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Appointment of the Constitutional Court Justice: Some Issues

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This article analyses important issues brought up in public regarding one of the constitutional institutions – formation of the Constitutional Court. At the outset, the article looks at the models of accessing the position of the Constitutional Court justice, their weaknesses and also responsibility of persons engaged in the appointment of justices. Challenges of parliamentary procedures are also discussed, especially considering that the platform *e-Saeima* was used as the voting platform to appoint the justice. The article also reflects a debate on whether a Constitutional Court justice can be appointed only once in a lifetime, keeping in mind the recent amendments to the Constitutional Court Law, including reappointment mechanism if the judge has had to leave the position before expiration of 10 years' mandate. Finally, the article analyses the role and meaning of decisions made by a special institution – Judicial Council – when appointing the Constitutional Court justice.

Keywords: justice, appointment, Constitutional Court, *Saeima*, Judicial Council.

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Introduction

In every society, judges play an important role as they are invited to protect the Constitution and democracy as such¹ and actually “hold mighty power in their hands”². The role of a justice has been widely discussed both in doctrine³ and in

¹ Barak, A. *The Judge in a Democracy*. Princeton: Princeton University Press, 2008, p. 20.

² Levits, E. Par dažiem tiesneša neatkarības aspektiem [On some aspects of the independence of a justice]. *Latvijas Republikas Augstākās Tiesas Biļetens*, No. 16, 2018, p. 69.

³ See for instance, Shetreet, Sh., Forsyth, Ch. (eds.). *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges*. Leiden: BRILL, 2011; Barak, A. *The Judge in a Democracy*.

practice.⁴ No doubt, persons who engage in selection and appointment of the justice or in process which leads to granting this special status, undertake an immense responsibility.

Considering the special role of the Constitutional Court in the state, all the countries with Constitutional Courts employing a special model of European constitutional control always put great emphasis on appointment of the justice of that court. Latvia is no exception in this regard, and appointment of the Constitutional Court justice, particularly considering the entire process, always entails some “excitement” for persons who are directly involved in the process or observe it.

Appointment of the Constitutional Court justice, discussions on candidates and appointment of the justice saw a lot of novelties on the second half of 2020. Firstly, there were five candidates running for the position of the justice. Almost each coalition party and opposition members offered their candidates, a move unprecedented so far. Besides, the Constitutional Court justice failed to be appointed in seven election rounds. Secondly, appointment of the Constitutional Court justice allowed returning to an issue debated many years ago, namely, if a person who had once assumed a position of the Constitutional Court justice can be reappointed. Thirdly, the Judicial Council for the first time in its history created a new formula of decision – its opinion – when presenting its point of view on the candidates of justice.

1. Appointment of the Constitutional Court Justice: Persons, Decisions and Responsibility

In order to ensure building of competent and independent Constitutional Court, all countries usually put a lot of effort in formation of corps of the Constitutional Court judges. It cannot be denied that the Constitutional Court may fulfil its mission only if the justices are impartial and independent from politicians, persons who have appointed them, and are free from any external influence.⁵ An independent court is an essential guarantee of democracy and freedom in each country.⁶ Also experience of the European Court of Human Rights recognises the appointment of the justice as one of the elements of the judge’s independence.⁷

⁴ See for instance, Judgement of 18 January 2010 by the Constitutional Court of the Republic of Latvia in case No. 2009-11-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2009/05/2009-11-01_Spriedums_ENG.pdf#search=2009-11-01 [last viewed 28.03.2021]; Judgement of 14 December 2010 by the Constitutional Court of the Republic of Latvia in case No. 2010-39-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2010/05/2010-39-01_Spriedums_ENG.pdf#search=2010-39-01 [last viewed 28.03.2021]; Judgement of 26 October 2017 by the Constitutional Court of the Republic of Latvia in case No. 2016-31-01. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/12/2016-31-01_Judgment_ENG-3.pdf#search=2016-31-01 [last viewed 28.03.2021].

⁵ Schwartz, H., Lee, H. P. (eds.). *The Struggle for Constitutional Justice in Post-Communist Europe*. Chicago: University of Chicago Press, 2000, p. 39.

⁶ Shetreet, S. *Judicial Independence and Accountability: Core Values in Liberal Democracies*. In: *Judiciaries in Comparative Perspective*. Cambridge: Cambridge University Press, 2011, p. 3. Available: <http://ebookcentral.proquest.com/lib/lulv/detail.action?docID=775093> [last viewed 28.03.2021].

⁷ Judgement of the European Court of Human Rights *Case of Findlay v. The United* (application No. 22107/93), para. 73. Available: <http://hudoc.echr.coe.int/eng?i=001-58016> [last viewed 28.03.2021].

It can be said that a way of appointing the justice, appointment criteria and term of the mandate are crucial factors behind the court's independence and autonomy.⁸

Theoretician A. S. Sweet speaks of two appointment systems for the Constitutional Court judges.⁹ a study conducted by the Venice Commission "Democracy Through Law" lists three systems for Constitutional Court justice appointment.¹⁰ The first is the so-called nomination or direct appointment system when a person holding such right chooses a justice nominee and there are no other procedures required (approval or electing). Nomination system according to Article 56 of the French Constitution is applied when forming the Constitutional Council of France.¹¹ It is known that all former presidents of France *ex officio* are members of the Constitutional Council of France, as well. In this system, nomination of justice mostly depends on politics and politicians, because even though a justice must qualify for certain requirements, political influence cannot be excluded.

