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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

OPINION

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

**Adopted by the Venice Commission
at its 80th Plenary Session
(Venice, 9-10 October 2009)**

**on the basis of comments by
Mr Gagik HARUTYUNYAN (Member, Armenia)
Mr Wolfgang HOFFMANN-RIEM (Member, Germany)
Ms Jasna OMEJEC (Substitute Member, Croatia)**

Table of contents

- 1. General remarks 3
- 2. Requirements for candidates..... 3
- 3. Term of office..... 4
- 4. Procedural changes..... 5
- 5. Dissenting opinions 5
- 6. Remuneration and social guarantees 6
- 7. Administration..... 7
- 8. Conclusion..... 8

1. *By letter of 13 May 2009 the President of the Constitutional Court of the Republic of Latvia requested the Venice Commission to give an opinion on draft Amendments to the Law on the Constitutional Court of Latvia (hereinafter referred to as “the Amendments”, CDL(2009)144, with explanatory memorandum).*
2. *The Commission appointed Mr Harutyunyan, Mr Hoffmann-Riem and Ms Omejec as rapporteurs. Their comments figure in documents CDL(2009)145, 146 and 147 respectively.*
3. *The Commission adopted the present opinion at its 80th Plenary Session (Venice, 9-10 October 2009).*

1. General remarks

4. The Amendments provide regulations on matters such as the requirements for being candidate for judge of the Constitutional Court, the procedure of confirmation of judges, the term of office and the procedure and organisation of the Constitutional Court. Moreover, the Amendments grant the judges special social guarantees.
5. The present opinion assesses the Amendments in the light of the Constitution of Latvia, international instruments and comparative legislation and practice.
6. Article 85 of the Constitution of Latvia sets out:
“In Latvia, there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The appointment of judges to the Constitutional Court shall be confirmed by the Saeima¹ for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the Saeima.”
7. Moreover, Article 82, second sentence of the Constitution enshrines the principle of the independence of judges with the following wording:
“Judges shall be independent and subject only to the law.”

2. Requirements for candidates

8. The Amendments introduce certain requirements for a candidate for judge of the Constitutional Court into Article 4.2 of the Law on the Constitutional Court (hereinafter “CCL”). Some of them can already be found in the present law, such as Latvian citizenship. Other criteria have been increased and specified: The educational requirements have been increased to bachelor’s (or equivalent) and master’s degree in law whilst the starting point for the ten years of working experience needed has been rendered more precisely. Finally, one can find newly introduced criteria, the “impeccable reputation” or the minimum age of 40 years. The issue of exclusion (“lustration”) of various officials of the former USSR, which is part of the existing Law on the Constitutional Court, remains out of the scope of the present opinion.
9. The legal **requirement of Latvian citizenship** for a person who is a candidate for the position of a Constitutional Court judge is a standard appears to be no problem at all. This criterion exists in most countries with the exception of very small ones (e.g. Andorra, Liechtenstein) where judges are also appointed from neighbouring countries or countries in a special post-conflict constitutional situation (e.g. Bosnia and Herzegovina).

¹ i.e. the Parliament of the Republic of Latvia.

10. The requirement of “**impeccable reputation**” is difficult to determine in abstract terms but also complies with international standards. In its application, Parliament will have to develop a coherent practice.

11. The amendments introduce a **minimum age of 40 years** for candidates. “[T]he minimum age requirement is used by several countries in order to guarantee professional and life experience”.² While not all countries have such a limit, there is a number of countries, which provide for a minimum age for constitutional court judges ranging from 35 years (Armenia) to 45 years (Hungary). 40 years are required in the Czech Republic, Germany, Russia, Serbia, Slovakia, Slovenia, Ukraine. While the Venice Commission considered a minimum age of 50 years exaggerated³, the required age of 40 years appears to be reasonable from the viewpoint of life experience and maturity, without restricting the circle of possible candidates further than necessary.

12. Candidates are required to have a bachelor’s degree and a **master’s degree in law**. With few exceptions (e.g. France), most countries require higher education in law for their constitutional court judges. The Amendments also provide that candidates should have **10 years legal work experience** after having acquired a bachelor’s degree. These criteria fit to international standards and have not been increased unreasonably far, keeping in mind both the limited pool of candidates in a smaller country like Latvia and the necessarily high exigencies they have to be confronted with. Finally, they will not necessarily lead to a Constitutional Court consisting of career judges and prosecutors only, but will leave space for other legal professionals (e.g. lawyers or law professors) as well and hence allow for a composition of judges different from the ordinary judiciary, which would comply with the logic of a specialised Constitutional Court.⁴

13. Hence, these requirements for a candidate for judge of the Constitutional Court are in **compliance with international standards**.

