

# ESTONIA'S CONSTITUTIONAL ASSEMBLY, 1991-1992

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"Surprisingly little has been written about the general subject of constitution-writing," Harry Eckstein observed when organizing a conference on the design of constitutions (1993). The final products, the texts of the constitutions, have been the object of extended analysis, but the process by which they are born remains obscure. "Little has been written about the selection and nature of members of constitutional assemblies" (Eckstein 1993). The present article casts some light on how the Estonian Constitution of 1992 came about. Some of the details presented are secondary or tertiary from the viewpoint of Estonian history but may be of interest to the comparativist who tries to address Eckstein's concerns.

Estonia's resolution on the resumption of independence (20 August 1991) also called for a Constitutional Assembly (henceforth referred to as CA) and for a popular referendum on the resulting draft. On 28 June 1992, the referendum took place and the Estonian Constitution was approved, 91.2 to 8.8%. Participation was 66.3% of those eligible. In September 1992, parliamentary and presidential elections took place (see Taagepera 1993c), and in October the first prime minister was appointed in accordance with the stipulations of the new constitution. With these steps, the first half of the introduction of constitutional rule was completed. It remained to wait for the second half of the process to take place: developing reverence for the constitution, and weaving a fabric of interpretations, precedents and traditions around it.

This article describes the origins and workings of the CA, August 1991 to June 1992, with emphasis on the early phase which set the tone and established the general framework. The approach is chronological.<sup>1</sup> My main emphasis is on the central political structures (parliament, president, cabinet), which occupy 52 of the 168 articles of the CA. The remaining 116 articles include a long chapter on the bill of rights (48 articles), and others on finances, foreign relations, local government, courts, defense, etc. The key issue considered here is the choice between parliamentary and presidential forms of government. Much debate in the CA centered around it, either in its own right or as a proxy for various other interests.

## **Estonia's Previous Constitutions**

The debate in 1991-92 was clearly influenced by the country's constitutional history after it achieved independence in 1918-1920. For the general context, see recent overviews of Estonian history by Raun (1991) and Taagepera (1993a).

In 1919 a Constituent Assembly was elected and adopted a super-parliamentary constitution (1920). The prime minister served as head of state, and during cabinet crises no one was in charge even symbolically. A third of the parliament could request a two-month delay in promulgating any law adopted by majority vote, so as to give time to organize a request for a popular referendum (1920 Art. 30). Such a referendum could be initiated by 25,000 citizens (about 5% of the electorate), and if it went against the parliament, new parliamentary elections were mandatory (1920 Art. 32). This suspensive minority veto and threat of referendum made the parliament quite cautious. Extremely proportional representation of parties contributed to fractionalization, and the average cabinet duration was eight months. As a result, the popular mood flipped to the opposite, presidentialist extreme.

An improved parliamentary constitution was narrowly defeated in a popular referendum (1932). A presidential constitution proposed by the extreme right was approved in 1933. The president was to be elected in direct elections, but meanwhile the role of an interim president fell to the incumbent prime minister, Konstantin Päts. He claimed he was invested with the new emergency powers granted to the elected president and he used them to crush the extreme right, but also to abolish the parliament and cancel the presidential elections. The latter action clearly violated the 1933 Constitution (Raun 1991:119).

In 1937 a docile Constitutional Assembly drew up a new constitution, largely following the guidelines set by Päts. Because this constitution became effective on 1 January 1938, it has been called both the Constitution of 1937 and of 1938. Päts advertised it as more moderately presidential than the 1933 version and this myth was widely accepted. However, a systematic check, using the Shugart and Carey (1992) checklist, brings unexpected results: The 1933 Constitution gives the president powers comparable to those in the U.S., but the 1938 Constitution is superpresidential to a degree matched only by Paraguay, among the contemporary presidential regimes considered by Shugart and Carey.<sup>2</sup>

When the USSR demanded military bases in Estonia (September 1939) and, later, full-scale entry of unlimited troops (June 1940), Päts yielded perhaps too easily, with too few consultations. During the first month of occupation, the Soviets could maintain some veneer of legality by forcing Päts to sign the Soviet orders as presidential decrees. In this respect, matters would have been more awkward for the occupiers if they had to deal through the parliament. The final outcome would most likely have been the same, given the brute force ratio, but a nagging suspicion remains among many Estonians that the presidential constitution enabled one man to capitulate in the name of an entire nation that was not consulted.<sup>3</sup>

The ensuing Estonian Soviet Socialist Republic does not even qualify as a puppet regime, because Moscow bypassed it in pulling most of the strings: Even the smallest details were administered directly from "the Center." The Constitution of the ESSR was a meaningless scrap of paper that could be

and was altered at a moment's notice (Misiūnas and Taagepera 1993:279) and disregarded in practice. It acquired some significance in 1988, though, when the Soviet rule began to crumble. It served as a stopgap basic law after Estonia's proclamation of a "transition period toward independence" (Spring 1990) but was so despised that no one suggested the ESSR Constitution as a possible starting point for the constitutional debate that began in 1990.

### **The Political Forces in Early August 1991**

The main political lines in early 1991 were drawn as follows: There were two competing parliamentary bodies: the Supreme Council and the Estonian Congress, both elected in early 1990 in free elections but based on different criteria of participation. The Supreme Council was elected practically by all those who happened to be in Estonia, including Soviet army draftees, who clearly were not permanent residents. The Estonian Congress was elected by all those who were citizens of Estonia prior to Soviet occupation, including exiles in the West.<sup>4</sup>

Most national radicals declined to run for the Supreme Council because they considered the Council illegitimate on two related accounts: It derived from the Supreme Soviet of the ESSR and it was partly elected by colonists who were illegal immigrants from the viewpoint of legal continuity of the Republic of Estonia during the Soviet occupation. It should be noted that about one-fifth of the Russian residents of Estonia were citizens of the pre-occupation republic, and about one-twentieth of Estonians were not. The formal criteria of the radical nationalists were legal, not ethnic. Their aim was restoration of the pre-occupation republic (including the 1938 Constitution) and private property, and they objected to any thought of a new republic that would take into account the intervening demographic and economic changes.

