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COMMENTS ON THE DRAFT OF THE LATVIAN CONSTITUTIONAL COURT

by

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O p i n i o n
on the draft of the Latvian Constitutional Court Act

by
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1. General Overview

1.1. The establishment of procedures protecting the Constitution as the supreme law of the land represents a necessary step in the democratic transformation of the former communist countries. Thus, the very idea to introduce in Latvia a judicial protection of the Constitution deserves full support.

Like most of the East-European countries, Latvia decided to adopt the continental (Kelsenian) concept of a separate constitutional court and rejected the American system of the universal judicial review. In my opinion, this was a right choice since ordinary courts in our countries are not suited for deciding constitutional cases (see writings of Cappelletti, Favoreu and Stern in this respect).

The general picture of the Latvian Constitutional Court seems to be quite close to the Austrian-German model of judicial review. The Court is organized as an independent constitutional organ, is vested with full jurisdiction to review statutes and other regulations as well as to decide other constitutional cases or controversies. I do not have any basic objections in regard to the model of Constitutional Court proposed in the Latvia's draft.

1.2. There are, however, at least two questions concerning the legal environment of the proposed Law.

1.2.1. First of all, as I understand, Latvia has provisionally readopted its old democratic Constitution of 1922. This Constitution does not contain any single provision concerning the judicial review in general and the Constitutional Court in particular. Hence, the constitutional basis for the proposed Law remains rather unclear.

In my opinion, it would be very problematic to adopt the Constitutional Court Act without simultaneous adoption of a constitutional amendment (or a separate constitutional act) providing for some fundamental features of the constitutional review. The Constitutional Court cannot simply act without deriving its powers and authority directly from the Constitution. Since the law-making competencies of both, the Parliament and the Executive results from the Constitution, any limitation of these powers (and the very existence of a Constitutional Court represents rather serious limitation) must be based upon the Constitution as well. Finally, once all basic provisions on the Constitutional Court are adopted on the constitutional level, they become secured against being changed or repealed by an actual parliamentary majority which could soon be unhappy to be confronted with an independent Court.

Therefore, a constitutional amendment represents a necessary prerequisite for adoption the Constitutional Court Act. Both drafts (of the constitutional amendment and of the Constitutional Court Act) should be submitted to a joint discussion. One of the important questions for such discussion would be the distribution of matters that should be regulated on the constitutional and on the statutory level.

1.2.2. It is also unclear for me, what other statutes and procedures already exist in the field where the Constitutional Court is going to act. At least two reforms should be completed in order to create a "friendly" legal environment for the Constitutional Court. In the first place, it is the reform of the administrative procedure accompanied by an introduction of judicial review of all decisions (individual acts) rendered by administrative agencies in individual cases. The power of such review must be given to the regular courts (ordinary courts or - preferably - separate administrative courts) and they should examine whether decisions of administrative agencies have been issued in conformity with s t a t u t e s and within statutory prescribed procedures. Only than, the idea to entrust the Constitutional Court with a power to review the conformity of individual decisions with the C o n s t i t u t i o n could really work - the Constitutional Court cannot act as a substitute for another segments of the judicial branch.

Secondly, the Constitutional Court Act should be read upon general provisions on judiciary, in particular on the status of judges (see my observations to Article 37).

2. Jurisdiction of the Court

2.1. The Court is vested with several "standard" competencies: review of legal norms (Article 11 no.1-4 and 7), competency disputes (no.5), review of individual enactments in administrative cases (no.6). At least three other competencies, although fairly typical for a "continental" constitutional court, have not been given to the Latvian Court:

- impeachment of the President of the Republic and of other high state officials - since the Constitution provides for another procedure to remove the President, no judicially performed impeachment is necessary. Also for the future, I would not recommend to entrust the Constitutional Court with such power. First of all, since impeachment procedures are - by definition - highly political matters, I am not sure, whether it would be "healthy" for an emerging Court to be invited into such conflicts. Furthermore, impeachment constitutes a form of a quasi-penal trial, where the court has to establish facts and responsibility. Constitutional courts do not fit here, since they are destined to solve legal matters and not establish facts;
- establishing of universally binding interpretation of the Constitution (e.g. Hungary) or of parliamentary statutes (e.g. Poland). Even if this competence is quite developed in the operation of the Polish Court, I would be very careful to recommend it to other countries. This is a form of abstract (advisory) opinions, completely detached from any cases or controversies. Once the Court is vested with the power to establish a binding interpretation, it becomes inevitably invited to law-making;
- deciding on constitutionality of political parties (Germany and several countries following the German model). In an emerging (so-called militant) democracy someone has to do it - the danger to allow unconstitutional parties is clear and present. It would be relatively easy for the Court to decide on constitutionality of party documents (statute or/and program) since it is analogous to reviewing normative acts. Much more difficult would be to review the factual activities of political parties - the regular courts

seem to be better suited for this job.

2.2. Under the draft, judicial review of legal norms shall be the primary mission of the Court. I fully concur with such approach. I also agree that there should be three levels of review (three types of norms of reference): constitutionality, legality (conformity with parliamentary statutes) and conventionality (conformity with international treaties).

As far as the reviewable acts (PrÜfungsgegenstand) are concerned, I understand that the drafters intended to vest the Court with the power to review all existing legal norms (normative acts), except the Constitution. I do agree, but I am not sure, whether the provisions of Article 11 and 12 should not be reconsidered. The draft adopted a technique of identifying specific types of normative acts (laws of Parliament, regulations of the Cabinet, enactments of the President, ordinances of the local government). An unanswered question remains: what about other types of normative acts, whether an act that contains legal norms but bears another name (e.g. parliamentary rules of procedure) or an act that has been adopted by another authority (e.g. a normative regulation issued by a minister) are also subjected to the review of the Constitutional Court. Under the Polish experience, this problem has created a lot of troubles for the Court, and finally, the Court adopted a material approach: a "normative act" is any act issued by any state agency or by any agency (organization) fulfilling state authority if it contains general and binding regulation, notwithstanding on its name. Perhaps, an introduction of such general clause (e.g. "The CC reviews conformity of laws with the Constitution and the conformity of all other normative acts with the Constitution and other laws") into Article 11 would help to avoid possible controversies as to the scope of review of the Constitutional Court.

2.3. Less clear is the power of the Court to review the conformity of "national legal norms" with international treaties. First of all, the expression "national legal norms" (Art.11 no.7) seems to be an universal one, i.e. enhancing all Latvian norms and normative acts, the Constitution (constitutional acts) included. I do not think, it was intended by the drafters, and I do not think the

Court should have any powers to review whether the Constitution is conform with international treaties.

On the other hand, the draft does not provide any possibility to review the constitutionality of international treaties. As well known, such controversies occur regularly (let me mention only the example of the Maastricht Treaty) and there should be a way to decide whether a treaty does not violate the Constitution. I am not going to recommend any specific solution - the review of treaties could, for example, be limited to an a priori review only, but the problem as such is worth to be considered.

2.4. The "competency disputes" (Organstreit) invite contradictory comments. On one hand, new constitutional courts should avoid any direct involvement into political quarrels. The temptation to mediate in such matters is often irresistible, but the experience of the Zorkin Court should be regarded as a warning. On the other hand, there are (at least in Poland) numerous conflicts among constitutional organs, and the Constitution not always has been observed as it should be. Theoretically, this produces an excellent area for the Court, but the political dangers must not be overlooked (see also my observations to Article 12 sec.5).

2.5. The review of "administrative enactments" is shaped as a form of a "Verfassungsbeschwerde", i.e. an instrument offered directly to an individual whose constitutional rights have been violated by the Executive. In my opinion, this is a necessary component of the CC's jurisdiction. The procedure of the Verfassungsbeschwerde has already proved its effectiveness in countries like Germany, Austria or Spain; it was also adopted in some East-European countries (Hungary). Even if such procedure would probably increase the workload of the Court in a considerable manner, this should not impend the drafters from including the Verfassungsbeschwerde into the jurisdiction of the Court.

