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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

MEMBERSHIP IN THE EUROPEAN UNION AND THE ESTONIAN CONSTITUTION

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1) Introduction

Questions concerning the compatibility of the national constitutions with the provisions of European Union Treaties have been frequently raised in Member States as well as in those applying for EU membership. The result of the subsequent legal and political discussion has been, in many cases, to reform the national constitutions of the member States in order to accommodate them to the mandates of the Treaties (particularly when these Treaties had been revised, and new mandates were included) or to introduce, in the Constitutions of those countries which were candidates to accession, clauses which tried to avoid contradictions between a constitutional text elaborated in the classical framework of the Nation-State and the demands resulting from European integration, as included in the European legal order.

The reason for these reforms -and the legal and political discussions preceding them- is that the process of European integration, formally initiated in the Treaty on the European Coal and Steel Community of 1951 and later the Treaty of Rome of 1956, has resulted in deep changes in the way the traditional State functions (legislative, executive, judiciary) are distributed in the Member States, since many of these functions have been attributed to "external" subjects, namely, to the authorities of the European Union. With ever more frequency, the exercise of powers historically bound to the very concept of the Nation State is being transferred to institutions located outside the national legal order, and belonging to a supra-national European organization. From the norms of the EU Treaties, and the European Court of Justice's interpretation of those norms, it has been possible the establish the concept of integration (as distinguished from international cooperation) as the cornerstone for comprehending the organization and functions of the European Union, a concept which has resulted in the transformation of the constitutional concept of sovereignty.

2) Basic Notes on European Integration. The Transfer of Constitutional Powers

The alteration of traditional constitutional patterns derived from membership in the EU results from the fact that the Union does not respond to the usual type of international agreement based on cooperation among States, by which the authorities of different and separated countries act in a concerted and simultaneous manner in order to attain common objectives. The very concept of integration, in relation to the process of creation and development of an European Union, reflects the additional dimensions of this process in contrast to other international agreements.

a) The European integration process has meant that an increasing number of powers, traditionally exercised by national instances, are now exercised by a supra-national organization, which performs legislative, executive and judiciary functions. The transfer of competences to the European institutions implies a corresponding reduction of the powers of the authorities of the Member States. This transfer of competences has been extended by the successive reforms and extensions of the EU Treaties, and has resulted in a situation in which a significant amount of the activities of both public powers and private citizens now fall within the realm of the European legal order. Thus, there has been (and will continue to be) a progressive disempowerment of national authorities. The Maastricht Treaty of 1992 considerably extended the matters which are subject to the competence of European institutions. The ongoing Amsterdam reform will increase these competences. The creation of the European Union in 1992, took the previously existing European Communities a step further with the purpose of extending integration techniques to the fields (or pillars) of Justice and Foreign Affairs far

beyond the present mechanisms of cooperation.

b) In addition to the transfer of powers from national to European institutions, another dimension of the integration process deeply affecting the traditional constitutional provisions is the peculiar position of the European legal order with relation to the national legal orders of the Member States. The decisions of the Court of Justice of the European Community have stated in a continuous and sustained way, that the law of the European Community (now one of the component elements of the European Union) constitutes an autonomous legal order, which develops its effects without subordination to the legal orders of the Member States. This peculiarity gives rise to two aspects which are extremely relevant from a constitutional point of view: the direct effect of Community law, and the primacy of this law over the internal law of the Member States.

3) Direct Effect and the Primacy of European Law

Commencing with the famous European Court of Justice Van Gend en Loos decision as early as 1963, the general principle of direct effect has meant that the binding force of the norms created by Community institutions (Council and Commission) within the framework of the Treaties does not depend on their confirmation, adoption or ratification by national authorities. Thus, Community norms create (in the terms specific to their nature and content) immediate rights and obligations which are binding upon public powers as well as on individual citizens, and which citizens can exercise before the authorities of each Member State, including the national Courts. Thus, a direct link exists between European citizens and the European authorities as to the effects of the Treaties, as well as of the derived law (Directives and Regulations), as the European Court of Justice has repeatedly confirmed in more recent decisions, such as Brasserie du Pecheur/Factortame III, of 1996.

