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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

# COMMENTS ON THE DRAFT FEDERAL CONSTITUTIONAL LAW OF THE RUSSIAN FEDERATION ON THE RUSSIAN CONSTITUTIONAL COURT (CDL (94) 14)

by

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# Some Individual Comments on the Draft Federal Constitutional Law of the Russian Federation on the Russian Federation Constitutional Court

by

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Preliminary remark:

The following individual comments are based on the Provisional Draft of the Law [in the following: Draft Law] on the Russian Federation Constitutional Court in an unofficial English translation submitted to the Commission during its February 1994 session in Venice and the unofficial English translation of the Constitution of the Russian Federation as adopted by popular vote on 12 December 1993 [CDL (94)1].

The author of the Comments did not have the Russian texts at his disposal.

## I. Independence of the Constitutional Court

1. It is highly to be esteemed that the Constitution as adopted on 12 December 1993 provides for a permanent special Constitutional Court (art. 125).

   If a state introduces constitutional jurisdiction, especially in connection with a new constitution, it appears preferable to entrust the adjudication of constitutional issues to a special permanent institution than to the courts of ordinary jurisdiction (US-American model), in particular when the judges of the ordinary courts for historical-political reasons may not be trained and used to dealing with constitutional matters.

2. Institutional independence of the Court as well as individual independence of its justices appear to be safeguarded well (arts. 10, 118 secs. 1, 3; 120 sec. 1; 121; 122; 124 Const., arts. 1; 5 sec. 3; 6; 10 sec. 2; 11; 12; 13; 14-18, 27 Draft Law).

Nevertheless a few provisions of the Draft Law might be reconsidered for the purpose of clarification (some unclear points might result from the English translation of the Draft Law which might not exactly correspond to the legal meaning of the Russian terms of the Draft Law):

a) Art. 11 sec. 2 Sentence 1 Draft Law: Should the justices of the Constitutional Court really be allowed to exercise legal representation "in the court, in the arbitration court or in any other law-enforcement organs"?

It can hardly ever be excluded that the subject matter of such representation before other courts in the future might come before the Constitutional Court, be it by individual constitutional complaint (art. 95 Draft Law), by reference of the constitutional issue to the Constitutional Court by a court dealing with the specific subject matter (arts. 99; 102 Draft Law), or by any other kind of admissible application to the Constitutional Court. The solution of the problem of incompatibility by the justice's disqualification (art. 54 Draft Law) in such a situation certainly is conceivable by not very satisfactory.
It is therefore submitted to consider to drop sec. 2 from art. 11 Draft Law.

b) In art. 11 sec. 3 Draft Law it might be clarified that the prohibition to belong to political parties etc. does not relate to the time prior to the appointment of the justice. Otherwise a considerable number of highly qualified persons would be excluded a priori even from becoming candidates for a justiceship in the Constitutional Court.

c) Art. 15 sec. 3 Draft Law: The English translation uses the term the justice "should" be released promptly; this term would imply a less rigid obligation, implying possibly a certain degree of discretion for the organ detaining the justice. The English term for a strict obligation to release the justice would be "shall be released promptly" - which would be the adequate provision. It is unknown to the author of this comment whether the Russian term in the Draft Law means an imperative strict obligation.

d) Art. 15 sec. 4 last sentence Draft Law: It would appear adequate that the consent of the Constitutinal Court required should be given prior to the execution of any of the indicated sanctions. This might be clarified by inserting the word "prior" before the word consent, i.e. "with the prior consent of the Russian Federation Constitutional Court".

e) Art. 15 sec. 5 Draft Law: The same insertion of the word "prior" before the word "consent" appears to be advisable in this section.

f) In art. 18 sec. 1 lit. e Draft Law it would appear appropriate to clarify that only the verdict by a criminal court should have a terminating effect - provided the termination is formalized under sec. 2 by the Constitutional Court.

In order to prevent an abuse of criminal jurisdiction the finalization of the termination of the powers of a justice under sec. 1 lit. e should include the power of the Constitutional Court to evaluate the verdict of the (criminal) court. For similar reasons measures and decisions under the provisions of sec. 1 litt. f, g, h and i should be evaluated by the Constitutional Court when facing the question of finalizing the termination of the powers of a justice.

g) With regard to art. 27 sec. 3 Draft Law the English translation of the text might be misleading stating that the decisions and other acts of the Constitutional Court express

the justices' legal position "free from political passions [without comma!] and practical expediency".

