

Strasbourg, 26 November 1997
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Restricted
CDL (97) 43
Engl. only

N° 042/97
N° 052/97

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

CONFERENCE

"FIVE YEARS OF THE ESTONIAN CONSTITUTION"

NOTE BY THE SECRETARIAT

At the invitation of the Estonian Ministry of Justice, Mr Niemivuo (Finland) accompanied by Mr Dürr from the Secretariat participated in the Conference "5 years of the Estonian Constitution" in Tallinn on 26-27 September 1997. In his speech, the former Director of Legal Affairs of the Council of Europe, Mr Harremoës, highlighted the important role which the Venice Commission had played in preparing this Constitution in 1991. He underlined the importance of Article 123 of the Constitution which gives precedence to international treaties ratified by Estonia over domestic laws. Mr Niemivuo, who presented a report on a future revision of the Constitution of Finland (CDL (97) 39), pointed out that the Venice Commission is prepared to give its opinion on future revisions of the Estonian Constitution.

Although the conference made stock of the experience gained during the first five years of the existence of the Constitution discussing *inter alia* different ways of its interpretation, a large part of the conference was devoted to discussing future changes which would be necessary in the case of an accession of Estonia to the European Union. The government has instituted a Commission and intrusted it with the task of reporting by December 1997 on the need for such changes. Several speakers were of the opinion that only changes which were absolutely necessary should be made.

Apart from this main topic of possible revision, the following issues were identified by the President of the Republic in his speech.

A recent case of dismissal of the commander in chief of the Estonian defence by the President had given rise to doubt about the role of the President as the supreme commander of the defence forces (Article 78.16 of the Constitution). The chain of command seems unclear.

Parliament votes on the budget item by item and could thus effectively decide on the financing of visits by the President to particular States.

A constitutional complaint should be open to the citizen. During further discussion it was pointed out that this could be achieved in the existing system of a Supreme Court with a Constitutional Review Chamber or by instituting a new Constitutional Court.

Prof. Frowein, Director of the Max Planck Institute in Heidelberg, was of the opinion that the Estonian Constitution is in accordance with the requirements of democracy and the rule of law. Nevertheless, he proposed, *inter alia*, that Article 64 of the Constitution be modified. Members of government should not have the right to have their parliamentary seat returned to them after leaving government. Article 64.16, which attributes a subsidiary competence to Parliament, would have to be interpreted in a way which is coherent with the rest of the Constitution, i.e. new matters which relate to existing competencies of the executive should nevertheless fall in the competence of the executive. The right of Parliament to question the Chairman of the Board of the Bank of Estonia and others (Article 74 of the Constitution) goes too far, according to Prof. Frowein. After a vote of no confidence in the government, the President should be allowed to call elections only when it is impossible to form a new government (Article 97 of the Constitution). For the sake of the dignity of the President, he/she should always be elected by an electoral body and not by Parliament (at present: only upon Parliament's failure to agree on a candidate will an electoral body be formed, Article 79 of the Constitution). A coherent interpretation of the Constitution would result in rather formal powers of the President in the areas of national defence and foreign affairs (Article 78 of the Constitution). Furthermore, Prof. Frowein also urged for an individual complaint to the Supreme Court to be instituted.

In his report, Prof. Alexy (University of Kiel) highlighted the importance of Articles 3.1, 11, 13.2 and 19.2 of the Constitution as general limitation clauses for the system of fundamental rights as a whole.

Mr Gardener, Director of the British Institute of International and Comparative Law acting as an expert for the joint OECD/EU initiative SIGMA, identified the following articles of the Constitution as potentially in conflict with EU law: Article 111 (Bank of Estonia having the sole right to issue Estonian currency), Article 48 (right of membership to political parties exclusively for Estonian citizens), Article 57 (right to vote only for Estonian citizens), Article 156 together with Article 57 (right to vote in local elections). Article 1 of the Constitution, which stipulates the inalienable sovereignty of Estonia, would not need to be changed. With respect to this Article, Prof. Alexy proposed to add a paragraph stating that membership in the EU would not infringe upon the sovereignty of Estonia. Furthermore, Mr Gardener maintained that many of the problems related to EU-legislation might be solved via the principle of the precedence of application of EU law over national law. He cautioned against undertaking sweeping changes of the Constitution. In many cases the Supreme Court would be in a position to deliver its opinion concerning problems arising out of EU accession on the basis of Articles 121 and 123 of the Constitution.