3. Term of office

14. While the Constitution remains silent on this issue, the term of office has been clarified in the Amendment as the new Article 7.3 CCL provides that the **term of office is non-renewable**. Currently, only consecutive mandates are excluded but judges can be reappointed at a later stage. The latter, perfectly valid system exists for example in Germany or Spain. In its Study on the Composition of Constitutional Courts⁵, the Venice Commission favoured long, non-renewable terms or at most one possible re-election. The non-renewability **even further increases the independence** of a Constitutional Court Judge.

15. Moreover, the procedure for confirming judges has been altered to better guarantee a continuity of the membership by imposing on the nominating institutions – not less than 10 members of the *Saeima*, the Cabinet of Ministers and the Supreme Court – a **time limit of one month before the expiry of the term of office** to make a proposal for the successor (Article 11.2 CCL). In addition, it is inevitable for the institutional stability of the Court and to avoid any institutional blockage, that continuity of the Membership of the Court is ensured.⁶ This can be done by extending the mandate of the judge to pursue his/her work until the formal nomination of his/her successor as is already provided for in Article 11.3 CCL. **The combined approach of a time limit for the appointment and the extension of the mandate is to be welcomed.**

² CDL-AD(2004)024 Opinion on the Draft Constitutional Amendments with regard to the Constitutional Court of Turkey, § 25.

³ *Ibid.*

⁴ Cf. CDL-AD(2006)006, Opinion on the Two Draft Laws amending Law No. 47/1992 on the organisation and functioning of the Constitutional Court of Romania, § 17.

⁵ Cf. CDL-STD(1997)020, Study on the Composition of Constitutional Court, Science and Technique of Democracy no. 20, 4.2, 4.4.

⁶ Cf. *ibid.*, 4.3 *et seq.*

4. Procedural changes

16. The Amendments provide that the time limit for the institution that issued the act in question is doubled from one month to two (Article 20.9, item 3 CCL) while the Court may take five months for the preparation of the case instead of the current three (Article 22.7 CCL). Both these amendments are **entirely acceptable**. They allow for a reasonable time for the preparation of a case without unnecessarily prolonging it. On the other hand, there may be exceptionally complex cases of a highly controversial nature where it may be preferable to have a longer time for preparation and deliberation.

17. Furthermore, Article 32.2 CCL is supplemented to provide that not only the operational part of a judgement of the Constitutional Court but also the **interpretation of legal provisions** given **will be binding**. The interpretation of legal provisions is necessarily part of a judgment. Constitutional courts in new democracies sometimes encounter a 'literal' implementation of their judgements by the ordinary courts (or the executive), which respect the operative part but not the spirit of the judgement.⁷ The draft Amendments seem to be a response to such problems and are **welcomed**. Nonetheless the question remains whether all interpretations are binding or only those that are indispensable for the outcome of the case and in which the Constitutional Court expresses an interpretation of constitutional significance. The amendment – at least in its English translation – seems to be vague on this point: "interpretation of respective legal provision". **It should be made clear that this concerns the interpretation of the legal provision under review and only as far as it is indispensable for the outcome of the case.** *Dicta* as such should not be binding.

5. Dissenting opinions

18. Finally, a **faster publication of dissenting opinions** ("within two month after reaching the judgment") is provided in the Amendment. Currently, dissenting opinions are only published once a year in the official digest of the Court but not in the official journal. The argument, which is sometimes brought forward against the concurrent publication of dissenting opinions and against the possibility of dissenting opinions at all, goes that that the Court would be weakened if the other state powers and the public knew that a given decision was adopted only by a narrow majority within the Court. This argument is somewhat defensive because it presumes that there is a likelihood that such 'narrow-majority' judgements would not be implemented properly. The Constitutional Court however derives its legitimacy directly from the Constitution, which endows it with the full powers to annul legislation adopted by the elected representatives of the people. The very existence of a Constitutional Court is proof that the constituent power wanted to ensure that the provisions of the Constitution prevail over those of ordinary laws. The Constitutional Court, deciding with whatever majority in each case, only ensures the primacy of the Constitution.

19. Another argument sometimes brought forward against dissenting opinions is that that individual judges might feel obliged to dissent in order to please the power or political party that has nominated them. The answer to this argument is that once appointed constitutional court judges enjoy substantial guarantees of independence, which allow them to live their 'duty of ingratitude' towards these authorities. Another element of comfort is the collegiality between the judges. Even if a judge dissents, he or she remains part of the Court, which adopted the judgement, and will not question the legitimacy of the majority vote and the binding force of the judgement.