Practicability of a norm is an aspect relevant to its interpretation, practicability of a decision an aspect of its effectiveness. It is hardly conceivable to have these aspects excluded from the functioning of the Constitutional Court.

## II. Procedure of appointing justices of the Constitutional Court

According to art. 9 sec. 2 Draft Law the candidates for the position of justices of the Constitutional Court are previously discussed at the sessions of the relevant committees and commissions of the Federation Council, and then at the sessions of the Federal Council (plenary), which on the presentation of the Russian President elects them by secret ballot on majority vote and, if elected, appoints them.

While certainly the qualifications of the candidates required by art. 8 Draft Law must be established by the Russian President and by the Federation Council in an appropriate way, and while it would be blue-eyed to think that public discussion of the candidates could be avoided (not to mention the freedoms of expression and the media), it is a different question whether public discussion should be institutionalized in this way in the electoral body.

There are reasons for and against such institutionalized public procedures. They may result in greater transparency and legitimation of elected candidates, strengthening the role of the Court as an institution as well as the independence of the individual justice. They may, on the other hand, not only deter qualified persons from being exposed even with regard to their private spheres to the public but lend themselves to tactical manoeuvering, to attempts to steer or influence the future line of constitutional views of a candidate and thereby weaken the spiritual independence of a future justice. Recent experiences from Senate Hearings on nominated candidates for

the US-Supreme Court, in the opinion of this author, do not plead in favour of such procedures.

## III. Structure and Organization of Work of the Constitutional Court

1. a) According to art. 125 sec. 1 Constitution the Constitutional Court shall consist of 19 members. Art. 19 sec. 2 Draft Law provides that the Constitutional Court consists of two Chambers, formed at plenary session, comprising ten and nine justices respectively, one Chamber chaired by the Chairman of the Court, the other by the Deputy Chairman who are elected by the plenary Court with a simple majority by secret vote from their members for a 3-years term.

While the categories of matters to be dealt with by the plenary Court are enumerated in art. 20 secs. 1, 2 Draft Law, art. 45 Draft Law provides that decisions of assigning cases for hearings in chamber sessions are taken by the plenary Court which also state the order of priority of hearing the cases. According to art. 19 sec. 5 Draft Law the composition of the chambers may be revised every year.

b) While it is certainly appropriate in order to rationalize the work of the Court to have its jurisdiction exercised also by two chambers, the method selected by the Draft Law assigning cases to the chambers respectively as well as the short term (one year) within which the composition of the chambers may be revised appear not to be without problems which might become quite serious.

aa) It would be an unrealistic assumption to exclude the possibility that within the Court groups of justices will evolve who tend to share the same or similar opinions and attitudes with regard to the meaning and interpretation of the Constitution, or parts of it, with regard to the role of constitutional jurisdiction (judicial activism or judicial self-restraint, more "liberal" or more "conservative"

interpretations whatever these notions may imply) etc., differing from other justices or groups of justices.

This situation, in course of time, is prone to influence the decisions on the compositions of the chambers as well as the decisions on assigning specific cases to a respective chamber (both aspects not seldom will interact mutually). This might undermine the public prestige of and the confidence in the Court.

(1) A conceivable device to avoid, at least part of, this problem would be to have the justices of the chambers be determined by lot, excepting the chairman and the deputy chairman whose election would remain unaffected (art. 20 sec. 2 (1); 22 Draft Law).

(2) A second conceivable device would be to establish in advance by a (normative) regulation of the plenary Court for a period of time (possibly 3 years) the categories of cases to be dealt with be each chamber respectively. This would exclude manipulations from within the Court to have a specific case decided by a specific chamber.

The power to issue such regulations by the Plenary Court appears to be included in its competence under art. 44 Draft Law or could be provided for expressly by the Law.

Such kind of regulation will not in all cases lead to a clear assignment to the one or the other chamber. If the assignment by the regulation remains doubtful a small committee of justices, including the chairman and the deputy chairman, with other justices equal in number from both chambers, selected by lot, should have the power to assign the case to a chamber. In case the vote in this committee is tight, the chairman, in rotation with the deputy chairman, should have a casting (second) vote.

c) Revising the composition of chambers (art. 19 sec. 5 Draft Law) will lead to the question in which composition of

justices cases still pending at the time of revision will be decided.

