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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**

**PROPOSALS FOR CHANGES TO THE CONSTITUTION OF  
ESTONIA**

**Intermediary Report of the Governmental Commission**

The Constitution is a legal text of national colouring which presents the principles for making vital political decisions for the nation. For a national state, based upon the rule of law, the constitution is essential for its two meanings. On the one hand, the Constitution is a legally binding act of the broadest authority, basis from which all public power is derived. On the other hand, the Constitution is a product of historical development, and it reflects the cultural traditions, basic values and beliefs of the nation. This means that the Constitution, besides having legislative significance, also has historical and cultural value.

The prospective accession of the Republic of Estonia to the European Union has made it essential to make certain changes to the Estonian Constitution. The authors of this draft project for amending the Estonian Constitution propose to accomplish this by resolving the controversy inherent in the current text, as set forth below.

The current Constitution of the Republic of Estonia like the Constitution adopted in 1938 is characterised generally by exact formulations, and thorough treatment of its subjects. Applying this, the Constitution should contain all the essential mechanisms for deriving public power. In addition, the Constitution should contain both the basic principles and restrictions according to which international organisations may exercise their power in relation to the Republic of Estonia and its citizens. Precise formulation of the conditions and limits of delegating power to structures and institutions of the European Union is an essential point in providing criteria to the Constitutional Court for exercising control over the development of processes of European integration and over the resultant delegation of state power being in conformity with the Constitution.

However, the Constitution will continue functioning as a document according to which all national decisions are made by the national institutions of the Republic of Estonia. This means that the Constitution should, as a first priority, reflect the scope of work delegated to national institutions as well as their role and power in taking decisions that have international effects. At the same time, the drafting should as little as possible alter the composition of the current text. For example, the proportion of articles pertaining to the European Union as an international component in the Constitution should not be unduly large. The present structure of the Constitution should also be kept in its unaltered form.

The authors of the draft project have prepared their proposed modifications to the Constitution keeping the above in mind, and intending as a general principle to maintain the basic values and principles of the current Constitution. There is no thought of relinquishing these values or principles. From the historical context, the Constitution places special emphasis on ideas of the democratic development of the state and the requirements of state sovereignty. The Constitution of the Republic of Estonia does not contain a general provision on the delegation of powers currently regarded as matters of state sovereignty to international organisations. The absence in the current Constitution of provisions that would allow delegation of sovereign powers to the international level does not require any alterations in the Preamble nor Chapter I of the Constitution. It is an inseparable part of European identity to maintain both the shared and unique features of the constitutional legacy of the member states of the European Union. Therefore, accession to the European Union should, as little as possible, change the ideas and

principles that are at the foundation of the democratic order of these countries. Proceeding from this, the alterations to the Constitution that Estonia must make to become a member state of the European Union will be formulated so that they may be interpreted as exceptions to the basic principles of the Constitution. Applying this, these articles will not refer generally to international organisations, but will only refer to the European Union, and will be worded to require the formulation of precise and time-restricted criteria for the organisation. Furthermore, alterations will not be made to the various more specific portions of the Constitution though they may be affected by application of European Union law (for example no changes will be made to Article 59 which provides that legislative power shall only rest with the Riigikogu (the Estonian Parliament)).

In order to establish a uniform approach to constitutional regulation of European Union matters, the various regulatory norms pertaining to the European Union might be grouped here into one Article. It has not been decided where such an Article might be placed in the Constitution. One possibility might be Chapter IX of the Constitution, entitled “Foreign Relations and Foreign Treaties” since it pertains to a related topic.

**The Republic of Estonia could become a member of the European Union, which is a union of states established by its member states of their free will by agreement.**

**This first sentence** fixes the possibility of the Republic of Estonia being a member of the European Union. The use of the Conditional Mood here and at a later point eliminates the possible interpretation of the Article to oblige Estonia to be a member of the European Union. Moreover, the use of the Indicative Mood in Estonian legal texts is traditionally known to express imperativeness.

The notion of *the European Union* is meant in its broad sense including the three common powers of the European Union as well as the two remaining forms of united effort foreseen by the Maastricht Treaty (close cooperation on justice and home affairs). “*Of the free will of the member states*” refers to the peaceful course of development of the European Union.

