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# Constitutional Development of Estonia in 1988

Igor Gryazin\*

I have had many a chance to familiarize myself with different assessments and interpretations of the constitutional developments in Estonia, one of the Soviet Union's fifteen republics, both in Moscow and in the Western press. These assessments and interpretations vary between two extremes: (a) constitutional reforms in Estonia are just a face-lift repair of the juridical facade of the Soviet political system that does not influence the essence of the system; and (b) these reforms are manifestations of radical nationalism and separatism; in substance, the Estonian Soviet Socialist Republic (ESSR) attempted to secede from the Union of Soviet Socialist Republics (USSR) in 1988.

In the context of shortage of information and of the differences in political backgrounds and subjective aims of those who interpret the constitutional events in Estonia, these differences can well be understood. Thus, in the present Paper, I attempt to fill the information vacuum, as well as to demonstrate that neither of the above extreme characterizations are justified. I hereby formulate this conclusion: at the first stage, the constitutional reform in the Estonian SSR was aimed at dismantling federal dictatorship in the Republic and at preserving Estonia's membership in the Union on the basis of democratic federalism. The present Paper consists of nine parts: (1) the constitutional history of Estonia; (2) precursors of the constitutional reform; (3) the text of the draft amendments to the Constitution of the Estonian SSR; (4) commentary on the "Addenda"; (5) the speedy evolution of events; (6) the November 16, 1988 session; (7) procedure for registering federal laws in the Republic; (8) the federation's reaction; and (9) constitutional conflict.

Two remarks must be made before we proceed to the Paper itself.

First, constitutional reform, as any other important political process, does not occur at once. The year 1988 was only the beginning of constitutional reform in Estonia. Thus, my Paper is not a motion picture about the constitutional reform, with the word "end" coming in conclusion, but rather a photo of the situation that has taken shape by March 1, 1989. Despite that at present no one can predict the end of this story, I hope that this "photo" will be of interest to my American colleagues who are so keen on everything that concerns constitutionalism. It is not that the development of Estonia's constitution (with a mere 1.5 million residing in the Republic!) has any global significance, but rather that the process of constitution-making itself is juridically interesting. This process

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raises, as a rule, a number of general theoretical questions that are usually ignored, or overlooked, at "quiet" or ordinary times. Perhaps, my esteemed American colleagues will read these lines with a certain nostalgic feeling, reminiscent of their nation's halcyon days when it had to solve many similar problems.

In contrast to a confederation, which, for reasons of its relative instability, must heed the interests of its members seeking consensus, a federation, by virtue of its legal nature, is the unity of two relatively equipowerful, acute dialectical opposites: the federal power's tendency toward maximal centralization and the federation members' tendencies to maximally preserve their independence. This dualism, apparently, is inescapable.<sup>1</sup> This phenomenon, at the level of state law, is common to both the United States and the Soviet Union. If we engage in looking for analogies to 1988 Estonia in the history of the United States, then the present situation in the Republic can be likened to 1798-1799, the years of friction between Federalists and Republicans regarding the Alien and Sedition Acts<sup>2</sup> and the so-called Kentucky Resolutions.<sup>3</sup> The ideas of these resolutions are largely consonant with the intellectual groundwork of Estonia's constitutional reform.

Second, many emotions and passions have arisen around the constitution and its reform in Estonia, both in Moscow and in the Republic itself. Naturally, political, rather than academic juridical considerations are behind many moves. Constitutions cannot exist isolated from politicians, at least at the formation stage. I will ignore this aspect of the problem, however, although it is quite interesting. Nor will I dwell on the issues of Estonia's social development in the past few years, which played the decisive role in the development of the constitutional reforms in 1988. I will also refrain from discussing the events that unfolded during the adoption of the documents; evidently, these events have not remained undescribed. Instead, I will just try to present, without indulging in emotions and making assessments, a doctrinal analysis of some documents of milestone significance for Estonia's recent constitutional development.

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1 2 L. DUGUIT, *TRAITÉ DE DROIT CONSTITUTIONNEL* 144 (3d ed. 1927). It was no coincidence that Duguit in his time noted that no juridically correct concept of sovereignty was feasible in a federal state.

2 The Alien and Sedition Acts collectively refer to four individual acts passed during the summer of 1798: the Naturalization Act, ch. 54, 1 Stat. 566 (1798); the Alien Act, ch. 58, 1 Stat. 570 (1798); the Alien Enemies Act, ch. 66, 1 Stat. 577 (1798); and the Sedition Act, ch. 74, 1 Stat. 596 (1798). The first three acts—the Alien Acts—made it more difficult for aliens to remain in the United States by increasing the residency requirement for naturalization and by authorizing the President to deport those aliens whom he deemed dangerous to national security. The Sedition Act made it a crime to impede the operation of government or to libel the government in speech or writing. For a discussion of the political and legal controversies surrounding the passage of these acts, see J. SMITH, *FREEDOM'S FETTERS* (1956).

3 The Kentucky Resolutions, drafted by Thomas Jefferson, attacked the constitutionality of the Alien and Sedition Acts. See generally D. MALONE, *JEFFERSON AND THE ORDEAL OF LIBERTY* 395-409 (1962); Koch & Harry, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 WM. & MARY Q. (3d. ser.) 145 (1948). The United States Supreme Court, however, did not formally declare the Sedition Act unconstitutional until *New York Times Co. v. Sullivan*, 376 U.S. 254, 276 (1964).

As far as I know, the English text of the Constitution of the USSR adopted in 1977 is easily accessible to experts in the United States, so I will refrain from quoting from it.<sup>4</sup> The Constitution of the Estonian SSR, adopted in 1978, which is obviously less accessible in the United States, was, in effect, a copy of the federal Constitution and did not incorporate anything original until November, 1988. That is why, when speaking of the Estonian Constitution, I will also refer to the corresponding articles of the federal Constitution.

Finally, I would like to take this opportunity to express my gratitude to my American friends: Professor John B. Attanasio (Professor of Law, University of Notre Dame, Indiana) and David Good (then acting Secretary of State of Montana) for their invaluable recommendations, without which some of the documents listed below could not have been drafted. It is not our fault that our common advice, particularly about the undesirability of adopting the "supremacy clause," was never realized. Obviously, the theoretically optimal way of constitutional reform and its real implementation through the parliament, which is influenced by factors other than purely legal arguments, never coincide completely.

Comforting myself in this way, I shall get down to business.

### I. The Constitutional History of Estonia

Let me begin with a brief outline of Estonia's state and legal history in the twentieth century. Before the 1918 revolution in Russia, the modern territory of Estonia, populated mostly by Estonians, was part of the Russian Empire, which annexed this territory after the defeat of Sweden in 1721. The territory was divided between two administrative-territorial units—provinces or *gubernias* in Russian. During the Civil War in Russia and the Estonian liberation war, Estonia acquired self-government and independence within its modern confines. The first constitution of Estonia was adopted in 1920 when Estonia became a parliamentary republic, and in 1921 Estonia joined the League of Nations. Later, in 1934 and 1938, two constitutional reforms were carried out there, and as a result, Estonia became a presidential republic.

