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Estonia's Constitution and the EU: How and to What Extent to Amend It?

The issue of amending Estonia's Constitution for joining the EU has led to a delicate conflict between the rigid amendment procedures of a highly sovereignty-protectionist constitution and the changing (geo)political needs of the country. The positions divide broadly into two groups. The politicians and civil servants have preferred not to amend the Constitution and have recently initiated a motion for "complementing" the Constitution with an independent Third Constitutional Act. Legal scholars, on the other hand, tend to emphasise the need for a legitimate and legally correct entrance into the EU. This article subscribes to the latter view and proposes three amendment possibilities.*¹

1. Opinions on amending Constitution for EU accession

The effects of EU membership upon the Constitution of the Republic of Estonia have been extensively analysed by foreign and domestic experts; the potential amendments have been discussed in a number of seminars and conferences. Until early 2002, the discussion proceeded mainly from the draft amendments submitted by the Constitutional Expert Commission in its 1998 report "Potential accession to the European Union and its Consequences to Estonian Constitutional Law".*² The Expert Commission has used in its work foreign expert opinions, delivered by the SIGMA experts G. Carcassonne and J. Gardner, Venice Commission experts M. Niemivuo and L. Lopez Guerra, PHARE expert group McKenna & Co., and

¹ The article is based on a longer research paper written in the framework of the Estonian Legal Centre's project "Constitutional Law Institute", where the author has studied in detail the existing expert opinions on the constitutional impact of EU accession, the Member State's constitutional reforms and the main trends in sovereignty theory. See A. Albi. Põhiseaduse muutmise Euroopa Liitu astumiseks: ekspertarvamused, võrdlevõiguslik ja teoreetiline perspektiiv ning protseduur (Amending the Constitution for Joining the EU: Expert Opinions, Comparative and Theoretical Perspectives and the Procedure). – *Juridica*, 2001, No. 9, pp. 603–615 (in Estonian).

² Võimalik liitumine Euroopa Liiduga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt (Potential Accession to the European Union and its Consequences to Estonian Constitutional Law). 1998. Available at: www.just.ee/juridica2.html (in Estonian). The Expert Commission, composed of lawyers and academics, was established by the Government in May 1996 in order to carry out a thorough analysis of the potential problems of the Estonian Constitution, including the impact of EU accession.

H. Beemelmans, an expert of the German Legal Cooperation Foundation.³ Several foreign experts have recommended an amendment model adopted in their own countries; the most extensive amendment version has been put forward by McKenna & Co., whereas M. Niemivuo has recommended a minimum amendment so as to preserve the national character of the Constitution. The Legal Chancellor has submitted his opinions on amending the Constitution to the Parliament's Commission of European Affairs⁴ and to the Commission of Constitutional Affairs.⁵

In media and legal literature, the issues of amending the Constitution have been analysed by J. Laffranque, Director of the EU Law Department of the Ministry of Justice⁶; R. Maruste, Judge of the European Court of Human Rights and former President of the Supreme Court⁷; T. Kerikmäe, Vice Dean of the Concordia University⁸; and the author of this article.⁹ In addition, representatives of the legal scholarship, civil service and Parliament have expressed their opinions on the issue in the following events: conference "Analysis of the Constitution of the Republic of Estonia: the emerged problems and potential solutions", organised by the *Riigikogu* (Parliament) on 26–27 December 1999 in Haapsalu; Constitutional Amendment Roundtable organised by the Ministry of Justice and the EU Information Secretariat on 4 December 2000 in Tallinn; seminar "Does the Constitution need to be amended for joining the EU?", organised by the University of Tartu Eurocollege and Eurosceptic Movement on 12 October 2001 in Tartu; conference on EU's constitutional impact, organised by the European Studies Association on 27 November 2001 in Tallinn; Estonian Legal Centre's seminar "A legal dialogue concerning the issues of sovereignty and constitutional amendment" on 14 January 2002; and Academy Nord seminar "The Political and Constitutional Problems of Estonia's accession to the EU" on 22 February 2002 in Tallinn.

Although the opinions concerning the issues and extent of the constitutional amendments vary greatly, all foreign experts and most domestic scholars have deemed it necessary to amend the Constitution for joining the EU. A minimum common denominator could be distinguished with regard to the need for four amendments, which have also led to constitutional amendments in several EU Member States:

- delegating sovereignty to the EU;
- participation of the *Riigikogu* in the EU decision-making process;
- the EU citizens' right to stand for and vote in local elections and their rights concerning the EU four freedoms;
- the Bank of Estonia's exclusive right to emit the Estonian currency with a view to joining the Monetary Union.

