) of the Rules of Procedure of the Federal Constitutional Court of *Germany*; Rule 63 paragraph 1, Rule 64 paragraph 2 of the Rules of Procedure of the Constitutional Court of the Republic of *Kosovo* no. 01/2018; paragraph 145 of the Rules of Procedure of the Constitutional Court of *Latvia*; Article 55 of the Law on the Constitutional Court of the Republic of *Lithuania*; Article 60 paragraph 3 of the Rules of procedure of *Serbia*; Article 72 of the Rules of Procedure of the Constitutional Court of the Republic of *Slovenia*; Article 81 paragraph 2 of the Internal Regulations of the Constitutional Court of *Turkey*).

39. In addition, some require the announcement of a dissenting or concurring opinion during or at the end of deliberations (Article 51 paragraph 1 of the Rules of Procedure of the

⁶¹ Article 96 Internal Rules of the Supreme Court of Brazil,

<http://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTF.pdf>

⁶² See Rules of Procedure of the Constitutional Court the Republic of Kosovo, No. 01/2018 (Adopted on 31 May 2018), http://gjk-ks.org/wp-content/uploads/2018/06/rregullore_e_punes_gjkk_ang_2018.pdf.

⁶³ Para. 26, 55 of the Rules of Procedure of the Federal Constitutional Court of 19 November 2014, (2015, Federal Law Gazette I, 286; Geschäftsordnung des Bundesverfassungsgerichts).

⁶⁴ Article 22 of Regulation of the Constitutional Council of the Republic of Kazakhstan,

<http://ksrk.gov.kz/en/article/regulation-constitutional-council>.

⁶⁵ Article 32 paragraph 4 of the Regulations on the Organisation of the Activities of the Constitutional Court: “(4) *When a decision is adopted by secret ballot the signing of a dissenting opinion shall not be permitted.*”

⁶⁶ “*Within a ten-day period following the day of adoption of a decision or a report on the matters envisaged in Sub-paragraphs 1 to 4 and 7 of Article 168 of the Constitution, the Constitutional Court judge may present a special opinion on the final decision or conclusion as to the concluding part or reasoning part that is immediately published on the official website of the Constitutional Court, as well as the publication of normative legal acts in the manner prescribed by law and in the Constitutional Court’s Bulletin.*”

⁶⁷ Article 168. Powers of the Constitutional Court: (unofficial translation):

The Constitutional Court in the manner prescribed by the law on the Constitutional Court,

1) *shall determine the conformity of laws, decisions of the National Assembly, decrees and orders of the President, decisions of the Government and the Prime Minister, subordinate normative legal acts;*

2) *Before the adoption of draft constitutional amendments, as well as draft legal acts to be adopted, determine their compliance with the Constitution;*

3) *Before the ratification of an international treaty determines the compliance of the obligations to it with the Constitution;*

4) *resolve disputes arising out of their constitutional powers between the constitutional bodies;*

...

7) *issue a conclusion on the grounds for dismissing the President of the Republic;*”

Constitutional Court of the Republic of *Croatia*; paragraph 55 (2) of the Rules of Procedure of the Federal Constitutional Court of Germany; Rule 63 paragraph 1 of the Rules of Procedure of the Constitutional Court of the Republic of *Kosovo* no. 01/2018; Article 60 paragraph 2 of the Rules of procedure of *Serbia*; Article 40 paragraph 3 of the Constitutional Court Act and Article 71 paragraph 2 of the Rules of Procedure of the Constitutional Court of the Republic of *Slovenia*).

4. Wording, content and style

40. The legitimacy of judicial decision-making will only be ensured by separate opinions that remain loyal to the court and its institutional role. Separate opinions should therefore generally focus on explaining that the matter could be dealt with differently and, perhaps, in a better way, but not that the solution chosen by the majority was one of poor quality.

41. When considering whether or not to write a separate opinion, the judge should also keep in mind that it might "push" the majority opinion to a greater extreme than it would have done if he or she had negotiated a compromise. It is precisely because a separate opinion should be considered as an *ultima ratio* solution that the outcome of a judges' dispute is so important – a factual solution, not its presentation or self-assertion – judges should primarily attempt to influence the majority opinion rather than immediately aim for a dissenting or concurring opinion.

42. The law should treat separate opinions as a right of judges, and not impose on them a duty to disclose their opinion in every case they were not able to join the majority. However, should there be a line between dissent, which is important, and disrespect, which is to be avoided? As regards limits in the wording of separate opinions, there are only a few countries which have special provisions in this respect. A significant description of the problem may be found in a statement by Lyndel V. Prott:

*"The judge's speech and behaviour should be those of the elite of his society. He will be loyal to this Court and to his colleagues, especially in a case where an opinion is overruled by a higher court. In the case of a dissenting opinion he will express himself with courtesy without personal or sharp criticism. The English practice of judges referring to their colleagues as "my learned friend" or "my brethren" is a good example of this special courtesy. The judge should not criticise the Bench, e.g. through literary publications or even statements to the press. He must keep private conversations with his colleagues concerning matters coming before the court."*⁶⁸

43. In the US Supreme Court before the 1950s, dissents were polite and even apologetic, stressing the focus on consensus. However, by the 1950s, they became more common and were not only an expression of disagreement, but also a judicial statement.⁶⁹ The Supreme Court tried to mitigate this by reintroducing the "respectful dissent" expressing a "norm of collegiality" in the Court.⁷⁰ Therefore, even if recent Supreme Court Justices were renowned for their assertive dissents, they followed the norms of civility, collegiality and respect when they did not manage to reach a consensus. However, most importantly, they showed deep appreciation for the Supreme Court's role in the US' democracy and that public respect and confidence in the integrity of that Court was essential for its independence.⁷¹

⁶⁸ Prott, The Role of the Judge of the International Court of Justice, 10 *Revue Belge de Droit International* (1974), 473 (480).

⁶⁹ Auerbach, D., R-E-S-P-E-C-T, Find Out What It Means to Scalia, <https://slate.com/human-interest/2015/06/the-surprising-history-of-the-respectful-dissent-at-the-supreme-court.html>.

⁷⁰ Ibid.

⁷¹ Lyn, *Entrikin*, Disrespectful Dissent: Justice Scalia's Regrettable Legacy of Incivility, *Journal of Appellate Practice and Process*, <https://www.questia.com/library/journal/1G1-546620408/disrespectful-dissent-justice-scalia-s-regrettable>.

44. The Constitutional Court of Romania imposed strict limits for the contents of separate opinions. On 23 June 2017, the Constitutional Court adopted decision no. 1/22.06.2017⁷², which prohibits “assessments of a *sententious, ostentatious, provoking nature or politically suggestive opinions, as well as those leading to such an end point*”. Further, the “*separate and concurrent opinion cannot transgress the point of view of the judge so as to become a direct criticism of the decision of the Constitutional Court and it cannot become a party examination or an open criticism to the decision of the Constitutional Court.*” According to decision no.1/22.06.2017, separate opinions must be handed to the President of the Court who requests the judge concerned to re-write them if they do not respect these criteria and, if the judge refuses, decides that the dissenting opinion will not be published.⁷³

45. For constitutional or supreme courts that allow separate opinions, the solution might be for judges to include in their code of conduct or ethics a provision that deals with the content of separate opinions – not to the extent of dictating what these must contain – but on the contrary, which lines should not be crossed without impeding on the independence of the individual judge or harming the institution. This is a tricky balancing exercise, as it must be dissuasive enough for judges not to venture down that path, but at the same time provide them with the freedom of expression that they need to be able to make a reasonable dissent without fearing repercussions, which would have a chilling effect on the entire exercise and therefore be counterproductive.

46. It is important that a disrespectful separate opinion that breaches the code of conduct or ethics (or other) be published regardless of whether or not a procedure has been launched against the dissenting or concurring judge. A solution, as had been adopted in Romania for instance by a decision of the Constitutional Court in June 2017 as explained above, allowing the President of this Court to prevent the publication of separate opinions that are considered to bring criticism to the Court, or are considered to be judgmental or ostentatious or political in nature⁷⁴ – is problematic and should be avoided.

