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COMMENTS ON THE DRAFT LAW ON THE CONSTITUTIONAL COURT OF LATVIA (CDL (94) 20)

by

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Opinion on the Draft of the Latvian Law on the Constitutional Court[1]

I. General comments

1. The Latvian Law on the Constitutional Court which is to be scrutinised in the following has been drafted before the new Constitution of the Republic of Latvia has been adopted. The actual constitution of 1922 did not establish a Constitutional Court. In this sense, the law on the Constitutional Court will not be based on an actual constitutional provision. The establishment of the Constitutional Court and its competences will have to be taken into account by the new constitution which shall be drafted and adopted in the near future. However, as the constitution prevails over the ordinary law it is not sure that the structure, the functions and competences of the

[1]The opinion is based on the English translation of the draft of the Latvian Law on the Constitutional Court.

Constitutional Court as laid down in the draft will be definitive.

2. The draft is comprehensive: the structure and competences of the Constitutional Court shall be exclusively ruled by this law; art. 49, however, refers to the law on the administrative procedure and till this becomes effective, to the norms of the civil procedure code. The following opinion is not extended to the evaluation of the civil procedure and its impact on the constitutional procedure as the application of these norms is only provisional. On the other hand, the administrative procedure could not be taken into account as it has not yet been adopted and - to our knowledge - not even been drafted.

3. At the beginning we should underline that the draft to be commented as follows is a very impressive codification of constitutional jurisdiction which meets the highest standards in this field. This is all the more admirable, as Latvia has no tradition in this type of jurisdiction and a very difficult period of its history has just ended which was not very preoccupied with the administration of justice. This should be kept in mind, if in the following some remarks will be done which from our German experiences with constitutional jurisdiction seem to be obvious.

II. Remarks to the provisions in detail

Art. 4: The way of nomination

a) Nomination by the parliament and the Cabinet

Justices of the Constitutional Court shall be approved by the Saeima on the suggestion by the Cabinet. According to the constitution Latvia has a semiparlamentarian system; the Cabinet, nominated by the President must enjoy the confidence of the parliament, i.e. of its majority; the Cabinet cannot act against the will of this majority; in this sense, the Cabinet reflects the majority of the parliament. If the Cabinet proposes the candidates for the Constitutional Court, the approval by the majority of the Saeima is not a real cross-check of the executive power by the legislative power, but will only disguise the fact that the composition of the Constitutional Court depends on the majority in power, in the parliament and in the Cabinet which as showed above means the same. In other words the way of nomination is not a reliable guarantee for the desirable neutrality of the members of the Constitutional Court which is a necessary condition for its authority.

The Constitutional Court is empowered to decide on normative acts of the parliament and of the Cabinet. The effectiveness of the control surely will be higher, if the composition of the Constitutional Court is not determined by the same majority which adopts the norms in question or supports the government. For this reason, it is most

recommendable to require a qualified majority, f.e. a two-thirds majority for the election of the justices, as it is, by the way, the case in Germany. This will prevent the constitutional jurisdiction from becoming a means of the actual majority and raise its reputations as an independent organ.

b) Qualification of the justices

As for the composition of the Constitutional Court it seems to be desirable to have some persons there who have a certain practical experience in jurisdiction (f.e. former judges of the Supreme Court). Most of the European laws on Constitutional Courts in a way or another require such persons as members of the Constitutional Court. During the first decade after the establishment of the Federal Constitutional Court of Germany a member of this Court at the same time could be a judge at one of the Federal High Courts; this provision should make available his experience to the Constitutional Court as an "ordinary" judge and should help with building up a tradition in constitutional jurisdiction. Only when for of the increasing number of proceedings it became impossible to work in both courts the two judicial offices were declared incompatible by an amendment of the law.

