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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT AMENDMENTS TO THE LAW ON THE CONSTITUTIONAL COURT OF LATVIA

Results of the Seminar in Riga, 25-26 February 2000

SECRETARIAT MEMORANDUM

A. INTRODUCTION

During the 40th Plenary meeting of the Venice Commission, the Constitutional Court of Latvia asked the Commission to give an opinion on draft amendments to the Law on the Constitutional Cout of Latvia, which had been prepared by the Court itself (CDL (99) 61 – first version). At the same meeting, the Commission appointed Messrs Lavin (member, Sweden), Schwartz (expert, OHIDR), and Solyom (member, Hungary) as rapporteurs who prepared written comments (CDL (99) 68, 70, 71).

At the 41st Plenary meeting, Mr Solyom informed the Commission about the comments of the rapporteurs on Law on the Constitutional Court as modified by the first version of the draft amendments. The amendments introduce constitutional review in individual cases and favour a written procedure rather than the oral procedure which currently exists. Mr Solyom identified three main areas of concern: the fact that the amendments would allow judges of the Constitutional Court to be removed by an external power (the legislature) rather than the Court itself; the extension of the powers of the President of the Constitutional Court, with the possibility for the President to compose panels of judges in each case; and the time at which the annulment of a norm by the Constitutional Court becomes effective: at present it is when the decision is pronounced, rather than when it is published, which goes against the principle of legal certainty.

Mr Endzins, the acting Chairman of the Court (member, Latvia), informed the Commission that a revised version of the amendments was to be prepared on the basis of the comments by the rapporteurs. He asked the Commission to organise a seminar in Latvia to further discuss the draft amendments.

On 25-26 February the seminar took place in Riga. In view of the seminar, Mr. Pinelli (expert, Italy) had been invited to prepare a report on the amendments as well (CDL-JU (2000) 15). At the seminar, an English translation of the revised version of the amendments was made available to the rapporteurs (CDL (2000) 6).

At the seminar representatives from all powers of the state were present and the revised text was discussed. Mr Endzins informed the rapporteurs that the results of the seminar were to be incorporated in to a third version of the amendments which will be submitted to Parliament. The Court would insist on the parallel adoption of amendments to the codes of criminal and civil procedure, which would set out the procedure for the request of preliminary opinions from the Constitutional Court.

The rapporteurs expressed the readiness of the Commission to be of further assistance in the process of adoption of the amendments by Parliament.

B. GENERAL REMARKS

The rapporteurs expressed their satisfaction that many of their remarks on the first version of the draft amendments had been incorporated into the second version.

The rapporteurs identified two major thrusts of the amendments. On the one side the standing of the Court is to be considerably enlarged, notably to ordinary courts for preliminary requests (concrete review), the State Human Rights Bureau (ombudsman) and to individuals (constitutional complaint). The access of the individual to the Constitutional Court had always been dear to the Venice Commission as an effective means of Human Rights protection.

However, such an enlargement of competencies would necessarily trigger a much higher number of cases to be dealt with by the Court. As a consequence, the other major element of the amendments is a shift towards a written rather than oral procedure in order to cope with this higher workload of the Court.

It was also pointed out by the rapporteurs that sometimes laws as such were constitutional but their application by the executive or ordinary courts could be unconstitutional. Consequently, the amendments should seek to include the possibility to review laws as they are interpreted in practice ("living law").

C. REMARKS BY ARTICLE

Article 9 and Article 10 (existing text)

The rapporteurs insisted that the procedure for suspending or removing a judge of the Constitutional Court should not depend on the *Seima* (Parliament) but be a decision by the Court itself, taken by qualified majority. Otherwise, the independence of the Court might be endangered.

Article 16

The issue whether the Constitutional Court should decide only on the conformity of general norms (laws and sub-legal acts) with the Constitution or also any other norm of a higher force. It was mentioned that if the second approach were to be taken the Court would become a "court of hierarchy", rather than a pure constitutional court.

In Latvia, ordinary courts have the possibility not general norms if they contradict an act of higher legal force (e.g. regulation contradicting a statute). Nevertheless, it was argued that it is only the Constitutional Court which can annul them with general effect. Such a setting aside would contribute to the principle of legal certainty, especially in a country still in transition where it is yet doubtful whether the ordinary courts will fully assume this function.

Furthermore, it was pointed out that the hierarchy of norms is part of the Constitution: if a sub-legal act conflicts with a norm of higher legal force, it is the also Constitution and not only the higher norm which are violated.

Article 17

The rapporteurs were of the opinion that the term "fundamental constitutional rights" ought to include rights conferred in international human rights instruments.

Article 19[1]

The question was raised whether it would be more appropriate for a court of general jurisdiction to be able to request a preliminary decision from the Constitutional Court only when it is convinced of the unconstitutionality of a norm which it has to apply in a concrete case and has to hand down a corresponding decision or whether serious doubts by this court should be sufficient. In this respect it was pointed out that ordinary judges are sometimes reluctant to come to the conclusion that a general norm is unconstitutional. Allowing them to address the Constitutional Court already upon doubts, even if serious, would allow them to come forward with applications more easily. On the other hand, the quality of the request will be better if the ordinary court has come to the conclusion of unconstitutionality and is obliged to provide its motivation for this decision.

Article 19[2]

The rapporteurs insisted that the necessary exhaustion of remedies before a constitutional complaint should refer only to ordinary remedies. The use of extraordinary remedies should not prevent the individual to appeal to the Constitutional Court. The members of the Court agreed.

Furthermore, the rapporteurs suggested that criteria be given when the Constitutional Court is to suspend the execution of a decision of an ordinary court when dealing with a constitutional claim.

Articles 20 and Article 22

The rapporteurs were of the opinion that it would be very difficult for the Court to remain within the strict time limits set out in Article 20, paragraphs 6, 8 and 9 as well as in Article 22, paragraphs 7, 11 and 12 of the Law as amended. More realistic time limits might be appropriate. At least in cases of preliminary requests from ordinary courts (concrete review), time limits for the taking of a decision were, however, useful.

The Court agreed that some of these time limits could be extended.

Article 29

The rapporteurs pointed out that once a case has been admitted according to the criteria of Article 20, the criteria of admissibility should not remain under constant scrutiny by the Court. Article 29.2.1 could result in the review of the decision of admission of the case by the whole Court.

The rapporteurs, furthermore, suggested that the *res iudicata* rule in Article 29.2.2 should not totally preclude the Court to come to a different conclusion at a later time.

Article 32

The issue whether the annulment of laws should be effective *ex tunc* or *ex nunc*, was discussed controversially. It was pointed out that effects *ex tunc* could destabilise society, especially if many individual decisions had been taken on the basis of the unconstitutional law.

The second version of the draft amendments settles the problem of the time of entry into force of the decision of the Court by stipulating that they enter into force with their publication.

Article 33

The rapporteurs suggested that dissenting opinions should be made public together with the decisions in the official journal and not only in the official digest of the Court but already, which is published annually. Dissenting opinions had the advantage to force the majority in the Court to give a convincing motivation for their opinion. In this way they even help to legitimise the decision taken by the majority.