The largest group in the Supreme Council was the Popular Front, consisting of moderate nationalists. Its declared goals had evolved from autonomy to independence, which they largely considered a new start, given the length of the occupation period and the major social and demographic changes imposed during these 50 years. From their viewpoint, a new constitution was needed; their views on the relative merits of the parliamentary and presidential alternatives varied.

A second fairly large bloc, calling themselves "Free Estonia," included some top leaders of the Communist Party and many managers of state factories and farms. They were quite willing to privatize, as long as they themselves became the new owners. Aligned with them was Arnold Rüütel, the titular head of state of the ESSR and, subsequently, of the Republic of Estonia. He had become very popular and was highly likely to be reelected. Hence the group had an invested interest in presidentialism, which probably was also philosophically more congenial for Soviet-trained managers. On

the issue of legal continuity versus a new start they were indifferent and opportunistic.

The third relatively large but fluid group in the Supreme Council consisted of Russians, most of whom had entered Estonia as colonial settlers. Their views ranged from all-out Soviet imperialism to guarded support for Estonian independence. If there was to be independence, they certainly preferred a new start, in which they would be legitimate partners, rather than renewal of pre-occupation legitimacy that would make most of them illegal immigrants. Unfamiliar with parliamentarism, most Russians probably preferred presidentialism.

In the Estonian Congress the predominant group was the Estonian National Independence Party (ENIP). They advocated abolition of the structures inherited from the Soviet rule and restoration of the pre-occupation status quo as a starting point, before any adjustments could begin. This stand also implied the restoration of the 1938 Constitution, at least temporarily, but this prospect put many ENIP activists in a bind. They were aware of the less-than-democratic aspects of that constitution and how the excessive presidential powers may have weakened Estonia in face of Stalin's demands in 1939-40. Once restored, this constitution might be hard to change legally. Up to mid-1991, ENIP preferred not to debate this inconsistency, so as not to weaken the demand for restoration of pre-occupation institutions and citizenship.

The second important grouping in the Congress consisted of people active in the Estonian Heritage Society and later in the Christian Democratic Union. They shared the ENIP views, but with more concessions to pragmatism. Mart Laar (who was to become prime minister in October 1992) forcefully came out in favor of parliamentarism, pointing out the negative role of presidentialism in the loss of national independence in 1939-40 (Laar 1990).

On the eve of the August 1991 declaration of resumption of independence and formation of the Constitutional Assembly, the Supreme Council was the effective parliament (subject to limitations imposed by the Soviet armed presence), while the Congress was reduced to a reactive role. The Popular Front had joined the Congress elections reluctantly and late; it was underrepresented and gradually withdrew from active participation. The national radicals were similarly underrepresented in the Supreme Council, but those who had run and won (like Laar) were active and made some converts, given that the events went in the direction of independence which enhanced the popular expectations.

### **Formation of the Constitutional Assembly (20 August to 7 September 1991)**

The "Resolution on the National Independence of Estonia" was proclaimed by the Supreme Council on 20 August 1991, the second day of the reactionary coup in Moscow. The primary goal of the Estonians was to

draw a fragile legal demarcation line between Estonia and the USSR, in case the coup succeeded. A show of unity between the Supreme Council and the Estonian Congress was needed but in order to have a chance of being respected by Moscow, the declaration had to be in the name of the body Moscow recognized as legal, the Estonian Supreme Council. The declaration also had to mention the previous steps toward independence undertaken by the Council: the March 1990 resolution on transition toward independence and the March 1991 referendum on independence (in which the Soviet-era settlers participated). But all this weakened the claim of the Estonian Congress that Estonia was illegally occupied and hence was entitled to restoration of independence without any need for referendum or further resolutions. To stress the latter thesis, the Resolution began: "Proceeding from the continuity of the Republic of Estonia as a subject of international law..." Furthermore, two domestic resolutions were attached to the essentially internationally-oriented document, one on Constitutional Assembly, another on new elections. Thus, the crucial part reads:

The Supreme Council of the Republic of Estonia resolves:

1. To affirm the national independence of the Republic of Estonia and to seek restoration of the diplomatic relations of the Republic of Estonia.
2. To form a Constitutional Assembly, whose composition shall be determined by the highest legislative organ of state power, the Supreme Council of the Republic of Estonia, and by the representative body of the citizens of the Republic of Estonia, the Congress of Estonia, for the purpose of drafting the Constitution of the Republic of Estonia, to be submitted to a popular referendum.
3. To hold new Republic of Estonia parliamentary elections during 1992, on the basis of the new Constitution of the Republic of Estonia. (Full text in Taagepera 1993a:201-202)

For its immediate and pressing international purposes, the first of the three items sufficed; the other two, if anything, detracted attention from it. But the latter parts were needed to reach domestic consensus. They resolved the deadlock between the Supreme Council and the Congress at a unique moment, when both sides were most willing to compromise.

The Supreme Council accepted being described as an "organ of state power" implicitly devoid of representativeness, given that this role was expressly attributed to the Congress. The Supreme Council also agreed to share the formation of the Constitutional Assembly with the Congress. (Presumably, this was to be on a basis of parity, because no other proportions were stated--but not defining "parity" left room for various interpretations later.) The Congress, in return, implicitly agreed that the implementation and funding of the various tasks (formation of the Assembly,

referendum, elections) would be left to the Supreme Council as organ of state power--but this too was not spelled out. Both bodies implicitly agreed to disband once the new parliament was elected--but this was not clearly stated either. Although in spirit the proclamation was a joint one by the Congress and the Council, it was formally issued by the Council alone, for the aforementioned reasons.

