Erasmus Intensive Seminar on Legal Theory
19 - 26 May 1997, Bocholt

Jurisdiction in Europe.
Towards a Common Legal Method

Münster 1997

TRANSPARENCY, DISSENTING AND DEMOCRACY

Mario Perini

Dissenting

Premise

I will analyse the dissenting opinion: an opinion expressed in a judicial decision by a member of a Court inconsistent with the opinion of the majority of that Court.

Firstly I will ascribe a sense to the following expressions: 'judicial decision', '*motivation*', 'dissenting opinion'.

The expression '**judicial decision**' refers to a 'discourse': an ensemble of propositions connected together and posed in a same autonomous context[1]. This neutral characterisation can be specified by meaning that in contemporary systems a judicial decision is normally considered as the expression of a will, by which directly the judge and indirectly the Legislator is seen to impose authoritatively a rule in relation to a specific situation[2]. Thus a judicial decision requires an expression of will (the imposition of a rule of conduct), that is called *decisum* or *dictum* (*judgement*).

A judicial decision is normally composed by an another part: the '***motivation***' (*opinion of the Court*). This element can be considered a 'discourse', as well as the *dictum*, but differently from the *dictum* and accordingly to the ideology eventually followed, it can be regarded as a merely logical discourse (demonstrative nature of the legal reasoning) or as an evaluative discourse (argumentative nature of the legal reasoning).

A judicial decision can be taken by a single-judge court or by a multi-judge court.

In a collegiate court each member can express different opinion in relation to the same issue. The normative approaches towards this situation are different and eventually depend upon the consideration given to the *decisum* as well as to the *motivation*. For instance the 'Legislator' can implement the majority rule together with the unitary of the decision: in this case a court will express only one opinion, no matter if some members have expressed different point of view. The majority rule can be stated together with the possibility of each member of a court to express his own opinion[3]. But the opinion of a

member judge can be consistent with the *decisum* of the majority and inconsistent with the *motivation* adopted by the majority (***concurring***). Or the opinion can be inconsistent both with the *dictum* and the *motivation* adopted by the majority (***dissenting***). The opinion of each member can be made public or not[4]. Furthermore, in case of publicly made opinions the identity of each judge who expressed them can be maintained unknown[5]. In case of normative stated unitary of *dictum* and *motivation*, a member judge can eventually express is own opinion in a no official way, for instance in a juridical review[6].

Being the main object of this paper the *motivation* of a judicial decision more than the *dictum*, the expression 'dissenting opinion' will be used to refer both to the real dissenting and to the concurring opinion. As to the purpose of this paper, the dissenting opinion can be described as follows: "*le votum separatum y existe, c'est-à-dire le membre du tribunal a le droit de formuler sa propre opinion même quand elle n'est pas conforme aux opinions des autres.*"[7].

Models of *motivation* and *dissenting*

I shall deal with the continental model of judicial decision, in particular the Italian one[8]. It offers a good example of a 'bureaucratic' judicial decision[9]. This model was influenced by the post Revolutionary French experience and is generally adopted in civil law systems as well as in the European Community (European Court of Justice)[10].

The 'bureaucratic judicial decision' is the one characterised by the anonymity, the neutrality, the personality and specialisation of the body that adopts it. The decisions (seem to) have a strict 'rationality', namely a formal conformity to the normative acts issued by the Representative Body. It appears as a mere and technical execution of these norms[11]. The decision appears as a mere act of cognition. In case of collegiate courts, the decisions are adopted *per curiam* and not *seriatim* by each member: the judicial body (that particular court) seems to act as an animate animal capable of acts of cognition. In order to adopt a decision *per curiam*, the member-judges discuss and decide in the secrecy of the '*Camera di Consiglio*' (in chambers). The '*Camera di Consiglio*' is the main instrument to give the impression of a decision taken collectively and unanimously by the body.

Mainly for historical reasons related to the French revolutionary ideas, it is a characteristic of this model the existence of (the duty to express) a *motivation*. The

motivation states the logical-legal basis of the *dictum*. Following the bureaucratic model the *motivation*, as well as the whole decision, is adopted *per curiam* without manifesting the opinions of each member of the court.

This model is coherent with a particular structure and organisation of the Jurisdictional Power, that is the result of a specific ideology of the State (Separation of Powers, Democracy applied only to the Legislative Power[12]) and the whole legal system (legal positivism[13]).

This model differs from the 'insular' one[14] and generally from the 'common law' ones: decisions are characterised by the identity of the judge that adopts it as well as by the non-unitary of a decision taken by a collegiate court. The decision is adopted by expressing *seriatim* the opinions of each member-judge. The style is discursive[15]; there is no duty to give reasons[16]; the decision appears like an act of will more than an act of cognition. Decisions by collegiate courts can contain a plurality of opinions related to the same issue (*dissenting and concurring opinions*). That is due to a particular historical evolution: the decision of a court was the result of (the sum of) orally expressed opinions by each member judge[17].

The paper will focus on the continental model of decision, namely the Italian one. But in respect of the dissent, I will follow the common law model, namely the British one: opinions are expressed orally and then reported.

Functions[18] of *dissenting*

Being the dissenting opinion a part of the *motivation*, functions can be inferred from those of the *motivation*.

"*La motivation du jugement est donc d'une haute importance, pour le public et pour le juge même. ... la motivation des jugements expliq[uent] la bonne conduite des grands juges d'Angleterre.*"[19]. Thus the duty or the practice to publicly express reasons for a decision carries on a double function: a 'psychological' one in relation to the judge and a 'social' one in respect to the Public[20]. On one hand the judge is led to adopt a better and more accurate decision if he 'must' give some 'good' reasons for it. It would be more difficult to take wrong decisions, therefore the whole society will be benefited. On the other hand and independently from the psychological function, the reasons of a decision will make the Public able to control the exercise of the Judicial Function.

