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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
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**COMMENTS
ON THE CONSTITUTION
OF FINLAND**

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1. What follows below are my comments on the issue of the conduct of, and parliamentary control over, Finnish foreign policy. These comments are of a preliminary nature, but hopefully can serve as the basis for future discussion and possible inclusion in our report.
2. I will begin by sketching out the division of competence between the President and the government, before proceeding to the issue of parliamentary control, although the two issues are obviously closely linked. The point of departure for the analysis of the conduct of foreign relations is Section 3.2 which provides that "The governmental powers are exercised by the President of the Republic and the Government, the members of which shall have the confidence of the Parliament" and Section 58 which provides that "The President of the Republic makes decisions in Government on the basis of proposals for decisions put forward by the Government."
3. The Finnish system can thus be described as "semi-presidential", governmental power being shared. The President does not choose the ministers in the government. This is for the Prime Minister. The general rule is that the government prepares the basis for the decision and makes a proposal, but with some exceptions, the President is, in the final analysis not bound by the proposals of the government (RP 1/1998 rd p. 48).
4. But these general provisions are now complemented by a number of specific provisions in the field of foreign affairs. Section 93.1 provides that "The foreign policy of Finland is directed by the President of the Republic *in co-operation with* the Government" (my emphasis). According to the travaux préparatoires, "foreign policy" includes such matters as bilateral negotiations, participation in multilateral conferences and decision-making in international organisations. The "in cooperation" requirement means that, notwithstanding the primacy of the president in foreign policy, the President should not do anything significant against the will of the government (Gr UB 10/1998, p. 24). According to the travaux préparatoires, this is *inter alia* when "it is a question of important foreign policy decisions from Finland's side, or there are external initiatives which can have important consequences for Finland's internal affairs."
5. Historically, foreign policy was previously the almost exclusive preserve of the Finnish president. A strong feature of the new constitution is its increased emphasis on parliamentarism, and Section 93.1 provides the clear link to parliamentary accountability (see also below). The president's power to delegate treaty making power to administrative agencies is limited, and requires statutory authority. The insistence on cooperation with the government can partly be explained by historical factors – the almost complete dominance of foreign policy during President Kekkonen's period in office – but also as a counter-balancing factor to the increased popular legitimacy the President obtained by the introduction of direct elections in 1994.
6. Read in conjunction with the travaux préparatoires, section 93.1 is relatively clear. It would, in the ordinary run of things, become even clearer as a result of constitutional practice. The fact that government prepares Presidential decisions means that the mechanism is in place for ensuring that the government is properly involved in all issues which it considers it should be involved in. The President has no large staff of her/his own which can result in a risk of institutional "turf battles" with the government. Moreover, the government is fully in charge of (and so has full insight into) the execution of such decisions as under Section 93.3, "the communication of important foreign policy positions to foreign States and international organisations is the responsibility of the Minister with competence in foreign affairs."
7. If the direct popular elections risked producing "maverick" presidents, then the significant role still granted to the President in foreign policy could be problematic. But there is no evidence of this. Even though the political parties have not totally dominated the election of the President, their influence, and the maturity of the Finnish voting public, seems to make a maverick

president a relatively remote possibility, even if the public's trust in politicians waxes and wanes, and the election of a "populist" candidate cannot be excluded. Even if a candidate who is not supported by one or more of the larger Finnish parties is elected, the mechanisms which exist to ensure cooperation with the government seem adequate to avoid major problems.

8. In the circumstances, the issue which is likely to remain is, from the perspective of at least some parliamentarians, whether parliamentary insight into the work of the President/government is adequate (dealt with below).

9. However, there is an institutional issue as regards the division of foreign policy between government and President. There is an area of foreign policy where the President does not have primacy. In the specific area of EU affairs, Section 93.2 provides that "The Government is responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures ..."

10. This provision recognises that for EU states, the previous bright line between "foreign" and "internal" policy is no longer clear. The Finnish constitution divides competences in the conduct of foreign policy based, as Jääskinen notes, not on the substance of the subject-matter, but the context of the decision-making. By defining the area of governmental primacy by reference to an entity, the EU, whose competence is continually shifting, or rather, expanding, the framers of the Finnish constitution have deliberately provided for a growing area of primary governmental competence in foreign policy. The growth of common positions and strategies in the EU common foreign and security policy (CFSP), e.g. as regards what has traditionally been a crucially important part of Finnish foreign policy, its relationship with Russia, means that issues previously regarded as purely bilateral will now be regarded, depending on the circumstances, as partially, largely, or wholly, within the government's primacy.

