



2000



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Strasbourg, 08 June 2000

<cdl\doc\2000\cdl-ju\30-e>

Restricted

CDL-JU (2000) 30

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SEMINAR

ON “CASES OF CONFLICTS OF COMPETENCE BETWEEN
STATE POWERS BEFORE THE CONSTITUTIONAL COURT”

organised by the Venice Commission
in co-operation with the Constitutional Court of Armenia

Yerevan, Armenia, 4-5 October 1999

**The principle of separation of powers
and the experience of
the Constitutional Court of the Republic of Latvia**

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Honourable ladies and gentlemen!

I have the honour of addressing you from this tribune for the second time. Addressing you at the seminar that has already become traditional. Addressing you on the issue that is topical not only here in Armenia but also in our country- Latvia. On the issue, which to my viewpoint is urgent in most post-socialistic states. Therefore allow me to thank the organizers of the seminar both for organization of the seminar and for the efficient choice of the subject of it.

As you already know, the Constitutional Court of Latvia cannot boast of extensive and long-standing experience. However, when looking back to the almost three years of our performance, I may say with certainty that **issues, connected with implementation of the principle of separation of power in the constitutional rights of Latvia, are of great importance and have been repeatedly enlarged upon in the Constitutional Court decisions.**

Of course, it is not possible to name all the episodes of the Constitutional Court cases, which have been related to the principle of separation of power. Therefore I shall try to lay stress on several features characteristic in Latvia, at the same time mentioning some interesting decisions of the Constitutional Court in this sector.

1

Two years ago in this hall I have already spoken about the very first peculiarity. Namely, **Constitution of Latvia is one of the oldest effective European Constitutions** and the very oldest one in the Eastern European states. The Satversme (Constitution) of the Republic of Latvia was adopted on February 15, 1922.

On the one hand, renewal of the old Constitution has created favourable advantages concerning issues connected with separation of power. To my mind, by the process of renewal of the pre-war constitutional procedure, Latvia has managed to avoid bigger or smaller crises of power, experienced by several post-socialistic countries.

On the other hand, during the space of almost fifty years, when the Satversme (Constitution) of the Republic of Latvia was not *de facto* applied and interpreted, the democratic legal thinking had changed and advanced to a considerable extent. And the Constitutional Court of the Republic of Latvia, when interpreting the Constitution has had to keep pace with the above advancement all at once.

Besides, the Constitution of the Republic of Latvia is extremely laconic; therefore by interpreting it with the method of application of grammatical legal norms one can achieve little. It is of importance to make use of all the other methods of interpretation of legal norms, particularly that of the teleological method.

If we for instance take a look at Article 3 of the Constitution of Slovenia or Article 4 of the Croatia Constitution, we can notice that the principle of separation of power has been determined "black on white". The Constitution of the Republic of Latvia does not have an Article on it, however that does not mean that the above principle has not been constitutionally established. Only it is a little bit more difficult to perceive it and to refer to it.

Nevertheless the Constitutional Court has always tried to interpret notions expressed in the Constitution in close connection with contemporary conception on democracy and legal principles of a democratic state. For example, last spring the Constitutional Court reviewed the case on conformity of Regulations passed by the government with several laws. In its Decision the Court referred to the principle of separation of power.

The motivating part of the Decision started like this:

"Article 1 of the Constitution of the Republic of Latvia determines that Latvia is an independent democratic republic. In the democratic state the legislative power is vested in the people and the legislator – the Saeima (Parliament). The executive power – the Cabinet of Ministers – has the right to issue regulations but only in cases envisaged by law, and the above regulations shall not contradict Satversme (Constitution) and other laws. It results from the principles of rule of law and separation of power, that is the basis of existence of any law-based state." (Decision in case No.04-03/98/ "On Conformity of the Cabinet of Ministers 23.April, 1996 Resolution No. 148 "On the Procedure by which the Property is Restituted or its Value is Compensated to the Persons, whose Administrative Deportation from the Territory of the Latvian SSR or from the Part of the Territory of the Latvian SSR that Has Been Incorporated into the RSFSR is Recognized Unfounded" and the Cabinet of Ministers 4 November, 1997 Resolution No. 367 "Amendments to Regulations No.148 of April 23, 1996 "The Procedure by which the Property or its Value is Compensated to Persons, whose Administrative Deportation from the Latvian SSR is Recognized Unfounded" with the Law "On the Determination of the Status of Politically Repressed Persons Suffered during the Communist and Nazi Regimes"").