The second is the election system with the parliament as the last instance in decision-making. Decision to appoint the judge usually requires a qualified majority. In this system, the final decision is left to the parliament regardless of the persons who can nominate the candidates. Even though the studies show that this system aims at ensuring more democratic representation, it still depends on agreement in politics and among politicians, especially if a qualified majority is required to approve the candidate in the position.¹² On the other hand, even it is impossible to avoid political influence on appointment of a justice¹³, it cannot be treated as inherently dangerous.¹⁴ The main criteria when choosing a justice should be his/her professional qualities, compliance with certain requirements, not his/her support for an ideology or lines of some political parties. This is the model pursued when forming the Constitutional Court in Germany, Lithuania, Slovenia and Poland.¹⁵ The Constitutional Court justice is also appointed based to this system in

⁸ Engstad, N. A. (ed.), et al. *The Independence of Judges*. The Hague: Eleven International Publishing, 2014, p. 67. Available: <http://ebookcentral.proquest.com/lib/lulv/detail.action?docID=1922214> [last viewed 28.03.2021].

⁹ Sweet, A. S. *Governing with Judges: Constitutional Politics in Europe*. Oxford: Oxford University Press, 2000, p. 46.

¹⁰ *The Composition of Constitutional Courts*. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 4. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e) [last viewed 28.03.2021].

¹¹ Three of the 9 members of the French Constitutional Council are nominated by the President, three by the President of the National Assembly and three by the President of the Senate. See Constitution of October 4, 1958. Available: https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf [last viewed 26.01.2021].

¹² Sadurski, W. *Rights Before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. The Netherlands: Springer, 2005, p. 15; *The Composition of Constitutional Courts*. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 7. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e) [last viewed 26.01.2021].

¹³ Ferejohn, J. *Judicializing Politics, Politicizing Law*. *Law and Contemporary Problems*, Vol. 65, No. 3, Summer 2002, p. 43.

¹⁴ Saffan, M. *Politics – and Constitutional Courts (Judge's Personal Perspective)*. *Polish Sociological Review*, Issue 1, January 2009, pp. 3–25.

¹⁵ *The Composition of Constitutional Courts*. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 5. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e) [last viewed 26.01.2021].

Latvia and a decision of the *Saeima* emphasizes independence of justices.¹⁶ That is to say, regardless of the fact that implementers of all three functions of state power are involved in nomination of justices, the last word is reserved to politicians – the parliament; besides, the candidate must win 51 votes of the *Saeima* members to get this position.¹⁷

The third system, which is a hybrid of both previous systems, must be emphasized, as well. This system is applied when forming the corps of Constitutional Court in Austria, Spain, Romania and Italy.¹⁸

In doctrine, other division of those systems is also known. For example, M. De Visser offers three types of systems by considering the institutions involved in decision making (only parliament (I), parliament and executive power (II), various institutions (III)).¹⁹

In compliance with Article 4(1) of the Constitutional Court Law, three persons (institutions) are entitled to nominate the Constitutional Court justice: 10 *Saeima* deputies, Cabinet of Ministers and plenary meeting of the Supreme Court.²⁰ In forming the corps of the Constitutional Court, they abide by the principle that the next candidate is nominated by an entity (person) who previously nominated the justice whose mandate has expired regardless of the reason (expiration of term, his/her initiative, reaching of certain age, dismissal or losing of the office). At the end of 2020, 10 deputies of the *Saeima* became entitled to nominate the candidate of the Constitutional Court justice. As already stated, this time five candidates were running for the justice position.²¹ Each of the ten *Saeima* deputies are not prevented from exercising such rights granted under Article 4(1) of the Constitutional Court Law. It was nevertheless unusual that coalition parties (union of parties “Jaunā Vienotība”, political party “KPV LV”, New Conservative Party, union of parties “Attīstībai/Par!”, National Alliance “Visu Latvijai!” – “Tēvzemei un Brīvībai/LNNK”) did not manage to agree on one candidate.²² Legally, the majority of the *Saeima* is not bound by an obligation to agree on one candidate. Of course, unity and consolidation of current coalition is another issue which does not pertain to the law. At the same time, when promoting their nominees, the political parties must always consider if any of these numerous candidates can obtain the necessary 51 votes.

¹⁶ Judgement of 5 November 2004 by the Constitutional Court of the Republic of Latvia in case No. 2004-04-01, para. 10.1. Available: https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2004/04/2004-04-01_Spriedums_ENG.pdf#search=2004-04-01 [last viewed 28.03.2021].

¹⁷ Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922), art. 85. Available: <https://likumi.lv/ta/id/57980-latvijas-republikas-satversme> [last viewed 28.03.2021].

¹⁸ The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD(1997)020, p. 5. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e) [last viewed 26.01.2021].

¹⁹ *De Visser, M.* Constitutional Review in Europe: A Comparative Analysis. Oxford: Hart Publishing, 2014, pp. 206–209.

²⁰ Satversmes tiesas likums [Constitutional Court Law] (05.06.1996). Available: <https://likumi.lv/ta/id/63354-satversmes-tiesas-likums> [last viewed 28.03.2021].

²¹ Lēmumprojekta teksts: “Par Satversmes tiesas tiesneša apstiprināšanu” [Text of the draft decision: On approval of a judge of the Constitutional Court]. Available: https://titania.saeima.lv/LIVS13/saeimalivs_lmp.nsf/0/D2C8717CB92BA9A7C225860F00321943?OpenDocument [last viewed 26.01.2021].

²² Latvijas Republikas Ministru kabineta veidojošo 13. Saeimas frakciju sadarbības līgums [Cooperation Agreement of the 13th *Saeima* Factions Forming the Cabinet of Ministers of the Republic of Latvia]. Available: https://mk.gov.lv/sites/default/files/editor/sadarbibas_ligums_gala-redakcija_red.pdf [last viewed 26.01.2021].

