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REPORT

"The Role of the Constitutional Court in the System of the Separation of Power"

by

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Ladies and gentlemen!

During the period of the performance of the Venice Commission it has contributed much to find out the total European 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.

As is well-known, both the above principles have a long-standing history. Works by Montesquieu have been of great importance in the formulation of the principle of separation of power. Ch. L. Montesquieu has stressed that freedom may last only there, where no abuse of power exists. And it cannot exist, if the judicial power is not separated from the legislative and executive power[i]. In its turn, in accordance with the conclusions by J. Lock the rule of law determines that the law and rights are binding to every state institution as well as to the legislator himself. Persons, exercising the power of legislation. after they had assembled and passed laws under a certain procedure are subject to the effect of the laws. *(See Two Tractates on Ruling. J.Lock. Collected Works in 3 volumes. Volume 3. Moscow, 1988, page 347)*.

Our common European 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* or deduced from the constitutional norms. Of course, with time the sense of the above principles has changed.

“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”[ii].

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 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.

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. The Judgment reached by the Constitutional Court of Belarus in which the Court decided[iii] to declare as unconformable with the Constitution and laws of the Republic of Belarus Paragraph 3 of the Decree of the Supreme Council of the Republic of Belarus of 6 September 1996 "On the holding of a national referendum in the Republic of Belarus and measures for its guarantee" in respect of the submission of draft amendments and additions to the Constitution to a binding referendum. This Judgment for the then Court body meant to be ”their last word”. After that the Court body was quickly broken up. However this last word was heard, and the conclusions mentioned in the above Judgment on the anti-constitutionality of

the changes in Belarus became a criterion by which the greatest number of Western State experts assess the nature of the regime, ruling in Belarus. For example, the Venice Commission in its conclusion on the Amendments to the Constitution of Belarus[iv] stressed that examined proposals fall short of the democratic minimum standards of the European constitutional heritage. Inter alia the Venice Commission pointed out that the Venice Commission stressed that the Constitutional Court of Belarus had decided that the referendum could not have a binding but only a consultative character. In accordance with this decision, the Supreme Council declared that the referendum would not be legally binding. For the Commission it is self-evident that in any country wishing to become a Member of the Council of Europe, the decisions of the Constitutional Court have to be accepted and implemented by all other organs of State power. This Judgment is also a criterion by which the European Constitutional Court Conference has assessed the newly formed Constitutional Court of Belarus and has not admitted it as the full-fledged Member of the Conference..

I hope that noone of the court justices present here shall have to prove their loyalty to the oath they have taken in so radical situation as it was in Belarus.. However, every Constitutional Court justice is aware of the fact that he/she is to be also ready for the above situation. In their turn, those, who choose and confirm the judges, shall assess whether the maturity of the concrete person is sufficient for fair implementation of the oath.

In a greater or smaller extent the principle of separation of power classically becomes apparent in every Constitutional Court Judgment, in which the Constitutional Court declares that the legal act of the State President, the executive power or a court does not comply with the act, passed by the constitutional legislator – the Constitution.

In post-socialist states the Constitutional Court has an especial duty to see to it that the transition from the administration ordered system to the system of a democratic state, namely, the system, which envisages that the executive power may pass legal acts only after the Parliament has authorized it to do so, is implemented.

Simultaneously the duty of the Constitutional Court is also to see to it that the legislator itself takes the Constitution into consideration and does not meddle with the discretionary power, which has been envisaged for the government.

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 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 had violated the Satversme (Constitution) and a number of other laws.

The Constitutional Court in its Judgment [v] inter alia stressed that when realising the controlling function as well as any other function, the Saeima shall act in compliance with the Satversme and the laws. The impugned act was declared as unconformable with the Satversme and several other laws.

Not infrequently the Constitutional Court is the judge, who in a direct way holds the Themida Sword over the head of the potential abuser of power. When in the scales of justice activities of high officials are weighed, a heavy burden of responsibility falls upon the justices. Even though the justice has to take the decision on a legal issue, usually the issue on the compliance of the activity of the official with the Constitution or the law, the consequences of the decision of it, have a wide political context.Such examples shall not be looked for far off, as this year - as far as I know – the Constitutional Court of Romania has undergone just such a test, namely, given Advisory opinion concerning the proposal for suspension from the office of the President of Romania[vi] and elaborated a Ruling on the ascertaining the existence of circumstances, which justify the interim in the exercise of the office of the President of Romania[vii].

