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SOME REMARKS ON THE DRAFT CONSTITUTION OF THE REPUBLIC OF ESTONIA

by Prof. Hans RAGNEMALM (Sweden)

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1 INTRODUCTORY REMARKS

Due to the very short time available I have concentrated my remarks on a few issues. I will, however, affirm the favourable impression of the present draft Constitution in general. Already the first draft, presented to the Council of Europe delegation in October 1991, was an impressive work of legislation and the new draft is in my opinion even better.

2 FUNDAMENTAL FREEDOMS AND RIGHTS

First, it should be mentioned that chap. 2 of the draft Constitution might not fully meet the requirements of the European Convention on Human Rights. That, however, is not a demand even if Estonia would like to join the Council of Europe. The adoption of the internal legal system to the rules of the Convention need not be carried out at the fundamental law level. It is sufficient if ordinary legislation and the application of law meet the requirements of the Convention.

Some of the freedoms and rights listed in chap. 2 enjoy a strong position and are absolute in the sense that they cannot be restricted without an amendment to the Constitution. Most of the rights, however, are relative in that they can be limited by means of an ordinary law. It is obvious that the main feature must be just like this, but it seems to me that the possibilities to circumscribe the "relative" freedoms and rights are too wide in that only in the odd case (arts. 19 and 23) the draft Constitution indicates

the purpose for which the rights may be restricted by an ordinary law. So, in most cases it seems to be up to the Riigiskogu to decide, without any specific restrictions, if it will limit such a right.

I will remind of the fact that the European Convention concerning a lot of rights states that limitations imposed by means of a law are permitted only for certain purposes. This principles have been adopted in, for example, the Swedish Constitution which contains (The Instrument of Government, chap. 8, arts. 12-14) certain what may be called material rules of protection which are "absolute" in themselves and cannot therefore be set aside by the Riksdag. Where all the relative rights are concerned a limitation may be made only in order to achieve some purpose that is acceptable in a democratic society. The limitation may never go beyond what is necessary with regard to the purpose which has given rise to it, neither may it be extended so far that it constitutes a threat against the free formation of opinions as one of the foundations of democracy. No restriction may be made solely on grounds of political, religious, cultural or other such ideas. As regards the positive freedoms of opinions (freedom of speech etc) the protection goes somewhat further and by specifying a number of particularly important reasons that must be taken into account - the safety of the Realm, the sanctity of privacy etc - emphasis is laid on the fact that restrictions of these freedoms must be kept to a minimum. (In addition, each restriction of a relative freedom requires a special legislative procedure that is designed to ensure very careful consideration. A small minority of no more than ten members of the Riksdag can take the initiative to suspend for a twelve-month period the final discussion by the Riksdag of a proposed law of this kind, unless the Riksdag immediately rejects the proposed law or accepts it by a majority of five-sixths of its members.)

My conclusion is that it might be useful to add an article which states at least some general conditions for the restriction of <u>all</u> "relative" freedoms and rights. It could be formulated like this:

> Where fundamental freedoms and rights expressed in this chapter may be restricted by law limitations may be imposed only to achieve a purpose acceptable in a democratic society. The restriction may never exceed what is necessary with regard to the purpose which has given rise to it, neither may it be extended so far that it constitutes a threat against the free formations of opinions as one of the foundations of democracy. No restriction may be imposed solely on grounds

of political, religious, cultural and other such ideas.

It should also be quite clear that in this respect delegation to lower levels (the Government etc) is out of the question; se below.

Concerning the specific rights I will focus on just one article (39). The principle of public access to official documents (records) has in Sweden been regarded as so vital to an open society that it for years (in fact since 1766) has been laid down in the Constitution. Art. 39 of the draft Constitution of Estonia contains a rather strange counterpart which, in my opinion, goes too far and at the same time lacks real meaning. According to the article every citizen shall have "the right of access to full information" from state and local government officials on their activities. The wording of the provision indicates that the officials are obliged to talk on request which, of course, must be out of the question; how should such an obligation be enforced? On the other hand there are not explicit references to documents (records) which can be handed over on request. The lack of concrete content makes the value of the regulation doubtful.

3 THE NORM-MAKING POWER

The terminology concerning norm-making is somewhat confusing; it might, however, be due to difficulties in the translation of the draft into English. According to art. 51 "legislative power" in Estonia shall rest with the Riigikogu. As I have understood it, the terms "legislation" and "law" are related to this power of the Riigikogu. The meaning of the term "resolutions", used in art. 57, point 1, together with "laws" seems somewhat doubtful; perhaps it refers to not-binding norms. The next level is norm-making by the Government. According to art. 79, point 5, the Government shall, upon authorization by law and within the limits provided by law, issue "regulations" and "instructions" as well as take "decisions". In art. 91, however, the norms issued by the Government are called "ordinances" and "directives" - terms which in art. 84 are reserved for norms issued by a Minister.