Undoubtedly, it is in the best interests of society that the best lawyers work in the court. The Constitutional Court is an important constitutional institution which has a power to invalidate a legal provision adopted by the legislator. Therefore, it is crucial to appoint persons with the highest possible professional qualification in this very important office – Constitutional Court justice.²³ Professional knowledge and personal qualities are recognised as fundamental prerequisite of justice's independence.²⁴ For this reason, the legislation has set high requirements for candidate to the post of justice. Such requirements integrated in the Constitutional Court Law (Article 4, paragraph 2²⁵) match the common trends in other European countries. They are sufficient and adequate. Experience of the European countries shows that, for instance, in constitutional courts of Germany, Italy and Spain justices are law professors followed by justices of other courts, then lawyers.²⁶ Former politicians may also become justices, it is very common in the Constitutional Council of France. The former politicians have been seen assuming Constitutional Court justice office also in Latvia. It was notable in the so-called first composition of the Constitutional Court, where the court comprised several ex-politicians (Prof. A. Endziņš, Prof. I. Čepāne, Prof. R. Apsītis). In other words, it is a duty of all three entities (persons) who participate in candidate nomination procedure and after – Judicial Council and also the *Saeima* (Legal Commission and collegial institution of the *Saeima*) – to ensure that the best law specialists (or lawyers) work in the Constitutional Court.

Appointment of the Constitutional Court justice at late 2020²⁷ was unique also because voting took place in a remote *Saeima* sitting, using the platform *e-Saeima*. A need to use such platform was associated with varying restrictions imposed to limit the spread of COVID-19.²⁸ It must be explained that the Constitution does not

²³ Judgment of 18 October 2007 by the Constitutional Court of the Republic of Latvia in case No. 2007-03-01, para. 24.1. Available: https://www.satv.tiesas.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/01/2007-03-01_Spriedums_ENG.pdf#search=2007-03-01 [last viewed 28.03.2021].

²⁴ Engstad, N. A. The Independence ..., p. 3.

²⁵ Article 4(2) of the Constitutional Court Law determines that such person may be appointed as a justice of the Constitutional Court who:

- 1) is a citizen of the Republic of Latvia;
- 2) has an impeccable reputation;
- 3) has reached 40 years of age, on the day when the proposal regarding the confirmation as a justice of the Constitutional Court was submitted to the Presidium of the *Saeima*;
- 4) has acquired a higher professional or academic education (except the first level professional education) in law science and also a master's degree (including a higher legal education, which in regard to rights is equal to a master's degree) or a doctoral degree;
- 5) has at least 10 years of service in a law speciality or in a judicial speciality in scientific educational work at a scientific or higher educational establishment after acquiring a higher professional or academic education (except the first level professional education) in law science.

Paragraph 2.¹ of the same Article, in turn, stipulates that a person who cannot be a candidate for the position of a justice in accordance with Art. 55 of the Law "On Judicial Power" may not be appointed as a justice of the Constitutional Court. Satversmes tiesas likums [Constitutional Court Law] (05.06.1996). Available: <https://likumi.lv/ta/id/63354-satversmes-tiesas-likums> [last viewed 28.03.2021].

²⁶ Sweet, A. S. Governing with Judges, p. 48.

²⁷ Latvijas Republikas 13. Saeimas rudens sesijas četrdesmit trešā (attālinātā ārkārtas) sēde 2020. gada 21. decembrī [Forty-third (remote extraordinary) sitting of the 13th autumn session of the *Saeima* of the Republic of Latvia on 21 December 2020]. Available: https://www.saeima.lv/steno/Saeima10/Skana/1221_001-1200.htm [last viewed 26.01.2021].

²⁸ Ministru kabineta 2020. gada 6. novembra rīkojums Nr. 655 "Par ārkārtējās situācijas izsludināšanu" [Cabinet of Ministers Order of 6 November 2020 No. 655 "On the declaration of extraordinary situation"]. *Latvijas Vēstnesis*, No. 216A, 06.11.2020.

allow delegating parliamentary functions to another constitutional body due to an extraordinary situation. The *Saeima* was obliged to find a way to continue operating as a legislator, since the activity of the parliament as the single constitutional body of the state is essential and indispensable under any circumstances. This principle was strengthened in the statement of the State President dated 23 March 2020 on operational principles of the State adopted by the constitutional power entities to overcome extraordinary situation, stressing that the *Saeima* should continue working also remotely, whenever required, to organise work of the *Saeima*.²⁹ When an extraordinary situation was declared nation-wide, the *Saeima* started working in the extraordinary mode, concurrently developing an online platform *e-Saeima*. *E-Saeima* is found to be a modern tool of the 21st century suitable for work of the *Saeima* and a custom-made technology for specific procedures, allowing to implement parliament procedures during physical absence from the *Saeima* building.³⁰ Domain of constitutional law of Latvia has seen discussions on compliance of this platform with Article 15 of the *Satversme* stating that the *Saeima* shall hold its sittings in Riga, and only in extraordinary circumstances may it convene elsewhere.³¹ This discussion was actually ended by the judgement of the Constitutional Court which, among other questions, evaluated compliance of the *e-Saeima* platform with the Constitution, stating that “[h]olding of a remote *Saeima* sitting is an extraordinary measure enabling continued work of the parliament also under circumstances where deputies cannot meet in person due to epidemiological safety and restrictions imposed in this regard. It is crucial to create a mechanism in the State to allow continuation of the parliament’s activities and deciding on important issues by the legitimate constitutional body.”³²

