2000

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 25 January 2000

<cdl\doc\2000\cdl-ju\15-e>

Restricted

CDL-JU (2000) 15

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT AMENDMENTS TO THE LAW ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

Comments by Professor Cesare PINELLI (University of Macerata, Italy)

Introduction

The main purpose emerging from the Draft Amendments consists in giving individuals, courts and the State Human Rights Bureau the right to apply to the Constitutional Court for the protection of "fundamental constitutional rights". A general comment is thus needed on that point, before entering into a detailed analysis of single provisions.

General comment

Article 85 of the Constitution of Latvia states that the Constitutional Court "shall review cases concerning the compliance of laws and other legal norms with the Constitution, as well as other cases placed under its jurisdiction by law".

Article 16 of the Law of the Constitutional Court of 5 June 1996 has enforced the constitutional provision by stating that the Court's review regards the compliance of laws and acts herein mentioned with the Constitution, and even of certain acts with the law (see Article 16, nn. 3-8), as submitted to the Court from the public authorities mentioned by Article 17.

It is possible to argue, although no reference is explicitly made to the point, that those authorities might apply to the Court only to the extent that they claim that other authorities have infringed their own competences by adopting such acts. In this perspective, which recurs very frequently in the recent constitutional texts of Eastern European countries, the Court's task is that of solving conflicts opposing State authorities, irrespective of the fact that compliance of laws with the Constitution is at stake.

The Law of June 1996 leaves aside the question of the protection of fundamental rights. According to its provisions, it is hard to imagine how the Court can afford a decisive contribution to that protection. Therefore, enhancing the development of constitutional law as paramount law of the country becomes quite a difficult task.

The Draft Amendments give instead to individuals (after the exhaustion of all other remedies), to courts and to the State Human Rights Bureau the right to submit an application to the Constitutional Court for the protection of fundamental rights. This perspective needs to be wholly encouraged.

Nevertheless, the new proposals lead to some criticism on the ground of their capacity of pursuing that aim.

The Draft Amendments give standing to individuals, courts and the State Human Rights Bureau simply by adding them to the list of authorities entitled to apply to the Court under Article 16 of the Law of the Court, or with the separate provision of Art. 19, n. 2, concerning standing of "any person who holds that his fundamental rights have been violated by applying a normative act, which is not in compliance with the legal norm of higher force".

In both cases, standing is given not only for the compliance of laws and other acts with the Constitution, but also for the compliance of the acts specified at Article 16, nn. 3-8, with the laws. And this leads to a regrettable confusion for what concerns the judgments of the Court.

As I said earlier, under the law on the Constitutional Court now in force, the main task of the Court consists in solving conflicts between State authorities. Since that task does not necessarily imply that cases submitted to the Court involve constitutional questions, it is fairly obvious that those cases deal also with the compliance of, say, an act of the Cabinet with a law, and, more generally, of a normative act with the "legal norm of higher force".

One might argue, as I argued earlier, that the task of solving conflicts between State authorities is not the best way, if it is a way, of developing constitutional law as paramount law. It could also be added that, in solving certain kinds of conflicts, the Court might be involved in partisan issues threatening its role of judicial authority. But the choice of submitting to the Court cases regarding the compliance of a normative act with the legal norm of higher force, irrespective of the fact that that norm is the Constitution, is coherent with the purpose of giving the Court the general task of solving conflicts between State authorities.

Giving the Court the task of protecting fundamental constitutional rights of individuals, either through direct access of individuals, or indirectly (through the filter of a court of general jurisdiction and of an ombudsman-like authority such as the Human Rights State Bureau), is an altogether different question. Since fundamental constitutional rights are only those enshrined in the Constitution, cases submitted to the Court should be related, as suggested from Mr.

Schwartz, to the compliance of the laws and any other normative act exclusively with the Constitution, rather than with any "legal norm of higher force".

Specific comments

Constitutional Courts entrusted with the task of protecting fundamental rights run always the risk of being overwhelmed with applications by those who have standing. The Draft Amendments have attempted to override such a risk, but the envisaged solutions lead to some criticism.

