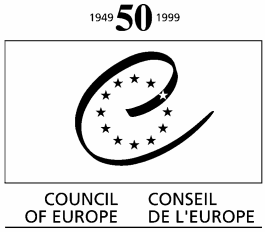

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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

Comments by Mr László Sólyom (Member, Hungary)

According to the Constitutional Court Law of the Republic of Latvia (in the following: CCLaw) the Constitutional Court (CC) hears cases pursuant to the Constitution, the CCLaw and the Procedural Law of the CC. (Art. 1.2.) As to today the Procedural Law has not yet been passed and the Constitution does not contain any substantial rule on the jurisdiction of the CC. Therefore I think it will be no exaggeration if I extend my comments also to provisions of the CCLaw which are not intended to be amended. The CCLaw - which is at the time being the only source of the powers and functgioning of the CC - can be seen so as a coherent system. It is perhaps not unnecessary to draw attention to points which seems to be noticeable for an external observer and which may deserve reconsideration by the authors of the Draft as well.

Besides of technical modifications the Draft introduces two essential changes. Through extending the right to submit an application to courts in connection with a case actually heard by them, and to persons whose fundamental constitutional rights have been violated by applying a normative act the Draft establishes in fact the concrete norm control, and a kind of constitutional complaint which seems to be its most common type in the third generation of constitutional jurisdiction ("unechte Verfassungsbeschwerde"). Both of them constitute a norm control in an individual case. This has a double effect: if the norm is held to be unconstitutional, it will be declared null and void erga omnes, and the consequences of invalidity must be drawn concerning also the individual case. The second essential change is the introduction of the procedure in writing. Extended standing and - as a consequence - increased case-load are conducive to a written pocess. Both changes have a major significance. They will alter the character and the role of the constitutional judiciary in Latvia. The CC will enter the field of individual remedies for violation of fundamental rights and the problem of the relation of the CC to ordinary courts will inevitably come to rise, even if the „constitutional claim” is restrained to infringements of individual rights by applying an unconstitutional norm. Secondly, (at least in my eyes) the written process is the proper form of a norm control, where usually there is no need to establish facts and procedural guarantees of the parties have consequently no significance. I consider both changes in the Draft as very positiv and, indeed, necessary steps. As a result the CC of Latvia will move closer to the standard type of the European Continental Courts. Even if its competences remained restricted to the norm control, in this respect the CC now has the powers like other CCs established in the 1990’s.

General Provisions

Art. 3. and 4. The seven judges of the CC shall be confirmed by the Saeima - according to the Constitution - by simple majority. For the sake of balancing out one-sided political influence the ususal mode of electing constitutional court judges is by qualified (as a rule by two third) majority. Only a few countries elect judges to the CC by simple majority, as for instance Poland. Of course, any change in this respect is beyond the scope of the CCLaw. But in any case, the necessary majority could be expressly stated in Part 1. of Art. 4.

A recent problem of East European CCs which do not have a rotation of judges (Hungary, Poland, Slovakia), that the terms expire at the same time and - even considering changes because of reaching the age limit and other vacancies - the whole Court will be exchanged within a short period of time. By this the continuity of the jurisdiction of the CC is seriously endangered. It is known that in Latvia not all the judges have yet been elected and by this it will come to a „natural" rotation (at least regarding two judges who will have a different date of expire). Even being so, it could be considered to introduce a rule on rotation.

Eligibility for a judge: The five years working experience required in Part 2. Art.4. is unusually short concerning both the legal practice and the academic field. The CCLaw prescribes no mininal age requirement, either. It may be understandable that the legislator wanted to open this new institution for the new generation of jurists. Nowadays, having years, and in Latvia, soon a decade of democracy behind us, the CCLaw could take also the life experience and ripe personality in consideration, which may surely be promoting for the work of a CC.

Art. 7. Part 3. Does the limitation „the same person may not be a judge for more than ten years concurrently" mean that after a break a former judge can be re-elected? The possibility of being reelected is so an important policy question that it should be stated expressly.

Part 4. Guaranteeing the return of a former judge of an ordinary court to his/her previous position is a very practical provision. (A lack of such a rule caused problems for instance in Hungary.) But considering the eligibility requirements it is likely that many CC judges will go back to the professional life after their ten years term has run out. In the free professions, as practising lawyer, there is no problem to start again. Even a former civil servant may find a proper job. But

for „closed professions", as a law professor, a similar guarantee can be of the same practical importance as for a judge.

