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(VENICE COMMISSION)

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

by
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Introduction

This opinion is forwarded to the Secretariat of the European Commission for Democracy through Law (the Venice Commission) in accordance with its request for the comments of three Commission members as rapporteurs on a draft Law on the Judicial Power in Latvia.

This draft law (herein referred to as the Law, and the several parts thereof as Sections, Chapters and Articles) has been presented to the Commission in an English translation of a text prepared under the auspices of the Latvian Ministry of Justice by a special Working Group chaired by the Minister, Ms. Ingrida Labucka, and including representatives from the Constitutional Court and the Supreme Court of Latvia as well as the General Prosecutor's office.

In considering the draft, I have had reference to the Constitution *(Satversme)* of the Republic of Latvia of 1922 as amended (in an English translation furnished by the Centre for Constitutional Justice), but not to the existing law or laws relating to the organization of the court system or the laws on court procedure, or to Latvian background material other than the accompanying letter of the Minister of Justice to the Commission.

1. General Comments

According to the Minister's letter, the main objectives of the Law involve the promotion of judicial independence and the strengthening of the capacity, effectiveness and transparency of the judicial system, together with promoting human resource development in connection with the system and strengthening the professionalism of judges and other court representatives. To this end, the Law *inter alia* foresees the establishment of two institutions new in Latvia within the framework for the judicial power, i.e. a Council of Justice and a Court Administration separate from the Ministry of Justice. The Law also sets out comprehensive provisions on the appointment and qualification of judges which I take to be new to a considerable extent.

As regards the structure of the court system itself, the main objective is to entrench a three-tier system of ordinary general courts (with District and Town Courts as a first instance, Regional Courts as an appellate instance and the Supreme Court as the highest instance), and to establish new administrative courts beside the general courts of first and second instance. In addition, it is to be noted that the plan for the Law also concerns the prosecuting power, as it is provided in Article 1 that the Prosecutor's Office will be an agency of the judicial power, to be regulated by a specific law presumably standing beside the proposed law on the judicial power. The main purpose presumably is to strengthen the independence of the prosecution.

The effective date of the Law is proposed as 1st January 2004, at which time an existing law on the judicial power (of 1993, as amended) and on the disciplinary liability of judges (of 1994, as amended) will be repealed. The new administrative courts are to be established by 5th January 2005 at the latest.

The introduction of some of the principles basic to the Law will require certain amendments of Chapter 6 (Courts) of the Latvian Constitution, and a draft law setting forth such amendments (i.e. changes in the wording of Articles 82 on the court structure and

Article 84 on the appointment and tenure of judges, and a new Article 86-1 on the prosecuting power) has also been submitted to the Commission for review.

In general, it must be said that the Law represents a progressive, thorough and well-considered effort at establishing a comprehensive act of legislation setting out the framework for the organization and operations of the judicial power in a manner consistent with the above objectives. Accordingly, it should be favourably regarded from a European point of view. The provisions of the Law are mostly well coordinated, and although they go into considerable detail, this is not necessarily to the detriment of the overall result.

It follows that the main aspects of the Law which need to be considered relate to issues which are central to the framework proposed, such as the basic method for appointment of judges and the role of the legislative assembly and the judiciary in that respect, the scope of powers of the Council of Justice and its composition (in the light of those powers and otherwise), and the position of the judiciary towards the legislative power and the Ministry of Justice. These aspects will be referred to below together with certain more specific matters.

2. Amendments to the Constitution

As an aside, it may be noted at the outset that although the Constitution of Latvia clearly is based on the principle of separation of powers, it does not contain a specific provision explicitly stating this to be the case (as e.g. Article 3 of the Finnish Constitution of 11 June 1999). It may perhaps be a matter for consideration whether it might be supportive of the standing of the proposed Law and of the judiciary to add such a provision to Section or Chapter 1 of the Constitution (e.g. by an additional paragraph or paragraphs in Article 2, where it is now stated that "The sovereign power of the Latvian State shall belong to the People of Latvia"). However, such specific addition should only be made if it is thought not to conflict with the style or method of the Chapter and the traditions behind its present text.

