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(VENICE COMMISSION)

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

by
Ms Hanna Suchocka (Member, Poland)

Hanna Suchocka

Opinion on the Draft Law on Judicial Power (Republic of Latvia)

I. General Remarks

1. The document submitted to the Commission for an opinion contains the draft version of the new law on judicial power. This is a complete and comprehensive regulation of the judicial power's problems. The previous law was ratified in 1993. A number of its solutions concerning the position of the judicial power in the system of state powers, especially the scope of its independence elicited reservations and critical evaluations. One surmises that the current draft legislation was written to some extent under the influence of the evaluation set forth in the report prepared by the Open Society Institute within the framework of the EU Accession Monitoring Program on Judicial Independence (2001). In the first part of this report containing a cumulative evaluation of the solutions found in all the EU candidate countries, Latvia was among the group of four countries in which "the problem of insufficient institutional independence is especially acute"[1]. In turn, the section devoted to the individual national reports states that "Latvia has made important progress towards the creation of an independent judiciary. Many of the formal guarantees of judicial independence are in place, partly as a result of progressive reforms in the early 1990s. However, reform has not remained a priority and major problems persist. In particular, the political and social environment is unfavorable to the development of an independent judiciary, over which the executive continues to exercise unduly intrusive administrative, supervisory and financial power."[2] The draft legislation presented now therefore attempts to eradicate all these shortcomings and to propose solutions aligned with generally-accepted European standards. This is another important step in the direction of breaking away from solutions typical of the past era. The organization of the judicial power is based on the principle of the separation of power and the exclusivity of the courts in exercising judicial power. The drafters of the proposed legislation are also searching for guarantees that will make it possible to ensure the achievement of this principle in the most consistent manner, including the principle of judicial independence, which is critical for the principle of the autonomy of the judiciary. There is no doubt, as evidenced by the report cited above, that the judicial system of Latvia was in need of change. It was too strongly rooted in remnants of the former system, which was most clearly revealed by the absence of a body representing judges as well as by the scope of the justice minister's rights with respect to the courts, which transcend the boundaries demarcated for the executive power in a system based on the concept of the separation of powers. Indubitably, the fundamental direction of change presented by the drafters of the proposed legislation is the correct one. This applies both to the general principles set forth in Section I and in particular to articles 7 and 8, which form classic guarantees of judicial independence as well as to the detailed solutions set forth in subsequent parts of the statute. In my opinion, I will therefore only react to those solutions that may elicit doubt, and in any case, are, at the very least, debatable according to me.

[1] Monitoring the EU Accession Process: Judicial Independence, Open Society Institute, Budapest 2001, p. 23.

[2] Ibid, p. 228.

II. Council of Justice

2. Latvia belonged to that small group of states that do not envisage the existence of a Council of Justice in their legal systems, where the justice minister and the President of the Supreme Court are the representatives of the judiciary power. Thus the presentation of draft legislation calling for the establishment of a Council of Justice must be evaluated positively. Section 3 of the draft legislation is devoted to this topic. The Council of Justice has been specified in article 28 as an independent agency representing and organizationally administering judicial power. Its powers (competencies) have been specified in turn in article 30. In this context, however, a fundamental question arises, namely, may one so unequivocally positively evaluate the broad range of powers awarded to this Council. This issue will certainly remain debatable. The dispute over the model for the council of justice and its relationship to the executive authority, especially to the justice minister has been and is present in various countries. For it is manifest that various solutions concerning the scope of its powers and its relationship to the justice minister are plausible even in a situation in which such a council exists. European standards are fairly flexible in this regards; they do not impose a specific uniform model. That is also why various solutions fit within European standards. Each country's lawmaker makes the decision on selecting the model for the body representing judges and its composition as well as a broader or narrower scope of powers while taking into consideration sundry factors, including among others, the tradition of a given state, the solutions of European democracy as well as the condition of the courts and the degree of preparation on the part of the judiciary community to discharge such broad powers that are not only adjudicative in nature. The insight into the efficiency and effectiveness of a given solution as opposed to some other solution will also be of importance in conducting this evaluation. That is why there are states in which the council of justice has very broad powers, or more properly, a certain type of omnipotence, while there are also states in which there is a large amount of room for the justice minister to operate despite the broad powers held by the council of justice (e.g. Germany and Austria), and this does not prompt any adverse repercussions in the area of judicial independence or in the operating effectiveness of the courts.

