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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

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

On the basis of comments by

Mr Rune Lavin (Member, Sweden)
Ms Hanna Suchocka (Member, Poland)
Mr. Hjörtur Torfason (Member, Iceland)

1. *By letter of 9 August 2002, the Minister of Justice of Latvia, Ms Ingrida Labucka, requested an opinion of the Venice Commission on the Draft Law on the Judicial System and corresponding constitutional amendments (CDL (2002) 115). This Draft had been 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 Prosecutor General´s office.*

2. The Commission invited Mr. Lavin, Ms Suchocka and Mr. Torfason to act as rapporteurs on this issue. Their comments have become documents (CDL (2002) 120, 121 and 134 respectively). The present opinion was adopted by the Commission at its 52nd Plenary session (Venice, 18-19 October 2002).

I General remarks

3. 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.

4. 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.

5. The draft legislation presented is an 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 powers and the exclusivity of the courts in exercising judicial power. The Draft strives to ensure the principle of the independence of the judiciary on the most consistent manner especially by introducing a body representing judges as well as by reducing the scope of the Minister of Justice's rights. 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.

I.1 Administrative Courts

6. 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. A system of general courts with universal jurisdiction (in civil, criminal and administrative law cases and with power of constitutional review) may however be the most democratic structure for the judicial power, and judges preferably should be generalists rather than specialists in the fields of substantive law.

7. 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. 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 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.

8. The plan for administrative courts is probably 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, there is no strong reason to recommend that the plan be abandoned or altered.

I.2 The Council of Justice and its relations to other judicial institutions

9. The establishment of a Council of Justice is a very positive step. Article 28 stipulates that the Council shall be an independent agency representing and administering the judicial power. The very wide range of its powers in Article 30 remain however debatable. European standards are fairly flexible and do not impose a specific, uniform model.

10. Together with the Council of Justice, it is proposed in Chapters 16 and 17 of the Law to establish a Judicial Administration, 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.

11. 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.

12. 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 and the risk of intra-judicial dependence needs to be mitigated.

13. The Council of Justice may be 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. From a democratic viewpoint, this might be in contradiction to the principle of an uninterrupted chain of democratic legitimacy (developed in German doctrine) which requires that every state body has to receive its powers – even if indirectly – from the sovereign people. A completely autonomous self-administration would lack such democratic legitimacy.

14. Furthermore, 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, although this is difficult given its wide powers.

15. 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.

16. 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.

II. Amendments to the Constitution

17. 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. 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 the Constitution.

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.

18. 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. Article 62 of the Constitution provides 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". The word "emergency" might be too inclusive and could also be applied to peaceful circumstances within a country. Specific reference to the "state of emergency as provided for in Article 62 of the Constitution" should therefore be made. This provision on military courts should in any case be given further consideration, but does stand somewhat apart from the main purpose of the draft Law, which is to provide for the general organization of the judiciary.

19. 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 for 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.

20. The scope of powers held by the parliament over judges must prompt certain reflections. 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.

21. 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 but while it may be well suited to meet present needs the balance might be tilted too much too far towards the legislative power. This is 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.

22. The parliament is undoubtedly much more engrossed in political games and the appointments of judges could result in 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. The right of appointment ought to remain linked with the head of state. Of course, the president also represents a given political tendency but in most cases he/she will demonstrate greater political reserve and neutrality. It therefore seems that entrusting the head of state with the power to nominate judges is a solution that depoliticizes the entire process of nominating a judge to a much greater degree.

23. While the amendment may be acceptable by European standards, there may be reason to reconsider the possibility of entrusting the President as the appointment authority or 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*.

III. Draft Law on Judicial Power

Article 1 (3) Judicial power shall be exercised by District (Town) Courts, Administrative Courts, Regional Courts, the Administrative Appellate Court, the Supreme Court and the Constitutional Court, and in case of war or an emergency, also by Court Martial.

24. As was emphasised above, the competency of Courts Martial should be linked to war or the "state of emergency as provided for in Article 62 of the Constitution".

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

25. 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 defense 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 (5): Establishing of special (emergency) Courts shall not be permitted.

26. This article raises the question of whether it is sufficient for constitutional purposes to describe simply the structure of the regular courts representing the judicial power, or whether it also may be necessary or desirable to state explicitly not only in Article 1 (5) of the Law that other courts may not be established but to lift this provision to the constitutional level.

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

27. 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.

28. 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 (2).

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

29. 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.

Article 4: (1) Civil cases shall be tried by the Court, hearing and deciding cases of disagreements concerning the protection of the civil rights or other interests protected by law of physical and legal persons (tort). (2) Criminal cases shall be tried by the Court, hearing and deciding on the grounds of allegations raised against persons, acquitting innocent persons or finding persons guilty of having committed crimes, and sentencing same. (3) Administrative cases shall be tried by the Court, hearing and deciding on administrative violations of persons, complaints of actions of institutions and officials of State Administration as well as other cases emanating from administrative legal relations.