The Constitution deals with the court system in the first Article of Chapter 6 (Art. 82), which reads as follows (in the above translation):

> "In Latvia court cases shall be heard by district (city) courts, regional courts and the Supreme Court, but in the event of war or a state of emergency, also by military courts. All citizens shall be equal before the Law and the Courts."

It is now proposed to amend the first paragraph of Article 82 so as to add that the system also will have Administrative Courts and Administrative Appellate Courts, while the text relating to military courts or courts martial will remain unchanged. Furthermore, it is proposed to delete the second paragraph (which is in fact superfluous, because the same principle of equality is now stated in Article 91 within Chapter 8 on Fundamental Human Rights) and to replace it with the following text: "The Council of Justice shall represent the judicial power and organizationally manage it."

Article 84 of the Constitution deals with the appointment and tenure of judges, and reads as follows:

> "The appointment of judges shall be confirmed by the *Saeima* and they may not be dismissed. The judges may be dismissed from their office against their will only upon the decision of the Court. The retiring age for judges shall be fixed by law."

It is now proposed to amend the first sentence so as to provide that judges "shall be appointed by the *Saeima*" instead of being confirmed by the Assembly. It is further proposed to amend the second sentence so as to provide that 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 third and final sentence is intended to remain substantially the same, but with a slight change in wording (to positive effect in my opinion).

As a third amendment, it is proposed to add the following Article 86-1 to Chapter 6 of the Constitution:

> "The Prosecutor's Office shall be a unified centralized institution headed by the Prosecutor General. The Prosecutor General shall be appointed by the *Saeima* at the recommendation of the Council of Justice for a term of five years. Operations of the Prosecutor's Office shall be regulated by a special law."

The principles embodied in the amendments will be referred to in sections 3-7 below. I have no problem with their wording (except as noted below), although I agree with Mr. Lavin that there may be reason to extend the text relating to the Council of Justice.

3. The Administrative Courts

As regards this novelty, it is of course perfectly compatible with European standards to introduce administrative courts with specific jurisdiction standing beside the ordinary general courts, and this is likely to contribute to the efficiency of judicial handling of administrative law cases, which presumably will constitute a relatively large portion of the judicial case load to be expected in the near future. It has been my opinion, however, that a system of general courts with universal jurisdiction (in civil, criminal and administrative law cases and with power of constitutional review) is the most democratic structure for the judicial power, and that judges preferably should be generalists rather than specialists in the fields of substantive law.

Accordingly, I have tended to think that in relatively small countries not having a tradition of administrative courts, it may not necessarily be desirable to establish such separate courts, especially if the countries also have an effective Ombudsman institution. One of the reasons is that the administrative law cases often are among the more weighty and challenging ones to come before the courts, and the fact of having to deal with them by the same token as cases among the citizens themselves is likely to enhance the professionalism and the professional and democratic ambition of the ordinary judges. On the other hand, it is also to be noted that in countries without administrative courts (such as Denmark, Iceland and Norway), there does often develop a certain tendency to create administrative review boards as a first or preliminary instance for complaints over administrative decisions, whose decrees may then by reviewed by the courts. This method is fine for the field of taxation, but not necessarily an ideal solution in other fields.

In Latvia, it is proposed to create administrative courts of first and second instance, with the Supreme Court remaining as the court of ultimate appeal. This last is extremely

important in my opinion and should not be altered in the process of adoption of the Law. As a second matter, if the administrative courts are created, it preferably should be possible to organize the judiciary so as to allow for rotation between these courts and the general courts among the judges of first and second instance, in order to promote a broad outlook and experience within the system. This possibility of rotation from time to time appears to be envisaged in Article 45 of the Law, which is to be welcomed on that account.

I assume that the plan for administrative courts is being developed in response to a strong need for efficient and proper handling of administrative law cases under present conditions in Latvia. With this in mind and in view of the two positive features above noted as regards the relationship to the general courts, I have no strong reason to recommend that the plan be abandoned or altered.

4. Other Special Courts

As above noted, the text on military courts in Article 82 of the Constitution is intended to remain substantially unchanged. As I understand it, the text does not primarily refer to the existence of regular courts martial with jurisdiction in respect of the armed forces, but to the possibility of having military courts set up or made to step in under circumstances of a state of war or other state of emergency and take over some of the jurisdiction of the regular courts or have a competence preceding theirs. I further assume that the meaning of the word "emergency" as used involves a reference to Article 62 of the Constitution, where it is provided that if "the State is threatened by a foreign invasion, or if disorders endangering the existing order of the state arise within the State or any part of the State, the Cabinet shall have the right to proclaim a state of emergency". In such event "the Board of the *Saeima* shall be notified by the Cabinet within twenty-four hours, and the Board shall put the decision of the Cabinet before the *Saeima* without delay".