An interesting procedural issue emerged during appointment (voting) procedure at the *Saeima* sitting. Pursuant to the *Saeima* Rules of Procedure, Article 31(8), if the number of nominees for a position exceeds the number of officials to be elected, the voting takes place (may take place) in several rounds.³³ In compliance with the *Saeima* Rule of Procedures, Article 26(4), if nobody collects the necessary number of votes in the first round, the voting is repeated for all the candidates. If nobody is elected then, the elections continue by excluding a candidate who received the least votes in previous round. The elections continue until one of candidates gets the necessary number of votes. Voting for the Constitutional Court justice in the second round of the *Saeima* sitting of 21 December 2020 led to equal number of

²⁹ Valsts prezidenta paziņojums Nr. 8 “Valsts konstitucionālo orgānu darbības pamatprincipi ārkārtējā situācijā” [President Notification No. 8 “Basic Principles of Activity of State Constitutional Bodies in an Extraordinary Situation”], para. 3. Available: <https://likumi.lv/ta/en/en/id/313400> [last viewed 28.03.2021].

³⁰ *E-Saeima*. Available: <https://www.saeima.lv/lv/likumdosana/saeimas-sedes/e-saeima/> [last viewed 28.03.2021]; see also *Libiņa-Egnerē, I.* Par *e-Saeimas* jauno platformu un tās priekšrocībām [About the new *e-Saeima* platform and its advantages]. *Jurista Vārds*, No. 23(1133), 09.06.2020, pp. 5–6.

³¹ See for instance, *Pleps, J.* Saeima turpina noturēt sēdes attālinātā veidā [The *Saeima* continues to hold sittings remotely]. *Jurista Vārds*, No. 24/25(1134/1135), 16.06.2020, pp. 6–7; *Meistare, D.* Saeimas Juridiskā biroja viedoklis par Saeimas attālinātajām sēdēm [Opinion of the Legal Bureau of the *Saeima* on remote sittings of the *Saeima*]. *Jurista Vārds*, No. 24/25(1134/1135), 16.06.2020, pp. 5–6.

³² Judgement of 12 March 2021 by the Constitutional Court of the Republic of Latvia in case No. 2020-37-0106, para. 4.2.24. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2020/07/2020-37-0106_spriedums-1.pdf#search=2020-37-0106 [last viewed 28.03.2021].

³³ Saeimas kārtības rullis [*Saeima* Rules of Procedure] (28.07.1994). Available: <https://likumi.lv/ta/id/57517-saeimas-kartibas-rullis> [last viewed 28.03.2021].

votes for two candidates (Gunārs Kūtris – 13 votes “for” and 80 votes “against” and Inese Druviete with 13 votes “for” and 80 votes “against”).³⁴ Pursuant to Article 26(4) of the aforementioned law, in the next – third – round, four candidates would be proposed for election. Since the least number of votes was received by two candidates, the Chair of *Saima* and Chair of the *Saeima* sitting found a quick solution, announcing the third round of elections with all five candidates and laying down a condition that “[i]f the number of least votes for the candidates will be equal, we will vote for three candidates in the round four.”³⁵ Nobody was elected as the Constitutional Court justice in the sitting of 21 December 2020, because also in the last round Mrs I. Ņikuļceva received only 47 votes of the *Saeima* deputies.³⁶

Since the parliament did not manage to appoint any of the five nominated justice candidates at the end of 2020, it does not automatically mean that the procedure of Constitutional Court justice appointment in Latvia is incorrect and inadequate. It has been useful and appropriate all the previous years. Obviously, the problem lay in achieving common ground in the parliament and differing views of the position members at the parliament, which cannot be affected by the law.

2. Restriction on Justice Reappointment: A Myth or Reality

One of the issues brought to light by the appointment of the Constitutional Court justice in 2020 concerned a question whether a person can be appointed as the Constitutional Court justice for a given term only once in a lifetime, or can he/she be reappointed.³⁷

It must be specified that normative regulation in Latvia is not very explicit and accurate in prohibiting a person to be reappointed to the office of the Constitutional Court judge as it is, for example, in Poland³⁸, Slovenia³⁹, Slovakia⁴⁰, Germany⁴¹ and a number of other countries.⁴² The doctrine in Latvia has witnessed contrary opinions in this regard.⁴³ Author of this article admits that by commenting on

³⁴ Latvijas Republikas 13. Saeimas rudens sesijas četrdesmit trešā (attālinātā ārkārtas) sēde 2020. gada 21. decembrī [Forty-third (remote extraordinary) sitting of the 13th *Saeima* autumn session of the Republic of Latvia on 21 December 2020].

³⁵ Latvijas Republikas 13. Saeimas rudens sesijas četrdesmit trešā (attālinātā ārkārtas) sēde 2020. gada 21. decembrī [Forty-third (remote extraordinary) sitting of the 13th *Saeima* autumn session of the Republic of Latvia on 21 December 2020].

³⁶ Ibid.

³⁷ Lēmumprojekta teksts: “Par Satversmes tiesas tiesneša apstiprināšanu” [Text of the draft decision: On approval of a justice of the Constitutional Court].

³⁸ The Constitution of The Republic of Poland. Article 194, para. 1. Available: <https://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/> [last viewed 28.03.2021].

³⁹ Constitution of Slovenia. Article 165, para. 1. Available: <https://www.us-rs.si/legal-basis/constitution/?lang=en> [last viewed 28.03.2021].

⁴⁰ The Constitution of the Slovak Republic. Article 134, para. 3. Available: <https://www.prezident.sk/upload-files/46422.pdf> [last viewed 28.03.2021].