Art. 5: Reelegibility

a) Meaning of this provision

In art. 5 para. 2 we recommend to make it clear if the reelegibility in general shall be excluded or only the tenure of two terms following each other immediately.

b) Competence of the parliament and the government to prolong the tenure

Art. 1 and 2 provide the independence of the Constitutional Court, art. 36 constitutes a guarantee for the independence of the justices; as a consequence of this principle, art. 5 para. 2 rules out the possibility of the tenure of two terms: no justice shall act with a view to his possible reelection. This idea is contravened by the provision of art. 5 para. 3 which authorises the parliament and the government to prolong a tenure at will. However, in order to exclude any possible suspicion of dependence the term and the limits of a tenure should definitely be fixed by the law itself. It must not be within the discretion neither of the government nor of the parliament (particularly its unqualified majority) to decide on the prolongation of the tenure.

Art. 7: Revocation

Once more, to make sure that the justices of the Constitutional Court feel and act in full independence, the revocation of a justice must not fall within the competence

of the parliament. The principle of independence requires that the decision on the revocation must be taken by the Court istself or, at least, must not be taken by parliament without a suggestion of the Court. Therefore, the parliament must not have any discretion to decide on the revocation of a justice as for example provided by art. 7 para. 3. It must not be forgotten that the parliament shall be under the control of the Court. So, any possibility to influence the Court decisions should be excluded.

Art. 8: Approval of a new justice

a) Meaning of the provision

It has to be clarified what is meant by "the term provided in art. 5 of this Law". Will the new justice be nominated only until the end of the term of the justice who resigned or has been revoked, or will he be nominated for a full ten years.

b) Time-limit for reelection

Moreover, it seems neccessary that the law fixes the time within which the new justice has to be nominated and has to enter his office. Furtheron, it is recommendable that a justice whose tenure expired shall stay in his office until a new justice is nominated. Only in this way, it can be avoided that the parliament contravenes the work of the Constitutional Court just by the omission to nominate a successor (see art. 22 para. 3).

c) Equal terms for all justices

There ist another problem to be thought of. If in the process of establishing the Constitutional Court all its members will be appointed at the same time their tenures will expire at the same time, too. This, in the interest of jurisdictional continuity, should be avoided. For instance, this can be achieved by appointing several judges of an age which does not allow them to act for a full term, or by transitional regulations providing different terms for the first generation of judges. Also, other precautions to the same end may be imaginable.

Art. 10: Competences of the Chairperson

No court is hierarchically organised. The principle of independence of each justice requires that all justices are equal with respect to there competences. The chairperson shall be only a primus inter pares with special competences in the field of representation of the court and its administration; he also may preside the plenary sessions. However, the chairman should have no special functions or competences in the organisation of the work. With respect to the independence of the justices their work must be regulated by the plenary. The determination of the reporters of the cases should be done at the beginning of each year by fixing abstract criterias for the distribution of the cases to each justice (f.e. either by matters or by the sequence in which the cases come to the court). For the same reason, it should

not fall within the discretion of the chairperson to nominate the reporter in a special case, as it is provided in art. 18 para. 1 or art. 20 para. 1. However, there may be a formal competence of the chairperson to ascribe a case to a judge according to the abstract criteria of allocation of duties as set out in advance.

Art. 11: Competences of the Court

a) Extension of the control to judicial decisions

The draft provides vast possibilities to control norms. The Constitutional Court shall also be authorised to review the compliance of administrative enactments with human rights and rights of citizens; such a review will take place only after the exhaustion of remedies, i.e. the case must at first be tried by ordinary courts. It lies within the logic of this regulation that also decisions of the ordinary courts shall be subject to a control by the Constitutional Court. If an ordinary court confirms an administrative enactment which is later declared unconstitutional it goes without saying that the decision of the court itself also violates the constitution; it, therefore, must be quashed by the Constitutional Court. Stricto sensu, after having exhausted all legal remedies (see art. 16 para. 1) the subject of a constitutional complaint before the Constitutional Court is rather the decision of the court confirming the administrative enactment than the act of the administrative authority which had originally enacted it. Apart from such a

constellation the Constitutional Court should be authorised to control if the ordinary courts pay due respect to guarantees of the procedure (i.e. due process, fair trial, right to be heard before the court etc.). Otherwise the violation of these fundamental rights would remain without sanction.

b) Compatibility of norms with international treaties

Art. 11 also provides the review of national legal norms with respect to international treaties. We are well aware of the intention which is behind this provision and we may remind of the provision in art. 25 of the German Basic Law which reads:

> The general rules of public international law shall be an integral part of federal law. They shall take precedence over statutes and shall directly create rights and duties for the inhabitants of the federal territory.

