



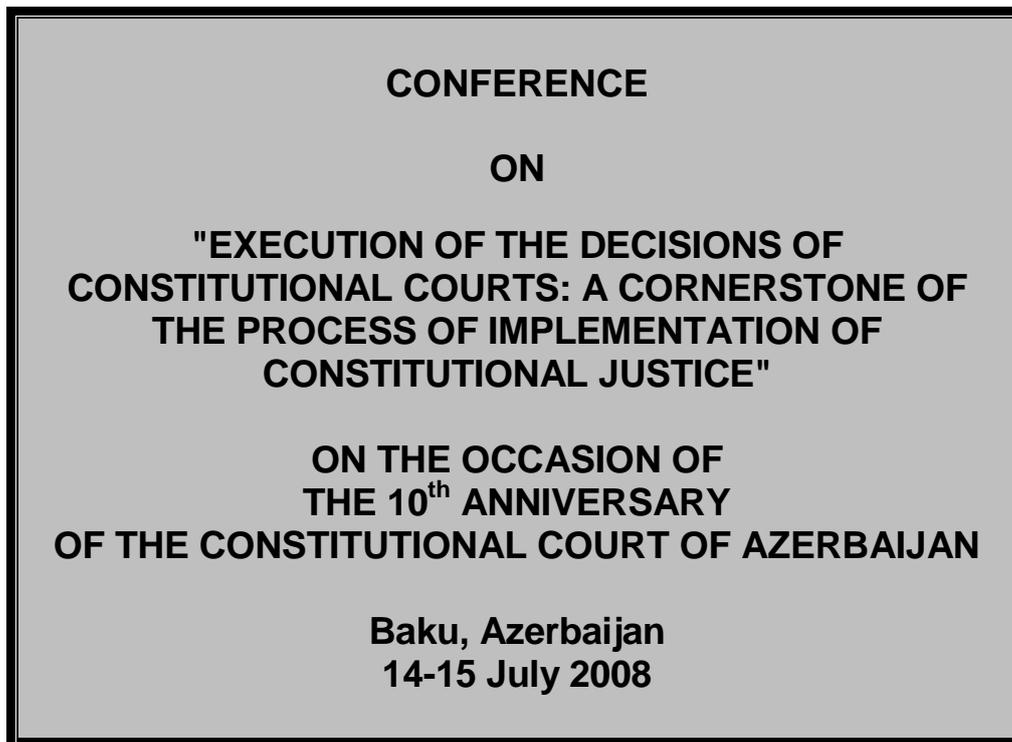
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REPORT

**"AUTHORITY OF THE CONSTITUTIONAL COURT
AS THE PRECONDITION OF EXECUTION OF THE DECISIONS"**

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Authority of the Constitutional Court as the Preconditions of Execution of the Decisions

[1] We always talk about the Constitutional Court as a safeguard of democracy and the rule of law. The main task of the Court, considering the principle of separation of powers, is to adjudicate – to review a case and to make a decision. Nevertheless, the result is achieved when the decision of the Court is implemented. And this is not the task of the Court.

In a truly democratic state where trust between the authorities does exist, decisions of the Constitutional Court are respected, not only as to their interpretation but also by executing them efficiently and without delay. Good and qualitative execution is essential not only to secure and improve protection of human rights, it favours good governance and enhances respect of the rule of law. Implementation of decisions to great extent depends on a Court's image in society, its authority and respect demonstrated by other institutions and authorities. As more society knows about the Court, as more it follows the Court's decisions and will not tolerate the inactivity by the executive in the implementation of decisions. And by society I mean not only individuals whose rights have been violated. Our experience demonstrates that nongovernmental organizations and the opposition have always played a very active role.

[2] Observing the principle of the separation of powers, the Court does not correct mistakes made by the legislator. The Court identifies compliance or non-compliance of a legal provision with the Constitution or other provisions of a higher force. Accordingly, if a provision has been announced unconstitutional or non-compliant with a provision of a higher force, the Court obligates to the legislator to correct the mistake.

The Constitutional Court of the Republic of Latvia does not execute its decisions and it is outside the competence of the Constitutional Court to supervise implementation of its decisions. The Constitutional Court Law does not provide *expresis verbis* for the procedure how decisions should be executed. But it does not mean that the Constitutional Court can not and does not impact the implementation of decisions. Since the main objective of all authorities is to secure a democratic State governed by the rule of law, it is even advisable to have a good cooperation and communication with the executive and legislative branches. The constitutional principle of separation of powers does not exclude inter-cooperation of the branches. The authorities just should communicate through appropriate means. Mutual understanding and respect is important.