With the agreement of 20 August, the national radicals essentially gave up on the 1938 Constitution and many of them did so with considerable relief. Besides the aforementioned concerns about excessive presidentialism, the realization had sunk in that it was impossible to reintroduce major aspects of the 1938 Constitution within its own framework. For example, the Second Chamber was partly appointed by the President, but it was also a major player in nominating presidential candidates. With both President and most Second Chamber members dead, there was no legal way to jump-start the engine.

Most national radicals now accepted the reasoning that legal continuity of independence was not tied to any particular constitution (there having been three constitutions during the previous period of independence), and that a popular referendum was a sufficient legitimizer for a new constitution as long as the referendum was restricted to the pre-occupation citizens, a notion which was making headway even in the Supreme Council. In principle, the CA might still decide in favor of the 1938 Constitution, and hence the radicals could claim they had not turned against it, but effectively, the 1938 Constitution was out of the picture.

The moment of danger passed in Moscow and the Estonian attempt at resumption of independence was successful with a speed beyond anyone's dreams. Not surprisingly, some people on both sides of the Congress-Council divide began to feel they had conceded too much to their domestic competitors, and they hinted that parts of the Resolution should be rescinded. However, rescinding the domestic deal risked jeopardizing the country's independence, given that the two were parts of the same proclamation. Furthermore, "A deal is a deal, and once undertaken has to be respected," as was forcefully stated at a meeting of the Congress leadership by Lauri Vahtre, one of its more radical members. Popular Front leader and Prime Minister Edgar Savisaar privately blamed the deal on his having been momentarily out of the country, and he attempted to get his Minister of Justice as "ex officio" Chair of the CA.<sup>5</sup> In the end, positive attitudes prevailed among the Estonians. The Russian members of the Supreme Council were too disoriented by the Moscow coup and its collapse to be heard from.

The size and the method of choosing the Constitutional Assembly led to extensive haggling. The Congress, consisting of 464 members with few duties, tended to favor 80 members--40 from each body. The Supreme Council, consisting of only 101 members, many of them overloaded with the usual parliamentary duties, tended to favor a total of 40, and some members

demanded a higher representation for the Supreme Council as the senior partner in the deal. Furthermore, 43 persons belonged to both bodies and could be considered a third category. In the end each body elected 30 members to the CA from amongst their own members. Those who were members of both the Congress and the Supreme Council could choose where they belonged. It should be noted that 40% of the Supreme Council but only 10% of the Congress members faced this tactical dilemma.

The election rules within each body were another issue. The most extreme proposal in the Congress was to give each member 30 votes, which would mean that the largest grouping could win all 30 seats, provided it had strong internal discipline. The Popular Front, isolated in the Congress, might be the big loser. Their counter-proposal was to apply the same rule as used in the elections of the Congress itself in 1990: In a district with X seats, each voter could vote for a number of candidates equal to square root of X, rounded upwards.<sup>6</sup> For a "district" of 30 seats, this formula would yield 6 votes for each Congress member. When the Congress convened on 7 September 1991, its majority settled for ten votes per member, and the outcome was reasonably proportional to the strength of various groupings. This happened because it turned out that the political lines were not firmly drawn.<sup>7</sup>

On the Supreme Council side, the election was by Single Transferable Vote (a procedure explained in Taagepera and Shugart 1989:26-27), the same way the Council itself had been elected by the population. Thus the outcome was fairly proportional to the strength of the various groupings. Seven Russians were elected, ranging from imperialists, who had rather transparently supported the reactionary coup in Moscow, to moderates, four of whom were pre-occupation citizens of Estonia.

#### **Preparations for the Constitutional Assembly (8 to 12 September)**

Among the total of 60 CA members, about 20 were connected to the Popular Front, another 20 could be counted as national radicals, some 13 were various Estonian moderates and reform Communists, and the seven Russians completed the list. Philosophical preferences, including the choice between parliamentarism and presidentialism, often cut across the lines of day-to-day politics, as long as group solidarity did not override one's own convictions. Considerable goodwill existed for trying to avoid procedural wrangling at the very start of the CA. This was particularly true of the Congress because they realized that a breakdown of the CA would throw the action back into the Supreme Council.

Indeed, the Supreme Council staked a major claim in a "Decision on the Tasks and Procedures of the CA of the Republic of Estonia" (3 September 1991). It failed to mention the Congress and thus treated the 20 August Resolution as a unilateral one. Some Council members worried that the CA might actually declare itself the supreme legislative body superseding both

the Council and the Congress, given that the CA was elected by both bodies. Therefore, the Decision specified that the CA was a "body without authorization to create norms," solely in charge of drafting a constitution. It further stipulated that the CA would be convened and chaired by the Chair of the Supreme Council, until the Chair of the CA was elected. With this, the Council brushed aside the request of the Congress that the Chairs of the Council and the Congress open the CA jointly. A constructive feature in the Decision was the stipulation that the CA decisions were to be reached by plurality rather than by absolute majority as in the Supreme Council. Indeed, the Council was often bogged down by the requirement, inherited from Soviet practice, of an absolute majority for most decisions. However, the stickiest items came in Part Four of the Decision:

The deadline for presenting a proposed constitution to the Supreme Council is 15 November 1991. The proposal to be presented to the Supreme Council is the one favored by the majority of the Assembly members. The Supreme Council will decide on putting the project to a referendum.

The deadline was a mere two months and two days after the first possible meeting of the CA. If the CA missed this deadline the Supreme Council might consider itself entitled to disband the CA. Furthermore, the criterion for an acceptable final proposal by the CA was not set at plurality but the majority of all CA members, so that neutrals and absentees would be counted as negative votes. This increased the danger of a formal deadlock in the CA. The most worrisome aspect was that the Council did not seem to feel obliged to put the proposal received from the CA to a popular referendum automatically, without further alterations, although failure to do so would violate the Resolution of 20 August. In sum, the Council reserved itself a number of escape routes in case it disliked the proposal produced by the CA.