I hope the justice of the Lithuianian Constitutional Court Stačiokas will tell us about the hard test, which was passed with flying colours by the justices of the Lithuanian Constitutional Court, namely, the matter[viii], in which the Constitutional Court declared that actions by President Rolandas Paksas of the Republic of Lithuania grossly violated the Constitution of the Republic of Lithuania.

Taking into consideration the practice of my own I may add that in matters, which concern essential and vital interests of separate parties and high officials, it is especially important to maintain a legal point of view, abstracting from personal and political sympathies. Of course, that is not easy

Nine years ago the Republic of Latvia Constitutional Court reviewed the matter on the so-called ”double loyalty”[ix] to the Cabinet of Ministers. From the legal viewpoint the Constitutional Court had to assess whether the Resolution on the Vote of Confidence for the Cabinet of Ministers complies with the Law ”The Structure of the Cabinet of Ministers” and ”Rules of Procedure of the Saeima”. In its turn, from the practical viewpoint the case was reviewed not long before the elections and its outcome meant vital advantages in the political campaign either for the politics, forming the government, or for those, who had submitted the claim. I had additional emotional difficulties as the claim was submitted by the deputy, with whom we for many years had been colleagues at the University, but before I was confirmed the Constitutional Court justice we had worked together on the draft of the Constitutional Court Law.

In what a way to maintain a clear legal viewpoint and ward off emotions under such a situation? Of course, every justice has the criteria of his own. I would like to stress the following. First of all one has to clearly realize that the benefit for a moment, which a political power or even the State may receive for a short time by the decision on a concrete matter, is not and cannot be greater than the benefit, received by the State after declaration of an independent and only a legally argumented Judgment.Even though the interests of the concrete submitter of the claim and those of the Cabinet of Ministers seemed to be at variance, when considering the issue more extensively, they had the same interests.Namely, a Judgment conformable with the Constitution.

In the above case the Constitutional Court unanimously concluded that the impugned Resolution by the Saeima on giving the vote of confidence to the Cabinet of Ministers had been adopted not taking into consideration several procedural norms, included in Article 6 of the Law ”The Structure of the Cabinet of Ministers” and Article 28 of the Rules of Procedure, however on its merit it was in compliance with Article 59 of the Satversme (Constitution) of the Republic of Latvia.

Viewing back I may say that it was one of the essential elements, which formed the public loyalty to the Constitutional Court. The Court has proved that it – in its Judgments – was guided by the legal aspects of the issues and the Constitutional Court does not take into consideration the fact what the previous activities of every justice have been.

However, it is frequently hard to establish the fact where legal arguments end and the political arguments start. Most complicated are the matters, in which the Constitutional Court has to determine its own place within the system of separation of power, namely, the cases when the Constitutional Court has to take decisions on issues, which concern the bounds of separation of power between the Constitutional Court and the government or the Constitutional Court and the Parliament. As a matter of fact the situation arises under which the Constitutional Court has to be the judge of the matter of its own and determine the bounds on its competence.

Many years ago the former President of the Austria Constitutional Court L.Adamovičs in his address at the celebration of the 70 years jubilee of the Austrian Constitution said that ”constitutional proceedings mean an organized raid of the lawyers upon the world of politics. […] and in this respect legitimate is the issue on the bounds of the constitutional control and the limit of the discretionary power of the legislator, within the framework of which only the legislator experiences the right of choosing the solution. One cannot draw the borderline just with mathematical methods, it is the issues of juridical methodology and thus – also that of the humanitarian (*originally Geisteswissenschaft, a word, which is the antonym to exact sciences)* sciences[x]”.

To my viewpoint in order to find this borderline the Constitutional Court shall always be ready both for a brave step, so as not to recede from realization of the principle of separation of power and ensurance of control as well as properly reserved in order to dissociate from the solution of obvious political issues.