It is quite clear that by this article the legal system in Germany is to be held in compliance with the general rules of international law, but it is also clear, that the international law does not prevail over the constitution itself. So, in view of part. 7, Art. 11, the question arises, if the general term "national legal norm" also includes the constitution, i.e. may the Constitutional Court declare a provision of the constitution itself unconstitutional because it is incompatible with a provision of an international treaty the regulations of which, by the way, may not be a part of the "general rules" of international law? Further,

shall a treaty of whatever kind prevail over all other norms or does the draft have in mind only treaties of a special character or content, i.e. multilateral treaties, treaties concerning human rights, treaties codifying generally applicable norms of international law?

Art. 12: Competences to initiate proceedings

a) Competence of the parliament and of parts of it

In art. 12 para. 2 and 3, it seems to be sufficient to mention only "at least 1/3 of the parliament" - instead of "1/3 of the parliament" and "the parliament" itself, because in this context a part of the parliament is not an authority different from the parliament and it is quite clear that if 1/3 of the parliament may initiate a proceeding the same can be done by the parliament as a whole.

b) Competence of local governments

Art. 12 para. 4 no. 1 must be read together with art. 15. According to art. 15 the Cabinet exercising its supervisory competences can revoke ordinances of local governments. If this happens the respective local government is entitled to appeal to the Constitutional Court after having exhausted all other legal remedies. According to art. 15 para. 2 the Cabinet may approve a direct appeal to the Constitutional Court. Anyway, the interest of the local government is to uphold its ordinance. Procedurally, two ways to defend this interest are possible. The first one obviously is taken by

the draft: the respective local government is entitled to claim the validity of its ordinance before the Constitutional Court - in general, after having exhausted all other legal remedies. The other way could be a "local government complaint", similar to the dispute between organs of the state, aiming at the quashing of the revocation of the local government's ordinance by the Cabinet.

The latter solution is more adequate to the interests which are at stake. For the local government has no abstract interest to have its own norm reviewed, but wants to defend its autonomy against any encroachment by the Cabinet; therefore, its action is not governed by doubts on the constitutionality or legality of its own norms, but is directed against the measure of the Cabinet. Such a "local complaint" which is not restricted to the review of the ordinance would allow a comprehensive control of the measures taken by the Cabinet.

If the dispute between the local government and the Cabinet nevertheless is framed as a review of ordinances, the Cabinet should be mentioned as an organ which is entitled to initiate a proceeding against an ordinance with respect to art. 15 para. 3.

c) Competence disputes

If there is a dispute between the Saeima on the one side and the President of the State or the Cabinet on the other

the majority of the parliament may be inclined to an indulgent attitude towards the one or the other. This attitude will not be shared by the opposition. In a situation like this the minority probably will be more eager than the majority to protect the constitution. This is, why art. 93 para. 1 lit. a of the German Basic Law provides that in the event of disputes concerning the extent of the rights and duties of the highest federal organs f.e. not only the parliament as a whole but also a part of it which has been vested with rights (i.e. competences) of its own by the Basic Law or by the rules of procedure of the Bundestag - a parlamentary group, a commission or even a single deputy - has the right to initiate control by the Federal Consitutional Court.