⁴¹ Act on the Federal Constitutional Court. Article 4, para. 2. Available: https://www.bundesverfassungsgesicht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=10 [last viewed 28.03.2021].

⁴² See The Composition of Constitutional Courts. European Commission for Democracy Through Law, CDL-STD (1997)020, pp. 13–15. Available: [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD\(1997\)020-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(1997)020-e) [last viewed 28.03.2021].

⁴³ See *Neimanis, J.* Tiesneša atkārtotas apstiprināšanas aizliegums Satversmes tiesā [Prohibition of re-appointment of a justice in the Constitutional Court]. *Jurista Vārds*, No. 4(1166), 26.01.2021 and also *Priekulis, J.* Par tiesībām atkārtoti ieņemt Satversmes tiesas tiesneša amatu [On the right to re-hold the position of a justice of the Constitutional Court]. *Jurista Vārds*, No. 4(1166), 26.01.2021.

Article 85 of the Constitution, which is the basis of the Constitutional Court's legitimacy, both debates on this issue when elaborating the Constitutional Court Law in the *Saeima* and arguments stating that regardless of revising the provision (Article 7(3) of the Constitutional Court Law) "[o]ne and the same person may not hold the position of a Constitutional Court judge for longer than ten consecutive years", the person should be appointed as Constitutional Court justice only once in a lifetime.⁴⁴

In order to understand this issue, it must be analysed in context of recent developments associated with the appointment of Mrs. I. Ziemele as a justice of the Court of Justice of the European Union and amendments to the Constitutional Court Law.⁴⁵ Actually, the mandate term of Mrs. I. Ziemele as the Constitutional Court justice, i.e., 10 years, had not expired when she assumed the new position (in Court of Justice of the European Union). In order to allow Mrs. I. Ziemele to return to the Constitutional Court at a later point, the Constitutional Court Law was amended. Analysis of *Saeima* materials reveals that a proposal to include the following provision in first sentence of Article 7 of the Constitutional Court Law: "[i]f a person has left the position of the Constitutional Court justice to assume a position in international court or to represent the State of Latvia by assuming a position in an international institution and no more than 10 years have elapsed since leaving the position of Constitutional Court justice, this person may be reappointed for the remaining mandate period" was submitted by the Minister for Justice, J. Bordāns and it was supported also by the Legal Commission of the *Saeima*.⁴⁶ J. Bordāns wrote a letter to the Legal Commission where he elaborated on the main arguments of his proposal: to promote the best professionals to work in international institutions, also keeping the door open for their returning to Latvia and provide an opportunity to work as the Constitutional Court justice for the intended 10 years once in a lifetime, and to split this period, if necessary, taking into account interests of the State (best representation).⁴⁷ Besides, the minister based his proposal on what the doctrine said about Article 7(3) of the Constitutional Court Law and that it "is interpreted to mean that a person can be a Constitutional Court justice only once in a lifetime and not more than for 10 years altogether."⁴⁸

⁴⁴ *Rodiņa, A., Spale, A.* Satversmes 85. panta komentārs [Commentary to Article 85 of the Constitution]. In: Latvijas Republikas Satversmes komentāri. VI nodaļa. Tiesā. VII nodaļa. Valsts kontrole [Comments on the Constitution of the Republic of Latvia. Chapter VI. The Court. Chapter VII. State Control]. Collective of authors, scientific ed. Prof. *Balodis, R.* Rīga: Latvijas Vēstnesis, 2013, pp. 151–152.

⁴⁵ Sāks pildīt EST tiesneša pienākumus [Will start the duties of a judge of the CJEU]. *Jurista Vārds*, No. 39(1149), 29.09.2020.

⁴⁶ Latvijas Republikas 13. Saeimas ārkārtas sesijas attālinātā sēde 2020. gada 2. jūlijā [13th Saeima of the Republic of Latvia, remote sitting of an extraordinary session on 2 July 2020]. Available: <http://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/E7DA72F06903BD48C22585EE004A44C5?OpenDocument> [last viewed 26.01.2021]; Latvijas Republikas 13. Saeimas rudens sesijas pirmā (ārkārtas) sēde 2020. gada 3. septembrī [The first (emergency) sitting of the autumn session of the 13th Saeima of the Republic of Latvia on 3 September 2020]. Available: <http://titania.saeima.lv/LIVS13/saeimalivs13.nsf/0/27CBAA76F2E67346C22585DE0022D824?OpenDocument> [last viewed 26.01.2021].

⁴⁷ Ministru prezidenta biedra, Tieslietu ministra J. Bordāna 18.05.2020. vēstule Nr. 1-11/1636 Latvijas Republikas Saeimas Juridiskās komisijas priekšsēdētājam J. Jurašam [Deputy Prime Minister, Minister of Justice J. Bordāns 18.05.2020. letter No. 1-11/1636 to the Chairman of the Legal Commission of the Saeima of the Republic of Latvia J. Jurass]. Available: <http://titania.saeima.lv/LIVS13/SaeimaLIVS13.nsf/0/B060CCA35A65CEA9C225856D0022CA49?OpenDocument> [last viewed 26.01.2021].

⁴⁸ *Ibid.*

Amendments to the Constitutional Court Law were adopted in the *Saeima* on 3 September 2020 and they came in force on 29 September 2020.⁴⁹

This time the mechanism integrated in this new paragraph 1 of Article 7 is not so important. A special emphasis must be placed on a fact that the new provision does not guarantee justice's (for example, for Mrs. I. Ziemele) returning for the remaining mandate term, but to participate in justice selection from the very beginning, in line with the justice nomination procedure. In the author's opinion, it is important that "returning mechanism" included in paragraph 1 of Article 7 reflected an understanding of the *Saeima's* composition of that time of Article 7(3) of the Constitutional Court Law: A person may assume Constitutional Court justice position for full 10 years, including also breaks in between, which is stipulated in the new paragraph 1 of Article 7, only once in a lifetime. If this provision were understood differently, there would be no sense whatsoever to amend the Constitutional Court Law and add this new "returning mechanism" of a justice, since then, for example, Mrs. I. Ziemele could again become the Constitutional Court justice for a new 10-year term instead of the remaining term stipulated in Article 7(1).