Extracts of the Estonian Constitution**Article 3**

Governmental power shall be exercised solely on the basis of this Constitution and such laws which are in accordance with the Constitution. Universally recognized principles and norms of international law shall be an inseparable part of the Estonian legal system. Laws shall be published in the prescribed manner. Only laws which have been published shall have obligatory force.

Article 11

Rights and liberties may be restricted only in accordance with the Constitution. Restrictions may be implemented only in so far as they are necessary in a democratic society, and their imposition may not distort the nature of rights and liberties.

Article 13

Everyone shall have the right to the protection of the state and the law. The Estonian state shall extend to foreign countries its protection of its citizens. The law shall protect everyone against arbitrary treatment by state authorities.

Article 19

Everyone shall have the right to free self-realization. In exercising their rights and liberties and fulfilling their duties, everyone must respect and consider the rights and liberties of other persons and observe the law.

Article 48

Everyone shall have the right to form non-profit associations and leagues. Only Estonian citizens may be members of political parties. The establishment of associations and leagues possessing weapons or organized in a military fashion or conducting military exercises requires a prior permit, the issuing of which shall be in accordance with conditions and procedures determined by law. Associations, leagues or political parties whose aims or activities are directed towards the violent change of the Estonian constitutional system or otherwise violate a criminal law shall be prohibited. The termination or suspension of the activities of an association, a league or a political party, and its penalization, may only be invoked by a court, in cases where a law has been violated.

Article 57

The right to vote shall belong to every Estonian citizen who has attained the age of eighteen. An Estonian citizen who has been declared mentally incompetent by a court of law shall not have the right to vote.

Article 74

Members of the Riigikogu shall have the right to request explanations from the Government of the Republic and its members, the Chairman of the Council of the Bank of Estonia, the President of the Bank of Estonia, the Auditor-General, the Legal Chancellor and the Commander or Commander-in-Chief of the Defense Forces. Requests for explanations must be answered at a session of the Riigikogu within twenty session days.

Article 78

The President of the Republic shall:

- 1) represent the Republic of Estonia in international relations;
- 2) appoint and recall, on proposal by the Government, diplomatic representatives of the Republic of Estonia and accept letters of credence of diplomatic representatives accredited in Estonia;
- 3) declare regular Riigikogu elections, and early elections for the Riigikogu, in accordance with Articles 89, 97, 105 and 119 of the Constitution;
- 4) convene the new complement of the Riigikogu in accordance with Article 66 of the Constitution, and shall open its first session;
- 5) propose to the Speaker of the Riigikogu to convene an extraordinary session of the Riigikogu in accordance with Article 68 of the Constitution;
- 6) proclaim laws in accordance with Articles 105 and 107 of the Constitution and shall sign documents of ratification;
- 7) issue edicts in accordance with Articles 109 and 110 of the Constitution;
- 8) initiate amendments to the Constitution;
- 9) determine the candidate for Prime Minister in accordance with Article 89 of the Constitution;
- 10) appoint and recall members of the Government, in accordance with Articles 89, 90 and 92 of the Constitution;
- 11) present proposals to the Riigikogu for appointments to the offices of the Chairman of the National Court, the Chairman of the Council of the Bank of Estonia, the Auditor-General, the Legal Chancellor and the Commander or the Commander-in-Chief of the Defense Forces;
- 12) appoint, on proposal by the Council of the Bank of Estonia, the President of the Bank of Estonia;
- 13) appoint judges on proposal by the National Court;
- 14) appoint and recall from office the Government of the Republic and, on proposal by the Commander of the Defense Forces, officers in the Defense Forces;
- 15) confer civil and military honours and diplomatic ranks;
- 16) be the Supreme Commander of Estonia's national defense;
- 17) present proposals to the Riigikogu on declarations of a state of war, on orders for mobilization and demobilization and, in accordance with Article 129 of the Constitution, on proclamations of a state of emergency;
- 18) declare, in cases of armed aggression against Estonia, a state of war, shall issue orders for mobilization and shall appoint a Commander-in-Chief of the Defense Forces, in accordance with Article 128 of the Constitution;
- 19) grant mercy, on the request of prisoners, by freeing those sentenced or reducing the sentence;
- 20) initiate the placing of criminal charges against the Legal Chancellor, in accordance with Article 145 of the Constitution.