11. Obviously, this results in overlapping competences. Foreign policy issues do not come neatly labelled as being either within the CFSP or not. A need to take a CFSP initiative can arise quite quickly, such as the imposition of EU sanctions. Events can quickly lead to a CFSP initiative, binding the EU states, being taken in an area previously left free for bilateral relations. As was noted in the materials provided to us, the issue is particularly awkward with the advent of the "St Petersburg" tasks of EU crisis management in the EU "near area". This provides for a further area of overlap, this time with the competence of the President as commander in chief of the defence forces (Section 128).

12. Is this problematic? There are a number of issues here. The first is that, traditionally, the value of "speaking with one voice" has been stressed in foreign policy.¹ If differences of opinion arise between the President and government, and these leak out to negotiating partners, this can make it more difficult to achieve a good deal for Finland, or undermine its credibility as a reliable partner. This applies in foreign policy generally. As regards EU and non-EU foreign policy, Finland's credibility is also reduced if it says one thing in the context of the EU, but behaves differently in non-EU contexts. A more minor consequence of the division between EU and non-EU foreign policy is that negotiating partners can be confused sometimes as to who they are negotiating with. In the EU context, the main negotiating partner is the Prime Minister, but if foreign partners perceive the President as superior to the Prime Minister, this can diminish the prestige (and so affect the bargaining power) of the latter. The President has, traditionally, attended EU Council summits, even if Finland is represented by the Prime Minister.

¹ See, e.g., the classic remark from Alexis de Tocqueville, "La politique extérieure n'exige l'usage de presque aucune des qualités qui sont propres à la démocratie, et commande au contraire le développement de presque toutes celles qui lui manquent" A. Jardin (ed.) *Oeuvres complètes. T. 3, Écrits et discours politiques* (Gallimard, Paris, 1990), p. 238. See also L. Wildhaber, *Treaty-making power and constitution: an international and comparative study* (Helbing & Lichtenhahn, Basel/Stuttgart, 1971) p. 68.

13. The second potential problem is that, as already mentioned, foreign policy issues can arise quickly, necessitating a relatively quick reaction. Where the constitution provides for overlapping competence, it will be necessary for the President and government to consult extensively with each other, and reach compromises, something which will be assumed to delay decision-making. Third, the overlapping competence can conceivably affect the willingness of the Finnish President or government to take foreign policy initiatives in their respective areas of primacy, because they do not wish to tramp on each other's toes. The increased need for consultation has a "price" not simply in terms of elapsed time, but also in terms of straining working relationships between the government and President. If the government wants to "remove" an issue from the President, it has the instrument to do so, by actively advocating (or supporting) a CFSP initiative in an area previously left for members states' bilateral foreign policies, concerning something which the President will obviously be very sensitive. And if parliament wants to say more on a foreign policy issue (below) a relatively simple way to do this is to take an expansive approach to what is within the CFSP. One thing which can be seen as an example of this is the views of the Committee on the Constitution on the issue of crisis management (54/2005). (Having said this, I agree with the Committee's analysis that the constitutional solution reached was artificial: CFSP decision making is both dynamic and "multi-phased".)

14. How real, and if so, how serious are these problems? It is difficult for me to say. Each supposed problem can be countered by other points.

15. The "one voice" argument can be exaggerated. In a semi-presidential system, giving the President primacy in foreign affairs makes sense in a number of situations. There is a value in Presidential continuity and expertise. A strong Presidential role in foreign policy is particularly useful where the electoral system or other factors tend to return unstable coalition governments. This was previously the case for Finland. But this has not been so since the 1980's. Nowadays, the coalition governments sit out their full four year terms. Where the government is stable, there is no reason for not involving it heavily in foreign policy matters, as is the case now. The question is rather if the powers of the President should be reduced. Having two centres of power both with their own source of democratic legitimacy need not be problematic. Admittedly, the voting system means that President is likely to come from one of the larger parties forming part of the coalition of government, even if he/she comes from a different party than that of the Prime Minister. But even if there were no President, and Finland had a pure parliamentary system, then coalition governments would still be the norm. And there can also be considerable differences of opinion in negotiating strategies or goals between government ministers in a coalition government. As long as these differences of opinion are kept confidential from foreign powers, negotiating strategy will not be undermined.