Art. 13: Representation

Art. 13 provides that a petitioner may be represented by any person authorised by him. It seems to be recommendable to restrict the possibility of representation to lawyers though certain exceptions may be allowed. This gives a guarantee that either the person concerned will bring the case or a qualified lawyer. It may to a certain extent prevent that persons will abuse this procedures for goals beyond the protection of constitutional rights. To make clear what we are thinking of we may remind of art. 22 para. 1 of the Law on the Federal Constitutional Court which reads:

> The parties may be represented at any stage of the proceedings by an attorney registered with a German

court or a lecturer of law at a German institution of higher education; in the oral pleadings before the Federal Constitutional Court they must be represented in this manner. Legislative bodies and parts thereof which are vested with rights of their own by virtue of their statutes or rules of procedure may, in addition, be represented by their members. The Federation, the Laender and their constitutional organs may also be represented by their officials provided that they are qualified to exercise the functions of a judge or are qualified for higher administrative service by having passed the prescribed state examinations. The Federal Constitutional Court may also permit another person to act as counsel for a party.

Art. 14: Cases initiated by ordinary courts

a) Obligation to bring the question of constitutionality before the Constitutional Court

Art. 12 para. 1 no. 4, para. 2 no. 4, para. 4 no. 2, para. 7 no. 4 "entitles" ordinary courts to initiate proceedings before the Constitutional Court. In art. 14 it should be made clear, that ordinary courts are *obliged* to bring the question of constitutionality before the Constitutional Court when they consider a norm - at least a law adopted by the parliament - unconstitutional which is to be applied in the pending case. This will assure the monopoly of the Constitutional Court to declare a law unconstitutional. The principle, laid down in the draft - and we hold this a necessary principle - says that all courts are obliged to review the constitutionality of a law to be applied in the pending case but only the Constitutional Court is authorised to declare it null and void because of its unconstitutionality.

b) Requirements for bringing a case before the Constitutional Court

According to art. 14 an ordinary court may initiate a proceeding before the Constitutional Court if it has "substantial grounds for concern" with respect to the constitutionality of a norm. This wording on the one hand could lead to difficulties in interpretation, for it is quite vague, on the other hand it opens too large a possibility to the courts to bring a case before the Constitutional Court. However, it should not be the task of an ordinary court to initiate a general review of norms only to eliminate eventual doubts about their compatibility with the constitution. On the initiative of a court only those norms should be checked by the Constitutional Court which have to be applied in a special case (as it is evidently provided in part 1, para. 2, art. 14), and such a norm is to be reviewed by the Constitutional Court only if the ordinary court feels unable to apply a norm inspite of the order of application, because it definitely considers the norm to be unconstitutional. Only in such a case the ordinary court may - and must - bring the case to the Constitutional Court because this alone has the monopoly to reject a norm as unconstitutional and to declare it null and void. For this reason, art. 14 para. 1 part 2 should require the "conviction" of the court trying the case that a norm to be applied in a special case is unconstitutional instead of mere "substantial grounds for concern". Otherwise, the Constitutional Court, by the way, could soon be overburdened with cases of this type.

c) Suspension of the procedure before the ordinary court

Art. 14 para. 2 provides that a procedure shall be suspended with the moment the petition is accepted. This regulation does not fit well into the logic of this proceeding. A court will bring a petition, because it is convinced that a norm which has to be applied in a certain case is unconstitutional. On these grounds it cannot continue its own proceeding. Instead, it has to wait for the decision of the Constitutional Court. Therefore, the proceeding before the court must be suspended not with the moment the petition is accepted (this depends only from the internal work of the Constitutional Court) but with the moment it decides to bring the petition before the Constitutional Court.

Art. 15: Special provisions refering to local governments

(See our remarks to art. 12 sub b)

Art. 15 para. 1 provides that a local government may initiate a proceeding concerning the constitutionality of an ordinance only after exhaustion of all other legal remedies, i.e. if the ordinary courts uphold the supervisionary decision of the government. Art. 12 para. 4 no. 2 read - as proposed in our remarks to art. 14 - in the sense that an ordinary court is obliged to initiate a proceeding if it is convinced of an ordinance to be unconstitutional, such a case can never happen, because, if the court joins the opinion of the government, it has to initiate the proceeding refered to in art. 12 para. 4 no. 2 and it is up to the Constitutional

Court to decide wether the ordinance is or is not constitutional. Once the Constitutional Court has made its decision, the local authority has no interest to bring the same question again to the Constitutional Court. Its competence according to art. 12 para. 4 no. 1 therefore remains important only for the case provided in art. 15 para 2, i.e. if the government dispenses the local government from the necessity to exhaust all other legal remedies.

