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COMMENTS
ON THE DRAFT LAW ON JUDICIAL POWER AND CORRESPONDING CONSTITUTIONAL AMENDMENTS OF LATVIA

by
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1. The material I have received comprises two pieces of draft legislation, namely the Draft Law ”Amendments to the Constitution of the Republic of Latvia” (I) and the Draft Law on Judicial Power (II).

I. Amendments to the Constitution

2. The proposal relating to changes in the Constitution comprises three articles. The amendments propose wording changes to articles 82 and 84, whereas the third article (861) constitutes an amendment to Chapter 6.

The following two articles require further comment.

> Article 82. Court cases in Latvia shall be heard by District (Town) Courts, Regional Courts, Administrative Courts, the Administrative Appellate Court and the Supreme Court, and in the case of war or an emergency also by Court Martial. The Council of Justice shall represent the judicial power and organizationally manage it.

3. This provision means inter alia that a Court Martial is competent in case of war or emergency. A Court Martial differs from a regular court in a number of essential respects regarding both its composition and conduct. Its competence ought therefore to be limited to very extreme circumstances, such as states of war. The word “emergency” is far too inclusive and could also be applied to peaceful circumstances within a country. “Emergency” should therefore be deleted and replaced with the words “imminent danger of war”, for example. See also below regarding article 1 (3) Draft Law on Judicial Power,

4. The proposal for the Law on Judicial Power makes it clear that the powers of the Council of Justice would be considerably more far-reaching than is expressed in the second paragraph of the provision. The Council will have extensive powers to make decisions and recommendations in purely individual cases, particularly with regard to the legal status of a particular judge. This ought to be stated explicitly in the wording of the legislation. Thus the provision might be worded as follows: “The Council of Justice shall represent the Judicial power, organizationally manage it and make decisions and recommendations in cases provided by law.”

> Article 84. Judges shall be appointed by the Saeima and may not be dismissed. A Judge may be dismissed only in cases provided by law based on a decision in a disciplinary case or a Court verdict in a criminal case. The law may stipulate the age at which a Judge shall retire from office.

5. The first two sentences of this article contradict one another. The first sentence states that “Judges may not be dismissed,” whilst the second states that “A Judge may be dismissed …”. The simplest remedy ought to be to delete the words “may not be dismissed” from the first sentence, If the intention is specifically to make the point that the Saeima lacks this right, then the words “by the Saeima” must be appended after the word “dismissed”.

II. Draft Law on Judicial Power

6. The proposed legislation constitutes a very comprehensive and detailed product. It is so rich in detail that its strict application may serve to obstruct the natural adjustment of the

Law to the circumstances of specific cases. A review should be conducted in order to investigate whether all the detailed provisions are necessary and also to avoid repetitions to some extent. The proposed administration of the judiciary is complicated and involves no less than five agencies: the Council of Justice, the Judicial Administration, the Judges Qualification Board, the Judges Disciplinary Board and the Conference of Judges.

7. Article 1 (3). As was emphasised above, the competency of Courts Martial should be linked to war or imminent danger of war. The term "emergency" ought in any case to be replaced. Article 1 (5) states that: "Establishing of special (emergency) Courts shall not be permitted." The provision thus means that "emergency" Courts are prohibited in principle, which ought then also to include Courts Martial.

> Article 1(4). The Prosecutor's Office is an agency of the judicial power monitoring the observance of law according to the authority granted to it by the Law on the Prosecutor's Office.

8. This provision indicates that the Prosecutors Office constitutes part of the Judicial power. However, judicial power is devolved exclusively upon the courts. The Prosecutor is a party to criminal cases and has nothing to do with the Judicial power. If the Prosecutor is counted as part of the Judicial power, the defence lawyer ought to have a similar status. The rule that the Prosecutor's Office is an agency of the Judicial power ought in other words to be removed. The Prosecutor's Office may thus, in the same way as sworn advocates in Chapter 20, be classified as a part of the judicial system, but not as part of the Judicial power.

> Article 1 (6). Judicial power shall be represented by the Council of Justice.

9. As was mentioned above, the Council of Justice will not have an exclusively representative function. This should be made clear in the proposed provision. One possibility would be to append the words ", whose precise powers are described in this law" to the provision.

> Article 2 (1). When hearing cases, Judges and lay judges shall act independently and shall be subject to the law only.
> (2) Judges shall decide cases justly and objectively, based on facts and in accordance with the law.

10. The provision in (1) applies to Judges and lay judges. The provision in (2) refers only to Judges. Lay judges may also be presumed to participate in decision making and should therefore be explicitly referred to in the provision in (2).