In the Law itself, it is stated in Article 3(3) that operations of courts martial shall be regulated by a special law. At this point, it is not clear to me whether such law is in force or whether it is intended to apply both to the regular operation of military courts and to the possibility of giving them extraordinary competence in case of war or emergency or only to the latter, i.e. to the creation of military courts in such cases.

It obviously may be questioned whether these provisions in Articles 82 and 62 of the Constitution are felicitous in all respects, and whether the words "state of emergency" as used in the former and elaborated in the latter may be too broadly circumscribed. However, I am inclined to feel that the question of their existence is in fact distinct and separable from the main question of how the organization of the judicial power is best provided for according to the objectives first above mentioned. Consequently, if it is felt in Latvia that the present is not the proper time for reconsidering these particular provisions, it may not be necessary for the Commission to comment on them on this occasion.

However that is, the proposed amendment to Article 82 raises the general question whether it is sufficient for constitutional purposes and from the point of view of judicial independence to describe simply the structure of the regular courts representing the judicial power, by naming the courts as is done in the present text, or whether it also may be necessary or desirable to state explicitly that other courts may not be established, and that courts may be established only by law. These matters are proposed to be dealt with in Article 1 (Judicial Power) of the Law, where it is stated in paragraph (2) that in the

Republic "cases shall be tried only by courts established by law" and in paragraph 5 that "establishing of special (emergency) courts shall not be permitted". There is perhaps reason to consider lifting these statements to constitutional level, by the same or similar words, through an appropriate extension of the first paragraph of Article 82 or the insertion of a new second paragraph.

5. The Council of Justice and Other Institutions

The establishment of a Council of Justice in Latvia, as proposed in the new paragraph of Article 82, is to be warmly welcomed, and it is also highly appropriate to give the Council constitutional standing, even irrespective of the question whether its powers should be as comprehensive as foreseen in the Law.

The organization and operations of the Council are dealt with in Chapter 5 of the Law, where it is provided in Article 28 that it shall (1) be an independent agency representing and organizationally administering the judicial power, (2) draw up a national policy and strategy for the development of the judicial system and its work and within its authority implement the same, and (3) operate in accordance with the Law and its own founding law, the latter to be drawn up by the Council to regulate its internal operations. The composition of the Council is dealt with in Article 29.

In Article 30, the scope of powers and duties of the Council are described in logical sequence, i.e. in relation to its functions (1) in representing the judicial power, (2) in developing the judicial system, (3) in determining judiciary service, and in other respects listed in paragraphs 4-10 of the Article.

Together with the Council of Justice, it is proposed in Chapters 16 and 17 of the Law to establish a Judicial Administration, as an independent agency reporting to the Council and functioning as its secretariat and being managed by a Director General appointed by the Council. This novelty is also to be welcomed.

In addition, the following institutions are envisaged by the Law:

- The Conference of Judges, i.e. of all judges in Latvia (Chapter 15), meeting at least once every year.
- The Judges' Qualification Board, having 11 members elected by the Conference of Judges for a term of 3 years (Article 85), all of them being judges from the various courts within the three-tier system.
- The Judges' Disciplinary Board, led by the Deputy President of the Supreme Court and having 11 other members elected by the Conference of Judges for a term of 4 years (Article 73), from among judges in specified positions.
- The Disciplinary Senate of the Supreme Court, consisting of the President of this Court and of 4 other Court justices elected by the general meeting of the Supreme Court for a term of 7 years (Article 24).

Given the comprehensive powers of the Council of Justice and the broad administrative mandate of the Judicial Administration under its auspices, it does seem desirable to provide also for these other institutions, and their specific roles appear to be logically determined.

The problems which may be involved accordingly do not relate to the number of institutions as such, but mainly to the question whether the overall power vested in the system may be too great and whether the system may tend to become too heavily dominated by the judicial profession from a democratic viewpoint.