In the Decision the Constitutional Court established that the disputable Regulations contradicted several laws and declared the passed Regulations null and void from the moment of their adoption. Thus, by interpreting the notion of the democratic republic included in Article 1 of the Satversme (Constitution) of the Republic of Latvia, the Constitutional Court managed to stress the contemporary notion of the democratic, law-based state.

When speaking about the Satversme (Constitution) of the Republic of Latvia I would like to name a constitutional norm, referring to the principle of separation of power that has been discussed at great length. Article 81 of the Satversme (Constitution) determines that " during the time between sessions of the Saeima the Cabinet has the right, if necessary and if not able to be postponed, to issue regulations which have the force of law. Such regulations may not amend the law regarding elections of the Saeima, laws governing the court system and court proceedings, the Budget and rights pertaining to the Budget, as well as laws adopted during the term of the current Saeima. They may not pertain to amnesty, state taxes, customs duties, and loans and they shall cease to be in force unless submitted to the Saeima not later than three days after the next session of the Saeima has been convened."

After renewal of the independence of Latvia and the Satversme (Constitution) taking effect, the above norm has caused a heated debate among the deputies of the Parliament and criticism of the scientists, as many of them consider it to be a deviation from the principle of separation of power. In the twenties Latvian scientists of law acknowledged that "the right vested in the Cabinet of Ministers to issue regulations which have the force of law during the time between sessions of the Saeima is the right uncommon in republics. As to Latvia, the above could be simply explained- at that time the Republic of Latvia did not have many conformable laws, elaborated by legislative institutions of its own (National Council, Constitutional Assembly, the Saeima), but the former Russian laws were in many cases inapplicable". (K.Dišlers. The State institutions of Latvia and their functions. Riga, 1925, pages 120-121)

After the Satversme (Constitution) was renewed in July 1993 the situation was very much the same as in the twenties. However, with time, the will of the Cabinet of Ministers to pass regulations did not decrease, but increased. Besides, high officials openly planned which laws could be "fought" through the Saeima and which to leave for the time between the Saeima sessions. Thus, the norm has not been implemented in accordance with its objective but also contrary to it.

Of great importance was the very first decision of the Constitutional Court declared in May 1997. ("On Conformity of the January 10, 1997 Cabinet of Ministers Regulations No. 23 "Amendments to the Law on Regulating Business Activity in the Energy Sector"- Passed in Compliance with the Procedure Set by Article 81 of the Satversme of the Republic of Latvia- and Conformity of Regulations No.54 by the Cabinet of Ministers of 14 March, 1995 "On Purchase Prices of Electrical Energy Generated in the Republic of Latvia" with the Satversme (Constitution) of the Republic of Latvia and with the Law "On Regulating Business Activity in the Energy Sector", as well as with Other Laws".)

In the fall of 1996 the Saeima (Parliament), when considering the Amendments to the Law " On Regulating Business Activity in the Energy Sector" in its third reading, declined the motion of the Cabinet of Ministers to delete parts 9 and 10 of Article 27 of the above Law. A month and a half later, during the time between the sessions of the Saeima, the Cabinet of Ministers deleted both parts by passing Regulations under the procedure set by Article 81 of the Satversme (Constitution).

As I have already mentioned, the Satversme (Constitution) envisages that regulations may not " amend laws adopted during the term of the current Saeima". One third of the Saeima deputies held that by including in their Regulations (under the procedure set by Article 81 of the Saeima) the norm, which the current Saeima had reviewed and declined, the Cabinet of Ministers had violated the Satversme. A claim was submitted to the Constitutional Court.

The representative of the deputies at the Court session stressed that "interpretation of Article 81 of the Satversme (Constitution) should be based on standards of Article 1 of the Satversme (Constitution) about Latvia as a democratic state, considering the principle of separation of power as the fundamental one and interpreting all the disputable issues on the rights of the Cabinet of Ministers in favour of the Saeima – the main and ruling legislative institution."