Following the previous formulation a very important function of the *motivation* is missed: namely the protection of interests involved in the decisional process. "*D'une part elle [la motivation] incite le juge à un bon travail; la possibilitè que l'obbligation de prèparer la motivation surgisse (si elle n'existe pas ex lege) exerce une pression qui favorise la conscience du juge. D'autre part la motivation lègale sert à persuader le sujets intèressès, comme les parties au procès, les autres tribunaux, l'opinion publique et la science*"[21].

In order to make order on what above said, two main pragmatic functions of a *motivation* can be pointed out[22]: 1) the **internal** or **psychological function,** that principally refers to the decision - maker; 2) the **external function**, that primarily refers to subjects different from the decision - maker. The last function can be related to: a) subjects directly interested in the cause *sub iudice* (for instance: plaintiff and defendant, subjects that can appeal the decision, appeal - judges, etc.); b) the Public in general. I will call the first one (*sub* a)) 'endoprocedural function' and 'extraprocedural function' the latter (*sub* b)).

a) The **endoprocedural function** focuses on the possibility for the parties to understand the meaning and the significance of a decision, especially in the case of an appeal. Furthermore it makes the appeal judges able to better evaluate the correctness of a lower court decision[23]. b) The **extraprocedural function** allows the Public to control the legitimacy and the rightness of a judicial decision[24].

Relating to the extraprocedural function a further subdivision can be made. The *motivation* can be useful for the Public in general or for the academic commentators and the judges in particular[25]. In this second case the reasons of a judicial decision contribute to the evolution of the case-law. Thus I will call this particular function as 'external extraprocedural evolutive function'[26].

The same functions, already stressed as to the *motivation* in general, belong to the dissenting opinion[27]. So which is, if any, the *quid pluris* that the possibility to openly express a dissenting opinion adds to the function of a *motivation* ?

In my opinion the existence of a dissenting opinion emphasises some functions of the *motivation* rather than other. The dissenting opinion stresses the internal or psychological function, in fact it induces to take better decisions.

The dissenting opinion does not emphasise the endoprocedural function. In fact only the *decisum* and the opinion on which it is based (the opinion of the majority) are important for the litigants. Instead "*[dissenting judgements] inevitably consist of statements which were unnecessary for the decision of the precise question before the court.*"[28]

Dissenting opinions have a main effect on both the extraprocedural functions[29]. The (publicity of the) dissenting opinion makes the Public and the commentators able to a deeper control on a single decision as well as the judicial function throughout a critical view inside the court.

The paper will consider the dissenting opinion only as to its effect in emphasising the extraprocedural function of the *motivation*.

Transparency

As controllability

"*... kann man folgenden Sats die transzendentale Formel des öffentlichen Rechts nennen: ' Alle auf das Recht anderer Menschen bezogene Handlungen, deren Maxime sich nicht mit der Publizität verträgt, sind unrecht.*"[30]; "*La publicitè se lie naturellement à l'appareil exterior de la justice*"[31], "*elle est l'ame de la justice*"[32]. These quotations show some sort of relation between 'justice' and 'transparency' (or 'publicity'). Both philosophers (Kant and Bentham) think that without publicity, in the sense of controllability, it is impossible to have justice. Both the philosophers intend the transparency as the possibility of checking the activity of a subject that operate in the Public Law sphere (in general for Kant and in the judiciary sphere for Bentham). This interpretation can be corroborated by analysing the context in which they express those opinions. In particular Kant exemplifies the transcendental formula by using the following example: if anyone would openly express a maxim not capable of publicity, anyone will try to prevent him from applying that maxim. This means that a maxim is unjust when it could not be subject to a control, in the sense of being accessible by anybody[33].

The paper will focus on the idea that in the Public Law sphere the transparency is related to the concept of control, or better to the possibility of control, more than the conception that without transparency there is no justice.

While talking about 'transparency' or 'publicity' as possibility of checking, I refer both to the possibility of knowing a specific act or action and to the possibility of understanding them. The distinction between accessible and intelligible (understandable) is emphasised by various commentators[34]. In order to have a real publicity of the acts of a subject that operates in the Public Law sphere, these acts must be not only accessible, but also understandable. That implies that every element relevant to increase the comprehension of an act must be accessible, too. Without the disclosure of these elements we only have an illusion of knowledge[35].

Its democratic function

Thus the transparency in the Public Law sphere is related to the idea of controllability; but who must be competent to control the actions of a subject that operates in the Public Law sphere ?

Norberto Bobbio writes that Democracy is the government of the visible power, the exercise of Public Power in public. He adds that to realise this kind of system it is fundamental that every government act must be accessible to the Public in a way that the Public can control it[36]. The same conception can be expressed in the following way: "*How can we govern ourselves if we know not how we govern ?*"[37].

If a legal system pursues the idea of Democracy, it follows that every citizen in this system should be able to control every act and every action performed in the Public Law sphere. In contemporary democratic systems the Power is usually delegated and exercised by subjects different from the people from whom the Power (it is said to) derives. Hence the transparency represents a ground rule in the Public Law sphere and the secrecy is only a mere exception to this rule[38].

As noted above, transparency requires both accessibility and intelligibility of the acts and the actions of the Public Authorities. But in democratic contemporary systems it is a common practice to attribute to 'experts' the exercise of public functions, in particular jurisdictional and executive ones (*legis executio*[39]). In this way a typical element of autocratic systems is introduced in contemporary democratic systems. That is the exercise of Power in secrecy: 'in a way not intelligible for the people', who usually will not be able to understand this technical science[40].

