



Strasbourg, 21 September 2009

CDL(2009)146*

Opinion No. 537 / 2009

Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

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

by
Mr Wolfgang HOFFMANN-RIEM (Member, Germany)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Introduction

1. By letter of 13 May 2009 the President of the Constitutional Court of the Republic of Latvia requested the Venice Commission, to give an opinion on the draft Amendment to the Constitutional Court Law of Latvia (hereinafter referred to as “the Amendment”).
2. The Amendment provides regulations on matters such as the requirements for being candidate for judge of the Constitutional Court, the procedure of confirmation of judges, the term of office and the procedure and organization of the Constitutional Court. Moreover, the Amendment grants the judges special social guarantees.
3. Although it was approved by the Cabinet of Ministers, the Ministry of Finance objected the Amendment, highlighting, that there was no special need for the judges of the Constitutional Court which would justify introducing additional social guarantees for them only.

Relevant Provisions

4. Special regulations on the Constitutional Court apart from the Constitutional Court Law of Latvia (hereinafter referred to as “CCL”) can be found in Article 85 of the Constitution of the Republic of Latvia. It is worded as follows:

“In Latvia, there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The appointment of judges to the Constitutional Court shall be confirmed by the *Saeima* [i.e. the Parliament of the Republic of Latvia] for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the *Saeima*.”

5. Moreover, Article 82, 2nd sentence of the Constitution of the Republic of Latvia enshrines the most eminent principle of the independence of judges in general, which is “a pre-requisite to the rule of law and a fundamental guarantee of a fair trial”¹ with the following wording:

“Judges shall be independent and subject only to the law.”

6. Furthermore the principle of independence is specified and amended in numerous documents supplying standards for regulations on the judiciary in general, especially the “Draft Report on the Independence of the Judicial System: Part I: The Independence of Judges” of the Sub-Commission of the Judiciary of the Venice Commission², the Opinions of the Consultative Council of European Judges (CCJE), in particular Opinion No 1 “On Standards Concerning the Independence of the Judiciary and the Irremovability of Judges”³,

¹ CCJE (2001) OP No 1, § 10.

² CDL (2009) 055 rev. This draft will probably be accepted by the Venice Commission on its next Plenary Session in Oct. 2009.

³ CCJE (2001) OP No 1.

the UN's "Basic Principles on the Independence of the Judiciary"⁴ and the "Bangalore Principles of Judicial Conduct of 2002"⁵.

7. Since a Constitutional Court is a specific judicial power it is separate from the courts of general jurisdiction. Since its task is to ensure the principles of democracy and the rule of law it lies in the centre of conflicts in politics and society. Therefore it should be noted, that some of the principles laid down in the codes mentioned above are applicable to the ordinary judiciary only, while Constitutional Courts are out of their scope.⁶ Nevertheless there are other principles, e.g. the independence of judges, which apply to both the judges of the ordinary judiciary and those of the Constitutional Courts. In fact the adherence of these has to be observed even closer as far as judges of Constitutional Courts are concerned.

8. Finally, the Constitutional Court Laws of the Member States may set a comparative pattern for assessing the Amendment.

Consideration of the Amendment

Preliminary remark

9. In the following the Amendment is assessed in matters of its compatibility with the Constitution of the Republic of Latvia as well as international standards. The Venice commission restricts the scope of this opinion to the provisions especially mentioned.

Requirements for a candidate

10. The Amendment introduces certain requirements for a candidate for judge of the Constitutional Court into the CCL. Some of them can already be found in Art. 4.2 CCL, such as Latvian nationality. Other criteria have been increased and specified: The educational requirements have been increased to bachelor's (or equivalent) and master's degree in law whilst the starting point for the ten years of working experience needed has been rendered more precisely. Finally, one can find newly introduced criteria, for instance the ability to be nominated for office of a judge in general, the "impeccable reputation" or the minimum age of 40 years.

11. The requirement of Latvian nationality appears to be no problem at all. Furthermore, the Venice Commission is of the opinion, that the "appointment of judges should be based on objective criteria"⁷ and the CCJE states that it should be "based on merit, having regard to qualifications, integrity, ability and efficiency"⁸. Therefore qualifications like a special legal education together with a certain working experience in this field as well as "impeccable reputation" which sets the benchmark for integrity perfectly fit to international standards. This is true in case of the ability to be nominated for office of a judge in general, too. The more so as the criteria above, although they have been elevated compared to the current legislation, have not been increased unreasonably far keeping in mind both the rather small pool of candidates in Latvia and the necessarily high exigencies they have to be confronted with.

⁴ GA resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁵ http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

⁶ Cf. CDL (2009) 055 rev, § 8.

⁷ CDL (2009) 055 rev, § 22.

⁸ CCJE (2001) OP No 1.

Finally, they will not necessarily lead to a Constitutional Court consisting of career judges and prosecutors only, but will leave space for e.g. professors of law as well and hence allow for a composition of judges different from the ordinary judiciary, which would comply with the logic of a specialized Constitutional Court.⁹

12. Ultimately, “the minimum age requirement is used by several countries in order to guarantee professional and life experience”.¹⁰ While the Venice Commission considered a minimum age of 50 years exaggerated,¹¹ the required age of 40 years as provided for in the Amendment can as well be found in other countries and appears to be reasonable without restricting the circle of possible candidates further than necessary.