The Law does not provide in a general way for the relationship between the judicial power and the Ministry of Justice, and appear to leave little scope for action by the Ministry in relation to the operations and administration of the courts, except by virtue of the Minister of Justice being a member of the Council of Justice. This is basically to positive effect, but there is perhaps reason to ask whether this is wholly intended, i.e. mainly whether it may also be planned to leave certain functions, such as powers of inspection and complaint to the Council or otherwise, within the Ministry under another law.

However that is (and apart from the matter of appointments referred to below), the most important question as regards the Ministry of Justice relates to the role which it may or may not have in the shaping and support of the budget for the judicial power, as one of the key factors in securing judicial independence is to ensure that the judiciary be supported by adequate financial means. As proposed in the Law, the budget for the judicial system is to be submitted "to the appropriate State institution as provided by law" by the Council of Justice, which is to "represent the judicial power during the process of preparation and performance of the budget (financial management)", i.e. presumably in its drafting and its execution after approval (Article 30 (1), subparas. 1 and 2). This does not explain whether the budget will go directly to the Ministry of Finance and the *Saeima* or through the Ministry of Justice. On the other hand, the Law clearly states, in Article 105 (3), that the judicial budget may not be changed without consent by the Council before being submitted to the *Saeima* as a part of the National Budget.

The issue of budget approval is always a difficult one, and while it follows from the arrangement proposed by the Law that the Council of Justice may to a certain extent become involved in parliamentary budget battles, this is something which is hard to avoid. At the same time, however, I believe it is generally important and conducive to *de facto* judicial independence to have the budget process so arranged that the Minister of Justice, and not only the Minister of Finance or the Cabinet as a whole, will feel politically responsible for the treatment eventually accorded to the judiciary in the matter of proper funding.

6. Composition of the Council of Justice et al.

According to Article 29, the Council of Justice will have 13 members, of which 5 have a seat by virtue of their office, 6 are judges elected for a 4-year term (one from the Supreme Court and one from each of the 5 judicial regions in the country) and 2 are nominated from outside government, one by the National Human Rights Office and one by the Council of University Rectors (from among doctors of law). The President of the Supreme Court shall act as Chairperson of the Council and the President of the Constitutional Court as Co-Chairperson, both of these being among the first 5. The other 3 are the Minister of Justice, the Prosecutor General and the Chairperson of the *Saeima* Legal Committee. Overall, the judges of the regular courts will thus have majority of 7, and of 8 counting also the Co-Chairperson.

This constellation is interesting, and given the wide powers of the Council, it is also hard to criticise. However, it may be asked whether the Minister of Justice should sit on the Board himself or delegate his seat for the executive power to a Ministry official or other person (such delegation might be more appropriate if the Minister is intended to have powers in relation to the judiciary despite the removal of court administration functions from the Ministry, but not in the opposite case).

It also may be questioned whether the Prosecutor General should have seat on the Council, although it seems that having it may contribute to his independence. In any event, if he has a seat, there also ought to be a seat for one or more representatives of the sworn advocates or independent practising lawyers, who also may be counted as a part of the judicial system (as provided in Article 101).

Overall, the composition of the Council may be said to favour somewhat the judicial profession rather than the users of the court system. To promote a broad outlook, it might be considered to have e.g. 2 more members nominated from outside the courts proper, at least one of whom should represent the practising advocates. An addition of outsiders should not necessarily lead to a corresponding increase in the number of judges on the Council.

The Council as proposed will be a relatively large body, and its operations accordingly may tend to be cumbersome. Although the Council may be able to divide itself into committees for handling work in specific fields, this can be problematic. Accordingly, there may be reason to consider the possibility of reducing the overall number of members, even if difficult given its wide powers.

The above comments as to the desirability of representation from outside and the opportunity for influence from the users of the court system also applies to the Judges' Qualification Board, i.e. to the extent that it plays a role in the selection of candidate judges. Though the recruitment and testing/training of future judges should aim at producing persons fit to assume the burden and responsibility of that career, it should not be pursued with an undue emphasis on having the new judges fit into the same mould as their older colleagues, but also allow for the preservation of the basic independence and integrity and democratic intuition to be required of each individual judge. Accordingly, there may be reason to consider the possibility of having a contingent of outsiders on this Board, such as persons representing advocates, the legal academic community, or even the executive and legislative power.

