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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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

by

Mr Antti SUVIRANTA (Finland)

Latvian Draft Law on the Constitutional Court

Comments on the draft CDL (94) 20

Introduction

My comments are based on an English translation of a Ministry of Justice draft, dated 14 February 1994. Some of the terms used in the translation appear strange. I hope, however, that I have understood the draft correctly.

As indicated in the title of the Draft Law, constitutional jurisdiction in Latvia is proposed to be entrusted to a single Constitutional Court. I suppose this principle will be embodied in the Latvian Satversme (Constitution), which is not yet effective (if I have read the indications in Article 50 of the Draft Law correctly). As more fully developed by Professor Helmut Steinberger in his study *Models of constitutional jurisdiction* (ISBN 92-871-2414-0, published in the Commission's series Science and technique of democracy) and most recently in his comments on the draft Federal Constitutional Law of the Russian Federation on the Russian Constitutional Court (CDL (94) 17), this is the solution recommended for the newly democratized countries. My general comment on the draft Latvian law is favourable. Several comments on the details of the draft will follow. Some provisions would without doubt have been easier to understand if I had had access to the preparatory materials of the draft.

Chapter I. *General Provisions*

Art. 3. According to the draft, the Constitutional Court would consist of five justices. I do not criticize the size

of the Court as such. However, the quorum of the Court is proposed to be four justices in the case of plenary sessions and three justices in other cases (Art. 22, sec. 3). It is not hard to imagine cases in which two or three justices would be disqualified or otherwise prevented from participating. Therefore, it might be advisable to provide for the appointment/election of e.g. three substitute justices for a term of office corresponding to the term of the ordinary justices. Such a provision would need to be completed by other provisions: on the remuneration of the substitute justices, on the order in which they are called to the Bench, and that they can be during or after their mandate be elected/appointed as ordinary justices.

Art. 4. The draft proposes that the justices of the Constitutional Court be appointed by the Saeima on the proposal of the Cabinet. The mode of selecting the members of a constitutional court is one of the crucial moments in securing the independence, the authority and the juristic competence of the court. Regard taken to the small size of the proposed Latvian court, it is hardly practicable to have different members of the court selected by two or more different organs; and regard taken also to the long term of office of the court members and to the fact that they would not be reeligible it might indeed be the best solution to entrust the selection to the Parliament.

However, the appointment of the members by the Saeima on the proposal of the Cabinet, without any more precise prescriptions, may give rise to problems. The first question is what happens if the Saeima does not approve the proposal of the Cabinet? So may happen especially in the case of a minority government; but eventually the disagreement should lead to a consensus.

A more severe problem is in my opinion that in the case of a (parliamentary) majority government the composition of the court might easily become one-sided. I would like to refer in

this context to the composition of the semi-judicial Federal commissions in America (such as the National Labor Relations Board ant the Interstate Commerce Commission), which regularly consist of three members from the Government party and two members from the opposition party. In European context, it might be advisable to require a majority of two thirds (of votes cast) for the election of the Court members. As pointed out by Professor Steinberger in his *Models*, this method should lead to a more many-sided composition because it would require a sufficient consensus. On the other side, a provision that the court members be appointed or elected on the proposal of the Cabinet would in my opinion be incompatible with the requirement of a qualified majority.

It is unclear to me what is meant with the expression "the highest education in law". Does this mean the education required of a University professor in law, a doctorate in law, or the University degree required for appointment to judicial posts, or to posts in superior courts, or for access to the Bar? But in Latvia the expression might be quite clear.

Art. 5. The independence of the Constitutional Court, so well protected with the fixed and not renewable term of office of ten years, would in my opinion be weakened in relation to the executive as well as to the legislative power if the tenure of a justice could on the proposal of the Cabinet be continued by a decision of the Saeima beyond the age of 65. The purpose of the proposed sec. 3 of this article might be fulfilled without endangering the independence of the Court, if the first sentence of sec. 1 and the whole sec. 3 would be replaced by a provision like: "The term of office of the Justices of the Constitutional Court shall be ten years. However, a person having already attained the age of 55 shall be appointed/elected for a fixed term extending at least to his 65th but not beyond his 70th birthday." (This modification would make the last part of sec. 2 of Art. 6 and point 5 of Art. 7 superfluous.)