5. Whether or not the majority is allowed to respond

47. It is important for the quality of judgments, and for the collegiality within the Court, for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary. To the extent possible, the majority should not be surprised by the content of a separate opinion, once the majority opinion is finalised. Should the majority decide to change their reasoning in view of the separate opinion, the dissenting or concurring judge should then have the right to withdraw or change his or her dissenting or concurring opinion within a short period of time. This requires for the majority to obtain the dissent in writing before the final judgment is announced, sent to the participants or published (see § 26(1) of the Rules of Procedure of the German Federal Constitutional Court⁷⁵; Article 72 paragraph 3 of the Rules of Procedure of the Constitutional Court of Slovenia⁷⁶). Ideally, both texts (the majority opinion and the separate opinion(s)) should be prepared at the same time (when the attempt to influence the majority opinion has finally failed), so that the separate

⁷² Official Gazette, Part I nr. 447. of June 23, 2017.

⁷³ This CCR Decision (no. 1/22.06.2017) has been cancelled by the Appeal Court of Bucharest on 20 June 2018.

⁷⁴ Ibid.

⁷⁵ § 26(1) reads as follows: “Any Justice who has participated in the decision may, until it is pronounced or drawn up in writing to be served, demand that the deliberations be continued if he or she intends to change his or her vote; any Justice may request that the deliberations be continued if he or she wishes to present aspects not discussed previously **or if a separate opinion gives cause to do so.**”

https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/GO_BVerfG.pdf?__blob=publicationFile&v=6.

⁷⁶ Article 72 paragraph 3 reads as follows: “Separate opinions are submitted to other Constitutional Court judges, who may comment on such within three days. A Constitutional Court judge who has submitted a separate opinion may reply to such comments within three days.”

opinion does not appear to be a type of “rebuke” to the majority or even to a particular judge-rapporteur, because of an alleged mistake they have made. It should rather be a parallel interpretation of a particular legal problem, usually concerning a conflict of values, for example why a minority would give preference to one constitutional value rather than another, preferred by the majority.

48. Any reaction and amendment is excluded if the pronouncement or remittance of the act of the Constitutional Court takes place before the dissenting judge – within a reasonable period of time – had the opportunity to give his or her opinion (see, e.g.: Article 51 paragraph 5 of the Rules of Procedure of the Constitutional Court Croatia; Article 55 of the Law on the Constitutional Court of Lithuania; Article 70 of the Constitutional Jurisdiction Code no. 502-XIII of the Republic of Moldova).

6. Pronouncement; anonymity and whether or not to disclose the number of votes

a. Pronouncement

49. The rules on the treatment of separate opinions during oral pronouncement of the Court act vary greatly. They range from the announcement of the separate opinion and its reasoning in addition to the majority decision (§ 55 (3) of the Rules of Procedure of the German Federal Constitutional Court; Article 112 paragraph 2 of the Act of 30 November 2016 on the Organisation of the Polish Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal⁷⁷) to not mentioning a separate opinion in the court sitting at all (Section 30 paragraph 6 of the Constitutional Court Law of Latvia).

b. Anonymity

50. The question of whether or not separate opinions should be anonymous has only been broached by a few countries. For instance, in Greece, the judgment must include the number of dissenting votes and their reasons,⁷⁸ but does not mention the identity of minority judges⁷⁹.

51. In the Czech Republic, the experience of the communist regime led to the introduction of separate opinions, which were seen as a means of protecting the personal integrity of individual judges. They continue to fulfil this role to this day. It is therefore important for a judge of the Czech Constitutional Court that a clear indication in the heading of each decision is included stating the name of the judge rapporteur who prepared the majority finding. If the draft is not adopted by the required majority, the President of the Court assigns the case to another judge, who – as the new judge rapporteur – will then draft the majority opinion. The Czech doctrine claims that judges who draft separate opinions take off their mask of anonymity, because they have openly admitted that they do not agree with the majority and that the Court’s decision was not reached unanimously. It also shows that the winning legal opinion was not accepted unequivocally, but that it was reached after difficult deliberations and after consideration of various arguments. Linking separate opinions to the name of a particular judge increases his or her responsibility for voting and content of the separate opinion.

7. Whether or not to disclose the number of votes

52. Disclosing the number of votes constitutes the transition between the traditional secrecy of deliberations and conducting them in public.

⁷⁷ Published in the Journal of Laws of the Republic of Poland on 19 December 2016, item 2072, see http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/The_Act_on_the_Organisation_of_the_Constitutional_Tribunal_and_the_Mode_of_Proceedings_Before_the_Constitutional_Tribunal_en.pdf.

⁷⁸ Article 93.3 of the Constitution of Greece.

⁷⁹ Law no.184/1975.

53. There are pros and cons to disclosing the number of votes. Arguments in favour of disclosure are that the mandatory publication of the actual number of votes brings greater insight into the voting and, therefore, also enables to better predict and assess possible changes in the case law. However, this comes with the requirement that there is no legal provision which proscribes disclosure.

54. The information about the number of votes is, among other things, an indication of the stability of the solution adopted in a decision, which is important not only for the parties to the proceedings, but it also allows others to estimate future developments in the case law on a given issue. It can also be an important mechanism of control provided to the public, which enables it to monitor the coherence in the decision-making of the court and individual judges. Finally, it might be argued that disclosing the number of votes could contribute to greater consistency in the case law.

55. Arguments against disclosing the number of votes are that the purpose of separate opinions is to present a different line of reasoning and not to predict future developments nor to reveal how strong the majority is in terms of numbers. What should matter is the strength of the arguments, not the number of votes.⁸⁰

8. Publication of separate opinions

56. If a separate opinion is made public, then the fact that the court was not able to reach a unanimous decision is revealed. As pointed out above, those who oppose the publication of separate opinions argue that it undermines the judgment of the court and diminishes its value as precedent. Proponents, however, claim that the plurality of opinions supports the legitimacy of law and enables it to develop.

57. The Venice Commission has consistently stated that separate opinions form a part of the judgment and should therefore be published together with the act and *ex officio*, not only upon request by the judges, who formulate these opinions.⁸¹ This requirement applies both to the publication medium and to the time of publication.

58. This is also supported by the Consultative Council of European Judges' (CCJE) Opinion no. 11 (2008) on the Quality of Judicial Decisions, which states in paragraph 51-52 that:

"51. In some countries judges can give a concurring or dissenting opinion. In these cases the dissenting opinion should be published with the majority's opinion. Judges thus express their complete or partial disagreement with the decision taken by the majority of judges who gave the decision and the reasons for their disagreement, or maintain that the decision given by the court can or should be based on grounds other than those adopted. This can contribute to improve the

⁸⁰ Many Member States of the Venice Commission have not broached this issue, for instance the Czech Constitutional Court Act does not address this issue and the disclosure of votes is never employed in practice. It is rare that information that can be used to deduce the number of votes can be found in the reasoning of the majority or in a separate opinion (but this is perceived negatively, since making public the number of votes comes across as a rather improper disclosure of information, which is something the law does not provide for). In the Czech Republic, it is clearly possible to determine the number of votes from the reasoning of the decision by the plenum in a situation in which a proposal to annul a law obtains a majority, but not a qualified majority (Out of fifteen judges, nine votes are required in order to annul a statutory provision). In such a case, the law and practice expect that it will be apparent from the reasoning that the dismissal reflects only the opinion of the so-called relevant minority and that it is a result of the fact that the requirement of nine votes for annulment has not been met.

⁸¹ See (CDL-AD(2009)042) Opinion on Draft Amendments to the Law on the Constitutional court of Latvia, paragraph 18 and subsequent; (CDL-AD(2011)018) Opinion on the draft constitutional law on the constitutional chamber of the Supreme Court of Kyrgyzstan, para. 51; (CDL-AD(2016)017), Opinion on the Amendments to the Organic Law on the Constitutional court of Georgia and to the Law on constitutional Legal Proceedings, para. 61.

content of the decision and can assist both in understanding the decision and the evolution of the law.

52. *Dissenting opinions should be duly reasoned, reflecting the judge's considered appreciation of the facts and law."*

IV. Conclusion

59. There are valid arguments for and valid arguments against having separate opinions in courts with constitutional jurisdiction. As the *paradox of dissent* has shown, if public judicial dissent can be seen as undermining the authority of a judgment, it can equally be seen as playing a constructive role in strengthening the legitimacy of courts precisely by doing so.

60. The basic choice of whether or not to introduce the right to submit separate opinions clearly remains with the States. The Venice Commission has a favourable attitude to introducing the right to submit separate opinions, but there is clearly no standard for doing so.