It is to be noted, however, that the Law apparently contains a feature which may be intended to accommodate this point of view, since in paragraph (4) of Article 40 on judicial training, it is provided that "a commission formed by the Council of Justice" will evaluate, by a procedure determined by the Council, the qualifications, experience and suitability of candidates for judgeship in order to arrive at a recommendation to the Council on their selection.

7. The Appointment of Judges

By the draft amendment to Article 84 of the Constitution, it is proposed that judges in Latvia be "appointed by the *Saeima*", while according to its existing text, the role of the Assembly has been to "confirm the appointment" of judges, i.e. as I understand, to consent

or not to consent to appointments made or proposed by the President of the Republic and/or the Minister of Justice. In theory, the new wording may be somewhat problematic, as it states simply the principle of appointment, but does not indicate the procedures by which the Assembly should proceed to a decision or any restraints being applicable to its liberty of choice, through recommendation requirements or otherwise (which restraints are implicit in the confirmation method). These matters are thus left to be provided for in ordinary legislation, such as the proposed Law.

This comment on Article 84 is perhaps overly blunt, seeing that it is proposed to state in Article 82 that a Council of Justice will exist to "represent the judicial power and organizationally manage it", and perhaps an inference may be drawn between the two to the effect of the Council having some say in the matter of judicial appointments. That inference would be strengthened if the text in Article 82 were extended by adding"… and make decisions and recommendations as provided by law" or similar wording.

As its predecessor, the amendment does not provide for a qualified majority in the matter of appointment, so a simple majority presumably will apply except to the extent that an ordinary law may provide otherwise. In this connection, it is to be noted that the principle of *Saeima* appointment is intended to apply to all judges.

The proposed amendment involves on its face a quite fundamental change from the existing Constitution, which must have been given careful consideration. It represents a method for constituting the judiciary which is highly democratic in general terms and may be well suited to meet present needs and indicate a break. It is, however, not without its risks from the point of view of judicial independence, *inter alia* since judicial appointments may over time be more likely than otherwise to become a subject of party politics.

There is also the broad question whether the principle of *Saeima* appointment tilts the balance for the judiciary too far towards the legislative power. In theory, the relationship of the judicial power to the legislature under the arrangement may be likened to that of the Ombudsman and the state revision in many countries. These institutions differ from the courts, however, as the Ombudsman (although independent) is an agent of the legislature in the interest of the people, and one of the functions of the state revision is to scrutinize the administration on behalf of the legislature, whereas the courts are to be wholly independent and to exercise control towards the legislature in matters of human rights and loyalty to the constitution.

The amendment accordingly is to positive effect and acceptable by European standards. However, there may be reason to reconsider the possibility of retaining a part of the prior method by arranging the process of judicial appointments so as to go by submission from the Council of Justice to the President of the Republic (who also is to represent all the people) and from the President to the *Saeima*.

The intentions behind the constitutional amendment presumably are revealed primarily by the Law, however, where it is indicated that the Council of Justice will play a central role with respect to the appointment of judges. This will provide a balance against the risks above mentioned, and the main question to negative effect will be whether the work of the Council in this respect may become too heavily dominated by the judicial profession. The participation of the judges in the process of selection and appointment is an essential element, but there is a need to ensure also the influence of a broader outlook and

experience, and the risk of intra-judicial dependence needs to be mitigated. The considerations in this respect have also been mentioned in Section 6 above. But basically, the role for the Council set out in the Law is to positive effect and to be welcomed.

In the above connection, it is to be noted with interest that judges who are taking office for the first time will receive their insignia (chain of office) from the President of the Republic, and he will receive the judge's oath to be sworn by them.

8. The Selection of Judges

The detailed provisions concerning judicial appointments are set out in the law, i.e. in Article 30 (3) (4), expressing the general rule that the Council of Justice is to submit recommendations to the *Saeima* on the appointment of judges and their confirmation in office, and in Section IV on Judges, mainly Chapter 6 on candidate judges and Chapter 7 on confirming a judge in office.