3. Latvia has decided to embrace the former solution in the presented draft. It is therefore following in the footsteps of Hungary and the most recent amendments effected in the judicial system in Bulgaria. It is proposed that the justice minister's current powers will be assumed almost entirely by the Council of Justice. This is most assuredly equitable and justified in many instances, especially in cases in which this applies to problems strictly associated with the delicate subject matter of judicial independence. The model solution proposed in this draft does prompt however a number of doubts and inherently contains certain traps. According to me, this includes the provisions envisaging the involvement of representatives of the judicial power, the members of the council of justice in the ongoing budgetary battle fought in the parliament, and this is undoubtedly a political debate. Article 30 item 2 regulates this issue stating that the Council of Justice represents the judicial power during the process of preparing and performing the budget (financial management). Under this solution, an effect opposite from the intended one may occur, namely, while wanting to ensure greater independence of judges and courts, and thus to bring about their de-politicization, it may turn out that they will, quite to the contrary, be engulfed in the rhythm of political debate. For there is no doubt that budgetary debates are everywhere a fight entailing participation in various political arrangements, and especially in a state that has modest budgetary means. Would it not then be a better solution, without deviating from the principle of having a separate budget for the judiciary, to leave these types of powers and

budgetary struggles in the government and the parliament to the justice minister since this office will remain? I would like to reiterate that I have concerns on whether such mechanisms entailing the outright transfer of all powers to the council of justice is the best solution. This may in the future lead to the council of justice forfeiting its fundamental nature underpinning the establishment of this institution, i.e. ensuring the principle of judicial independence while it may become a new type of a quasi ministry, i.e. an administrative and bureaucratic institution engrossed in daily administrative squabbles. In assuming a large range of typical issues related to managing the administration of justice, especially in a country that does not have a lengthy and stable tradition of judicial independence, but rather quite to the contrary, having negative baggage rooted in the executive power's dominance over the judiciary, this part of the council's activity linked to management, and thus to discharging the executive power's functions, may dominate its operations. One may have doubts on whether all the adverse phenomena mentioned in the report, especially the very negative evaluations concerning, i.a. corruption, will automatically dissipate upon the enlargement of the council's powers. It may turn out that the explicit achievement of this state of affairs in which the separation of the judicial power's functions from the executive power's functions will be hampered despite the original intentions. These doubts are exacerbated in light of the proposal set forth in article 28 (2), which states that the Council of Justice shall draw up a national policy and strategy for the development of the judicial system. It seems that this power held by the council of justice requires extremely explicit elaboration so as not to create constant conflicts with the government whose task is to outline the general political directions. This draft legislation does not anywhere state with sufficient clarity in this regards (determining policy and strategy) the relations between the powers of the body representing the judicial power, i.e. the council and the executive power, i.e. the justice minister. Perhaps, my evaluation is excessively skeptical but I believe that certain solutions are frequently introduced as ideal models, which in a specific social environment may not play as positive a role as one would ascribe to them at the time of their establishment. For this reason, while acknowledging the establishment of the council of justice itself to be a most positive development, I believe that its scope of powers should be analyzed profoundly once again, giving special consideration to its very broad composition. It consists of not only judges but also prosecutors (article item (4)). In turn, the experience of all the post-communist states teaches us that the operation of a prosecution for many decades based on totally different principles from courts and outfitted with very far-reaching executive power continues to affect how the prosecution fills its role today. Thus, in my opinion, there is an even greater danger that the operation of the council of justice will "tilt" in the direction of executive power. Especially since the draft legislation retains remnants of the prosecution's omnipotence from the past era. Article 1 (4) asserts that "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". This is, in fact, a clear echo of the general oversight exercised by the prosecution, strongly encoded in the thinking on the prosecution's role in new democracies. Perhaps, this is just a case of insufficiently precise wording, but this must prompt some reservations.