Requirements for standing of individuals (Art. 19.2)

According to Article 19.2, individuals are required to demonstrate not only the violation of their rights but also the exhaustion of all possibilities of protecting their rights with other legal means. Furthermore, they can apply to the Court only within 6 months from the date of the decision of the last institution becoming effective, and "shall add…1) explanations and documents necessary to size up the conditions of the case".

These provisions sound reasonable, with the exception of the last one, whose vagueness might drive the Panel (which under Article 20.6 is bound to inquire whether the constitutional claim complies with requirements of Article 18 and 19) to deny standing simply by stating that the claim needs further documents or explanations.

I think the Law should have to be more specific for what concerns "the conditions of the case". Alternatively, that requirement could be suppressed in light of Article 20.6 which adds other requirements to those provided from Article 19.2 for constitutional claims, among whom "4) the legal justification of the claim is evidently insufficient to satisfy the appeal". This requirement, which is not provided for application of courts (see Article 20.5), looks quite similar to the requirement of "explanations…necessary to size up the conditions of the case".

Requirements for standing of courts (Art. 19.1)

A) According to article 19.1 (1), the application of a court is not submitted to the Constitutional Court by any court while examining a case (as in the Italian and other systems), but by the higher courts herein mentioned. Further on, Article 19.1 provides certain requirements for the

application of the court, without saying which authority has to inquire whether these requirements are met. On logical grounds, the higher courts by which the application of a court is submitted to the Constitutional Court should be entitled to such inquiring. Otherwise, their task of sending the application to the Constitutional Court would not make sense.

But if higher courts are entitled to such inquiring, requirements of the application of a court will be scrutinized both from the higher courts mentioned at Article 19.1 and, according to Article 20. 5), from the Constitutional Court. That double scrutiny seems rather odd, being provided only for courts applications. The simplest solution should thus be the suppression of Article 19.1. (1).

B) Article 19.1 (3) requires from courts application to be "expressed in the form of a motivated decision". According to Italian legislation, a court holding that the legislation, which has to be enforced in the case, might not comply with the Constitution, can apply to the Constitutional Court with a motivated decision. That decision has to contain not only the reasons why the court thinks the law to be unconstitutional, but it must also demonstrate that that law has to be enforced in that particular case. This requirement is very important, since it presupposes that the court cannot submit to the Constitutional Court applications regarding whatever law he thinks unconstitutional, but only the law which the court should have to enforce, despite the fact that it deems it unconstitutional.

C) The Draft Amendments do not specify whether the court which has applied to the Constitutional Court has to suspend at the same time its judgement until the Constitutional Court has pronounced herself over the issue. This is the solution afforded from the Italian legislation, which is logically connected with the fact that the judge is bound to demonstrate that he has to enforce the law which he deems unconstitutional (see B)). Adopting such a solution for Latvia might avoid misunderstandings if not conflicts between Parliament, judges and the Constitutional Court.

The Court's admission of applications (Art. 20-21)

A) According to the Draft Amendments, applications, whichever their origin might be, have to be previously admitted from the Court. But rules concerning admission of applications of courts

and individuals differ strikingly from those concerning applications of public authorities mentioned at Article 20 (1).

While the former is committed to one or several panels consisting of three constitutional judges, whose decision is final, the latter are committed to a constitutional judge appointed by the Chairperson, whose refusal to initiate a case may be appealed to the Court by the applicant (see Article 21).

The fact that no appeal is allowed against the decision of the Panel reflects the need to restrict access to the Court from ordinary judges and individuals, which might otherwise overcharge the Court.

On the other hand, the appeal to the Constitutional Court of public authorities mentioned at Article 20 (1) against the refusal of the single judge to initiate a case appears unnecessarily complicated, and might create controversies between the single judge appointed by the Chairperson and the Panel. A far better solution might consist in committing the task of admitting applications of such authorities directly to the plenum of the Court, of course without providing any appeal.