It is not quite easy to get the grasp of the question concerning the extent to which the Riigikogu can delegate its legislative power. The wording of art. 79, point 5, gives the impression that there are no certain limitations related to special areas of legislation but delegation can be decided by law in any subject. As I mentioned before, it must be out of the question to delegate the power to restrict the "re-

lative" freedoms and rights to the Government or some other body.

So, there is need for some clarifications concerning delegation of norm-making power. It also, for practical reasons, seems necessary to provide the Government with some kind of residual competence. As it stands, the norm-making power of the Government seems in no case to be based directly on the Constitution but only on an ordinary act of law issued by the Riigikogu. In that sense, the Government has no norm-making power of its own; "legislative power ... shall rest with the Riigikogu" (art. 51).

As far as the central agencies and the representative bodies of local government are concerned, there are no references at all to norm-making at these levels. It can hardly be possible to do without such regulation.

I am not sure about the meaning of the expression "legal acts" (see arts. 66, 132, 142). In art. 66 and 132 it may refer to normative as well as individual decisions, though in art. 142 it seems obvious that it means other types of norms than laws ("an enacted law ... or any other legal act"). It is, of course, essential that the meaning is quite clear; see below.

4 THE COURTS

I have noticed with satisfaction that the courts have been given a central role in the system of legal protection of the individual. In the new draft Constitution it is laid down that it is the duty of the courts to deal with encroachments upon the freedoms and rights within an appeal case (art. 45). It is also clear from art. 142 that the State Court is responsible for the control of norm-making at all levels.

That means, I suppose, that the Court when dealing with a concrete case has to control that the regulation it is about to apply does not conflict with a statute of higher constitutional rank - the so called concrete control of norms. Whether or not there is av possibility to go to the Court asking for an examination whether a statute is constitutional without any connection with a decision about some individual matter - abstract control of norms - seems doubtful. If that is the case, indications should be given as to how and by whom the case could be initiated in such a matter. In my opinion there is a need of clarification on this point.

5 THE LEGAL CHANCELLOR

The institution of the Legal Chancellor could be described as a mixture between the Swedish institutions of the Parliamentary Ombudsman and the Chancellor of Justice. He has, however, an even stronger position than his Swedish counterparts and takes a more direct part in the businesses of the other high organs of the State (art. 131). The modifications made in the new draft compared with the former one make, in my opinion, the functions of the Legal Chancellor more limited and at the same time more realistic.

As indicated above, the expression "legal acts" is not quite clear. It is therefore difficult to form an opinion of the central provision - art. 132 - concerning the Chancellor's power to deal with an "illegal legal act". As I understand it, the expression here must refer to decisions in individual cases, but does it also include normative decisions (regulations)?

Compared with the first draft Constitution, there is a dramatic change in so far as there is now no reference to any possibilities for the general public to approach the Legal Chancellor with complaints. As I pointed out at the meetings in Tallin in October, the first draft went to far as it made it a duty of the Chancellor to deal with every complaint from the citizens. To be able to concentrate on important issues the Chancellor must have to decide for himself whether or not to investigare a complaint. As I understand it, the intention is not, however, to exclude the possibility of the citizen to approach the Chancellor. Maybe the task of handling such complaints is one of the functions which according to art. 135 are intended to be specified by law. It would, though, be preferable to indicate in the Constitution that the right of the individual to turn to the Legal Chancellor is specified by law.

6 SOME ADDITIONAL REMARKS

a) The provisions concerning the way in which the State Elder is to be elected are unclear and uncompleted (arts. 72-73).

b) To be confirmed by the Riigikogu as Prime Minister it is enough that the candidate receives the majority of yes-votes (art. 81). To get rid of him by a vote of no-confidence the resolution, however, must be adopted by a majority of the legal complement of the Riigikogu (art. 86). Is this inconsistency intentional?

c) The demands on the initiator concerning proposals of an economic character (arts. 95 and 106) seem to be somewhat unrealistic.

d) Does the ban on participation in the activities of political parties include conscripts during their active service? If that is the case, the regulation goes too far.

e) The drastic consequenses of a "guilty verdict" against a member of the Riigikogu (art. 69), the State Elder (art. 74) and members of the Government (?) are not related to specific, severe crimes. The intention could hardly be that even a minor violation of, for example, the traffic regulations should lead to the resignation of the person concerned.