20. Consequently, dissenting opinions do not weaken a Constitutional Court but they have numerous advantages. They enable public, especially scientific, discussion of the judgments,

⁷ E.g. Azerbaijan, see CDL-JU(2008)051syn, Conference on the "Execution of Decisions of Constitutional Courts", Baku, Azerbaijan, 14-15 July 2008.

strengthen the independence of the judges and ensure their effective participation in the review of the case.

21. The intention of the Amendments to **publish dissenting opinions earlier thus has to be welcomed**. However, the Amendments still allow for a publication of the dissent after the main part of the judgement. These parts form a whole, however, and **should be published together**.

6. Remuneration and social guarantees

22. The Amendments introduce a new remuneration system and additional social guarantees. Remuneration and social guarantees for judges of the Constitutional Courts is a rather sensitive matter, as they are closely linked to the independence of the judges on the one hand and on the acceptance of privileges in the society on the other. Several constitutions supply regulations on these matters.⁸

23. Certain social guarantees for judges of a Constitutional Court are necessary to secure their independence and impartiality, which could especially be affected by concerns about the time to come after the term of office has expired. The more so, as the Latvian labour market appears to be rather small. While the social guarantees of the judges of the Constitutional Court should equal those of other high state officials, the question to be answered for each of the measures proposed is: Are these guarantees necessary to ensure the independence and impartiality of the Constitutional Court of Latvia?

24. The draft Amendments intend to align the social guarantees of the Constitutional Court judges with those enjoyed by the Members of Parliament have been granted. To avoid the impression that the Members of Parliament are seen as a privileged elite, their **salaries are fully transparent**: "Information of the total sum paid to a Member shall be available to the public."⁹ **A similar rule for the Judges of the Constitutional Court should be introduced**.

25. The **remuneration of judges** should be guaranteed by law and be "commensurate with the dignity of their profession and the burden of their responsibilities"¹⁰. The common approach is to set a comparative pattern, e.g. the salary of a Member of Parliament, a minister or a judge of the High/Supreme Court, and to state the relations of this pattern graded from the President of the Constitutional Court to the Judge of the Constitutional Court.¹¹ A different system can be found in Luxembourg, where a general index functions as reference. The current approach of Article 38 CCL in principle is the usual one, with the salary of a Supreme Court judge as reference, but it was described as "very complex and unclear"¹². Therefore, the Amendments provide for a system with the "average gross salary of employees of the State for the previous year as provided in the official statistical report of the Central Statistical Bureau" as reference, which already serves as reference for the salary of the Members of Parliament.¹³ (There seems to be an error in the English translation of draft Article 38, item 3, which refers to the President of the Republic rather than the President of the Constitutional Court.) While this new **system as such cannot be objected**, it seems to be somewhat complex as well. Whether the

⁸ E.g. Article 176.3 of the Constitution of the Republic of South Africa; Section 6 of the Constitutional Law No. 1 of Italy.

⁹ § 14.8 of the Rules of Procedure of the *Saeima*.

¹⁰ Recommendation (94)12 of the Committee of Ministers of 13 October 1994 on the Independence, Efficiency and Role of Judges, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies, Principle III.1.b.

¹¹ Cf. Article 17.1 and 17.2 of the CCL of Albania; Article 4.1 of the CCL of Austria; Article 71 of the CCL of Azerbaijan; § 1a of the Law on the salary of members of the Federal Constitutional Court of Germany; Article 13 of the CCL of Hungary; Section 12 of the CCL of Italy; Article 16 of the CCL of Lithuania; Article 21.3 of the CCL of Moldova; Article 71 of the CCL of Slovenia.

¹² CDL(2009)144, Explanatory memorandum, p. 2.

¹³ Cf. § 12.1 of the Rules of Procedure of the *Saeima*.

outcome may be deemed as just, **cannot be judged** by the Venice Commission, due to a lack of information on the social conditions of Latvia.

26. The amended Article 39 CCL grants the judges **paid vacation of five to seven calendar weeks** a year. Whether the length of a vacation of five to seven calendar weeks is acceptable depends *inter alia* on the social conditions in Latvia, especially on the fact whether such a (in case of seven weeks rather long) time of vacation is typical for Latvia or rather exceptional. The duration of vacation is not presupposed by the special status of a judge of the Constitutional Court, but a matter of labour in general, taking into account the special burden being a judge of the Constitutional Court.

27. The special privilege of up to **two extra weeks** of holidays for Constitutional Court **judges who formerly have served in a court** – as opposed for example to former advocates or university professors – **seems to contradict the principle of equality between the judges**.