The draft adopts two procedures: the complaint against an "administrative enactment" and the complaint against a legal norm on which an "administrative enactment" has been based. This seems to be very reasonable distinction, particularly in respect to the exceptional character of the latter procedure (Article 16 sec.2 in fine).

As far as the norms of reference are concerned, the draft correctly provides not only for constitutional rights (which are not particularly developed in the 1922 Constitution) but also for "human rights" guaranteed by the 1991 Constitutional Law (Article 50 of the Draft). As I understand, there is no possibility to base a complaint solely upon international human rights instruments. As long, however, as the national constitutional regulations duplicate most of the European Human Rights Convention (and it is precisely the case in most East European countries) it does not matter. I do not have the text of the 1991 Constitutional Law (referred to in Article 50) but if this Law provides also for economic and social rights, I would suggest a second thought whether all these rights should be constitutionally enforceable. The postcommunist countries are usually unable to fulfil all constitutional obligations in this respect. Perhaps a Spanish solution (i.e. the limitation of the Verfassungsbeschwerde to personal and political rights only) could better fit in our region.

The definition of an "administrative enactment" (Article 47) is very broad - I understand that it was the drafters' intention to subject all individual decisions of the executive branch to constitutional review. On the other hand, Article 16 sec.1 stipulates that the proceedings before the CC could be initiated only after "having completed the general courts itinerary". What happens if there is no access to the general courts to review certain enactments? I do not think, it would be correct to assume that in such situation there is no access to the CC.

3. Organization of the Court

3.1. The size of the Court (five judges as provided in Article 3) seems to be too small. First of all, the workload of the Court would be probably a serious one - the procedure of Verfassungsbeschwerde would multiply number of cases. Secondly, it would be difficult to establish permanent panels deciding Verfassungsbeschwerden - if such panel should be composed of 3 judges (Article 22 sec.1) it would be necessary to increase number of judges to 7 or 9 in order to establish two or three panels. Finally, the composition of five judges requires to set the quorum at four. This can be highly impractical. There is always a possibility that one of the judges gets sick (we had in Poland two

cases when such a sickness was a prolonged one) and another judge would be temporarily absent or would be disqualified for a particular case. Then the whole business of the Court can be paralysed.

In my opinion, the composition of nine judges is probably the most optimal since it takes into account both, the size of Latvia's population and the envisaged workload of the Court.

3.2. The draft provides for the nomination of judges solely by the Parliament (Article 4 sec.1). Such solution is known to several countries (Germany included) and - if completed by irrevocability of judges and by a prohibition of reappointment - it could well serve to guarantee the independent position of the Court. However, in order to avoid the "packing" of the Court by actual parliamentary majorities, one could consider to introduce a requirement of a qualified majority (e.g. 2/3 or 3/5) in Parliament to appoint judges. Such requirement is adopted in several West-European countries.

3.3. The draft contains developed guarantees of the personal independence of judges as well as of the independence of the Court. Some provisions evoke, however, certain reservations:

- I am not sure, why the Cabinet should have a monopoly in submitting the candidates to the CC (Article 4 sec.1). It conflicts with the concept of the separation of powers and it limits the rights of the Parliament. If the initiative is given to groups of MPs (e.g. groups of at least 25 MP, i.e. one fourth of the total membership), the actual majority would probably act in agreement with the Cabinet anyway, but the opposition would have at least a right to submit its own candidates;
- How to set a maximum age for judges is a medical problem: there are countries that provides for such age - Germany; there are also countries that do not (France, Poland). In any case, however, I am not sure, whether the scheme proposed in Article 5 sec.3 is compatible with the principle of independence. A discretionary power of the Cabinet and the Parliament to allow to a judge to remain at the Court could be easily deformed into an instrument of political pressure;
- The Parliament's power to dismiss a judge (Article 7) can be