61. For its Member States, which have decided to allow separate opinions, the Commission makes the following general recommendations, which are based on a logic of coherence of this basic choice:

- a) The law should treat separate opinions as a right of judges, and not impose on them a duty to disclose their opinions in every case they were not able to join the majority.
- b) The legitimacy of judicial decision-making will only be ensured by separate opinions that remain loyal to the court and its institutional role. Therefore, separate opinions should focus on explaining that the matter could be dealt with differently, perhaps, in a better way, but not that the solution chosen by the majority was of poor quality.
- c) A separate opinion should be considered as an *ultima ratio* solution. Therefore, it is essential that judges debate and attempt to influence the majority opinion before envisaging a separate opinion.
- d) It is important for the quality of judgments and for the collegiality within the court for the majority to be able to react and respond to a written separate opinion and to amend the findings or the reasoning of the majority, if necessary. Should the majority decide to change their reasoning in view of the separate opinion, the dissenting or concurring judge should then have the right to withdraw or change his or her dissenting or concurring opinion within a short period of time. This requires for the majority to obtain the dissent in writing before the final judgment is announced, sent to the participants or published.
- e) The judges' code of conduct or ethics should deal with separate opinions – not to dictate the contents, but to set out which lines should not be crossed, without impeding on the independence of the individual judge or harming the institution. It is important that a disrespectful separate opinion that breaches the code of conduct or ethics (or other) be published regardless of whether or not a procedure has been launched against the dissenting or concurring judge.

62. The Venice Commission is at the disposal of its Member States that wish to introduce or amend provisions on separate opinions.

V. APPENDIX – REGULATIONS REGARDING SEPARATE OPINIONS

A. Examples of States with relevant provisions on separate opinions

63. The following part presents an overview of the legal situation in those Member States of the Venice Commission that have provisions on separate opinions in their constitutions or laws on the court or in separate internal rules of the court or both.

1. Albania

64. According to Article 133(2) of the Constitution of Albania and Article 72(2) of the Law on the Organisation and Functioning of the Constitutional Court of Albania, the decisions of the Constitutional Court are taken by a majority vote of the judges present at the plenary session hearing.⁸² A judge with a dissenting opinion enjoys the right to reason his or her opinion, which is then attached to and published together with the Court decision (Article 72(8) of the mentioned Law). The publication of dissenting opinions is also governed by Article 132(3) of the Albanian Constitution.⁸³

2. Armenia

65. The Law on the Constitutional Court of the Republic of Armenia⁸⁴ sets out that the Court shall adopt a decision or conclusion on the case at a closed session. The results of the voting by name shall not be published (Article 59). According to Article 65 of this Law, the decisions and resolutions of the Court shall be published in the Official Gazette and in the Bulletin of the Constitutional Court. Article 62 of the Law determines that decisions are generally adopted by majority vote. Judges have no right to abstain from voting. Pursuant to paragraph 7 of this Article, in cases set out in Article 100(1) and (2) of the Constitution, a member may present a dissenting opinion on the final as well as on the reasoning part of the decision, which is published in the Constitutional Court Bulletin together with the decision.

66. However, it seems that at this point, the last amendment of the Constitution has not yet been taken into account, because Article 100 of the current Constitution deals with extraordinary sessions and sitting of the National Assembly. It is possible that the reference in Article 62 of the Law on the Constitutional Court has not been updated and should actually refer to Article 168 of the Constitution, paragraphs (1) and (2) of which relate to the constitutional review of laws.⁸⁵

3. Azerbaijan

67. In Azerbaijan, the Law on the Constitutional Court⁸⁶ allows judges to express their dissenting opinion in case of disagreement with resolutions adopted by the Court (Article 17(7)). In accordance with Article 64, dissenting opinions must be in writing and published along with the resolution of the Constitutional Court. Article 68 further stipulates that rulings of the Plenary shall be adopted by a majority of five judges, whereas those of the Chambers of the Court shall be adopted by a majority of votes. In accordance with Article 69, resolutions of the Plenary shall

⁸² Law No. 8577 on the Organisation and Functioning of the Constitutional Court of the Republic of Albania (10/2/2000), www.codices.coe.int.

⁸³ Constitution of Albania (1998, amended 2007), www.codices.coe.int.

⁸⁴ Law of the Republic of Armenia on the Constitutional Court (20/11/1995, last amendment 1/6/2006), at http://concourt.am/english/law_cc/index.htm. The Rules of Procedure are only available in Armenian.

⁸⁵ Cf. Venice Commission, Opinion on Amendments to the Law on the Constitutional Court of Armenia, CDL-AD(2006)017 of 22 June 2006, para. 27, where it is stated that *the "limitation of dissenting opinions to cases of constitutional review of laws and of treaties seems to be an acceptable middle way excluding more politicised powers like electoral disputes or impeachment."*

⁸⁶ Law of the Republic of Azerbaijan on the Constitutional Court (23/12/2003), at <http://www.constcourt.gov.az/laws/22>.

be published in the Official Gazette. Other rulings the publication of which is considered necessary by the Court shall be published in the Newsletter of the Court.

4. Bosnia and Herzegovina

68. Article 43 of the Rules of the Constitutional Court of Bosnia and Herzegovina⁸⁷ regulates separate opinions in a detailed manner. Judges who have taken part in the consideration of a case may state concurring or dissenting opinions. They may also give a bare statement of dissent or join a separate opinion (Article 43(1)). A separate opinion must be presented and explained in writing no later than 15 days after the decision has been sent to the judge concerned (Article 43(2)). It shall be attached to the minutes of the session and enclosed with the case-file concerned. This shall be duly noted in the rendered decision and the ruling (Article 43(3)). A separate opinion shall be annexed to the decision and published together in the Official Gazette and the Bulletin of the Constitutional Court (Article 43(4)). It is also stated in paragraph 5 that a decision shall not be remitted before a separate opinion has been submitted, or before the time limit referred to in paragraph 2 has expired.

69. In general, decisions of the Constitutional Court are taken by majority vote (Plenary and Grand Chamber) or unanimously (Chamber; cf. Art. 42(4) and (6) of the Rules of the Court).

5. Brazil

70. Article 96 of the Internal Rules of the Supreme Court of Brazil⁸⁸ provides that at each trial, *inter alia*, the reasoned votes will be joined to the case-file with the judgment. Under paragraph 2 of this Article, the Cabinet of Ministers releases the report, written votes and transcript of the trial within 20 days of the trial session. Paragraph 3 states that the secretariat of the session transcribes the report and votes that were not released under paragraph 2, with the exception of which have not been reviewed.

6. Bulgaria

71. According to Article 32 of the Regulations on the Organisation of the Activities of the Constitutional Court, most of decisions of the Court are rendered by open vote. Judges who do not agree with a decision may sign it and attach a dissenting opinion, in which they set out their opinion in writing.⁸⁹ Those who form part of the majority may also publish concurring opinions.⁹⁰

72. A separate opinion, however, is not permitted when a decision is adopted by secret ballot (Article 32(4)). Article 33(1) of the Regulations sets out that Court decisions shall be published in the Official Gazette, together with the reasons, dissenting opinions and opinions, within fifteen days of their adoption.

7. Chile

73. In Chile, according to Article 39.2 of the Organic Law of the Constitutional Court, "*Judges who dissent from the majority opinion of the Court shall have their dissent recorded in the judgment.*"

⁸⁷ Rules of the Constitutional Court of Bosnia and Herzegovina (Official Gazette No. 22/14), at <http://www.ccbh.ba/osnovni-akti/pravila-suda/drugi-dio/?title=poglavlje-i-sjednice-ustavnog-suda>.

⁸⁸ <http://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTF.pdf>

⁸⁹ Regulations on the Organization of the Activities of the Constitutional Court, Official Gazette No. 106/20.12.1991 (last amended by SG No. 8/26.01.2001), at <http://www.refworld.org/pdfid/44ae60524.pdf>.

⁹⁰ European Parliament' Dissenting Opinions (2012), 20 f.

8. Croatia

74. In Croatia, the Constitutional Court renders most of its decisions and rulings by a majority vote of its judges. Judges who have separate opinions shall give the reasons for their opinions in writing.⁹¹ This is also regulated by the Rules of Procedure of the Constitutional Court,⁹² which contain a separate chapter that regulates dissenting opinions in more detail (Chapter 5).