Upon their election, the tactics of those CA members interested in a constructive outcome (and this included most of the Popular Front and Congress leaders) were to settle the procedural issues (bylaws, electoral rules for the Chair and his assistants, financial support) before the CA convened. A small informal group would meet in closed quarters, in order to avoid playing to the galleries. At the opening session of the CA, the rank-and-file would be presented with a well-prepared package visibly supported by prominent members of both the Congress and the Supreme Council, discouraging any suggestions for amendments. An efficient start was imperative because of the 15 November deadline. Thus the positive aspect of this deadline was to discourage dawdling.

The elections to the CA were concluded on 7 September, and six days later it was to convene. Meanwhile, a series of meetings took place in the Supreme Council office of Marju Lauristin, leader of the Social Democratic

Party (a part of the Popular Front coalition). Other participants on the Popular Front side were Jüri Rätsep, Rein Taagepera, and Peet Kask, who brought a draft of bylaws. The Congress leadership was represented mainly by Eve Pärnaste and Kalle Jürgenson. Wishing to avoid the election of an extreme radical as Chair of the CA and not expecting to push through one of their own, the Popular Front side presented a pre-agreed list of "moderate radicals" acceptable to the Popular Front. The Congress leaders apparently had done similar calculations and, to the pleasant surprise of the Popular Front, came out with a list of Popular Front members acceptable as Chair. Included was Tõnu Anton who eventually was elected. He was loosely connected to the Popular Front and had performed well as Chair of the Supreme Soviet Legislative Committee (see Taagepera 1991:480).

Kask's draft bylaws for the CA were discussed and amended in a businesslike manner and ENIP member Pärnaste was assigned to join Kask for further revisions. The draft they presented to the informal group underwent few further changes. Financial support came perforce through the Supreme Council who controlled the state funds. The plenary meetings of the CA were to take place in the traditional assembly hall of Estonian parliaments, now in the hands of the Supreme Council. The latter met Monday through Thursday, which left Fridays and Saturdays for the CA. The early part of the week would be used for the extensive committee work required prior to plenary meetings. For the 30 members who belonged both to the Supreme Council and the CA the workload promised to be horrendous: six days of plenary meetings, plus both assemblies' committee work and other preparation.

Bitter experience with some Supreme Council members, who collected their pay but hardly ever showed up, resulted in a decision to pay the CA members on a per diem basis, that is, for the days they actually appeared for plenary or committee work. Furthermore, members who had not attended at least one-half of the plenary sessions were to be barred from voting on the final project. (The latter requirement was soon forgotten. Given that the Supreme Council insisted that the CA adopt a project with at least 31 positive votes, it was in the CA's interest not to disqualify anyone.)

The informal committee also set up a timetable, a measure essential in view of the short time span of two months allocated to the CA. This initiative came from Peet Kask, who remembered how the Supreme Council had wandered aimlessly during its first months in 1990, after the crucial decisions about independence had been made. The deadline for accepting proposals for constitution drafts was set at 25 September, 12 days after the convening of the CA. (This deadline was later changed to 30 September.) Once one of the projects was chosen as the basis, committees were to work on their respective sections for three weeks, continuously bringing to the plenary meetings the articles they already had agreed on, and also those on which they had "agreed to disagree," that is, those items about which the committee was fairly evenly split. International experts had to be selected

and invited as soon as the CA convened so that they could make their arrangements to visit Estonia at the end of October. By that time the first round of revisions had to be completed. The second reading of the draft was to take place by 7 November, and the third one by 14 November.

Concerned that group loyalties and day-to-day politics might begin to override individual judgment on long-term decisions, I suggested an oath of office to counter such tendencies. I was assigned the task to draft the oath, and so I did, after midnight, at the home of the Buldas family, where I was staying. I scribbled the text, handcopied it cleanly, and the next day it was accepted by the informal group, with a couple of stylistic changes:

As a member of the Constitutional Assembly of the Republic of Estonia I realize that future generations are watching me, from times when I no longer exist. My work in formulating a constitution will be judged by history, and not by my contemporaries. When stepping over the threshold of the Constitutional Assembly, I shall leave behind the day-to-day politics of the previous week. I shall stand alone in the face of my conscience and shall try to be worthy of history.

#### **The First Two Sessions (13 to 20 September)**

The CA convened on 13 September 1991. Seats had been assigned randomly so as to minimize factional interactions. The opening speech was given by the formal head of state, Chair of the Presidium of the Supreme Council Arnold Rüütel, who was also a member of the CA. He read the oath of office and accepted with a handshake the signed oaths handed in by the other CA members. As had been agreed in the informal committee, the Chair and two Vice-Chairs were elected on a single ballot, using effectively the Single Nontransferable Vote procedure (see Taagepera and Shugart 1989:28). Each member had one vote; the largest vote-getter became Chair, and the next two became Vice-Chairs. At the end of nominations only three candidates remained on the ballot: Lauri Vahtre, a junior member of the Congress leadership; Ülo Uluots, a member of the Free Estonia group; and Tõnu Anton. Overeager backbenchers actually nominated several prominent leaders of the Congress and Popular Front, but they all declined. So did Valeri Kois, a Russian with pre-1940 Estonian citizenship. The votes were: Anton 35, Vahtre 16, and Uluots 1. The support for Uluots was actually larger, but the Free Estonia group figured that their man would win the vice-chairmanship anyway, even with a single vote, and they threw their other votes to Anton whom they preferred to Vahtre as Chair.

After a lunch break I gave a scholarly overview (largely based on Lijphart 1984) of the differences between majoritarian and consociational democracies and between federal and unitary states. I reviewed the strengths and weaknesses of parliamentary, premier-presidential and presidential

systems (largely on the basis of a draft of Shugart and Carey 1992), recommending moderation in whatever direction was chosen. The data I presented suggested that parliamentary democracies tend to be slightly more stable than the presidential varieties. The texts of the three previous Estonian constitutions were distributed, and Minister of Justice Jüri Raidla presented his views on various desiderata, proposing a constitution located between that of 1920 (ultraparliamentary) and that of 1938 (ultrapresidential). He outlined the broad chapters in a draft constitution his team was preparing so that committees could be composed on that basis.

