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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

MEMORANDUM ON THE EVALUATION AND FOLLOW-UP STUDY OF THE CONSTITUTION OF FINLAND

by the
Ministry of Justice of Finland
Law Drafting Department

1. Why is the follow-up of the Finnish Constitution necessary?

The new Constitution of Finland entered into force on the 1st of March 2000. The main objective of the reform was to strengthen the parliamentary features of the governmental system. This was expressed by emphasizing the Parliament's role as the supreme organ of state and strengthening the role of the Government, which is accountable to the Parliament. According to the central principles of parliamentarism, the election of the Prime Minister and the direction of the formation of the Government were given to the Parliament. This was thought to strengthen the citizens' opportunities to influence also the Government's general composition in the parliamentary elections. The reform increased the powers of the Parliament and abolished former restrictions to the Parliament's powers both in relation to legislative work and foreign affairs. In legislative powers, the centre of gravity moved clearly to the Parliament. According to the principles of parliamentarism, also the role of the Government was in many respects strengthened in relation to the President of the Republic.

As a significant reform of state it was well-grounded to follow the implementation of the reform already from its early stages. Soon after the reform's entry into force two follow-up studies were made at the Ministry of Justice. Already then it was stated that ***the reform's effects on the political and governmental system could in all respects be evaluated only on a longer time period.*** For example section 61 of the Constitution, which regulates the formation of the Government, had not been applied at all at the time that the follow-up studies were being made at the Ministry of Justice. ***The evaluation of the functioning of the Constitution requires follow-up information on the application of the provisions of the Constitution in different social situations and circumstances***. The need for researched information on the issue was – and still is – especially emphasized due to the fact that issues relating to the Constitution reform do not seem to have gotten a very significant role in jurisprudential or social science research.

Former studies

Two studies on the implementation of the Constitution have been made earlier at the Ministry of Justice. The first study was made very soon after the reform's entry into force. It examined the implementation of the new Constitution during its first year in force (1.3.2000-28.2.2001). In September 2001 the Ministry of Justice appointed a working group to prepare a study on the implementation of the Constitution. The work of the working group was to be organised in such a manner that, on the basis of it, the Government could give the Parliament an announcement on the implementation of the reform during the ongoing term of Parliament.

The report of the working group was completed in November 2002. The Constitution had then been in force for only two and a half years. As appendixes to the report, four separate studies were published. The first one dealt with the direction of foreign policy, the second one with referendums, the third one with citizens and the Constitution and the last one with exceptional laws and their relationship to the Constitution.

On the basis of the work of the working group an announcement on the implementation of the Constitution was given to the Parliament by the Minister of Justice. A discussion on the announcement was organised in the Parliament in February 2003.

2. What issues are to be evaluated and examined in the follow-up work?

In the above-mentioned report it was, as a general conclusion, stated that as a whole the main objectives of the reform had been fulfilled and that the Constitution had proven to be functional. Some subject matters and certain provisions were, however, evaluated more closely. These issues, which are discussed in the following, are central to the evaluation of the reform also in the longer run.

The decision-making process in foreign policy issues and Finland's membership in the European Union. In the report it was stated that the decision-making process in foreign policy issues had functioned without great problems. The implementation of the obligation to co-operation between the President and the Government (section 93 of the Constitution) was evaluated, for example, by examining the work of the Government's Cabinet Committee on Foreign and Security Policy. The report stated that at that time the handling of current foreign policy issues had been quite rare as the agenda of the Cabinet Committee had been emphasized mainly on security policy issues. More recent information on the work of the Cabinet Committee has not been collected. The new practice relating to Finland's representation in the summits of the European Council was found to be better than the former practice. According to the new practice the Government decides Finland's representation in the summits. In the report this question relating to representation was no longer seen as a significant constitutional problem even though the issue has still been discussed.

The problems relating to the relationship between the Government and the President in foreign policy issues have later come up, among others, in a certain decision-making situation relating to military crisis management. In this issue the desired decision-making procedure required enacting an exceptive act, meaning that the intended decision-making procedure was seen to be in conflict with the Constitution.

The membership in the EU has converted many traditional foreign policy issues into EU-policy issues. This development may cause similar kind of problems more generally in the future. In its recent statement on the Treaty establishing a Constitution for Europe, the Parliament's Constitutional Law Committee stated that the formalisation of the European Council cannot be an insignificant factor to the practices followed between the Government and the President in foreign policy issues. The Committee stated that the EU Constitution reform – if it is carried out – will strengthen even more the role of the Prime Minister relating to the direction of Finland's EU-policy and as Finland's representative in the summits of the European Council. The Committee also stated that the need for specific constitutional provisions on Finland's membership in the EU and on transferring powers to international bodies should also be considered in the future in connection to broader amendments.

The growth of regulation on the level of acts and the "constitutionalisation" of legislation. The constitutional reform and partly also the reform of basic rights and liberties in 1995 have lead to the growth of regulation on the level of acts. In practice this has meant growth in the legislative work of the Parliament and stricter boundaries to the use of decrees. The development reflects the emphasising of the parliamentary features of the Constitution as it emphasises the role of the Parliament as the supreme user of legislative powers. On the other hand, this development has evoked discussion on whether the centre point of gravity has already moved too much to the level of parliamentary acts and whether this kind of transition is appropriate. This development has effects both on the level and the substance of legislation. The effects have so far been examined very little. For example, the interpretations of the Parliament's Constitutional Law Committee relating to issuance of decrees and delegation of legislative powers have not been systematically examined while the new Constitution has been in force. This is the situation even though section 80 of the Constitution, which regulates issuance of decrees and delegation of legislative powers, is the most cited provision of the Constitution in the statements of the Constitutional Law Committee.

