



Strasbourg, 3 December 2010

CDL-JU(2010)024

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

in co-operation with the  
**Constitutional Court of the Republic of Tajikistan,**  
**«The Deutsche Gesellschaft für Technische Zusammenarbeit (GTZ)»**  
and  
**The Open Society Institute – Assistance foundation in Tajikistan**

**INTERNATIONAL SCIENTIFIC AND PRACTICAL  
CONFERENCE**

**ON**

**"CONSTITUTIONAL CONTROL BODIES  
IN THE INTEGRATION OF LEGAL SYSTEMS:  
THE INTERNATIONAL EXPERIENCE AND PRACTICE  
IN TAJIKISTAN"**

**4-5.11.2010, DUSHANBE, TAJIKISTAN**

**REPORT**

**“THE CONSTITUTIONAL COURT AS GUARANTOR  
OF DEMOCRACY, RULE OF LAW AND  
SEPARATION OF POWERS”**

by

**Mr Aivars ENDZINS**

**(Professor, School of Business Administration Turiba,  
Former President of the Constitutional Court of Latvia,  
Member of the Venice Commission)**

Ladies and gentlemen !

Please allow me first of all to thank the organizers of the event for the invitation to be among the members of this very important international scientific and practical conference.

I would like to take this opportunity to congratulate the Chairman of the Constitutional Court of the Republic of Tajikistan Mr. Mahkam Mahmudov, judges and staff of the court on this memorable event –15-year jubilee . I want to wish our Tajikistan colleagues strength and persistence in deepening the rule of law.

During the twenty years period of the performance of the Venice Commission it has contributed much to find out the total European and World heritage of the legal sector, as well as to help in putting common for Europe legal values into the legal systems of separate states. One of the cornerstones of the democratic law-governed state – the principle of separation of power and closely connected with it the principle of rule of law also belong to the European constitutional heritage.

Our common constitutional heritage and understanding of a democratic law-governed state has been formed on the above conclusions of the classics of the age of Enlightenment. The above principles can be found in every contemporary constitution either formulated *expressis verbis* for example –Article 10 of the Constitution Republic of Poland, Article 2 of the Constitution Republic of Portugal, Article 10 of the Constitution of the Russian Federation, Article 9 of the Constitution of the Republic of (Tadjikistan) or deduced from the constitutional norms.

The necessity to ensure strong, independent and able to function judicial power follows from both – the fundamental principles of a law-based state and the human right to a fair court. I agree with the former President of the European Commission of Human Rights prof. Stefan Trechsel that “ the independence of judiciary is a cornerstone, not only of respect for human rights, but also of the rule of law. ...We are faced here with a fundamental principle of the organisation of a State, a basic “stuff that constitutions are made of”. It is neither the legislative nor executive branch that ultimately prevents a descent into totalitarianism. An independent judiciary sustains the rule of law without pursuing the aims of particular political party, and does not hesitate to decide in favour of the weak.”<sup>1</sup>

If it is inscribed in the Constitution of state that the state is a democratic law-based state, then just this one norm means – the Constitution demands observing the principle of separation of power and ensurance of judicial power as one independent branch of power.

For example, Article 1 of the Republic of Latvia Satversme (Constitution) determines that “Latvia is an independent democratic republic.” The Republic of Latvia Constitutional Court has concluded:

“From Article 1 of the Satversme, determining that Latvia is an independent democratic republic, several principles of a law-based state follow, among these also the principle of separation of power and the rule of law.

The principle of separation of power is the main principle, which envisages organization and functioning of the state power. It provides for harmonious cooperation, mutual control and derogation of the three powers.”<sup>2</sup>

---

<sup>1</sup> Monitoring the EU Succession Process: Judicial Independence. Open Society Institute EU Accession Monitoring Program, Budapest, 2001., p.9

<sup>2</sup> Judgement in case No.2001-09-01 “On the Compliance of the Cabinet of Ministers February 27, 2001 Regulations No.92 “Procedure for Stating the Amount of Sugar-Beet Supply for Sugar- Beet Growers with Article 91 of the Satvewrsmе (Constitution)”, January 21, 2002.

When thinking of the performance of the Constitutional Court, I may mention several essential sectors, to which the Constitutional Court has made a contribution in the advancement of democracy and legal-based state as well as furthered transition from the socialist to the Western legal system.

First of all one should mention issues connected with the separation of power. The Constitutional Court Republic of Latvia has seen to the existence of mutual balance and control of realization of the state power as well as to moderate rule. For example, after receiving the claim from the government, the Constitutional Court reviewed the matter considering whether the Parliament by its decision may assign the government with the duty in the sector in which the law establishes a concrete competence for the government. Namely, the Parliament 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 Parliament 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 Parliament with the above decision had violated the Constitution and number of other laws.