The session ended early after the members wrote down their individual committee preferences and authorized the elected Assembly leadership to compose these committees. Kask and Pärnaste were empowered to coopt other members to finalize the bylaws. What was accomplished in this brief session might have been drawn out over many weeks if there had been less preparation, spirit of cooperation, and luck.

At the second session (20 September) seven committees were set up. The Chair's name and loose affiliation are shown below.

- I. Preamble; Generalities; Legislation; Amendment--Vello Salum, ENIP
- II. Basic rights and duties of citizens--Vardo Rumessen, ENIP
- III. Parliament; Government; Budget--Illar Hallaste, Christian Democrat
- IV. President--Peet Kask, Popular Front
- V. Defense--Enn Tarto, Republican
- VI. Courts; Chancellor of Justice; State Audit--Jüri Rätsep, Popular Front
- VII. Local Government--Kalle Jürgenson, Christian Democrat

An effort was made to include members of significant groupings in all committees, so that a consensus reached in committee would be likely to stand in plenary meeting. For this reason the number of committees was kept down to seven. Committee chairs came mainly from the Congress, while Free Estonia and the Russians had none. One reason for this imbalance was that the CA members who also belonged to the Supreme Council were overloaded with Council tasks and declined. Some committees visibly had a much wider scope than some others; it is not entirely clear how this was decided.

The seven Russian members were spread thin. Most of them rarely attended the CA sessions. They did not seem to have much interest in details, apart from the rights of citizens and noncitizen residents. Their ability to participate was further limited when Estonian was chosen as the sole working language of the CA. Most of the Russian members understood and spoke Estonian poorly, if at all, despite having lived in Estonia for many years. Their statements at the plenary sessions had to be presented in Estonian translation, the more so because three CA members came from

abroad (Finland, Sweden, California) and did not understand Russian. However, in some of the committee discussions, statements in Russian were accepted.

The bylaws were adopted at the second session. An attempt to form official political factions within the CA was voted down, as was an attempt to establish a quorum requirement, which would have given the most passive members a stranglehold on the proceedings (as was the case in the Supreme Council). Henceforth the CA could begin its sessions regardless of how many members bothered to show up on time. (The lowest number of members attending was 15, on 23 November 1991.) The absentees knew that crucial decisions might be taken without them--and this was a major incentive to attend. The lack of a quorum requirement was essential for the successful functioning of the CA. The initial deadline for proposals for the draft constitution (25 September) was quite short and could hardly be met unless one had a project prepared before the unpredictable events of August 1991. Only one proposal, that of the Raidla team, reached the CA in time and hence the deadline was extended to 30 September. Meanwhile, there was some inevitable spinning of the wheels at the CA. Eventually, four projects were submitted, plus the recommendation to stick with the Constitution of 1938.

### **The Constitutional Proposal Alternatives (21 September to 11 October)**

The project of Minister of Justice Raidla was submitted first, and the CA began to discuss it in committees to get some practice while waiting for further submissions. To me, the Raidla draft looked disappointingly presidential, after the balanced speech Raidla had given at the opening session. Kask and I had considered preparing a parliament-oriented draft but the work was overwhelming for such a short time, and the Raidla project had promised to be an adequate starting point. Now it looked like an uphill struggle to purge it of the worst excesses of presidentialism such as extensive decree powers.<sup>8</sup>

The second project was presented by Ando Leps, a maverick lawyer. Its juridical form was solid but in content it was a superpresidential clone of the 1938 Constitution.

A formal proposal to proceed from the 1938 Constitution was made. Its proponents recognized that it could not work under the current circumstances but they recommended that its validity be reconfirmed for the sake of legal continuity, and that the new constitution be worked out following the amendment rules stipulated in the 1938 Constitution. Unfortunately, this procedure involved a President and an Assembly that no longer existed and could not be readily recreated. If the CA had met one month earlier, under conditions of Soviet claims on Estonia, this proposal might have had considerable appeal, as another symbolic assertion of the continuity of Estonian independence during the occupation. But in October

1991 this motive was lacking and even those who might have liked the superpresidential aspects of the 1938 Constitution largely realized that Soviet disruption of institutional continuity made its reintroduction impossible.

Finally, just before the deadline, two parliamentary projects were submitted, both by people who had been too busy with intellectual endeavors to complete their higher education. One draft was basically designed by ENIP member Jüri Adams. It was a solid expansion of the 1920 Constitution, avoiding its superparliamentary weaknesses and inserting some aspects of the 1938 Constitution, such as the position of Chancellor of Justice. It was unfortunate that this project was submitted by a group of ENIP members, pointedly to the exclusion of other supporters of parliamentarism. Indeed, it was touted as the "ENIP project," which obviously made its adoption harder for those CA members who liked parliamentarism but had reservations about ENIP. Party politics threatened to enter the debates within the CA.

The other parliamentary project was presented by Kalle Kulbok, leader of the Royalists. Kulbok had narrowly failed election to the CA on the Popular Front slate at the Estonian Congress. His draft was appealing because of its brevity. It largely followed the 1920 Constitution while avoiding its parliamentary excesses, and it condensed some complex matters into breathtakingly clear and concise prose. A major deviation from all other projects was a change in the country's official name, from "Republic of Estonia" to simply "Estonia," so as not to preclude a shift to monarchy. As an outsider, Kulbok did not stand a chance, and he eventually withdrew his draft, after presenting its defense at the CA, as did all the other authors. Various Estonian legal experts (mainly Soviet-trained) were also invited to come and comment on the drafts.

The decision on 11 October followed the standard voting procedure adopted by the CA, which was essentially an approval vote (see Taagepera and Shugart 1989:13). All competing proposals were voted upon separately, counting only the positive votes, and the one with the lowest votes was eliminated. This procedure was repeated and the winner of the final round was then submitted to a simple plurality vote. If there were more nays than yeas, a completely new proposal would have to be worked out.