After all, the legal structure of the discussed problem seems to be not quite logical. The most adequate solution, we think, would be the one which art. 15 para. 1 basically is envisaging. If the ordinance of a local government is revoked by the Cabinet the respective local government should be entitled to apply to the ordinary court. In the proceeding this court shall have the competence to decide on the compatibility of the ordinance in dispute with norms of a higher level and in case the ordinance does not comply with them to declare it invalid. There is, to our opinion, no need to vest the power for such a decision exclusively with the Constitutional Court because the authority of another supreme constitutional organ, as f.e. the Saeima or the Cabinet, is not at stake. Notwithstanding this recommendation the law may provide that the local government or the Cabinet - depending which of them has not been satisfied by the ordinary court - may appeal to the Constitutional Court in order to reserve for it the competence to take a last and generally binding decision.

Art. 16: Individual constitutional complaint

a) Time-limit

According to art. 16 para. 1 an individual constitutional complaint has to be brought within one month after the decision by the last court instance becomes effective. The law should provide the case that a person misses this time-limit without fault. Shall the person in such a case nevertheless have the right to initiate the proceeding? Should there not be a provision that the applicant can be restored to his former position?

b) Direct access to the Court

Art. 16 para. 2 opens the possibility to a person to bring a case concerning the constitutionality of a law on which an administrative enactment is based, directly before the Constitutional Court; it dispenses from the requirement to exhaust all other legal remedies. This regular requirement obviously has two reasons: Firstly, the individual constitutional complaint is only a subsidiarian remedy, i.e. a person may initiate a case before the Constitutional Court only if it is not satisfied by the other remedies. The Constitutional Court must not be overburdened with cases which in a no less satisfying manner can be decided by other courts. The mere opinion of a person that an administrative enactment is based on a norm which he or she on whatever reasons thinks to be unconstitutional does not mean that this person cannot be satisfied by an ordinary court. The second

reason for the requirement to exhaust all other remedies is that the Constitutional Court will get a better understanding of the meaning and content of an ordinary norm if it is "supplied" with the decisions of courts which are specialised in the application of such norms. For these reasons, the exception to the requirement to exhaust all remedies provided in art. 16 para. 2 should be reduced to very extraordinary cases.

Another consideration also should be made in this context. Art. 16 para. 2 refers to a case in which human rights or rights of citizens could have been violated because the legal norm the administrative enactment is based upon does not seem to be in compliance with a higher norm. However, it is not less possible that the said violation is not caused by a conflict of norms but by a wrong interpretation or application of the norm on which the enactment (or the decision of a court) is based; the ordinary court may have misunderstood the impact of the constitution for the construction of a law. Also such cases exceptionally may require th right of a person to address himself directly to the Constitutional Court.

Art. 18: Petition acceptance

Art. 18 para. 3 requires a decision on the acceptance or rejection of the petition within one month after the date the petition is submitted. This provision may help to accelerate the decisions of the Court. On the other hand, it is not

within the power of the Court to regulate the amount of petitions which will be brought before it. There might be situations when it is impossible to decide on the acceptance within the time-limit of art. 18 para. 3 because of the quantity or the difficulty of the cases brought before the court. Therefore, it is recommendable to leave more flexibility to the Constitutional Court in dealing with the cases. The provision should be interpreted in favour of such flexibility.

Art. 19: Rejection of the petition

Art. 19 para. 3 gives the possibility to make an appeal against the decision rejecting a petition. It is forseeable that there will be quite an amount of cases in which such an appeal will be done. Therefore, it seems preferable to have the decision on the acceptance directly taken by three (or, perhaps, two) justices without any possibility to appeal.

