607

94/2992

Council of Europe
Conseil de l'Europe

Strasbourg, 18 August 1994
<s:\cdl\(94)\39.>

Restricted
CDL (94) 39

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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

by

Mr Klaus BERCHTOLD (Austria)

C o m m e n t s
on the Draft Law on the Constitutional Court of Latvia

The following comments relate to the draft Law on the Constitutional Court of Latvia as contained in document CDL (94) 20 of 4 May 1994.

According to Article 25 the administrative procedure law shall govern the procedure before the Constitutional Court if not otherwiese provided for in the Law on the Constitutional Court. Many features of the procedure are not regulated in the draft. It is understood that these features will be regulated in the law on administrative procedure. This is true for instance concerning the question whether an application has suspensive effect or suspensive effect may be granted by the Constitutional Court. Furthermore, no provisions concerning parties to the proceedings before the Constitutional Court are contained in the draft, no provisions concerning the reopening of procedures and no provisions as to the question whether an applicant must or only may be assisted by a barrister are provided for.

To Article 2: Since Article 1 and probably the Constitution itself says already that the Constitutional Court is an independent institution, Article 2 seems to me superfluous.

To Article 3: Since the Court consists only of five members I think it advisable to provide for substitute judges.

To Article 4: It might be considered a system whereby the members of the Constitutional Court themselves propose the judges to the Saeima. The proposal of judges by the Cabinet should be an exemtion because the Constitutional Court in essence has the function of controlling the executive power. Therefore, at least not all the judges should be appointed on a proposal of the executive power.

Whatever way is chosen, it would be advisable that not only one person is proposed to the Saeima. Very often such proposals consist of three persons, so that the Saeima may elect one person out of a list of three persons.

The provision is unclear insofar as the Saeima has to "approve" a judge on the suggestion of the Cabinet. What does it mean "approve"? In the procedure of appointment of judges the Saeima should have the deciding word. I suggest that the Saeima elects the judges on the basis of a proposal - preferable made by the Constitutional Court - of three persons.

To Article 5: It would be perferable in para. 3 to give the right to propose to the Saeima the extension of office of a judge not to the Cabinet but to the Court.

To Article 6: Again, why must be given a resignation to the Cabinet? Why may a judge not resign by a written notice to the president of the Court and the president in the same way to the Saeima?

As to para. 2 it seems to me not advisable to provide for an obligation to resign. What is the sanction if a judge does not resign? The first case provided for in this provision, furthermore, needs an official establishment whether a judge has "undertaken activities incompatible with the status of the Constitutional Court justice". Who is competent to establish those facts? I think such a decision should be left to the Constitutional Court.

If pension age is reached the judge may eo ipso lose its office. No resignation is needed. What happens if a judge does not resign in such a case?

To Article 6: Who is competent to revoke a judge? It would be preferable not to speak about "revocation". It should be left to the Court to decide whether one of the points 1 to 3 in fact is given, and if so, the law may provide that under these circumstances a judge loses office.

If a judge resigns he must not be revoked. Nobody is forced to hold a public office. Therefore, a judge loses office by resignation. The same is true in the case he reaches the age of 65 years. Points 4 and 5 are unnecessary.

To Article 8: See comments on Article 4. This provision must be adjusted to the system chosen for the appointment of judges.

To Article 9: Why is the president elected only for a very short periode? I am afraid that such a system is not in the interest of continuity. In view of the fact, that the Court consists only of five judges, within a short time eventually every judge has been president for a certain time. I wonder whether this is good for the "climate" in the Court.

To Article 10: Para. 3 provides for "instructions" of the president, although only concerning "organisational issues". To speak about "instructions" in the context of a Law on the Constitutional Court gives a bad impression and might be misleading. What are "organisational issues"? I think it is the very function of the president to allocate the cases to the judges, to establish the agenda of the plenary sessions and to preside over such sessions. Is there a need for para. 3? It is recommended to deleate this para.

To Article 11: Since it is only provided for that the Court controls administrative "enactments" as to their conformity with human rights, I miss the control of administrative activities which are not "enactments". Would it be possible to apply against an arrest of a person, against seizure of property (for instance: by customs authorities) or search of home? In all these cases there is no administrative "enactment". On the other side such administrative "activities" need protection in view of human rights by the Court. I think the draft should be supplemented accordingly.