For the draft projects, the first round gave Adams 29, Raidla 25, "1938" four and Leps one vote. The second round was 29-26-6, while the third was Adams 29, Raidla 22. In the subsequent simple plurality vote, Adams won approval with 37 votes.

Given the fairly narrow margin between Adams and Raidla, it is not surprising that most subsequent changes went toward increasing the presidential powers. If Raidla's project had been narrowly adopted, changes might have gone in the opposite direction, and the final text produced by the CA might have been only moderately more presidential. However, in view of the political pressure brought on the CA to make its final text more presidential (as described later on), this is not certain. The choice of the

starting draft set the scene for an essentially parliamentary outcome. This article will give only a cursory overview of the subsequent events, once this crucial decision was taken.

### **The First Reading and Foreign Experts (12 to 29 October)**

The preparation for the first reading involved massive committee work. The items approved by committee consensus usually passed the plenary with little discussion. Most plenary time was spent on those items in which the committees recognized an internal split. At the time I made a detailed analysis of voting at some early joint sessions of the "Parliament" and "President" committees, in which I participated by fax. Opinions tended to diverge along philosophical lines that did not coincide with the existing political groupings.<sup>9</sup>

Each of the seven committees was authorized to invite up to three foreign experts. Of these, eleven actually materialized. They spoke at the plenary CA, on 28 and 29 October, and also consulted in committees.<sup>10</sup> Four of them also sent written comments later, and so did several other experts who did not visit Estonia.<sup>11</sup> All of them were presented to the CA as law specialists; political scientists were notably few. It was as if the CA conceded that the world might offer superior legal advice but felt that all the necessary political wisdom existed in Estonia. More likely, given that political science was not allowed in the USSR, CA members simply had not internalized the fact that political science existed as a field of expertise distinct from legal studies. Contradictory advice was given at times, as one might expect.<sup>12</sup> Much of the attention focused on human rights.

### **The Second and Third Readings (31 October to Late December)**

This phase began with virulent attacks against the emerging parliamentary constitution, both in the CA and in the press, by the proponents of presidentialism. In the Assembly, Ülo Uluots desperately tried to change one article after another to favor presidential rule but with very limited success. In the press, the CA came to be presented as an illegitimate "self-appointed" body that should be replaced by a task force of "experts," meaning Soviet-trained lawyers. It was utter demagoguery but it dominated the press, where positive evaluations of the CA were scarce.<sup>13</sup>

In the CA committees and plenary sessions many issues that had been voted upon were reopened, and the outcomes at times changed markedly.<sup>14</sup> On 8 November a new committee was formed, a redaction committee to edit and coordinate the various chapters that up to then had been debated in relative isolation. This led to inconsistencies in content and terminology. The committee was headed by Liia Hänni (Rural Center Party, another outgrowth of the Popular Front) who had stood out by the way she had solved a major deadlock in the Local Government committee.

As the deadline set in September for the conclusion of the CA's work arrived (15 November), the task was not completed. Clearly several more weeks were needed. Adams and some other Estonian Congress leaders expressed to me their concern that the Supreme Council might insist on the deadline it had set and disband the CA as a failure. This did not happen, but tensions remained. The Supreme Council decided that the CA must present the constitutional draft and also the implementation laws by 20 January 1992.

During the Third Reading (from 22 November) the chapter committees continued to meet but the focus was on the redaction committee. The CA decided on 13 December (by 31 to 4, 2 neutrals) to make the draft public and invite comments. It also formed a committee, with one member from each chapter committee, to start work on the implementation laws.

### **Public Debate and Implementation (January and Early February 1992)**

Some 500 persons, groups, and organizations sent in recommendations of various lengths that went in extremely diverging directions. Only two widespread demands emerged: to call the head of state *president* rather than *riigivanem* (literally, state elder) as proposed in the draft, and to have direct presidential elections, instead of election by the parliament. The CA acceded to the change in the name, by 16 votes against 14 and 4 neutral (16 January 1992). Direct elections were rejected at the time but a compromise was later made: The first presidential elections would be direct; however, the decision would revert to the Parliament if no candidate obtained an absolute majority.

The redaction committee continued its work but attention was concentrated on how to phase in and implement the new constitution. Initially, these transitory measures were intended as an additional chapter of the constitution itself. Therefore, a new "Chapter 16" committee was formed on 10 January, headed by Kalle Jürgenson, who previously chaired the Local Government committee. A major bone of contention was the new committee's proposal to block former Communist powerholders from running for office during the first ten years. It led one CA member to accuse the CA of indulging in day-to-day politics by initiating political repression. He resigned from the CA but soon reconsidered.

The work of the CA clearly extended much beyond the planned two months; attacks against it continued. A most serious challenge came in January 1992 at a meeting of provincial administrators, where disbandment of the CA was demanded. Head of state Arnold Rüütel, a proponent of strong presidential powers, attended the meeting and accepted the resolution in a resigned voice, but many felt he had actually engineered the show. However, a public opinion survey (reported in the CA minutes of 16 January 1992, p. 29) indicated a 60% level of support for a moderate presidency, in line with the draft by the CA. The Supreme Council overwhelmingly

defeated a proposal to disband the CA but directed it to begin cooperation with an "expert group" headed by Minister of Justice Raidla and "other experts" to introduce "necessary changes" in the draft constitution before submitting it to the Supreme Council (16 January 1992). This political pressure again put the main action into the redaction committee.

### **The "Final" Votes (14 and 28 February 1992)**

On 14 February the project was deemed as finalized as it would ever get and two major votes took place. The implementation laws were separated from the constitution but were to go to a referendum as part of the same package. Thereafter, the motion "To Approve of the Draft Constitution and to Transmit It to the Supreme Council and the Estonian Congress for Submission to a Referendum" was adopted by 32 votes in favor, 3 opposed, and 6 neutral. Only 41 of the 60 CA members were present. From the viewpoint of good sense, the margin was overwhelming. However, an absolute majority (31 votes) of all members was required by the Supreme Council, and the decision just barely satisfied that requirement. The CA pointedly transmitted the draft not only to the Supreme Council but also to the Congress and intimated that the next step must be a popular referendum rather than any further reworking by the Supreme Council.