75. Pursuant to Article 50 of these Rules, several judges may also assume a joint dissenting opinion together (applicable rules are the same). Such an opinion shall be signed by all judges who dissent. Article 51(1) of the rules sets out that judges who announce a dissenting opinion orally at a session of the Court may simultaneously request that this opinion be published together with the decision or ruling rendered in the Official Gazette. A written statement of reasons for the dissenting opinion shall be submitted to the President of the Court within eight days after the decision or ruling was rendered; until then (or until the expiry of the time limit), the decision or ruling shall not be sent for publication (Article 51(3) and (4)). If no oral statement of reasons was provided, a dissenting judge (or several judges) has the right to explain his or her opinion in writing and publish this statement, within a reasonable time from the day the decision or ruling was written (cf. Article 27(5) of the Constitutional Act; Article 52(1) Rules of Procedure of the Constitutional Court). In practice, however, separate opinions are very rare.⁹³

9. Cyprus

76. In Cyprus, the Supreme Court currently exercise constitutional jurisdiction,⁹⁴ notwithstanding the constitutional provisions that provide for a separate constitutional court.⁹⁵ Judges are allowed to publish dissenting or concurring opinions.⁹⁶

10. Czech Republic

77. The Constitutional Court Act of the Czech Republic regulates the structure, organisation and proceedings held before the Constitutional Court. According to Article 14 of this Law, a judge who disagrees with the decision of the Plenary or with its reasoning has the right to have his or her individual opinion noted in the record of discussions and appended to the decision with his or her name stated. In line with Article 22, the same applies to panel members who disagree with the Panel's decision.⁹⁷

78. Separate opinions are published in the Court's own Reporter, not in the Collection of Laws, where a mere note at the bottom of the judgment mentions their existence.⁹⁸ The vote of each judge remains secret, even though voices demanding the publication of number of votes have appeared. When the judgment is pronounced publicly, the separate opinion is not read as it would then sound as the last word with a greater impact than the opinion of the majority.

⁹¹ Constitutional Act on the Constitutional Court of the Republic of Croatia, Official Gazette No. 49/02 (3/5/2002), Article 27(1) and (4).

⁹² Rules of Procedure of the Constitutional Court, 22/11/2003, Official Gazette No. 181/03 (amended 15/1/2015, Official Gazette No. 2/15), at

https://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

⁹³ Barić, *The Transformative Role of the Constitutional Court of the Republic of Croatia: From the ex-Yu to the EU*. Working Paper Series. Analitika – Center for Social Research (2016), 33.

⁹⁴ Nicolatos/Parparinos/Hadjiprodromou, *Administrative Justice in Europe*, The Supreme Court of Cyprus (2018), 2; at http://www.aca-europe.eu/en/eurtour/i/countries/cyprus/cyprus_en.pdf

⁹⁵ European Parliament' *Dissenting Opinions* (2012).

⁹⁶ Nicolatos/Parparinos/Hadjiprodromou, *Administrative Justice in Europe*, The Supreme Court of Cyprus (2018), 29.

⁹⁷ Constitutional Court Act No. 182/1993 (16/6/1993), at <https://www.usoud.cz/en/legal-basis/>.

⁹⁸ European Parliament' *Dissenting Opinions* (2012), 21.

79. In the Czech Republic, it is still being debated whether, in case of continuing disagreement with the majority opinion, it is better to keep repeating the same separate opinion time and again or whether the separate opinion should be used just once and the majority decision should be followed as a precedent. When it comes to the decisions by the plenum, in practice, both the option to write a joint separate opinion and the option to join a separate opinion authored by another judge are used.

11. Denmark

80. There is no special constitutional court in Denmark.⁹⁹ However, as stated in the introduction, Scandinavian Supreme Court judges have similar functions to those of constitutional judges).¹⁰⁰

81. Each judge in Denmark has the right to deliver his or her own opinion, whether in agreement with the other judges or to express his or her dissent. In some cases, however, it is considered important that the court appear unanimous.¹⁰¹ Separate opinions are published as a part of the judgment. The names of the judge issuing them are indicated.¹⁰²

12. Estonia

82. Estonia does not have a specialised Constitutional Court and constitutional review is exercised by a special section of the Supreme Court.¹⁰³ The publication of separate opinions to final judgments and to opinions on the interpretation of the Constitution is permitted.

83. Separate opinions are regulated by the Constitutional Review Court Procedure Act.¹⁰⁴ Pursuant to Section 57 of this Act, judgments shall be adopted by simple majority votes while safeguarding confidentiality of deliberations. A judge, or several judges, who disagree with the judgment or the reasons, may append a (joint) dissenting opinion to the judgment. This opinion shall be submitted by the time of pronouncement of the judgment and signed by all the judges concerned (cf. Section 57(2) and (5)). Section 59 of this Act provides for similar rules for separate opinions issued in relation to opinions on the interpretation of the Constitution. Separate opinions are published together with the judgment both in the Official Journal and on the website of the Court (cf. Section 62 of the mentioned act).¹⁰⁵

13. Finland¹⁰⁶

84. The Constitution of Finland does not set up a constitutional court, but provides judicial review to be carried out by ordinary judges when laws manifestly conflict with the Constitution.¹⁰⁷ Finnish judges are allowed to publish separate opinions.

⁹⁹ Venice Commission, Supreme Court of Denmark. Working document for the Circle of Presidents of the Conference of European Constitutional Courts, CDL-JU(2006)034 of 29 August 2006), 2.

¹⁰⁰ Bårdsen, The Nordic Supreme Courts as Constitutional Courts (Seminar, October 2015), 1.

¹⁰¹ Lindblom, The Role of the Supreme Courts in Scandinavia, 39 Scandinavian Studies In Law (2000), 325, 365.

¹⁰² European Parliament' Dissenting Opinions (2012), 21, with further references. See also Zahle, Judicial Opinion Writing in the Danish Supreme Court (Højesteret), 51 Scandinavian Studies In (2007), 559, 574ff.

¹⁰³ For details, see Laffranque, Dissenting Opinion and Judicial Independence, Juridica International VIII/2003, 162, 166 f.

¹⁰⁴ Constitutional Review Court Procedure Act (1/7/2002, last amendment 7/6/2017), at <https://www.riigiteataja.ee/en/tolge/pdf/528062017007>.

¹⁰⁵ European Parliament' Dissenting Opinions (2012), 23. see also Laffranque, Dissenting Opinion in the European Court of Justice, Juridica International IX/2004, 14.

¹⁰⁶ European Parliament' Dissenting Opinions (2012), 28, with further references.

¹⁰⁷ See Section 106 of the Constitution (1999, last amendment 2011, at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (English translation). For more details, see also Lavapuro/Ojanen/Scheinin, Rights-based constitutionalism in Finland and the development of pluralist constitutional review, 9 International Journal of Constitutional Law (2011), 505-531, e.g. at 517 f.

85. The Code of Judicial Procedure provides, in Chapter 24 Section 7(8), that if a vote has been taken, the opinions of the dissenting members shall be attached to the judgment of the District Court. As for judgments and final orders of the Court of Appeal, opinions of dissenting members shall be attached to the judgment or final order (Section 15(8) of Chapter 24).¹⁰⁸

14. Georgia

86. In Georgia, two laws regulate the practice of separate opinions: the Organic Law on the Constitutional Court of Georgia (OLCC)¹⁰⁹ and the Law on Constitutional Legal Proceedings (LCLP).¹¹⁰

87. According to Articles 43(13) and 47 of the OLCC, a member of the Court may express a dissenting or concurring opinion, which is to be drawn up in writing when a judgment is adopted. Full texts of judgments, rulings, etc. of the Constitutional Court, as well as any dissenting/concurring opinion shall be published at the website of the Court.

88. A dissenting/concurring opinion shall also be published at the Legislative Herald of Georgia under the procedure established by the LCLP. The corresponding provisions in the LCLP are Article 7(3) and (4).¹¹¹

15. Germany

89. Since 1971, Germany allows constitutional judges to issue separate opinions. The Law on the Constitutional Court (Federal Constitutional Court Act¹¹²) in Article 30(2) explicitly grants minority judges the right to publish their separate opinions (*Sondervotum*). Accordingly, if a judge expressed a differing view on the decision or its reasoning during the deliberations, he or she may express this view in a separate opinion; the separate opinion shall be annexed to the decision.

90. Further details are set out in the Rules of Procedure.¹¹³ Pursuant to Section 55 of these Rules, the separate opinion has to be submitted to the chairman of the senate within three weeks after the decision. The separate opinion is announced together with the decision. It is also published in the collection of decisions of the Constitutional Court, indicating the name of the judge. The same rules apply to separate opinions to decisions of the Plenary of the Court.

91. It is important to note that the Court may state the number of votes in the decision, but is not obliged to do so. In any case, the identity of the judges who voted for and against the decision is not revealed.¹¹⁴

¹⁰⁸ Code of Judicial Procedure (No. 4/1734; last amendment 2015). See also *Lindblom*, The Role of the Supreme Courts in Scandinavia, 39 *Scandinavian Studies In Law* (2000), 325, 365.