³ L. Lopez Guerra. Euroopa Liitu kuulumine ja Eesti põhiseadus (EU Membership and Estonian Constitution); M. Niemivuo. Euroopa liikmelisus ja Eesti põhiseadus (EU Membership and Estonian Constitution); J. Gardner. Constitution of the Republic of Estonia. Review of Issues of Compatibility Arising From Membership of the European Union; G. Carcassone. Kommentaarid Euroopa Liiduga ühinemisega seotud uue paragrahvi kohta Eesti põhiseaduses (Comments on the New Paragraph concerning Accession to the European Union in the Estonian Constitution); McKenna & Co. Seadusandluse ühtlustamine: konstitutsioonilised parandused (Harmonisation of the Legislation: Constitutional Amendments); H. Beemelmans. Ekspertiis Euroopa Liitu kuulumise ja Eesti põhiseaduse kohta (Expert Opinion on EU Membership and the Estonian Constitution). The opinions are available in the collection "Põhiseaduse Juriidilise Ekspertiisi Komisjoni Tegevuse Aruande Lisa 'Välisekspertiisid'" (Appendix "Foreign Expert Opinions" of the Report on the Activity of the Constitutional Expert Commission). Tallinn: Justiitsministeerium, 1998 (in Estonian).

⁴ Available in annotated form in the *Riigikogu* Press announcement of 12 October 2001, www.riigikogu.ee (in Estonian). On the request of the Legal Chancellor, the author has submitted an expert opinion "Põhiseadus ja Eesti ühinemine Euroopa Liiduga" (The Constitution and Estonia's Accession to the European Union). Florence, 4 October 2001 (in Estonian). This opinion also contains the main positions and proposals of the present paper.

⁵ Õiguskantsleri arvamus Justiitsministeeriumis välja töötatud eelnõu "Põhiseaduse rakendamine Euroopa Liidu liikmeks oleku tingimustes" kohta (Legal Chancellor's Opinion on the Ministry of Justice draft law "Implementation of the Constitution in the Conditions of European Union membership"), 16 April 2002 (in Estonian).

⁶ J. Laffranque. Constitution of the Republic of Estonia in the Light of Accession to the European Union. – *Juridica International*, No. 6, 2001, pp. 207–221.

⁷ R. Maruste. Eesti enne euro-otsustust (Estonia before the Euro-decision). – *Postimees*, 12 June 2001 (in Estonian); Põhiseadust tuleks siiski muuta (The Constitution Should Still be Amended). – *Postimees*, 30 January 2002 (in Estonian).

⁸ T. Kerikmäe. Estonian Constitutional Problems in Accession to the EU. – A. Kellermann *et al.* (eds.). *EU Enlargement. The Constitutional Impact at EU and National Level*. The Hague: T.M.C. Asser Press, 2001, pp. 291–300.

⁹ A. Albi. Post-modern versus Retrospective Sovereignty: Two Different Sovereignty Discourses in the EU and Candidate Countries? – N. Walker (ed.). *Sovereignty in Transition*. Oxford: Hart Publishing, forthcoming 2002; A. Albi. The Central and Eastern European Constitutional Amendment Process in light of the Post-Maastricht Conceptual Discourse: Estonia and the Baltic States. – *European Public Law*, 2001, No. 3, pp. 433–454; A. Albi. The "Souverainist" Constitutions of the Eastern European Applicant Countries with a View to EU Membership. – M. Aziz (ed.). *Sovereignty and the Constitutional Dimension of Enlargement*. Palgrave, forthcoming 2002; A. Albi. The Baltic Constitutions and the EU Accession. P. Cramer (ed.). Stockholm: SNS Publishing House, forthcoming 2002; A. Albi (Note 1); A. Albi. Euroliit ja kaasaegne suveräänsus. Üks võimalikke vastukajaid põhiseaduse ekspertkomisjoni üleskutsele aruteluks (European Union and Contemporary Sovereignty. One Possible Response to the Constitutional Expert Commission's Call for a Debate). – *Juridica*, 2000, No. 3, pp. 160–171 (in Estonian).

However, on the political level, the fears for a potential negative result of the constitutional amendment referendum, with a view to the eurosceptic public opinion^{*10}, have led to voices that the Constitution does not need to be amended for EU accession. Former President Meri has recommended to organise a referendum after a few years of EU membership on whether Estonia wants to withdraw from the Union^{*11}; former Prime Minister Laar has expressed uncertainty about the need for amendment considering the diversity of the expert opinions^{*12}; the professors of Concordia University, T. Kerikmäe and F. Emmert, have advocated an integration-friendly interpretation of the Constitution through the prism of international law.^{*13}

In early 2002, the Ministry of Justice, insisting on pressure of time and the difficulty of finding a consensus in the parliament, started to promote the idea of not amending the Constitution, but “complementing” it with the so-called Third Constitutional Act. This Act would exist independently beside the Constitution and the Implementation Act of the Constitution and it would be adopted in accordance with the constitutional amendment procedure in a referendum. After a fast and relatively closed deliberation within an *ad hoc* commission, composed of representatives of the party factions, civil service and academia, the Act on Complementing the Constitution of Estonia was initiated in the Parliament on 16 May 2002. It provides the following: “Estonia may join with the European Union” (§ 1); “[i]n case of Estonia’s membership in the European Union, the Constitution will be applied, taking into consideration the rights and obligations arising from the Accession Treaty” (§ 2); and “[t]his Act may only be amended by referendum”. According to the explanatory part of an earlier draft, the Third Act would form “a legally correct, simple and honest” constitutional path for joining the European Union and it would have “the value of Estonia’s sign in the eyes of the legal scholars of other countries and politicians”.^{*14} Its procedural and substantive shortcomings with a view to Estonia’s constitutional law have, however, led to serious criticism, which will be discussed in more detail in part 4.