It is a wise rule observed in many legal orders that only justices who have participated in the hearing of the case should participate in deciding the case.

d) In cases pending before a chamber, that is outside the categories of art. 20 Draft Law, nevertheless principal questions of constitutional law relevant to the decision of the case may emerge in the course of the proceedings. In such a situation the chamber concerned should have the possibility, if not the obligation, to refer the ruling on this legal question (or even the case as such) to the plenary Court. Such kind of reference procedure is not covered by art. 20 sec. 1 (4), sec. 2 (3) nor by Chapt. XIII of the present Draft Law and should therefore be expressly included in the Draft Law.

The reason for such kind of reference procedure is to minimize the danger of a diverging jurisprudence within the Constitutional Court which would be unfavourable to its prestige.

e) It would serve the same reason if the Law provided an obligation of the chamber respectively to refer to the plenary Court for answering legal questions, relevant to the case, if the chamber in the case pending before it wants to deviate from a ruling of the respective other chamber or of the plenary Court.

f) Provisions to that effect (d, e above) might be added as sec. 2 of art. 21 Draft Law. It would make the provision of art. 79 sec. 1 subsec. (3) Draft Law to a considerable extent superfluous.

2. Art. 19 sec. 3 Sentence 2 Draft Law provides that if there is no quorum at a Chamber, according to a plenary decision "its members can be supplemented by a justice (or justices) from another chamber".

While such supplementation is indeed necessary in order not to bar the functioning of the Chamber concerned, it might be considered that the supplementing justice or justices might be determined by (secret) lot, not by decision of the plenary Court. This would exclude manipulations by the majority of the plenary Court of the composition of the Chamber concerned in actual pending cases.

## IV. Principles of procedure

1. From arts. 29, 30, 52 ff., Draft Law it appears to result that, as a principle, all cases have to be dealt with in public oral hearings. While this is certainly appropriate for the categories of cases to be dealt with by the plenary Court under art. 20 sec. 1, subsecs. (1), (2), (3), (5) Draft Law it may be questioned whether all cases brought before the Constitutional Court under the provisions of Chapters XII (complaints of unconstitutionality) and XIII (request of courts to review constitutionality of laws) of the Draft Law should be dealt with at oral proceedings. Oral proceedings are very time-consuming. The Constitutional Court may very soon be overburdened with cases.

It is, therefore, submitted to consider to give the Constitutional Court discretionary power whether to deal with cases, other than those enumerated in art. 20 sec. 1, subsecs. (1), (2), (3), (5) Draft Law, by oral or by written procedure. It goes without saying that also in written procedures the sides involved must enjoy the guarantees of a full a fair hearing (see, i.a., arts. 49, 50 sec. 2 subsec. 3 Draft Law), but such hearing must not of necessity be an oral hearing. Art. 50 sec. 2 Draft Law might be adjusted providing for written statements of the organs mentioned therein.

2. Whether the provisions in art. 32 sec. 2, 3 Draft Law on the time order of the examination of cases to be followed will work effectively or rather retard or paralyse the functioning of the Constitutional Court only experience will show. It, nevertheless, might be preferable to have such provisions stated in the regulations to be issued by the Constitutional Court than in the Law so that after sufficient practical experience the Constitutional Court itself might be able to adjust them expediently rather than to have them necessarily amended by the legislator of constitutional laws.

3. It is submitted for consideration whether the power of the Constitutional Court to issue interim orders of protection might be provided for in a separate article of the Law for all kinds of procedures (and not just as presently in sec. 3 of art. 40 Draft Law). Such interim orders are a most powerfull instrument of constitutional courts to safeguard the constitutional positions at issue from being undermined or outflanked by whatever side or interested powers.

   It might be provided expressly that the Constitutional Court could issue such orders proprio motu (ex officio) or on motion by a side having standing in the respective procedure.

4. The relationship between arts. 4 sec. 3 and arts. 58 ff. Draft Law appears to require some clarification:

   The meaning of art. 4 sec. 3 Draft Law is somewhat abiguous. The Constitutional Court deliberates and decides on the categories of matters as defined in art. 125 Constitution. In order to accomplish that task the Constitutional Court itself has to establish the facts of a case falling within its jurisdiction under art. 125 Constitution. It would curtail the execution of this function if the Constitutional Court would be bound to the findings of facts relevant to the constitutional issue by another court or body, or be barred from establishing and examining facts which are relevant to a case that is under aspects other than constitutional law

within the competence of other courts.