> Article 2 (4). Judicial independence shall be guaranteed by the State.

11. It is not clear how this guarantee is to be effectuated in practice. If this is intended to take place by means of legislation, this has already been taken care of by means of the provisions in (1), (2) and (3) in the same article, and for this reason the provision in (4) appears unnecessary. If the intention is that the guarantee is to be expressed by means of actual measures, the nature of these measures ought to be stated in the provision.

12. Article 4 (1), (2) and (4). The provisions make mention only of the Court. It is neither the same concrete court nor the same type of court that is referred to in all instances, however. For the sake of clarity, the wording should specify "the competent court by law".

> Article 5 (1). A Court verdict come into legal force shall be binding on all. Such a verdict has the force of law and it shall be respected like the law.

13. I am assuming that the word "verdict" is used here in relation to court judgements in general and not exclusively judgements relating to criminal cases. A court judgement that has attained legal force may as a rule only take effect in relation to the parties concerned. A party that has not been involved in a civil case may naturally place the same or a similar issue before the courts for consideration. Thus a judgement that has attained legal force is not binding for everybody. Another issue is that of whether the rule is intended as an expression of a desire that agencies and private individuals shall show respect for the decisions made by courts. If this is the intention then the wording "binding on all" should be replaced by the words "held in respect by all". If the word "binding" is retained, however, then the rule must be altered to include the limitation that the court judgement is binding in those regards and to the extent that is laid down in the wording of the judgement.

14. The rule in the second sentence ("Such a verdict has the force...") is quite unintelligible from the standpoint of procedural law. A judgement can never be equated with a provision of law. Provisions of law are directed at all the citizens, agencies and so forth within a state. A judgement imposes certain obligations upon a specific, named party, or sentences the party to a certain sanction etc. The rule should therefore be deleted from the final sentence.

15. The rule in (1) should be worded as follows: "A court verdict come into legal force shall be held in respect by all", or possibly, "A court verdict come into legal force shall be binding in accordance with its wording".

> Article 5 (2). A verdict come into legal force shall be executed.

16. The fact that a judgement has attained legal force does not necessarily mean that the judgement is executable. Some judgements are of a stipulatory or status nature and are not intended for execution in the proper sense. Whether or not a judgement is intended to be executable is evident from its wording. The following wording ought to be appended to the proposed rule: "... in accordance with its wording."

Article 6. The heading reads: "A person's right to the protection of the Court." This heading is not adequate in relation to the content of the provisions in (1) and (3). The heading should instead read: "A person's right to a fair trial by the court."

17. The provision in (2) relates to a certain level of judicial protection for citizens. The content however is such that it belongs in Bill of Rights provisions. The rule in (2) should therefore be deleted.

> Article 8 (7). A Judge shall not be materially liable for loss and damages caused to a party in a case by an illegal or unjustified Court verdict. In cases provided by law such loss and damages shall be compensated by the State.

18. It is not clear who is to decide whether a judge has passed an illegal or unjustified Court verdict. This ought to require that the judicial remedies have been exhausted and that this result has been reached in the highest instance. It must also be evident, i.e. beyond debate, that the judgement at issue is marred by errors of this kind.

19. Article 9 (2). The procedural code statutes must include provisions making it possible for a person who doesn't understand or speak Latvian (either a foreign national or a Latvian citizen) to follow court proceedings and to respond during such proceedings by means of an interpreter.

20. Article 13. The heading speaks only of Establishing District (Town) and Administrative Courts. The provisions in this article however relate not only to the establishment of courts, but even to their closure. The word 'Establishing' should be replaced by the word 'Organising' in the heading.

21. According to article 13, the Council of Justice constitutes the decision-making body. The Council is to decide as to the establishment, reorganisation or closure of the courts in question. Further, it is to decide the number of courts, their territory of jurisdiction, their location and the number of Judges in each court. These are not purely judicial issues, however, but are essentially to do with political considerations relating to infrastructure, the provision of service to citizens and so forth. It is therefore a matter for debate whether the right to make decisions on these issues should be devolved upon such a pronouncedly judicial body (as manifested by its composition) as the Council of Justice. In Sweden the right to make decisions relating to the establishment, reorganisation and closure of courts is devolved upon the Parliament (Riksdagen). These issues have frequently been debated in the Swedish Parliament. I am of the opinion that serious consideration ought to be given to the question of whether the Saeima ought to be designated as the decision-making body instead of the Council of Justice. This point also applies to some extent to the rule in article 14 (1).