In order to evaluate the disputes over amending the Estonian Constitution for EU accession, the following sections emphasise two factors: (a) the EU’s extensive effects on sovereignty; and (b) the “souverainist” character of the Estonian Constitution.

2. EU’s main effects on traditional sovereign nation state

It is important to understand that amongst contemporary international organisations, the European Union is the most restrictive towards national autonomy and it has gradually been acquiring elements of statehood. Its most far-reaching effects on the traditional sovereign nation-state could be summarised as follows.

Government — approximately two thirds of the Member States’ legislation derives in a varying degree from the EU institutions.

State’s tasks — EU also has competences in the core fields of state sovereignty such as monetary, internal security, defence and foreign policy.

Legal order — EC law is supreme and directly applicable with regard to the national legal orders, including over the national constitutions.

State’s veto — is limited by the extensive use of the qualified majority voting.

National currency — has been replaced in twelve Member States by the common currency, the euro.

People — the Member States’ citizens have EU citizenship.

Constitution — the Treaties go much further than the traditional international treaties, so that the ECJ and academia call the body of functionally constitutional texts “the constitutional charter”. In addition, the Charter on Fundamental Rights has been adopted.

¹⁰ In May 2001, the percentage of anti-EU voters would have amounted to 59% (Postimees, 19 May 2001); however, Estonia’s victorious performance in the Eurovision song contest increased the amount of EU-supporters to 54% by August 2001 (Postimees, 25 August 2001).

¹¹ H. Roonemaa. Meri: rahvas võiks aastate pärast hääletada euroliidust välja astumist (Meri: the People Could Vote on Secession from the EU after a Few Years). – Eesti Päevaleht, 5 May 2001 (in Estonian).

¹² Presentation of the Prime Minister Mr. Laar, unedited transcript of the *Riigikogu* Session on Estonia’s preparations for EU accession, 18 January 2001. Available at: www.riigikogu.ee (in Estonian).

¹³ Joint written opinion of T. Kerikmäe and F. Emmert to the questions submitted for seminar “Does the Constitution need to be amended for joining the EU”, organised by the University of Tartu Eurocollege and Eurosceptic Movement on 12 October 2001 in Tartu.

¹⁴ Explanatory letter of the draft bill of 14 March 2002.

Popular sovereignty — the European Parliament is elected directly and has important powers due to the co-decision procedure. The EU's democratic legitimacy derives thus both from the national and European level.

Legal personality — belongs to the Communities, but the EU has treaty-making powers in the Third Pillar, which altogether leaves the state's international acting capacity rather limited.

Secession — according to the predominant view, it is not possible to withdraw from the Union.

Territorial borders — are becoming blurred due to the free movement of EU citizens and the regime of free movement of goods, services, labour and capital. Also, the territorial competences are being replaced by the functional competence boundaries of international organisations.

The forthcoming enlargement is further likely to deepen these tendencies, in order to avoid a paralysis of the decision-making mechanisms with 25–30 Member States. The Convention on the Union's Future, which convened as a result of the Laeken Declaration, is discussing amongst fundamental reforms also issues such as the adoption of the EU constitution, introduction of a bicameral European Parliament, abolition of unanimity in most areas, direct elections of the European President and endowing the EU with a legal personality.

3. Estonia's Constitution as one of the most “soverainist” in Europe

These effects upon sovereignty are in particular contrast with the Estonian Constitution, because it protects sovereignty exceptionally strictly. It stands out as one of the most “soverainist” constitutions in Europe, because of the following reasons.