Besides, experience shows that especially at the beginning of its performance the Constitutional Court has to take into consideration the lack of understanding the legislator and the executive power may experience. I shall illustrate it with two examples from the Republic of Latvia Constitutional Court case law.

Extremely scandalous was 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 was of the viewpoint that the Statute contradicted several laws and submitted a claim to the Constitutional Court.

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 Judgment. 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.

Evaluating the legal essence of the disputable Statute the Constitutional Court established that the disputable Statute was not in compliance with several laws.

The Judgment 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 take place 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 Judgment 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.

The above situation took place eight years ago and I would gladly forget it, however, quite recent events show that the balance in the relations between the ruliting political majority and the Constitutional Court in reality is rather fragile.

Of course, the politicians have learned from the errors of the previous politicians. Any attempts to weaken constitutional proceedings by liquidating the Court are in the past. Much more efficient measure to lessen the influence of the Constitutional Court is the attempt to confirm for the office of the Constitutional Court justice persons, who ”stand near” the politicians, thus hoping that being in the body they will act in the interests of the respective party. I would like to add that after the ”hullabaloo” of the journalists one of the judges was not confirmed for the post. In their turn two Constitutional Court justices were confirmed for the post in spite of the negative decision about them expressed by the Parliament Legal Affairs Committee.

I am an optimist and hope that the above does not mean that the politicians have reached their aim. The Constitutional Court Law establishes a number of guarantees for the ensurance of the independence of the Constitutional Court justice, which ensures the possibility of having a ”strong backbone” even in cases, when the person has been closely connected with a particular group..

And about another interesting case, when the Republic of Latvia Constitutional Court in its activities has come into contact with the situation under which its competence to review a concrete ”substandard” act has been questioned. In the matter about the so-called compensations to the deputies the Constitutional Court elaborated basic principles for the solution of such cases and pointed out that “The judicial power as a whole and the Constitutional Court as its constituent part shall insure control over both other state powers. As concerns the judicial power, the competence of the Constitutional Court ”steps back” behind the competence of the court of general jurisdiction and is interpreted as narrowly as possible. First of all it concerns the cases of constitutional claims. The law envisages that all the general means of protection shall be exhausted. In its turn examination of the Presidium normative acts is not within the competence of any court of general jurisdiction, therefore such an interpretation of Article 16 of the Constitutional Court Law, which denies control of the above acts in case of violation of rights, would be at variance with Article 1 of the Satversme.”[xi] The Constitutional Court had already reiterated that several principles of a law-governed state followed from the above Article, including the principle of separation of power.

I have to remark that at that time the above matter showed that some representatives of the legislator have a very peculiar understanding about the methods of implementing the principle

of separation of power. Thus, when the case, connected with the legality of compensations paid to the deputies was reviewed, the Head of the Saeima Administrative Committee Juris Dobelis dared to express a rather indicative insinuation (I am quoting him): ”You see, the Saeima itself determines not only the budget of the state, but also its own budget. Thus it is just on our conscience how much we decide to give ourselves, as we are able to do it as we want. And, sorry to say, we are determining your budget as well. There!”[1] Then an immediate and sharp reaction by the mass media followed. The viewpoint, expressed in it was not flattering to the author of the above expressions.

However, quite recently I was surprised to find out that just this deputy had been chosen by the Saeima as the Head of the Parliamentary Investigation Committee for reviewing issues on potentially illegal and unethical activity within the Judicial system concerning issues of ethics of the judges' activities. And there is one more problem sector, when determining the framework of the Constitutional Court competence. One comes across it when reviewing matters, which have been initiated on constitutional claims.

In many states of the European continent the principle of wholeness of Constitution is being developed and used. It quite often leads to the practice that – when reviewing the conformity of the impugned norm with that norm of the Constitution, which the submitter has claimed - this norm is being assessed in conjunction with other norms and not rarely it is established that in essence the impugned norm does not comply with another norm of the Constitution, which has not been pointed out in the claim. In such cases the principle of wholeness of the Constitution as if is at variance with the principle that the Constitutional Court may not initiate matters on its own initiative, namely, that it can act only as far as the submitter has claimed it.