The Constitutional Court in its Judgement inter alia stressed that when realising the controlling function as well as any other function, the Parliament shall act in compliance with the Constitution and the laws and that "...the law and rights are binding to every state institution as well as to the legislator himself." The impugned act was declared as unbecoming with the Constitution and several other laws.<sup>3</sup>

When reviewing another case the Constitutional Court has concluded that by adopting the challenged act the Cabinet of Ministers has exceeded its authority and made the decision on the issues, which are within the competence of judicial power.<sup>4</sup>

In a democratic law-governed state power is divided so as to reach the aims of the separation of power. In its turn the necessity of reaching the aims of separation of power allows deviations from the formal realization of this principle. In constitutional practice particular deviations from the principle of separation of power may be regarded as admissible, if it makes the realization of functions of the state power more efficient, strengthens independence of a certain institution from another power or secures functioning of mutual balance and counterbalance system of the three powers.

The principle of separation of power creates the needed preconditions for the functioning of the Constitutional Court. In its turn the existence of constitutional proceedings in this or

---

<sup>3</sup> Case No. 03-05 (99) "On Conformity of Items 1 and 4 of the Saeima April 29, 1999 Resolution on Telecommunications Tariff Council with Articles 1 and 57 of the Satversme (Constitution) of the Republic of Latvia and Other Laws."

<sup>4</sup> Case No. 04-07 (99) "On Conformity of Item 1 Of the Cabinet of Ministers November 30, 1999 Resolution (Protocol 67, Paragraph 38) "On protection of Foreign Investments Earmarked for Entrepreneurial Activity of the Limited Liability Association "WINDAU" at the Bauska Co-generation Station" with the Republic of Latvia Satversme, Chapter 3 of the Law "On the Structure of the Cabinet of Ministers", the First Part of Article 1 of the Law "On Foreign Investment in the Republic of Latvia", Article 41 of the "Power Industry Law", the First and Fourth Parts of Article 8 of the Law "On Privatization of the State and Municipal Property" and Article 49 of the Law "On Joint Stock Companies".

another form of organization is a necessary precondition for the functioning of a democratic law-governed state, a necessity needed in order not to permit abuse of power.

The role of the Constitutional Court within the system of separation of power first of all is to ensure the existence of the system itself. Namely, to protect the democratic system of the state from the attempts to transform it to authoritarian or even totalitarian regime. It is not a matter of chance that just during the time critical for democracy, that is between the First and the Second World War, independent constitutional courts, which had relevant authority, were formed; like the Constitutional Court of Austria – the oldest Constitutional Court in Europe. In my state the idea was expressed by the Parliament deputy Paul Šīman in 1930 in his article “Eight Years of Constitution of Latvia”. On May 8, 1934 furthering the above idea the Parliament deputy Herman Šteġman submitted a motion to supplement the Constitution with new Article, which shall envisage establishment of a special State Court. However, this motion did not receive the required majority of votes and one week later after coup in my country was established authoritarian regime.

Of course, the Constitutional Court is not a magical remedy and if it is just alone it cannot protect from misuse of power in all cases. However, it is often extremely important for the Constitutional Court in decisive moments to be brave enough to tell the truth to the world, even if it is a “bitter” truth.

Simple liquidation of the Constitutional Court are possible in the society with strong authoritarian traditions. As you now the Constitutional Court of the Republic of Kyrgyzstan not only was liquidated this year but also the Acting Prosecutor General Republic of Kyrgyzstan on September 24, 2010 initiated criminal case against all members of former Constitutional Court.

I dare to affirm that the above methods cannot be used if the democracy has been consolidated in the society. When in August 1999, after the Constitutional Court of my country reviewed two scandalous cases and reached judgments, which the government would have liked to be different, the then Prime Minister and the Minister of Justice expressed the viewpoint 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. Public society and mass media actively fought against it and majority of the Parliament politicians did not back the idea. After that 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.

Smaller or bigger problems concerning the authority of the Constitutional Court members have been faced in other states as well. However, in the greatest part of cases, it had not led to crisis in the Constitutional Court activities.

Politicians are often dissatisfied with the Constitutional Court judgments. Besides, even in those states, which the post-socialist democracies consider to be positive instances. Thus in her address to the German Federal Constitutional Court during the celebration of its 50 anniversary, the then President of the Court prof. J. Limbach reminded that there have been times when high German officials and politicians have made critical remarks about the activities of the Constitutional Court. But why dissatisfaction with the activities of the Constitutional Court of the ruling politicians in some states is confined to critical remarks as in Germany, but in other states it leads to constitutional crisis?

I would like to stress that public democratic traditions, maturity of democracy or its absence are of vital importance. Under mature democracy the solution adequate to traditions of democracy will be found.

Thank you for attention!