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ИНФОРМАЦИЯ ОБ АВТОРЕ

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UDC 342

SEPARATE OPINION OF A JUDGE OF THE BODY OF CONSTITUTIONAL JURISDICTION IN COMMON LAW COUNTRIES

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SUMMARY

The article is a theoretical study of an institution of separate opinion in common law countries on the example of the Supreme Court of the United States and the Supreme Court of the United Kingdom. The analysis of the arguments in favor and against the existence of separate opinions in collegial judicial bodies is being carried out, as well as the reasons and grounds for their expression. The analysis reveals the role and influence of a judge's individual opinion on society and the development of legal practice on the example of the most resonant dissents of the last century.

Key words: separate opinion, dissent, common law.

ОСОБОЕ МНЕНИЕ СУДЬИ ОРГАНА КОНСТИТУЦИОННОЙ ЮРИСДИКЦИИ В СТРАНАХ АНГЛО-АМЕРИКАНСКОЙ ПРАВОВОЙ СИСТЕМЫ

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АННОТАЦИЯ

В статье проводится теоретическое исследование института особого мнения в странах англо-саксонской правовой системы на примере Верховного Суда Соединенных Штатов Америки и Верховного Суда Соединенного Королевства. Осуществляется анализ аргументов «за» и «против» существования отдельных мыслей в коллегиальных судебных органах, а также причин и оснований их высказывания как таковых. С помощью сравнительно-исторического анализа раскрывается роль и влияние особого мнения судьи на общество, в частности, на развитие юридической практики, на примере наиболее резонансных отдельных мыслей прошлого века. Сделан вывод о том, что обоснованное особое мнение не только не наносит вреда авторитету и единству суда, а наоборот – подтверждает всесторонность рассмотрения дела судом, а также независимость каждого судьи.

Ключевые слова: отдельное мнение, несогласие, англо-саксонское право.

Introduction. Beginning almost with the establishment of courts composed of a plurality of judges, the dissenting opinion and its proper place in judicial pronouncements has been the subject of discussion by members of the bench and bar. Legal experts and other specialists did not remain aloof from the issue of separate opinions of judges of higher courts as well. Both the Anglo-Saxon (common law) and the Romano-Germanic (continental law) system of law presuppose the existence of an institution of separate opinion. Nevertheless, each of the systems has its own peculiarities, and, in general, the order of expressing these thoughts is fundamentally different. This article deals primarily with the common law system and dissents of judges of bodies that conduct constitutional justice, especially the Supreme Court of the USA and the UK Supreme Court.

Relevance of this topic is confirmed by the low level of research conducted on this issue. There is quite a big amount of literature in the United States of America regarding the use of dissenting opinions. Legal scholars have dealt primarily with the relationship between dissenting opinions and the doctrine of binding precedent, and have tried to solve the problem of the precedential value of plurality decisions, e. g. decisions lacking a reasoning shared by the majority of the judges [1, p. 1345]. But there were not so many studies dedicated to the value of separate

opinion of a judge as such. Empirical research and academic discussion has been limited even in England, where the role of decision-making process of judges can hardly be underestimated.

The purpose of the article is to examine the practice of dissenting opinions in common law countries. It will present the main arguments against and in favor of this practice, as identified by scholars who have focused on theoretical issues and on the role of individual opinions of judges of the bodies of constitutional jurisdiction.

Main body. Roots of the dissenting opinion can be found in common law countries. National and international approaches to individual opinions vary widely. From the practice of *seriatim opinions,* whereby each of the judges taking part in the deliberations publishes his/her opinion separately, and these are published one after the other (still followed by the Supreme Court of the United Kingdom), to the criminalization of violations of the secrecy of deliberations (interpreted as forbidding the publication of judges' individual opinions and votes), a whole range of options is possible, and different solutions have been adopted in different systems [2, p. 163]. Concurring and dissenting opinions ("concurrences" and "dissents") are opinions by judges who did not reach an entirely common ground with the other judges of the court, and wish to express a slightly or even dramatically different view of the case. In general, a concurring opinion is an opinion by a judge who would have reached the same result as the majority, but for a different reason. Dissenting opinions are opinions by judges who disagree with the majority's result entirely. In most cases, dissenting opinions try to persuade the reader that the majority's decision was simply incorrect.