In the presentation I would like to outline two important aspects of the execution of decision. First, I would like to talk about the Court's role and impact on the execution. And then, since the Court does not implement its decision, I would like to describe the problems and examples related to the very process of the implementation, as well as describe persons and institutions involved in this process.

Indirect Impact of the Court on the Form and Term of Execution of Judgment

[3] As it has been recognized in the "Strategy of the Activities of the Ministry of Justice for 2007 – 2009", one of the most important questions of the constitutional policy is a prompt and adequate implementation of decisions of the Constitutional Court. The Strategy states that it is particularly important in cases when the Constitutional Court has pointed out that it is necessary to amend the regulation¹, or when the announcement of invalidity of a contested provision has

¹ Judgment in the case No. 2002-15-01 "On the Compliance of Item 16.1 of the Transitional Provisions of the Law "On State Pensions" in the Part "from January 1, 1991" with Articles 1, 91 and 109 of the Republic of Latvia Satversme", 23.12.2002, and Judgment in the case No. 2005-13-0106 "On the Compliance of Section 5 (Items 5 and 6) of the Saeima (Parliament) Election Law and Section 9 (Items 5 and 6 of the first Paragraph) of the City Dome,

been delayed so that the legislator would be able to make the necessary amendments (corrections)², or when it is necessary to draft a new regulation, which would correspond to the information included in the decision of the Constitutional Court.

There are two ways how the court indirectly impacts the way, the term and sometimes even the procedure of the implementation of a decision.

[4] In separate cases, when the provision has been recognized as unconstitutional, it is sufficient just to delete the provision. Usually in such cases no problems arise regarding execution of the judgment.

But there are cases in which, when the provision is just deleted, the situation, without the particular provision, deteriorates for an individual even more.

According to Article 32(3) of the Constitutional Court Law, any legal norm (or act) which the Constitutional Court has determined as incompatible with the legal norm of a higher force shall be considered invalid as of the date of publishing a judgment of the Constitutional Court, unless the Constitutional Court has provided otherwise. Thus the Constitutional Court Law authorizes the Court to decide on the date when the provision shall become invalid. In any case, if the Constitutional Court has declared that a norm (act) does not comply with a legal norm of a higher force, the Court shall determine the date, from which the contested provision (or act) is no longer in effect, according to Article 31(11) of the Constitutional Court Law.

Accordingly, when the Court realizes that an immediate deletion of the provision would deteriorate the situation, considering the fact that the legislator requires time for improving the normative regulation, the Court delays the declaration of invalidity³. The Court provides the legislator with the period of six months to draft a new improved regulation.

In such situations the Court often indicates how the provision, which has been declared as unconstitutional but invalid only from the date in future, should be applied – usually according to the Constitution and taking into account the interpretation provided in the decision⁴.

Let me quote the Court in the case where it declared as unconstitutional the provision of the Law "On Personal Income Tax", according to which, when establishing the amount of the personal income tax to be paid, as evidence shall be recognized only the documents submitted to the State Revenue Service (SRS) before the date established by the SRS. The documents submitted after the date, even in the Court, shall not be recognized as evidence.

"By determining the moment when the contested provision becomes invalid, the Constitutional Court takes into account the fact that the legislator requests time for improving the normative regulation since the contested provision ensured achievement of the legitimate objective, namely, efficient tax administration. If the contested provision is recognized as invalid prior to legislator having made a more lenient regulation, achievement of the specific legitimate objective can be endangered. [...]. Such situation, which would evolve if there would be no

District Council and Rural District Council Election Law with Article 1, 9, 91 and 101 of the Republic of Latvia Satversme (Constitution) as well as with Article 25 and 26 of the International Covenant on Civil and Political Rights", 15.06.2006.

² Judgment in the case No. 2003-08-01 "On the Compliance of Article 96 (the first sentence of the second part) of the Criminal Procedure Law of Latvia with Articles 89 and 92 of the Republic of Latvia Satversme (Constitution)", 06.10.2003.

³ Judgment in case No. 2002-04-0306 "On the Compliance of Items 59.1.6, 66 and 68 of the "Regulations on the Internal Order of the Investigatory Prisons" with Articles 89, 95 and 111 of the Satversme", 22.10.2002, Para 3 of the Concluding Part.

⁴ Judgment in the case No. 2006-28-01 "On the Compliance of the Second Sentence of the Fourth Part of Section 22 of the Law "On Personal Income Tax" with Section 92 of the Satversme of the Republic of Latvia (Constitution)", 11.04.2007.

regulation regarding this matter, would be even less compliant with the Constitution than the current situation. The Constitutional Court has held several times [...]: in such situation it is admissible that the norm that is in conflict with the Constitution remains valid for a certain period of time so that the Legislator would have an opportunity to solve the situation, wherein both, the interest of the society and of individual tax payers are observed.