In 1940, Estonia was admitted to the USSR as a result of the 1938 Molotov-Ribbentrop Pact, which divided the spheres of influence between the USSR and Germany.<sup>5</sup> The sovereign existence of Estonia was ended, and the Republic was renamed the Estonian Soviet Socialist Republic. The power of the 1936 Constitution of the USSR was extended

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4 The changes introduced into the Constitution in November-December 1988 have been published in the United States (*see infra* note 19), but these changes are of no principal importance for our topic.

5 Germany alone recognized the act of Estonia's joining the Soviet Union. [Since the original drafting of this paper, the Soviet Congress of People's Deputies has condemned the Molotov-Ribbentrop Pact. *See* Fein, *Soviet Congress Condemns '39 Pact That Led to Annexation of Baltics*, N.Y. Times, Dec. 25, 1989, at A1, col. 2. *Ed.*]

over Estonia.<sup>6</sup> Nevertheless, the question of the legal basis of Estonia's joining the Soviet Union remains unresolved.<sup>7</sup>

The acting Constitution of the Estonian SSR came into force in 1978. It copies the less fortunate (in the legal sense) Constitution of the USSR adopted in 1977, as has already been mentioned.

## II. Prerequisites of the Constitutional Reform

The main constitutional reforms of 1988 were intellectually inspired by the decisions of the nineteenth All-Union Conference of the Communist Party of the Soviet Union, the June and September Plenary Meetings of the Central Committee of the Communist Party of Estonia, and the program theses of the new, massive political movement—the Popular Front of Estonia. It was necessary to fix the achieved level of democratization of society and to provide guarantees that could rule out any possibility of a return to the totalitarian past.

The first impetus to the reforms in Estonia was the idea of Estonia's transition to complete cost-accounting and economic self-government put forward in September 1987 by four economists and politicians: Kallas, Made, Savisaar and Titma. The economic essence of the "proposal of the four" was that the Estonian SSR, remaining within the Soviet Union, had to enter equal commodity-economic, rather than administrative-subordinate, relationships with the federation, if the former was to achieve the effectiveness of its economy. Estonia had to spend what it had earned and to do it in the way that was most profitable for it. On the other hand, Estonia had to have the right to everything it had earned except that part of the earnings that would go to the federal funds according to pre-set quotas.

The evolution of this idea brought forth the realization that implementing economic self-government presupposes the Republic's political competence and its protection from any interference by the federal authorities in its internal affairs, i.e. the restoration of the state sovereignty which has so far existed only formally.<sup>8</sup>

All the Republic's newspapers started to carry hundreds of statements on the matters relating to the constitutional development of the Republic under the conditions of restructuring in the economy. Thousands of people took part in the discussion. This massive movement had a negative aspect, too. A great number of ideas and proposals, which not only complemented, but also opposed each other, often overshadowed the understanding of the general idea. The line of difference between the main and the secondary ideas was obscured, and the discus-

6 A paradoxical fact: contrary to the massive Stalinist crimes, the Constitution of the USSR adopted in 1936, which was *formally* in effect at that time, was quite democratic. It contained many civic freedoms, including freedom of the press and freedom of social organization. It also did not include a provision giving supremacy to one political party. This was added in the 1977 Constitution and still remains. See KONST. SSSR art. 6.

7 The events of 1940 in Estonia were described by many historians, and I don't feel in the position to analyze them historically. The legal aspects of the matter are only starting to be analyzed in earnest.

8 See KONST. SSSR art. 76; KONST. ESSR art. 68.

sion itself turned into an anarchy of opinions. A document, a text, that could concentrate the people's intellectual potential at key aspects of the fundamental law was necessary.

In a sense, the text of amendments to the Constitution of the Estonian SSR, later called "the Gryazin project," provided the point of departure for the constitutional reform in Estonia. It was published on September 28, 1988, as a draft for further discussion. As its author, I would like to dwell on several aspects of this project.

First, this project is not the fruit of the efforts of a single person or any official group. It formulates and systematizes some of the ideas that were in the air in September of 1988. That is why in the further narration I will subsequently refer to it as "Addenda."

Second, the publication of this document was not an official act, but an initiative of a group of scientists.

Third, the document was intended for at least a six-month discussion.

Fourth, adoption of the articles in question was regarded as a temporary measure to be in effect before the adoption of the new Constitution of the Estonian SSR. We meant to win time for this work.

Fifth, the publication of this document in the present Paper is connected to the fact that, for a number of objective reasons, and despite its drawbacks, this document became the basis and the program of the constitutional changes, which were subsequently implemented.<sup>9</sup>

### III. The Text of the Draft Amendments to the Constitution of ESSR

#### *Article 1*

The following amendments have a temporary character in the sense that the working out of the draft of the new constitution starts immediately after these amendments are adopted. These amendments are of a constant character in the sense that they present an inseparable and equipotent part of the acting Constitution of the Estonian SSR.

#### *Article 2*

The Constitution of the ESSR, together with these amendments, is the Fundamental Law of the Republic, which means that in case of necessity, observance is obligatory by all law-enforcing bodies—courts of law, courts of arbitration, procurator's offices, organs of state security and public order, as well as by all officials.

Any subordinate legal act by either Union or republican bodies, whether the act be in law, decrees, instructions, etc., shall be rejected and refused application if it is not in conformity with the Constitution of the ESSR.

Any ruling by the People's Court or departmental arbitration that refuses application of a legal act shall become valid and binding on all

<sup>9</sup> The text of the document presented here does not completely coincide with the text published in the newspapers. It has been edited and amended, e.g., the sequence of articles, terminology. I hereby present the final version, compiled on October 2.

courts and organs of state arbitration after it is affirmed by the Supreme Court or the State Arbitration of the Republic.

### *Article 3*

All all-union legal acts become effective in the territory of the Republic after they are registered by the Presidium of the Supreme Soviet of the Estonian SSR. Conformity with the Constitution of the Estonian SSR shall be the sole criterion for the registration of any legal act.

All all-union laws and other legal acts that were in effect before the adoption of the "Addenda" shall be considered as registered by the Estonian SSR. If during their application they prove contradictory to the Constitution of the Estonian SSR, they shall be refused application on the basis of the second paragraph of Article 2 of the "Addenda," about which the all-union body that passed the act in question shall be informed.

### *Article 4*

Pacts and declarations defending the rights of man and citizen, which are internationally recognized and ratified by the Union of Soviet Socialist Republics shall be an inseparable part of the law and order of the Estonian SSR.

### *Article 5*

The sovereignty of the Estonian Soviet Socialist Republic implies that the republic—represented by its bodies of state power, state administration and organs of justice—shall have the supreme power on the territory of the Republic. The sovereignty of the Republic is integral and indivisible; however, in the interests of the unity of the USSR—with the purpose of its preservation and development—the Estonian SSR shall renounce the execution of some of its sovereign rights. The limits of the competence of the Union of SSR and the Estonian SSR are specified by Articles 73 of the Constitutions of the USSR and the ESSR.

### *Article 6*

The Popular Front and other mass public movements shall be an inseparable part of the political system of the Republic together with the public organizations enumerated in Chapter 1 of the Constitution of the ESSR.

### *Article 7*

The territory of the Estonian SSR shall comprise the land, mineral resources, airspace, territorial waters and continental shelf recognized by international law. The sovereignty of the Estonian SSR and the state ownership of land shall imply the right of the organs of state power and administration to levy taxes for the use of lands independently from the juridical status of the land-user. The Estonian SSR shall have the right to

terminate the use of land if it does not correspond to the interests of the Republic.