The other scenario that gives rise to the writing of a dissent, the more frequent one, is when, at the first consultation, the submitted draft is accepted by the majority, but a minority of one or more judges firmly believes that the holding, or reasoning, or both, are seriously wrong. A judge, who has the independence and character we have a right to expect, cannot sign onto a decision he or she thinks is seriously wrong. Thus, a dissent must be written not only for the benefit of the quorum in an effort to change their minds, but also for publication. It must not be a one-liner that says no more than, "I dissent"; it must explain why "I dissent" [3, p. 4]. Well-written dissents are entirely consistent with collegiality. In fact, well-written dissents, expressing the writer's disagreement with the court, promote collegiality. A dissent worth writing goes beyond conclusory assertions that the court is wrong and the dissenter is right. It usually takes a lot of time to write a good dissenting opinion. A dissent worth writing explains precisely why the dissenter's view is correct and the court's decision is not. Unless a dissenting opinion does that, it should not be written, for it would detract from the court's image, and the court's image is important, both to the court and to the community that the court serves. A poorly written dissent, therefore, may indeed detract from collegiality, but in my view, a well-written dissent should enhance it [3, p. 93].

Justices of the Supreme Court of the USA have been writing dissents since the court has been created. This court is the one to conduct constitutional control in the United States. Moreover, in the US Supreme Court any justice can write a dissenting opinion. They are using the opportunity to write dissenting opinions as a means to voice their concerns or express hope for the future. At first, the dissenting opinion was a rather common occurrence there. But with the lapse of time it has become not an often practice. At the time when John Marshal was the Chief Justice – there were no separate opinions at all and the Supreme Court spoke in one voice.

Prior to Marshall's appointment, it had been the custom of the Supreme Court, as it was in England, for each justice to deliver an opinion in each significant case. This method may be effective where a court is dealing with an organized and existing body of law, but with a new court and a largely unexplored body of law, it created an impression of tentativeness, if not of contradiction, which lent authority neither to the court nor to the law it expounded. With Marshall's appointment – and presumably at his instigation – this practice changed. Thereafter, for some years, it became the general rule that there was only a single opinion from the Supreme Court. Indeed, Marshall's term was marked by great consensus and stability on the court; Marshall only dissented formally once during his tenure, and between 1811 and 1823 the Supreme Court's personnel did not change – the longest such period in history [4]. Nevertheless, the justices have an obligation to bring their individual experiences and intellects to bear on every case on which they sit, and the best way to do that is for court members holding a minority view to put that view in writing as persuasively as possible for his or her colleagues to consider. Thus, dissenting opinions surely should be written, as meaningful as possible, for the benefit of the future.

However, despite of the fact that separate opinions were of common nature in the Supreme Court from the very beginning, a contrary position existed as well. Thus, William A. Bowen once said: "<…> the dissenting opinion is of all judicial mistakes the most injurious. Its effect on the public respect for courts is difficult to exaggerate. It is, happily, a habit of the public mind to regard the judiciary as the worthy and safe repository of all legal wisdom; but this respect must receive a sad shock when every court is divided against itself, and every cause reveals the amateurish uncertainty of the judicial mind. It is not to be dreamed that all men should be of one mind. Nevertheless, it is surely to be expected that the wranglings of our judges be at least decently veiled <…>" [5, p. 690].

There is a unique example of how a judicial dissent may once become the basis of future laws, a crucial element of the foundation for new legal principle. A famous case – *Plessy v. Ferguson* is an illustrative case. In the very decision, the majority of the Supreme Court of the United States in 1896 ruled that racial segregation in schools and the rule of "separate but equal" did not violate the Constitution. John Marshall Harlan was the only one to write a dissent. Legal commentators at the time did not think very highly of Harlan's dissent. William Bowen, for example, who did not care for the sense at all, condemned Harlan's in particular: "Among the forms which dissent has taken the most harmful is that which may be called the "dissent of warning". The office of this is to criticize the opinion of the court and to warn an innocent public against the ills, which will surely befall it if the court persists in its erroneous course. The most drastic treatment of these kind to which the Court has ever had to submit at the hands of one of its members is, perhaps, that furnished by Mr. Justice Harlan in *Plessy v. Ferguson"*. Nearly 50 years later, immediately after the Supreme Court handed down the landmark ruling in *Brown v. Board*