Thus in a democratic system, considered as a system in which the governor is the governed people, if a Public Authority is not invested directly by the people, it is

essential that people have the right to control every act and action of this Authority: everyone should have the right to freely use his mind. That is one of the most relevant means to implement the principle of transparency in the Public Law sphere.

Which Branches of the Government should the principle of transparency be implemented in ?

It is traditionally affirmed that a freely elected Legislative Body[41] together with the Rule of Law are enough for any democratic system. Even if in some extent the *legis executio* is creation of norms, it is a mere implementation of the 'will' of the Representative Body[42]. Thus the executive and judiciary Powers legitimation derives from that of the Legislative one. Implications of this conception are: the idea of the judiciary as a 'neutral power', a power '*en quelque façon nulle*'[43] (formalist positivism[44]), and the traditional '*Transmission Belt Model*' of administration[45].

The traditional conception that limits the democracy to the Representative Body can be accepted if and only if the control of every act of the Public Authorities is granted to the people. As pointed out by many scholars, the *legis executio* is not the mere implementation of the law[46], but it always implies some sort of discretion. Hence the people, who are excluded from the direct participation in important Public Powers, namely administration and jurisdiction, should have the right to control them. Thus the transparency must be enforced in each Branch of a Government.

In particular: transparency and the Judiciary

Following what stated above, in the judiciary every kind of secrecy should be abandoned (unless some specific interest requires, like for instance the protection of minors[47]). But in systems influenced by the French Revolution[48], collegiate courts operate in secrecy[49] both in deciding and expressing their opinion (unitary motivation[50]). Traditionally the secrecy in collegiate courts is justified in order to prevent judges from external pressure as well as to assure more dignity and force to the decision[51] by making it appear as the result of an unanimity of consensus. In my opinion a deeper justification of the secrecy both in the decision-making process and opinions of each member judges can be found. Two main ideas are deep-rooted in the positive law as well as in the mind of the judges[52]. 1) The organicistic idea related to the State machine, and the consequent 'bureaucratisation' of its organisation. 2) The following idea of the right answer in

relation to a specific case. The Legislator realises the appearance of the correctness of just one answer by the fiction of the unanimity of consensus in the collegiate courts as well as by preventing the people to know what happens in Chambers.

This idea refers principally to the legal reasoning and represents a *Vulgata* of the positivism, commonly accepted by both the positive legal culture and judges[53]. Many scholars[54] have convincingly criticise the idea of the right answer related to the legal syllogism. The idea of legal reasoning as a logical-deductive process (a merely cognitive process) is related to the conception of the judge who 'finds' the right answer for that case[55].

The model of decision fitting to that kind of conception is the bureaucratic one, where the style is formal and technical. Judicial decisions seem the product of experts who apply the rules of the legal logic. In this case the *motivation* carries on the 'endoprocedural' function only [56]. The extraprocedural one is completely useless because there is no need to legitimate Powers that are '*en quelque façon nulle*', being a mere implementation of the law.

It is now possible to understand why in many systems influenced by the French Revolution Democracy is implemented only in the Legislative Body. Parliament is free to act and create the law only respecting the limits if any Constitution. The Judiciary[57] is a neutral Power and so it does not need any democratic legitimation. Its legitimation derives from the mere application of the statute law (produced by the Representative Body) in a rational and logical way[58].

***Dissenting*, Transparency and Democracy**

The kind of legitimation[59] exposed above should be modified in a system which tends to assimilate the governed people with the governor: together with non democratic subjective[60] principles of legitimation of Public Authorities it is fundamental to recognise democratic objective principles of legitimation, those related to the action of the Public Authorities[61].

If the *legis executio* always implies some sort of liberty in its exercise, the Powers that perform this activity should be subjected to a control[62] by the governed people[63]. Thus the principle of Transparency in the Public Law sphere is to be implemented. In particular every act and action of a Public Authority is to be performed publicly.

In respect to the jurisdiction the popular control is traditionally made possible by both the publicity of the trial and the *motivation* of the decisions[64]. Hence the private view of a control exercised by the parties of a trial and the bureaucratic view of a control exercised by the appeal judge must be integrated with the democratic view of a control exercised by the People, in which name the decision is pronounced. Thus [65] the *motivation* should be structured in a way to make this control effective[66] and the extraprocedural function of the *motivation* should be strengthened.

In particular, the secrecy[67] of the decision-making process (in chambers) is to be abandoned. Consequently the possibility for each member judge to express publicly his/her own opinion is to be introduced[68]. The (publicity of the) dissenting opinion, as already noted, emphasises the function of the *motivation* related to the popular control (extraprocedural public function). For the dissenting opinion makes it clear to anyone that there is a range of possible right answers[69] related to a particular case: it clarifies that as far as the *legis executio* is not a neutral function, it requires a popular control. Dissenting opinions furnish a plurality of juridical solutions related to a particular case and in so doing it makes people able to exercise a deeper control of judicial power. Dissenting opinions make the judicial activity not only more understandable (it makes public what happens in chamber), but also more intelligible (it furnishes to people a plurality of juridical solutions of a particular case).

In order to realise these purposes, dissenting opinions should be accessible to every citizen. Thus systems that maintain the secrecy in the Public Law sphere ad in the judiciary in particular (as for the *ECJ*, or for the collegiate courts that is modelled on the French example), should take a lesson from the British system: "*The Times newspaper publishes each day a half to a whole page of law reports giving very full extracts from judges' opinion. Every day in the morning train you can see people travelling to work reading these reports and it is the commonest thing for a judge to meet people who say they have just read one of his judgements - with interest, approval or disapproval. Not everyone reads The Times, but the popular papers will print anything quotable from the judges - so one can certainly say that the decisions of the courts achieve a wider penetration into national consciousness than a note in Dalloz.*"[70].