#### *Article 8*

The sovereignty of the Estonian SSR shall comprise the right independently to issue securities. The rate of exchange of these securities to the securities of the Union of SSR and other states shall be determined by corresponding special agreements.

#### *Article 9*

State enterprises, situated on the territory of the ESSR, shall be the property of the Republic. The Estonian SSR, on clearly expressing its will, shall transfer some enterprises to the all-union or union-republic subordination. Union departments shall have the right to invest their capital in the Estonian SSR and derive profits from them with the consent of, and on the terms suggested by, the government of the Estonian SSR. Movable property of military units stationed on the territory of the Estonian SSR shall be the property of the Union of SSR.

#### *Article 10*

The product, turned out at the enterprises of the Estonian SSR and at the enterprises of the union subordination, shall be the property of the ESSR, outside the limits specified in Article 9.

#### *Article 11*

The Estonian SSR shall participate in the formation of the union budget, on the basis of parity, in common with the other union republics. The Estonian SSR shall make payments to the union budget within the limits of open budget contributions and in the form of fixed payments.

The participation of the Estonian SSR in all-union programs as well as the exchange of goods with the other union republics shall be performed on the basis of corresponding agreements.

The Republic shall be independent in utilization of revenues derived from its foreign economic activities. Part of such revenues shall go to the all-union currency fund on the basis of corresponding agreements.

The Estonian SSR shall have an independent responsibility for the foreign economic commitments of the Republic.

#### *Article 12*

The Estonian SSR recognizes the legitimate property of the citizens and juridical persons and provides for protection and inviolability of such property in a court of law. The all-union and foreign investments in the Republic and the profits derived from such investments shall not be subject to nationalization.

Except as confiscation in the form of punishment for a criminal offense, the compulsory alienation of property shall be conducted for com-



pensation only, the amount of compensations shall be determined either with the consent of the interested parties or by a court of law.

### *Article 13*

In the Estonian SSR, a citizen is subject to criminal proceedings exclusively for actions, but not for beliefs, political opinions or their expression.

### *Article 14*

The Estonian SSR shall provide legal protection of all basic civic freedoms, specified by Articles 45, 48, 49, 50 of the Constitution of the ESSR. This implies that any limitations on such rights or freedoms can be brought about exclusively by a court ruling.

Only an open law shall be binding on all citizens.

### *Article 15*

Besides the rights spelled out in the Constitution of the ESSR, citizens of the Estonian SSR shall have the rights:

- (a) to a healthy environment;
- (b) to free abrogation of the citizenship of the Estonian SSR;
- (c) to state insurance against unemployment;
- (d) to appeal before a court for protection of their constitutional rights and freedoms.

### *Article 16*

The list of basic civic rights and freedoms given in the text of the Constitution of the ESSR and the "Addenda" is not complete. The Estonian SSR shall provide state and legal protection of the universally recognized human rights not listed herein.

### *Article 17*

The freedom of conscience existing in the Estonian SSR implies the freedom of atheistic and religious activities and expression. All religious denominations shall be equal before the state and are separated from it.

### *Article 18*

The Estonian language shall be the state language of the Estonian SSR. The Estonian language shall be used in business correspondence of the bodies of state power and administration, institutions, enterprises and organizations. The use of the state language of the Estonian SSR and other languages is regulated by law.

### *Article 19*

The Estonian SSR shall provide for equality of all ethnic minorities residing on the territory of the Republic on the basic principle of cultural autonomy.

*Article 20*

The Estonian SSR shall have its own citizenship. Issues relating to the citizenship of the Estonian SSR shall be regulated by law.

*Article 21*

The new Constitution of the Estonian SSR shall be adopted after the national voting referendum. Only the citizens of the Estonian SSR shall participate in the referendum.

The new Constitution of the ESSR shall be adopted if two-thirds of the citizens of the Estonian SSR, who have the right to vote, approve of it.

#### IV. Commentary on the Addenda

This text requires comment. I will note that the very idea of initiating the constitutional reform in the form of amendments to the main text of the constitution was borrowed from the United States. I chose this way for a number of reasons:

(a) the absence of problems connected with the need to preserve the system and pattern of present text of the Constitution of the ESSR. Besides, the correction of the main text of the Constitution of the ESSR, which I attempted in 1987-1988, demonstrated that it was more expedient to compile a new addenda than to correct the main text satisfactorily;

(b) the technically simple way of complementing amendments with new articles; and,

(c) the clear line of difference between the old and the new text ("Addenda") of the Constitution of the ESSR, which enables a layperson to see the very essence of new constitutional provisions. In addition, complete preservation of the old text ruled out questions about preserving particular parts of it.<sup>10</sup>

Now let us switch over to the commentary on the articles given above.

*Article 1.* This article legally fixes the status of the Addenda, their equality to the main text of the Constitution of the ESSR, and the long-term objective—the creation of the new constitution. It is specified that the articles of the then existing Constitution of the ESSR must be properly applied in the new context provided by the Addenda.

*Article 2.* This article for the first time characterizes the subtitle of the Constitution of the ESSR as the fundamental law. Thus far, the public and professional lawyers have perceived the Constitution of the ESSR as a declarative political text and have not applied it in practice. However, the constitutional reform has meaning only if this article is there. If no one applies the constitution, then its content has no importance whatsoever.

<sup>10</sup> The example of changes introduced in the Constitution of the USSR in November-December, 1988 is quite demonstrative. By introducing changes in the old text, it was indirectly confirmed that the intact parts of the text were favored by the Supreme Soviet, despite that some of them were clearly unsatisfactory. This necessitated the reservation that the old articles were "conditionally" in effect which, in the purely legal sense, weakened the legal force of the Fundamental Law.

Taking decisions on concrete cases, the bodies responsible for applying the law have so far abstained from referring to the Constitution of the ESSR and refused to consider cases based on direct constitutional references. This article is binding on the bodies responsible for applying the law and requires that they refuse to apply subordinate acts (laws, decrees, instructions, etc.) when such acts contradict the Fundamental Law—thus stressing the special legal status of the constitution. Thus, the judicial branch acquires a power of its own as a branch isolated from the legislative and executive branches. This condition is the necessary prerequisite for the formation of a state governed by law. In order to create a uniform legal policy and to provide for its stability, the article stipulates that supreme courts sanction rulings on the constitutional character of legal acts. The latter condition makes such rulings binding on all courts. Subordinate courts, aware of the decision of the Supreme Court and the State Arbitration on a concrete case, will have to act according to that precedent; otherwise, lower court rulings will be reversed. The order suggested by this article, as demonstrated by the United States experience, makes it unnecessary to set up some new constitutional body with a new and special legal procedure.

*Article 3.* This article departs from the existing constitutional order that an all-union act, as an act issued by a higher authority, shall prevail over the republican act in case there is a discrepancy between the two. In particular, this is stipulated by Articles 74 and 173 of the Constitution of the USSR and by Article 75 of the Constitution of the ESSR. These provisions are based on a clearly erroneous legal assumption that equates the union republic, as a sovereign state, with an administrative unit of a unitary state, such as a region or a district.<sup>11</sup> At the same time, the relationships between the Union and the Republic are not the administrative relationships of subordination, but the union relations of the federation and the sovereign state. Consequently, at work here is the principle *lex specialis derogat generali*, which is especially evident when the republican law is passed *after* the Union law. In this case the principle is also complemented by the principle *lex posterior derogat priori*. Possible contradictions are not the result of an essentially contradictory character of the law, but an expression of a special opinion or original understanding of the union republic.

