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"The Constitutional Court in the system of state bodies: Crucial problems and ways to resolve them"

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REPORT

"The continuity of the functioning of the Constitutional Court as the guarantee of its independence"

by
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Ladies and gentlemen!

Today constitutional proceedings are a part of our common European constitutional heritage and understanding of a democratic law-governed state. the Constitutional Court is often called the constitutional watchdog. 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.

Unfortunately the common practice of the post-socialist states shows that - figurately speaking- one comes across the attempts of the politicians to make themselves free from the constitutional watchdog by coaxing and lulling it to sleep, in places even liquidating it.

Liquidation of the Constitutional Court, which was faithful to Constitution was one of the essential steps undertaken by V.Lukašenko, when establishing the autoritarian regime in Belarus. As is well-known the Constitutional Court of Belarus did not obey the clout and decided[i] 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.

Simple liquidation of the Constitutional Court was possible in the society with strong autoritarian traditions. I dare to affirm that the above methods cannot be used if the democracy has been consolidated in the society. And I do not have to look for an example far away, as in 1999 several very high officials of Latvia 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.

I am also well acquainted with the situation, which had arisen in Ukraine when the activities of the Constitutional Court were blocked for some time, as I was one of the experts appointed as a rapporteur by the Venice Commission for elaboration of the Commission opinion on possible Constitutional and Legislative improvements to ensure the uninterrupted functioning of the Constitutional Court of Ukraine[ii].

Smaller or bigger problems concerning the authority of the Constitutional Court members have been faced in other European 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 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 consitutional crisis as here, in Ukraine, when the

activities of the Constitutional Court were paralized for some time? Can such situations be averted by a more perfect procedure of choosing of the Constitutional Court justices and the status of the Constitutional Court?

First of all 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 even if the procedure is faulty. Under mature democracy there exists a much lesser possibility that persons, who do not experience the public loyalty or loyalty of the Parliament, might be chosen for the office of the Constitutional Court justice. And even if it might happen, it is doubtful that the leading politicians, knowing, that there exists mature democracy, would dare to make use of shortcomings of the procedure to forbid Constitutional Court justices taking the oath.

In its turn every incompleteness in the procedure of confirming of justices and the status of the Constitutional Court under immature democracy may become a catalyzer of the existing discrepancy and lead to smaller or bigger crisis. If it is not *expressis verbis* determined in the law what should be done as well as what will happen if what should be done will not take place, then there exists the possibility to interpret the legal norms not only in compliance with the legal theory of democratic states but also according to the theory once taught at the USSR higher schools. Namely, on the basis of revolutionary legal sense or party belonging. Parties, colours and understanding about who are " one's own people" have radically changed but the way of thinking about interpreting everything "in favour of one's own" continues to exist.

Thus under immature democracy it is important for the procedure of confirmation of the Constitutional Court justices to be clearly and precisely established by law and in basic issues fixed also in the Constitution. Namely, continuity of the Constitutional Court shall be unequivocally ensured on the level of legal norms and not depend on the viewpoint of this or that interpreter of the legal norm.

During the time alloted to me it is not possible to discuss all the aspects of the issue, therefore I shall mention only the most important ones..

1. There shall be norms, which guarantee the activities of the Court regardless of termination of the term of authority of certain justices and confirmation of new persons. In the already mentioned opinion the Venice Commission pointed out that "A safeguard may be established through a provision allowing a judge to continue to sit at the Court after his/her term of office has expired until the judge's successor takes office. Such a mechanism is currently in place for example in Bulgaria, Germany, Latvia, Lithuania, Portugal,and Spain. Such a system prevents that a stalemate during the appointment process blocks the activity of the Court. ... This will however not be sufficient in case of retirement for health reasons or death of a judge."[iii]

The Constitutional Courts of both – Latvia and Ukraine - are approximately of the same age. The Constitutional Court Law of the Republic of Latvia, as well as the Law "On the Constitutional Court of Ukraine" have been passed in 1996. Initially in none of the above laws it was envisaged what happens if after termination of the authority of a justice no new justice is confirmed.

The necessity to supplement the above regulation arose in Latvia after the bitter experience, which was connected with the confirmation of the seventh Constitutional Court judge. Namely, the Republic of Latvia Constitution (the Satversme) establishes that the Saeima shall confirm the appointment of judges to the Constitutional Court for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the Saeima. In its turn the Constitutional Court Law establishes that the Constitutional Court shall have seven justices. Justices of the Constitutional Court shall be

confirmed by the Saeima. Three justices of the Constitutional Court shall be confirmed upon the recommendation of not less than ten members of the Saeima, two – upon the recommendation of the Cabinet of Ministers, but two justices of the Constitutional Court – upon the recommendation of the Plenum of the Supreme Court. The Plenum of the Supreme Court may select candidates for the office of a justice of the Constitutional Court only from among Republic of Latvia judges.