It might be left to the discretion of the Constitutional Court whether in case facts relevant also under constitutional law are pending before another Court or body the Constitutional Court will suspend its proceedings until the other court or body has rendered a final decision.

It may also be left to the discretion of the Constitutional Court whether it may base its decision in a case under its competence on the final ruling on the establishment of the relevant facts by another court if by the jurisdiction and procedure of such court a due process of establishing facts is ensured.

5. Art. 69 sec. 2 Draft Law deals with criteria of interpretation of acts. It stresses the literal sense of the act and the literal interpretation given by "official and other acts or by existing law-enforcing practice as well".
To single out from the canon of scholarly accepted criteria of interpretation of norms just a few of such criteria (and to leave out, f.i., the purpose of the act, its history etc.) appears to be not very convincing.

It is submitted to consider dropping sec. 2 of art. 69 from the Draft Law.

## V. Categories of procedures before the Constitutional Court - Art. 80 Draft Law

1. Complaints of unconstitutionality - Chapt. XII: should it not expressly be provided that in order for the complaint to be admissible the complainant, as a rule, must have exhausted other judicial remedies at his disposition and capable of doing away with the asserted violation of his/her basic rights and freedoms?

This would make it clear that judicial enforcement of the Constitution, in particular of the basic rights and freedoms, is not only the task of the Constitutional Court but - within their competences and procedures - of all other courts as well (art. 2; 15; 18 Constitution).

2. Chapt. XIII - Reviewing the constitutionality of laws at the request of courts:
From art. 101 Draft Law appears to result that a requirement of admissibility of the application of a court shall be "the disclosed ambiguity" of the question whether the law to be reviewed by the Constitutional Court is compatible with the Constitution or not.

This may invite a great number of applictions by courts, in particular as the competence of the Constitutional Court under art. 125 sec. 4 Constitution and art. 3, sec. 1 subsec. 3 Draft Law appears not to be resisted to laws passed after the entry into force of the Constitution of Dec. 12, 1993. Ambiguity and doubts concerning the compability of laws very probably will arise with many laws; the courts will tend to refer these issues to the Constitutional Court increasing its case load tremendously.

It, therefore, might be considered in order for applications under Chapt. XIII to be admissible that the referring court itself deliberates on the question of the constitutionality of the law in question and may refer it to the Constitutional Court only if it is convinced of the unconstitutionality of the law to be applied in the case pending before it, in other words: mere doubts of the court should first be surmounted by the court itself, and only when it is convinced of the unconstitutionality of the law should reference of the question to the Constitutional Court be admissible. An additional requirement of admissibility should be that the referring court would have to substantiate in detail the arguments from which it draws its conclusions of unconstitutionality of the law in question.

This solution would not only tend to protect the Constitutional Court from an overload of cases; it would also tend to make the courts aware of the situation that not only the Constitutional Court but they themselves have to deliberate and apply constitutional law. If a court decides that the law in question is compatible with the Constitution it will have to decide the case on this basis; if in that situation in the opinion of a participating citizen this decision is erroneous and violates his/her basic rights it shall be open, after exhaustion of other available judicial remedies, to enter a complaint of unconstitutionality with the Constitutional Court against the court's decision applying an (assertedly) unconstitutional law.

This solution would require adjustment of art. 101 draft Law by dropping the words "the disclosed ambiguity in".

3. Chapt. XV - Interpretation of the Constitution

According to art. 125 sec. 5 Constitution, Chapt. XV Draft Law, the Constitutional Court upon request by the President of the Russian Federation, the Federation Council, the State Duma, the Government of the Russian Federation or the legislative bodies of the subjects of the Russian Federation interprets the Constitution.

This competence and procedure in practice will mean that the Constitutional Court will be requested to give advisory opinions on constitutional questions.

It is quite remarkable that in other constitutional orders such advisory competence of constitutional courts is not provided for. Such kind of competence involves various problems: To give, e.g., an advisory opinion on the constitutionality of a draft law (possibly comprising many articles) will be very time-consuming. In particular in respect to economic and social legislation in highly complex societies it will be quite difficult to ascertain in advance the potential consequences of the law "in action" which are

relevant under constitutional law. If the Constitutional Court later on will be faced with the enacted law, it might be embarrassed by its earlier findings in the advisory opinion.