To Article 12: According to para. 1 the President of the State and the Cabinet are entitled to initiate proceedings in which the constitutionality of a law is examined. This is unusual. The main question is, whether such a right should be accorded to the executive power. I have my doubts. Normaly the executive power has to execute the law but not to question the law. Many laws will be initiated by the Cabinet. It is strange that the Cabinet may afterwards challenge the law alleging, the law is unconstitutional. The President of the State verifies the law and shall now appeal against that law before the Constitutional Court. This may be a source of conflict between the legislative und executive power and create instability. It should be reconsidered whether points 1 and 3 should be maintained.

As to point 2 (1/3 of the deputies), I regard this as a right of the minority of the deputies. There are no objections.

Point 4 seems to me too narrow. First of all, I think the provision is to be understood as allowing a court to have a law examined as to its constitutionality insofar as the court has to apply that law. It would be advisable to formulate the draft in such a way. The basic idea is, that a court has the right not to apply a law which in its view may be unconstitutional. In such a case the court shall have the right that the Constitutional Court renders a binding judgement on the question

of the constitutionality of the law in question. This is an important provision. But it is unclear, whether the Constitutional Court itself has that right. The text as it stands may be understood in such a way, that the Constitutional Court is a "court" in the sense of para. 1, point 4. It is, however, recommended to make that point clear: If the Constitutional Court has doubts concerning the constitutionality of a law which he has to apply in the case before him, he may institute seperate procedures to examine the constitutionality of that law. I think this would be an important provision, especially insofar as the Constitutional Court should not have less rights than the other courts.

Para. 2 gives rise to the same problems as para. 1. I doubt that there are convincing reasons to give the President of the state and the parliament the power to initiate proceedings before the Constitutional Court against regulations of the cabinet. The same is true as regards para. 3 concerning enactments of the President. On the other side the Constitutional Courts should be able to control regulations of the cabinet and enactments of the President of the state if the Court has to apply those provisions in a case.

The concerns just expressed relate also to para. 4. Why should it be possible that the local government challenges its own regulations? If the local government thinks its own regulations not in conformity with the constitution, the local government may repeal such a regulation.

In my opinion the right to challenge laws, regulations of the cabinet, enactments of the President and ordinances of local government should exclusivly given to the courts (including the Constitutional court) insofar as they have to apply such provisions in a specific case. The right of a minority of parliament to challenge laws may be maintained.

The questions arises whether individuals should be given the right to challenge laws, regulations etc. before the Constitutional Court. Such a provision could read as follows:

"The Constitutional Court decides whether laws or regulations are unconstitutional when an applicant alleges direct infringement of his rights through such unconstitutionality in so far as the law or regulation become operative for the applicant without the delivery of a judicial or administrative decision".

I welcome para. 6 grating a right to petition to individuals in cases of alleged violations of human rights. I assume that there are no exceptions andd all human rights beeing granted by the constitution. Otherwise the formulation would be too narrow.

The intention of the last half sentence ("or such persons wishes such enactment to be enacted") is unclear. Is the intention to give legal protection against inactivity of an administrative authority? If that is the case, the provision is to be welcomed. But it remains the question whether the Constitutional Court is the adequate Court to perform such a function. It would be preferable to give such a function to an administrative court.

To Article 14: The quotations in para 1 of other provisions of the draft are obviously incorrect

It is not advisable to qualify legal conditions. In para. 1 point 2 what means "substantial grounds"? The word "substantial" adds in reality nothing, but gives raise to difficulties of interpretation. It should therefore be deleated.

The following sentence ("In its petition the court...") may also be deleated because that obligation is already covered by article 13 para. 1.

Para. 1 and 2 are deal with the "acceptance" of the petition. If the underlying idea is that the Constitutional Court has by a seperate decision to declare a petition admissable, this is a possible way. Nevertheless, such a procedural step means double work for the Constitutional Court and might be reconsidered. If there is no substance in a petition it is much easier for the Constitutional Court to reject the petition

by final judgement.

To Article 15: The basic idea behinde this article is completely unclear to me. I am not able to comment on this article.