The concepts of "appointing" and "confirming in office" of judges are basic to the selection process described in the Law. As I understand, the distinction is that a candidate judge who is new to the court system (and may have to undergo training and testing) needs to be appointed, while a candidate who is already within the system by virtue of appointment may subsequently need to be confirmed in office. In both cases, the final approval lies with the *Saeima* under the general rule above mentioned, but I assume that its liberty of choice may be more limited in the case of confirmation.

The distinction seems very clear as regards candidates for a seat on the courts of first instance, who are to be appointed for an initial (probationary) term of 3 years and confirmed in office for an indefinite term upon completion thereof, cf. Article 43 (1) and (2). If the work of the judge proves to have been unsatisfactory in the opinion of the Judges' Qualification Board, he is not to be nominated by the Council of Justice for confirmation, cf. Article 43 (3).

As regards candidates for the courts of second and third instance (the Regional Courts, the Administrative Appellate Court and the Supreme Court), it does not seem clear from the translation of the Law (i.e. from Article 38 (2), (3) and (4) on the one hand and Article 44 on the other) whether they need to be appointed in all cases or whether the concept of confirmation also may apply.

In any event, the rules for recruitment of judges set out in Article 38 (Length of time worked in a legal speciality) are progressive and positive in the sense that they allow judges on the courts of second and third instance to be recruited not only from the courts of first instance, but also from among persons with legal experience other than through judgeship, i.e. (i) sworn advocates or prosecutors, (ii) teachers in legal (judicial) subjects at university faculties of law, and (iii) persons with experience in other positions "which the Council of Justice has recognised as such where a person may obtain knowledge necessary" for a judge on the court in question.

The inclusion of the third group (which presumably will cover e.g. lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is very necessary in my opinion. The method of leaving the definition of the outer limits of this group to the Council of Justice involves a certain risk, but the risk is not

unacceptable in my opinion, since one must assume that the Council will handle the matter by standing rules (within its Founding Law or otherwise) rather than *ad hoc*. If this requirement is not thought to be sufficiently implied in the text of the Law, the wording perhaps can be clarified. Also, it may perhaps be appropriate to consider whether the Law should specify whether or not experience for a lawyer as a member of parliament should count as experience qualifying for judgeship (in my country, such experience is directly relevant in the case of appointments to the district courts of first instance, but not to the Supreme Court).

The rules of recruitment also are progressive in the respect that the filling of vacancies for the position of a judge always is to proceed on the basis of an advertisement inviting applications for the post at minimum notice, cf. Article 42 (2). As I understand, this will apply to judgeship at all levels.

The general requirements for judgeship are set out in Article 36, cf. Articles 37 (age limits), 38 (experience) and 39 (faults), as well as Article 40 (training). The requirements seem generally appropriate to the purpose, including the minimum age limit (35 years for a Supreme Court judge and 30 years for others). It may be noted that one of the requirements in Article 36 is that a judge be proficient in the Latvian language "to the highest level" which seems reasonable when viewed as a strictly professional qualification. According to Article 39, a candidate is not eligible if he has a criminal record. If this means that minor offences will be included, the requirement may be too strict. The Article further provides for exclusion of employees of state security organizations and current or past members of organizations forbidden under the laws of Latvia.

As above mentioned, the Judges' Qualification Board, whose duties are set out in Chapter 14 and mentioned elsewhere, will have considerable say in the selection of judges. According to Article 85 (1) and (2), it is envisaged as a self-regulating institution of judges composed exclusively of judges from specified posts. However, its meetings may be attended in a consulting capacity by certain high-ranking persons including the Minister of Justice, the Prosecutor General, university rectors and deans of law faculties, or their representatives, and a representative of the Latvian Organization of Judges (in my view, a representative of the association of practising advocates should be added the group).

This allowance for limited participation by outside persons is a positive feature in my opinion. As mentioned in Section 6 above, however, the broader question is whether it may be desirable to have persons from outside the courts sit on the Board as full members. This is especially relevant in connection with recommendations for judicial appointment, and it is also to be recalled that Article 40 (4) provides for a commission to be formed by the Council of Justice to evaluate candidate judges and recommend the persons most suitable. If the duties of the Qualification Board are primarily related to the testing etc. of candidates entering the system by way of the courts of first instance, and if the task of actual recommendation is to be handled by said commission, the rule on composition of the Board by judges would seem to be appropriate, and the question then is how the commission and the procedures for its work should be constituted. As implied by the above comments, it should include persons from outside the courts.