Simultaneously, the Constitutional Court takes into account the fact that the administrative courts in each specific case have an option to adjudicate the case by applying directly the norms of the Constitution. However, in order not to violate the basic rights of persons established in the Constitution by decisions of the tax administration while the contested provision is still effective, the contested provision during this period is to be applied *inter alia* observing the instructions provided in this judgment of the Constitutional Court.”⁵

[5] Sometimes the Court in its decision indicates how problems could be resolved in the most effective way, what should be taken into account when drafting amended provisions.

In the case No. 2004-14-01, the prohibition established by the Immigration Law to appeal against a decision of the Minister of the Interior, by which a person was included into the so-called “Black List”, was contested. In the Black List there are included persons for whom entry into the Republic of Latvia is prohibited. Since the objective of the contested provision is to protect the State and public security, the Parliament maintained that the restriction is proportionate. The Constitutional Court held that in order to reach the objective it was possible to use the means, which limited the fundamental rights at a lesser extent. Therefore the restriction can not be considered as proportionate since violates the right of a person to a fair trial.

By determining the date when the contested provision becomes invalid, the Constitutional Court took into account the fact that the legitimate objective of the provision is to protect State security interests. Therefore a comparatively long period shall be at the disposal of the legislator for it to be able to determine a special procedure for the Court to review cases where State security interests are involved. The Court pointed out that the procedure shall both protect the security interests of the State and ensure the right of a person to a fair trial.

In its decision, the Court drew attention to the Chapter IX “Protection of Information” of the Canadian Immigration and Refugee Protection Act⁶ providing an effective judicial control, which ensures both, the protection of legitimate security interests and a substantial level of judicial protection. Although with some delay, but the legislator developed a procedure considering the Court’s suggestions.

[6] The Constitutional Court Law does not *expressis verbis* confer the Constitutional Court the authority to renew the regulation, which existed before adoption of a provision declared as invalid. However Article 31(12) of the Constitutional Court Law provides that other decisions made by the Constitutional Court may be included in the judgment. Accordingly, the Constitutional Court is authorized to indicate what should be done in order to avoid new violations of the fundamental rights after the declaration of invalidity of the provision.

Thus, if necessary and possible, the Constitutional Court in the Substantive part of its decision may hold that the provision (or act), which has been in force before the contested provision and now is declared as invalid, remains effective.

Responsibility for Execution of Decisions and Problems thereof

⁵ Judgment in the case No. 2006-28-01 “On the Compliance of the Second Sentence of the Fourth Part of Section 22 of the Law “On Personal Income Tax” with Section 92 of the Satversme of the Republic of Latvia (Constitution)”, 11.04.2007, para 22.

⁶ 2001, c.27, <http://laws.justice.gc.ca/en/l-2.5/index.html>, viewed on October 5, 2004

[7] When we talk about the responsibility to implement (execute) a decision of the Constitutional Court, usually we talk about the executive's responsibility. The Court has recently directly indicated in its decision that it is the duty of the Cabinet of Ministers to ensure the binding force of decision by the Constitutional Court.

When the Constitutional Court reviews cases regarding binding regulations of a local government, according to Section 62(9) of the Law On Local Governments, the chairperson of a territorial local government council shall be responsible for the execution of the decision, since the local government council could be regarded as one of the parties in the case.

At the same time the Ministry of Regional Development and Local Government also has some responsibility, since the Law On Local Governments provides that although local governments, within the scope of their competence and the law, shall act independently, the activities of local governments [...] shall be monitored by the Ministry of Regional Development and Local Government, in order to avoid that its chairperson fail to fulfill or violate the provisions of the Constitution, laws and Cabinet regulations, or also fail to execute court judgments.

[8] There still is a problematic case where municipalities involved in the matter have not executed the decision of the Constitutional Court. The Court held in its decision that the municipalities had no rights to preserve into its ownership residential houses and apartments in order to secure implementation of local government functions. Thus the local governments shall offer them for privatization according to the general order. The Court held that the provision, according to which local governments had the right to preserve into its ownership some apartments, violated the principle of equality and the principle of legal certainty. The Court indicates in its decision that a profound analysis of the process of passing the contested provision in the Parliament reveals that, despite the objections by several State institutions, the contested provision in its essence has mainly served as the means for some local governments to justify their former and current illegal activities in the field of privatization, *expressis verbis* referring to implementation of local government functions and care for needy residents. Consequently, the duty of the local governments considering the Constitutional Court decision was to repeal all the illegal decisions prohibiting privatization. They have failed to do this.