The constitutional impact of the European integration process can also be observed in the principle of the primacy of European law, i.e., that the binding force of Community law (primary and secondary) cannot be superseded by any "internal" national rule, not even at the constitutional level. This principle was not expressly contained in any of the original Community Treaties, but the European Court of Justices established it as a basic element of the Community legal order in its Costa/Enel decision of 1964, confirmed in subsequent decisions, most famous being the Simmenthal ruling of 1978, or the Greens ruling of 1986, in which the Court clearly stated that the Community legal order implies a limitation of the sovereign rights of the Member States. A final consequence of the principle is that any national Court is bound to apply Community law with preference to internal law; and that, moreover, national courts are bound by the interpretation of Community law handed down by the Court of Justice of the Community.

4) The Compatibility of the Estonian Constitution with the EU Treaties

As a result, when considering the eventual need to reform the Estonian Constitution prior to entry into the European Union, at least two questions must be raised when determining the compatibility of European basic law (the European Treaties) and the Estonian constitutional text:

a) Does the extension of the powers and competences of the European Union institutions of the European Union, and the subsequent disempowerment of national Estonian authorities, require an express constitutional "empowerment" clause transferring the exercise of constitutional competences from national to European institutions?

b) Do any of the dispositions included in the European legal order directly contradict any of the specific clauses of the Estonian Constitution?

If the answer to any or both questions were affirmative, a constitutional reform would be required prior to ratification of the accession treaty, since Article 123 of the Estonian Constitution states that "foreign treaties which are in conflict with the Constitution" cannot be concluded, and, thus the constitutional text must be amended to accommodate the Treaties before accession to the European Union.

5) National Sovereignty and the Constitutionality of the Transfer of Competences

Article 1 of the Estonian Constitution contains a rather classical proclamation of national sovereignty: "Estonia is an independent and sovereign democratic republic wherein the supreme power of the state is held by the people". The sovereignty of the Republic as the supreme power superiorem non recognoscens implies not only independence vis-à-vis any non-Estonian authority (as expressly stated in the article cited above) but also, according to the usual concept of sovereignty, that the supreme public power in Estonia will be exercised by the institutions of the Republic. Furthermore -as a justification of this sovereignty- the supremacy of the power of the people is also proclaimed. The Republic is sovereign, and, within the Republic, political supremacy belongs to the people. Sovereignty is, thus, linked to democracy.

Sovereignty implies having the "competence over competence", i.e., the authority to distribute the powers of the State among different public entities as established by constitutional mandate. "Government power shall be exercised solely on the basis of this Constitution and such laws which are in accordance with the Constitution" (Article 3 of the Estonian Constitution). Thus, the Constitution attributes legislative power to the Riigikogu (Article 59), reserving certain matters for parliamentary law (Articles 69, 104, for instance). Executive power is commended to the Government (Article 86), including the implementation of foreign policy and the organization of relations with foreign states (Article 87). And judicial power is invested "solely" in the Courts (Article 146). Constitution-making (constituent) power is regulated in Chapter XV of the constitutional text, establishing special procedures, separate from legislative and treaty-making powers. Thus, through explicit constitutional mandate, public functions are apportioned among the organs of the State, as a reflection of the sovereign power of the Republic, as exercised by the constitution-making power.

The Estonian Constitution does not include a clause which would permit the competences attributed constitutionally to the State authorities to be redistributed by the executive or the legislative, much less to be transferred by them to non-Estonian authorities. The treaty-making power regulated in the Constitution (Chapter IX, Foreign Relations and Foreign Treaties) does not include the power to amend the Constitution by means of a treaty, nor does it grant authorization to conclude treaties contrary to the provisions of the Constitution (Article 123).