The Constitutional Court backed the viewpoint. In the Decision it was concluded that "the concept "laws adopted during the term of the current Saeima" included not only the published text of the law passed by the Saeima, but also motions on perpetuating several standards in the former and still valid wording, that the Saeima had considered and adopted in the third reading of the draft, even though they were not officially disclosed in the published text of the law."

The Constitutional Court stressed that the Saeima, when deciding not to delete parts 9 and 10 of Article 27 of the Law "On Regulating Business Activity in the Energy Sector" as well as when voting for the whole draft, had expressed its will to retain the above parts in the wording in effect. Consequently, the Cabinet of Ministers had no right to amend it under the procedure set by Article 81 of the Satversme (Constitution).

The disputable Regulations were declared null and void from the moment of their adoption.

3

Another peculiarity referring to cases on the principle of separation of power reviewed at the Constitutional Court can be noticed in the Rules of Procedure of the Constitutional Court of the Republic of Latvia. Namely, **the court proceedings do not envisage the so-called "competence arguments"**. As is well known the above arguments are reviewed at the German Federal Constitutional Court.

The draft of the Constitutional Court Law, submitted to the 5th Saeima by the Latvian government, envisaged reviewing "competence arguments" among the Saeima, the State president and the Cabinet of Ministers". The norm was retained during the first and the second readings of the draft. However, the 5th Saeima did not manage to pass the law after its third reading. When preparing the law for submission to the 6th Saeima, the Legal Committee came to the conclusion not to name competence arguments as a separate category of cases.

Why did the legislator decide to refuse from the above proceedings? The answer is quite simple. The majority of the Saeima Legal committee were of the opinion that "competence arguments" shall not be named as a separate category of proceedings, because in cases of competence arguments just like in cases of control on abstract legal norms, the question is about conformity of an act adopted by a constitutional institution with the constitution or a normative act of higher legal force.

When considering the decision with my present experience and knowledge, I would comment it like this.

From the one hand the greatest number of cases reviewed at our court and the theoretically potential cases prove that refusal of competence arguments as a separate category of proceedings does not mean that the above arguments shall not be reviewed at the Constitutional Court. Namely, the Constitutional Court Law envisages that the Constitutional Court shall review cases concerning the compliance of acts of the Saeima, the Chairman of the Saeima, the President of the State, the Cabinet of Ministers and the Prime Minister with the Satversme (Constitution) and other normative acts of higher legal force. Moreover, the Saeima, not less than 20 deputies of the Saeima, the State President and the Cabinet of Ministers have the right of submitting a claim on initiating a case at the Constitutional Court.

Thus, if any of the above institutions has "broken into" the sphere of authority of another institution, the respective act may be contested at the Constitutional Court. Besides, not only theoretical reasons but also the experience of the Constitutional Court have proved that the model works. Thus, there are no separate proceedings on competence arguments at the Constitutional Court but the competence arguments are reviewed at the Constitutional Court.

It should be stressed that in difference from the German Federal Constitutional Court, the Constitutional Court of Latvia as well as our neighbours in Lithuania, colleagues in Armenia and some other Constitutional Courts review cases not only on compliance of laws with the Constitution but also on conformity of government acts with the Constitution and other laws. In this case, competence arguments as a separate category of proceedings lose their importance. Besides, not only the legislator of Latvia but also legislators of Lithuania, Armenia and other states have come to the same conclusion.

On the other hand, there are several theoretical nuances that the Constitutional Court Law of Latvia has neglected.

Namely, one can question an activity (act) i.e. a case when an institution surpasses (transgresses) its rights. At the same time, one cannot appeal against inactivity, i.e. the case when an institution or an official does not act. However, there is a possibility that the institution or the official who is dissatisfied with inactivity of the other institution or official expresses its viewpoint. And the answer – this or that act- may be submitted to the Constitutional Court. However, the considerations are purely theoretical, as there has been no case when a problem of inactivity of any institution or official has become topical because of incorrect interpretation of authority.

In its turn, cases when an institution is of the opinion that another institution exceeds its authority are quite numerous. Among those is the case, which was reviewed at the Court session on September 20, 1999. As the Decision of the case has not been yet reached, I shall express only the essence of the problem.