¹⁰⁹ Organic Law on the Constitutional Court of Georgia, 3/6/2016, Law No. 5161.

¹¹⁰ Law of Georgia on Constitutional Legal Proceedings, 21/3/1996, Law No. 159-nG (last amended with Law No. 5162 of 3/6/ 2016).

¹¹¹ For further details, see Venice Commission, Opinion on the Amendments to the Organic Law on the Constitutional Court of Georgia and to the Law on Constitutional Legal Proceedings, CDL-AD(2016)017 of 14 June 2016, paras. 61, 63.

¹¹² Federal Constitutional Court Act (1993, Federal Law Gazette I, 1473, last amended 2017, Federal Law Gazette I p. 3546; Gesetz über das Bundesverfassungsgericht).

¹¹³ Rules of Procedure (2015, Federal Law Gazette I, 286; Geschäftsordnung des Bundesverfassungsgerichts).

¹¹⁴ *Kelemen*, Dissenting Opinions in Constitutional Courts, 14(8) *German Law Journal* (2013), 1345, 1362 f.

16. Greece

92. Greece does not have a Constitutional Court. Any court may exercise constitutional review. However, the Supreme Special Court (also Special Highest Court) is competent to resolve disputes on constitutional interpretation which arise between the Highest Courts, in order to settle them.¹¹⁵

93. The Greek Constitution allows, in general, that separate opinions in courts are issued. Article 93(3) of the Constitution sets out that the publication of dissenting opinions is compulsory. A law shall specify matters concerning the entry of any dissenting opinion into the minutes as well as the conditions and prerequisites for its publication. The implementing law issued in this regard is Law No. 184/1975. In accordance with Article 35(1) of this Law, the votes cast are anonymous: the judgment must include the number of dissenting votes and their reasons, without mentioning the identity of minority judges.¹¹⁶

17. Hungary

94. Judges of the Hungarian Constitutional Court are allowed to deliver individual opinions, which are published together with the final judgment.¹¹⁷ Section 66 of the Act on the Constitutional Court explicitly allows for the publication of dissenting or concurring opinions; along with a written reasoning. The individual opinion is attached to the decision.¹¹⁸

95. Separate opinions (that may be drafted by all dissenting judges collectively, or by one of them who is then joined by others) may be delivered in a period of four days after the final decision has been adopted: the judgment is only published after this period has elapsed, so that any dissenting opinion can be attached to it.¹¹⁹

18. Iceland

96. Similar to the other Scandinavian countries, there is no Constitutional Court in Iceland.¹²⁰ Individual opinions of judges at the Supreme Court are permitted, as provided by Article 165 of the Act on Civil Procedure¹²¹.

97. When a judgment is pronounced and the court's conclusion is read in public in court, any individual opinions shall be mentioned (Article 165(3)). As to the publication of Supreme Court judgments, Article 165(4) stipulates that if individual opinions come to a different conclusion from that of the majority judgment they shall also be published. If this is not the case, it is sufficient to mention that there was disagreement over the grounds for the conclusion.

¹¹⁵ Cf. Article 100 of the Constitution (revised 27/5/2008). See also European Parliament' Dissenting Opinions (2012), 23.

¹¹⁶ European Parliament' Dissenting Opinions (2012), 24. See also Venice Commission, *Mavčič*, Importance of the Dissenting and Concurring Opinions (Separate Opinions) in the Development of the Constitution and Judicial Review with a Special Reference to the Slovenian Practice, Report at the Black Sea Regional Conference on "The Importance of Dissenting and Concurring Opinions in the Development of Judicial Review" (September 2010, Georgia), CDL-JU(2010)016 of 30 September 2010, 3.

¹¹⁷ *Trócsányi/Horvath*, La pratique des opinions dissidentes en Hongrie, 8 Nouveaux Cahiers du Conseil Constitutionnel (2000), 1, at <https://www.conseil-constitutionnel.fr/node/1196/pdf>.

¹¹⁸ Act on the Constitutional Court No. CLI (2011).

¹¹⁹ *Trócsányi/Horvath*, La pratique des opinions dissidentes en Hongrie, 8 Nouveaux Cahiers du Conseil Constitutionnel (2000), 1 f.

¹²⁰ Cf. *Bårdsen*, The Nordic Supreme Courts as Constitutional Courts (Seminar, October 2015), 1.

¹²¹ Act on Civil Procedure/Law No. 91/1991 on Procedure in Civil Cases, as amended by Law No. 38/1994, at <https://www.government.is/publications/legislation/lex/?newsid=8438c68e-fa06-11e7-9422-005056bc4d74>.

19. Ireland

98. The Irish Constitution explicitly prohibits the publication of separate opinions in most constitutional matters.¹²²

99. Ordinary judges, and the Supreme Court when exercising ordinary jurisdiction, may issue separate opinions. However, a stricter procedure applies to constitutional review.¹²³ When the Supreme Court decides on the constitutionality of any law upon the President's request or upon appeal from a lower court, it issues a single opinion. This majority decision shall be pronounced by one of the judges. Dissenting opinions shall not be pronounced; it is not even permitted to disclose the existence of any such other opinion (cf. Articles 26 and 34(3) of the Constitution). This absence of dissenting opinions in constitutional matters has been criticised by Irish scholars, who see it as an obstacle to the development of the Court's jurisprudence and to a more dynamic interpretation of the Constitution.¹²⁴

20. Kazakhstan

100. According to Article 34 of the Constitutional Law on the Constitutional Council of the Republic of Kazakhstan, "*A member of the Constitutional Council who disagrees with its final decision shall have the right to have his opinion and to outline it in writing.*" According to Article 37.2, the final decision sets out the composition of the Constitutional Council that issued it and Article 41 provides that it will be published in the Kazakh and the Russian languages in the official national newspapers.

21. Kosovo

101. Under the Rules of Procedure of the Constitutional Court of the Republic of Kosovo No.01/2018 (Adopted on 31 May 2018), Rule 61 deals with dissenting opinions.

102. Paragraph 1 of Rule 61 states that "*A Judge of the Court shall have the right to prepare a written dissenting opinion to a Judgment of the Court. A dissenting opinion may be joined by other Judges and shall state specifically the reasons why the Judge disagrees with the opinion of the majority or plurality of the Court.*" And paragraph 2 sets out that "*A Judge of the Court shall not have the right to prepare a dissenting opinion to a Resolution on Inadmissibility or a Decision of the Court. Any Judge shall have the right to indicate in such a Resolution on Inadmissibility or a Decision that the Judge disagreed with the majority.*"

22. Korea, Republic

103. According to Article 36(3) of the Act on the Constitutional Court of Korea (1988), "*Any Justice who participates in an adjudication shall express his or her opinion on the written decision.*" And Article 36(5) sets out that "*The final decision shall be made public through publication in the Gazette of the government.*"

23. Kyrgyzstan

104. Article 49 of the Constitutional Law on the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic states that:

¹²² Constitution of Ireland (1937, last amendment 2015), at <http://www.irishstatutebook.ie/pdf/en.cons.pdf>.

¹²³ European Parliament: Dissenting Opinions (2012), 23.

¹²⁴ O'Tuama, Judicial Review under the Irish Constitution: More American than Commonwealth, Electronic Journal of Comparative Law (2008), <https://www.ejcl.org/122/art122-2.pdf>.

“A judge of the Constitutional Chamber who does not agree to the act of the Constitutional Chamber or who voted for a judgment or pronouncement on the merits of the case considered by the Constitutional Chamber, but who was left in minority during voting on some other matter or on motivation of the adopted act, shall have the right to present his / her dissenting opinion in writing.

Dissenting opinion of a judge shall be attached to the materials of the case and shall be published simultaneously with the act of the Constitutional Chamber in the same publication where such act is to be printed.”

24. Latvia¹²⁵

105. According to the Constitutional Court Law, judgments of the Constitutional Court are adopted by majority and deliberations take place *in camera* (Section 30).¹²⁶ However, judges have the right to express, in writing, a dissenting opinion, which shall be appended to the case, but not declared in the court sitting (Section 30(6)).