NOTES

[1] See TARUFFO M., "*La motivazione della sentenza civile*", Padova, Cedam, 1975, p. 30.

[2] A different conception existed in the Middle Age where the Ordeal expressed the *voluntas Dei*.

[3] See GORLA G., "*Le opinioni non 'segrete' dei giudici dissenzienti nelle tradizioni dell'Italia preunitaria*", in AA.VV., "*Il segreto nella realtà giuridica italiana*", Padova, Cedam, 1983, p. 145 and ff.; GORLA G., "*Procedimento individuale. Voto dei singoli giudici e collegialità 'rotale': la prassi della Rota di Macerata nel quadro di quella di altre Rote o simili tribunali fra i secoli XVI e XVIII*", in SBRICCOLI M. and BETTONI A. (a cura di), "*Grandi tribunali e Rote nell'Italia di antico regime*", Milano, Giuffrè, 1993; DENTI V., "*Per il ritorno al 'voto di scissura' nelle decisioni giudiziarie*", in MORTATI C. (a cura di), "*Le opinioni dissenzienti*", Milano, Giuffrè, 1964; NADELMANN K.H., "*The Judicial Dissent. Publication v. Secrecy*", in 8 *The American Journal of Comparative Law*, 1959, p. 415 and ff.

[4] "*One of the sharpest points of contrast beetween the two lwgal cultures is the prevalence within the English speaking legal system of multiple opinions, both concurring and dissenting, at the appelate court level; dissent among the judges of Continental European courts no doubt occurs behind closed doors, but behind those doors it is resolved, and the published motivation is then presented as the single - and, as it might appear - incontestable opinion of the whole court.*", MACCORMICK N., "*Judgements in the Common Law*", in PERELMAN CH. et FORIERS P. (eds.), "*La motivation des décisions de justice*", Bruxelles, Etablissements Emile Bruylant, 1978.

[5] That was the situation in Denmark before the reform of 1958, see NADELMANN K.H., "*The Judicial Dissent. Publication v. Secrecy*", quoted.

[6] In Italy and in France sometimes it happens that a member of a Supreme court writes a comment on a judicial decision that he has adopted as member of that court. For Italy see PIZZORUSSO in OCCHIOCUPO N., "*La Corte Costituzionale tra norma giuridica e realtà sociale*", Bologna, Il Mulino, 1978, p. 132 and ff.. For France see NADELMANN K.H., "*The Judicial Dissent. Publication v. Secrecy*", quoted.

[7] WRÒBLEWSKI J., "*Votum separatum dans la theorie et l'ideologie de l'application judiciaire du droit*", in AA.VV., "*L'ordinamento giudiziario*", III, Rimini, Maggioli, 1985, p. 349.

[8] In general for this model see: GORLA G., "*La struttura della decisione giudiziale in diritto italiano e nella 'Common Law': riflessi di tale struttura sull'interpretazione della sentenza, sui 'Reports' e sul 'Dissenting'*", in *Giu. it., I, 1*, 1965, p. 1239; SCHLESINGER R.B., "*Comparative Law - Cases, Text, Materials*", Mineola, New York, The Foundation Press, 1970, pp. 268 and ff.; TARUFFO M., "*La motivazione della sentenza civile*", quoted, pp. 319-353; PERELMAN CH. et FORIERS P. (eds.), "*La motivation des décisions de justice*", Bruxelles, Etablissements Emile Bruylant, 1978; GORLA G., "*Sulla via dei 'motivi' delle 'sentenze': lacune e trappole*", in *Foro it., V*, 1980, pp. 201 and ff.; GORLA G., "*Diritto Comparato e diritto comune europeo*", Milano, Giuffrè, 1981; AA.VV., "*La sentenza in Europa (Metodo, tecnica e stile)*", Padova, Cedam, 1988; SBRICCOLI M. and BETTONI A. (a cura di), "*Grandi tribunali e Rote nell'Italia di antico regime*", Milano, Giuffrè, 1993.

[9] See WEBER M., "*Wirtschaft und gesellschaft*", trad. it. "*Economia e società*", Milano, Edizioni di Comunità, 1980, libro I, parte I, 3, par. 3-5; vol. III, parte II, 7, par. 7-8; TARUFFO M., "*La motivazione della sentenza civile*", quoted, p. 304; TARUFFO M., "*Motivazione*", voce dell'*Enciclopedia Giuridica Treccani*.

[10] See CAPOTORTI F., "*Le sentenze della Corte di Giustizia delle Comunità Europee*", in AA.VV., "*La sentenza in Europa (Metodo, tecnica e stile)*", quoted.

[11] This model is also appealed as '*formal style*', see MACCORMICK N., "*Judgements in the Common Law*", in PERELMAN CH. et FORIERS P. (eds.), "*La motivation des décisions de justice*", Bruxelles, Etablissements Emile Bruylant, 1978.

[12] See KELSEN H. "*Il primato del Parlamento*", Milano, Giuffrè, 1982.

[13] In general see BOBBIO N., "*Il Positivismo giuridico*", Torino, Giappichelli, 1979.

[14] See ATIYAH P.S., "*Judgements in England*", in AA.VV., "*La sentenza in Europa (Metodo, tecnica e stile)*", quoted, pp. 140 and ff..

[15] *"Judgements in the Common Law system, are written, expecially today, in a somewhat discoursive style."* ATTYAH P.S., *"Judgements in England"*, in AA.VV., *"La sentenza in Europa (Metodo, tecnica e stile)"*, quoted, p. 145

[16] When I write that in the common law system there is no duty to give reason I mean that the common law does not impose to give reasons for a particular decision (but consider now in United Kingdom the recent judgement *Doody v. Secretary of State ([1993] 3 All E.R. 92.)*. I do not want to say that the judicial decisions are never motivated.