At any rate, what all applicants (individuals, courts and other authorities) might really need, as suggested in Mr. Lavin's opinion, is rather an opportunity to complement a defective application before the application is dismissed. Of course, there are cases where the refusal of the Court to admit the application cannot allow such an opportunity (e.g., the case is not within the jurisdiction of the Constitutional Court, or the applicant is not entitled to submit the application). But since in other cases applicants might complement a defective application (e.g., the application does not comply with the requirements of Articles 18 or 19, or, as provided only for constitutional claims, the legal justification of the claim is evidently insufficient to satisfy the appeal to the Constitutional Court), a specific provision might allow applicants to complement such an application only in those cases.

Written and oral proceedings (Art. 28)

While proceedings initiated from applicants named at Art. 20.1 can be oral if those applicants request to participate to the process, in any other case proceedings are written. But Art. 28 is

unclear for what concerns the latter case, providing the written proceedings if "documents submitted together with the application suffice". What happens, then, if documents do not suffice? Should the application simply be refused, as Article 20.5 and 20.6 seem to presuppose, or can applicants, as I suggested earlier, complement a defective application by producing documents requested from the Court?

Closing of proceedings (Art. 29)

According to the new version of Article 29, proceedings may be closed before announcing the decision by a ruling of the Constitutional Court:

1) upon a written request of the applicant;
2) if the disputed legal norm (act) is no longer in effect;
3) the Constitutional Court establishes that the decision to initiate a case does not comply with the requirements of Article 20;
4) a decision on the same issue has been declared in another case.

1) Mr. Solyom has appropriately recalled the ECHR's practice and law, according to which, if the applicant declares to renounce to his complaint, the Court has to examine whether the rights protected in the Convention do not require to continue the process. If those rights do require it, the Court has to continue the process despite the withdrawal of the claim, for reasons of public interest.

It is worth adding that, if the applicant is a court, and if the court is bound to suspend the process until the verdict of the Constitutional Court (as I said earlier, this is the Italian solution which might be of some interest for Latvia), no withdrawal of the claim can be admitted.

2) and 4) If the norm is no longer in effect or a decision on the same issue has already been reached, the Court should have no discretionary power to close the proceeding before announcing the decision, but rather ought to refuse to initiate the case. If this is so, and since the Latvian law commits to the single judge or to the panel respectively the task of a previous admission of the conditions of the case, it should be far better to give to the single judge or to the panel the task of inquiring whether the conditions mentioned at nn. 2) and 4) recur in each case.

3) It is contradictory to give the Constitutional Court the power to close proceedings "before announcing the decision" if "the decision to initiate a case does not comply with the requirements of Article 20". In fact, that power presupposes that the proceeding has already been initiated. And if it has been initiated, the Court must have already ascertained that the requirements of Article 20 are met.

It might be objected that 3) presupposes that the Court can override the decision of the single judge or the Panel. But both the single judge and the Panel are organs of the Court, expressing its will in the cases mentioned at Articles 20-21. If this is so, 3) creates a new stage of inquiry concerning the admission of applications, unnecessarily complicating the constitutional process. My opinion is that 3) could be suppressed.

Reaching the verdict of the Court (Art. 30)

The envisaged solution contrasts with Article 28.7 of the Law of 1996.

Contents of the verdict of the Court (Art. 31)

The addition of "12) other rulings, if necessary" appears too vague.

It should instead be useful to add to 7) the opinion of judges dissenting from the majority of the members of the Court. In every constitutional order admitting dissenting opinion (among whom Latvia: see Article 30.2 of the Law on the Constitutional Court of 1996), that opinion is part of the verdict of the Court, in order to let the public know the diverging arguments which have been disputed before the Court.

Force of a verdict of the Court (Art. 32)

The last sentence of Art. 32.2 ("unless the Constitutional Court has ruled otherwise") leaves room to uncertainty, which is highly undesirable with regard to the date of publishing the Court's decisions.

Furthermore, Art. 32.5 contrasts sharply with Art. 32.2, since constitutional claim is included among the applications which can lead to written proceedings according to Art. 28.

In order to save the content of both Art. 32.2 and Art. 32.5, Art. 32.2 should comprehend the underlined sentence which follows: "If the proceedings have been held in writing, provided that they do not derive from a constitutional claim, the legal norm (act), which……". Or, alternatively: "If proceedings other than those deriving from a constitutional claim have been held in writing….".