In December of 1996 the Constitutional Court commenced its activities not having the full Court body, namely – in the body of 6 justices (the Constitutional Court has the right of commencing its activities if at least 5 justices are confirmed).. The post of one Constitutional Court justice, which had to be confirmed upon the recommendation of the Saeima, was vacant. The Constitutional Court had to wait for the seventh justice for three years and a half. For several times candidates were nominated but none of them received to needed majority vote. Only in June of 2000 the Constitutional Court was in full body. Before that I as the Acting Chairman of the Constitutional Court had to repeatedly remind the politicians - both publicly as well as during lobby interviews – that they have the duty of ensuring the confirmation of the Constitutional Court justice.

This situation served as a good lesson and norms, which were directed to ensurance of the continuity of the Constitutional Court activities, were inserted into the Constitutional Court Law Amendments to the Constitutional Court Law were adopted by the Saeima on November 30, 2000. Inter alia the Amendments envisaged"If upon termination of authority of office of a Constitutional Court justice – or upon his/her reaching the age established in the first Part of Article 8 of this Law – the Saeima has not confirmed another justice, the authority of the Constitutional Court justice shall be regarded as prolonged to the moment of confirmation by the Saeima of a new justice and he/she has sworn the oath."[iv]

This norm was really significant, when at the end of 2006 termination of the authority of four Constitutional Court justices (one of the four left her post already in summer of 2006) took place. Three out of four candidates were confirmed by the Saeima several days after the term of authority of the previous Constitutional Court justices had ended. In its turn the history repeated itself as concerns the seventh Constitutional justice. The candidate to be nominated by the Saeima was confirmed to the post of the office of the Constitutional Court justice only after several months – in April of 2007.

The Law of Ukraine on the Constitutional Court of Ukraine in the English language was accessible to me in the wording as amended by the Law of 03.08.2006[v]. It is possible that just now a new wording has been passed. In the wording as amended by the Law of 03.08.2006 I could not find any any norms, which envisage that the justice, whose term of authority has terminated continues fulfilling his/her duties till the time of confirmation of a new justice. Thus the possibility that "history may repeat itself" still exists. Therefore I request the representatives of the Ukrainian legislative power to listen in and consider the possibility of supplementing the Law of Ukraine on the Constitutional Court of Ukraine with the above regulation. I would like to remind that the Venice Commission has also suggested to include into the Law the regulation. providing that a judge remains in office until his or her successor takes office.

The Venice Commission recommended also the simplification of the taking of an oath by providing for a written form of taking the oath or the introduction of an internal mechanism for swearing in. this recommendation was narrowly focused to the specific situation, which had arisen in Ukraine in 2006.

It cannot be denied that a solemn ceremony of taking the oath may have a great psychologic importance in the activities of the Constitutional Court. In the Republic of Latvia the State President accepts the oath of the Constitutional Court justices. It is a festive

procedure. It shall be admitted that no legal norm regulates the term in which the President has to accept the oath and what happens if the President evades doing it. However, we have had no problems in this respect. The State President's Chancellery plans the occasion by taking into consideration the State President's schedule and after consultation with the Constitutional Court on organizing and technical issues.

I have also taken part at the solemn ceremony when the oath is taken by the Republic of Lithuania Constitutional Court justices.. The oath of the justice of the Constitutional Court of Lithuania shall be accepted by the Speaker of the Seimas in a sitting of the Seimas. The oath shall be accepted in keeping with the rules established in the procedure of acceptance of the oath of Members of the Seimas.

The Law on the Constitutional Court of the Republic of Lithuania determines consequences in case if the justice does not take the oath in conformity with the law. Namely, the justice of the Constitutional Court who either does not take the oath in the manner prescribed by law, or who takes a conditional oath, shall lose the powers of the justice. The Seimas shall adopt a corresponding resolution thereon.

The Law does not establish what happens if the the Speaker of the Seimas avoids to accept the oath. However, I have not heard that it has happened in Lithuania.
In a democratic law-governed state the situation, when an official avoids fulfilling such duties, should not be permissible. The legislator, when passing legal norms has the right of trust that the officials will honestly implement them.

However, I have also come across the situation in Latvia when several well-known lawyers in lobby talks expressed the viewpoint that the State President should not accept the oath of the Constitutional Court justices, confirmed in December of 2006. The background of the situation was like this. The Latvian politicians had come to the conclusion that a very 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 3 Constitutional Court justices were confirmed for the post in spite of the negative decision about them expressed by the Parliament Legal Affairs Committee.

At the time when the confirmation of the persons for the post took place I also expressed concern about the suitability of two persons. However, it is one thing to express a viewpoint during the procedure of taking the decision or about the taken decisions, but quite another to submit or not submit to the ruling of the Saeima. If the Saeima confirmed these persons, then both the duty of me as well as other persons was to accept the will of the democratically elected legislator even if it did not seem to be correct. To my mind, this is an important borderline between democracy and anarchy

I would like to add, that the above does not mean that the Latvian 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.

As far as I know difficulties of choosing such candidates for the post of the Constitutional Court justice, who would satisfy both – the majority of the society and the politicians - do not exist only in Latvia and Ukraine. For example, in Hungary vacancies in the Constitutional Court have created serious problems several times. In Latvia also the post of the Constitutional Court justice has been vacant now and then.