When the previously mentioned amendments to the Constitutional Court Law came in force, a person who had been a justice for entire 10 years was nominated as the candidate after all. This issue appeared in the Judicial Council in a section of questions and answers, however, nothing was said about it in a decision on this Constitutional Court justice's candidate. It is possible that this issue was debated among the members of the Judicial Council, but it was not reflected in the available decision. It is also possible that debates were not held (on this issue) in the Judicial Council and it did not even notice any obstacles in this aspect. More accurately, this assumption is only a probability, since materials of the Judicial Council which would reflect this discussion is not publicly available.

The *Saeima* Legal Commission (as revealed in the minutes of the sitting) decided that "all nominated Constitutional Court justice candidates meet all the criteria and all candidates are suitable for a position of the Constitutional Court justice."⁵⁰ In this case, one Commission member voted against, since she believed that not all candidates qualified for the criteria, however, she did not specify which criterion exactly or which candidate or candidates did not qualify. The decision of the *Saeima* Legal Commission certainly raises a question as to what an opinion of the *Saeima* Commission was regarding this so-called "second chance issue", because the opinion of the Legal Commission stated on 27 October 2020 did not match or it was contrary to the one expressed when supporting amendments of the Constitutional Court Law integrating "returning mechanism" of the Constitutional Court justice (Article 7(1)).

Ideally, candidate nominators, i.e., 10 *Saeima* deputies, Cabinet of Ministers and plenary meeting of the Supreme Court, first of all, are responsible for nominating a person as the Constitutional Court justice once in a lifetime. Afterwards, other persons involved – Judicial Council and the *Saeima* – may express their opinions in

⁴⁹ Grozījumi Satversmes tiesas likumā [Amendments to the Constitutional Court Law] (03.09.2020). Available: <https://www.vestnesis.lv/op/2020/178.5> [last viewed 28.03.2021].

⁵⁰ Saeimas Juridiskās komisijas 2020. gada 27. oktobra sēdes protokols Nr. 151 [Minutes of the sitting of the *Saeima* Legal Commission of 27 October 2020 No. 151]. Available: [http://titania.saeima.lv/livs/saeimasnotikumi.nsf/0/06dba78d96c5e0b2c225860800463b84/\\$FILE/PR_2020_10_27_10_00_JK.pdf](http://titania.saeima.lv/livs/saeimasnotikumi.nsf/0/06dba78d96c5e0b2c225860800463b84/$FILE/PR_2020_10_27_10_00_JK.pdf) [last viewed 26.01.2021].

this regard. This time, the persons involved remained silent, obviously believing that there are no obstacles for a person to assume the position repeatedly.

3. Decision of the Judicial Council or What is Expected from the Judicial Council

Article 4(5) of the Constitutional Court Law states that “The Presidium of the *Saeima* shall inform the Judicial Council regarding the candidacies for Constitutional Court justice position, inviting to provide an opinion on them.” This provision was included in the Constitutional Court Law on 19 May 2011 when adopting the law “Amendments to the Constitutional Court Law”⁵¹ – after a similar provision was already integrated in another law. Paragraph 3 of Article 89¹¹ of the Law “On Judicial Power” (amendments of 3 June 2010) stated that “The Judicial Council shall hear the candidates for the office of a justice of the Constitutional Court and provide an opinion on them to the *Saeima*.”⁵² Annotation of the amendments to Article 4(5) of the Constitutional Court Law reveals a remark that “[a]mendments to the Constitutional Court Law must be made in a way to harmonise its wording also with other laws already in force.”⁵³ Provisions included in these two normative acts are complementary, not mutually excluding, creating a mechanism for the Judicial Council to engage in the appointment of the Constitutional Court justice.

Involvement of the Judicial Council in this procedure is rather unique, since usually other persons/institutions comprising professionals or public representatives are not engaged in appointment of the Constitutional Court justice.⁵⁴ Transcript of the *Saeima* sittings shows that this provision was not particularly debated.⁵⁵ However, it is most likely that the legislator wanted to involve the Judicial Council in forming of the corps of Constitutional Court judges, considering its composition and also the tasks⁵⁶, in order to evaluate the candidate professionally and impartially.

The Judicial Council must, firstly, hear out the candidate and, secondly, present its opinion on them. Hearing obligation allows a candidate to speak about their suitability for this position, to answer the questions. Meanwhile, a phrase “to present its opinion on them” which is integrated in the law means providing a substantiated and understandable opinion adopted by a collegial institution regarding a particular person. The legislator, most probably, expected to hear an opinion from the Judicial

⁵¹ Grozījumi Satversmes tiesas likumā [Amendments to the Constitutional Court Law] (19.05.2011). Available: <https://likumi.lv/ta/id/230990-grozijumi-satversmes-tiesas-likuma> [last viewed 28.03.2021].

⁵² Grozījumi likumā “Par tiesu varu” [Amendments to the Law “On Judicial Power”] (03.06.2010). Available: <https://likumi.lv/ta/id/212199-grozijumi-likuma-par-tiesu-varu-> [last viewed 28.03.2021].