Art. 7. The mandate of a Justice shall according to this article be revoked when suggested by the Saeima on certain grounds. The (English) text of the proposed article does not, however, reveal who shall make the actual decision. I hope the intention is that the Constitutional Court itself shall examine whether the grounds brought forward by the Saeima fulfil the requirements of the Article and, if that be the case, bring about the revocation.

Chapter II. *Competency of the Constitutional Court*

Art. 11. The proposed competence of the Constitutional Court is very wide. The evident *raison d'être* of a constitutional court is that embodied in *Point 1* of this article, that is to decide whether legislation adopted by the Parliament is compatible with the Constitution. This "natural" competence of the Constitutional Court would also comprise the essence of *Point 7:* to decide whether legislation adopted by the Parliament is compatible with the international obligations of the country, as well as the core of *Point 5:* to decide whether a given decision of the Parliament lies within its competence according to the Constitution. It is, however, hard to believe that the caseload within these "natural" boundaries would in Latvia justify the existence of a specialized court with five high full-time judges (with high salaries). Therefore, it is easy to understand that the competence of the proposed court has been extended to other matters, even though they might more naturally belong to the competence of other (general or administrative) courts.

But even though the extensive competence is easy to understand, it is important also to note the problems connected with such competence. The Constitutional Court becomes easily a "Super-Supreme Administrative Court", where decisions of administrative authorities can be contested.

This applies especially to *Point 6* of this article, entitling

any party to contest an "enactment" of an administrative authority at the Constitutional Court on the ground that the enactment violates his human or citizen's rights. In this context an enactment simply means any administrative decision granting or denying any person a right or a status or imposing on him a duty or prohibition (see Art. 47, sec. 1). Ordinarily, the legality of such a decision could be examined at a court of law. In the case of an alleged violation of human or citizens' rights, the draft law would, however, allow to contest the judgment of the last ordinary instance at the Constitutional Court; in some cases, the ordinary court instances could be by-passed (see Art. 16).

The contestant may have based his claim at the administrative authority and at the ordinary courts as well on Constitutional provisions on human and citizens' rights as on other provisions and circumstances. The interpretation and application of the different sources may be closely intertwined. The last ordinary judicial instance ought to be able to formulate the final judgment in the matter on all of its aspects.

There is, however, the possibility that the decision of the administrative authority and the judgments of the ordinary courts are based on an ordinary Act of Parliament and the aggravated party maintains that the legislation in question violates the constitutional provisions on human and citizens' rights. This controversy would be apt for the Consitutional Court to decide. But would it not be more natural to base the competence (and the procedures) of the Constitutional Court in such case on point 1 of Article 11, without need to create a "Super-Supreme Court"? The same applies, *mutatis mutandis*, to cases where the regulation or ordinance on which an administrative decision is based is alleged to violate constitutional provisions on human or citizens' rights: should the constitutionality of the regulation or ordinance not be examined on the basis of points 2 to 4 of Article 11?

Point 4 of Article 11 is indeed another example where the

draft turns the Constitutional Court into a "Super-Supreme" Court. Here, a Cabinet decision to revoke a local ordinance can be contested by the local government unit in question first at ordinary courts and finally at the Constitutional Court; upon leave of the Cabinet, the ordinary courts may be by-passed; and a judgment of an ordinary court to reverse the decision of the Cabinet may in turn be contested by the Cabinet at the Constitutional Court (Article 15). The dispute between the Cabinet and the local government unit need not be constitutional: revocations of ordinances on the basis of non-compliance with ordinary legislation or regulations given by the Cabinet may according to the draft also be brought to the final examination of the Constitutional Court. Are these not like any ordinary administrative law matters which are finally decided by an ordinary (superior) court? (In a federal state, disputes concerning the distribution of powers between federal authorities and the authorities of a constituent state belong to the natural competence of a constitutional court. But Latvia is a unitary state.)