[17] See SCHLESINGER R.B., *"Comparative Law - Cases, Text, Materials"*, quoted, p. 323-4; STEIN G.P., *"Judgements in the European Legal Tradition"*, in AA.VV., *"La sentenza in Europa (Metodo, tecnica e stile)"*, quoted, in particular pp. 33-34; GORLA G., *"La struttura della decisione giudiziale in diritto italiano e nella 'Common Law': riflessi di tale struttura sull'interpretazione della sentenza, sui 'Reports' e sul 'Dissenting'"*, p. 1255

[18] Consistently with my analysis about the outward appearance of a decision, only the pragmatic functions of a judicial decision, and not the ideological ones, will be analysed: *"La function idéologique de la motivation est de déterminer le 'sources' de la décision d'un fa on intelligible, de donner les arguments qui soutiennent la décision dans le contextes de la controverse qui avait lieu pendant le procès. ... La motivation légale sert aussi aux valours praxeologique."*, WRÓBLEWSKI J., *"Motivation de la décision judiciaire"*, in PERELMAN CH. et FORIERS P. (eds.), *"La motivation des décisions de justice"*, quoted, p. 126.

[19] BENTHAM J., *"Oeuvres Complet"*, Bruxelles, Louis Hauman et Compagne, 1830, III, Ch. XXV (*"Des moyens de publicité"*), p. 53-54.

[20] I prefer to use the term 'public' instead of 'audience'; in fact the last one is more ideologically characterised. See PERELMAN CH., *"La motivation des décisions de justice, essai de synthèse"*, in PERELMAN CH. et FORIERS P. (eds.), *"La motivation des décisions de justice"*, quoted, pp. 415 and ff.; TARUFFO M., *"La motivazione della sentenza civile"*, quoted, pp. 191-205.

[21] See WRÓBLEWSKI J., *"Motivation de la décision judiciaire"*, in PERELMAN CH. et FORIERS P. (eds.), *"La motivation des décisions de justice"*, quoted, pp. 126-127.

[22] In this description I follow some Italian authors: TARUFFO M., *"La motivazione della sentenza civile"*, quoted, pp. 319 and ff., in particular pp. 333 and ff.; GORLA G., *"Sulla via dei 'motivi' delle 'sentenze': lacune e trappole"*, quoted, p. 206; AMODIO AND., *"Motivazione della sentenza penale"*, voce della *"Enciclopedia del diritto"*, Milano, Giuffrè, 1977, pp. 185 and ff.; DENTI V., *"Commento all'art. 111 Cost."*, in BRANCA G., *"Commentario alla Costituzione"*, Bologna, Zanichelli, 1987, pp. 7 and ff.; CARETTI P., *"Motivazione"*, voce della *"Enciclopedia giuridica Treccani"*.

[23] TARUFFO M., *"La motivazione della sentenza civile"*, quoted, p. 334.

[24] TARUFFO M., *"La motivazione della sentenza civile"*, quoted, p. 334.

[25] It is appealed extraprocedural function because it does not affect the subjects directly involved in the cause, but it refers to subjects extraneous to that. See TARUFFO M., *"La motivazione della sentenza civile"*, quoted, p. 335.

[26] In the common law system this function must be considered as the more important.

[27] Some commentators have indicated the following specific functions of the dissenting opinion.

1) To improve the responsibility of a member judge in a way to induce him to take a better decision (see MORTATI C., *"Considerazioni sul problema dell'introduzione del 'dissent' nelle pronunce della Corte Costituzionale italiana"*, in MARANINI G. (a cura di), *"La Giustizia Costituzionale"*, Firenze, Vallecchi, 1966, p. 163; see also ANZON A., *"Per l'introduzione dell'opinione dissenziente dei giudici costituzionali"*, in *Politica del diritto 1992*, pp. 329 and ff., in particular pp. 332-334; DENTI V., *"Per il ritorno al 'voto di scissura' nelle decisioni giudiziarie"*, quoted, pp. 12-13 and 19 and ff.; NADELMANN K.H., *"The Judicial Dissent. Publication v. Secrecy"*, quoted; DOUGLAS W.D., *"The Dissent; a Safeguard of Democracy"*, in *32 Seattle Wash J. Am. Jud. Soc'y, 1948*, pp. 104 and ff.).

2) The possibility that a member judge can openly express a different opinion related to a particular issue, induces all the other members to evaluate better the case. (MORTATI C., *"Considerazioni sul problema dell'introduzione del 'dissent' nelle pronunce della Corte Costituzionale italiana"*, p. 163; see also ANZON A., *"Per l'introduzione dell'opinione dissenziente dei giudici costituzionali"*, quoted, p. 332 ; DENTI V., *"Per il ritorno al 'voto di scissura' nelle decisioni giudiziarie"*, quoted, p. 13; RODOTA' S., *"L'opinione dissenziente dei giudici costituzionali"*, in *Politica del diritto, 1979*, pp. 637 and ff.).

3) The deeper evaluation of the case before the court by both the majority and the minority of the judges guarantees a better decision. (MORTATI C., *"Considerazioni sul problema dell'introduzione del 'dissent' nelle pronunce della Corte Costituzionale italiana"*, p. 163).