Departing from practical considerations, it is not expedient to conduct a retroactive procedure for all the acting all-union acts—the costs involved in the process would be exorbitant. Besides, most of these acts have been passed in conformity with the procedure and are, as a result, legally valid. The amendment does not reject the validity of legal procedures employed in the Republic, but provides the Republic with additional guarantees in this sphere.

Bearing in mind the necessity of legislative and procedural brevity, the present article recognizes the procedure stipulated in Article 2 of the Addenda. However, in contrast to Article 2, the right to initiate refusal of registration can be vested both in the Supreme Soviet of the ESSR and

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11 See KONST. SSSR art. 76; KONST. ESSR art. 68.

its Presidium, often after a suggestion from the Supreme Court or State Arbitration of the ESSR.

I have already mentioned that Professor John Attanasio and David Good told me that this article ("supremacy clause") was very radical and could change the entire pattern of the Soviet federative system. I shared their apprehensions and conveyed the arguments of Professor Attanasio to the meeting of the heads of all Estonian movements and voiced my own doubts about the necessity of preserving this article in the project. However, paradoxically is that it was this article that became the law of Estonia on November 16, 1988, while other, more moderate ideas, were never realized.

*Article 4.* This article gives real substance to internationally recognized human rights for the first time in Soviet practice. In the context of the Addenda, this means that any citizen has the right to appeal to the court of law, basing the complaint directly on international pacts.

The article restores the principle fixed in Estonia's constitutions of 1920 and 1938 (Article 4).

*Article 5.* First, this article fixes—for the first time in Soviet history—the democratic principle of division of power into legislative, executive and legal branches (Articles 2 and 3 of the Addenda). The supremacy of the legal branch turns it into a guarantor of stable law and order.

Second, the interpretation of the concept of sovereignty is necessary for distancing it from the concepts of "divisible and partial sovereignty."<sup>12</sup> In order to restore the federalist principles derived from Rousseau's Social Accord,<sup>13</sup> the article stipulates in principle the possibility (so far unaffirmed by the corresponding procedure) of the union republic's renouncing some of its rights to union subordination. This amendment once again confirms the border of competence between the federation and the union republic specified in the constitutions of the USSR and the ESSR. An analysis of these texts (Articles 73 of the Constitutions of the USSR and the ESSR) demonstrates that this border does not need any radical revision at present.

Any changes to these articles would be premature, all the more because so far we lack legal practice in their interpretation, and we just do not know what these articles mean. The fact is that the federal authorities act, as a rule, in defiance of the interests of the union republics. This fact, however, does not mean that Article 73 is invalid. As has already been mentioned, this article and the constitution at large are not yet operative. The actual meaning of Article 73 must surface after the Addenda

<sup>12</sup> Three such concepts are most widespread in the Soviet literature:

(a) the theory of potential sovereignty: the union republic is sovereign only before joining the Union and after seceding from it;

(b) the theory of competence: the union republic is sovereign within the limits of its competence. KONST. SSSR art. 73(12); and

(c) the theory of actual sovereignty (or the positivist theory): the union republic is sovereign only within the limits of its actual political capabilities.

Certain objections exist as to each one of these theories, but these deserve to be discussed in another paper.

<sup>13</sup> J.-J. ROUSSEAU, *On Social Contract or Principles of Political Right*, in ROUSSEAU'S POLITICAL WRITINGS 84 (A. Ritter & J. Bondanella ed. 1988).

are adopted, when corresponding cases appear on the basis of Article 2 of the Addenda and relevant interpretations are made.

*Article 7.* The present definition characterizes the territory of the Estonian SSR as a subject of international law, thus affirming the republic's state sovereignty.

This article can be, if necessary, a prerequisite to Estonia's joining the northern European process of nuclear disarmament, for example, via declaring the Estonian SSR a nuclear-free state.

*Article 8.* This article is necessary as an adequate clarification of the meaning of paragraph 6 of Article 73 of the Constitution of the USSR and as a means of neutralizing the stereotype connected with this paragraph and rejecting, in substance, the principle of sovereignty in financial and credit matters. On the one hand, the Republic's right to its own monetary system is a matter of principle.<sup>14</sup> On the other hand, this right has a practical meaning, too. The unbalanced removal of products turned out in the Republic is achieved in two ways: (1) by compulsory removal of products to the so-called all-union funds; and (2) by buyers from poorer neighboring regions of Russia. The unbalanced character of this removal stems from the fact that in exchange for real goods and services the Republic receives money which has no value, i.e. outside the confines of Estonia, Latvia and Lithuania, this money can buy much less volume of more expensive and low-quality goods. Thus, the Republic's monetary system could protect the market of the Republic, whose population does not exceed 0.5% of the population of the Soviet Union, against removal of its produce via the second way.

Articles 9 and 10 of the Addenda, which I will discuss below, provide a method for blocking compulsory removal of products to the all-union fund. In general, it is intended not to reduce the exchange of goods inside the Soviet Union but to put it on a commodity basis. Federal expropriation must be replaced by civic-legal, commercial relationships based on agreements.

*Article 9.* This article expresses the economic and civic-legal essence of the sovereignty of the union republic. It must be noted that this article only restores the actual legal state of affairs, since there are no legal justifications for the transfer of property from the Estonian SSR to the Soviet Union. In this context, the direct state property covers state enterprises alone. Cooperative, joint-stock, private and similar ventures are property under the republican sovereignty. In this case, the transfer of enterprises under the all-union and union-republican subordination will be an exception to the rule which will require the clearly expressed will of the legislative power of the Republic. Recognizing the presence of the federal economic interest and taking into account the absence in the USSR of territories with special federal status, the Estonian SSR pledges to offer its territory to the union departments and their capital investments.

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<sup>14</sup> Federalists argued that no republican monetary system was feasible in a federation and that history knows no precedent. This is wrong. A colonial province of Tsarist Russia, Finland had its currency and custom service. Moreover, even today there are several monetary systems in the USSR: "conventional" rubles, various coupons (for hard-currency shops), checks, etc.

However, the Republic retains the right to decide this question independently.

According to this article the property of the Armed Forces is the inseparable property of the Union of SSR, and the Estonian SSR indirectly and temporarily rejects its sovereign right to have its own army. State property interests will be protected against military authorities by terminating the use of land as stipulated in Article 3 of the Addenda.

*Article 10.* This article has the meaning of a presumption and formulates the regime: everything produced in the Republic shall be the property of the Republic if not specified otherwise.

*Articles 10 and 11.* These articles exclude the administrative practice of uncontrolled removal of produce from the Republic on the basis of arbitrary decisions by union authorities. Instead, the transfer of products to all-union funds will be conducted on the following terms: (a) establishment of long-term quotas of deductions to the all-union fund; (b) the consent of the proprietor of the product, i.e. the union republic, to conduct such deductions.