In January 1999, the Saeima formed an Investigation Commission to clarify several issues connected with the sector of telecommunications. When evaluating conformity of the activities of the authorized representatives of the Telecommunications Tariff Board with the Law "On Telecommunications", the Commission established several deviations from the above Law. On the initiative of the Investigation Commission, the Saeima adopted the decision, among other issues obligating the Cabinet of Ministers to dismiss the members of the Tariff Board and in a month to form a new Board, at the same time charging the new Board with the task of revising the decisions on tariffs adopted by the previous Board.

The Cabinet of Ministers completed the task, at the same time submitting a claim to the Constitutional Court, pointing out that the Saeima with the above decision has violated the Satversme (Constitution) and a number of other laws. In its application the government refers to the principle of separation of power and stresses that the Cabinet of Ministers is responsible for its activity before the Saeima, and the basis of the responsibility lies in equal relations between the Parliament and the government. They hold that the Satversme (Constitution) does not bestow upon the Saeima special privileges of general supervision. The government, when realizing their competence shall be independent and autonomous.

As Article 9 of the Law "On Telecommunications" determines that "the Telecommunications Tariff Board in the body of seven independent experts is formed by the

government of the Republic of Latvia on the advice of the Minister of Communications for the term of 5 years, the Cabinet of Ministers holds that the authority of the government to form the Telecommunications Tariff Board has been clearly determined in the Law.

The Saeima in its turn is of the opinion that by implementing the parliamentary function of control under the constitutional procedure, it had had the right of passing a political decision, which contained the above assignment to the government.

As to the viewpoint of the Constitutional Court, I hope to deal with it at the seminar, as at that time the Decision will be declared.

4

And there is one more aspect, which has been extremely topical in the performance of the Constitutional Court and perhaps could interest other constitutional Courts as well. That is – separation of power between the first two powers and the third one. Namely, issue on the authority of the judicial power and in this case – on the authority of the Constitutional Court.

In the practice of the Constitutional Court there have been two cases when the authority of the Constitutional Court to review a certain act has been heatedly discussed.

The first one referred to a legal act, which has been adopted before renewal of the Satversme (Constitution) of the Republic of Latvia on the whole, namely – a certified interpretation by two ministries. At the time, when this document was adopted, only 4 Articles of the Satversme (Constitution) were effective, the institution of the Cabinet of Ministers was not renewed –its activities were carried out by the Council of Ministers. And all the ministries were subordinated to it.

The Constitutional Court Law envisages that the Constitutional Court reviews cases on ” compliance of normative acts issued by institutions or officials subordinated to the Cabinet of Ministers with the Constitution, other laws and regulations of the Cabinet of Ministers.”

At the Court session was expressed a plea of closing proceedings as the Constitutional Court was authorized to review only the acts issued by ”institutions subordinated to the Cabinet of Ministers” and not acts issued by ”institutions subordinated to the Council of Ministers”. The Constitutional Court, by using teleological and systemic method of interpretation and on the basis of the principle of unity and succession of the legal system, declared that Article 16 of the Constitutional Court Law shall not be interpreted narrowly and declined the plea to close the proceedings. (The Decision was declared when reviewing the case No. 04-05/97 ”On Conformity of the Joint Interpretation by the Ministry of Finance – No.047/475 Certified on April 30, 1993- and by the Ministry of Economic reforms – No.34-1.1- 187, Certified on May 4, 1993 – ”On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy”” and Interpretation by the Ministry of Economy No.3-31.1-231 of December 28, 1993 ”On the Procedure of Application of the Joint Interpretation by the Ministry of Finance and the Ministry of Economic Reforms ”On Revaluation of Fixed Assets by Enterprise and Entrepreneur Company Accountancy ”” with the Law ” On the Procedure of Privatisation of Objects (Enterprises) of the State and Municipal Property” as well as with Other Laws.””)

The second occasion was especially interesting and connected with the extremely scandalous case, the so-called "Case on the Real Estate Agency".