The Court may not itself initiate the process. However, there are cases, when it is admissible and even necessary to ”leave the boundaries of the claim” and include in the control also such norms, which have not been contested or assess the conformity with the norms, compliance with which has not been impugned. In separate states it has been determined by the law. For example, Paragraph 78 of the German Federative Constitutional Court Law establishes:: If the Federal Constitutional Court comes to the conclusion that Federal Law is incompatible with the Basic Law or that Land Law is incompatible with the Basic Law or other Federal Law, it shall declare the law to be null and void. If further provisions of the same law are incompatible with the Basic Law or other Federal Law for the same reasons, the Federal Constitutional Court may also declare them to be null and void.

In its turn the third Part of Section 61 of the Ukraine Constitutional Court Law envisages “If consideration of the case arising from the constitutional claim or constitutional petition reveals the non-conformity with the Constitution of Ukraine legal acts (their separate parts) other than those for which an examination has been opened and which influence the adoption of a decision or the providing of an opinion in the case, the Constitutional Court of Ukraine recognizes such legal acts (their separate parts) as unconstitutional ones”.

To my mind expansion of the limits of the claim in the Judgment is possible and even necessary in order to ensure efficient protection of person's rights and execution of the Judgment. Simultaneously, one has to observe ”the concept of close link”, namely, the Court may declare as invalid only such a norm, which is closely connected with the impugned norm. Besides, in each particular case it shall be substantiated why a transition from one norm to another one has taken place.

[1] Case No. 2001-06-03 ” On Compliance of Items 4, 5, 6, 7, 8 and the First Sentence of Item 9 of the Saeima Presidium February 28, 2000 Regulations ”On the Procedure of Compensating Expenses Occurred to the Deputies while Exercising their Authority” with Article 91 of the Republic of Latvia Satversme.

And in the conclusion about one more problem zone concerning the place of the Constitutional Court in the system of separation of power, about which the Constitutional Courts are often reprimanded: for delving into the sector of the legislator. How far is the Constitutional Court allowed to change from the so-called ”negative legislator”, who declares as invalid the norm, which does not comply with the Constitution to ”a real legislator”, who determines a specific regulation connected with the Judgment.?

Constitutions and laws, regulating constitutional proceedings of several states, envisage for the Constitutional Courts, if they establish unconformity of a legal act with the Constitution, extensive authority to determine both – the moment by which the impugned norms lose effect and the fact whether legal norms, amended by the impugned norms, regain their legal force. Besides, quite often the Constitutional Courts themselves determine the way of execution and procedure of their Judgments. Thus, for example, Article 140 (the first sentence of the sixth Part) of the Austrian Federative Constitutional Law determines:

” If a law is declared as null and void by the Constitutional Court Judgment, because it is unconformable with the Constitution and if the Judgment does not rule it otherwise, then beginning with the day of the above law losing effect, the provisions of the law, which have been repealed by the law, which the Constitutional Court declared as unconformable with the Constitution, take effect”.

The Constitutional Court of Austria in any particular case takes the decision on the fact whether the previous legal regulation – in compliance with the above norm of the Constitution – takes effect again[xii].

In its turn Paragraph 35 of the German Federal Constitutional Court Law establishes that the Federal Constitutional Court in its Judgment may determine the executor of the Judgment and the manner of execution. It has been marked in literature that from the above Paragraph follows authorisation to the Court to determine legal consequences of its Judgments[xiii]. Federal Constitutional Court, if it is necessary, determines the Regulation to be applied till the next activities of the legislator; or the regulation, which shall be in effect, if the legislator does not execute provisions of the Federal Constitutional Court Judgment[xiv]. Constitutional Courts of other states, for example the Constitutional Court of Slovenia[xv], are used of acting similarly.

Also the Constitutional Court of Republic of Latvia has concluded: “If it is possible and necessary, the Constitutional Court in the substantiating part of the Judgment may declare that legal norms, which have been amended by the impugned act, which the Constitutional Court has recognised as unconformable with the legal norms of higher legal force, recover their legal force.”[xvi]

The above activity of the Constitutional Court was the beginning for discussions among the Latvia lawters.