Art. 10. The words used to define the behaviour of a judge for which he/she can be „released" (Part 3. Art.10) or „removed" (Part.6.2. Art 36) from office are not the same, although they should mean the same conduct. Art.9. Part 2. speaks of „an act incompatible with the status of a judge". This refers obviously to all acts listed in Part 1. of Art.36., for which the judge bears disciplinary responsibility. But if the „unbecoming conduct" in Part 1.3. Art 36 and „a shameful act which is incompatible with the status of a judge" in Part 3. Art.10 describe the same conduct of the judge, the wording of the Law should be the same.

Upon recommendation by the CC the Saeima may relaise the judge from office because of incapacity to work or having committed a shameful act. The confirmation of a CC judge by the Saeima is a necessary. From and by this act receives the judge his/her power and legitimacy. But once confirmed, it is not necessary that a judge will be removed from office prior to the end of the term by the same organ that created him/her as judge. On the contrary, it seems to me that the regulation of the CCLaw is against the independence of the CC. If the Court holds that one of its members is unable to fulfill his/her duties on grounds of health, or behaved him/herself in a manner not worthy of a judge, then the possibility to overruling by the Saeima such a very essential personal decision of the Court, that alone knows what is necessary for its further sound functioning, violates the CC's independence. What happens if the Saeima declines to follow the recommendation of the CC (on clearly political grounds)? Considering that for removal of a judge - and also for rejecting the respective ruling of the CC, that is keeping him/her in office against the will of the Court - a simple majority is sufficient, such a possibility can not be excluded.

I think the decision on releasing or removing a judge from office should be in the exclusive power of the CC.

From the wording of Art. 10 it is not clear, whether the removal of a judge who was finally convicted of a crime occurs automatically, or by decision of the Court or by the Saeima.

Art. 11. Keeping in office the judge until his/her successor swears the oath is a very practicable rule, because the nomination and confirmation of a new judge may be delayed on several, and mainly political grounds - despite the clear obligation of the Saeima set down in the new Part 2.

Accorcing Part 4. the judge shall finish all cases in which he participated even beyond the end of his/her authority. Such a rule would be necessary only if the rules of procedure required that all cases had to be heard by the same judges from the beginning until the decision. The CCLaw does not contain such a rule. What is then the sense of Part 4?

Art 12. The Chairperson and the Deputy Chairperson are elected „by an absolute majority vote of the entire total of the judges", by secret ballott. I agree absolutly. But I ask myself why is it not the general rule for decisions in personal matters of similar weight? For instance, according to Parts 4 and 5 of Art 36, the removal from office can be recommended to the Saeima by the votes of three judges, which is less than the theoretical possible absolute majority (that is four votes). I understand that the rule in Art 12 works only when all the seven judges will be confirmed, while a disciplinary measure may be necessary even before. But would it not be better to have special rules for the present situation and another rule for the time of the full court?

The CCLaw does not tell whether the Chairperson (and his/her deputy) can be reelected, and if yes, how many times? Theoretically even a reelection in four times is possible (at the last occasion practically only for one year). Three years are to short for instance for managing international relations of the CC, but the possibility to end the presidency of a judge after three years who did not function well as Chairperson must naturally be saved.

Art. 13. Para 2. and 3. It seems to me, that the powers of the Chairperson can be delegated too easily to other judges. Moreover, the duties of the Chairperson and the Deputy could be defined precisely. What can the Deputy do while „assisting" the Chairperson? I think in such a small Court, consisting only of seven judges, it is enough, if the Deputy of the Chairperson performs the functions of the Chairperson in his/her absence. (Of course, this may have consequences also as to the salary of the Deputy Chair, that is, it would be the same as the salary of other judges.)

If the CC holds to be necessary to maintain the possibility of „assistance" to the Chairperson by a third judge, too, at least some competences of the Chairman should be excluded from delegation.

Art 13. I understand that a Procedural Law will be passed. Then the CC will be regulated on four levels: Constitution, CCLaw, Procedural Law and the (administrative) Rules. Is it not too complicated? Can the rules of procedure not be divided between ther CCLaw (incorporating the most important ones that are significant for the participants of the procedure) and the Rules?

Authority of the CC

Art 16. The Article speaks on the one hand of acts (of the Cabinet of Ministers, the President of State, Chairperson of the Saeima and the Prime Minister), and normative acts (of institutions and officials subordinated to the Cabinet of Ministers, of officials confirmed, appointed or elected by the Saeima, of a Dome of municipalities) on the other. The differentiation is maintaned in the language of the CCLaw which uses the term „legal norm (act)" at several places. (A former text in the Codices reads: „regulations and other normative acts of the Cabinet of Ministers". According to the now valid text: „acts of the Cabinet...") The issue is not a question of terms but is of substantial significance and influences the charakter of the CC. Can the CC of Latvia review not only normative acts, but also individual acts of the Cabinet of Ministers and of the three highest state officials?