Here the Republic takes upon itself duties of a monetary character. In other words, no authority will command the Republic to transfer natural products—meat, power, steel, etc. The long-term quotas accepted by the Republic will be of a binding character and any failure to observe these quotas will incur sanctions similar to civic-legal and international trade sanctions. The Republic can participate in the union budget in two ways: (a) the federation determines the volume of federal expenditure (maintenance of the Armed Forces and the government, needs of the defense industry) and sets, with the consent of the Republic, the sum the Republic must pay to the union budget; or (b) the federation determines, with the consent of the Republic, the tax in the form of a percentage of the Republic's national income.

The main feature of the article is that the Republic becomes free from the necessity to spend its money on federal projects in which it is not interested.

*Article 12.* The history of the USSR and the Estonian SSR knows numerous instances when the state broke its political commitments. For example, the lands given to the peasants for eternal possession were later confiscated (in the 1920s in the USSR and in the 1940s in the Estonian SSR), and peasants themselves were repressed. The same happened to private owners, to whom Vladimir Lenin guaranteed the inviolability of property during the so-called New Economic Policy (NEP). This article is designed to reduce the natural and justified suspicion of potential entrepreneurs (both Soviet and foreign ones) of the state by providing legal guarantees of property for the first time in history.

*Article 13.* This article characterizes concrete guarantees of basic civil rights and freedoms, honored by the Constitution of the ESSR. It speaks of the freedom of each citizen to express any convictions and opinions if they do not result in active and legally punishable actions against the existing state and constitutional system. This behavior can be recognized as free when it is directed at improvement of the system.

However, in any case, only a court of law can pass the corresponding ruling. This constitutional amendment renders invalid the anti-democratic clauses of the Soviet criminal legislation, including the operative Estonian criminal legislation, which is used as a means of terror against political opposition.

*Article 14.* As is known, no constitution in the Soviet Union contains the principle of the absolute character of civil freedoms. Freedoms of speech, demonstrations, etc., can be used only in the interests of the state, the people, and the existing system.<sup>15</sup> It seems that at present no deviation from this principle is feasible. However, this article strips the authorities of the monopoly to express "the interest of the people." Any expression of the popular will can be made exclusively in the form of public court proceedings, which decide that the exercise of the particular civic freedom is against the principle or fundamental interests of the government.

This article also renders invalid classified laws concerning the rights, freedoms, and duties of citizens.

*Article 16.* Professor Attanasio drew my attention to the discussion connected with the Bill of Rights.<sup>16</sup> A similar article was a part of older Estonian Constitutions.<sup>17</sup>

*Article 18.* This article introduces the concept of the official (state) language for the first time in the constitutional practice of the Estonian SSR.<sup>18</sup> According to commonly recognized practice this means that (a) the Estonian language shall be the language of business correspondence used by state institutions in relations with each other; (b) the Estonian language shall be the original language of the legal acts issued in the Republic; (c) the state must provide a broad network of opportunities for people of other nationalities to study the Estonian language; and (d) the state shall have the right to compile a list of positions to be filled only if the applicant is fluent in the Estonian language.

All these requirements do not, by any means, cover the internal affairs of local and ethnic self-governments. Failure to learn the state language can by no means be a basis of any limitation of civic rights and freedoms, except the limitation of the right to work, as specified in section (d) of this commentary.

Aspect (b) is juridically important, too. In the past the federal Supreme Court of the USSR has actually usurped the right to interpret the laws of the union republics. By declaring the Russian text of the laws of the Estonian SSR to be translations from the Estonian original, the amended constitution puts an end to this practice.

*Article 19.* The principle of cultural autonomy implies granting political and cultural rights as well as bodies of self-government to ethnic minorities which do not have sovereign territories within this state. Communities recognized as ethnic minorities (in Estonia these must be

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<sup>15</sup> See KONST. SSSR arts. 47, 50, 51.

<sup>16</sup> See U.S. CONST. amend. IX.

<sup>17</sup> See KONST. ESSR art. 33 (1938); KONST. ESSR art. 26 (1920).

<sup>18</sup> Cf. KONST. ESSR art. 5 (1938); KONST. ESSR art. 5 (1920).

Russians, Ukrainians, Jews, Finns, Germans, Poles, etc.) have the right to receive the support of the state in organizing ethnic-linguistic elementary education, to set up self-governed ethnic communities and cultural establishments, and to enjoy guaranteed political representation in parliament. Detailing this principle, including representation, must be carried out during the reform of legislative power in the Estonian SSR at the second stage of the constitutional reform.

*Article 20.* This amendment is a clarification of Article 33 of the Constitution of the USSR and Article 31 of the Constitution of the Estonian SSR. Both articles fix the primacy of Union Republic citizenship. A citizen of the Union Republic is simultaneously a citizen of the Soviet Union and not vice versa. In contrast to this provision, Article 121(10) of the Constitution of the USSR vests the right to make decisions on citizenship issues in the Presidium of the Supreme Soviet of the USSR. Thus, the amendment removes this contradiction in favor of affirming the republican sovereignty. The relatively homogeneous population of Estonia (95% Estonian) in 1940 no longer exists. Today Estonians make up less than 60% of the Republic's population and are in the minority in the Republic's capital city of Tallinn. Introduction of Estonian citizenship can, on the one hand, put an end to the mechanical assimilation of Estonians and, on the other hand, abolish the antidemocratic system of internal passports in Estonia. Departing from the principle that a democratic state is a means of protection and expression of interests of all citizens, persons who do not have this citizenship are stripped of passive and active franchise as regards state bodies of power (but not the local bodies of self-government!), and of the right to participate in referenda. This serves as a guarantee against excessive influence in the electorate by a transient part of the population who regard the Estonian SSR as a temporary place of residence.

Lack of Estonian citizenship can relieve a person of some specific duties with respect to the ESSR—for instance, service in national armed forces, payment of some taxes, etc.—but also can lead to the absence of some rights that concern a person's relationships with the state, such as franchise and the right to occupy certain positions. At this, one should pay attention to the right to freely abrogate the Estonian citizenship recognized by the Republic in Article 15(b) of the Addenda.

*Article 21.* Assuming that the constitution, which requires sufficient time to be worked out, would be sound and applicable for a long period in history, the article stipulates a new, more complicated and more democratic procedure for its adoption which eliminates the possibility of its arbitrary change by the Supreme Soviet. Historic practice demonstrates that the very presence of the Supreme Soviet, which often votes unanimously, is not a guarantee of stability and democratic character of the law.

## V. The Speedy Evolution of Events

As has already been mentioned, the "Gryazin project" was intended for a lengthy discussion. However, on October 22, 1988, the text of the



amendments to the Constitution of the USSR was published.<sup>19</sup> As the most cursory analysis can show, it deprived the union republics even of that formal sovereignty they had enjoyed before.<sup>20</sup> Since the analysis of this document is not the subject matter of the present Paper, I will confine myself to only two examples.

Article 119(13) granted central authorities the right to arbitrarily deprive republican bodies of power by introducing martial law or "special forms of government." It followed from this article that the federal authorities acquired the right arbitrarily to remove republican governments, for instance, when the latter raise the question of seceding from the Union, which is an inseparable right of the union republic. However, so far, expression of this right has been regarded as a criminal offense.

Article 113(7) of the draft concentrated new prerogatives, such as legislative regulation of property relationships, payment, and price formation, in the hands of central authorities. The list of new federal prerogatives was left open.