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

Term of office

14. The term of office has been clarified in the Amendment as the new Article 7.3 provides that the term of office is non-renewable. This is an aggravation compared to the current situation, which only prohibits more than ten years in a row, and thus would allow reappointment. With respect to the rather long term of office, which according to Article 7.2 CCL is ten years, this is the preferable solution and has to be welcomed.¹² The non-renewability increases the independence of a Constitutional Court Judge.

15. Moreover, the procedure for confirming judges has been altered to better guarantee a continuity of the membership by giving the *Saeima* a time limit of one month before the expiry of the term of office to make a proposition for the successor. It is inevitable for the institutional stability of the Court and to avoid any institutional blockage, that continuity of the Membership of the Court is ensured.¹³ This may be done either by “allowing the incumbent judge to pursue his/her work until the formal nomination of his/her successor or a provision specifying that a procedure of nomination of a new judge could start some time before the expiration of the mandate of the incumbent one”.¹⁴ The approach of the Amendment together with Article 11.3 of the CCL combines these tools in a reasonable way and hence is well in compliance with international standards in this field.

Procedural Changes

16. The Amendment holds procedural changes of minor importance: The time limit for the institution that issued the act in question is doubled from one month to two while the Court may take five months for the preparation of the case instead of the current three. These alternations do not raise concerns. They take into account that there must be sufficient time to prepare a case.

⁹ Cf. CDL-AD (2006) 006, § 17.

¹⁰ CDL-AD (2004) 024, § 25.

¹¹ *Ibid.*

¹² Cf. CDL-STD (1997) 020, 4.2, 4.4.

¹³ Cf. CDL-STD (1997) 020, 4.3 *et seq.*

¹⁴ CDL-INF (2001) 002, § 17.

17. Furthermore, the binding effect of the interpretation of certain legal provisions as provided for in a judgment of the Constitutional Court, will be introduced into Article 32.2 CCL. Meanwhile under the current Article 32.2 CCL judgments already have a binding effect. An interpretation of a provision actually is part of a judgment. Therefore, this addition seems to have a more clarifying role. Such a clarification may raise the question, whether all interpretations are binding or only those that are indispensable for the outcome of the case. It is suggested to clarify, that *obiter dicta* as such are not binding.

18. Finally, a faster publication of dissenting opinions (“within two month after reaching the judgment”) is provided in the Amendment. Currently dissenting opinions are only published once a year. So the Amendment will enable and enforce public, especially scientific, discussion of the judgments and thus has to be welcomed. It would even be preferable to provide for a publication of the dissent together with the decision.

Administration

19. The Amendment will introduce a new Article 40 into the CCL. Its aim is to establish a new structural unit, the Administration, which is meant to relieve the President of the Constitutional Court of his/her burden of responsibility for the administrative functioning of the Court. Establishing an administrative unit does not raise concerns. The Venice Commission suggests clarifying the rights of the President in relation to the Head of Administration. Will the Head of Administration be responsible to the President and will he/she be obliged to follow instructions by the President?

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

Remuneration and social guarantees

21. The Amendment introduces a new remuneration system and additional social guarantees into the CCL. The Venice Commission was informed by the President of the Constitutional Court that these guarantees are the same as those, which the Members of the Parliament have been granted. The following remarks take this as a premise.

22. Remuneration and social guarantees for judges of the Constitutional Courts is a rather sensitive matter, as it is closely linked to the independence of the judges on the one hand and on the acceptance of privileges in the Latvian society on the other. Several constitutions supply regulations on these matters.¹⁵

23. Remuneration of judges should be guaranteed by law and “commensurate with the dignity of their profession and the burden of their responsibilities”.¹⁶ The Sub-Commission on the Judiciary of the Venice Commission is of the opinion that “the level of remuneration will have to be determined in the light of the social conditions in each country to the level of

¹⁵ *E.g.* Article 176.3 of the Constitution of the Republic of South Africa; Section 6 of the Constitutional Law No. 1 of Italy.

¹⁶ Rec. (94) 12; CDL (2009) 055 rev, § 39 *et seq.*

remuneration of higher civil servants in this field.”¹⁷ The common approach is to set a comparative pattern, e.g. the salary of a Member of Parliament, a minister or a judge of the High/Supreme Court, and to state the relations of this pattern graded from the President of the Constitutional Court to the Judge of the Constitutional Court.¹⁸ A different system can be found in Luxemburg, where a general index functions as reference. The current approach of Article 38 of the CCL in principle is the usual one, with the salary of a Supreme Court judge as reference, but it was described as “very complex and unclear”. Therefore, the Amendment supplies a change for a system with the “average gross salary of employees of the State for the previous year as provided in the official statistical report of the Central Statistical Bureau” as reference, which already serves as reference for the salary of the Members of Parliament.¹⁹ While this system as such cannot be objected, it seems to be even more complex and the increase of clarity remains suspicious. Whether the outcome may be deemed as just, cannot be judged by the Venice Commission, due to a lack of information on the social conditions of Latvia.