Art. 17. By extending the standing to courts and to persons, whose rights has been violated, these amendments introduce the concrete norm control and a kind of individual constitutional complaint. I suggest to complete the last clauses in each Part mentioning the „person, whose fundamental constitutional rights have been violated" by the very important condition, contained in Article 19.2 Part 1: ...have been violated „by applying a normative act". It would make clear that the constitutional claim is directed to a norm control with consequences for the individual case, and it is not a claim against violations of rights by individual acts and behavior of state organs and officials.

May I draw attention to the serious practical difficulties that are implied in the extension of the right to challenge the constitutionality of international agreements by anybody.

Proceedings

Art. 18. Part 2. restricts the possibility to challenge more acts in the same application. Such a linking up is allowed only if a normative act and its implementing norms are disputed, or in the case of ultra vires issued norms. This rule implies that also the Court is bound not to extend the review to norms which are not indicated in the application, and, in turn, one can reach the conclusion that the Court cannot go beyond the application in other respects, either. I can not see why the applicant could not challenge more norms in the same claim if they affect the same matter and why could the CC not include norms into the review which were not indicated in the claim, but relate to the same subject. Now, that the CCLaw extends standing to all persons, and at the same time makes legal counsel not obligatory, it may happen frequently, that the layman applicant is not able to indicate all norms that are relevant to his case. For instance, the Hungarian CC always extends the review to all norms which are „closely connected" to the law challenged in the application. The result may be that not the disputed norm, but another norm will be declared unconstitutional and nullified. In Art. 19.1. Part 5. it is very reasonable that courts are allowed to challenge all the norms which are to be applied in the given case.

Art.19.1. In the case of a concrete norm control the applicant is always the Chamber or Senate of a given court that is hearing the case in which the disputable norm has to be applied. It is clear from Part 1. Because the following Parts speak only of „court", it would not be unnecessary to add to the end of Part 1: „(in the following: court)".

Art. 19.2. Parts 2. and 3. The constitutional claim shall be submitted „only after exhausting all the possibilities of protecting the above rights with other legal means". The deadline is 6 months „from the date of the decision of the last institution becoming effective".

It should be clarified, whether only the ordinary legal remedies have to be exhausted (for this meaning speaks Part 3: the final or „effective" decision is reached at the end of the ordinary remedies), or also the extraordinary remedies must be exhausted (this interpretation is backed by the wording of Part 2: „all the possibilities of protecting the right"). I think, exhausting the ordinary remedies is sufficient. In this case it may happen, that the applicant initiates two parallel cases, one before the CC and another one in that he/she tries also for an extraordinary remedy. But the two cases are not aimed at the same goal: only the CC can decide on the constitutionality of the applied norms. It may happen, too, that the court carrying out the extraordinary remedy

applies a norm which was not applied by the previous, lower courts. This norm can be challenged, of course, after the judgement in the extraordinary review.

Art 21. The difference between the procedures of initiating a concrete norm control and constitutional claim on the one hand and all other applications on the other, can be justified by the presumably significant number of constitutional claims. If the decision on initiating the case is taken immediately by the Panel, the CC can save much time and energy. The applicant will have a final decision earlier. This decision will be based only on his/her arguments: the institution or official who issued the norm has no say in this preliminary phase and especially can not appeal against the decision initiating the case. But also the applicant of the constitutional claim has to pay for these advantages: only his/her claim can be refused if it is held evidently insufficient as to the legal reasoning. (All other grounds for not to initiate the review are of formal character.) The Draft obviously does not suppose that an application by a court may be prima facie unfounded.

Art. 21. Part 5. provides for the case when a complaint (of the original appellant) is satisfied and the case will be initiated. According to Part 10. of Art 20, the decision refusing to initiate the case was forwarded to the applicant. Now, as the case will be initiated, not only a copy of this decision, but also a copy of the application should be forwarded to the institution or official who issued the disputable act. Part 5. of Art. 21 does not provide for this, but requests a written reply.

Art 22. In Part 3. the text contains „the organisational session consisting of three judges", which has been replaced in Art. 20. Part 7. by „the Constitutional Court". It was understandable because here the CC extends the time limit for decision even for the Panels. In the case of Art 22 - extending the term of preparation of the case for review - the decision of the whole Court is not necessary. The question is whether the institution „organisational session" will be maintained and if yes, whether the formation of the three judges-session should not be regulated (as like as the formation of the Panels in Art 20. Part 4.).