Such examples are numerous. The Estonian SSR was, in effect, deprived of the opportunity to block the bill parliamentarily. Even had all the deputies from Estonia, Latvia, and Lithuania voted unanimously against the bill, it would have been passed by a majority vote anyway. There was one way out left—conscientious creation of a constitutional conflict between the Constitutions of the USSR and the ESSR, in which the latter could win a chance to preserve its sovereignty, if only formally.

Because the adoption of the amendments to the Constitution of the USSR was scheduled for the end of November, 1988, the deadline for Estonia's countermeasures was November 20, 1988—the reason being that a law passed by the Supreme Soviet of the Estonian SSR comes into force ten days after it is published in the official newspapers. On the request of the people and deputies, the session of the Supreme Soviet of the Estonian SSR was convened on November 16.

During the campaign for the session, public awareness started to favor the adoption of "the supremacy clause," which was the simplest and most apparent means of protecting the republic's sovereignty. The clause was dubbed "the Laak-Preimann amendment" after the names of the deputies who officially presented the article. This amendment made it possible to refuse honoring, in Estonia, the amendments to the Soviet Union's Constitution which encroached on the state sovereignty of Estonia. Characteristically, the press had almost no objections to the Laak-Preimann amendment itself, but debated its two versions, the meaning of which boils down to the following:

(a) all federal laws acting in the Estonian SSR are valid if they are not declared as contradicting the Constitution of the Estonian SSR;

(b) no federal law is valid in the Estonian SSR until it is approved by the Estonian SSR.

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<sup>19</sup> For the text of the draft amendments, see *Draft Law on Constitutional Amendments* [sic], British Broadcasting Corp., October 24, 1988 (NEXIS library, Currnt file).

<sup>20</sup> Recall that Article 76 of the Constitution of the USSR and Article 68 of the Estonian Constitution define the Union Republic as "a sovereign Soviet socialist state."

As can be easily seen, the difference here is in the different presumptions, of which variant (b) is more radical. Variant (b) has no significant difference from Article 3 of the Addenda, and it was adopted as the law.

## VI. The November 16, 1988 Session

On November 16, 1988, the extraordinary session of the Supreme Soviet of the Estonian SSR was held in Tallinn. The session received extensive coverage in the world press. The session adopted a number of documents which obviously are too lengthy to be published here in full; however, some aspects connected with the development of Estonia's constitutional reform should be noted. To have a better idea of the character and tendencies of this process, let us compare these aspects with articles of the Addenda.<sup>21</sup>

### A. *The Declaration of the Supreme Soviet of the Estonian Soviet Socialist Republic on the Sovereignty of the Estonian SSR*

Noting that a number of negative phenomena in the Republic (economic, ecological, and demographic crises) derive from the interference of the federal authorities into the affairs of the Republic, it was declared that Estonia's sovereignty had to be restored. In this connection the Declaration includes the following definition: "The sovereignty of the Estonian SSR implies that the republic's supreme bodies of power, administration and justice shall have the supreme power all over the territory of Estonia. The sovereignty of the Estonian SSR is integral and indivisible."<sup>22</sup> Thus, Article 5 of the Addenda proved to be not the juridical norm, but an expression of the official will of the Republic's supreme legislative body. The Declaration also stipulated "the supremacy of the laws of the Estonian SSR in the territory of the Estonian SSR"<sup>23</sup> and fixed the procedure under which the amendments to the Constitution of the USSR were to come into force in Estonia only after they have been approved by Estonia. In the definition of sovereignty the principle of division of power was fixed for the first time in the Soviet practice. Naturally, this idea itself seems trivial today, but in the Declaration it served as the opposition to the concept according to which democratization of society had to be achieved through strengthening the power of the representative legislative body.<sup>24</sup>

### B. *The Law of the Estonian SSR on Introducing Changes and Amendments to the Constitution (Fundamental Law) of the Estonian SSR*

The following amendments were introduced:

<sup>21</sup> I would like to suggest that the reader have the text of the Constitution of the USSR by his side when reading the following.

<sup>22</sup> The text of the Declaration has been translated and reprinted in *Estonia Claims Right to Veto USSR Laws*, The Current Digest of the Soviet Press, December 21, 1988 (NEXIS library, Currnt file).

<sup>23</sup> *Id.*

<sup>24</sup> This was the stand which B. Lazarev attempted to justify in the *Kommunist* (no. 16, 1988). And it was this idea that Thomas Jefferson opposed in his time.

(1) The preamble was complemented with a clause to the effect that the legal system of the Republic incorporated all pacts on human rights ratified by the Soviet Union, in particular the Pact on Economic, Social and Cultural Rights and the Pact on Civil and Political Rights.<sup>25</sup>

(2) The article of the Constitution of the Estonian SSR corresponding to Article 4 of the Constitution of the USSR was complemented with the following text: "citizens and juridical persons in the Estonian SSR enjoy legal protection of their constitutional rights."<sup>26</sup>

(3) The article of the Constitution of the Estonian SSR corresponding to Article 10 of the Constitution of the USSR was changed. The first three paragraphs were rewritten as:

The foundation of the economic system of the Estonian SSR is socialist ownership of the means of production in the form of state, cooperative property and property of public organizations and public movements.

The economic system of the Estonian SSR also includes personal, private and mixed property.

The state protects all forms of property and provides conditions for its growth.<sup>27</sup>

The fourth paragraph of the article was left intact.

(4) The article of the Constitution of the Estonian SSR corresponding to Article 11 of the Constitution of the USSR was changed. The first paragraph was left intact, while the second paragraph was rewritten as:

The land, its minerals, atmospheric air, internal and territorial waters, shelf, forests and other natural resources are the exclusive property of the Estonian SSR. The Estonian SSR owns the basic means of production in industry, construction, and agriculture; means of transport and communication; the banks; the property of state-run trade organizations and public utilities, and other state-run undertakings; most urban housing; and other property necessary for purposes of the Estonian SSR.<sup>28</sup>

(5) Article 74 of the Constitution of the Estonian SSR, corresponding to Article 74 of the Constitution of the USSR, which formerly read "the laws of the USSR shall have the same force in the Estonian SSR," was rewritten as:

Laws and other legal acts of the USSR shall come into force in the Estonian SSR after they have been registered in line with the procedure established by the Presidium of the Supreme Soviet of the Estonian SSR.

<sup>25</sup> Compare with Article 4 of the Addenda.

<sup>26</sup> Compare with Articles 2, 14, and 15(d) of the Addenda.

<sup>27</sup> Compare with Article 12 of the Addenda. Legal protection of property, suggested by the draft, is achieved by aligning this amendment with the preceding one, which declares legal protection of juridical persons. The notion of private property was introduced for the first time.

<sup>28</sup> Compare with Articles 7, 9, and 10 of the Addenda. In this the lawmakers conscientiously departed from Article 7 of the draft which defines the territory of Estonia. This definition was replaced by the one including the total of resources belonging to Estonia. This variant is more up to the point: today the main problem is not to protect the territory of Estonia but its natural resources from the federal authorities.