***Supervision of constitutionality*.** The new Constitution maintained the prior system relating to supervision of constitutionality. According to this system supervision of constitutionality is based on prior supervision exercised by the Parliament's Constitutional Law Committee. Due to this system, the interpretations of the Constitutional Law Committee are in a significant role in the interpretation of the Constitution. The reforms of the Constitution and of the basic rights and liberties have increased the Committee's workload significantly. The systematic analysis of the Committee's interpretations would give valuable information on the functioning of the

Constitution (for example on the need to enact exceptional laws), on how the Constitution has influenced legislation and to which questions the Committee has mostly focused on in its work. Due to the extensive workload of the Committee, often only such Government proposals are sent to the Committee, in which the need for the Committee's statement is specifically mentioned. This brings a certain amount of chance to the allocation of the Committee's work.

In addition to the system of prior supervision, the Constitution includes also an opportunity for the courts to exercise post constitutional supervision in individual cases (section 106 of the Constitution). This opportunity seems to have gotten the role that was intended for it. The provision was aimed to serve as an ultimate guarantee for individuals for protection under law. At least until now the application of section 106 has been very rare. The provision has been applied in only one case by the Supreme Court. On the other hand, referring to the provisions of basic rights and liberties has increased in the courts. In a larger extent, the effects of the Constitution are, however, reflected in the work of the supreme supervisors of legality, meaning the Chancellor of Justice and the Parliamentary Ombudsman.

***Implementation of basic rights and liberties*.** In recent discussion much attention has been paid to the implementation of economic, social and cultural rights. Concern has been presented that the municipalities, which are in practice responsible for the implementation of these rights, do not have the sufficient financial resources to take care of them. The matter has significance also in respect to equality. It is the Ministry of Social Affairs and Health and the Ministry of Education that are in a central role in the handling of these issues.

Also the legal system of the European Union presents challenges to the implementation of basic rights and liberties. The supremacy of EU legislation may cause pressure to the legal protection of national basic rights. On the other hand, strengthening the role of basic rights in the European Union (in the way that in the Treaty establishing a Constitution for Europe is proposed) may bring new kinds of situations to the borderline of the national and EU legal system.

***Municipal autonomy*.** The growth of the municipalities' duties and the economic struggles of them have put the functioning of municipal autonomy under a lot of pressure. Within an ongoing project concerning the reform of municipal structure and public services, solutions to these problems have tried to be found. The development of the municipalities' situation and the functioning of municipal autonomy require follow-up in the future. In this respect the central authority is, however, not so much the Ministry of Justice, but the Ministry of the Interior.

***Privatization of public administration*.** Privatization of public administrative tasks has during the last decades put certain central principles of the rule of law under a lot of pressure. Section 124 of the Constitution sets boundaries to the privatization of public administrative tasks. The provision sets out the preconditions for delegating public administrative tasks to private entities and lays down the situations, in which such delegation is not allowed. Quite a lot of practice of the Constitutional Law Committee has already been gotten on the provision. On the basis of this practice, it seems that the demands of the Constitution have, despite everything, been met without big problems.

***Referendum*.** As a complement to the representative system the Constitution includes also the opportunity to organise national consultative referendums. The Constitution does not, however, include provisions on a people's initiative. In the reform of the Constitution the provisions concerning referendum were left untouched, due to the fact that it was not thought to be possible to evaluate the functioning of the provision on the basis of only one organised referendum. The only referendum that at that time had been organised was the referendum of 1994 on Finland's entry into the European Union. In the report of the working group that was appointed to follow-up the implementation of the Constitution it was stated, that the constitutional provisions on the citizens' possibilities to direct participation require revaluation on the long run.

3. Two forms of action: an international evaluation and a broad national follow-up study

The follow-up of the Constitution can be carried out through two forms of action: an international evaluation and a broad national follow-up study. In order to carry out the international evaluation preliminary and unofficial negotiations have been held with the Venice Commission in order to get the Commission to carry out the international evaluation. In the preliminary negotiations the Venice Commission has given an affirmative answer to Finland's inquiries. The Venice Commission has also before done similar kinds of evaluations. They have, however, primarily been focused on the new member states of the Council of Europe.

For example, the decision-making system in foreign affairs would suit well for a subject matter in such an international evaluation. In addition to (or in replace of) the evaluation of the Venice Commission, it could also be considered that also a Scandinavian evaluation would be done. The preparation of the evaluation would in this case be given to one or more of the Scandinavian experts in the field of constitutional law or political science.

The national follow-up study could, on the other hand, focus especially on the evaluation of the functioning and effects of the Constitution on a long time period. The preparation of the study could be organized in the same manner as in the follow-up study of 2002. In this case, the analysis would, however, inevitably move on a quite general level. The study could also be organized so that it would focus on certain specific issues. In this case it should be considered what issues would be suitable for a study of the Ministry of Justice. This kind of questions would relate especially to the legislative effects of the Constitution.

4. Timetable

The Constitution has been in force for only six and a half years. This is such a short time that sufficiently experiences have still not been gotten from the Constitution in order to make justified conclusions. It can, however, be estimated that a national follow-up study should be started during the next few years, during which the making of the study would be given to a university or other research institute. The project would be extensive. It would take about two years and demand the work contribution of at least two senior researchers and one research assistant. In addition to constitutional law, it would be well-grounded to include into the study also an evaluation from the point of view of social sciences, mainly political science.

The starting of the international evaluation depends on the chosen researchers, financing and agreed timetables. The goal should, however, be that the international evaluation and the national follow-up study would be ready when the Constitution has been in force for ten years.