Part 4. provides for a decision of the Chairperson of the CC to forward the case for review. Shall it be taken within the three (five) months term of preparation, or immediately following it? Or is it at the discretion of the Chairperson?

The question is important, because the applicant can get acquainted with the arguments of the institution or official who issued the act from this date on. (**Art. 24.**) On the other hand, participants shall be notified of the time of the session only 15 days before it. (Part 6 of Art 22.) How can the participants make use of their right to see the case material from the decision of the Chairperson onwards, if they will not be notified of that decision?

Art. 25. I did not object that according to Art 22. Part 1. the Chairperson determines the judge who prepares the case for review, that is, the judge writing the opinion which will be discussed in the plenum. There are traditional arguments for an automatic (mechanical, that is neutral and inpersonal) distribution of cases among the judges. This may further judicial independence. On the other hand the President of the CC may use the advantage of special knowledge of the judges, to see the case load etc. But is seems to me to go too far that the three judges panels are selected by the Chairperson for the review for each particular case. (Part 4.) Such a subjectiv composition of the Court for each case is close to endanger the right of the applicant to a „lawful court". If the Panels for previous review are elected by the Court, why does not this procedure apply here? Three judges panels could for instance be re-elected each year, or they can be composed for more years, as well.

Art. 27. Closed doors are allowed only if in the case a state secret would become public. Protection of state secrets can hardly be necessary in norm controll proceedings. If individual „acts" can really be reviewed, such a need may be realistic. But in this case one can imagine other interests, too, which deserve protection. If the CC has the right to decide on open or closed session, it may be more practicable concerning privacy and similar poitns than state secrets. In which case would the CC opt for an open session if it is probably that a state secret will be lifted?

Art 28.1. Without a written process a Constitutional Court can hardly survive. Even from the theoretical point of view an oral process in cases of abtract norm control is not necessary. The Draft, however, maintains the oral process in cases of the abstract norm control and introduces written proceedings for concrete norm control and for constitutional claims, which deal with individual cases and in which establishing facts is more probably than in abstract cases. It is clear that the Draft has intended to settle a great number of constitutional claim cases in writing. It can be supposed, too, that if the applicants are high officials of the state the Court - perhaps for the sake of polity - did not want to take away the possibility of oral argument (from their

representatives). Moreover, courts and applicants of constitutional claims, and, on the other side, and in all cases, the institution or official who issued the disputable act can request an oral hearing, and in this case the Court has no possibility to go on in writing. All this means that the scope of proceedings in writing is according the Draft very narrow and unpredictable.

There are some procedural difficulties, too. Part 1. gives the Chairperson the power to decide on a written or an oral process in a very early phase. He/she gives the case for preparation for an oral or a written review, as if there were differences between the two kind of review in this stage of the process. It would be more appropriate if the judge, preparing the case could make a proposal for a written process, it is he/she, who can decide whether an oral hearing is necessary or not. The second question is, from where can the participants know that the case will not be reviewed orally? The Draft does not provide for a notification either following the decision of the Chairperson for preparation for a written process or after closing the preparation.

My remarks are not against the written process. On the contrary: I would support an extension of the proceedings in writing, first of all in abstract norm control cases. I can imagine that the written process becomes the rule and oral hearings will be held only exceptionally, in cases of public interest (as abortion, or in cases having significance in the given political situation), or if the Court will draw the attention of the public to a constitutional question. Sometimes it is enough if the decision is announced publicly.

Art. 29. According to the Draft the process may be closed befor the decision is announced (in fact before the decision is reached) in very different cases. If the decision on initiating the case turns out to be wrong or the issue to be res judicata (Part 2.), I think, the CC shall close the proceedings. The cases described in Part 1. deserve a more precise regulation.

If the applicant withdraw the claim, it is right, that the CC may, but is not obliged to close the process. But it is not at the free deliberation of the Court whether it contoniues other not. It was the established practice of the European Court of Human Rights that it continued the process despite of the withdrawal of the claim, if reaching a decision was held to be a public interest. Today the earlier practice became a rule for the new Court. (Art 37. of the Eur. Convention of Human Rights: the Court has to examine whether the rights protected in the Convention do not require to continue the process.) Some CCs (as the German CC from 1998) develpoed a similar practice. Point 1 of Part 1. could be completed in this sense.

Point 2. of Part 1. provides that the Court may close the proceeding, „if the disputable legal norm (act) is no longer in effect". It is suggested, that the process shall be closed if it is directed at an abstracte norm control. In case of unconstitutionality, a not valid norm can not be annihilated by the CC. But in a concrete norm control case, the applicant court surely has to apply the norm which is no more in effect (because, for instance, at the time a contract was concluded, it was a valid rule; or there is a process between a private person and the Tax Authority, the taxation rule has in the meantime been changed, but the not valid text is to be applied for the case). A respective differentiation is recommended for the Draft: if a no more effective norm has to be applied in a concrete case the CC has to decide on its constitutionality.