106. In accordance with Rule 145 of the Court's Rules of Procedure,¹²⁷ dissenting opinions must be presented in writing to the chairperson within two weeks from the announcement of the judgment. The dissenting opinion shall be published in accordance with the procedure defined by the mentioned Law. This means that according to Article 33 of the Constitutional Court Law, it shall be published within two months, judgments being published in the Official Gazette within five days of their adoption. The Court shall publish the collection of judgments once a year, in which all judgments and dissenting opinions shall be included.¹²⁸

25. Lithuania¹²⁹

107. Lithuania's Law on the Constitutional Court¹³⁰ allows the publication of separate opinions.

108. Article 55 sets out that a judge who disagrees with an act adopted by the Court may set forth his or her (written and reasoned) dissenting opinion within three days of the announcement of the corresponding act. The dissenting opinion shall be attached to the case; parties of the case and mass media shall be informed thereof. This is also regulated in detail in Section IV of the Rules of Procedure of the Court (Rules 144-156).¹³¹

109. In accordance with these rules, dissents (of judges who were present during the consideration of the case) are circulated among all constitutional judges; two or more judges may submit a joint separate opinion (Rule 144). Pursuant to Rule 148, a judge may submit a concurring opinion regarding the whole body or separate parts of the reasoning of an act and/or a dissenting opinion concerning the operative part of this act, the whole decision etc. Rule 150 sets out that a separate opinion may not make the positions voiced by other judges and the distribution of votes publicly known, among others. As to the publication, Rule 152 stipulates that a separate opinion is published on the website of the Court and attached to the considered case; the parties to the case and the mass media are informed about it.

¹²⁵ European Parliament' Dissenting Opinions (2012), 25.

¹²⁶ Constitutional Court Law (9/6/1996, last amendment 12/9/2013), at <http://www.satv.tiesa.gov.lv/en/2016/02/04/constitutional-court-law/>.

¹²⁷ Rules of Procedure (5/2/2014), at <http://www.satv.tiesa.gov.lv/en/2016/02/04/hello-world/>.

¹²⁸ For more details, see Venice Commission, Opinion on Draft Amendments to the Law on the Constitutional Court of Latvia (CDL-AD(2009)042) of 13 October 2009, paras. 20-21.

¹²⁹ European Parliament' Dissenting Opinions (2012), 25 f.

¹³⁰ Law on the Constitutional Court of the Republic of Lithuania (3/2/1993, amended 11/11/2008), at <http://www.lrkt.lt/en/about-the-court/legal-information/the-law-on-the-constitutional-court/193>.

¹³¹ Rules of the Constitutional Court (5/3/2004, amended 31/8/2015), at <http://www.lrkt.lt/en/about-the-court/legal-information/the-rules-of-the-constitutional-court/194>.

26. Mexico

110. According to Article 7 of the Organic Law of the Federal Judicial Branch, relating to the Supreme Court of the Nation, “*If a minister [i.e. judge] disagrees with the majority, he may state his particular vote at the end of the respective final judgment, provided that he submits his particular vote within the five days after approval.*”

27. Moldova, Republic of

111. Dissenting Opinions among judges in the Republic of Moldova are regulated in the Constitutional Jurisdiction Code.¹³² Article 67 of this Law sets out that a judge of the Constitutional Court who disagrees with a judgment or advisory opinion may express in writing his or her dissenting opinion. Upon request, the dissenting opinion shall be attached to the adopted act.

112. In general, in accordance with Article 17 lit (c) of the Law on the Constitutional Court,¹³³ judges of the Constitutional Court have to express affirmative or negative votes upon adoption of the acts of the Court. Pursuant to Article 26(1) of the same Law, the Constitutional Court adopts decisions, resolutions and issues opinions. The judge is obliged to pronounce him or herself in favour or against the act. Article 27 stipulates that acts of the Court shall be adopted by a majority vote, which normally has an open character. Upon request, the judge’s dissenting opinion shall be attached to the adopted act (cf. also Article 67 of the Constitutional Jurisdiction Code).¹³⁴

28. Monaco

113. Rules concerning the organisation and procedure of the Supreme Court of Monaco were laid down in 1963.¹³⁵ According to Article 34, the names of concurring judges are mentioned in the decisions of the Court. Extracts of the decision are published in the *Journal de Monaco*, the Official Gazette (Article 37¹³⁶).

29. Montenegro

114. Pursuant to Article 151 of the Constitution, the Constitutional Court of Montenegro shall decide by majority vote of all judges. The decisions of the Constitutional Court shall be published.¹³⁷

115. Article 40 of the Law on the Constitutional Court of Montenegro sets out that deliberations and voting shall be conducted in a closed session, while the decision shall be made public. Judges may single out their opinion stating either the reasons for which they fully or partially agree with the decision, but considers that there are additional reasons that should have been

¹³² Law of the Republic of Moldova on Constitutional Jurisdiction Code, No. 502-XIII (16/6/1995, amended 3/3/2009), at <http://www.constcourt.md/public/files/file/Baza%20legala/CodJC.en.pdf>.

¹³³ Law on the Constitutional Court No. 317-XIII (13/12/1994).

¹³⁴ Article 27 amended by law No. 213-XVI (23/10/2008), at <http://www.bbcj.eu/law-constitutional-court-republic-moldova/>.

¹³⁵ Sovereign Ordinance on the Organization and Functioning of the Supreme Court, No. 2.984 of 16/4/1963 (last amended 15/9/2016), at <https://www.legimonaco.mc/305/legismclois.nsf/ViewTNC/2FFC5CC166BD369EC125773F00383862!OpenDocument>.

¹³⁶ As amended by Sovereign Ordinance No. 5.371 of 19/6/2015.

¹³⁷ Constitution of Montenegro (2007), at <https://web.archive.org/web/20080119172342/http://www.legislationline.org/upload/legislations/01/9c/b4b8702679c8b42794267c691488.htm>.

stated in the decision or the reasons for which they are fully or partially against the decision taken. This singled out opinion shall be published on the website of the Constitutional Court, along with the decision to which it relates. The judge concerned may request that this opinion be published in the Official Gazette, along with the decision to which it relates.¹³⁸

30. Norway

116. Section 88 of the Constitution of Norway provides that the Supreme Court pronounces judgments at final instance.¹³⁹ The judicial decisions of the Supreme Court are published in the Norwegian Law Gazette and the Lovdata Foundation legal information system.¹⁴⁰ Judges are entitled to deliver their own opinion; dissenting opinions should be declared and explained openly.¹⁴¹

31. Peru

117. The Organic Law of the Constitutional Court no. 28301 of Peru, provides in Article 5 that *“Judges may not refrain from voting, and must vote for or against, on every occasion. The grounds for voting and individual votes are given together with the judgment in accordance with the special law.”*

32. Poland

118. According to Article 190(5) of the Polish Constitution, decisions of the Constitutional Tribunal are taken by majority.¹⁴²

119. The Act on the Organisation of the Constitutional Tribunal¹⁴³ provides details on the rules applicable to dissenting opinions. Article 106 of this Act provides the legal basis for both dissenting and concurring opinions. According to this provision, a ruling of the Tribunal shall be determined by a majority vote. A judge who disagrees with the majority may, before the delivery of the ruling, submit a dissenting opinion, providing a written statement of grounds for his or her dissent. The dissenting opinion shall be mentioned in the ruling. Such opinion may also refer to the reasoning only. The ruling shall be signed by all the judges of the adjudicating bench, including the outvoted judge.

33. Portugal

120. In Portugal, constitutional and ordinary judges may deliver dissenting opinions. The judges of the Constitutional Tribunal have the right to table their reasons for a dissenting vote

¹³⁸ Law on the Constitutional Court of Montenegro (26/2/2015). For details see also Venice Commission, On the Draft Law on the Constitutional Court of Montenegro, CDL-AD(2014)033 of 13 October 2014, para. 41.

¹³⁹ Constitution of the Kingdom of Norway (1814, last consolidated 24/5/2016).

¹⁴⁰ Website of the Supreme Court, at

<https://www.domstol.no/en/Enkelt-domstol/-norges-hoyesterett/the-supreme-court-of-norway/>.

¹⁴¹ Lindblom, The Role of the Supreme Courts in Scandinavia, 39 Scandinavian Studies In Law (2000), 325, 365. See also Supreme Court of Norway, Annual Report 2016, 14 f,

https://www.domstol.no/globalassets/upload/hret/internett/virksomhetsrapportforretningsstatistikk/endelig-nettversjon-1.2.17-supremecourtofnorway2016_korr3.pdf.

¹⁴² Constitution of the Republic of Poland (2/4/1997), Journal of Laws (Dziennik Ustaw) No. 78, item 483, at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>. Cf. opinion of the Venice Commission March 2016.