However, in case the decision of the Cabinet is based on legislation which in the opinion of the local government unit is unconstitutional, the controversy would in my opinion be apt for the Constitutional Court to decide, but on the basis of point 1 of Article 11. And in case points 2 and 3 of Article 11 are preserved (I return to this question later) and the Cabinet's decision to revoke the ordinance is based on a regulation of the Cabinet or on an enactment of the President, it would similarly be natural for the Constitutional Court to decide, on the basis of these points, whether the Cabinet's regulation or the President's enactment is unconstitutional or unlawful.

The constitutionality or legality of a local ordinance can be examined by the Constitutional Court also in connection with a dispute pending at an ordinary court of law (point 2 of sec. 4 of Article 12). In accordance with my suggestions in the preceding paragraph, I would propose that this possibili-

ty as such be also deleted from the draft. Also in connection with a pending court case, an ordinance of local government could thus be finally examined by the Constitutional Court only in case a question arises whether the Act of Parliament or the regulation of the Cabinet on which the ordinance is based is unconstitutional or, in the case of a Cabinet regulation, illegal.

I now return to *Points 2 and 3* of Article 11. It would in my opinion be quite possible that the constitutionality or legality of the Cabinet's regulations and the President's enactments were finally examined by ordinary courts trying specific cases. However, according to points 1, 2 and 3 of sections 2 and 3 or Article 12, the Saeima and one third of the Saeima deputies, as well as the President or the Cabinet, as the case may be, are entitled to submit the constitutionality or legality of the regulations or enactments to the examination of the Constitutional Court, evidently without any connection with any specific controversy. As far as such "abstract norm control" is considered appropriate, it can in my opinion quite well be entrusted to the Constitutional Court. And if the abstract norm control is entrusted to the Constitutional Court, the final control in specific court cases of the constitutionality and legality of the Cabinet's regulations ("concrete norm control") should also preferably be entrusted to the same organ, as provided for in point 4 of section 2 of Article 12. It is an open question for me why a question about the constitutionality or legality of a President's enactment arising in connection with a specific court case cannot be submitted by the court in question to the Constitutional Court. Perhaps such a question cannot arise?

A corollary to the preceding paragraph is that even though the competence of the Constitutional Court according to *Points 5 and 7* of Article 11 exceeds the Court's "natural" competence, I do not question the appropriateness of the whole scope of the competence of the Court according to these points.

Art. 12. I have treated this article in my comments to Article 11.

Chapter III. *Proceedings*

Art. 14. According to point 2 of section 1 of this article, a court can submit a petition to the Constitutional Court only in case it has substantial grounds for concern whether the norms in question are compatible with the respective higher norm. This entails that a party to the proceedings at the court in question has no right to have the constitutional (or comparable) question examined by the Constitutional Court. I do not criticize this solution as such; parties might use such an unconditional right frivolously, to obstruct the proceedings at the ordinary court. Would it not, however, be possible to give a little more value to the views of a bona fide party by providing that the ordinary court *shall* submit a petition to the Constitutional Court in case it finds that *a party* to the proceedings has "substantial grounds for concern"?

I have suggested above that point 6 of Article 11 might as such be deleted from the draft but that the question whether the legislation (Act of Parliament or subordinate legislation) on which the decision of the administrative authority and the judgments of the ordinary courts are based violates the constitutional provisions on human and citizens' rights should be decided by the Constitutional Court on the basis of points 1 to 4 of Article 11. With regard to the importance the drafters seem to have given to this matter, the aggravated party might in such a case have a more unconditional right to have the ordinary court make a petition to the Constitutional Court.

According to *Section 2* of Article 14, general court procedure shall be suspended with the moment the petition is accepted

(by the Constitutional Court). I suppose the intent is to give the ordinary court discretion as to whether the procedure at that court shall be continued after the court has decided to make the petition but while the petition is still pending at the Constitutional Court?

Arts. 15 and 16. I have treated these Articles in my comments to Article 11.

Art. 24. Should a trial not be declared only partially close when the circumstances mentioned in this article do not require a complete secrecy of the proceedings?

Art. 28. I wonder whether supplementary provisions are needed for the case there are more opinions than two, e.g. that the legal enactment in question is totally invalid, only partially invalid or totally valid? Or is it impossible that such a case arises?

Chapters IV to VII

No comments.

Chapter VIII. *Closing Provisions*

Art. 51. The date June 1, 1994 needs to be amended.