To Article 16: Para. 1 makes it a precondition for a petition to the Constitutional Court that the general court has not satisfied the applicants claim "in full". Again, such qualifications are not advisable and may lead to difficult questions of interpretation. On the other hand it is not the question whether the claim was satisfied in full or not which is of importance but whether the applicant has some reasons to allege an interference into his human rights. The applicant according to article 13 para. 1, point 4 has to state such alleged interference, therefore, the last part of the sentence in article 16 ("and when the courts has not satisfied his claim in full") might be deleated.

The time-limit for an application beginns when "the decision by the last court instance becomes effective". Is there a special provision in latvian law in which that very moment is circumscribed? Normaly a decision becomes "effective" in the moment of oral pronuncement of the decision or in the moment of the service of the document containing the decision.

I welcome very much para. 2 because this provision contains a strong protection against interference into human rights. The condition "is not effective due to its conflict with any higher legal norm as an exception" can be improved. First of all the norm is "effective" so long as not repealed by the Consitutional Court. The words "as an exception" are not clear. What is important is that the applicant alleges the general norm on which the judgment of the court is based is not in conformity with the human rights granted by the constitution.

As to the question of acceptance of the petition see the comments to article 18.

Article 16 contains not provision as to the necessity of the assistance of a lawyer. This question should be considered. In general it is not advisable to allow proceedings before the Constitutional Court without being represented by a lawyer. Thereby many ill-founded casesmay be avoided. Also the question of legal aid in such cases is left open.

To Article 18: As already stated I am not in favour of a system of special acceptance of the petition. This complicates the procedure and there are not specific advantages.

If the system of a special decision of acceptance is maintained, it is necessary that the defendent party has the right to argue in these proceedings. No provision to that effect is made in the draft.

Para. 2 2nd sentence is only relevant if the petition is accepted. That should be made clear. There should be a time-limit for the reply of the defendant party. In this context it may be mentioned that there is no provision in the draft which makes it clear who is the defendant party. This specifically is unclear in cases in which an individual disputes an administrative act alleging the act not being in conformity with human rights. In such a case has the general court or an administrative authority (which?) to defend the case before the Constitutional Court?

What happens if the judge does not give a decision within one month as provided for in para. 3? I assume that nothing will happen. Why then to oblige the judge to give judgement within a specific time-limit. If there are no consenquences, the provision is superfluous.

To Article 19: A possibility of an appeal within the Constitutional Court is not recommendable. Nearly everbody will use such a possibility. It would be preferable to give the competence for a decision on the rejection of the petition to a three-

judges-body but provide that such a decision is final.

To Article 20: It is unclear what is ment in para. 1 by the condition "When the decision is made". Which "decision" is ment should be clarified.
Since the whole Constitutional Court consists only of five judges I do not think that it is advisable to entrust the preparation of the case to more than one judge.

In para. 2 it would be enough to give the judge-rapporteur the right to do whatever is necessary in order to clarify the facts of the case. An enumeration of what he can do leads to difficulties if somethings has been forgotten.
As to the time-limit in para. 3 it should be taken into account that such time-limits are without sense if there is no consequence in case of a violation of the time-limit. I think para. 3 could be deleated. This is valid also for para. 5, 1st sentence, is concerned. To what does the two words "such decision" refer to?

To Article 21: What is evisaged by "introducing" the parties to the proceedings to the case materials? Certainly the parties have the right to inspect the courts files and must be heard on the facts ascertained by the Court. This should be clearly stated in the law.

To Article 23: I assume that the "actual circumstances of the case" are the facts. I cannot see any advantage that the president of the Constitutional Court should announce decision on the facts as provided in para. 6. Questions of fact and law can bee decided in one judgement. In many cases the questions of fact and the question of law cannot be clearly seperated as experience shows. For this reason, a separation seems to me not advisable.
At the end of the oral hearing the court should either pronounce judgement - what in most cases will not be possible - or announce that judgement will be given in writing. Not advisable is the announcment of the date of judgment. Again this is only complicating procedures because in cases the Court is not in position to uphold the date, nothing is happening. On the other side, the president cannot forsee how long it will take to come to a decidsion. Difficult questions may arise during consideration of the case by the court. Therefore, it would perferable to deleate para. 9.