The debate on the implementation laws continued, including stylistic revisions by the redaction committee. These laws were approved on 28 February, by a margin of 28 to 3. The CA Chair Anton voiced the opinion that the 31-vote requirement did not apply in the case of implementation rules and the Supreme Council did not challenge him. The article that would prevent top communists from running until AD 2000 was adopted separately, to be put on a referendum as a separate question. The vote was 20 for and 8 opposed. This seemed like the last session of the CA. But one month later it was hurriedly convoked again.

### **The Crisis (March and Early April 1992)**

The Supreme Council debated from 16 to 19 March whether to treat the draft constitution like any other draft law, subject to amendment by the Supreme Council, or whether to vote only on the issue of having a referendum on the CA project as it stood. The last course of action won, 59 to 7. Then, however, the Supreme Council decided to return the draft to the CA, by a vote of 59 to 4 and 5 neutral, claiming that the draft "lacked consensus among the Estonian people," something one might think the referendum was meant to determine. The Council asked the CA to "coordinate" its draft with the "expert group" of the Supreme Council lawyers. Thus, while claiming to honor the agreement of 20 August 1991, the Supreme Council effectively rejected it, unless the CA's product was adjusted to the taste of the Council's presidentialist majority.

The Estonian Congress reacted angrily on 22 March. It not only approved the draft for submittal to a referendum but added an ultimatum: If the Supreme Council could not initiate the referendum by 16 April, then the Congress would do it on its own. The vote was 234 to 3. The Tallinn City Council, usually not very supportive of the Congress, agreed with it this time.

The CA reconvened on 27 March with little advance notice. The session was opened by Rüütel who claimed that the draft lacked a clear majority in the CA itself and that it was criticized by "experts in state law." He presented only two alternatives, omitting that of accepting the draft: either dump the draft completely or continue work to make it "reflect truly democratic principles" (which he did not specify). He graciously came out in favor of the second option. Thereafter, the positions of the Supreme Council and the Congress majorities were presented to the CA. The redaction committee proposed further refinements of style but also transmitted some of the proposals presented by the Raidla "expert group."

This work continued on 3 April. Dozens of terminology issues had been pinpointed during the CA recess in March.<sup>15</sup> Some of the existing ambiguities could have considerable impact. For example, during a change of cabinet, a strict reading of the existing text would imply the simultaneous existence of two prime ministers, the outgoing and the incoming. On the other hand, some of the proposed changes involved a subtle shift in the powers of the President, such as his ability to propose a second candidate for prime minister in case his first nominee was rejected by the Parliament, or his ability to turn to the State Court, if the Parliament reasserted a law the President had vetoed.<sup>16</sup> One would think that such issues would have been settled during the first reading in October or caught by the Western experts, but clearly some questions were still unsettled in April. Another year of debates probably would not have improved the outcome but would have produced a continuing seesaw battle between opposing viewpoints.<sup>17</sup>

The CA decided not to reopen the issue of Presidential election within the framework of the constitution itself, which continued to stipulate election by the Parliament (or in case of a deadlock, a wider electoral college). However, the implementation law was changed so as to make possible the direct election of the first President, provided that it produced an absolute majority for one of the candidates. Meanwhile, the implementation law was still being studied by experts of the Ministry of Justice, and the CA was still waiting for the Supreme Council decision.

### **The Denouement (10 April to June 1992)**

The CA held its thirtieth and last session on 10 April. It completed the last revisions of the constitution, voting on individual changes but not revoting on the entire document. Indeed, attendance did not surpass 31, the minimum vote set by the Supreme Council, and some of those present

would not have voted in favor of the project. Essentially, the 14 February vote was still considered valid. The CA also put the last touches on the implementation laws which now allowed top Communists to run for Parliament and President but not to be appointed to various nonelective positions. The last task of the CA was to word and approve (by 22 to 2) an address to the Estonian people, recommending adoption of the constitution. The total votes amounted to 24. Thus the finale was witnessed by only 40% of those elected to the CA.

A referendum to be held on 28 June was announced by the Supreme Council only two months in advance. It included the draft proposed by the CA as well as the implementation laws, to be voted on as a single package. The special article regarding temporary exclusion of former top Communists from top posts had vanished from the implementation. It is unclear who made this decision, but it was made after the last session of the CA. Instead, a vague "oath of conscience" appeared, by which candidates and appointees denied any secret collaboration with the KGB. (Open KGB employment or collaboration seemed to be acceptable!)

Despite a last-minute negative media blitz by some stalwarts of the 1938 Constitution and other presidentialists, both "white" and "red," the new constitution was adopted in a referendum by a majority of 91%. The CA disbanded. So did the Supreme Council and the Congress, once the parliamentary and presidential elections were held (September 1992) in conformity with the new constitution. Adoption of a constitution did not make Estonia's social and economic problems go away but it supplied a political framework for solving them at a time when most neighboring countries (such as Russia) continued to be plagued by the absence of such a framework.

### Notes

1. In a conference paper (Taagepera 1993b) I went beyond chronology and outlined an analysis of the process and the participants, but I find it difficult to finalize this part. My account of the events is partly based on direct observation and participation as an elected member of the CA. However, I could physically participate during only a few weeks in September and November 1991. For the rest of the debates, I depend on the transcripts of the proceedings and other written materials and communications. I am very much indebted to Peet Kask for supplying me with these materials.
2. At most three presidential candidates could be nominated by the respective majorities of the local councils (appointed by Päts), the Upper Chamber (largely appointed by Päts), and the Lower Chamber. In almost-free Lower Chamber elections, Päts achieved a moderate majority, which enabled him to become the sole presidential candidate. He was

confirmed without being subjected to popular election. Given his majority in the parliament, he did not have to resort to many of the powers available to the president under the constitution, and so the impression of moderate presidential powers was preserved.