30. 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.

31. It is being assumed that the word “verdict” is used here in relation to court judgements in general and not exclusively judgements relating to criminal cases. This may be a problem of translation. 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 entered into 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.

32. 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.

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

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

34. The fact that a judgement has entered into 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 terms."

Article 6. A person's right to the protection of the Court.

35. 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."

Article 6 (2): All persons shall have the right to the protection of the Court from threat against their life, health, personal freedom, honour, dignity and property.

36. The provision in (2) relates to a certain level of judicial protection for citizens. The content however is such that it belongs into human rights provisions at the constitutional level. The rule in (2) should therefore be deleted in the present Draft.

Article 9 (2): Language of litigation

37. 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.

Article 13: Establishing District (Town) and Administrative Courts Establishing District (Town) and Administrative Courts
(1) The decision to establish, re-organize or close a District (Town) or Administrative Court shall be adopted by the Council of Justice.
(2) The Council of Justice shall determine the number of District (Town) Courts and their Land Books Sections and Administrative Courts, their territory of jurisdiction, location and number of Judges in each Administrative Court, District (Town) Court and its Land Books Section, bearing in mind the total number of Judges determined by the Saeima, the administrative territorial division of Latvia and other circumstances.

38. 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.

39. If the overall concept of the Law is that the current district court system is in need of general reorganization at this time, 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.

40. 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. 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.

41. The Commission was informed that the term "independent sessions" relates to sessions arranged on a regular basis by a court at a locality within its territory of jurisdiction other than the permanent locality for such sessions. Maybe the wording of this Article could be clarified to exclude any other special type of "sessions" not covered by the permanent rules governing legal procedure. The same holds for article 15 (3).

Article 18 (2): Regional Courts shall have a Civil Case Panel and a Criminal Case Panel.

42. Ideally there should be the principle of rotation of the judges between panels from time to time. The same applies to the Supreme Court (having Senates, Article 22).

Article 20 (1): Prior to the start of each calendar year the Chairperson of the Court shall, bearing in mind the basic principles determined by the Council of Justice, decide on the procedure for allocating cases to the Judges. This procedure may be departed from only by a motivated decision.

43. It is assumed that this article intends to provide for an objective method of distributing cases among judges. Compare also article 26. This is positive and important, and perhaps the requirement for objectivity in the allocation could be further emphasized.

Article 22 (1): The number of Judges of the Supreme Court shall be determined by the Saeima upon recommendation of the Council of Justice.

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.

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

44. 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".

Article 28 (2): The Council of Justice shall draw up a national policy and strategy for the development of the judicial system…

45. 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 determine with sufficient (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.

Article 29 (2). Members of the Council of Justice by way of their office shall be: …
4) the Prosecutor General; …

46. 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 or she 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.

Article 30 (2) item 2: the Council of Justice shall … represent the judicial power during the process of preparing and performing the budget (financial management)

47. 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.

48. The issue of budget approval is always a difficult one, and it follows from the arrangement proposed by the Law that the Council of Justice may to some extent become involved in the parliamentary budget battles and which are undoubtedly of a political nature. This is something which is hard to avoid. 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 political debate. Without deviating from the principle of having a separate budget for the judiciary and, in order to allow for a *de facto* judicial independence, these of powers and budgetary struggles could rather be left with Minister of Justice or the Cabinet as a whole which will feel politically responsible for the treatment eventually accorded to the judiciary in the matters of proper funding.

Article 38 (1): Length of time worked in a legal speciality

49. The opening of the profession of judge for candidates from outside the judicial system (e.g. lawyers in governmental service and in private practice in fields of work other than mainly court litigation) is to be welcomed. However, the method of leaving the definition of the outer limits of this group to the Council of Justice involves a certain risk. 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. 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.

50. Standing rules should determine these criteria. Consequently, the wording could 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.

51. In some cases, 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.

Article 39: … A person may not be a Judge who: 1) has a criminal record notwithstanding that the record has been extinguished or cancelled …

52. If this means that even minor offences will be included, the requirement may be too strict.

Article 40 (1): The number of trainees, the length of and procedure for training shall be determined by the Council of Justice with a view to ensure a sufficient reserve of appropriately trained candidate Judges. The length of the training shall be one month to a year, taking into account the professional level of the candidate.

53. 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. It would be expedient for the statute to specify more precisely the length of education to preclude such far-reaching arbitrariness.

Article 43 (1) District (Town) and Administrative Court Judges shall be appointed by the Saeima at the recommendation of the Council of Justice for a term of three years.
(2) After completion of the three years in office, a District (Town) or Administrative Court Judge may be confirmed in office by the Saeima at the recommendation of the Council of Justice for an indefinite term.
(3) In the event the Judge's work has been unsatisfactory, the Council of Justice, in accordance with the opinion of the Judges Qualification Board, shall not nominate the Judge for confirmation in office.