4) The dissenting opinion allows the public to control and so to criticise the decisional process of the Judiciary; in this way the dissenting opinion contributes to improve the Democracy. (ANZON A., *"Per l'introduzione dell'opinione dissenziente dei giudici costituzionali"*, quoted, p. 333; see also ANZON A., *"La motivazione dei giudizi di ragionevolezza e la* dissenting opinion", in AA.VV., *"Il principio di ragionevolezza nella giurisprudenza della Corte Costituzionale"*, Milano, Giuffrè, 1994, pp. 257 and ff.; TARUFFO M., *"La fisionomia della sentenza in Italia"*, in AA.VV., *"La sentenza in Europa (Metodo, tecnica e stile)"*, quoted, pp. 188 and ff.).

5) *"to discuss and enunciate general principle as pointers to the future developement of the law...is sometimes best fullfilled by the delivery of more than one judgement"* (CROSS R., *"Precedent in English Law"*, Oxford, Clarendon Press, 1977, p. 101, see also MORTATI C., *"Considerazioni sul problema dell'introduzione del 'dissent' nelle pronunce della Corte Costituzionale italiana"*, p. 163; ANZON A., *"Per l'introduzione dell'opinione dissenziente dei giudici costituzionali"*, quoted, p. 332; NOVARESE F., " 'Dissenting opinion' *e Corte Europea dei Diritti dell'Uomo"*, in ANZON A. (a cura di), *"L'opinione dissenziente"*, quoted, pp. 375-6; MORTATI C., *"Prefazione"*, quoted, p. IX; DENTI V., *"Per il ritorno al 'voto di scissura' nelle decisioni giudiziarie"*, quoted, p. 17.

It clearly appears that the first two functions specifically indicated in relation to the dissenting opinions can be identify with what I have called 'psychological function' of the *motivation*: that is to induce the judges to take better decision. The function sub 3) can be assimilated to the 'external endoprocedural function' of the *motivation*. The last two functions sub 4) and 5) can be identified respectively with the extraprocedural public function and with the extraprocedural evolutive function of the *motivation*. For these reason I think that the dissenting opinion has not any specific function qualitatively different from that of the *motivation* in general.

[28] CROSS R., *"Precedent in English Law"*, quoted, pp. 90-91.

[29] See ATTYAH P.S., *"Judgements in England"*, quoted; CROSS R., *"Precedent in English Law"*, quoted, pp. 100-101.

[30] KANT I., *"Zum ewigen Frieden"*, in *"Kant's Werke"*, Berlin und Leipzing, Walter de Grunter & Co., 1923, p. 381.

[31] BENTHAM J., *"Oeuvres"*, Bruxelles, Luis Hauman et Compagnie, 1830, p. 53 (*De moyens de publicité*).

[32] BENTHAM J., *"Oeuvres"*, quoted, p. 287 (*De la pubblicité*). The same opinion is expressed by BONCENNE M., *"Théorie de la Procedure Civil"*, Bruxelles, Société Belge de Librairie, 1839, p. 278.

[33] Perhaps this idea is related to the conception of the Enlightenment that anyone has the right to freely express his own ideas and comments on how the *res publica* is governed (public use of anyone's mind); in fact, in order to realise this purpose it is fundamental that 'political' information are accessible to everybody. See KANT I., *"Beantwortung der Frage: Was ist Aufklärung ?"*, trad. it. *"Risposta alla domanda: che cos'è l'illuminismo ?"* (1784), in *"Scritti Politici"*, Torino, Unione Tipografico-Editrice Torinese, 1956, p. 143. *"N'oblions pas que le principe de la publicité demande la liberté de la presse pour tout ce qui se passe dans les cours de justice."*, BENTHAM J., *"Oeuvres"*, quoted, p. 53; see also BOBBIO N. *"La democrazia e il potere invisibile"*, in *Rivista italiana di scienza politica* 1980, pp. 187-188.

[34] See SCARPELLI U., *"La democrazia e il segreto"*, in AA.VV., *"IL segreto nella realtà giuridica italiana"*, Padova, Cedam, 1983, pp. 628-632; TARUFFO M., *"La fisionomia della sentenza in Italia"*, quoted, p. 210; ABBAMONTE G., *"La funzione amministrativa tra riservatezza e trasparenza. Introduzione al tema"*, in AA.VV., *"L'amministrazione pubblica tra riservatezza e trasparenza"*, Milano, Giuffrè, 1991 (Atti del XXXV. convegno di studi di scienza dell'amministrazione, Varenna 21-23/9/1989), pp. 7-22, in particular pp. 10-14.

[35] SCARPELLI U., *"La democrazia e il segreto"*, quoted, p. 630.

[36] BOBBIO N., *"La democrazia e il potere invisibile"*, quoted, pp. 181 and ff., in particular pp. 181-182 and 184.

[37] The American Attorney General in 1967; see STEPHENSON, *"Government in the Sunshine Act: Opening Federal Agency Meetings"*, in 26 *The American University Law Review* 1976, p. 205 footnote n. 226.

[38] SCARPELLI U., *"La democrazia e il segreto"*, quoted.

[39] See KELSEN H., *"General Theory of Law and State"*, Cambridge, Harvard University Press, 1945, Part II, Ch. II, par. G.

[40] See BOBBIO N., *"La democrazia e il potere invisibile"*, quoted. In relation to the Public Administration clear examples of this kind of 'government of the experts' are the American *Expertise Model* of Administrative Action, elaborated in the '30s of this Century, as well as the Italian *'modello collaborativo'*. For the first one see MASHAW J.L., *"Due Process in the Administrative State"*, Yale University Press, 1985, pp. 18-22; STEWART, *"The Reformation of American administrative law"*, in 88 *Harvard Law Review* 1975, pp. 1678 and ff.; BREYER and STEWART, *"Administrative law and Regulatory Policy. Problem, Texts and Cases"*, Little, Brown and Co., 1982, p. 31. For the *'modello collaborativo'* see CASSESE S., *"Il privato e il procedimento amministrativo"*, in *AG*, CLXXIX, 1971, pp. 105-6; BARONE, *"L'intervento del privato nel procedimento amministrativo"*, Milano, 1969, pp. 147-8). Following these models the discretion of the Public Administration is more apparent than real. In fact it must realise the goals stated by the Legislature applying the non legal rules of the administrative science, that is an *'apolitical science'* (See STEWART, *"The Reformation of American administrative law"*, quoted, footnote 36 p. 1678). So Administrators act as a professional men like doctors or engineers. The Administrators are legitimated to exercise Power without any effective control by the People because this Power in reality is 'neutral', in fact consists in the mere application of the apolitical administrative science.