- The Constitution distinguishes between sovereignty and independence (the first paragraph of § 1).
- Independence and sovereignty have been declared timeless and inalienable (the second paragraph of § 1).
- There are no explicit provisions authorising the delegation of powers to international organisations. Although § 121 provides that the *Riigikogu* ratifies, *inter alia*, treaties by which Estonia joins international organisations, the *travaux préparatoires* of the Constitution in the Constitutional Assembly show that on the basis of § 1, Estonia's entrance into the political, economic and military associations of states requires a prior constitutional amendment and referendum.^{*15}
- The sovereignty provisions may be amended only by a referendum, requiring broad political and social consensus (§ 162).
- The Constitution prohibits the conclusion of unconstitutional treaties (§ 123).
- The Estonian legal theory has interpreted the sovereignty provisions rather conservatively, based on the writings of the legal scholarship of the first Republic of Estonia of the 1930s. This interpretation has also been applied by the Constitutional Expert Commission with regard to the EU's meaning of sovereignty.^{*16}

In comparison, amongst the fourteen written constitutions of the EU Member States, six do not mention sovereignty at all, declaring simply that the people form the source of power.^{*17} Four use a one-sentence formula that sovereignty belongs to the people.^{*18} Only the constitutions of Ireland, Portugal and Luxembourg contain more provisions on sovereignty and distinguish it from independence. All Member States' constitutions contain provisions on delegating powers to international organisations and six of them also to the European Union. The constitutions of the other Central and Eastern European candidate countries share a “soverainist” character similar to Estonia, although in a less resolute language.^{*19}

¹⁵ Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly). Tallinn: Õigusteabe AS Juura, 1996, p. 530 (in Estonian).

¹⁶ See Note 2.

¹⁷ Germany, Belgium, Sweden, Austria, the Netherlands and Denmark.

¹⁸ Italy, France, Spain and Greece. The Finnish Constitution has two separate sentences in this respect.

¹⁹ See in more detail A. Albi. Post-modern versus Retrospective Sovereignty (Note 9).

4. A critical appraisal of Third Constitutional Act

Considering that Estonia's Constitution protects sovereignty exceptionally strongly and that EU membership entails far-reaching effects on national sovereignty, it is important that the accession would take place by legally correct and legitimate means. The procedural and substantive shortcomings of the Third Constitutional Act have been publicly criticised by A. Jõks, the Legal Chancellor^{*20}, R. Maruste, the Judge of the European Court of Human Rights and former president of the Supreme Court^{*21}, by lawyers of constitutional and international law in a joint opinion^{*22}, and others.^{*23} The main constitutional problems raised with relation to the Third Act are the following.

Firstly, the Third Constitutional Act does not fit into the Estonian legal order. In some countries (*e.g.* Austria, Sweden, the Czech Republic), the constitutional laws possess a status equal to the constitution and the constitution prescribes for their adoption the same quorum as for constitutional amendment. A comparison with these countries is not, however, adequate for Estonia, because the Estonian Constitution does not provide for these kinds of constitutional acts. The legal position of the Implementation Act of the Constitution is not equal to the Constitution or the above-mentioned constitutional laws, because it regulated the transition period a decade ago and it has predominantly expired. Only two sections — § 2 and partly § 3 — are still applicable; however, these are not material legal norms, but legal sentences explaining the definition of the majorities required for voting according to the Constitution. Conversely, the Third Act and the Constitution regulate the mechanisms of exercising power. Altogether, Estonia's legislative principles and traditions provide that laws are amended by introducing amendments directly into the laws themselves instead of existing in parallel.

Secondly, the Estonian Constitution belongs to the category of constitutions which have a rigid amendment procedure. Chapter XV of the Constitution establishes three concrete amendment procedures, which do not include an act which would exist independently besides the Constitution instead of amending it. The Constitution may only be amended by the constitutional amendment laws (§ 163). According to § 3, the powers of state are exercised solely pursuant to the Constitution and laws which are in conformity therewith, and § 123 prohibits the conclusion of treaties which are in conflict with the Constitution. A circumvention of such explicit procedures would be incompatible with the principles of the rule-of-law-based state and may create a dangerous precedent for the future.

Thirdly, constitutional amendment should also be preferred for the reason that the Eastern European constitutions form legal rather than political documents, considering our 50-year experience with the declaratory communist pseudo-constitutions. The Third Act would obscure and devalue Estonia's clear and directly applicable Constitution, which, differently from many old Western constitutions, is not a mere declaration or a historic text.

Fourthly, the content of the Third Act does not effectively reflect the exercise of power after the entrance into the EU and thus fails to live up to the rationale, essence and justification of the Constitution, which is to regulate the distribution and exercise of the state power. R. Maruste has expressed a strong position that the Third Act would constitute in this respect a "rape of the Basic Law and nihilism towards the constitutional state"^{*24}; this position has been supported in a press release by the participants of the Academy Nord conference.^{*25}

Fifthly, the Third Act would provide unlimited interpretation possibilities and therefore no legal certainty. There would be two documents with an equal legal force, of which one would stand outside the current system of the Constitution. According to the legal traditions of Continental Europe, an interpreter does not possess such extensive freedom and the absolute application of principles is an exception. The situation

²⁰ See Note 5; A. Jõks. Põhiseadus muutuste künnisel (Constitution on the Doorstep of Changes). – Postimees, 17 April 2002 (in Estonian).

²¹ R. Maruste (Note 7).