Article 79

The President of the Republic shall be elected by the Riigikogu, or, in the case described in the fourth paragraph of the present Article, by the Electoral Body. The right to present a candidate for President of the Republic shall rest with at least one-fifth of the complement of the Riigikogu. Any Estonian citizen by birth, who is at least forty years of age, may be presented as a candidate for President of the Republic. The President of the Republic shall be elected by secret ballot. Each member of the Riigikogu shall have one vote. A candidate who is supported by a two-thirds majority of the complement of the Riigikogu shall be considered to be elected. Should no candidate receive the required majority, then a new vote shall be organized on the next day. Before the second round of voting, there shall be a new presentation of candidates.

Should no candidate receive the required majority in the second round, then a third round of voting shall be organized on the same day between the two candidates who received the most votes in the second round. Should the President of the Republic still not be elected in the third round of voting, the Speaker of the Riigikogu shall convene, within one month, an Electoral Body to elect the President of the Republic. The Electoral Body shall be comprised of the members of the Riigikogu and representatives of the local government Volikogus. Each local government Volikogu shall elect at least one representative, who must be an Estonian citizen, to the Electoral Body. The Riigikogu shall present to the Electoral Body as candidates for President the two candidates who received the greatest number of votes in the Riigikogu. The right to present a presidential candidate shall also rest with at least twenty-one members of the Electoral Body. The Electoral Body shall elect the President of the Republic with a majority of those members of the Electoral Body who are present. Should no candidate be elected in the first round, a second round of voting shall be organized on the same day between the two candidates who received the highest number of votes. Further procedures for the election of the President of the Republic shall be determined by the Law On Electing the President of the Republic.

Article 97

The Riigikogu may express no-confidence in either the Government of the Republic, the Prime Minister or a Minister by a resolution adopted by the majority of the complement of the Riigikogu. The issue of no-confidence may be initiated by at least one-fifth of the complement of the Riigikogu by submitting a written motion at a session of the Riigikogu. The issue of expressing no-confidence may come up for resolution no earlier than two days after its being submitted, unless the Government demands speedier resolution. In the case of no-confidence being expressed in the Government or the Prime Minister, the President of the Republic may, on proposal by the Government and within three days, declare early elections. In the case of no-confidence being expressed in a Minister, the Speaker of the Riigikogu shall notify the President of the Republic, who shall recall the Minister from office. The expression of no-confidence on the same grounds may be re-initiated no earlier than three months after the previous no-confidence vote.

Article 111

The sole right to issue currency in Estonia shall rest with the Bank of Estonia. The Bank of Estonia shall organize currency circulation, and promote the stability of a good national currency.

Article 121

The Riigikogu shall ratify and denounce treaties of the Republic of Estonia

- 1) which amend state borders;
- 2) the implementation of which requires the adoption, amendment or annulment of Estonian laws;
- 3) by which the Republic of Estonia joins international organizations or leagues;
- 4) by which the Republic of Estonia assumes military or assets obligations;
- 5) where ratification is prescribed.

Article 123

The Republic of Estonia shall not conclude foreign treaties which are in conflict with the Constitution. If Estonian laws or other acts are in conflict with foreign treaties ratified by the Riigikogu, the articles of the foreign treaty shall be applied.

Article 156

The representative body of local government shall be the Volikogu, which shall be elected in free elections for a term of three years. The elections shall be general, uniform and direct. Voting shall be secret. In the election of the local government Volikogu, all persons who have reached the age of eighteen years and who reside permanently on the territory of that local government unit shall have the right to vote, in accordance with conditions determined by law.