54. New judges in the courts of first instance will only receive permanent tenure after serving an initial term of 3 years. This arrangement may be appropriate and desirable under current conditions, but does not give the novice judges unqualified professional and personal independence. If adopted, this arrangement should be phased out as soon as reasonably possible. Perhaps the Law could provide for a revision of this feature being undertaken at a specific point in time. Also, it might be attempted to make the qualification criteria more clear and specific.

Article 52 (1): A Judge, when first taking up office, shall swear the following oath: " I, … taking up the duties of a Judge, am aware of the responsibility entrusted to me and swear to be honest and just, loyal to the Republic of Latvia, search for the truth at all times, never betray it, and try cases in accordance with the Constitution of the Republic of Latvia and its laws."

55. 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. 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". An alternative 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". This also applies to the oath prescribed in article 53 (1).

Article 58: During a vacancy or a temporary absence of a Judge, the Council of Justice may temporarily, but not for longer than two years, instruct another District (Town), Administrative, Regional, Administrative Appellate Court Judge, an Honourable Judge, or a lay judge who complies with the requirements for a candidate Judge of the appropriate Court, to perform the duties of a District (Town) or Administrative Court Judge, provided these persons have given their written consent.

56. These provisions are necessary, and the final decision appropriately lies with the Council of Justice. It is assumed 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.

Article 61 (1): The maximum age of a District (Town), Administrative, Regional and the Administrative Appellate Court Judge shall be 65 years of age and for a Supreme Court Judge, 70 years of age.

57. 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. Experience has shown that the vast majority of judges and prosecutors apply for this extension. This 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 powers.

Article 65 (2): Following application of the Chairperson of the District (Town) Court, the District (Town) municipal council shall decide to dismiss a lay judge from his/her duties, if he/she: … 2) has breached the law in the trying of a case;

58. A judge, including lay judges, should never be held responsible for the incorrect application of the law in trying cases. The remedy for an incorrect or illegal application of the law is an appeal to a higher instance but not the dismissal of the judge.

Article 66: The heading reads: "Rights and freedoms of a Judge."

59. 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.

60. 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.

Article 69 (2): Revocation of a Court verdict or ruling shall not be grounds per se to charge with liability a Judge who had taken part in the decision making, unless he/she has committed a deliberate breach of the law, been negligent or careless in the application of law.

61. See comments relating to Article 65 (2) above.

Article 73 (5): Meetings of the Judges Disciplinary Board may be attended in an advisory capacity by the Minister of Justice and the Prosecutor General or persons duly authorized by them, as well as persons authorized by the Latvian Judges Organization.

62. The justice minister's participation in an advisory capacity in the meetings of the Judges' Disciplinary Board 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. This may require additional thought.

Article 74 (1): The Judges Disciplinary Board shall hear disciplinary cases not later than within a month of receiving the case, not including the time when the Judge who has been charged with disciplinary liability suffers from a temporary inability to work.

63. One should positively assess the provision envisaging short deadlines for handling the disciplinary matters of judges. 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.

Article 82 (2): In the event the Judges Disciplinary Board has adopted a ruling to recommend to dismiss the Judge from office and this ruling was not appealed, … material shall be forwarded to the Saeima …
(3) In the event the Saeima sees no grounds for dismissing the Judge from office, or the Prosecutor General to lay criminal charges, the disciplinary case shall be returned to the Judges Disciplinary Board or the Disciplinary Senate respectively, who then shall review the case again.

64. The acceptance of parliamentary control over the disciplinary board is inconsistent. 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.

Article 85: The Judges Qualification Board is a self-regulating institution of Judges with a view to strengthen the professional independence of the judiciary. …

65. The Judges' Qualification Board will have considerable say in the selection of judges. 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. A representative of the association of practising advocates should probably be added the group. This allowance for limited participation by outside persons is a positive feature. 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 rules on composition of the Board would seem to be acceptable, and the question then is how the commission and the procedures for its work should be constituted. As implied by the above comments relating to paragraph 15 above, it should include persons from outside the courts.

Article 88: … The Judges Qualification Board shall determine a qualification supplement for Judges, provided the Judge has attended continued educational training and improved his/her professional knowledge and skills within the period of time provided by law. …

66. While this feature probably is desirable, it must be clear that the rules will not be administered so as to increase judicial interdependence.

IV. Conclusions

67. In general, it can 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.

68. 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 the composition of the Council (in the light of those powers and otherwise), and the position of the judiciary towards the legislative power and the Ministry of Justice. The powers of the Council of Justice are very wide ranging. The scope of

these powers taken together with the composition of the Council mainly of judges might create a problem of democratic legitimacy of the judiciary in Latvia.

69. 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.

70. Remarks of a concrete character have been directed *inter alia* at the following conditions:

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

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 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.

5. Provisions for interpreters should be made at court proceedings.

6. The procedure for the appointment of judges should set out clear criteria.

7. The procedure of distribution of cases between judges should follow objective criteria.