9. The tenure of judges

According to the Law, the general rule will be that judges receive permanent appointment (for life, subject to a general age limit), consistently with principles of judicial independence. The maximum age is 70 years for a Supreme Court judge and 65 years for other judges, but may be extended for up to 5 years subject to recommendation by the Judges' Qualification Board (Article 61). This provision for a certain flexibility is understandable and in my view acceptable, but admittedly not without risk. The extension must in any case be a one-time determination for a specific period.

The general rule applies with the important exception that new judges in the courts of first instance will only receive permanent tenure after serving an initial term of 3 years, as already mentioned (Article 43). This trial arrangement may be appropriate and desirable under current conditions, but does not give the novice judges unqualified professional and personal independence. If it is adopted, the aim ought to be to have it phased out as soon as reasonably possible. Perhaps the Law could provide for a revision of the arrangement being undertaken at a specific point in time. As of now, it should in any case be attempted to make the criterion for qualification ("In the event the judge's work has been unsatisfactory …", Article 43 (3)) more clear and specific.

As noted in Section 2 above, Article 84 of the Constitution is to be amended so as not to state simply that a judge can be dismissed only upon a court decision, but to provide instead that dismissal may occur either pursuant to a court decision in a criminal case against the judge or on the basis of a decision in a disciplinary case. The change in Constitution wording is important and may need to be further considered, but the matter is in any case dealt with by extensive provisions in the law, mainly in Chapter 11 on termination of office (Articles 63 and 64) and Chapter 13 on disciplinary liability.

As to criminal proceedings, it is provided in Article 8 (2) that a judge may be charged only by the Prosecutor General and with the consent of the *Saeima*. If this occurs, he shall be suspended, and if found guilty, he may be dismissed by the Council of Justice (Articles 63 (1) and 64 (3) (1)). As to disciplinary proceedings, it is envisaged in Article 64 (3) and Articles 77 and 82 that they reveal conduct which may involve criminal liability, the case will be handed over by the disciplinary authority to the Prosecutor General for decision as to whether the judge should be prosecuted in a criminal action, while if the conduct is otherwise seen to warrant dismissal, the disciplinary authority may adopt a decision to recommend to the *Saeima* that the judge be dismissed, the final decision then being taken by the Assembly, i.e. either to approve dismissal or send the case back to the disciplinary authority for review.

The procedures and measures in relation to disciplinary action are carefully laid out in the Law, and the authorities envisaged for handling it mainly are the Judges' Disciplinary Board and the Disciplinary Senate of the Supreme Court, to which the judge can appeal divisions of the former. On the whole, the procedures seem to be acceptable from the point of view of judicial independence, also in the manner by which they substitute special court proceedings (before the Disciplinary Senate) for an ordinary court proceeding to terminate the service of a judge.

Otherwise, it is provided in Article 64 (1) that a judge unable to perform his duties for health reasons may be discharged from office by a vote of more than half the members of the Council of Justice. Also, Article 64 (2) permits the discharge of a judge by the *Saeima*

at the recommendation of the Council in the event of a reorganization or a reduction in the number of judges of a court. If employment at another court is not available, Article 117 provides that he shall continue to draw his pay for up to six months, which period is on the short side. For these cases, it might be considered to provide explicitly that the judge should be able to contest the decisions in court or at least to claim damages for unjust discharge.

10. The Structure of the Courts

The constitutional amendment and Article 1 (3) of the Law clearly spell out the types of courts (general and administrative) constituting the three-tier system. For the second instance, the number of courts is also spelled out in Articles 14 and 15, while for the five appellate courts, the determination of their territorial jurisdiction, location and number of judges is left to the Council of Justice, and this power appears to be reasonably circumscribed. Article 14 also provides that a Regional Court may establish "independent sessions" with territory to be determined by the Council. If this term simply refers to ordinary sessions arranged at a locality other than the permanent principal seat of the court, the provision is in order, but otherwise it may be questioned.