28. Considering the pressing need not to hinder the functioning of the Court and especially to avoid a blockage of the Court, it is indispensable to provide for rules ensuring that the outcome of cases (e.g. the composition of a majority) will not be affected by vacations of individual judges. In other countries the **right to take a vacation is often restricted to periods when the court does not sit** and the judges take collective annual vacation. Such a provision seems to be missing in Latvian law. Another possible measure is to **allow the President to recall Judges from their vacation** in case that their presence is required. A problem related to such a provision were to vest discretion to the President to decide whether a judge should be recalled or replaced by another judge: Then the President could influence the outcome of the case by this decision. Hence, such a discretion would not be acceptable.

29. In general, the attribution of bonuses (Article 39¹ CCL) includes an element of discretion. Remuneration should be based on a general standard and not on an assessment of the individual performance of a judge. **At least bonuses, which involve an element of discretion, should be excluded.**

30. The **allowances** foreseen in the Amendment (Articles 39².1-39².4, 39².6 CCL) do not pose a threat to judicial independence, because they are distributed **on the basis of objective criteria** only. Anyhow, this does not mean, that judicial independence calls for them. If the proposed system of allowances is identical to that granted to members of Parliament and if social conditions in Latvia do not conflict with such a system, there is **no reason to withhold** it from the Judges of the Constitutional Court.

31. The **long service pensions** as foreseen by the Amendment in Article 39³ CCL are related to the guarantee of judicial independence and in principle are welcomed. It may be crucial to avoid judges being prone to reaching decisions with regard to potential employers. These new measures would add to the existing right provided for in the Law on the Constitutional Court to return to the position held before the appointment as a judge of the Constitutional Court (Article 7.4 CCL)¹⁴. This does not hold true to the same extent for the **allowance to be paid in case of the end of the term of office** (Article 39².6 CCL), since a one-time allowance will not last very long and thus will not reduce the temptation to recommend oneself for a future job through the way acting as a judge.

7. Administration

32. The Amendment will introduce a new Article 40 into the CCL. Its aim is to establish a new structural unit, the Administration, which is meant to relieve the President of the Constitutional Court of his/her burden of responsibility for the administrative functioning of the Court. It seems that the Constitutional Court of Latvia has a very small number of staff compared to other

¹⁴ This measure probably only concerns previous employment in the public sector.

countries. The establishment of an administrative unit is certainly in line with the practice in many other countries and does not raise concerns.

33. The Venice Commission suggests clarifying the rights of the President in relation to the Head of Administration. Will the Head of Administration be responsible to the President and will he/she be obliged to follow instructions by the President? Details can be left to be regulated by Rules of Procedure of the Court, thus allowing the Court some flexibility to adapt these regulations in the light of experience. On the other hand, it should be excluded that the Head of the Administration will become the hierarchical superior of the advisors and assistants of the judges. They must be answerable only to the judge at least as far as they assist the judges in the preparation of court decisions.

34. In addition to this, the newly introduced Article 41 (which basically complies with the current Article 40 CCL) provides, that the assistant and advisor of a judge shall be employed for a term equal to his/her term of office, exonerating the Court from the regulations of short-time contracts stated in the Latvian Labour Code. In return it specifies the normative acts offering social guarantees that shall be applied on these assistants and advisors. Allowing short-time contracts for the assistants and advisors of the judges of the Constitutional Court contrary to the Latvian Labour Code would be justified because of the special character of this work, where enjoying personal confidence is of particular importance.

35. Nonetheless newly appointed judges will be well advised to keep also previous assistants and their institutional memory. A team completely composed of a new judge and new assistants may have quite some difficulty to find their way in the Court and would become efficient only after a possibly long learning phase.

8. Conclusion

36. The amendments are well drafted and will enable the Constitutional Court of Latvia to improve its efficiency. The main results of the assessment can be summarised as follows:

1. the requirements for a candidate for judge of the Constitutional Court and the amendments to the term of office are in compliance with international standards;
2. the procedural changes (extension of deadlines) have to be welcomed;
3. dissenting opinions should be published with the main part of the judgement;
4. the new remuneration system seems to be acceptable, however it is not possible to assess the level of its accordance with the specific social, economic and political conditions in Latvia;
5. additional vacation only for former ordinary judges contradict the principle of equality between the judges;
6. at least bonus and premium systems, which are attributed on a discretionary basis seem incompatible with the principle of independence of the judiciary;
7. introducing other social guarantees is mainly a question of appropriateness;
8. establishing an administrative unit does not raise concerns, though some clarifications on the hierarchical organisation of this unit would be welcomed;

37. The Venice Commission remains at the disposal of the Latvian authorities for any further assistance.