⁵³ Likumprojekta “Grozījumi Satversmes tiesas likumā” anotācija [Annotation of the draft law “Amendments to the Constitutional Court Law”]. Available: <http://titania.saeima.lv/LIVS10/SaeimaLIVS10.nsf/0/A8825E46508D27C4C22577D80024DB17?OpenDocument> [last viewed 26.01.2021].

⁵⁴ Schwartz, H., Lee, H. P. The Struggle ..., p. 42.

⁵⁵ See Materiāli likumprojekta reģistrā likumprojektam “Grozījumi likumā “Par tiesu varu”” Nr. 165 [Materials in the *Saeima* draft law register No. 165. Amendments to the Law “On Judicial Power”, p. 9. Available: <http://titania.saeima.lv/LIVS/SaeimaLIVS.nsf/webSasaiste?OpenView&restrictto category=1657/Lp9> [last viewed 26.01.2021].

⁵⁶ Bičkovičs, I. Tieslietu padome ir tiesu neatkarības stiprināšanas garants [The Judicial Council is a guarantor of strengthening the independence of the judiciary]. *Latvijas Republikas Augstākās Tiesas Biļetens*, No. 16, 2018, p. 97.

Council on suitability of the candidate for given position covering two important aspects. Firstly, the Council should evaluate what the candidate has achieved and done before in his/her professional carrier. Secondly, the Council should evaluate whether the candidate is able to deliver what is expected from the Constitutional Court justice, taking into account his/her professional and personal qualities. The Judicial Council can, of course, define and come up with their own evaluation criteria.

Decisions of the Judicial Council regarding the Constitutional Court justice candidates can be divided in two groups.

Decisions of the Judicial Council regarding the Constitutional Court justice candidates were concise and constructive until 26 October 2020. They expressed support for appointing a relevant candidate to this position. It was the case with candidates S. Osipovs⁵⁷, I. Ziemele⁵⁸, A. Laviņš⁵⁹, G. Kusiņš⁶⁰, D. Rezevska⁶¹, A. Kučs⁶², J. Neimanis⁶³. It is noteworthy that in these cases the Judicial Council had to express an opinion only about one nominee.

The second period outlines another reality since on 26 October 2020 when Judicial Council had to state its opinion on several candidates for this office. For the first time, the Judicial Council had defined exact criteria which it took into consideration when providing its opinion on them. Namely, evaluation was aimed at: professional authority and professional performance; contribution to development of the legal system; professional and private reputation within the framework of available data; perspective on the place and role of the Constitutional

⁵⁷ Tieslietu padomes 04.07.2011. lēmums Nr. 50. Par Satversmes tiesas tiesneša amata kandidāti S. Osipovu [Judicial Council's decision of 04.07.2011 No. 50. On the candidate for the position of a justice of the Constitutional Court S. Osipova]. Available: <http://www.at.gov.lv/files/uploads/files/docs/nr50.pdf> [last viewed 26.01.2021].

⁵⁸ Tieslietu padomes 18.08.2014. lēmums Nr. 48. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 18.08.2014 No. 48. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2014/Nr.48-2014.PDF [last viewed 26.01.2021].

⁵⁹ Tieslietu padomes 10.03.2014. lēmums Nr. 10. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 10.03.2014 No. 10. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2014/Lemums%20Nr.10-2014.PDF [last viewed 26.01.2021].

⁶⁰ Tieslietu padomes 27.01.2014. lēmums Nr. 1. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 27.01.2014 No. 1. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2014/1_2014.PDF [last viewed 26.01.2021].

⁶¹ Tieslietu padomes 06.10.2015. lēmums Nr. 91. Par Satversmes tiesas tiesneša amata kandidātu [Judicial Council's decision of 06.10.2015 No. 91. On a candidate for the position of a justice of the Constitutional Court]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2015/Lemums%20Nr.%2091-2015.pdf [last viewed 26.01.2021].

⁶² Tieslietu padomes 15.12.2016. lēmums Nr. 87. Par Satversmes tiesas tiesneša amata kandidātu A. Kuču [Judicial Council's decision of 15.12.2016 No. 87. On the candidate for the position of a justice of the Constitutional Court A. Kučs]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2016/LemumsNr_87-2016.pdf [last viewed 26.01.2021].

⁶³ Tieslietu padomes 28.11.2016. lēmums Nr. 81. Par Satversmes tiesas tiesneša amata kandidātu J. Neimani [Judicial Council's decision of 28.11.2016 No. 81. On the candidate for the position of a justice of the Constitutional Court J. Neimanis]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2016/Lemums%20Nr_%2081-2016.pdf [last viewed 26.01.2021].

Court in country.⁶⁴ It can be concluded that three capacities of a candidate were subject to evaluation: evaluation of current activity (achievements), evaluation of reputation and evaluation of knowledge about the place and role of the Constitutional Court in a state.

In general, setting of precise criteria of candidate evaluation is a positive sign. They clearly indicate that Judicial Council has set high standards for the Constitutional Court justice candidates. Such criteria, most likely, will be applied also to next prospective Constitutional Court justice candidates, without ruling out a possibility to specify, redefine and change such criteria. In terms of content, the Judicial Council has taken a big step forward when evaluating the Constitutional Court justice candidates according to content and essence. It can be acknowledged as a very good practice.