24. Moreover, the Amendment grants the judges social guarantees, in particular a paid vacation of five to seven calendar weeks a year, a bonus and premium system, a system of allowances to be paid in cases such as annual vacation, injury, death of a family member, child birth or the end of the term of office, transport and accommodation expenses and long service pensions.

25. On the one hand certain social guarantees for judges of a Constitutional Court are inevitable to secure their independence and impartiality, which could especially be affected by concerns about the time to come after the term of office has expired. The more so, as the Latvian labour market appears to be rather small. On the other hand the principle of the independence of judges does not function as a *carte blanche* for social guarantees whatsoever. One has to watch carefully, which guarantees result from the independence of judges and which are just nice to have without being presupposed by the special situation of judges of a Constitutional Court. Considering the given information, that the social guarantees added are the same as those, the Members of Parliament have been granted (Does this really include all the guarantees contained in the Draft Amendment?), can only give an indication in this case. All the more as the Parliament is probably the only institution to set its own rules which can lead to certain temptations. This might suggest the public impression of an elite that is mainly interested in its own material prosperity instead of caring for the common welfare and thus undermining the credit of the democratic system of a state ruled by law. To avoid such an impression the Members of Parliament have to pay a price for their payment system, which is to allow total transparency: “Information of the total sum paid to a Member shall be available to the public.”²⁰ It has to be taken into account that there is no similar rule for the Judges of the Constitutional Court.

26. Whether the length of a vacation of five to seven calendar weeks is acceptable depends *inter alia* on the social conditions in Latvia, especially on the fact whether such a (in

¹⁷ CDL (2009) 055 rev, § 41.

¹⁸ Cf. Article 17.1 and 17.2 of the CCL of Albania; Article 4.1 of the CCL of Austria; Article 71 of the CCL of Azerbaijan; § 1a of the Law on the salary of members of the Federal Constitutional Court of Germany; Article 13 of the CCL of Hungary; Section 12 of the CCL of Italy; Article 16 of the CCL of Lithuania; Article 21.3 of the CCL of Moldova; Article 71 of the CCL of Slovenia.

¹⁹ Cf. § 12.1 of the Rules of Procedure of the *Saeima*.

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

case of seven weeks rather long) time of vacation is typical for Latvia or rather exceptional. The duration of vacation is not presupposed by the special status of a judge of the Constitutional Court, but a matter of labour in general, taking into account the special burden being a judge of the Constitutional Court. Besides this it does not seem justified to grant a special privilege of up to seven weeks vacation to those judges who formerly have served in a court (Article 39.2).

27. Considering the pressing need not to hinder the functioning of the Court and especially to avoid a blockage of the Court it is indispensable to provide for rules to ensure that the outcome of cases (e.g. the composition of a majority) will not be affected by vacations of individual judges. In other countries the right to take a vacation is in principle restricted to periods where the court does not sit (exceptions in urgent cases). Such a provision seems to be missing in Latvian law. Another possible measure is to allow the President to recall Judges from their vacation in case that their presence is required.

28. Since the Venice Commission finds, that "remuneration should be based on a general standard and not on an assessment of the individual performance of a judge" the draft report of the Sub-commission on the Judiciary strictly states in relation to bonuses: "Bonuses should be excluded."²¹ Consequently this is true for non-financial benefits, too, as they are "a potential threat to judicial independence".²² The bonus and premium system of the Amendment is incompatible with the principle of independence of judges.

29. Besides this there seems to be no need for such a bonus system in case of a vacant position, since Article 11.3 of the Constitutional Court Law prolongs the authority of an incumbent judge until a new judge has been sworn in. If vacations will be in principle restricted to periods when the court does not sit, the extra workload of judges will be restricted. Extra workload in the remaining cases should already be compensated by the ordinary financial remuneration.

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

31. An allowance to be paid in case of the end of the term of office is related to the guarantee of judicial independence; it may be crucial to avoid judges being prone to reaching decisions with regard to potential employers. On the other hand one may think of alternatives, for instance a guarantee to return to the position (or a similar one), held before the appointment as a judge of the Constitutional Court or long service pensions. These instruments may have a better effect on guaranteeing independence than paying a one-time allowance that will not last very long.

Conclusion

32. The main results of the assessment can be summarized as follows:

²¹ CDL (2009) 055 rev, § 41.

²² CDL (2009) 055 rev, § 42 *et seq.*

- the requirements for a candidate for judge of the Constitutional Court and the amendments to the term of office are in compliance with international standards;
- the procedural changes have to be welcomed;
- establishing an administrative unit does not raise concerns, though some clarifications are recommended;
- the new remuneration system is not objected, if it complies with social conditions in Latvia;
- the bonus and premium system is incompatible with the principle of independence of the judiciary;
- there are alternatives to a one-time-allowance at the end of the term which perform better in protecting judicial independence;
- introducing other social guarantees is mainly a question of political appropriateness, not preset by law.