The Supreme Soviet of the Estonian SSR has the right to suspend or limit the application of legislative or other acts of the USSR if such acts violate the sovereignty of the Estonian SSR or regulate the questions which, according to the Constitution of the Estonian SSR, pertain to the prerogative of said Estonian SSR or disregard the specificity of the republic.<sup>29</sup>

In addition, amendments were introduced to eleven more articles of the Constitution of the ESSR, which in effect meant that the Popular Front was constitutionally given equal rights with earlier public organizations. This effect was achieved by adding the words "and public movements" to the words "public organizations."<sup>30</sup>

In other words, the Supreme Soviet of the Estonian SSR did not consider or adopt most of those articles of the Addenda which can be called the amendments to the Bill of Rights. In fact, the situation did not change. By recognizing the international pact on human rights as part of the legal system of Estonia, the Bill of Rights of Estonia became formally identical with the Bill of Rights recognized by the world community. One can say that this recognition renders juridically meaningless the corresponding articles of the Addenda: Articles 13, 14, 15, 16 and 17.<sup>31</sup>

Thus, nine out of the suggested twenty-one amendments became the law of the Estonian SSR one way or another. By the way, on December 5, 1988, at its next sitting, the Supreme Soviet of the ESSR adopted the constitutional amendment that makes Estonian the state language of the republic.

Unfortunately, during the discussion and adoption of these amendments, the lawmakers omitted the very principle of their technical form as additional clauses of the main text of the constitution. However, there was no time for discussion, and any technical innovations would only complicate legislative and constitutional problems, complex as they are.

Thus, a more remote, long-term objective—correction of the "supremacy clause"—became (quite unexpectedly) an acting law of Estonia, moreover, the nucleus of the constitutional amendments. However, I repeat, the immediate objectives of the constitutional reform, as I was often told by my esteemed American colleagues, could have been achieved also by the aggregate of other norms contained in the Gryazin project.

If we consider the change of the supremacy clause, i.e. the Laak-Preimann amendment, as the nucleus of the implemented part of the constitutional reform, then in its turn the procedure of registering all-union laws by the Republic is its internal legal nucleus. The main princi-

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29 Compare with Article 3 of the Addenda.

30 Compare with Article 6 of the Addenda.

31 Moreover, in retrospect, one can say that the inclusion of Articles 13-17 in the Addenda was, on my part, a theoretical mistake that could bring about negative juridical results. Since the internationally recognized rights are broader than those specified by Articles 13-17 of the Addenda, their doubling in the Constitution could be interpreted as the absence of force of international pacts as long as their provisions are not specified in the Constitution of the Estonian SSR. This would mean "a reduction" in the volume of rights guaranteed by the said pacts. This mistake was slightly repaired, however, by Article 16 of the Addenda, but in this case this mistake does not attest to the juridical correctness of the document either.

ple of this procedure and the text of the draft law to this effect was worked out on the day after the session (November 17, 1988) and approved at a theoretical seminar of lawyer-members of popular movements of Lithuania, Latvia, and Estonia.

## VII. Procedure for Registering Federal Laws in the Republic

Preliminarily, however, I would like to remind the readers of the regime for constitutional checking of normative acts, suggested by the Addenda:<sup>32</sup>

(a) a normative act of the federation or the Republic shall not be applied by a court of law if the court of law declares the act to be contradictory to the Constitution of the Estonian SSR; formally the act shall remain in force but shall not enjoy legal protection;

(b) all-union normative acts shall come into force in Estonia only after they have been registered by the legislative body of the Republic; thus, registration is a preliminary (with respect to the court of law) stage of the probation of the constitutional character of the all-union law.

In other words, if the registration procedure realizes the principle of the Union Republic's sovereignty within the USSR, then the court control is the realization of the principle of division of power within the Republic itself.

An American colleague might need one more clarification. So far, I have used freely the terms "law" and "normative act" as if they were synonyms. Now I must explain the difference between the two. Laws are acts of the legislative power—both in the USSR and the union republics; they are acts of the Supreme Soviet. Their number is comparatively small; they are usually passed openly and thus constitute no special problem. The essence of the tragedy of the Soviet economic and legal systems is found not in laws, but in the right of ministries and committees attached to the Council of Ministers to issue, in the *administrative* order, acts which in effect have the same force as the laws, i.e. they are binding on many physical and juridical persons. Such administrative normative acts of the federal authorities have set arbitrary prices, strictly limited financial and accounting activities, removed the republic's products to all-union funds, established the limits of wages and salaries, and—this fact is indeed a paradox—determined the recipes for different brands of bread and the price of tickets to cinemas.<sup>33</sup> The number of such acts is infinite, and it would be absurd to speak of any constant monitoring of the constitutional character of these acts—this is simply physically unfeasible.

These preliminary notes will, hopefully, help in understanding the juridical meaning of the following text of the draft law on registration and the process by which all-union laws and other normative acts become effective in the Estonian SSR. Here is the text:

<sup>32</sup> See Articles 2 and 3.

<sup>33</sup> This situation remained until November, 1988.

(1) Registration of laws and normative acts is the procedure for probation of such acts from the point of view of their compliance with the Constitution of the Estonian SSR.

(2) All-union laws shall come into force in the Estonian SSR after they are registered by the Supreme Soviet of the Estonian SSR. In the period between the sessions of the Supreme Soviet, these laws are registered preliminarily by the Presidium of the Supreme Soviet of the Estonian SSR, after which they come into force. The decision on the preliminary registration shall be approved at the next session of the Supreme Soviet of the Republic. Refusal of registration shall suspend the application of the law.

(3) All-union normative acts shall become valid and registered in the Republic from the moment they are issued by the originating body. These acts are in force in the Estonian SSR provided they are not declared contradictory to the Constitution of the Estonian SSR in a court of law.

The court procedure for registration of such acts does not rule out the right of the Supreme Soviet of the Estonian SSR and its Presidium to probe their constitutional character. The procedure of initiating the relative proceedings is similar to the legislative process.

This is only the general idea. As can be seen from the text, procedural issues are not yet elaborated and processual terms not yet defined, etc. However, the events that followed propelled further elaboration of this important procedure, necessary for the realization of the Laak-Preimann amendment, to the background.

### VIII. The Federation's Reaction

On November 26, 1988, ten days after the extraordinary session of the Supreme Soviet of the Estonian SSR, came the federal response to the constitutional changes implemented by Estonia. The Presidium of the Supreme Soviet of the USSR passed a decree which declared a number of amendments to the Constitution of the Estonian SSR *invalid*. Before considering some of the arguments of this decree, let's consider one *extremely important question*: is this decree itself juridically valid; does the Presidium of the Supreme Soviet of the USSR have the right to issue such decrees?

Actually, according to Article 121(4) of the Constitution of the USSR, the Presidium of the Supreme Soviet of the USSR "ensure[s] observance of the Constitution of the USSR and conformity of the Constitutions and laws of the Union of Republics to the Constitution and laws of the USSR." It does not follow from this, however, that the federal lawmaker has the right to cancel or declare invalid supreme legislative acts of the Republic, expressing the juridically sovereign will of its people. Moreover, the law regulating the procedural issues of the USSR Supreme Soviet activities, directly prescribes what should be done in such cases. Article 64 of the Regulation of the Supreme Soviet of the USSR says that if there is a discrepancy between the republican and all-union laws, the Presidium of the Supreme Soviet of the USSR has only the right to *suggest* that the Republic bring its legislation into conformity with the all-union legislation. There are no other powers. There is only

one possible conclusion: the decree of the Presidium of the Supreme Soviet of the USSR is invalid itself, and the words about the cancellation of the amendments to the Constitution of the ESSR have emotional, rather than juridical force.