III. Administration of the Courts

4. The appointment of a separate judicial administration should be acknowledged as an indubitably innovative solution (section V). A separate judicial administration is appointed that "shall be monitored by the Council of Justice". This constitutes a fundamental change with respect to the current system. Only a few post-communist states have opted to introduce

a separate judicial administration in changing the judicial system.[3] Of course, one should assume that this solution, i.e. advocating the administration of courts separate from the justice minister, was introduced to the draft legislation after analyzing in detail the various existing models and types of solutions; that the positive elements resulting from this solution for the judicial power have been considered precisely, but above all that great consideration has been given to the topic of whether this institution will be capable of discharging all these functions. I think that in the case of Latvia, which thus far has not even had an institution like the Council of Justice and since it does not have any experience with its operation, the introduction of a new institution managing the administration may lead to additional difficulties. One should remember that judicial administration is not performed by a separate body in all of the EU member states. In many countries in which the judicial system is not operating all that badly, judicial administration is exercised by the judicial power. Perhaps, one should think more profoundly about the nature and the type of rights left to the justice minister and after more careful observation of the operation of the council of justice in practice, then one could make the decision to spin off the judicial administration. This reflection is all the more well-founded insofar as one may observe certain inconsistencies in the draft legislation itself. On one hand, the minister is stripped of performing judicial administration and he/she is basically stripped of having any rights over the judicial administration. On the other hand, however, the justice minister's participation in an advisory capacity in the meetings of the Judges' Disciplinary Board (article 73 section 5) is permitted, i.e. the body that adjudicates on the disciplinary accountability of judges. In other words, the minister is allowed to participate in a body that decides about very important matters related to the status of a judge, and thus he/she will make decisions about the most crucial matters associated with a judge's independence while at the same time being deprived of any rights whatsoever in the administrative area. I think that this requires additional thought.

IV. Role of the Parliament

5. The scope of powers held by the parliament over judges must also prompt certain reflections. I am aware that this is undoubtedly another problem up for discussion on who should be entrusted with the right to nominate judges. I belong to the advocates of the concept that this right should rather be vested in the head of state. This is indubitably an historical prerogative of the head of state and this is a certain type of an argument. It seems, however, that it is also of significance that the parliament is undoubtedly much more engrossed in political games. Of course, the president also represents a given political option. Departing however from systems in which the president is highly involved politically, in most cases he/she demonstrates greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a considerably more rational solution that depoliticizes the entire process of nominating a judge to a much greater degree. The excessive role played by the parliament was also emphasized in the EU report I discussed at the outset of this paper. It states among other things that "In a number of areas, the parliament also has unnecessarily broad discretion in areas of judicial administration, which could more properly be conducted by judges themselves; for example, judges may only be granted tenure by a vote of parliament after three to five years of service". This report criticizes the excessive role played by parliament by examining the possible rights of the

[3] As an aside, one may only assert that this solution undoubtedly calls into question the nature of the justice minister. Since the prosecution is incorporated in the judicial power and it is covered under the action of the council of justice, the minister cannot play the role he/she has for instance in the American system, in which he/she is identified with the prosecution. Accordingly, the role of the minister would require a new definition.

judges themselves. Without determining who should hold the rights to nominate judges temporarily, I believe that the final nomination for tenure should be effected by the head of state, and not as a result of political bargaining in the parliament in which every member of parliament coming from one district or another will want to have his or her own judge. According to me, this process of involving the parliament in judges' nominations is very dangerous and should be altered, especially since such a fundamental change, without terming it revolutionary, is being made in many other areas. The report cited above also reminds us that "there are no other standards limiting the parliament's discretion to approve or reject a candidate" (p. 252).

6. The acceptance of a certain type of parliamentary control over the disciplinary court is equally inconsistent. This is regulated by article 82 (2). This is a very bad solution. It forms a clear concession to the former system. I would like to reiterate that on one hand there is the far-reaching solution concerning the judicial administration and the rights of the council of justice while on the other hand there is the far-reaching role to be played by the parliament in staffing issues and judicial oversight. That is, in issues strictly linked to independence and judicial adjudication.