of Education, the editors of the New York Times declared: "It is eighty-six years since the Fourteenth Amendment was proclaimed a part of the United States Constitution. It is fifty-eight years since the Supreme Court with Justice Harlan dissenting, established the doctrine of "separate but equal" provision for White and Negro races on interstate careers. It is forty-three years since John Marshall Harlan passed from this earth. Now the words he used in his lonely dissent in an 8-to-1 decision in the case of *Plessy v. Ferguson* in 1896 have become in affect by last Monday's unanimous decision of the Supreme Court a part of the law of the land <…>" This is an instance when the voice crying in wilderness finally becomes an expression of a people's will and in which justice overtakes and thrusts aside a timorous expediency [6].

Evan A. Evans, Judge of the United States Circuit Court of Appeals mentioned once that the very fact that so many dissenting opinions begin with an excuse, in the nature of an apology, suggests a lack of justification for their pronouncement [7, p. 139]. This fact is actually a source of disappointment, because there is no reason for a qualified lawyer, experienced judge to precede their arguments with an apology. Moreover, there is a good chance that the reason for excuse is that the very existence of a separate opinion in a collegial body is still considered as a sign of contention within the court and does not contribute to the unity and effective administration of justice, which is nonsense and to some extent an archaism.

The practice of revealing dissents in the US Supreme Court is hardly universal. In the civil-law tradition that holds sway in Europe, and in countries once controlled by a continental power, courts – at least those in the regular court hierarchy – issue a collective judgment, cast in stylized, impersonal language. The author of the judgment is neither named nor otherwise identifiable. Disagreement, if it exists, as it sometimes does, is not disclosed. At the same time, the British common-law tradition lies at the opposite pole. In appeals in that tradition, there was conventionally no "opinion for the court" at all. Instead, the judges hearing the case composed their own individual opinions which, taken together, revealed the court's disposition. Changes in British practice and in some European tribunals have brought these divergent systems closer together. The European Court of Human Rights seated in Strasbourg, for example, publishes signed dissenting opinions [8]. In addition, in some constitutional courts established abroad after World War II dissents are disclosed. Nevertheless, mostly, the historical traditions hold [9, p. 1]. British judges in general and British high court judges in particular, are perceived to be independent and isolated from political pressure and interference. Furthermore, these judges tend to show a particularly high rate of consensus. Thus, traditionally, dissenting judgments in England's highest courts were not in favor. Senior judges were supposed to keep their dissents to themselves. For instance, in the Privy Council, they were only allowed to make a record in a special book, which, presumably, no one would ever see. However, eventually the situation has changed significantly, and history has often acquitted the dissenter. British courts have come a long way since Privy Council dissents were hidden and the modern culture of judicial practice is a significantly more collaborative process, including the circulation of draft opinions. This is something of a middle way between the extremes of judicial individualism and collectivism; and it should guide our attitude to dissenting voices.

The English judicial process is in essence a continuous discussion, which in all but superficial or detailed respects resembles any discussion among educated, informed and reasonable people. But, the judicial process is just that: a process. It is just as much about the procedure as the outcome that it leads to. However, this is where the debate begins: should the UK Supreme Court adopt, on the one hand, position that the role of judges is to reach an individual, unaided view of the case at hand; or a more "continental" collective approach, akin to the European court of justice, where the "exercise must be to come up with the irreducible minimum which the court can say to give its answer"? [10].

Comparing the UK Supreme Court to the House of Lords the evaluation shows that out of the fifty-seven judgments reported on British and Irish Legal Information Institute, ten involved a dissenting opinion. It means that 82% of decisions were unanimous – which is almost exactly the same percentage found in the House of Lords. In addition, a research has showed that unanimity occurs significantly more frequently in UK most senior court, than those of the USA, Australia and Canada. The collegiate approach is thus a double-edged sword: it both requires dissenting views for its health; but concurrently explains why consensus is more likely to be reached. However, the fact that the celebrated dissents of the past are famed for their rarity should not faze the dissentients of today [10].