In the meantime, three decisions of the Judicial Council dated 26 October 2020 revealed a brand new and unprecedented formula. Namely, on the one hand, the Judicial Council approved candidates of the Constitutional Court justice as suitable, yet expressed remarks or commentaries, for instance, “the candidate lacks wider up-to-date perspective on the place of the Constitutional Court in the State”.⁶⁵ If one takes into account criteria set by the Judicial Council – a perspective on place and role of the Constitutional Court in the State – such decision made by the Judicial Council may lead to think that given candidate has a perspective of the Constitutional Court concerning this criteria, but it is not wide and up-to-date, yet it has not affected the final decision. An even broader formula was included in other decision, where it was admitted that a person is a suitable candidate for the Constitutional Court justice position, nevertheless, a remark was made on lack of authority, practical experience and wider perspective on constitutional issues.⁶⁶ Furthermore, here it is possible to conclude that the said shortcomings have not interfered with making the final decision and they have remained insignificant, because they have not influenced the central formula that the candidate is suitable for the position.

Unfortunately, there are no other publicly available materials to understand what considerations have given rise to such remarks. Yet, it is clear that the Judicial

⁶⁴ Tieslietu padomes 26.10.2020. lēmums Nr. 61. Par Satversmes tiesas tiesneša amata kandidāti Inesi Nikuļcevu [Judicial Council's decision of 26.10.2020 No. 61. On the candidate for the position of a justice of the Constitutional Court Inese Nikuļceva]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_61_2020.pdf [last viewed 12.04.2021]; Tieslietu padomes 26.10.2020. lēmums Nr. 60. Par Satversmes tiesas tiesneša amata kandidāti Inesi Libiņu-Egneri [Judicial Council's decision of 26.10.2020 No. 60. On the candidate for the position of a justice of the Constitutional Court Inese Libiņa-Egnerē]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_60_2020.pdf [last viewed 26.01.2021].

⁶⁵ Tieslietu padomes 26.10.2020. lēmums Nr. 62. Par Satversmes tiesas tiesneša amata kandidātu Gunāru Kūtri [Judicial Council's decision of 26.10.2020 No. 62. On the candidate for the position of a justice of the Constitutional Court Gunārs Kūtris]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_62_2020.pdf [last viewed 26.01.2021]; Tieslietu padomes 26.10.2020. lēmums Nr. 58. Par Satversmes tiesas tiesneša amata kandidātu Ringoldu Balodi [Judicial Council's decision of 26.10.2020 No. 58. On the candidate for the position of a justice of the Constitutional Court Ringolds Balodis]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_58_2020.pdf [last viewed 26.01.2021].

⁶⁶ Tieslietu padomes 26.10.2020. lēmums Nr. 59. Par Satversmes tiesas tiesneša amata kandidāti Inesi Druvieti [Judicial Council's decision of 26.10.2020 No. 59. On the candidate for the position of a justice of the Constitutional Court Inese Druvietē]. Available: http://at.gov.lv/files/uploads/files/9_Tieslietu_padome/Lemumi/2020/TP_lemums_nr_59_2020.pdf [last viewed 26.01.2021].

Council is not merely a formal institution engaged in appointment of the Constitutional Court justice and all the future candidates of the Constitutional Court justice must take into account the named criteria.

Summary

1. It is in the interests of the society if the best lawyers work in the Constitutional Court. A prerequisite of justice's independence and impartiality is also his/her professional competence and personal qualities. Therefore, the legislation has set a high standards and requirements for a justice candidate. Such requirements integrated in the Constitutional Court Law (Article 4, Paragraph 2) match the common trends in other European countries. They are sufficient and adequate.
2. Appointment of the Constitutional Court justice at the end of 2020 in Latvia was unique also because the voting for the Constitutional Court justice took place in a remote *Saeima* sitting, in platform *e-Saeima*. Furthermore, the Chair of the *Saeima* sitting had to quickly resolve an adequate application of Article 26(4) of the *Saeima* Rules of Procedure ensuring a proper voting procedure.
3. Even if the parliament did not manage to appoint any of 5 nominated justice candidates at the end of 2020, it does not automatically mean that the procedure of Constitutional Court justice appointment in Latvia is not good and appropriate. It was useful and correct throughout all the previous years. The problem was obviously in finding compromises in the parliament which is outside the scope of law.
4. Provision of the so-called "returning option" integrated in Article 7(1) of the Constitutional Court Law does not promise a safe return of the justice in his/her position for the remaining mandate term; instead, it offers participation in the justice selection process from the start, in line with the nomination procedure in place.
5. Amendments to the Constitutional Court whereby the law offers a possibility for the Constitutional Court justice to return in his/her position for the remaining term reflects an understanding of current *Saeima* composition on Article 7(3) of the Constitutional Court Law that a person can assume a position of Constitutional Court justice for 10 years only once in a lifetime. If this provision were understood differently, there would be no need to amend the Constitutional Court Law and supplement this new "returning mechanism" of the justice.
6. Involvement of the Judicial Council in appointing of Constitutional Court justice is quite unique. The Judicial Council must, firstly, hear out the candidate and secondly, – present its opinion on him/her. Hearing obligation allows a candidate to speak about his/her suitability for this position, to answer the questions. Meanwhile, a phrase "to present its opinion on them" which is integrated in the law means providing a substantiated and understandable opinion adopted by a collegial institution regarding suitability of particular person for the position.
7. Opinion of the Judicial Council on suitability of a candidate for given position can cover two important aspects. Firstly, the Council should evaluate what the candidate has achieved and done before in his/her

professional life (career). Secondly, the Council should evaluate whether the candidate will be able to perform what is expected from the Constitutional Court justice, by considering his or her professional and personal qualities.

8. Determination of evaluation criteria for the candidate by the Judicial Council is a good practice, and the criteria already defined clearly shows that the Judicial Council has set high standards for Constitutional Court justice candidates. The Judicial Council is not merely a formal institution engaged in appointment procedure to the Constitutional Court justice office, and all future candidates must take into account the named criteria.

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