Art. 30. Part 5. If the protocol of the court session shall be signed by all the judges participating in it (Art 27, Part 7.), what is the reason for the modification in the Draft, according to which only the Chairperson and the secretary of the court session signe the decision?

Part 6: If the CCLaw knows the dissenting opinion, moreover, no vote „against" is possible without reasoning in writing, further the dissents shall be attached to the file and be published in the collection of decisions (Art. 33.), why is it not announced at the Court session and why is it not published in the Latvijas Vestnesis? Dissenting opinions are part of the decision, as the other reasoning is part and parcel of the decision. The dissents do not endanger or diminish the legitimacy of the CC in the public eye. The common experience of the Courts is the contrary. The half-hearted solution of keeping the dissenting opinion hidden in the yearly collections can not be supported.

Art. 32. Part 2. second sentence and Part 3. It is a very practicable solution that unconstituional norms become invalid, as a rule, ex nunc. The Draft differentiates between decisions in written and oral proceedings. In case of a written procedure the norm shall be considered invalid as of the date of publishing the decision in the Latvijas Vestnesis. Orally announced decisions effects the invalidity of the norm from "the date of announcing the verdict". I am sure that repealing a legal norm with the date of the oral announcing of the CC decision results in legal uncertainty. The norm had been published in the official gazette - this being the precondition ot its effectiveness -, and some norms become effectiv even on the day of their publication. The verdict of the CC shall be published in the Latvijas Vestnesis within five days from the announcement. Only from this publication on can be told that all the adressees of the norm must

know and count with the invalidity of the norm. A modification in this sense is strongly recommended.

The verdict of the CC may come into effect upon announcement. (Part 1.) The beginning of the invaliditiy of the norm is another question. The CCLaw should provide for detailled rules on the case if the „Court has ruled otherwise" than the main rule (losing effect upon publication of the decision, see Parts 2. and 3.). For instance the CCLaw should define the conditions for a pro futuro or an ex tunc invalidity (the latter even in case of an abstract norm control). It would also be necessary to give rules for the consequences of the invalidity for existing legal relationships which have once been established on the given norm. (For instance if a criminal law provision was struck down, certain types of criminal cases shall be reopened etc.)

Part 4.provides for the consequences if an international agreement proved to be unconstitutional. Is it realistic, that the Government is „immendiately obliged to see that the agreement is amended, denounced, suspended or the accession to that agreement is recalled"? The decision of the CC has effect only for the domestic law. The international obligation is even not touched by the constitutional problems of a party to it. Of course, the Cabinet of Ministers and the Saeima are obliged to do something in order to create conformity between the Constitution and the international agreement. From among the possibilities even the amendment of the Constituion can not be excluded.

Status of Judges of the CC

Art 35. The immunity against criminal prosecution and arrest can be lifted by the Saeima. I have the same concerns as with the removal from office of a CC judge. After having confirmed the judge, any power of the Saeima on the judges is against the independence of the CC. The relationship between Parts 1. and 2 is not clear. Detention and searching presuppose the consent of the CC. But are not, or at least can not be, such acts part of a criminal prosecution, for which the Saeima is competent?

The power of decision on the immunity of a judge should be with the plenum of the CC as it is recommended for all personal affairs. (Not in the hands of three judges, as Part 2 provides for. Who appoints these three judges?) The relationship between immunity and administrative offence is not clear. The immunity should extend also to adminstrative violations. If the Court

decides that the immunity of a judge be maintained, then the judge has immunity also against a procedure for administrative offence. In which case is it possible that the responsibility for an administrative offence may be changed into disciplinary liability? If the judge was granted immunity, is he/she not protected also against a disciplinary procedure for the same offence? Or if the Court denied immunity for the judge will he/she face a double responsibility? (According to Part 8 of Art. 36 disciplinary punishment does not exclude criminal and material liability of the judge. Does it exclude liability for administrative offences?)

Art. 36. The role of the deputy od the Chairperson is especially disturbing when he/she can initiate alone a disciplinary case and appoint an investigating judge. (Even when the Chairperson is not absent. Is it „assistance”?) For the composition of the Court while deciding the disciplinary matter see. the comments to Art. 25.)

Financing and Remuneration

Art. 37. The financing the CC is a question of its independence. Therefore more detailled rules are recommended (as to the submission of a proposed budget to the Saeima by the Court, the exclusive right to dispose over the financial means etc).