Creditable was the action of the opposition in the Parliament. The opposition informed the Minister of Regional Development and Local Government that the municipalities failed and deliberately delayed execution of the Constitutional Court decision. After having not received a satisfying answer, the opposition officially addressed the Prime Minister complaining about the Minister having failed to control the implementation of the Constitutional Court decision, reminding that the failure to execute court decision is regarded as a serious violation and because of the social risk Article 296 of the Criminal Law provides the applicable sentence – a fine not exceeding sixty times the minimums monthly wage.

[9] Another problem I would like to mention is execution of the decision of the Constitutional Court in the case about the long-service pensions for military persons.

The Constitutional Court established in the case that the provisions that amended the calculation of long-term pensions of militaries violated the principle of equal treatment and the principle of legal certainty. Before the amendments were introduced, the basic wage and perquisites were taken into consideration when calculating a pension. However, according to the amendments, no perquisites shall be taken into consideration when calculating the long-service pension.

The Court delayed the declaration of invalidity considering that it would effect the budget and the legislator requires time for improving the normative regulation. As far as it concerns the militaries whose rights have been violated by the contested provisions, the Court held that the

Law on Long-Service Pensions for Military Persons should be applied, observing such wording of the Law, which was effective before introducing of the contested amendments.

In the beginning of this year (which is the year after the decision), the Court received the letter of the retired militaries complaining about the inaction of the Ministry of Defence – the Minister issued the order to execute the decision of the Constitutional Court a month after the Court's decision, but till that time the judgment had not been implemented (pensions had not been recalculated and paid). Although it does not fall within the responsibility of the Court to supervise implementation of its decisions, the Court informed the Ministry of Defence about the letter and requested information about the measures taken. After a period of more than a year after the decision was taken we were informed that the ministry had made a list of persons whose pensions needed to be recalculated, had drafted the amendment of the Law and established the date when the amendment would come into force, after which the recalculation would be completed and pensions paid immediately. The amendment came into force on 19th of April, 2008. Unfortunately, there is no information at my disposition whether the immediate payment has been finished. I would like to believe that it has, since my idea is that the execution to a great extent depends on the respect for the Constitutional Court.

[10] I would like to outline one more problem related to the case where the compliance of an international treaty was contested. In this case, unlike other cases, a problem of implementation of the decision was approached immediately after initiating the case.

Two days after the Prime Minister of the Republic of Latvia and the Chairman of the Government of the Russian Federation signed the Republic of Latvia and the Russian Federation Treaty on the State Border of Latvia and Russia (the Border Treaty), twenty-one members of the Parliament submitted an application contesting the Border Treaty. A case was initiated. At the same time, the Parliament started the procedure of ratifying the Border Treaty by passing the Law "On the Republic of Latvia and the Russian Federation Treaty on State Border of Latvia and Russia".

The Twenty-one members of the Parliament asked the Court to apply the provisional remedy – to suspend the process of ratification in the Parliament in order to avoid the situation when the implementation of the decision of the Constitutional Court in the case (if the Court declares the Border Treaty as non-compatible with the Constitution) would be impossible.

According to the Vienna Convention on the Law of Treaties of May 23, 1969, in a case of treaties fixing a territorial boundary, unilateral withdrawal is impossible. In order to terminate international obligations, the consent of the Russian Federation would be needed. According to the opinion of the Twenty-one members of the Parliament, the execution of a decision of the Constitutional Court can not depend on other State's consent.

The Court agreed with this statement, but it did not suspend the procedure in the Parliament. In this particular case, implementation of the decision will not be problematic even if the Law "On the Republic of Latvia and the Russian Federation Treaty on State Border of Latvia and Russia" is passed, since the Border Treaty, according to the Law On International Agreements of the Republic of Latvia comes into the force only after exchanging of ratifications (done by the President of the State or the Minister of Foreign Affairs).

The Court held that, observing the principle of separation of powers, the Court has no rights to suspend the procedure of passing a law in the Parliament.

At the same time I would like to point out that in some cases the Court has exercised its rights to apply provisional remedy to avoid the situation when the implementation of decision is hampered.

Thus the Court has recently decided to suspend execution of the decision of the Administrative Court in order to prevent substantial harm to the applicant⁷. In this decision, the Court established that suspension of other courts decisions is an exceptional remedy and can be applied only for reaching relevant objectives.