²² Ühispöördumine seoses nn Põhiseaduse Kolmanda akti riigiõiguslike probleemidega (Joint Statement concerning the Constitutional Problems of the Third Constitutional Act), by A. Albi, M. Gallagher, I. Koolmeister, R. Maruste, L. Mälksoo and P. Roosma. – Juridica, 2002, No. 5 (in Estonian). In fact, almost all scholars who have replied to the call for this public statement have informally stated that they find the Third Act constitutionally problematic, but they declined to officially join due to the political sensitivity of the issue.

²³ L. Mälksoo. Kuidas muuta põhiseadust? (How to Change the Constitution?). – Postimees, 13 May 2002 (in Estonian); the Third Act has also been criticised by the participants of the Academy Nord constitutional amendment seminar in the press release Kokkuvõtte seminarist "Eesti Euroopa Liiduga ühinemise põhiseaduslikud ja poliitilised probleemid" (Conclusions of the seminar "The constitutional and political problems of Estonia's EU accession"). – News list of the Estonian Legal Center, 25 February 2002. Available at: www.lc.ee (in Estonian).

²⁴ R. Maruste (Note 7).

²⁵ Conclusions of the seminar "The constitutional and political problems of Estonia's EU accession" (Note 23).

would become particularly complicated when it would come to applying the principles of the Third Act to the constitutional norms which are in manifest conflict with EU law, raising the question of the limits of interpretation. The Third Act leaves the Constitution in conflict with real life and simply postpones the legal disputes instead of solving them.

Finally, considering that the Third Act would be adopted in accordance with the procedure of constitutional amendment in a referendum, it would not be considerably more difficult to introduce an EU chapter into the Constitution, whereas the solution would be considerably more legally correct, simple and honest. The fear that two referendums would have to be organised can be avoided by formulating the referendum question so that it would authorise the constitutional amendment as well as the conclusion of the EU Accession Treaty. The Third Act creates unnecessary legal chaos and destroys the clear and coherent constitutional basis of Estonia's statehood. The Third Act may also become counterproductive to its aim of facilitating the accession, since the people who support the EU may vote against this suspect way of devaluing the Constitution.

5. Amendments in the light of expert opinions, comparative experience and theoretical perspectives

Considering the foreign and domestic expert opinions, comparative experience and theoretical perspectives, which will be discussed in the subsequent sections, three amendment options could be put forward.

The first option is to introduce into the Constitution, as in France and Austria, a special EU chapter bringing neatly together all the EU-related issues and potential amendments in future. The EU chapter could be inserted after Chapter IX on international relations. In accordance with Estonia's traditions of legal technique, the Chapter should be numbered Chapter IX¹ and the provisions accordingly 123¹, 123², *etc.*

The second possibility is to amend the individual problematic provisions, as has been suggested by most experts.

Thirdly, in case primary importance would be given to the principles of sovereign nation state and minimal harm to them, it is possible to introduce into the Constitution only one amendment paragraph, which would regulate the two most important issues: delegation of sovereignty and democratic legitimisation via the national parliament. Other potential conflicts could be solved by a clause recommended by G. Carcassonne — “according to the conditions provided in the European Union treaties”. The amendment proposals, which have also been recommended by the Legal Chancellor to the *Riigikogu*'s Constitutional Affairs Commission, could read as follows.

5.1. Options I and II

Section 123¹ or the third paragraph of § 1.

“[With a view to economic and social welfare and security,] Estonia may delegate to the European Union the state competences deriving from the Constitution for their common exercise by the European Union Member States to the extent necessary for the application of the Treaties.”

Section 123² or the second paragraph of § 59.

“In the legislative activity of the European Union, the Government proceeds from the *Riigikogu* positions, [which may be disregarded in case of an important integrational reason, reporting about it in the *Riigikogu* session]. The detailed rules are established by law.”

Section 123³ or the third paragraph of § 9.

“The citizens of the European Union Member States enjoy the rights deriving from the European Union law to the extent equal to the Estonian citizens, [including the right to vote and stand for the elections of the local governments and European Parliament].”

Section 123⁴ or the second paragraph of § 111.

“When joining the Monetary Union, the competences of the Bank of Estonia may be delegated to the European Central Bank.”

Section 123⁵ or the third paragraph of § 123.

“The European Community law is directly applicable and, in case of conflict with Estonia's laws or other acts, the European Community law is applied. [The President submits each new European Union treaty before its ratification to the Supreme Court, which will make a reasoned decision about its conformity with the Constitution].”

5.2. Option III — minimum amendment

The third paragraph of § 1 or § 123¹.

“Estonia may delegate to the European Union bodies the state competences deriving from the Constitution for their common exercise by the European Union Member States, according to the conditions provided and to the extent necessary for applying the Treaties.

In the European Union legislation, the Government proceeds from the *Riigikogu* positions [and may disregard these only in case of an important integrational reason, reporting about it in the *Riigikogu* session]. The detailed rules are established by law.”

