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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

Secretariat Memorandum

*Report on the visit by a group of members
of the Commission to Estonia and Latvia*

As a step towards their membership in the Council of Europe the authorities of Estonia and Latvia requested the Secretary General of the Council of Europe to provide urgent assistance in the drafting of the new constitutions, by means of a visit to Tallinn and Riga by a small team of experts that the Secretariat chose from among the members of the Commission.

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ESTONIA

A delegation composed of members of the European Commission for Democracy through Law (Messrs. Berchtold, Ragnemalm, Russell and Suviranta) and Mr Harremoes, Director of Legal Affairs of the Council of Europe accompanied by Mr Lamponi and Mrs Carlander visited Tallinn on 28 and 29 October 1991. The programme included a meeting with the President of the Supreme Council of Estonia Mr Arnold Rüütel, a meeting with the Constitutional Assembly in plenary session and in workshops and a meeting with the author of the draft Constitution at present under consideration, Mr Adams.

Other experts from Canada, Denmark, France and Germany had also been invited by the Estonian authorities.

The draft Constitution is reproduced in document CDL (91) 33.

The main items raised by the experts were the following :

- **Fundamental rights (Chapter 2)**

It was noted that the right to life, with its corollary of the abolition of the death penalty, was not mentioned nor were torture and inhuman treatment specifically forbidden. Generally speaking, derogations to protected rights should only be allowed when they are based on objective criteria and embodied in a law, as is the case with the European Convention on Human Rights.

Certain provisions in this chapter were considered to be too detailed, containing matters (namely of judicial procedure) better dealt with in ordinary law, thus avoiding the need for frequent amendments of the Constitution, with the risk of undermining its credibility.

Although the right of association was guaranteed (Article 18), there was no specific mention of the right to establish political parties. On the other hand, the ban on associations aimed at incorporating Estonia into Russia by peaceful means was far reaching and should be reconsidered.

- **Parliament (Chapter 5)**

A three year term (Article 52) appeared to be too short. Every member of parliament should have the right to ask the Government questions, and not only one-fifth of the Parliament (Article 62).

The option chosen by the drafters of a one chamber parliament was considered the most appropriate one in the present circumstances.

- **Government (Chapter 6)**

The powers of the Prime Minister should be specified, and the principle of collective responsibility of government should be stressed. Contrary to the provision of Article 69, consideration should be given to the possibility of allowing Ministers to remain active members of parliament, in order to strengthen co-operation between government and parliament.

- **International Law (Chapter 9)**

Article 5 and this chapter should be expanded to specify the rank of treaties in the hierarchy of sources of law, ideally below the constitution but above ordinary law. Another alternative would be to leave it to parliament to decide whether each individual treaty should become part of domestic law, and on what rank.

In this context a provision on possible transfer of competence to supranational bodies, such as the EEC, was also worth considering.

The possibility of concluding treaties with a simplified procedure not requiring ratification in certain cases should also be foreseen.

- **State controller and legal chancellor (Chapters 11 and 12)**

The powers attributed to these two officials appeared to be too large, exceeding those normally attributed to analogous organs such as the Ombudsman.

In particular, the power attributed to the legal chancellor to assess the unconstitutionality of a law (Article 101) would seem to be more appropriate for a court. Also, courts should rather receive individual complaints for breach of fundamental rights (Article 102).

- Courts (Chapter 13)

More precise conditions for the independence of the judiciary would have to be spelled out.

The creation of a Constitutional Court was recommended.

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LATVIA

Messrs. Berchtold, Russell and Suviranta, accompanied by Mr Harremoes and Mr Lamponi, proceeded to Riga on 30 and 31 October 1991.

They met the President of the Supreme Council of Latvia, Mr Anatoljs Gorbunovs, the Legislative Commission of the Supreme Council and representatives from opposition parties.

a. Citizenship Law

All the Latvian hosts impressed upon the experts that the major problem facing Latvia today was the renewal of Latvian citizenship and the extent and modalities of possible nationalisation of the very large number of settlers from the USSR.

While it was undisputed that those who had Latvian citizenship before 17 June 1940 and their descendants should simply resume it, the question was still open for other residents.

The Supreme Council of Latvia adopted on 15 October 1991 a Resolution (reproduced in document CDL (91) 34) setting forth criteria for nationalisation : knowledge of Latvian language, freely lodged application for Latvian nationality and relinquishment of any other nationality, 16 years of residence, knowledge of the fundamental principles of the contribution and oath of allegiance to Latvia.

This Resolution is to form the basis of a draft law which is being drawn up.

The experts considered that the criteria mentioned above were generally speaking reasonable, provided that the law embodying them was flexible enough, due attention was paid to each individual case, and that appropriate and speedy court remedies were available to defeated applicants.

b. Draft Constitution

To date, only 44 articles of the draft Constitution (reproduced in document CDL (91) 35) concerning "citizenship, citizens' rights and obligations" and "rights and obligations of people" have been approved in first reading.

The main issues raised by the experts were the following :

- **Article 5, Citizenship**

On the problem in general, see above. In addition, it was said that the possibility of dual citizenship should not be discounted altogether, this being the trend towards which the Council of Europe and many of its members are now moving in order to promote equality of sexes and integration of immigrants.

- **Article 6, Extradition**

This matter is better dealt with by ordinary law; as an alternative, the possibility of derogation stemming from international treaties (as in Article 9) should be foreseen.

- **Article 13, Right to Life**

This right should be complemented by the abolition of the death penalty, at least by ordinary law at a later stage if time is not yet ripe.

- **Article 15-19, Criminal procedure**

These provisions should be worded in more general terms, leaving the details to ordinary law.

- **Article 29, Right to change residence**

This right, granted to everyone, seems to contradict Article 10, which gives to citizens only the right to choose one's residence.

- **Article 44, Restrictions**

This article appears to be consistent with the European Convention on Human Rights; the courts, in particular a Constitutional Court to be established by the Constitution itself, would guarantee that there would be no abuse.

The experts also recommended that the Constitution should contain a provision on the rank of international law in the hierarchy of the sources of law, and that the office of the Ombudsman be set up.

When the provisions on the procedure for amendment of the Constitution are drafted, one should remember that, as a general rule, a Constitution containing only general principles should be made very difficult to amend, while a Constitution containing very detailed provisions should be made less difficult to amend.

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The members of the Commission and the Secretariat wish to put on record their gratitude for the warm hospitality extended to them during their stay in Tallinn and Riga.