Conclusions. The notion of dissent certainly is appropriate in the context of a democratic society, based on freedom of expression. However, by aligning judicial dissents with the principle of collegiality of the modern supreme courts, we come closer to its exact role in the judicial process. What collegiality requires is not a fixed quota of dissents per term, against which the current performance of the court can be assessed. It rather explains that the purpose of dissent is not to be proved right in a later judgment or by Luxembourg court. It is, instead, to contribute to a process, to an outcome, to create a debate in society and the legal community as a whole within which the truth will be born. After all, as practice shows, a separate thought plays its part.

Taking into consideration the diversity of opinions, the judges should recognize a duty, not always observed, to try to ensure that there is a clear majority ratio. A dissent is written not only for the benefit of the quorum as an effort to change their minds, but also to be published. It gives an opportunity to reach the legal community with ideas and arguments shown in the dissent. However, it must not be only a statement that a judge dissents, but also an explanation why he or she dissents. A dissent worth writing goes beyond conclusory assertions that the court is wrong and the dissenter is right. A well-written dissent promotes collegiality and independence of every judge. Moreover, judges are required to use their experience and knowledge in each particular case and apprize their position to their colleagues, and the best way for the judge holding the minority view to out speak – is to write a separate opinion, as persuasively as possible for his or her colleagues to consider. Judicial dissent is a chance to be used by a judge to point out his or her reservations and suggestions how to deal with possible legal issues. The majority might not agree, but that is not the point of a dissent written. It is not to be dreamed that all men should be of one mind. Nevertheless, in the end, if a judge

cannot express his critical position, even if it means to say that the court he is sitting in has broken the law or the constitution, what is the point of having a right to dissent?

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ОБЗОР ЗАКОНОДАТЕЛЬСТВА УКРАИНЫ В СФЕРЕ МЕДИЦИНСКИХ РЕФОРМ НА СОВРЕМЕННОМ ЭТАПЕ РАЗВИТИЯ

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АННОТАЦИЯ

Статья посвящена научному анализу правовой среды Украины относительно реализации мероприятий по проведению медицинской реформы, правовых основ обеспечения равных возможностей оказания медицинских услуг и обеспечения соблюдения прав медицинских работников. Исследуется законодательная и нормативно-правовая база по охране здоровья в Украине. В статье рассмотрены вопросы реформирования системы здравоохранения Украины, направленые на улучшение медицинского обслуживания населения, проанализированы отдельные меры по проведению реформ, которые содержат определенные риски для дальнейшего функционирования системы здравоохранения и обеспечения прав медицинских работников, которых необходимо избежать.

Ключевые слова: защита прав, медицинские работники, законодательство Украины в области здравоохранения, реформы системы здравоохранения.

REVIEW OF UKRAINIAN LEGISLATION IN THE FIELD OF MEDICAL REFORMS AT THE PRESENT STAGE OF DEVELOPMENT

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SUMMARY

The article is devoted to the scientific analysis of the legal environment of Ukraine regarding the implementation of measures for medical reform, implementation of legal principles of ensuring equal opportunities for the provision of medical services and ensuring the observance of the rights of medical workers. The legislative and regulatory framework for health in Ukraine is being explored. The article deals with the reform of the health care system of Ukraine aimed at improving the medical care of the population and analyzes individual measures of reform, which contain certain risks for the further functioning of the health care system and the provision of the rights of medical staff that should be avoided.

Key words: protection of the rights, medical workers, medical officers, Ukrainian legislation in the field of health protection, healthcare reform.

Постановка проблемы. В последние годы приоритетным направлением деятельности Министерства здравоохранения Украины остается дальнейшее развитие первичной медицинской помощи, улучшение качества и доступности медицинских услуг. Новые внедрения законодательства в сфере здравоохранения предусматривают кардинальные качественные изменения всех функций системы здравоохранения (управление этой системой, обеспечение ее соответствующими ресурсами, финансирование и предоставление качественных медицинских услуг [1; 2]). Принятие на государственном уровне законодательных нормативно-правовых документов по реформированию системы здравоохранения, а также соответствующих распорядительных актов местных областных государственных администраций, позволило осуществить реальные шаги в реформировании первичного уровня оказания медицинской помощи, проведении подготовительных работ для реформирования специализированной медицинской помощи.

Актуальность темы исследования подтверждается тем, что научное сообщество предлагает для использо-