The part of the sentence - “*a union of states established by its member states by agreement*” means that Estonia may only then be a member of the European Union, when the latter is legally a union of states, i.e. a confederation. As Estonia, according to Article 1 of the Constitution, is an independent state, it cannot become a part of another state, even if it is a federation of states. Confederation is characterised by its being established by an agreement concluded by equal subjects of public international law. Applying this, the powers of the central institutions of a confederation are derived from the *agreement* of the member states. In contrast, the powers of the central institutions and the member states in a federation are derived from the constitution of the federation. As such, the member states cannot be considered sovereign states. As stated in the Preamble of the Constitution, the Republic of Estonia was established based upon the inextinguishable right of the Estonian people to national self-determination. To safeguard and develop this state, the Estonian people adopted the Constitution in a referendum. From this, *only* the Estonian people have the right through *pouvoir*

*constituant* derived from the right to self-determination to adopt the Constitution, a legal act of supreme power, which is the foundation for the rule of law. Exercising their right to self-determination, the Estonian people are the highest embodiment of state power and the only sufficient source for the legitimacy of this power. Consequently, a possible European Constitution cannot replace the Constitution of the Republic of Estonia as the legal foundation for the enactment of public power in Estonia, and the European Parliament as a public representative body cannot be of superior legitimacy to the Estonian legislative body in the Republic of Estonia.

**For the Republic of Estonia to become a member of the European Union and to allow the enactment of the Treaty on European Union signed with consideration of the principles of mutuality and equality on February 7, 1992, certain constitutional state powers may be delegated to the bodies the European Union, so that they can be commonly applied by the member states of the European Union, provided that this does not come into contradiction with the basic principles and tasks of the Estonian state the way they have been fixed in the Preamble of the Constitution.**

According to **this second sentence** the Republic of Estonia condescends to the essential results involved in being a member of the European Union - to a situation in which a certain portion of the sovereignty of the Estonian statehood is implemented by the bodies of the European Union.

*The principle of equality and mutuality* as a formulation placing emphasis on the equality of states and mutual obligation to follow the commitments fixed in agreements has been based on an analogy with the provisions on international relations in the Constitutions of several European states (Italy, Greece, France) in this draft version as well as the criteria for legitimising the delegation of power. The words “*may be commonly applied*” allows the delegation of powers only to those bodies of the European Union in which Estonia, either directly or indirectly, participates.

The use of the term “*delegation of powers*” expresses the non-federal principle, according to which the development of the European Union takes place on the basis of national constitutions which allow the delegation of power to the bodies of the European Union. Member states of the European Union, being sovereign states, may revoke their delegation of powers in questions regulated by the bodies of the European Union and make them singularly their own concern by using accepted mechanisms of International Law and changing the agreed upon relations between the European Union member states. In this context, the term “relinquish” is not appropriate as it expresses taking an unrevokable decision. It is obvious that no state, and no individual either, can commit oneself to the binding obligations of an agreement indefinitely.

The direct reference to the Treaty on European Union signed in Maastricht on February 7, 1992 emphasises the constitutional mandate for Estonia’s accession to the European Union, the institutional structure and responsibilities of which are in accordance with the ones fixed in the Maastricht Treaty. The constitutional mandate shall not be expanded to cover any altered structure and responsibilities of a European Union that may evolve through changes in the basic agreements caused by closer integration policies, so that the

institutional structure does not correspond to the structure of a union of states and the competence of material law has been expanded. The Constitution shall continue to guarantee the right of the people as the embodiment of the highest state power to supervise any future delegation of state power by the people's representatives either to the legitimacies of other peoples, or to the bodies of state power not invested with democratic legitimacy.

*Constitutional mandates of the state power* - while the requirements for the delegation of the mandates of state power have been defined, the notion of mandates of state power is a broad concept. Accessing to the European Union will give added significance to the actions of the European Council and the European Court of Justice (in turn as legislative body, and court that is superior to the member states the National Courts, as well as a court that creates precedent). This will affect the legislative and judicial powers of the member states of the European Union. This means that the mandates of state powers will include competences fixed in agreements between states (*le droit originaire*), creation of derived rights (*le droit dérivé*) as well as the right to develop new rights. In brief, all rights have been considered which, when exercised, result in a body of legal principles and norms which form the law of the European Union.

The Preamble and the Introductory Articles of the Treaty on European Union contain defined criteria for the development of the European Union and the integration of Europe. The principles of democracy, rule of law and social state are also reflected in the Constitutions of the member states and, therefore, there is no need to repeat them in these proposals for the amendment of the Constitution. According to the Treaty on European Union, Article F the European Union honours the national identity of its member states and as derived from the unique cultural heritage of each member state as well as from the values building the content of national identity, each member state is expected to present its principles of maintaining and developing its national identity.