¹⁴³ Act on the Organization of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal (30/11/2016), Journal of Laws 19/12/2016, item 2072, at http://trybunal.gov.pl/fileadmin/content/dokumenty/Akty_normatywne/The_Act_on_the_Organisation_of_the_Constitutional_Tribunal_and_the_Mode_of_Proceedings_Before_the_Constitutional_Tribunal_en.pdf.

(*voto vencido*; defeated vote), in accordance with Article 42(4) of the Law of the Constitutional Court.¹⁴⁴

121. According to Article 3 of this Law, decisions of the Constitutional Court are published in the Official Gazette (in the first or second series, depending in the nature of the decision), whereas, according to Article 115, all judgments of the Court with a doctrinal interest shall be published in the Bulletin of the Ministry of Justice (selected by the President).

34. Romania

122. Acts of the Constitutional Court of Romania are usually adopted by a majority vote of the judges, as provided by Article 6 of the Constitutional Court Law.¹⁴⁵

123. Pursuant to Article 59 of this Law, Constitutional judges who have given a negative vote may formulate a separate opinion. With regard to the reasoning of the decision, they may also write a concurring opinion. The dissenting or concurring opinion shall be published in the Official Gazette of Romania, together with the decision.

124. On 23 June 2017, the Constitutional Court adopted decision no. 1/2017¹⁴⁶, which prohibits “assessments of a sententious, ostentatious, provoking nature or politically suggestive opinions, as well as those leading to such an end point”. Further, the “separate and concurrent opinion cannot transgress the point of view of the judge so as to become a direct criticism of the decision of the Constitutional Court and it cannot become a party examination or an open criticism to the decision of the Constitutional Court.” According to decision 1/2017, separate opinions have to be handed to the President of the Court who requests the judge concerned to re-write them if they do not respect these criteria and, if the judge refuses, decides that the dissenting opinion will not be published.

35. Russian Federation

125. In the Russian Federation, Article 70 of the Law on the Constitutional Court¹⁴⁷ provides for the adoption of concluding decisions on a case under consideration in closed conference. Judges and other persons present in the closed conference shall have no right to divulge the content of the discussion or the results of the voting.

126. According to Article 72, decisions are taken in open voting, by majority vote. It is not permitted to abstain from voting. Article 76 sets out that a judge of the Constitutional Court, who does not agree with the decision, may express his or her opinion in writing. The judge's special opinion shall be attached to the case materials and shall be published alongside the decision of the Court. A judge who voted for the adopted decision or the conclusion on the merits, but who was in the minority when voting on any other question or on the motives behind the decision, may express in writing his or her opinion on his or her disagreement with the majority of the judges. This written disagreement shall also be attached to the case materials and published in the Bulletin of the Court.

¹⁴⁴ Law of the Constitutional Court No. 28/1982 (15/11/1982), Official Gazette No. 264/1982, Série I de 1982-11-15, last amended by Law No. 1/2018 (19/4/2018), at <http://www.tribunalconstitucional.pt/tc/legislacao0101.html>; no translation available. Cf. also European Parliament: Dissenting Opinions (2012), 27.

¹⁴⁵ Law No. 47 of 1992 on the Organisation and Operation of the Constitutional Court (last amended by Law No. 330/2009), at <https://www.ccr.ro/Legea-nr-471992>. Cf. also Toader/Puskás Zoltán, National report presented at the 2011 World Conference on Constitutional Justice, at http://www.venice.coe.int/WCCJ/Rio/Papers/ROM_Toader_E.pdf.

¹⁴⁶ Official Gazette, Part I no. 447. of June 23, 2017.

¹⁴⁷ Federal Constitutional Law No. 1-FKZ on the Constitutional Court (21/7/1994, amendments 8/2/2001).

127. As regards the publication, decisions of the Constitutional Court shall be published in the Bulletin of the Constitutional Court.

36. Serbia

128. The legal basis for the Constitutional Court of the Republic of Serbia is the Constitution (Articles 166-175),¹⁴⁸ the Law on the Constitutional Court¹⁴⁹ and the Rules of Procedure.¹⁵⁰

129. Article 49 of the Law on the Constitutional Court provides that decisions of the Constitutional Court are, in general, published in the Official Gazette of the Republic of Serbia.

130. According to Article 60 of the Rules of Procedure of the Court, a judge shall have the right to a dissenting opinion. This judge shall be obliged to orally announce the dissenting opinion at the session, upon the adoption of the said decision or ruling. He or she shall also provide a written statement of reasons for the dissenting opinion, which shall be published together with the decision in the Official Gazette and the Bulletin of the Court. The dissenting opinion shall be published in the collection of decisions adopted by the Court, in the same volume as the decision or ruling to which it relates. The same rules apply to joint dissenting opinion of several judges.

37. Slovak Republic

131. A judge at the Constitutional Court of the Slovak Republic who disagrees with a decision (either of the plenary or of a senate) has the right to have his or her separate opinion briefly noted in the record on voting and published as the other parts of the decision, as provided by Section 32 of the Act on the Organisation of the Constitutional Court.¹⁵¹

132. In general, pursuant to Section 33 of this Law, decisions on the conformity of legal regulations, on the interpretation of the Constitution etc. are published in the Collection of Laws of the Slovak Republic.

38. Slovenia

133. According to the Constitutional Court Act¹⁵² and in the Rules of Procedure of the Court,¹⁵³ judges in the Slovenian Constitutional Court have the right to publish separate opinions.

134. Article 40 of the Constitutional Court Act stipulates that the Court decides at a closed session and that any judge who does not agree with a decision or its reasoning may declare that he or she will write a separate opinion. This opinion must be submitted within the period of time determined by the Rules of Procedure, otherwise, it is deemed that the judge is not submitting a separate opinion (cf. Article 72 of these rules). According to Article 66 of the Rules of Procedure, decisions and orders generally contain, among others, a statement of

¹⁴⁸ Constitution of The Republic of Serbia (Official Gazette No. 98/2006), at <http://www.ustavni.sud.rs/page/view/en-GB/235-100028/constitution>.

¹⁴⁹ Law on the Constitutional Court 2007 (Official Gazette No. 109/07 of 28//2007, last amended 14/12/2015), at <http://www.ustavni.sud.rs/page/view/en-GB/237-100030/law-on-the-constitutional-court>.

¹⁵⁰ Rules of Procedure (Official Gazette No. 103/13) adopted on 14/11/2013, at <http://www.ustavni.sud.rs/page/view/en-GB/238-101921/rules-of-procedure>.

¹⁵¹ Act No. 38/1993 on the Organization of the Constitutional Court, on the Proceedings before the Constitutional Court and the status of its Judges (20/1/1993, last amended by Act No. 324/2004), at http://portal.concourt.sk/download/attachments/3604914/a_38_1993.pdf.

¹⁵² Constitutional Court Act, Official Gazette, No 64/07, at <http://www.us-rs.si/media/constitutional-court.act.full.text.pdf>.

¹⁵³ Rules of Procedure of the Constitutional Court of Slovenia (2011), Official Gazette No. 86/07, 54/10 and 56/11, at <http://www.us-rs.si/en/about-the-court/legal-basis/the-rules-of-procedure-of-the-constitutional-court/>.

the composition of the Court which reached the decision, which includes the results of the vote, the names of the judges who voted against the decision and of those who submitted separate opinions.

135. Article 71 of the Rules further specifies that a separate opinion may either be a dissenting opinion if a judge disagrees with the operative provisions, or a concurring opinion if he or she disagrees with the statement of reasons. Furthermore, it is possible that a group of judges submits joint separate opinions or that a judge is joined by others. Pursuant to Article 73 of the Rules of Procedure, if a decision or an order is published in the Collected Decisions and Orders of the Constitutional Court, the website etc., separate opinions are published together with the decision or order. Since the Court has to pay for publication, they are not published in the Official Journal.¹⁵⁴

39. Spain

136. The Spanish law provides the possibility for separate separate opinions. The Constitution explicitly provides that separate opinions are to be published together with the judgment of the *Tribunal Constitucional* in the Official State Gazette (Article 164).¹⁵⁵

137. Article 90 of the Organic Law on the Constitutional Tribunal¹⁵⁶ further specifies that decisions are usually adopted by majority vote of the judges present in the deliberations. Judges may reflect their disagreeing opinion in a separate opinion (*voto particular*) which has been defended in the deliberation. Separate opinions will be incorporated into the resolution and will be published in the Official Gazette, together with the judgment, order or statement to which they refer.