[41] See KELSEN H., *"Il primato del Parlamento"*, Milano, Giuffrè, 1982, pp. 61-77; KELSEN H., *"General Theory of Law and State"*, quoted, Part II, Ch. IV, par. B, k-l.

[42] For the Italian system see GUASTINI R., *"Commento all'art. 101 Cost"*, in BRANCA G. and PIZZORUSSO A. (a cura di), *"Commentario della Costituzione"*, Bologna, Zanichelli, 1994, pp.169-170.

[43] MONTESQUIEU, C.L. DE SECONDANT, *"De l'esprit des lois"*, trad. it., Milano, Rizzoli-BUR, 1996, vol. I, part II, book XI, ch. VI.

[44] See CARRIO' G. R., *"Sobre la interpretación en el derecho"*, in Id., *"Notas sobre derecho y lenguaje"*, Buenos Aires, Abeledo-Perrot, 1979; BOBBIO N., *"Il Positivismo giuridico"*, Torino, Giappichelli, 1979, part II.

[45] See STEWART *The Reformation of American administrative law* quoted, pp. 1671-6 in particular 1675; MASHAW J.L. *Due Process in the Administrative State* Yale University Press, 1985, pp. 15-18. *"The Traditional Model of administrative law thus conceives of the agency as a mere transmission Belt for implementing legislative directives in particular cases. It legitimates intrusions into private liberties by agency officials not subject to electoral control by ensuring that such intrusions are commanded by legitimate source of authority - the legislature."*, STEWART, *"The Reformation of American administrative law"*, quoted, p. 1675.

[46] *"Le juge est considèrè, de nos jours, comme dètenteur d'un poivoir, et non comme 'la bouche qui prononce les paroles de la loi', car tout en étant tenu par les prescriptions de la loi, il possède un marge d'appréciation: il opère des choix, dictés non seulement par les règles de droit applicables, mais par la recherche de la solution la mieux adaptée à la situation. Il est inévitable que ses choix soient fonction de jugements de valeur..."*, PERELMAN CH., *"La motivation des décisions de justice, essai de synthèse"*, quoted, pp. 421-422; see also TARUFFO M., *"La motivazione della sentenza civile"*, Padova, Cedam, 1975, p. 149-170; CARRIO' G. R., *"Sobre la interpretación en el derecho"*, in Id., *"Notas sobre derecho y lenguaje"*, Buenos Aires, Abeledo-Perrot, 1979; GUASTINI R., *"Commento all'art. 101 Cost"*, pp. 152-158. In relation to the Public Administration see HARLAW and RAWLINGS, *"Law and Administration"*, London, Weidenfeld and Nicolson, 1984; STEWART, *"Madison's Nightmare"*, in 57 *University of Chicago law review* 1990, pp.335 and ff.; STEWART, *"The Reformation of American administrative law"*, quoted, pp. 1667 and ff.; AA.VV., *"Valori costituzionali e Pubblica Amministrazione"* (Atti del convegno, Firenze 19-20 /2/1993), Firenze, Edizioni Regione Toscana, 1994; BENVENUTI F., *"L'amministrazione oggettivata: un nuovo modello"*, in *Rivista trimestrale di scienza dell'amministrazione* 1978, pp. 6 and ff.; COGNETTI S., *"Normative sul procedimento , regole di garanzia ed efficienza"*, in *Rivista trimestrale di diritto pubblico* 1990, pp. 94 and ff..

[47] This idea was expressed by Bentham, who wrote that secrecy in judicial process could be admitted only for specific and concrete reasons related to a particular case. See BENTHAM J., *"Oeuvres"*, quoted, Ch. XI, pp. 291-292 (*"Cas d'exception a la publicitè de la procedure"*).

[48] NADELMANN K.H., *"The Judicial Dissent. Publication v. Secrecy"*, quoted; GORLA G., *"Le opinioni non 'segrete' dei giudici dissenzienti nelle tradizioni dell'Italia preunitaria"*, quoted, pp. 151-153; GORLA G., *"Civilian Judicial Decisions"*, in GORLA G., *"Diritto comparato e diritto comune europeo"*, Milano, Giuffrè, 1981, pp. 711 and ff.

[49] GUASTINI R., *"Commento all'art. 101 Cost"*, in BRANCA G. and PIZZORUSSO A. (a cura di), *"Commentario della Costituzione"*, Bologna, Zanichelli, 1994, p. 159.

[50] VARANO V. , *"Organizzazione e garanzie della giustizia civile nell'Inghilterra moderna."*, Milano, Giuffrè, 1973, p. 264 footnote n. 160

[51] *"It is said, for instance, that in such countries the anonymity of the per curiam decision may be necessary (a) to protect the individual judges from improper pressures, and (b) to add more dignity and force to their judgements*

by keeping judicial disagreements from the eyes of the public.", SCHLESINGER R.B., *"Comparative Law - Cases, Text, Materials"*, quoted, p. 325.SCHLESINGER R.B., *"Comparative Law - Cases, Text, Materials"*, Mineola, New York, The Fundation Press, 1970, p. 324-325.

