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ON

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

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REPORT

"THE ROLE OF DISSENTING AND CONCURRING OPINIONS IN THE TURKISH PRACTICE"

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THE ROLE OF DISSENTING AND CONCURRING OPINIONS IN THE TURKISH PRACTICE

It is not always possible to achieve consensus and unanimity while deciding on any matter in a committee or a group. To take different points of view into consideration is one of the most important practices in the process of decision making and it is very helpful in the development of the democratic reconciliation.

When this issue is considered in terms of law, we encounter with the concepts of dissenting and concurring opinions. The concept of dissenting opinion and concurring opinion may be briefly defined as a democratic mechanism reflecting the thoughts of the ones who fall outside the majority vote on any subject.

Some argue that decisions should not contain dissenting or minority votes. In this regard, it has been put forward that minority views should not be included in judgments, should not published and should not be declared on the grounds that their publication and declaration affect trust to the judiciary and have influence on its decisions in a negative way and that they do not conform to the supremacy of the judiciary[1]. According to this view, on a similar case, a dissenting vote can turn into a majority vote with when the composition of any chamber or bench change. If that happens in a very short time, there is a possibility that the discussions on critical decisions of the Constitutional Court will decrease its reliability.

In spite of these negative approaches there is another approach to dissenting opinions. According to this approach, if all members of any chamber or bench do not share the same opinion, different opinions should be put forth in their decisions[2]. The second approach is generally accepted as a common practice in judicial decisions.

It may be seen that certain decisions of committees or groups on the same matter change in the course of time. Consequently, the minority opinions may become majority opinion. Even though this situation can be evaluated as if it is an institutional inconsistency or contradiction at the first sight, in fact it is an indication of its contribution to the institutional transformation and development of the dissenting or decomposed views[3].

As it is known, it is not compatible with the human nature that expression of opinions is confined into certain patterns in a democratic society. Dissenting votes, as a procedural matter and as a democratic concept which reflects the value judgments of the ones falling outside the majority on a subject, are not only a form of the freedom of expression but also they contribute a good functioning of an court. From that point of view, they have a very important function in the formation of judgments of any court. Courts generally take their decisions with a majority vote. When the dissenting opinions and their reasoning are included in the decisions, the subject shall be discussed deeply from the point of dissenting opinions and possibly they will have impact on the discussions and evaluation of court decisions in the future.

The concepts of dissenting votes and concurring opinions, which are of high importance legally and politically, only have a meaning with the majority votes and reasoning of the judgment. Contrary to the decisions of the Constitutional Court taken unanimously, the impacts of the result in the judgments based on the majority votes, can encounter different interpretations mostly, in respect of the number of the dissenting votes taken and the reasons they are based

[1] Muhammet ÖZEKES, **The Right to Public Hearing in Civil Procedural Law,** Yetkin Publishing, 2003, p. 181.

[2] Mustafa GÖNÜL, **Dissenting Opinion on Turkish Constitutional Justice, Public Administration Digest, Volume** 28, June 1995, No.2, p.11.

[3] Mustafa GÖNÜL, **mentioned article,** p.11.

on. Dissenting votes can put forth different points of view, regarding to cases on which no reconciliation is achieved and which need to be discussed in the future as well.
Dissenting votes may contribute to the concrete scientific discussions in the future. It is also possible that a different resolution can be adopted after the discussion of the question, which is put forth in a dissenting vote and in a judgment. Such a result has certainly a great importance in terms of the dynamism and development of law.

Since in bench courts, each member has to have a full evaluation of the case, the judgments of the Constitutional Court contain evaluation of all of its members[4]. Evaluation of the members having different opinions is reflected in the dissenting opinions[5]. For this reason, we can conclude that the judgments should contain dissenting opinions.