However, the European Treaties contain provisions which imply that many significant public functions, of a legislative, executive or judicial nature, originally exercised by the institutions of the Member States, would have to be transferred to the institutions of the Union. Furthermore, since 1992 the scope of the powers of the European institutions has reached far beyond the creation and regulation of a common market, and transcends the economic sphere. The introduction of a common currency within a foreseeable term, along with common banking institutions, and the inclusion of European competences on border and visa regulations, among others, means that membership in the European Union can have a very significant impact on the constitutional distribution of powers. Thus, accession to the European Union would result in a reapportionment of public powers among national and European authorities, and poses the question as to whether this reapportionment is possible under the present Estonian Constitution.

6) The Previous Experiences of European Union Member States

The issue now confronting the Estonian Republic also had to be solved in the past by the present Member States of the European Union, and their experiences can be illuminating. During the process of forming the European Community, the Member States perceived the necessity of a constitutional empowerment clause which would strengthen the integration process. The clauses, included in many Constitutions, concerning traditional treaty-making powers did not seem in many cases to provide a sufficient basis to allow, by means of a law or Treaty, constitutional competences attributed by the Constitution to internal organs to be transferred to a supranational institution. The presence of clauses providing for certain "limitations of sovereignty" (such as in the Preamble of the French Constitution of 1946 which is still in force in the 1958 Constitution) was not sufficient in the opinion of the French Constitutional Council, as expressed in decision 76-71(Case Election to European Parliament) which stated that "transfers of sovereignty" are something qualitatively different from "limitations of sovereignty."

As a result, even before the relevant changes in the European Treaties established in the Treaty of Maastricht took place, constitutional empowerment clauses were introduced in the constitutions of some Member States in order to adapt the constitutional text to the terms of integration (as was in the case of the Federal Republic of Germany where a clause, subsequently reformed, was introduced in Article 24 of the Basic Law, allowing the Federation to confer, by means of a parliamentary law, "sovereign competences to supranational organizations"). Clauses of this nature were also included in the constitutions of countries not yet members of the European Community, in order to make accession possible without the need for constitutional reform. For example, by means of an organic law, Article 93 of the Spanish Constitution (ratified in 1978) established the possibility, by means of an "organic law," of concluding a treaty conferring to an international organization the exercise of constitutional competences.

However, the need for this type of constitutional empowerment clauses was most generally felt on the occasion of the Maastricht reform of the European Community Treaties and the creation of the European Union, posing problems essentially identical to the ones now confronting the Estonian Republic. The question was whether the series of competences attributed to European institutions implied a direct and significant reduction of the national sovereignty proclaimed, either explicitly or implicitly in the national constitutions of the Member States. Perhaps the

most illuminating response to this question was the one offered by the French Constitutional Council in its Decision 92-308, which stated that the introduction of a common monetary policy and the provision of a common visa policy affected the "essential conditions" of the exercise of sovereignty, requiring a formal constitutional mandate which would permit the ratification the Treaty reforms introducing those changes. Also noteworthy is the recent Decision 97-394, of December 31st 1997, in which the Constitutional Council stated that the Amsterdam Treaty in matters relating to asylum, immigration and visa policy (Articles 73 J and 73 K of the Treaty) implied transfers of competence in favour of the European authorities which affected the essential conditions of the exercise of national sovereignty, and (despite the empowerment already present in Article 88 of the Constitution) lacked the necessary constitutional mandate. Thus, the Amsterdam Treaty could not be ratified by France without a prior constitutional reform.

Concerning the main question posed in 1992, empowerment clauses were deemed necessary in France, Portugal and the Federal Republic of Germany which, with or without the intervention of their national constitutional courts, effected constitutional reforms introducing clauses of this nature (or, as in Germany, reinforcing the existing one). The opinion of the Councils of State in both Belgium and Luxembourg was favourable to reform, although it was not considered to be immediately necessary (Article 24 of the Belgian Constitution subsequently being reformed in this sense in 1994). In any case, either as a result of the rulings of organs of constitutional jurisdiction, or as a result of considerations of political expediency, the constitutions of France, Portugal, Germany and Belgium were reformed in order to provide for the transfer of competences affecting "essential elements of national sovereignty" to the Union or, more generically, to "international organizations."