> Article 14 (2). A Regional Court may establish independent sessions. Such independent session shall be established and their territory determined by the Council of Justice.

22. It is not clear what is meant by "independent sessions". If the term refers to sessions arranged by a court at a locality within its territory of jurisdiction other than the permanent locality for such sessions, then there is no fault to be found. However, it might be considered more dubious if the term instead refers to some special type of "sessions" not covered by the permanent rules governing legal procedure. The same holds for article 15 (3).

23. Article, 20. This article states that the Chairperson of the court shall allocate cases to the judges. If this means that the Chairperson assigns to the judges the concrete cases that they are to adjudicate, then the system is unacceptable. If it simply means that the Chairperson decides which judicial areas each judge shall be responsible for (e.g. civil cases, criminal cases, tax cases or administrative cases) then this procedure is acceptable. Compare also article 26.

> Article 28 (1). The Council of Justice shall be an independent agency representing and organizationally administer judicial power.

24. The Council's competence in this area is also laid down in article 82 of the constitution (see above). The Council's competence is wider than this, however, and in particular, the Council has the competence to decide upon and make recommendations affecting judges in individual cases. For example, it is the Council that appoints the Chairperson of the court and the Chairperson's deputy, and that decides on extending the service of judges who have reached retirement age and on replacements for judges. The Council will also have a considerable influence through its recommendations to the Saeima regarding the appointment of judges, As was expounded above, this ought to be specified in the wording of the legislation, by means for example of appending the words "...and make decisions and recommendations in cases provided by law".

25. Article 29 (2). The provision makes it clear that the Prosecutor General is an obvious choice for membership of the Council of Justice. As was expounded above, a prosecutor should not be counted as part of the Judicial power. At the most, he may, in the same way as an advocate, be counted as part of the judicial system (see chapter 20). It follows from this that the Prosecutor General should not be included in the Council of Justice out of consideration for the information that the Council will be privy to.

26. Article 29. The Council of Justice is heavily dominated by judicial professionalism, primarily in the form of judges. Apart from the Minister of Justice and the Chairperson of the Saeima Legal Commission, the composition of the Council is such that the judiciary and other lawyers close to this body themselves make decisions relating to their own affairs. The need for ideas and assessments from other areas of society may be missed. With regard to the question of appointments in particular, there is a risk for nepotism and a broader outlook is lacking.

27. Article 52 (1). According to the oath prescribed in this article, the judge shall swear inter alia to be loyal to the Republic of Latvia. The oath relates to what the judge shall observe in the exercise of judicial power that be is about to embark upon. When he adjudicates in a civil case between two parties or in a criminal case where there is a suspect, he shall thus consider being loyal to the State of Latvia. This compliance towards the State would be most conspicuous where the State happens to be a party in a case before the court. The Swedish judicial oath does not include a declaration of loyalty to the kingdom of Sweden. It is my opinion that such a declaration may give rise to suspicions that inappropriate considerations may become involved in concrete court cases. The most expedient course of action would be to delete the words "loyal to the Republic of Latvia". This also applies to the oath prescribed in article 53 (1).

28. Article 66. The heading reads: "Rights and freedoms of a Judge." For the most part, however, the article contains prescriptions relating to the various obligations of judges and thus to limitations upon their freedom (3), (4) and (5). The word "freedoms" should therefore be replaced by the word "obligations".

> Article 67. A Judge shall be entitled to protection of his/her own person and property and that of his/her family.

29. This protection ought to be granted to all citizens and not merely to judges and their families. The rule appears to be unnecessary and may be deleted.

III. Summary

In addition to observations of a legal-technical nature, criticisms of a concrete character have been directed at the following conditions:

1. The competence of the Court Martial is too broad. This should be limited to times of war or imminent danger of war.

2. The Prosecutor's Office is to be included as part of the Judicial power. Judicial power shall only be exercised by independent courts, and thus the prosecution authorities should be kept separate.

3. A court decision is to be binding for all in the same way as a law. A court decision can never be ascribed such a general effect. Each individual decision has the significance accorded to it by its wording.

4. The Council of Justice is to be almost exclusively comprised of judges. With consideration for the competence and powers of the Council, it is questionable whether other categories of persons should not also be represented on the Council.

5. The Council of Justice has a decision-making influence on the organisation of the courts. Certain issues involve political considerations, however, that may call for reflection as to whether the Saeima should be assigned this decision-making authority.

6. The judge is to swear an oath of allegiance to the Republic of Latvia. This oath may constitute an obstacle to the impartial and fair exercise of the judicial office.