3. When the Russian government began to voice openly neocolonialist ambitions in the aftermath of the Russian 1993 elections, some of its spokesmen renewed the false claim of Estonia joining the USSR "voluntarily." The decrees that the "strong" president signed under duress, in 1940, do not help to clarify the Estonian position.
4. I was elected to the Congress from my childhood home town, Tartu, while residing in California.
5. Although I belonged to the same party as Savisaar (People's Center Party, one of the parties that evolved from the Popular Front), I reacted strongly against this proposal in a TV appearance and contributed to its withdrawal.
6. In 1990, the Congress organizers consulted me and I suggested this square root formula on an intuitive basis, as a Limited Vote (see Taagepera and Shugart 1989:28-29) compromise between the undesirable aspects of the "unlimited vote" for X candidates on the one hand and the utterly limited Japanese Single Nontransferable Vote (Taagepera and Shugart 1989:28) on the other. I have not yet found a theoretical justification for this formula but still like its effects.
7. As an example of cross-voting, although I belonged to the minority Popular Front slate, I received the second-highest number of votes, behind Jüri Adams, who was working on a draft constitution on behalf of ENIP. An interesting side aspect of the Congress convention was unprecedented activity by the 43 advisory members elected to the Congress by those post-1940 immigrants willing to consider themselves as applicants for future Estonian citizenship. (Some 8% of all colonists participated in 1990 in the election of these advisory members--but they have not received any preferred treatment over the rest of non-citizens, as of early 1994.) Given that the Russian members of the Supreme Council could participate in the election of CA members, the advisory members of the Congress claimed the same right, reminding the Congress that they had been exceptionally loyal to the cause of restoration of Estonian independence when the going was tough. The Congress acceded, and the advisory members participated in the vote. However, none of them received sufficient votes to be elected to the CA. Fewer votes per member might have given them some representation.
8. I had to leave to teach at the University of California, from where I faxed to the committee a long list of proposed changes to the Raidla draft.
9. For instance, the only other person with exactly my voting pattern was Viktor Niitsoo, an ENIP member with whom I had acrimonious debates on current issues a year earlier.

10. The following foreign experts attended. Those indicated by asterisks were sent by the Council of Europe. Claus Bernholdt(\*) (Berchtold? Bertholdt?--the minutes are unclear), legal advisor to the Chancellery of Austria on human rights and state law; Guy Carcassonne, Professor, University of Paris, and member of the Constitutional Council of France; Peter Germer, Professor of state law, Aarhus University, Denmark; Erik Harremoës(\*), Denmark, head of the delegation of the Council of Europe, and its Legal Director; Roman Herzog, President of the German Federal Constitutional Court; Tim Macpherson, Dean of Law School, York University, Toronto, Canada; Hans Ragnemalm, Professor and Parliamentary Ombudsman, Sweden; Matthew Russell(\*), senior legal adviser to the Irish Government; Matthew Shugart, Assistant Professor, International Relations, UC-San Diego; Antti Suviranta(\*), President of the Finnish Supreme Administrative Court, Zierlein, who apparently talked only in committees.
11. Written comments were sent by Herman Schwartz, American University, Washington, DC (25 October 1991); and much later by the Minister of Justice of Germany (3 January 1992); by law professor Peter Häberle, Bayreuth University, Germany (8 January 1992); by Germer (14 January 1992); by Ragnemalm (20 January 1992); by Suviranta (23 January 1992); and by Carcassonne (3 February 1992). The draft constitution was also discussed in a Council of Europe report on human rights in Estonia (18 November 1991), prepared by Raimo Pekkanen, Judge of the European Court of Human Rights, and Hans Danelius, Member of the European Commission of Human Rights.
12. The position of Chancellor of Justice was considered overly powerful by Ragnemalm and Bernholdt. Carcassonne and Russell felt the Prime Minister's position was too weak.
13. I was in Estonia for 10 days in November 1991 and wrote a series of three articles in *Rahva Hääl*, the main Tallinn daily, explaining the CA procedures, comparing the draft constitution to the previous Estonian constitutions, and explaining why the Supreme Council should give the CA an extension.
14. For instance, I reintroduced the equivalent of the US Fifth Amendment, against self-incrimination. The original Adams draft contained it, but it had been eliminated, apparently on the advice of European law experts.
15. An example of a terminology issue was the "Fifth Amendment" sentence that originally read "No one can be compelled to bring witness against oneself or one's close ones." The term used, *sundima*, has the dictionary translations "to force, compel, make do, coerce, constrain, oblige, drive, urge to, impel, induce" (Saagpakk 1982: 880). Which of these different connotations was meant?--only physical coercion, or also indirect inducement? The language specialists had induced a change to *kohustama*: "to oblige, bind, engage, put under obligation, obligate, bind over (to do), commit" (Saagpakk 1982:307). In April *sundima* was

readopted. Was it a pointless haggling over a word the meaning of which could emerge only through interpretation in courts? Not quite. The courts would be looking, among other things, for the original intent, and the three pages of comments in the CA minutes go a long way to clarify such intent.

16. The President's ability to refer a law to the state court was inserted but with no stipulation on how soon the court must respond. Starting in April 1993, President Lennart Meri began to claim unconstitutionality of many laws passed by the Parliament. The latter was left with the choice between changing the laws to suit the President or facing an indefinite delay in court, something politically impossible in the case of urgent laws such as the one on reprivatization of housing (April 1993). The President had gained a stranglehold over details of legislation, a possibility no one foresaw during the CA debate. After this success, President Meri continued to look for further loopholes in the constitution in late 1993 but was beaten back in January 1994 when he tried to claim a constitutional right to block the Prime Minister from replacing some members of his cabinet. This is the way tradition is built to complement the written constitution.
17. Witness the seesaw struggle between inclusion/exclusion of the "Fifth Amendment" (Note 14) and, within it, the battle between the terms *sundima* and *kohustama* (Note 15).

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