[52] See TARUFFO M., *"La motivazione della sentenza civile"*, quoted, p. 308.

[53] *"Certainly, I have the impression that in Continental Europe, with its tradition of a career judiciary ... there is much emphasis ... on the idea of judging as a science which can be learned and which must be practised with an impersonal rigour."*, MACCORMICK N., *"Judgements in the Common Law"*, quoted, p. 168; for the European Court of Justice see CAPOTORTI F., *"Le sentenze della Corte di Giustizia delle Comunità Europee"*, quoted, p. 242; for Italy see TARUFFO M., *"La motivazione della sentenza civile"*, Padova, Cedam, 1975, p. 149-151, in particular footnote n. 2; TARUFFO M., *"La fisionomia della sentenza in Italia"*, quoted, p.212; GUASTINI R., *"Commento all'art. 101 Cost"*, quoted, p. 153.

[54] See TARUFFO M., *"La motivazione della sentenza civile"*, Padova, Cedam, 1975, p. 149-170; CARRIO' G. R., *"Sobre la interpretación en el derecho"*, in Id., *"Notas sobre derecho y lenguaje"*, Buenos Aires, Abeledo-Perrot, 1979; TROPER M., *"La motivation des décisions constitutionnelles"*, in PERELMAN CH. et FORIERS P. (eds.), *"La motivation des décisions de justice"*, quoted, pp. 287 and ff., GUASTINI R., *"Commento all'art. 101 Cost"*, pp. 152-158.

[55] See TARUFFO M., *"La motivazione della sentenza civile"*, Padova, Cedam, 1975, p. 165-170; for an historical analysis see GORLA G., *"Sulla via dei 'motivi' delle 'sentenze': lacune e trappole"*, quoted, pp. 208-209 and 211-212; ROSSI A., *"La nuova legge sulla responsabilità civile dei magistrati e gli organi collegiali"*, quoted, pp. 262-263.

[56] See TARUFFO M., *"La motivazione della sentenza civile"*, quoted, pp. 210-211

[57] For the Administration see KELSEN H., *"Il primato del Parlamento"*, Milano, Giuffrè, 1982, pp. 61-77.

[58] See TARUFFO M., *"La motivazione della sentenza civile"*, quoted, p. 168.

[59] I use the expressions 'subjective' and 'objective' legitimation in the sense indicated by ROMANO-TASSONE A., *"Sulla C.D. 'funzione democratica' della motivazione dei pubblici poteri"*, in RUGGERI A. (a cura di), *"La motivazione delle decisioni della Corte Costituzionale"*, Torino, Giappichelli, 1994, pp. 33 and ff.. This author in some extent follows the conception of WEBER in *"Wirtschaft und gesellschaft"*.

[60] KELSEN H., *"Il primato del Parlamento"*, quoted, pp. 61-77; KELSEN H., *"General Theory of Law and State"*, quoted, Part II, Ch. IV, par. B, k-l.

[61] Traditionally the authors, which have analysed the problem of legitimation in the *legis executio* functions, refer only to the subjective aspect of the legitimation. See for example KELSEN H., *"Il primato del Parlamento"*, quoted; SCHMITT C., *"Verfassungslehre"*, trad. it. *"Dottrina della Costituzione"*, Milano, Giuffrè, 1984, pp. 360 and ff..

[62] The control, I am talking about, is the minimal one, that is the possibility to publicly and freely use one's own mind . It corresponds to a weak kind of political responsibility. See GUASTINI R., *"Commento all'art. 101 Cost"*, quoted, p. 170 footnote n. 13.

[63] *"se si riconosce la inadeguatezza (del resto palese) della dottrina cognitiva dell'interpretazione, questo modo di vedere resta privo di fondamento. Si pone allora il problema di assoggettare anche il potere giurisdizionale, come ogni altro potere dello Stato, a controlli 'esterni'."*, GUASTINI R., *"Commento all'art. 101 Cost"*, quoted, p. 171.

[64] In this sense see BENTHAM J., *"Oeuvres Complet"*, quoted , III book, Ch. XXV (*"Des moyens de publicité"*).

[65] TARUFFO M., *"La motivazione della sentenza civile"*, quoted, p. 407.

[66] *"Dètenteur d'un pouvoir, dans un régime dèmocratique, le juge doit rendre compte de la manière dont il en use par la motivation."*, PERELMAN CH., *"La motivation des décisions de justice, essai de synthèse"*, quoted, p. 422.

[67] Following the above explanation, another step should be made to approached to the democratic idea: namely the emphasis on the external justification inside the *motivation*. See WRÔBLEWSKI J., *"Motivation de la décision judiciaire"*, quoted. Indeed the external justification exercises principally an extraprocedural function: it makes possible to control the discretion held by a judge. See TARUFFO M., *"La motivazione della sentenza civile"*, quoted, pp. 305-306 and 310-311.

[68] The following authors think that there is a deep relationship between the accessibility of the dissenting opinions of judges and democratic systems on one hand and the secrecy of the in Chambers decisional process and autocratic systems on the other hand: DOUGLAS W.D., *"The Dissent; a Safeguard of Democracy"*, quoted;

NADELMANN K.H., *"The Judicial Dissent. Publication v. Secrecy"*, quoted; MORTATI C., *"Considerazioni sul problema dell'introduzione del 'dissent' nelle pronunce della Corte Costituzionale italiana"*, quoted, in particular p. 164.

[69] See WRÒBLEWSKI J., *"Votum separatum dans la theorie et l'ideologie de l'application judiciaire du droit"*, quoted.

[70] LORD WILBERFORCE, *"Intervento"*, in AA.VV., *"La sentenza in Europa (Metodo, tecnica e stile)"*, quoted, p. 361.