Art. 20: Preparation of the case for trial

a) Competence to require additional explanations

Art. 20 para. 2 authorises the reporter or the reporters to require additional explanations etc. Even if, before a case is brought to the Court as a whole, a comprehensive preparation of a proceeding by the reporting justice(s) certainly is very useful, the Court as such must remain the master of the proceeding, i.e. the tribunal as such must be

entitled as well to decide on additional explanations etc. as to stop inadequate measures of the reporter(s).

b) Time-limit

With respect to art. 20 para. 3 see our remarks to art. 18. Any fix time-limit within which a case must be decided should be avoided. Otherwise the authority of the Constitutional Court could be damaged not by delays for which the justices are responsible but by a law which they cannot respect for comprehensible reasons.

Art. 22: Composition of the tribunal

a) Composition of the tribunal when reviewing a law

Art. 22 provides that individual constitutional complaints (part 6, art. 11) are to be tried by a three justices tribunal. Is this tribunal also competent if the Constitutional Court reviews a law according to art. 16 para. 2 ? It seems to us preferable if in such cases the plenary has to decide; it could be considered a disregard of the parliament if only a part (that may be in fact only two justices) of the Constitutional Court could declare a parlamentary law unconstitutional. The competence of the plenary also in this case would be in conformity with the general principle laid down in the draft that it falls within the competence of the Constitutional Court as a whole to declare a norm unconstitutional.

b) Determination of the composition

The composition of the section of three justices, the substitution and the nomination of the chairperson must not lie within the competence of the chairperson of the court but should be regulated in an abstract way at the beginning of each year (see our remarks to art. 10).

Art. 23: The trial

Art. 23 provides an oral proceeding in each case as a rule. This provision seems to be highly problematic. On the one hand, it is desirable to make the constitutional jurisdiction transparent to the largest possible extent. Oral proceedings will help to reach this goal. On the other hand, such proceedings take quite a lot of time. Depending on the amount of cases which will be brought before the Court it will be factually impossible to deal with them in a reasonable time, if each case requires an oral proceeding. Beyond, the proceedings before the Constitutional Court mostly concern questions of law, not of facts, which do not necessarily require an oral proceeding; in other words, the Constitutional Court regularly will not have to take evidence. A proper preparation of the decision by the exchange of written statements between the parties concerned, possibly responding to special questions of the Court (or the preparing justice), may be by far more suitable to support the Court with the necessary legal aspects than an oral argument. There should be at least the possibility for the

parties to renounce an oral proceeding or for the court to declare it unnecessary. It may be mentioned that the Constitutional Court in Germany deciding more than 5.000 cases a year holds oral proceedings less than ten times within this period, and in Spain which has quite a modern Constitutional Court (since 1982) never such a proceeding has taken place.

Art. 24: Openess of the trial

The decision on the openess of a trial falls within the competence of the whole court; it is not the task only of the chairperson (see our remarks to art. 10).

Art. 27: Discontinuation of proceedings

It is questionable if a proceeding shall be discontinued in each case when a disputed legal enactment is invalidated prior to the court decision. In special cases, there might be an interest in a decision even in such a case, i.e. if there is a risk that the State organ will repeat its enactment or that a person will claim damages for this enactment and therefore has an interest to know if it was unconstitutional.

Art. 28: Court decision

a) Decision vote

It is not in conformity with the principle of equality between the justices that a decisive vote is conveyed to the

chairperson. All justices should have the same vote. In the event of equal votes it could be provided that the case is rejected, as art. 15 para. 2 of the German law on the Federal Constitutional Court says.