[11] For instance, the Constitutional Court on November 21, 2005 reviewed⁸ the provision establishing that convicted person for his work shall receive wage at the amount of 40% of it. The provision was contested because the applicant alleged that it violates the principle of equal attitude, as well as the right enshrined in the Constitution to receive not less than the minimum wage established by the State. The Court ruled the provision as unconstitutional, because the Cabinet of Ministers had been authorized to determine the procedure of payment of wage but not the minimum amount of a the wage. Since the due procedure has not been followed, the provision was regarded as invalid.

Consequently, the Ministry of Justice prepared the Informative Report where it found that in order to execute the decision of the Constitutional Court 644 891 lats (approximately one million euros) were necessary so that there could be two possible solutions of the problem. The first – to get an additional funding from the Ministry of Finances. The second – to deduct 50% of the wage of the convicted persons. Since the Ministry of Justice was in favour of the second proposal, the regulation was drafted and passed on the bases of it.

The new provision providing for wage deduction (50%) was contested in the Constitutional Court. On June 14, 2007 the Court recognized the restriction as unconstitutional because it violates the principle of equality.

Following the decision, the Ministry of Justice prepared a new Informative Report where it established that it is impossible to determine wage deductions in a way to avoid violation of the principle of equality. As a result, the contested provision was deleted.

The situation described demonstrates that the reaction of the executive to the decision of the Constitutional Court has been immediate. It seems like the intend and the will was good as well. The fact why the same issue returns in the Constitutional Court more than once should be analyzed by the executive power, not the Court.

Execution of Judgments – New Regulations of the Cabinet of Ministers

[12] Recently there have been changes introduced in the field of execution of decisions of the Constitutional Court.

Already in the Draft Strategy of the Activities of the Ministry of Justice for 2007 – 2009, in 2006, it was stated that the Ministry of Justice would be the most appropriate institution to coordinate the prompt and adequate implementation of decisions of the Constitutional Court.

In the Constitutional Court decision No.2007-12-039 the Court directly pointed out: “Constitutional Court draws attention of the Cabinet of Ministers to [...] the duty to ensure the binding force of judgment by the Constitutional Court”.

⁷ Decision of the Constitutional Court of the Republic of Latvia of February 20, 2008 to initiate the case.

⁸ Judgment in the case no. 2005-03-0306 “on the compliance of the cabinet of ministers april 22, 2004 regulations no. 417 “amendments to the cabinet of ministers february 19, 2002 regulations no. 74 “the payment procedure for the labour of inmates at the institutions of imprisonment” with articles 91 and 107 of the republic of latvia satversme and article 14 of the european convention for the protection of human rights and fundamental freedoms”, 21.11.2005.

⁹ Judgment in the case No.2007-12-03 “On Compliance of the Part of Ādaži Land Use Plan Providing for Construction in the Flooding Area of The Big Baltezers Lake with Article 115 of the Satversme (Constitution) of the Republic of Latvia”, 21.12.2007.

So in the beginning of this year the Ministry of Justice developed the “Concept of Representation of the Cabinet of Ministers in the Constitutional Court”. On May 26, 2008 the Regulation of the Cabinet of Ministers No. 368 “Procedure of Representation of the Cabinet of Ministers in the Constitutional Court” was passed, which entered into force on June 20, 2008. Regulations of the Ministry of Justice was amended, providing that one of the tasks of the Ministry is to coordinate execution of decisions of the Constitutional Court¹⁰.

The Regulation of the Cabinet of Ministers No. 368 determines the procedure for execution of decisions of the Constitutional Court. According to the Regulation, the representative of the Cabinet of Ministers – official of the Ministry of Justice – shall be appointed. The representative shall coordinate execution of decisions, prepare informative report on execution of decisions, collaborate with the Parliament, carry out analysis of decisions, prepare a review on results of execution of decisions of the Constitutional Court once in a year.

[13] The Constitutional Court, observing the principle of separation of powers, is not able to impact the term, in which a decision would be executed and whether instructions of the Court would be taken into consideration.

As I have already mentioned before, it is even advisable to have a good cooperation and communication with the executive and legislative branches. Separate Branches may not always agree on matters of mutual interest, but each should strive to do so by means of respectful exchange of insights and ideas, to know and appreciate the position of the others.

There is no doubt that an important role in execution of decisions is played by the image of the Court. It generally determines whether the society would keep up with the decisions by thus preventing their non-implementation. By showing respect to the Court and the judicial power, the executor of the decision shall also respect the viewpoint of the Court. However, if the legislator is not willing to respect the viewpoint of the Court, there are no measures at the disposition of the Constitutional Court, by means of which it could impact the legislator.

¹⁰ Regulation of the Cabinet of Ministers No. 243 “Regulations of the Ministry of Justice”, 29.04.2003, Section 15.4.