accepted as long as the Parliament has no discretion in this respect. Thus, situations described in no.1,2,4, and 5 do not provoke any objections. I am not sure, however, whether the same evaluation could be accorded to no.3. For example, a decision whether the position held by a judge in a "non-governmental organization" is a "leading one" (Article 37 sec.2) leaves some discretion to the deciding authority. Therefore, the power to dismiss a judge (or to submit a motion of dismissal to the Parliament) should be in such cases accorded to the CC itself. Furthermore, there can be another situations warranting a dismissal of a judge (grave neglecting of judicial duties etc.). The CCAct should provide for such possibility, but an exclusive power of dismissal should be reserved for the Constitutional Court acting as a disciplinary authority;

- the immunity of judges protects them against any "administrative penalty imposed by the court" (Article 38 sec.1). What about administrative penalties imposed by administrative agencies and not subjected to any review by the courts ?

- the draft correctly requires a consent of the CC in immunity matters. I am not sure, however, whether the Parliament should be given a power to overrule Court's decisions in such matters (Article 38 sec.3). Since most of the Court's business would be to review parliamentary statutes, the Parliament should not be given any powers in regard to judges in office;

- a budgetary autonomy should be accorded to the CC in a more clear manner (Article 41 is not sufficient since it does not provide who decides on the CC's budget);

- the structure and organization of the CC should not be regulated by the Cabinet (Article 48). Such regulations should rather be adopted by the CC itself. The same applies to Article 39 sec.4.

4. **Specific Comments**

Article 5 - there should be a provision that a judge remains in office until his successor is nominated.

Article 12 sec.1 no. 2 - since the Parliament consists of 100 Members, 1/3 of its members would be 33,33.... Why not adopt a

natural figure, like 25, 30 or 33.

sec.2 no. 2 - there is no necessity to accord the whole Parliament with the powers to initiate proceeding; if such power is given to a group of MPs they can act on behalf of the Parliament. On the other hand, one may consider to enlarge the initiative of parliamentary organs by giving this right to the Saema Presidium and/or to the standing committees);

sec.3 no. 1 - see sec.2 no.2. Why the courts do not have the right to review Presidential enactments? It would be rather difficult to assume that there are no individual cases or controversies that can arise upon application of such enactments. The President's acts are also omitted in Article 14 sec.1 no.1;

sec.5 - the draft is not clear as to the parties entitled to initiate "competency disputes". Are there only three potential actors: the President, the Parliament (i.e. the whole Chamber) and the Cabinet (as suggest Article 11 no.5) or are there some other "parties" (as suggest Article 12 sec.5), e.g. parliamentary committees, individual MPs (one may invoke here the German construction of the Organstreit). I do not think the multiplication of "parties" would be advisable, but the law must be fully clear in this respect;

Article 14 - the solution under which the general courts do not have power to declare unconstitutionality of parliamentary statutes, and they must submit the case (the so-called "legal question") to the CC, is widely adopted in Continental Europe. In most countries, however, the courts do have the power to ignore (to refuse to apply) nonstatutory (substatutory) regulations that appears contrary to the Constitution or to parliamentary statutes. In some countries (e.g. Poland), the courts have a choice between the incidental refusal to apply such substatutory regulation and the referral of the question to the CC. Under the Latvian draft, the general courts seem to be deprived of any power to refuse to apply not only governmental regulations but also local ordinances. One may express doubts whether these limitations do not go too far.

Article 15 - this seems to be very complicated and longlasting procedure. Why not give to the Cabinet a power to suspend local government ordinances and to the CC a power to decide whether such

ordinances are conform to higher legal norms. The general courts need not be included in such a dispute.

Article 17 - the deadline of 4 months seems to be very long. If actions of "State authorities" evoke objections, it is usually possible to act - more or less - immediately. At the same time, it is very important to be sure that such actions are final and cannot be contested (invalidated). Thus, the one months deadline would be more than enough.