b) Promptness of the decision

Art. 28 para. 2 provides that the decision shall be announced after the meeting and not later than within 10 days after the trial. Moreover, after another 10 days the decision shall be delivered in a written form and forwarded to the parties. We have serious doubts if this regulation is useful. German experience in constitutional matters shows that it is highly desirable to announce the decision together with its written reasons. Otherwise it could happen that the Court reacting on public comments on the decision could be tempted to adapt its considerations to the "public opinion". Furthermore, the 10 days time-limit seems to be extremely short in case difficult legal questions or arguments between the justices are at stake. So we would like to remind of art. 30 of the Law on the Federal Constitutional Court which states, firstly, that the written reasons of the decision have to be laid down before it is announced and, secondly, that in case oral pleadings have been held (which, as has been said above, happens very seldom) the decision shall be proclaimed at a date lying within three months of their termination; but it is up to the Court, if necessary, to exceed this three months time-limit. Though promptness of jurisdiction, of course, should not be disregarded, the Court

should be authorised to extend the 10-days-limit, because the thoroughness of the deliberation process within the Court claims priority. "Deliberandum est diu quod statuendum est semel".

Art. 29: Effectiveness and content of the decision

a) Effectiveness in cases in which an administrative enactment is quashed

It does not make sense to give the effect of the law to a decision of the Constitutional Court if it only quashes an administrative enactment or the judgement of a court. In such a case the effect of the decision is restricted to the concrete case. The difference between a decision concerning the compliance of a legal norm with a norm of a higher level and a decision concerning disputes on competences or constitutional complaints as far as they are directed against individual administrative enactments or judgements of the judiciary has well been taken into consideration in art. 29 para. 2 part. 2 of the draft. But the provision that all decisions of the Constitutional Court shall have the effect of the law overshoots the mark. Therefore, this regulation should be limited to decisions concerning the validity of a norm.

b) Consequences for administrative acts and judicial decisions if a law on which they are based is declared unconstitutional

It should be provided in the law what will happen to the administrative enactments and judicial decisions based on a

law which later has been declared unconstitutional. Under German law such enactments and decisions remain in force. The same, as it seems, will apply according to the draft, since art. 29 para. 3 provides that if a law has been declared unconstitutional it shall become ineffective only with the moment such decision is made, unless the Constitutional Court provides a different term of ineffectiveness. Basically, this provision of invalidity ex nunc meets the requirements of the judicial practice by far better than the legal fiction of invalidity ex tunc in which the German (unlike the Austrian) jurisprudence persists. Nevertheless, as far as an administrative enactment or judicial judgement based on a law which later has been declared null and void, has not yet been executed, an execution should not be possible any more. Moreover, if a criminal law is declared unconstitutional and therefore has become ineffective all persons convicted under this law should be enabled to claim a retrial of their case. So, there are various possibilities to solve the conflict between the certainty of the law and the justice.

Art. 33: Summary proceedings

a) Qualifying a case as urgent

According to our comments on art. 10 we are of the opinion that neither the chairperson nor a justice nominated by him at his discretion should be competent to decide if a case is urgent. The decision should be laid within the competence of

the reporter as appointed according to abstract procedural regulations or the respective tribunal.

b) Right to appeal

It may be recommendable to give a right to appeal not only to a person/authority who claimed the summary proceeding and got a negative decision but also to the person/authority against whom the effects of the summary proceedings may be directed. This seems to be necessary because in general, the summary proceeding does not allow to hear all parties concerned in a due way. Therefore, all persons/órgans concerned should be entitled to explain their point of view in a proceeding of appeal.

c) Composition of the tribunal

Even in a summary proceeding the decision should be taken by at least three justices as such a decision may have a quite far-reaching impact on the political life (f.e. suspension of a law or prohibition of a certain act of an organ). If the law should provide according to this proposal the question of appeal may be settled herewith.

Art. 34: Temporary decision

Art. 34 para. 3 provides the suspension of a law if the Constitutional Court has declared that there are reasonable grounds for concern on the constitutionality of a norm. Is this case of suspension exclusive? Or may a norm be suspended

also in a case when its constitutionality is uncertain but the values at stake require the suspension until the Constitutional Court has taken a decision on the constitutionality? There may be such cases that as long as a situation is uncertain a law should not be applied. On the other hand, if there are "reasonable grounds of concern ...", can this in any case be a sufficient reason to suspend a law which provides acts or services which are indispensable for persons depending on them?