There was a scandal even before the case was submitted to the Constitutional Court. The Prosecutor's Office detected that the state stock company "The Real Estate Agency" had unlawfully granted more than 180 apartments in the state-owned houses. The apartments had been assigned on the bases of the Statute certified by the Board. The Prosecutor's Office were of the viewpoint that the Statute contradicted several laws and submitted a claim to the Constitutional Court.

The Real Estate Agency, in its turn, was convinced that the Constitutional Court did not have the authority to review the case because the Agency was the state stock company under the subordination of the Ministry of Finance and was not "an institution subordinated to the Cabinet of Ministers".

Just before the Court session there was an absurd situation: the Agency did not demonstrate that the disputable Statute was in compliance with the laws, but tried to prove that the Constitutional Court was not authorized to evaluate conformity of the Statute instead.

In fact, through the prism of competence of the Constitutional Court a very painful problem on wilful activities of separate state stock companies was touched upon. It should be noted that the above state stock company "The Real Estate Agency" has been established by the Cabinet of Ministers as the legal successor of rights and liabilities of the liquidated state institution "The State Property Fund". On the one hand the Agency continued acting as a state institution, on the other – tried making use of the privileges of the status of the stock company. Unfortunately, more for the sake of their employees and not for the sake of the state or society. Many of the above 180 apartments were granted to the employees of the Agency or their relatives, several to "important persons" from among the financiers and politicians. Pressure exerted on the Constitutional Court was unmistakable.

Yet, the Constitutional Court did not give in. The principle of separation of power and the role of the judicial power in the democratic society were stressed in the Decision. The Constitutional Court concluded: "One of the fundamental principles of a democratic state is the principle of separation of power. It follows that there exists control of the judicial power over the legislative and executive power. No legal norm or activity of the executive power shall remain out of control of the judicial power, if it endangers interests of an individual.

Courts, incorporated into the legal system of general jurisdiction, are authorized to review civil liability controversies, criminal cases as well as claims arising from administratively legal relations. However, in compliance with the law, the above courts are not authorized to declare acts of normative nature null and void. Therefore in 1996 in Latvia was established the court, incorporated into the legal system of jurisdiction – the Constitutional Court, which in compliance with Article 85 of the Satversme (Constitution) is authorized to review cases regarding compliance of laws and other acts with the Satversme (Constitution) and other laws.

To state whether – in compliance with Item 4, Article 16 of the Constitutional Court Law – the claim in this case is within the competence of the Constitutional Court, it shall first of all be ascertained if the Agency is "an institution subordinated to the Cabinet of

Ministers” and secondly – whether the Regulations is a normative act.” (The Decision in case No.04-03/99/ ”On Conformity of the State Stock Company – the Real Estate Agency Regulations ”On the Procedure by which Free Apartments in Dwelling Houses under the Management of the Real Estate Agency shall be Rented” with Articles 2, 10 and 11 of the Law ”On Housing Support Granted by the State and Local Governments,” Article 40 of the Law ”On the Rent of Dwelling Space” and Item 4 of the Transitional Provisions of the Law ”On the Privatisation of State and Local Governments Apartment Houses”.”.)

Evaluating the legal basis and objectives of the establishment of the Agency, at the same time retracing the historical development of the administrative real estate institution to the moment of foundation of the Agency, the Constitutional Court concluded: ”The Agency has been established by the will of the state as an institution entrusted with the function of the subject of the public law, i.e. management of the state real estate. Even though it is within the competence of the Agency to accomplish activities of civil character and it has been established as an enterprise, it does not mean that the Agency is merely the subject of private rights.” (The same Decision.)

To establish whether the Agency that is a stock company under the authority of Ministry of Finance is ”an institution subordinated to the Cabinet of Ministers ” in the notion of Item 4, Article 16 of the Constitutional Court Law, the Constitutional Court adhered to Article 58 of the Satversme (Constitution) determining that ”institutions of state administration are subordinated to the Cabinet of Ministers”. After analysing the verbatim report of the Satversme Assembly as well as the Law of 1925 ”The Structure of the Cabinet of Ministers ” and the Law ”The Structure of the Ministries” of 1928, the Constitutional Court established that ” the will of the legislator has been to unite the whole administrative system, not dividing its institutions into degrees or levels of subordination. The Constitutional court stressed that ” the present structure of the state administrative institutional system has changed, separating the institutions, which are subordinated, supervised and under the authority of ministries... Nevertheless, the sense of Article 58 of the Satversme (Constitution) has remained unchanged – to unite all the state institutions, performing functions of public power, into one common system under the authority of the Cabinet of Ministers.”