5.3. Content of draft provision on delegating sovereignty

5.3.1. Main conceptual approaches to sovereignty in EU — which to prefer?

The proposed draft provision on delegating sovereignty stands out conceptually against the Constitutional Expert Commission's proposals (1998), which have proceeded from the “paradigm of sovereign nation-state”.²⁶ I will explain this alongside with a closer look into the four main conceptual approaches to the EU's meaning of a sovereign nation state, the validity of which should be appraised in the perspective of the above-described EU's effects on sovereignty and probable post-enlargement integration scenarios.

The first group regards the European Union as a **confederation or an association of states**, which, contrary to a federation, does not substantially harm national sovereignty. Advocated mainly by the Member States' constitutional lawyers, it found its major expression in the German and Danish Maastricht decisions, the ideology of which has strong roots in C. Schmitt state theory. As a result of the influential post-Maastricht conceptual discourse, which has called for revising the 19th century sovereignty concepts in the EU context, the traditional nation-state centred approach has been gradually declining into mere political rhetoric. It remains popular in Eastern Europe²⁷, including Estonia; the Constitutional Expert Commission has described the EU as an association of states or a confederation. Its draft amendments permit the delegation of **sovereignty**, in the meaning of state powers, but prohibit giving up Estonia's **independence** to a federal European Union, which would emerge if the EU would adopt a constitution or equate the European Parliament's powers with those of the national parliaments.

The problem with this approach is that it would remain short-sighted towards the reforms prepared by the Convention on the Union's Future and, in addition, it does not sufficiently take into account the Union's current effects on a sovereign nation-state (chapter 2). Therefore, the author has, in the proposed draft amendments, proceeded from the second approach, which regards the EU as a **supranational organisation**, where sovereignty is divided, shared or commonly exercised. It is the politically, academically and judicially the most well-established concept and most foreign experts have in their opinions also proceeded from this approach. In addition, the author suggests that the expression “supranational organisation” should not be regarded as a transitory concept before the EU's eventual development into a federation, but, considering the untraditional multi-dimensional structure of the EU, it would remain explanatory also in the case of adopting the EU constitution or introducing a bicameral European Parliament. As concerns the distinction between sovereignty and independence, it is rare in Western Europe and it is losing its substantial discursive value, considering the EU's multifaceted effects on sovereign statehood. However, if the constitutionally embedded distinction between sovereignty and independence is to be retained, the interpretation of independence should be modernised. The concept of “open statehood”²⁸, which has been used in the German legal theory, has proved to be a feasible alternative, as it has been adopted on the author's recom-

²⁶ The draft amendments of the Estonian Constitutional Expert Commission read as follows:

The third paragraph of § 1: Estonia may, on the basis of referendum, participate in the European Union, which is an association of states created by its Member States on the basis of the Treaties.

Section 123¹: Estonia may, under the principles of reciprocity and equality, delegate to the European Union bodies the competences deriving from the Constitution, in order to exercise them jointly with the European Union Member States, to the extent necessary for the implementation of the Treaties the Union is based upon and on the condition that this does not violate the basic principles and functions of the Estonian statehood, manifested in the Preamble of the Constitution.

²⁷ See more A. Albi. Post-modern versus Retrospective Sovereignty (Note 9) and A. Albi. The Central and Eastern European Constitutional Amendment Process in light of the Post-Maastricht Conceptual Discourse (Note 9).

²⁸ See S. Hobe. The German State in Europe After the Maastricht Decision of the German Constitutional Court. – GYIL, 1994, Vol. 37, p. 113; S. Hobe. Statehood at the End of the 20th Century — The Model of the “Open State”: A German Perspective. – Austrian Journal of International and European Law, 1997, No. 2, p. 127 ff.; also K. M. Meessen. Hedging European Integration: the Maastricht Judgement of the Federal Constitutional Court of Germany. – Fordham International Law Journal, 1994, Vol. 17, p. 524 ff.; M. Zuleeg. The European Constitution under Constitutional Constraints. The German Scenario. – European Law Review, 1997, p. 22.

mentation by the Latvian Constitutional Amendment Working Group.²⁹ According to this concept, the internationalisation of most spheres of life has shifted the fulfilment of the state's tasks to the transnational level on the basis of efficiency; the openness to international cooperation has become the fourth element of state, besides the government, people and territory.

In formulating the draft provision, I have used the Expert Commission's expression "delegation of state competences", which would include the delegation of parliamentary, governmental, presidential and judicial powers and avoid thus the amendment of pertinent provisions in other chapters. However, differently from the Expert Commission's interpretation that delegation signifies the right of secession (the majority of the legal literature does not deem it possible to withdraw from the Union), I have proceeded from the fact that most Member States' constitutions seem to use different formulations rather interchangeably and delegation is more conventional to the Estonian legal language.³⁰ The draft provision would be addressed, as in the Expert Commission's draft, expressly to the European Union, considering that the constitutions of those Member States, which accommodate the EU integration under the provisions of ordinary international organisations, have been criticised for not effectively reflecting the distribution and exercise of powers. However, Estonia's Constitution would also need a clause for legitimising the membership in other international organisations which restrict sovereignty, such as WTO, NATO, UN and COE.