40. Sweden

138. Similar to the other Scandinavian countries, there is no centralised constitutional court in Sweden. All judges may issue separate opinions.¹⁵⁷ These should be declared and explained openly.¹⁵⁸

139. In the context of judgments and final decisions, the parties shall be notified of any dissenting opinions at the same time and in the same manner as the judgment or decision (Sections 1, 9 and 12 of Chapter 17 of the Code of Judicial Procedure¹⁵⁹).

41. “The former Yugoslav Republic of Macedonia”

140. Dissenting opinions are regulated in the Rules of Procedure of the Constitutional Court.¹⁶⁰ Article 25 of these rules sets out that a judge who voted against the decision or who considers that it should be based on another legal basis, may separate his or her opinion and explain it in writing.

¹⁵⁴ European Parliament Dissenting Opinions (2012), 27 f, with further references.

¹⁵⁵ Constitution of 1978 (revised 2018), at <http://www.senado.es/web/conocersenado/normas/constitucion/index.html?lang=en>.

¹⁵⁶ Organic Law No. 2/1979 on the Constitutional Tribunal del Tribunal Constitucional (3/10/1979, as amended by Organic Law No. 6/2007; no translation available.

¹⁵⁷ Cf. Bårdsen, The Nordic Supreme Courts as Constitutional Courts (Seminar, October 2015), 1; European Parliament Dissenting Opinions (2012), 28, with further references. Also see *Laffranque*, Dissenting Opinion and Judicial Independence, *Juridica International* VIII/2003, 162, 165.

¹⁵⁸ *Lindblom*, The Role of the Supreme Courts in Scandinavia, 39 *Scandinavian Studies In Law* (2000), 325, 365.

¹⁵⁹ Code of Judicial Procedure (1942:740, amended 1998), at <https://www.government.se/government-policy/judicial-system/the-swedish-code-of-judicial-procedure/>.

¹⁶⁰ Rules of Procedure of the Constitutional Court (7/10/1992), Official Gazette No. 394/92.

141. The separate opinion is published in the Court Bulletin and in the official magazine in which the decision of the Court is published.

42. Turkey

142. The Turkish Law on the Establishment and Rules of Procedure of the Constitutional Court¹⁶¹ sets out that judges who are not in agreement shall deliver their reasons for opposition to the verdict within the duration of time specified in the Internal Regulation (Article 66 of the law).

143. According to Article 57 of the Internal Regulation of the Constitutional Court,¹⁶² decisions shall generally be adopted by a simple majority. Judges may submit jointly or separately their dissenting vote texts or different reasoning. If they do so within the established time limit after the final version of the decision has been determined, these dissenting opinions shall be incorporated into the decision, otherwise the decision shall be published without them.

144. In general, decisions are published in the Official Gazette (Article 66 of the Law). However, while reasoned decisions made regarding the merits in applications for annulment and objection shall be published in the Official Gazette, the Presidency determines which of the other decisions will be published there, as well (Article 58 of the Rules of Procedure).

43. Ukraine

145. The Law on the Constitutional Court of Ukraine¹⁶³ sets out in Article 93 that a judge who signed a decision, opinion or ruling to reject or to terminate constitutional proceedings may state his or her dissenting opinion within the term established in the Rules of Procedure (see below).¹⁶⁴

146. The dissenting opinion must be written, attached to the relevant act and published on the official website. Pursuant to Article 94 of the Law, acts of the Court shall usually be promulgated on the official website of the Court. Together with the dissenting opinion, an act shall also be published in the Bulletin of the Constitutional Court.

147. Further regulations about dissenting opinions can be found in Articles 73 to 75 of the mentioned Rules of Procedure of the Constitutional Court. Section 74 of these rules determines the time limits for dissenting opinions (twelve days from the day of the adoption of the decision; providing the opinion, delivering the ruling). Section 73 stipulates that the text of a dissenting opinion shall be placed after the text of the act of the Court following the results of the constitutional proceedings. Finally, Section 75 regulates the publication.

44. United Kingdom

148. There is no Constitutional Court in the United Kingdom.

149. Judges follow the tradition of issuing decisions *seriatim*: every judge delivers his or her individual opinion separately, and decisions are taken by majority. Separate opinions are permitted and will be published; the name of the dissenting judge is mentioned.¹⁶⁵

¹⁶¹ Law on the Establishment and Rules of Procedure of the Constitutional Court, No. 6216 (30/3/2011), at <http://www.constitutionalcourt.gov.tr/inlinepages/legislation/LawOnConstitutionalCourt.html>.

¹⁶² Internal Regulation of the Constitutional Court (Official Gazette 12/7/2012, No. 28351).

¹⁶³ Law On the Constitutional Court (as amended by Law No. 2147-VIII, 3/10/ 2017).

¹⁶⁴ Rules of Procedure of the Constitutional Court of Ukraine (22/2/2018, No. 1-PS/2018).

¹⁶⁵ *Wittig*, Separate Opinions at the Federal Constitutional Court, 154, 156; *Machacek*, Die Einrichtung der „Dissenting Opinion“ im internationalen Vergleich, JRP 1999, 1, 5. Cf. also the database of the UK Supreme Court, at <https://www.supremecourt.uk/cases>. See further European Parliament: Dissenting Opinions (2012), 29.

150. With regard to constitutional review, the Supreme Court is competent to decide on the compatibility of laws with the ECHR, but not with the national Constitution. Also in these cases, the Court issues *seriatim* decisions. Although the practice of issuing *seriatim* opinions has recently been questioned, the right of judges to issue separate opinions is not under discussion.¹⁶⁶

B. The European Court of Human Rights

151. Separate opinions play an important role in the case law of the European Court of Human Rights. Article 45(2) of the European Convention of Human Rights expressly mentions separate opinions: accordingly, if a judgment does not represent a unanimous opinion of the judges (in whole or in part), any judge shall have the right to deliver a separate opinion.

152. This provision is complemented by Rule 74(2) of the Rules of Court, which stipulates that any judge who has taken part in the consideration of a case shall be entitled to annex to the judgment a concurring or dissenting separate opinion (or a bare statement of dissent).¹⁶⁷

153. In a similar vein, Rule 88 of the Rules of Court provides that any judge may attach to a decision or advisory opinion a separate concurring or dissenting opinion, or a bare statement of dissent.

154. Separate opinions, which are quite common at the Grand Chamber level, serve as a suitable instrument to express the internal plurality of the Court.¹⁶⁸ Often, they are connected with a desire to illustrate the national social and legal background. In this context, a dialogue regularly takes place between judges and Member States, which seems to increase the acceptance of judgments by national governments.¹⁶⁹

155. Although there have been cases of dissenting judges who defended the views of their own government, others have used separate opinions in order to provide guidance to their country with regard to an adjustment of the national law.¹⁷⁰ They make the discussions within the Court transparent and pluralistic, highlight trends and controversies, emphasise the freedom of expression as well as the independence of the judges. Separate opinions belong to the general philosophy of the Court. They may also influence future jurisprudence.¹⁷¹

¹⁶⁶ European Parliament' Dissenting Opinions (2012), 29, with further references.

¹⁶⁷ Rule 74 of the Court, as amended on 13 November 2006.

¹⁶⁸ *Garlicki*, Note on Dissent in the European Court of Human Rights, in: Global Constitutionalism, Yale Law School, 2008, I-8. For an analysis of separate opinions at the ECtHR, cf. *Grabenwarter*, Die Bedeutung der "dissenting opinion" in der Praxis des Europäischen Gerichtshofs für Menschenrechte, JRP 1999, 16; cf. also *Bruinsma*, The Room at the Top: Separate Opinions in the Grand Chambers of the ECHR (1998-2006). *Ancilla Juris* 2008, 32 (with regard to the Grand Chamber from 1998 until 2006).

¹⁶⁹ *Grabenwarter*, Die Bedeutung der "dissenting opinion" in der Praxis des Europäischen Gerichtshofs für Menschenrechte, JRP 1999, 16; 19 f (with case law examples).

¹⁷⁰ *Grabenwarter*, Die Bedeutung der "dissenting opinion" in der Praxis des Europäischen Gerichtshofs für Menschenrechte, JRP 1999, 16; 20 f (with case law examples).

¹⁷¹ *Wildhaber*, Opinions dissidentes et concordantes des juges individuels à la Cour européenne des droits de l'homme, in: Dupuy, (ed.), *Mélanges en l'honneur de Nicolas Valticos. Droit et justice* (1999), 529 ff.