As to the district courts of first instance, the system provided for according to Articles 12 and 13 is that the total overall number of judges on these courts is to be determined by the *Saeima*, while the number of the courts themselves and their territories of jurisdiction are to be determined by the Council of Justice, taking into account the total number of judges. The Council will at the same time have the authority to establish, reorganize or close a district court (general or administrative). As the principle is that courts should be established only by law, this arrangement implies a very considerable delegation of power from the *Saeima* to the Council, and it seems appropriate to ask whether this can be avoided.

If the overall concept of the Law is that the current district court system is in need of general reorganization at this time, I believe that the said solution is acceptable, i.e. on the footing that an ideal district court arrangement may be difficult to determine in advance and that a process of development may be more desirable, also from the point of view of the users of the court system. However, it may be asked whether basic issues such as the one whether the district courts generally should be many with few judges or few with many judges could be addressed more clearly in the Law. The inference in Articles 16 and 17 only is that each district court will have more than one judge, and that the number may go beyond eight.

As to the internal structure of the courts of first and second instance, it may be noted that their Chairpersons are to be nominated by the Council for terms of 5 years, which is acceptable.

Comments on Individual Articles

11. The General Provisions of Chapter 1 are geared to principles of judicial independence and the rule of law and mainly well founded and coordinated. However, Article 1 (4) may be criticized for providing that the Prosecutor's Office will be an agency of the judicial power, which should be changed.

12. In Article 2 on judicial independence, it is provided in paragraph (4) that such independence "shall be guaranteed by the State". This provision is not necessarily superfluous, as it presumably infers an obligation on the executive power to respect the independence of the judiciary and a policy commitment by the legislature to provide the necessary financial, material and social means for sustaining this independence. However, a more explicit expression of these latter considerations might be considered.

13. According to Article 2 (3) and Article 4, it appears that the ordinary courts will have general and residual jurisdiction (civil, criminal etc.), limited only by the jurisdiction of the administrative courts, although that wording is not used. This principle is appropriate and positive.

14. Article 5 provides that a court verdict shall be binding on all and be respected like the law (1), and that a verdict "shall be executed" (2). These provisions express the proper principle, but the wording should be altered, e.g. to the effect that a verdict or judgement shall be "binding in accordance with its terms and respected by all" and be "executed in accordance with its terms".

15. In Article 18, it is provided that Regional Courts should be divided into panels according to fields of law (a civil and criminal panel), and the same applies to the Supreme Court (having Senates, Article 22). As above noted, there ideally should be principle of rotation of the judges between panels from time to time.

16. In Article 20, it is provided that the procedure for allocating cases to individual judges should be decided in advance for each year in a manner accessible to the public. This is positive and important, and perhaps the requirement for objectivity in the allocation could be further emphasized.

17. Article 21 provides for general meetings of the various courts not less than once a year, which is positive.

18. In Chapter 4 on the Supreme Court, the question of the number of judges is left to the decision of the *Saeima* upon recommendation of the Council of Justice. In my opinion, it would be preferable to state a definite number for this important court, or at least a maximum and a minimum, seeing that there is a qualitative difference between determining the number by law or merely by a resolution of the Assembly as presumably envisaged.

19. Article 52 sets forth the text of the oath to be sworn by each judge when first taking office. While I agree that the words "loyal to the Republic of Latvia" may not be beyond misinterpretation, I believe that a positive way to solve the problem would be to add a reference to the people from which the sovereign power is derived, i.e. to ask the judge to state that he will be "loyal to the Republic and the people of Latvia".

20. Chapter 10 provides for the possibility of temporary substitution of a permanent judge by another qualified judge in cases of vacancy or temporary absence. These provisions are necessary, and the final decision appropriately lies with the Council of Justice. I assume that the intention is that the substitution should be initiated by a request from the respective

court and made in consultation with its Chairperson. Perhaps a wording to this effect could be inserted.

21. Article 88 provides for a qualification supplement for judges, related to their efforts at continued educational training and improvement of professional skills. While this feature probably is desirable, it must be clear that the rules will not be administered so as to increase judicial interdependence.

23. The provisions in Chapter 15 in the Conference of Judges are positive in my opinion.

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The above comments obviously are not exhaustive, and a further consideration of the subject matter will be appropriate. I hope that they have given sufficient impression of my general view, which is that the draft Law is on the whole to be welcomed as well-designed instrument clearly attempting to meet the demands of its august and important objectives.

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