7. Above, I have touched upon the proposals which are the most critical in the new law in my estimation. Indubitably, it nevertheless has many advantages. These advantages include, as I have indicated, the introduction itself of the council of justice into the Latvian system. Moreover, the acceptance of clear principles for the separation of matters (article 20). I also believe that it is very necessary to spin off the administrative judiciary.

8. Based on the experience of my homeland I have devoted much attention to the first three problems which are of a fundamental constitutional dimension; for they will ultimately determine, as practice shows, whether the entire system will be efficient or ineffective and consequently what the social evaluation will be of the administration of justice. It is well known that the principle of the independence of judges and courts is not a principle unto itself but rather serves to ensure the efficient, impartial and rapid hearing of cases. All efforts should be dedicated to this objective when proposing new solutions concerning the judicial power.

V. Other Detailed Remarks

9. It seems that the provisions specifying who may become a judge require more detailed consideration. The question arises on whether the opportunities are not too great when article 38 (1) permits as follows: "a person may be confirmed as a judge of a district (town) court if he/she has worked for at least five years as an instructor of judicial subjects at the faculty of law of a university". The same applies to the nomination to become an administrative court judge as mentioned in article 38 as well as higher ranking judges, including the Supreme Court. According to me, the principle of discretionary recognition is too broadly defined for the council of justice. Especially since the final part of these articles awards nearly unconstrained freedom to the council to decide who may become a judge. For it is proposed that a person may be a judge if he/she has already filled "another position which the Council of Justice has recognized as such where a person may obtain the knowledge necessary for a judge of a district (town) court". This applies, respectively, to the regional court and to both instances of the administrative court and even to the Supreme Court (article 38). This implies excessive vagueness in the criteria, especially since the statute does not specify what other positions those may be that may authorize a person to take the

office of a judge subsequent to the evaluation of the council of justice. According to me, this is a very great weakness in this statute.

10. Other provisions concerning the education of judges also elicit doubts. Excessive arbitrariness is also used here. Article 40 states that "the length of the training shall be one month to a year. The length and procedure for training shall be determined by the Council of Justice (…) taking into account the professional level of the candidate". In my conviction, this leaves too much room for arbitrary decision-making by the council of justice. Such a general specification without any more precise statutory criteria may always lead to certain suspicions of bias and a less than objective evaluation. For this reason I believe that it would be expedient for the statute to specify more precisely the length of education to preclude such far-reaching arbitrariness.

11. I also believe that the provisions concerning the protection of a judge as set forth in article 67 are too far-reaching. Perhaps, they are not sufficiently precise. The current wording would imply that every judge may demand protection of his/her person and his/her property. This cannot be achieved. It would, however, be a fairly unique solution in the world. It begs for more precision.

12. One should positively assess the provision envisaging short deadlines for handling the disciplinary matters of judges (article 74). One hopes that this provision will be effective since experience teaches us that these cases are long and drawn out to the point of reaching the statute of limitations without coming to a conclusion with an unambiguous verdict.

13. One reflection also comes to mind in the context of article 61 on the conclusion of a judge's work. This article specifies the age limit for judges to stop working (65 years) while it is 70 years for Supreme Court judges. One may doubt whether it is the best solution to allow for applications to extend the period of work beyond the age envisaged by the statute. Polish experience has shown that the vast majority of judges and prosecutors apply for this extension. This once again gives some discretionary authority to the council of justice. Would it not be better to embrace the opposite principle? That is, raise the age limit in the statute coupled with the statutorily-guaranteed right to take early retirement. Then the law would specify clear criteria without creating yet another right enlarging the council's omnipotence.

14. In conclusion, the submitted draft legislation entails many new and important solutions but precisely on account of their total innovativeness in the Latvian system some of them should be re-analyzed profoundly. For it is known that it is not so easy to change certain solutions once they have been implemented. However, prior to their entry into force, one may avoid all the dangers known to exist by leveraging the experience of other countries.