Article 20 - there should be a clear provision allowing the Court to have an access to all state secrets. A special procedure can be established, but the CC cannot depend on the goodwill of the Cabinet or the Minister of Interior in such matters.

Article 23 - the Law should also provide for other meetings of the Court (in camera sessions), for example to take decision on discontinuation of the proceedings etc;

- the notion of "decision on the actual circumstances of the case" (no.6) is unclear. Such clarification should be made rather before the trial starts;
- why not to carry out the complete (electronic) record of the trial (no.10);
- there are no provisions on hearing witness testimonies during the trial.

Article 25 - since I am not familiar with the Latvian Administrative Procedure Act, it is difficult to evaluate its usefulness for the CC. A provisional referral to the Code of Civil Procedure (Article 49) indicates, however, that the Administrative Procedure Act does not exist in a decent form. I can only indicate that in some countries (Austria, Portugal, partly Poland) the referral to the civil procedure was adopted.

Article 26 - there are no provisions as to the participation of lawyers (advocates), especially in procedure concerning Verfassungsbeschwerde.

Article 27 - if the challenged "legal enactment" (I understand

it means "normative act" not an individual decision) is repealed before the CC reaches its decision, there should be a possibility to decide on discontinuation of the proceedings. The CC, however, should have discretion to continue the case and to decide that the act in question w a s unconstitutional. Such decision can be important for both, the claims of persons already affected by such act (if the procedure is discontinued no remedies provided in Article 29 can be used) and the situations of future applications of repealed provisions.

Article 28 sec.1 - there should be a clear provision that all written dissenting opinion shall be published together with the majority opinion of the Court.

Article 29 sec.2 - in case of a "competency dispute" (Article 11 no.5), the decision of the CC is binding to the parties. What does it mean "binding"? Is it a duty of the State organ whose actions have been found unconstitutional to rectify those actions, are those actions valid (legally effective), what are the sanctions if the Parliament or the President disregards the decision of the CC. In my opinion, it can be very difficult to impose any concrete duties on the "parties" of an Organstreit. The CC's decision should have declaratory effect only: it should simply certify who acted within the Constitution and who acted without constitutional legitimation;

sec.3 - what is the meaning of the term "ineffective". A statute of Parliament (or any other regulation) must be officially repealed. The CCAct should provide for procedure of such repeal and can, for example, provide that it is the attribution of the CC's Chairman to publish an appropriate announcement in the official Journal of Laws;

- this provision grants rather broad discretion to the CC as to fixing the "term for such legal enactment becoming ineffective" and offers no guidance whatsoever. In my opinion any prospective departure from the rule that the normative act cease to exist from the moment the CC's decision is made should be regarded as an exception. The CCAct should enumerate situations when such departure is allowed and should fix a maximum time limit (e.g. six months or one year - like in

Austria) for delaying the effectiveness of the decision. At the same time, the CCAct should clarify situations when the decision would have a retroactive effect. As far as the penal law is concerned, it seems obvious that all punishments inflicted upon an unconstitutional law must be invalidated. There may be more complicated situations in regard to civil or administrative relations - some injustices should be probably rectified, in some other instances the protection of acquired rights and bona fide actions must prevail. Generally speaking, however, it is impossible to leave all these matters to be decided by the Constitutional Court for each case. The CCAct should be supplemented by developed provisions (like e.g. § 79 of the German CCourt Act, Article 40 of the Spanish CCAct, Article 31 of the Polish CCAct) on the effects of CC's decisions upon verdicts, decisions and situations that have occurred before the CC decided the case.

Article 30 - this is a very general rule and, in my view, it should be developed into more elaborate set of rules.

Article 37 sec.1 - is the expression "other creative job" clear enough?

- there is no prohibition for judges to participate in companies in which the State has predominant share. There should be a referral to the general legislation on the status of judges as applicable to the CC's judges as well. The same applies to Articles 44 and 45.

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