Thank you for your attention!

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[i] see Montesquieu Ch. L’Esprit des Lois. P., 1936.- Ch.XI – P.3 – 6.

[ii] see the Constitutional Court November 21, 2005 Judgment in case No. 2005-03-0306, Item7

[iii] 04.11.1996. Decision of the Constitutional Court of the Republik of Belarus in Case Nr. J-43/96 On the compliance with the Constitution and laws of the Republic of Belarus of paragraphs 2.2, 2.5 and 3 of the Decree of the Supreme Council of the Republic of Belarus of 6 September 1996 "On the holding of a national referendum in the Republic of Belarus and measures for its guarantee", see www. codices.coe.int.

[iv] Venice Commisssion Document No CDL-INF(1996)008e, adopted by the Commission at the 29th Plenary Meeting of the Commission in Venice, on 15-16 November 1996.

[v] Constitutional Court of Republic of Latvia judgment in 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", October 1, 1999.

[vi] Advisory opinion No. 1 5 April 2007 concerning the proposal for suspension from the office of the President of Romania, Mr traian Băsescu, Official Gazette of Romania, Part I, no.258 of April 18th 2007, english translation see http://www.ccr.ro/deciziitotal/pdf/2007/en/avizconsultativ.pdf.

[vii] Ruling On the ascertaining the existence of circumstances which justify the interim in the exercise of the office of the President of Romania Official Gazette of Romania, Part I, no.269 of April 20th 2007, english translation see http://www.ccr.ro/deciziitotal/pdf/2007/en/hot1.pdf.

[viii] Constitutional Court of the Republic of Lithuania 31 March 2004 Conclusion on the Case No. 14/04 on the compliance of actions of president Rolandas Paksas of the Republic of Lithuania against whom an impeachment case has been instituted with the constitution of the Republic of Lithuania, see http://www.lrkt.lt/dokumentai/2004/c040331.htm.

[ix] Constitutional Court of the Republic of Latvia judgment in the case No.03-04(98) "On Conformity of the Saeima 30 April, 1998 Resolution on the Vote of Confidence for the Cabinet of Ministers with the Law "The Structure of the Cabinet of Ministers" and Rules of Procedure of the Saeima" July 13, 1998.

[x] 70 Jahre Bundesverfassung. Herausgegeben vom Verfassungsgericht der Republik Österreich, S. 7-8.

[xi] Constitutional Court of Republic of Latvia judgment in the case No.2001-06-03 ""On Compliance of Items 4, 5, 6, 7, 8 and the First Sentence of Item 9 of the Saeima Presidium February 28, 2000 Regulations " On the Procedure of Compensating Expenses Occurred to the Deputies while Exercising their Authority" with Article 91 of the Republic of Latvia Satversme", February 22, 2002.

[xii] see for example, Austria Constitutional Court September 28, 2004 Judgment in case No. G98/04; March 16, 2001 Judgment in case No. G150/00; December 5, 2002 Judgment in case G296/02// http://ris.bka.gv.at

[xiii] see: Bundesverfassungsgerichtsgesetz. Mitarbeiterkommentar und Handbuch. C.F. Müller Juristischer Verlag Heidelberg, 1992, S. 695.

[xiv] see, for example: BVerfGE 39, 1[68], BverfGE 48, 130 [184], BverfGE 99, 216 [219], BverfGE, 1 Bvl 4/97 vom 6.7.2004, Absatz 71, http://www.bundesverfassungsgericht.de

[xv] see, for example, the Constitutional Court of Slovenia March 31, 1994 Judgment in case No. U-I-25/92 // http://odlocitve.us-rs.si/

[xvi] Constitutional Court of Republic of Latvia judgment in the case No. 2005-12-0103 ""On the Compliance of the Cabinet of Ministers November 11, 2005 Regulations No. 17 "Amendments to the Law "On Coercive Expropriation of Real Estate for State or Public Needs"" and June 9, 2005 Law "Amendments to the Law "On Coercive Expropriation of Real Estate for State or Public Needs"" with Articles 1 and 105 of the Republic of Latvia Satversme"", December 16, 2005.