7) <u>On the Need for an Empowerment Clause in the Estonian Constitution</u>

In the light of the experiences of other European countries, the accession of the Republic of Estonia to the European Union would entail two consequences of constitutional relevance:

a) The redefinition of the attribution of powers set out in the Constitution, since integration into the European Union would represent a transfer of constitutional competences to Union authorities, and

b) A limitation of the sovereignty of the Republic, as proclaimed in Article 1 of the Constitution, since the competences transferred can be considered as essential components of the State's power. As examples, EC Articles 100.2 C and concordants (visa policies), 109 L and concordants (exchange rates and currency policies in the framework of the EMU), 171 and concordants (powers of the Court of Justice) or 189 (legislative powers of the Community authorities) may be cited. It should also be emphasized that the these Community powers can be exercised without the consent of all Member States.

The Estonian Constitution confers powers to the Riigikogu to ratify treaties "by which the Republic of Estonia joins international organizations or leagues" (Article 121.2). But the Constitution does not include any provision authorizing the State organs having treaty-making powers to modify the constitutional distribution of competences (either by reapportioning them, or by transferring them to external entities), nor to reduce or restrict the essential elements of the

sovereignty of the Republic set our in Article. 1.

As a result, and taking into account that not only Article 1, but also those provisions of the Constitution relating to the distribution of powers would be affected by entry in the European Union, in order not to contravene those articles it would be advisable to introduce an empowerment clause in the Estonian Constitution whereby, by means of a law or of a treaty, constitutional competences related to the exercise of national sovereignty could be transferred to international or supranational organizations.

That clause, which might be modelled on the ones present in the constitutions of several Member States such as France (Article 88), the Federal Republic of Germany (Article 24), Spain (Article 93), Portugal (Article 7), Belgium (Article 24), or the Netherlands (Articles 91.3 and 92) would present at least two additional advantages:

a) First, it could include a provision guaranteeing for the participation of the Riigikogu in the formulation of the European policies of the Estonian Republic. The Estonian Constitution establishes that the Executive power shall "implement foreign policies" (Article 83). In the structure of the European Union, there is a strong presence of organs whose designation or composition depends on the proposals or decisions of the executive powers of the Member States. Therefore, a constitutional mandate providing for the participation of the Riigikogu (as the State organ which represents the Estonian people) in the internal processes to define Estonia's position on European matters, and the proposals to be formulated by the Estonian representatives in the European Union institutions, would partially compensate for that predominance of the executive powers, sometimes considered to be a "democratic deficit".

b) Secondly, the introduction of an empowerment clause would contribute to the legal certainty of the binding force of European law in Estonia. Given the system of "diffuse" control of the constitutionality of laws which exists in Estonia, the transfer or empowerment clause, by explicitly providing for the constitutionality of that transfer of competences, would confirm the direct and preferential binding force of European law (Treaties, regulations, directives and decisions), and would preclude the possibility of European law not being applied by the Estonian courts based on Article 152 of the Constitution which states that "if any law or another legal act is in conflict with the Constitution, it shall not be applied by the Court in trying a case". If the constitutionality of the treaty of accession were guaranteed, the preferential application of European law would also be assured, since Article. 123 of the Estonian Constitution provides that "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."

8) <u>Conflicts between the European Treaties and Specific Clauses of the Estonian Constitution</u>

Apart from the general (and basic) question of the compatibility between the sovereignty clause of the constitution and the transfer of powers essential to the exercise of sovereignty resulting from entry in the European Union, problems of another nature have arisen in the past in relation to the need for constitutional reform prior to accession to the Union or, in the case of Member States, before ratifying a reform of the Treaties. These are problems derived from the direct and present contradiction between particular provisions of the Treaties and certain constitutional mandates. In these cases the problem is no longer whether a clause providing for the transfer of

constitutional competences for the future exercise by the Union is present but rather, whether the mandates of the Treaties, which impose real and specific obligations, are compatible with the constitutional texts. The paramount example has been the conflict between Article 8 B of the European Community Treaty granting European Union citizens the right to vote and to be candidates in local elections of the Union State in which they reside, and the national Constitutions which limit voting rights exclusively to citizens of the State.