To Article 24: In drafting this article the formulation in article 6, para. 1 of the European Convention of Human Rights should be taken into account. The decision should be left to the court, not to the president.

To Article 26: As already stated in another context I think it necessary that as far as private person make a petition to the court they should be assisted and represented by a lawyer. This is necessary in order to avoid a lot of manifestly ill-founded cases.
I have not explication for background of para. 2. If serveral natural persons are challenging the same administrative act, they may have different interests. Why should they all be represented by the same lawyer? I cannot understand the purpose and aim of such a provision.

To Article 28: The seperate opinion of a judge should not be attached to the file but to the judgement.
Does para. 2 mean that there are no judgements in writing, that all judgements must be delivered orally? If so, this seems not advisable to me. Only at the beginning of the court's functioning such a system may work. But when there are numerous cases, this will turne out to be a heavy burden to the court. But not only to the court: People have to come again to the court, probably they will have to

travel considerable distances. The delivery of the judgement in the absence of the parties, on the other side, makes no sense.

As already stated in other context, to oblige the court to deliver judgement within 10 days after the oral hearing and to give it in writing within other 10 days is not advisable because if not done so there are not consequences. Therefore, these are not useful provisions.

Para. 3 may be retained. I think it would be enough when judgements are signed by the president. If a judge who has taken part in the proceedings became ill or is just on holidays no judgement can be rendered. In my view the provision is an unnecessary complication.

To Article 29: According to para. 2 the judgement of the Consitutional Court has the effect of "the law". What is the intention of such a provision? In my opinion such a provision in reality has not legal meaning. The effect of a judgement is one the one hand its binding force, on the other what is contained in the following paragraphs. The 1st sentence of para. 2 could be deleated, and if done so probable difficulties in interpretation may be avoided.

As to para. 3 the effect of the judgement in cases of unconstitutionality of laws etc. should not be the ineffectiveness of the legal provision concerned, but the legal provison should be repealed, should therefore no longer be a part of the legal order.

If general norms are no longer part of the legal order, it is necessary in the interest of publicity of the legal order to promulgate their cancellation in the official Law Gazette. Such cancellation of legal provisons is of interest for all. Hence the publication!

It is not advisable to give the cancellation of a legal norm effect "from the moment such decision is made". At that moment, apart of the Constitutional Court, nobody knows of the cancellation, the law may be therefore applied to other cases although it is no longer part of the legal order. For this reason cancellation of the law should enter into force with the publication.

The provision contained in the last half-sentence of para. 3 is very wise. But it should the court not be given the possibility to prolong the validity of such law indefinitely. A time-limit should be introduced. I could inmage that the court declares that a law, although unconstitutional, may be valid during a year, beginning with publication of the cancellation, in order to make legislative adjustments possible.

I doubt the advisability of giving the judgement whereby an administrative act was cancelled retroactive effect as provided for in para. 5. Eventually the petition was given suspensive effect, so that the administrative act has had not effect at all. To repeal the administrative act challenged is enough. Furthmore, the competent administrative authority should be obliged to render a new decision being bound by the judgement of the Constitutional Court.

I miss a provision concerning the costs of the procedure before the Constitutional Court.

There is no provision concerning the service of the judgement to the parties of the proceedings.

To Charpter IV: I wonder whether summary proceedings are really necessary. In cases of individual applications in human rights cases to give to the application suspensive effect, in my opinion protects the interests of the applicant in an adequat manner. There is experience, that difficult cases must be considered seriously even if in cases of urgency and this needs a certain time. On the other side the Constitutional Court will give ugent cases immediate consideration. Summary proceedings involve the danger that the judgement cannot be upheld and this my cause damage, inconviences and trouble.

If maintained the provision of the charpter should be reconsidered in the light of what has been stated in relation to other provisions of the present draft.

To Article 36: In view of article 1 this provisions seems to me superfluous.

To Article 37: May a judge of the Constitutional Court be a practicising lawer, judge of a general court, notary? Those questions should be regulated clearly.

To Article 38: I finde it unusal to give judges of the Constitution Court immunity. I dont think this is necessary in order to exercise such a function.