To my mind one should not discuss the problems, which arise during the procedure of choosing a Constitutional Court justice , only from the negative viewpoint. I dare to state that a vacancy is not the worst that may happen. Confirmation of such justices, who do not enjoy public confidence or whose confirmation procedure or adequacy for the above post are doubted is much more dangerous.

Continuity of the Constitutional Court shall be viewed as a unified complex of problems, consisting of the requirements to the justices, the procedure of confirmation, the procedure of holding the Office and guarantees of the Court activities in case, when it is impossible to adapt to the terms determined for confirmation.

It is important that the activities for filling the vacancy start well in advance so that the selection of a candidate is finalised by the time the vacancy occurs. In Romania, for example, a new judge must be appointed at least a month before the end of the mandate of the preceding judge. In Hungary according to the Act on the Constitutional Court a new judge must be elected at least three months before the end of the mandate of the preceding judge (Article 8.4).

In Latvia it is envisaged that the Constitutional Court in writing informs the institution, which recommended the confirmation of the justice, whose authority of office has terminated, about termination of authority of office. In case when the justice has been confirmed on the recommendation of not less than ten Saeima members, the Saeima is informed about the fact. The Constitutional Court announces about the termination of authority of office of a justice or his/her reaching the age established in the first Part of Article 8 at least three months earlier. Experience has proved that just the existence of the norm does not ensure rapid process of confirmation of the justices for the vacancies.

Problematic situations may arise not only then, if there is a vacancy but also then, if the procedure of confirmation or adequacy for the post is being questioned. For example, the Republic of Lithuania Constitutional Court had to reach a decision about the conformity with the Constitution of the confirmation procedure.

In 2005 a case was initiated on the request of the group of Seimas members (the petitioner). Decree of the President of the Republic of Lithuania and Resolution of the Seimas of the Republic of Lithuania, which were connected with the appointment of K. Urbaitis for the post of justice of the Constitutional Court of the Republic of Lithuania was contested. In the opinion of the petitioner the absence of advice of a special institution of judges (the Council of Courts) provided for in Paragraph 5 of Article 112 of the Constitution was a constitutional obstacle to the President of the Republic to issue Decree “On Presentation to the Seimas of the Republic of Lithuania Concerning Dismissal of R. K. Urbaitis from the Office of a Justice of the Supreme Court of Lithuania” to submit this decree to the Seimas for consideration.

Not going deeper in to the essence of the case, I would like to note that the concern of Lithuanian deputies on the constitutionality of the confirmation of the justice of the Constitutional Court did not create a constitutional crisis. The problem was solved in an adequate for a law-governed state manner by the Constitutional Court judgment.

However, it was possible to solve it in such a way in Lithuania, because the Lithuanian Constitutional Court Law envisages gradual replacement of the Court body. Namely, the Law establishes that the Constitutional Court shall consist of 9 justices, each appointed for a single nine-year term of office. Every three years, one-third of the Constitutional Court shall be reconstituted.

It is difficult to imagine what would happen if, for example, the deputies of opposition in Latvia in December of 2006 would have tried to question the constitutionality of confirmation of three Constitutional Court justices. The situation might have arisen that the justices, constitutionality of whose confirmation was questioned, should take the decision on the constitutionality of their confirmation.

I have to admit that in 1996 the experts of the Venice Commission stressed that gradual replacement of justices is advisable, but at that time it seemed that 10 years is a long enough time for first of all to create the Constitutional Court and only then to think about what shall happen after termination of the authority term of the Constitutional Court justices. However, the time passed unnoticeably and what the experts had warned us about did take place. The majority of the Constitutional Court justices left their office at one and the same time.

I hope that the above problem in future will be solved in a natural way, as one of the confirmed justices, after reaching a certain age, will not be able to hold the post for 10 years, determined by the Law.

Both – the gradualness of replacement of the justices and the ensurance that the former justice is able to continue activities to fill the vacancy for some time may make the situation, connected with the continuity of the Court activities, better. However, the problems can be eliminated by the development of democracy and understanding of the State officials about carrying out their duties in a democratic, law-governed state. I hope that both – Latvia and Ukraine shall reach such a maturity of democracy and no new crisis of Constitutional Court performance shall arise.

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Thank you for your attention!

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[i] 04.11.1996. Decision of the Constitutional Court of the Republic 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.

[ii] European Commission for Democracy through Law (Venice Commission) opinion no. 377/2006 on possible Constitutional and Legislative improvements to ensure the uninterrupted functioningof the Constitutional Court of Ukraine on the basis of comments by Mr A. ENDZINS (Member, Latvia), Mr J. MAZAK (Member, Slovakia), Mr P. PACZOLAY (Member, Hungary), Adopted by the Venice Commission at its 67th Plenary Session (Venice, 9-10 June 2006) , http://www.venice.coe.int/docs/2006/CDL-AD(2006)016-e.asp.

[iii] ibidem.

[iv] Section 3 Article 11 of the Constitutional Court Law.

[v] Text of the Law from CODICES, http://www.codices.coe.int