In addition to the criteria set forth above for the European Union this provision also proposes, in the context of the developing European Union, a clause of safeguarding national identity. Neither the principal laws of the European Union nor the present state of the legislation of the European Union derived from new laws created by bodies of the European Union as a result of the partial delegation of sovereign state power of the member states to the European Union (*acquis communautaire*) shall come into contradiction with the fundamental principles and tasks of the Estonian statehood. The principles underlying Estonia's unique social values are, first and foremost, found in the *Preamble* of the Constitution, which reflecting constitutional continuity has been worded more or less the same way in all the preceding Constitutions of the Republic of Estonia. The Preamble unites liberal and national-conservative values. The Preamble provides that Estonian statehood is founded on liberty, justice and law. The Preamble provides that the basic social task for the Estonian state is to safeguard the general well-being for the present and future generations. The Preamble also provides the idea of the Republic of Estonia being a national state, in that it sets forth the task of the state to guarantee the preservation of the Estonian nation and its culture throughout ages. The term *nation* in this context does not signify citizenship (people), but it is a term of ethnic meaning, signifying Estonians as a community of shared origin, traditions and mother tongue. Consequently, the idea of an Estonian national state does not express the idea of

the unity of its citizenship, characteristic of all unitary states, but it rather expresses the idea of a state being an institutional form of an ethnos. Even at this final stage of Estonia becoming a member of the European Union and applying the fundamental principles of free movement of goods, services, capital and people, Estonia can relinquish neither the principle of providing guarantees for the preservation of the Estonian people as the majority group in Estonia, especially considering the vulnerability of the Estonian people because of its small size; nor the principle of providing guarantees for vitality and evolution of Estonian culture.

**The Government of the Republic of Estonia shall, as early and fully as possible, advise the Riigikogu (Parliament) of all questions pertaining to the European Union; and to the extent the government is involved in the process of law making in the European Union context, give due regard to the positions adopted by the Riigikogu on all related questions. These areas should be regulated by precise procedural norms when the Republic of Estonia becomes a member of the European Union.**

In the European Union the power to make laws is delegated to an intergovernmental body. The adopted bills of law being “derived acts of law” do not need ratification. At the same time, according to Precedent Law of the European Court of Justice, these laws are superior to the laws adopted by the parliament of a member state. To compensate for the fundamental shift enhancing the powers of the executive branch in the balance of constitutional organs of power, the Constitution should establish standards for as extensive a participation as possible by the national parliament in developing Estonian positions to be promoted in law making of the European Union.

The formulation *all questions pertaining to the European Union* is a broad one, embracing besides the field of law-making also other political fields concerning the European Union.

The requirement of informing the Riigikogu *as early as possible* shall provide the Riigikogu in all possible cases sufficient time to develop its position in accordance with relevant procedural rules. The Riigikogu should be informed as early as the Government of Estonia or any person or institution representing the Government has notice of some activity of law-making (e.g. planning or preparing a legal instrument). Informing the Riigikogu only after the Commission has officially presented a draft law would not provide sufficient time to act. To be able to develop a national consensus on a question as early as possible will provide the national government more time to make new national laws that approximate the new European legislation.

The requirement for the Riigikogu to be informed *as fully as possible* will provide the Riigikogu all of the essential information needed to make an appropriate decision; essential points may be highlighted to emphasise crucial information.

The second half of the sentence (*...give due regard to the positions adopted by the Riigikogu when participating in the process of law making in the European Union context*) specifies the circumstances in which the principle set forth in the first half of

the sentence is to be applied, and makes it obligatory for the Government of the Republic of Estonia and its affiliated bodies to take due account of the positions adopted by the Riigikogu in all European Union activities aimed at law making. These instruments of law would include regulations, directives and decisions that pertain to the Republic of Estonia.

The Government being required *to give due regard to the positions adopted by the Riigikogu* means that the positions should become a part of the decision making process. The question whether the decision resulting from the process of decision-making in substance must be consistent with the position of the Riigikogu (i.e. whether the positions of the Riigikogu should be binding in content) is still to be resolved.

A precise procedure how in practice the Government and the Riigikogu should cooperate should be fixed by law. All other questions concerning the application of European Law and the work of the national bodies of the Republic of Estonia as they inter-relate with institutions of the European Union should also be legally regulated.