When acquainting itself with the materials on elaboration and adoption of the Constitutional Court Law, the Constitutional Court concluded that ”the will of the legislator by establishing the Constitutional Court in the Republic of Latvia and envisaging its authority in determining compliance and legality of normative acts, has not been to set up constitutional control only over acts, passed by the institutions under subordination or supervision of the Cabinet of Ministers, leaving normative acts, adopted under authority of it without any legal control.”

Thus, by evaluating the above legal norms all in all and by taking into consideration the principle of separation of power, the Constitutional Court declared that ”the Agency is subordinated to the Cabinet of Ministers and its activities, if connected with passing of normative acts, is within the competence of the Constitutional Court.”

Evaluating the legal essence of the disputable Regulations the Constitutional Court decided that ” Regulations meet all the requirements of features of an external normative act. Its main objective was to determine the scope of persons to whom it was possible to grant the state apartments under management of the Agency. It did not envisage that only the

employees of the Agency had the possibility of receiving an apartment. Regulations contained binding preconditions for those who wanted to obtain rental rights and it could be used repeatedly. Application of the Regulations has caused legal effects.”

The Constitutional Court stressed : ” not everybody may pass external legal norms: only subjects of public power, authorised to do so, are allowed to adopt them. The first part of Article 14 of the Law ”The Structure of the Cabinet of Ministers” establishes that the Cabinet of Ministers may issue normative acts – regulations. In compliance with this Law, determining the fundamental issues of the state administration, other institutions of the state administration, also those subordinated to ministries are not authorised to pass external normative acts. The Statute of the Agency does not envisage such rights either...

Thus, by passing Regulations, containing external legal norms, the Agency has violated the competence, established within its Statute and has acted without regard for authority. Regulations, passed in this manner, are unlawful and inapplicable.

The Constitutional Court established that the disputable Regulations were not in compliance also with Articles 2, 10 and 11 of the Law ” On Housing Support Granted by the State and Local Government”, Article 40 of the Law ”On Rent of the Dwelling Space”, and Item 4 of the Transitional Provisions of the Law ” On the Privatisation of State and Local Governments Apartment Houses”. The Constitutional Court declared the Regulations null and void from the moment of its adoption.

The Decision resulted in double effects.

On the one hand, the Director General of the Agency was dismissed and the Prosecutor’s Office submitted the claim to the Court, petitioning to nullify property rights on unlawfully granted apartments to persons who had aided and abetted the unlawful activity, i.e. the employees of the Agency – as should happen in any law-based state.

On the other hand there were activities, which should not happen in a law-based state. Several very high officials announced that the Constitutional Court should be liquidated. It turned out that a really independent court, which reached its decisions on the basis of the law, without taking into consideration ”hints” of other powers, inconvenienced the activities of some high officials. The conflict was solved due to the activities of the so-called fourth power – mass media that actively defended the Constitutional Court, especially after I informed them that before reaching the Decision the Constitutional Court had experienced ”pressure”. Gradually the above officials started ”backsliding” and even announced that they had not wanted to liquidate the Constitutional Court but had just wanted to improve proceedings of the Court.

Summing up the above, I may express the viewpoint that issues connected with the implementation of the principle of separation of power are really topical in Latvia. As could be seen from the given examples on the experience of the Constitutional Court, the issues are topical both theoretically and in practice.

It is painful to speak about the attempts of liquidating the Constitutional Court. It does no credit to Latvia. However, I am satisfied that our state has got over the unpleasant event and I do hope nothing alike happens any more. Understanding on the real notion of the

separation of power and its consistent implementation cannot be achieved in a day. It develops and strengthens together with other principles of a democratic state, and together with the development of the society.

The Constitutional Court of Latvia alone is not able to ensure the consistent existence of the above principle in the state. However, the Court with the conclusions expressed in its decisions and its unyielding attitude to unlawful influence is trying to make a contribution in implementation and interpretation of the principle of separation of power.

Thank you for your attention!

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