The third conceptual approach finds that the EU's structure already resembles the principle of **federalism**, or qualifies it as a new form of federalism. The Debate on the Future of the Union is increasingly speaking about the "European federation of the nation-states".

The fourth group — mainly scholars of European law — are searching for a **new notion** which would clearly distance itself from the federation-confederation scale and correspond to the EU's unconventional character, comprising of international, supranational, federal and nation-statist elements. Amongst the alternatives are concepts such as multi-level constitutionalism, European Commonwealth; and, in political science, the system of multi-level governance. The traditional concept of sovereignty is being revised by most legal, political science and economic treatises and they even doubt its explanatory value, considering the contemporary globalising and multi-authority world. The scale of alternatives is broad — post-sovereignty, late sovereignty, open statehood, sovereignty belonging to member states jointly through the intergovernmental conference, *etc.*³¹; the most viable amongst them are yet to be seen.

5.3.2. Clauses for delegating sovereignty and the question of amending § 1

The proposed provision on delegating sovereignty would adopt from the Expert Commission's draft the clause **necessary for the application of the treaties**, as a symbolic warning against too extensive interpretation of the EU competences. However, account should be taken of the dangers to the uniform application of the EC law, which may result from the judicial review of the EU competences by the increasing number of powerful and active Constitutional Courts after the enlargement. The proposed amendments would not include the Expert Commission's **referendum clause** for ratifying the successive EU treaties, with a view to the internal dangers to participation in the EU policies (in case of a negative result, a referendum may not be reinitiated within one year and the *Riigikogu* has to be dissolved) and to avoid further pressure on the EU's cumbersome and fragile treaty amendment procedures. Amongst other safeguard clauses, the Expert Commission has acknowledged that the clauses "equality" and "reciprocity" would disregard the facts that the obligations deriving from the EU membership do not depend on reciprocity, and the division of votes in the Council does not follow the principle of states' equality.³² Finally, it would be advisable to refer to the objectives of the accession such as **security and economic and social welfare**, similar to several Member States' constitutions.

The question of whether the amendment on delegating sovereignty should be inserted into § 1, which declares that Estonia's sovereignty and independence are timeless and inalienable and can be amended only by referendum (§ 162), has proved rather sensitive. The amendment of § 1 has been deemed necessary by the Constitutional Expert Commission, R. Maruste, McKenna & Co. and the Eurosceptic Movement. The amendments should be made in the other chapters of the constitution according to J. Laffranque, foreign experts

²⁹ The Theoretical Foundation of the Amendments to Satversme proposed by the Working Group. Riga: Ministry of Justice, November 2001. According to the Legal Secretary of the Working Group, Arnis Buka from Latvia's Ministry of Justice, the Working Group used in its work the author's earlier paper A. Albi. Estonia's Sovereignty in Perspective of EU Accession: Rethinking traditional constitutional concepts. — Bachelor Thesis of the University of Tartu, 1999, which pointed out the need to modernise the sovereignty approach and recommended the "open statehood" concept at p. 23.

³⁰ For instance, the German constitution uses four expressions — participate, delegate, transfer and limit sovereignty; the French Constitution speaks about participation, delegation, transfer and common exercise.

³¹ See for references A. Albi. Post-modern versus Retrospective Sovereignty (Note 9).

³² Presentation of L. Madise in the public discussion on amending the Estonian Constitution, organised by the Ministry of Justice and EU Information Secretariat, 4 December 2000, Tallinn, National Library.

G. Carcassonne and M. Niemivuo, the Legal Chancellor, and, in a joint opinion, E.-J. Truuväli, H. Lindpere, M. Vunder and R. Laffranque, the professors of the Law Institute.³³ G. Carcassonne and J. Laffranque have recommended the introduction of a special EU chapter. M. Niemivuo, on the other hand, has not found changes in Estonia's sovereignty, proceeding from the traditional sovereign state centred approach. The professors of the Law Institute have not deemed it necessary to amend § 1 for the reason that the principle of sovereignty is contained in the constitutions of all the Member States³⁴, and the amendment would further be inadvisable due to the impression of restricting sovereignty. Presently, Estonian political and legal opinion predominantly prefers not to amend § 1, which is indeed understandable in the light of the fear for the consequences of a potential negative referendum result, considering Estonia's tragic history and sensitive geopolitical situation.

5.4. Amendment of other conflicting provisions

Besides delegating sovereignty, most experts deem it necessary to amend the Constitution with regard to three further issues, which have also led to constitutional amendments in several Member States.