An analysis of the Estonian Constitution shows that some of these conflicts are also present:

a) A first conflict, similar to the one cited above, is the incompatibility of Articles 57 and 156 of the Estonian Constitution with respect to Article 8.B of the European Community Treaty. Art. 156 grants voting rights in local elections to residents "in accordance with conditions determined by law," while Article 57 states that voting rights (without exceptions) are restricted to "every Estonian citizen who has attained the age of fifteen." Since Article 8 B of the European Community Treaty extends local voting rights to all resident citizens of the EU, a reform of the Estonian Constitution, extending voting rights in local elections to EU citizens resident in Estonia, would seem unavoidable. Similar conclusions were also reached in Spain and France, following decisions of the Constitutional Court and the Constitutional Council. The reform of the Constitution would also make it possible for EU citizens resident in Estonia to participate as voters or candidates in the Estonian elections to the European Parliament in the terms set our in Article 8. B of the Treaty.

b) In that regard, Article 48 of the Estonian Constitution also states that "only Estonian citizens may be members of political parties." It is very doubtful that, given the inter-relation among all political rights, such a clause could be considered compatible with the free and equal exercise of voting rights (to vote and be candidate) in local elections, as well as in elections to the European Parliament. Article 8B of the EC Treaty provides that EU citizens shall have the right to vote "under the same conditions as nationals of that State," which would exclude discrimination based on factors as relevant as party membership. This interpretation is also reinforced in Article 6 of the Treaty which forbids discrimination for reasons of nationality when applying Treaty mandates. As a consequence, the Estonian Constitution should also be amended to allow EU citizens resident in Estonia to be members of political parties.

c) Another contradiction to be considered is the one existing between Article 111 of the Estonian Constitution ("the sole right to issue currency in Estonia shall rest with the Bank of Estonia") and Article 105 A of the EC Treaty providing for the emission of currency by the European Central Bank. Given the present rate of development of the European Monetary Union and the forecast for the future in monetary matters, (which may result in the unification of currencies in the European Union by the year 2002), the contradiction between the aforementioned clauses may soon be more real than hypothetical. Certainly, it can be assumed that the empowerment clause, providing for the transfer of constitutional competences to the EU, could also address this issue. But the categorical terms of Article 111 ("The sole right", in the English version) would recommend clarifying the competences of the European institutions in this relevant matter.

9) Brief Conclusions

The forty-plus years of experience in the process of European integration, set out in the European Treaties and defined in the rulings of the European Court of Justice, requires and establishes a European legal order whose binding force does not depend on the ratification or agreement of the authorities of the Member States. Thus, membership in the European Union requires the transformation of both the classical constitutional patterns regulating the exercise of State powers and of the very concept of sovereignty. The express reflection of this transformation in the constitutional text (as implemented in the constitutions of many Member States), in order to avoid contradictions between the European Treaties and the national constitutions, is not only advisable, but rather a prerequisite for ensuring the coherence of the legal order and the certainty of law. Constitutional reforms to adapt the national basic norms to the European Treaties (and their reforms) have become a common phenomenon, and can be expected to be repeated.

The constitutional reforms which would appear to be a prerequisite to Estonia's accession to the European Union may be enumerated as follows:

a) The introduction of an empowerment clause authorizing the transfer of State competences to European (or, more generically, international) authorities, by means of a Treaty or equivalent legal instrument. The clause could be complemented with provisions outlining the participation of the different State organs in the formation of Estonian European policy.

b) The extension of voting rights to EU citizens (the right to vote and to be a candidate) in local elections, also removing obstacles to the participation of European citizens in European elections in Estonia, by means of an amendment to Articles 57 and 156 of the Estonian Constitution.

c) The extension of the right to belong to political parties to EU citizens resident in Estonia by modifying Article 48 of the Estonian Constitution, and

d) The acknowledgment of the European Union's competence in currency matters, eliminating the monopoly held by the Bank of Estonia, by means of a reform of Article 111 of the Estonian Constitution.

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