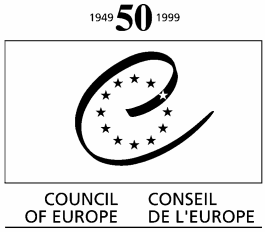

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

Comments by Mr Herman Schwartz (Expert, ODIHR)

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The following comments are subject to two caveats: (1) I am not familiar with Latvian law. Provisions that seems either obscure or questionable to me may be quite clear or clearly correct in the light of
Latvian law.

(2) The comments are based on an English translation. Translations are inherently unreliable. Thus, some of the comments may result solely from errors or obscurities in the translation.

General Comment - Articles 16, 17, 19-1, 19-2, and 25(4), (5).

The primary purpose of the amendment is to expand the jurisdiction of the Court by allowing more entities standing to gain access to the Court, in particular, individuals with human rights complaints, the Human Rights Bureau and courts. This is a laudable objective and none of the comments herein are meant to discourage that. However, when the amendments are grafted onto the existing law, which is itself somewhat flawed in the manner I will describe, they can result in two effects which are deleterious: (1) the Constitutional Court may be overwhelmed with applications by those who would have standing; (2) the applications will include a huge number of issues that the Constitutional Court is not especially equipped to deal with, and which other courts can handle more effectively.

The reason for this is that although the Constitution itself seems to focus on constitutional review, as set forth in Article 85 ("The Constitutional Court shall review cases concerning the compliance of laws and other legal norms with the Constitution"), it also grants the Court jurisdiction in "other cases placed under its [Constitutional Court] jurisdiction by law." Const. Art. 85. The Constitutional Court law, Articles 16-19, both in its original version and after the proposed amendments, authorizes and indeed obligates the Constitutional Court to review cases regarding compliance of many legal norms and acts not just with the Constitution but with other laws as well, including statutes, regulations of the Cabinet of Ministers, international agreements, and a catch-all provision "the law." This can produce an enormous number of cases that deal with the validity of everything from ministerial acts and administrative regulations to international treaties. If standing is limited - as it is now, without the amendments - then this broad grant of jurisdiction is not likely to overwhelm the Court, for relatively few entities have access to the Court and fewer still are likely to have an interest.

Even with limited standing, however, the Constitutional Court still has no business dealing with non-constitutional issues. It is not particularly qualified to do so, for the only task for which the Constitutional Court has a special competence is that of constitutional review. The courts of general jurisdiction, on the other hand, deal with such non-constitutional matters all the time, for compliance of norms and actions with norms of higher legal force is a standard issue for both administrative courts and courts of general jurisdiction. This is even more true with respect to the compliance of specific normative and other acts of high and other state officials with a relevant law.

If the Constitutional Court is forced to spend a great deal of time on these non-constitutional cases, it will not be able to devote enough time and attention to the vital constitutional questions that will probably come before it with the expanded standing provisions, especially through referrals from the general courts and the constitutional complaints.

Finally, the Court's stature and prestige in the community depend on its being seen as a special tribunal entrusted with maintaining and promoting the highest values of the State and nation. Although the Constitutional Court does require a significant number of important cases to come before it, it is very important that it not be seen as just another tribunal with jurisdiction over quite ordinary cases.

In sum, the proposed Constitutional Court law amendments pose two problems: (1) the Constitutional Court may be overwhelmed with a huge number of cases; and (2) there is no need to have the Court decide non-constitutional problems.

Specific Comments on Proposed New Articles

Article 1(2)

What is the relationship of the "Procedural Law of the Constitutional Court" to the Rules of the Constitutional Court, referred to in original Article 14 and Article 20(4)? I found no reference anywhere else in the Constitutional Court Law to this Procedural Law, which appears for the first and only time in this proposed amendment.

Article 16

The General Comment applies here to Article 16(1).

Article 16(2)

A problem arises with treaties that are already ratified. Obviously, treaties involve relations with other nations and if the Constitutional Court overturns an already ratified treaty, this could create international complications.

On the other hand, it would be anomalous to allow the continuance in force of a treaty that violates the Constitution if, as appears the case in Latvia, treaties are subordinate to the Constitution and not of equal or superior force.