I would like to mention the legal bases of the dissenting votes in the Turkish Constitutional Court judgments:

First of all, it should be pointed that the institution of dissenting votes is a procedural matter. It obtains its basis from provisions of laws[6]. Positive legal basis of the dissenting votes exercised in the Turkish Constitutional Justice is the 53rd Article of the Act on the Foundation and Proceedings of the Constitutional Court, numbered 2949. According to this rule, *"The judgments of the Constitutional Court are written with their reasoning. The judgments are signed by the President and the Members who take part in the jurisdiction and examination. The ones who oppose the judgment shall explain their reasoning in the judgment. The judgments are notified to the ones concerned as such."*

On the other hand, in the first paragraph of the 12th Article of the Rules of the Constitutional Court, it is provided that *"The ones who take part in the judgment, the ones who remain in the minority and the summary of the judgment are specified with minutes."* As for the fifth paragraph, in parallel with the 53rd Article of the Act numbered 2949, it is stated that *"The ones who remain in the minority indicate the bases of their opinions in their dissenting opinions which they may draw up together or separately within one month as from the date on which the draft decision is put on the agenda to be read."* In order to draw up the decision with its reasoning, a period of one month has been fixed since there were some delays in the past in drafting judgments with their dissenting opinions.

It is observed that some opinions in the dissenting votes of the judgments of the Turkish Constitutional Court on various cases have been adopted later by the majority of the members and they turned into majority vote. When generally considered, it can be stated that this change and diversity arising in judgments incline towards the fundamental rights and universal standards in terms of the Turkish Constitutional Court. At that point, I would like mention some examples of dissenting opinions of the Turkish Constitutional Court judgments. Later on, they have been shared with other members of the Court and become majority opinions.

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[4] Muhammet ÖZEKES, **The Right to Public Hearing in Civil Procedural Law and Some Current Issiusel,** Directrote of Global Law Education Programs (IGUL), Edition No:4, Nergiz Publishing, Ankara 2004, sh.267.

[5] Mustafa ALP, **So-called (Observable) Reasoning in Court Decisions from Point of Constitutional Court,** Prof Dr. Tevfik Birsel'e Armağan, İzmir 2001, sh.241.

[6] Mustafa GÖNÜL, **mentioned article,** sh.15.

DECISIONS ON WARNING TO THE POLITICAL PARTIES

At the beginning of 2000, there was difference of thoughts among the members of the court. This difference was reflected in the dissenting opinions of the judgments on dissolution of political parties.
Articles 68 and 69 of the Constitution have been amended in 2001 and some provisions have been brought on establishment, activities and dissolution of political parties. Those provisions may be regarded as the rules applied in a democratic social state. According to those provisions, any political party shall be dissolved if its internal regulation and program are contrary to Article 68/4 of the Constitution, if it has become a centre for the execution of activities violating the provisions of the same Article, if it accepts financial assistance from foreign states, international institutions and persons and corporate bodies.

In Article 104 of the Act on Political Parties, it was stated that if political parties are in conflict with the provisions of that law, they will be given warning by the Constitutional Court. If the conflict is not removed within 6 month, an action against that political party shall be brought to the Constitutional Court in order to be dissolved.

At that time, the members who used dissenting votes on warning decisions against political parties put forward following thoughts regarding the subject: There is no provision on dissolution of political parties in the Constitution if they are in conflict with Article 104 of the Law on Political Parties. Since there is no clear provision in the Constitution on dissolution of political parties, they may not be dissolved due to reasons counted in the Law. It is doubtless that the legislator can introduce another sanction other than dissolution so that the political parties will act in accordance with the statutory provisions provided for in Article 104.

The thoughts expressed in dissenting opinions have been discussed intensely in the doctrine. With the effect of those discussions, lawmaker has amended the provisions of Article 104 in 2003. Under the new provisions, the political party that does not observe warning of the Constitutional Court shall not be dissolved, but they will be deprived of state aid.

Therefore, it can be clearly observed that the thoughts expressed in the dissenting opinions pushed the legislator to amend provisions on dissolution of political parties. That is one of the important effects of dissenting opinions on the Turkish Political Parties Law.