Riigikogu's participation in the EU decision-making process. Considering the weak democratic legitimacy of the EU decision-making procedures, many experts have recommended introducing a provision on the national parliament's right of information and its mechanisms of participation in the EU affairs.³⁵ Amongst the Member States, a pertinent amendment exists in the constitutions of Germany, Finland, Portugal, Austria, Sweden, France and Belgium. The proposed provision, which could be inserted into § 123² or the second paragraph of § 59, has advocated the Austrian model, where Government may disregard the parliament's positions only in case of an important integrational reason, reporting about it in a parliamentary session. This restrictive approach would avoid the democratic problems of the accession negotiations, where the members of the Estonian Parliament's Commission of European Affairs have seen themselves as having only a "statistical" role, not to mention the rest of the parliament.³⁶ It is equally important that this restrictive regulation would promote social discussion and the development of the positions of the interest groups, which, in turn, would pressure the government to take in its positions greater account of the country's social and economic conditions.

The EU citizens' rights to vote and stand for election in the elections of local municipalities and the European Parliament are issues, which experts have almost unanimously found to be in contradiction with the Constitution. These rights would be restricted by § 57 (the voting right belongs to the Estonian citizens), § 156 (election of the local municipalities) and § 48 (only the Estonian citizens may belong to the political parties). Amongst the Member States, the active and passive voting right in the local elections (in Austria and Portugal also in the European Parliament elections) has been introduced in Germany, France, Portugal, Austria, Spain and Belgium. In addition, the experts have pointed out that the **prohibition to discriminate against the EU citizens with regard to the free movement of workers, services and capital** could contradict §§ 28, 29, 30, 31, 32, 34, 36 and 44 of the Constitution, which permit limiting certain rights exclusively to the Estonian citizens.³⁷ I have recommended McKenna & Co.'s proposal to solve the problem of the EU citizens' rights with a single amendment, which could be introduced into § 123³ or the third paragraph of § 9.

The third manifest constitutional conflict concerns the **Bank of Estonia's exclusive right to emit the national currency** with a view to the euro³⁸; a reference to the European Central Bank could be introduced into § 123⁴ or the second paragraph of § 111. France, Germany and Portugal have introduced constitutional amendments in this regard.

³³ In joint written opinion submitted for the seminar mentioned in note 13.

³⁴ The author would however refer to part 3 of this paper, according to which none of the Member States' constitutions contain an analogous categorical declaration on timelessness and inalienability of sovereignty and independence, while six constitutions do not mention sovereignty at all. In addition, differently from the Estonian Constitution, these constitutions contain provisions on delegating powers to international organisations and the EU.

³⁵ Experts G. Carcassonne, H. Beemelmans, L. Lopez Guerra, Expert Commission, the Legal Chancellor and K. Ahi. Rahvuslik parlament Euroopa Ühenduse õiguse kontekstis (National Parliament in the Context of European Community Law). – Juridica, 1999, No. 6, p. 297 ff. (in Estonian).

³⁶ Presentations at the *Riigikogu* Session of 23 February 2001 on Estonia's preparations for joining the European Union. Unedited transcript available at: www.riigikogu.ee/ems/stenograms/2001/01/m01012303.html (in Estonian).

³⁷ In a varying degree experts Carcassonne, McKenna & Co., Gardner, Maruste and the Constitutional Expert Commission.

³⁸ Niemivuo, Lopez Guerra, Beemelmans, Gardner, Expert Commission, Legal Chancellor, Maruste and V. Kraft, the President of the Bank of Estonia (V. Kraft's presentation at the conference "Analysis of the Constitution of the Republic of Estonia: the emerged problems and potential solutions", organised by the *Riigikogu* on 26–27 December 1999 in Haapsalu, transcript available at: <http://euroskepsis.ee/laine/laine1.htm> (in Estonian).

Besides the above three amendments, the author has also recommended, for reasons of transparency and clarity, a provision on **supremacy and direct applicability of the EU law**, which has been advocated by several experts, although amongst the Member States it has been constitutionally incorporated only in Ireland. Section 123 would be insufficient, as it would secure the applicability of the ratified treaties, but not of the EU secondary law. In order to avoid a constitutional conflict, it is worth considering G. Carcassonne's proposal to subject the new EU treaties on the French model to a prior constitutional review. Namely, EC law requires supremacy with regard to the national constitutions, while in Estonia, supremacy would explicitly belong to the Constitution under § 15 (right to resort to courts and the obligation of the courts to declare unconstitutional the acts which are in conflict with the Constitution), the first paragraph of § 123 (Estonia does not conclude treaties which are in conflict with the Constitution) and § 152 (the courts do not apply any laws that are in conflict with the Constitution and the courts have to initiate the constitutional review proceedings).^{*39}

³⁹ Cases 11/70 *Internationale Handelsgesellschaft*, [1970] ECR 1125 at 1134; 106/78 *Simmenthal*, [1978] ECR 4199 and 314/85 *Foto-Frost*, [1987] ECR 629.