One way of dealing with this problem is to allow the Court to rule that a decision finding an already ratified treaty unconstitutional is to be given only prospective effect, so that legal relations based on the treaty remain in effect unless the Court decides otherwise. This matter could be left to the discretion of the Constitutional Court.

Article 17(2)

1. The reference to "acts of the Cabinet of Ministers" is unclear. Does this refer to individual acts, as opposed to legal norms? Article 16(4) refers both to "acts" and to "normative acts," implying a difference between the two. If the provision refers to individual "acts" of Cabinet ministers, this too can produce a very large number of cases, especially if this refers to compliance of such acts with "other laws," as well as with the Constitution.

2. The fact that "normative acts issued by institutions or officials subordinated to the Cabinet of Ministers" can also be analyzed for compliance with "regulations of the Cabinet of Ministers" injects the Constitutional Court, into matters that are even more appropriate for the general courts rather than for the Constitutional Court since not even a statute is involved in this context. The additional cases this could produce is also very great, for the provision can cover the entire administrative apparatus of the State.

Article 17(6)

This provision currently limits standing to challenge a minister's decision to rescind municipal regulations to the relevant municipal council, and no amendment is proposed. Here I think that standing should be expanded to include individuals or the Human Rights Bureau, because a rescission could violate the constitution by rescinding a municipal regulation designed to protect a person's rights. For example, a municipality may enact a local law that grants certain ethnic groups language rights, in compliance with a constitutional provision or a treaty obligation to promote ethnic diversity and autonomy. Rescission of this law could violate the groups' constitutional rights, and the Human Rights Bureau and any individual personally affected should be permitted to challenge the rescission. This is likely to involve very few cases.

Article 17(7)

If compliance of norms with international agreements is kept within the jurisdiction of the Constitutional Court, it is not clear why there should not be a right to challenge compliance of municipal regulations with such agreements.

Article 19

I think the numbers are incorrect. I think it should read ¶1, §7; ¶2, §6; ¶4, §5; ¶6; ¶7, §6.

Article 19-1(2)

Although this may sound inconsistent with the prior comments about excessively expanding the jurisdiction of the Constitutional Court, this provision seems to me to be too narrow because it is one-sided: limiting the caseload only to cases where the court or judge of the land registry concludes that the norm does in fact violate the Constitution wrongly allows appeals to the Constitutional Court only for those who unsuccessfully <u>defend</u> the law, as opposed to those who unsuccessfully <u>challenge</u> the law. This is one-sided and unfair. The application of a court or a judge of the land registry should be permitted if the court or judge concludes that there is a <u>substantial question</u> as to whether the norm complies with the constitution, and there should be no need to conclude that the norm in fact violates the Constitution. (I do not make this suggestion for those situations where the norm simply does not comply with "a legal norm of higher force".)

Moreover, given the normal reluctance of civil law judges of the courts of general jurisdiction to find that laws and other normative acts do indeed violate the constitution, this puts an almost insuperable burden on the challenger. For this reason, referral provisions

similar to those adopted by Italy, Poland, Romania[1], and elsewhere, in which it is enough that there be a question as to constitutionality for a case to be referred to the Constitutional Court, should be adopted.

In addition, there should be a provision that proceedings in the Court or the land registry are suspended pending the outcome of the Constitutional Court decision.

Article 19-2(4)

Whether or not to suspend the execution of a general court's decision when the Constitutional Court considers an individual's constitutional claim, should be left to the discretion of the general court and the Constitutional Court. Unless there is such a suspension, the decision of the Court may be of no value to the applicant. Both the lower court and the Constitutional Court should therefore have the power to suspend the proceedings if allowing the lower court's decision to go into effect will effectively prevent the Constitutional Court from providing the applicant with effective relief if his complaint is sustained.

Article 20(2)

It is not clear from the translation whether this gives the judge the discretion to refuse to initiate a case under these circumstances, or whether he is obligated to do so. Ordinarily I would think that he is obligated to do so, but the phrasing, at least in the English translation submitted to us, makes it appear discretionary.

[1] Italy: Const'l Law No. 1 of 9 Feb. 1948, §1; Law No. 87 of 11 March 1953, §2; Poland: 1997 Const. Art. 193, Constitutional Tribunal Act Art. 3; Romania: Law on the Organization and Operation of the Constitutional Court, Art. 23.2.