Nonetheless, although the said decree has no legal force whatsoever, it is interesting as a document, expressing the federalist concept of the state in the form it had at the end of November, 1988.

The main and most unexpected action was that on having "cancelled"<sup>34</sup> two out of the five parts of the Declaration on Sovereignty, the federal lawmaker left intact that part of the Declaration that gives the absolute definition of sovereignty. By this token, the federal lawmaker *recognized in words* that the supreme power in the republic belongs to the *republic itself*. As for the changes in the Constitution of the Estonian SSR, the federal lawmaker "cancelled" the amendments we spoke about in the first part of this paper, marked there under Nos. 2-5.<sup>35</sup> The Presidium of the Supreme Soviet of the USSR "affirmed the validity" of recognizing international pacts on human rights as a part of the Estonian legislation (although it "cancelled" legal protection of them) and of constitutionally legalizing public movements.

As for the ideological and conceptual conflict of the federalist and democratic "parties" in the constitutional reform, one must note three crucial aspects of the critical content of this decree.

First, as we remember, the amendment to the Constitution of the Estonian SSR, while providing guarantees of inviolability of property, stipulated the existence of *private* property along with the traditional forms of property. This amendment was "cancelled" because the Constitution of the USSR does not contain this form of property. It follows that the federal lawmaker adheres to the presumption: everything that is not delegated by the federal Constitution to the competence of the republic is the competence of the federation.<sup>36</sup> Thus, it is presumed that the republic has no right of its own besides those declared by the federal Constitution. This presumption affirmed the stand expressed in Article 73 of the Constitution of the USSR, which defines the questions of the federal competence. The list of them concludes with the words "and settlement of other matters of all-union importance."<sup>37</sup> In other words, the federal competence here must be interpreted more broadly, while the republic still doesn't have the rights absolutely guaranteed to it.

Second, the article on the property of the Estonian SSR was "cancelled," too. It follows from this that today the federal authorities are still unprepared for a juridical analysis of both the 1940 events in the Baltic Region and the legal basis of Estonia's joining the USSR. The

<sup>34</sup> When commenting on the November 26 decree of the Presidium of the USSR Supreme Soviet, the word "cancel" must be in quotation marks because, as I have demonstrated, this document has no juridical power whatsoever.

<sup>35</sup> See *supra* text accompanying notes 26-29.

<sup>36</sup> This provision is directly opposed to the Tenth Amendment to the Constitution of the United States.

<sup>37</sup> It is similar in the new amendments to the Constitution of the USSR. See *supra* note 21, art. 113(21).

problem is that so far there are no juridical grounds to recognize the state property of Estonia as federal property. To wit: if (a) Estonia was occupied by the USSR in 1940, then the basis of the union property is the occupation power, which cannot be recognized as the basis of legitimate property; if (b) Estonia's joining the Soviet Union is recognized to have been voluntary, then again there is no act on alienation of the property of Estonia—to say nothing of natural resources: land, water, minerals, etc. Such documents or political declarations just do not exist. In such an important business there can be no automatic alienation of property.<sup>38</sup> It must be specially stressed that the legal document of 1922 that is the basis of the formation of the USSR was never signed by Estonia.

Third, the federal authorities expressed their willingness to protect the supremacy clause in their favor by “cancelling” the corresponding amendment to the Constitution of the Estonian SSR. However, on expressing this willingness, the Presidium of the Supreme Soviet of the USSR went into conflict with its own Decree, which recognizes the supremacy of the republican power on the territory of the republic.

In general, it can be said that when we speak about constitutional differences in the Soviet Union we mean the intrinsic contradictions of the federal Constitution rather than the differences between the constitutional policies of the federal and republican authorities. On the one hand, there are such provisions as the sovereignty of the Union Republic<sup>39</sup> and affirmation of its absolute character in the November 26, 1988 Decree, the protection of the Republic's territory against the federal authorities,<sup>40</sup> the Republic's right to enter into relations with other states,<sup>41</sup> and, at last, the right to secede from the Soviet Union.<sup>42</sup> On the other hand, there are the recognition of the supremacy of federal laws over republican ones,<sup>43</sup> the subordination of the republican procurator to the federal one,<sup>44</sup> and obvious interference of the federal authorities in the internal affairs of the Republic.<sup>45</sup> The Estonian SSR, by developing and using one set of articles opposed by the other, did not create any new differences, but only brought the Constitution of the USSR, with its deep contradictions, out of its state of internally contradicting balance.

## IX. Constitutional Conflict

Thus, the constitutional conflict took shape by the end of 1988. On the one hand, the amendments introduced to the Constitution of the Estonian SSR and based on a number of articles of the Constitution of the USSR entered in opposition to other articles of the federal Constitution. On the other hand, the federal authorities expressed their negative attitude to these amendments, but could not cancel them and never at-

38 By the way—even Manhattan Island was *bought* from the Indians.

39 KONST. SSSR art. 81.

40 KONST. SSSR art. 78.

41 KONST. SSSR art. 80.

42 KONST. SSSR art. 72.

43 KONST. SSSR art. 74.

44 KONST. SSSR art. 166.

45 KONST. SSSR arts. 145-150.



tempted to do so. The Estonian SSR did not renounce its amendments either.<sup>46</sup> The situation should be interpreted as follows: the Union thinks that the amendments to the Constitution of the Estonian SSR are not operative. On its part Estonia adheres to the opposing stand, although without advertising it. The real state of affairs must be revealed by the courts, which both sides have so far been trying to avoid.

What are the prospects for resolution of this conflict? There are no prospects at all until the principle of supremacy of law over political power is restored. If the constitution is not binding on the authorities, then it does not matter what the constitution declares nor in which form it declares it. However, since the creation of the state governed by law was declared by the Soviet Union as the program objective, the solution of this conflict will soon become a pressing necessity. A lawyer who has not lost the sense of reality cannot but understand that no compromise in the field of the supremacy clause is possible, and, consequently, the only prospect is a more reasonable, democratic and legitimate distribution of competence between the federal and republican authorities. However, as a proponent of the ideas of Thomas Jefferson, and as one who bears in mind his thirty-seventh letter to *The Federalist*, I do not expect much from the new distribution of competence: in practice it will never be absolutely accurate.

That is why the real way out of the constitutional conflict between the Estonian SSR and the Soviet Union, a conflict which is likely to spread to other union republics as democratization develops in the USSR, is the establishment of a court, independent from the federal and republican authorities, which could look into and resolve similar conflicts.<sup>47</sup> This court would be able to protect not only the just interest of the federation and its members, but also the supreme juridical value and the guarantor of existence of a democratic society—its constitution.

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<sup>46</sup> The December 5, 1988 session of the Supreme Soviet affirmed the decisions taken on November 16.

<sup>47</sup> The Committee for Constitution Supervision, which is being created by the federal lawmaker, cannot solve this problem. First, it will be an organ of one of the conflicting sides—the federation. Second, in accordance with the amended Constitution of the USSR it will have no prerogatives and functions of a court of law. However, the very fact of creation of such a body is in itself the first step towards a more serious protection of Soviet constitutionalism.