A specific procedural problem in this context consists in the question who should be heard in this procedure - the Draft Law in Chapt. XIV does not provide for any participant except the applicant, although the interpretation of the Constitution by the "ruling" (see art. 67 sec. 2 Draft Law) of the Constitutional Court may potentially be prejudicial to the constitutional positions of other organs or bodies. It is submitted, therefore, to consider to supplement Chapt. XIV by provisions to the effect that
(1) the Constitutional Court has to notify the other organs mentioned in art. 104 Draft Law of the request by an applicant in due course of its proceeding;
(2) shall give them adequate apportunity to state their opinions on the requested interpretation of the Constitution; this might be established by a right of intervention (participation) to the procedure under Chapt. XIV;
(3) the Constitutional Court may invite at its discretion any other organ or body to state its opinion on the requested interpretation of the Constitution.

In order to avoid that the Constitutional Court might be (ab-)used under Chapt. XIV as a commentator on purely abstract questions without actual relevance in the constitutional process (or with political intentions still hidden from it by the requesting organ) it might be considered whether art. 125 sec. 5 Constitution would allow to make it a requirement for admissibility of the request that the "ambiguity of interpretation of provisions of the Constitution" (see art. 105 Draft Law) had been established by actual controversies between the organs enumerated in art. 104 Draft Law. This would be highly recommendable because it would make the Constitutional Court aware of the constitutional positions potentially involved and other organs or bodies which should have an opportunity to be heard.

## VI. Material and Social Status of Justices - Sec. IV Draft Law

1. Art. 112 sec. 1 Draft Law: It might be clarified that the stimulatory payments "resultant from work" may not be evaluated according to the contents of a justice's attitude in deciding cases.

2. To have the Federal Assembly confirm the "stimulatory payments resultant from work" (art. 112 sec. 2 Draft Law) appears not to exclude the danger that the Federal Assembly, at this occasion, might try to influence the attitude of the justices and of the Constitutional Court as such. This would be highly inappropriate. A purely quantitative criteria for such "results" would be quite deficient as the difficulty of cases with which a justice is concerned may vary very much. It would appear preferable to drop the provisions dealing with "stimulatory payments resultant from work" and instead raise the salary of all justices to 90 % of the salary of the President of the Constitutional Court.

   Art. 112 sec. 3 Draft Law may produce misgivings and tensions between justices with and without scientific law degrees. It may also have some influence on the appointment of justices. It might be considered to drop this provision too.

## VII. Right to initiate legislation in the State Duma

1. Art. 104 sec. 1 Constitution accords the Constitutional Court the right to initiate legislation within its "terms of reference", according to art. 3 sec. I subsec. 6 Draft Law "within the limits of its competency".

   A right to initiate legislation if excercised will unavoidibly draw the initiating organ into the complexities of the political process, penetrating the sphere of the legisltor. If the Constitutional Court by such initiative leaves the sphere

of judicial functions its prestige may seriously be damaged (if, e.g., the legislator rejects initiatives by the Constitutional Court). Exercising this right may also impair the impartiality and objectivity of the Constitutional Court and embarrass it considerably, when later on the Constitutional Court or other courts (see Chapt. XIII Draft Law) have to decide on the constitutionality of a law which was enacted upon the Constitutional Court's initiative.

2. In view of the principle of separation of powers (art. 10 Constitution) which is a fundamental principle (art. 16 sec. 1 Constitution) it is submitted that art. 104 sec. 1 Constitution, as far as it deals with the right of courts to initiate legislation, should be interpreted quite narrowly. Such narrow interpretation is supported by art. 104 sec. 1 sentence 2 Constitution when it relates this right of initiative to the respective "terms of reference". In view of theses provisions of the Constitution itself one might argue that the right of the Constitutional Court to initiate legislation should not extend beyond subject matters dealing with the organisation of the Constitutional Court, its competences to deal with subject matters, its procedure and the status of justices, while it would be beyond this right to initiate legislation for other matters enumerated, e.g., in arts. 71 and 72 Constitution.

If this narrow interpretation would be the understanding of the legislator the text of art. 3 sec. I subsec. 6 Draft Law might meet no objection.