THE ANNUAL INCREASE ON THE RENT TO BE APPLIED TO IMMOVABLES

In 2000, a provisional Article was added to the Act on Real Estate Rents. Under that Article, the rents that are applied to immovable shall not be increased more than %25 in the year 2000 and not more than % 10 in the year 2001.

A local court applied to the Constitutional Court in order the phrase “%25 in the year 2000” of the provisional Article to be annulled. It alleged that determination of a maximum increase in immovable rents by a provision of Law is not compatible with the principle of a social state governed by the rule of law. The local court also considered that it has got negative results towards owners of immovable. I would like to mention that during those years, in Turkey the inflation rate was quite high.

The Constitutional Court did not find the mentioned provision unconstitutional. According to the Court, amount of immovable rents is continuously increasing and it affected economic and social life in a negative way. That is why limitation of immovable rents has been introduced in order to ensure the economic balance between owner and renter. The rents of immovable are not only related to obligational law but also it is related to public law. If any measure is taken by the State, because of the scarcity of immovable, their rent shall increase continuously and

tremendously. Since immovable rents are a social issue, the State may determine a maximum rate for the immovable rent. Therefore, the Constitutional Court rejected the application and did not find any unconstitutionality in the provision.

In the dissenting opinions, it is stated that the freedom of contract is formulated in Article 48 of the Constitution and it is among the fundamental rights and liberties. The freedom of private enterprise is accorded both to the real people individually and collectively and to the legal people. In Article 35 of the Constitution, it has been accepted that everybody has property and inheritance rights. In spite of those provisions, it can not be acceptable that the limitation at the rate of % 25 introduced by the provisional Article. That is not aimed to public interest since it had disadvantages for the owners of immovable and advantages for the renters. So that provision includes a regulation contrary to the freedom of contract.

After one year, the Court reviewed a request on limitation at the rate of %10 annually in the same regulation. In the new judgment it has almost based its reasoning on dissenting opinions of the mentioned judgment: Modern democracies are the regimes in which fundamental rights and liberties are ensured to a largest extent. It cannot be acceptable that provisions which limit the fundamental rights and liberties in a broad sense or make them unavailable. Since it has touched the essence of fundamental rights, it is not compatible with the requirements of a democratic social order. Therefore, the limitation introduced for the immovable rent has gone beyond its purpose and brought forth the conclusion that a just balance which should exist between the landlord and the tenant has been violated to the disadvantage of the tenant to the extent that it cannot be described as acceptable, reasonable in a democratic society. In this case, it is not compatible with the requirements of a democratic social order.

Therefore, it can easily be observed that the thoughts expressed in the dissenting opinion in the previous judgment have turned into a court decision on a later date.

I would like to mention some numbers on dissenting opinions of the Turkish Constitutional Court judgments. When the numerical and proportional distribution of the dissenting votes in the judgments of Constitutional Court between 2008 and 2010 is examined, it is seen that 257 judgments out of the total 403 judgments have been rendered unanimously; in return, at least one dissenting vote is available in 146 judgments. And this shows that unanimity has not been reached in %65 of the judgments. In the years before 2008, the number of judgments rendered unanimously is less than the judgments rendered by a majority vote. Moreover, it is obviously seen that judgments by a unanimous vote are not related to the problematic issues in the practice and doctrine of the Turkish Constitutional Justice.

In my opinion, the high number of the judgments with dissenting opinions shows that the cases before the court have been broadly discussed.

More examples can be given on dissenting opinions of the Turkish Constitutional Court judgments. In spite of the negative thoughts on publication of dissenting opinions, their positive effects cannot be denied on constitutional justice. There are concrete data indicating the positive contributions of dissenting votes and different thoughts to the development of the Constitutional Justice in terms of the Turkish Constitutional Law. I am pleased that development is inclined towards the state governed by the rule of law, human rights and universal values.