Art. 37: Judicial behaviour

Art. 37 para. 2 and 3 provides that justices of the Constitutional Court shall not be members of a political party and therefore, when elected, immediately have to suspend their membership. This, of course, shall strengthen the justices' impartiality. But, will the result of it be more than a deceptive appearance?

Constitutional jurisdiction has to apply constitutional law and therefore it has a permanent influence on the political process which, in essence, is the subject of constitutional regulation. So, justices of a Constitutional Court are not only required to be learned lawyers, they also should have political experience. If so, they often will happen to be political party members. Does anybody believe a mere suspension of membership might change the justice's way of thinking? Impartiality must be based in character, and not in acts remaining on the surface. This, naturally, does not

dispense a justice, may he be a member of a political party or not, from definitely refraining from party political activities of any kind.

Art. 38: Immunity of justices

Art. 38 provides the immunity of justices in order to guarantee their independence. The competence to deprive a justice of his immunity shall be exclusively with the Constitutional Court, not with the parliament - even in cases when the Constitutional Court rejects to take such a measure (see our remarks to art. 7). Otherwise the parliament would have an undue impact on the status of the justices while they are in office.

Art. 42: Remuneration

Art. 42 parallels the status of the justices of the Constitutional Court to the status of the justices of the Supreme Court as far as remuneration is concerned. This is inadequate, not only because f.e. the Supreme Court in trying a specific case has to initiate a procedure before the Constitutional Court if it considers a law unconstitutional (see art. 14) and will be bound by the decision of the Constitutional Court as provided in art. 29 para. 2 and 4. Moreover, the Constitutional Court should be estimated as a constitutional organ on the same level as the President of the State, the Saeima and the Cabinet, standing above all the other organs of the State, and this also should be clearly

expressed in the provisions refering to the justices' remuneration. Looking back to art. 1 of the draft one may describe the Constitutional Court of the Republic of Latvia not only as "an independent institution of the State justice system" but also as "a court independent vis-à-vis all the other constitutional organs".

Art. 48: Internal regulations

Art.48 authorises the government to enact the internal regulations of the Constitutional Court. This seems to us a further example of possible and totally undesirable political impact on the Constitutional Court. Therefore, only the Constitutional Court itself can be competent to enact a statute concerning its structure and organisation within the framework of the law. Nobody would accept the claim of the government to adopt the rules of parliamentary procedures - it should go without saying that quite the same applies to the Constitutional Court.

III. Conclusive remarks

1. The draft of the Latvian law on the Constitutional Court is quite comprehensive. However, it seems recommendable to add three further provisions.

Firstly, the question if fees shall be paid should be dealt with.

Secondly, the case that a justice is biased must be provided in a way or another. It does not seem sufficient to refer to the civil or administrative procedural code, as the problem of a biased justice appears in the constitutional jurisdiction in another perspective than with general ordinary courts. A justice of the Constitutional Court might be concerned by his own decision quite more easily than a judge of an ordinary court, especially when he decides on the constitutionality of a law, which claims a general application. For this reason the rules on the question of bias must be adjusted to the situation of the Constitutional Court.

Thirdly, the law on the Latvian Constitutional Court should contain a provision on the obligation of the Court to establish a schedule for its work at the beginning of each year, which will be adopted by the whole Constitutional Court, not only by its chairperson, and which is to provide the distribution of the cases which will be brought before the court in an abstract way in order to exclude any manipulation.

2. Our comments are thought as proposals to amend some details of the law on the Constitutional Court. They are by no means a general or basical criticism of the law which indeed seems to give a solid ground on which the Latvian Constitutional Court after being established can successfully work.

However, the experience shows that a law on the Constitutional Court is subject to changes. Whenever amendments are done the parliament must have in mind that a Constitutional Court is a very delicate organ within the State structure which has a great impact on political life. Therefore, the adoption as well as an amendment of this law should be done with the consent of a broad majority of the parliament including at least parts of the opposition. The impression of the Court being an instrument of the actual majority in parliament has to be avoided by all means.

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