16. As regards confusion, this certainly has arisen in foreign negotiating partners (for a recent example, the minutes of the last EU Council meeting in June 2007 recorded Finland as being represented by its head of state, not the head of government, Huvudstadbladet, 25 June 2007). However I am not aware of any evidence that the Finnish Prime Ministers's position has been undermined in practice.

17. As regards delays caused by consultation, the need for speedy decision-making can also be exaggerated. As regards the third argument, having two centres of power indeed means that there will be sensitivity concerning measures regarded as being within each's "turf". But where it is recognised that there is common turf – and it is clear that the President and government do recognise this - this encourages consultation and compromise, which is no bad thing for a small country, especially one where the goal of consensus in foreign policy has been an important part of the political culture. Consultation practices and compromises quickly emerged with when the new constitution entered into force. Since March 2000, the Ministerial committee on Foreign and Security Policy has been chaired by the Prime Minister, but the President closes the

meeting and sums up the discussions. It may be that other countries which have semi-presidential models have specific mechanisms for ensuring consultation and cooperation, and for resolving speedily, and confidentially, differences of opinion between President and government. Conversely, other countries may have "worst practices" in this regard, which can be mentioned as examples to avoid. I think the Finns would be most interested in hearing of any such models from the Venice Commission.

18. A concluding point on this issue: if this were desired, the power of the Presidency could obviously be weakened in a number of ways, by constitutional amendment, e.g. by giving the government the primacy also in general (non-EU) foreign affairs. However, this weakening of the President's position need not take the form of constitutional amendment. It is likely to come about anyway, as a result of the expansion of natural development of the CFSP and the EU itself.

19. To turn now to the issue of parliamentary control. As already mentioned, this is closely linked to the above issue, in that increasing governmental control will, with present parliamentary mechanisms, probably mean a strengthening of parliamentary control.

20. Globalisation and regionalisation means that issues previously perceived by parliaments as being within domestic affairs, are now being, in practice, decided by international negotiations where there is often a lack of openness/transparency, limited or no possibility of participation through representatives chosen directly by the people, and a lack of accountability for the end result. It is often impossible to say whether better results have been achieved.² Imposing accountability is more difficult, as all participants will have an interest in reaching relatively ambiguous decisions, and so limiting their political responsibility. As negotiations must be conducted confidentially, non-elected diplomats increase their power. And flexibility decreases, because everything is based on a series of interlinked compromises. Finally, the distance between the voter and international problems is perceived as large.³

21. At the same time, at least for EU states, parliaments can get more to say over foreign policy issues which might previously have been regarded as a matter largely or wholly for the government. This is a result of the integration of EC related foreign policy (within parliamentary control mechanisms) with EU and non-EU foreign policy (in many countries only sketchily subject to parliamentary insight and control).

22. As with the issue of conduct of foreign policy, Finland applies a dual system concerning EU and non-EU foreign policy matters. Section 44 provides that "the Government may present a statement or report to the Parliament on a matter relating to the governance of the country or its international relations". This is matched by Section 97.1 "The Foreign Affairs Committee of the Parliament shall receive from the Government, upon request and when otherwise necessary, reports of matters pertaining to foreign and security policy". Under section 93.1 the Parliament accepts Finland's international obligations and their denouncement and decides on the bringing into force of Finland's international obligations in so far as provided in this Constitution. The President decides on matters of war and peace, with the consent of the Parliament." Section 94 provides for four categories of agreement for which parliamentary consent is necessary before Finland approves a treaty, "treaties and other international obligations that contain provisions of a legislative nature" (meaning treaties which require legislation, or involve changes in statutes), treaties which are "otherwise significant" (meaning politically significant) treaties which "otherwise require approval by the Parliament under this Constitution" (meaning concerning powers explicitly given to the Parliament, such as to approve the budget) and the denouncement of such obligations. Special majorities (two thirds of the votes cast) apply for treaties concerning the Constitution or an alteration of the national borders. A limit is placed

² L. Stenelo, 'Samråd och tystnad i förhandlingsdemokrati', in, *Globalisering* SOU 1993:83, at p. 247.

³ Stenelo *ibid.* p. 237, although the often-mentioned "CNN factor" may be shrinking this distance.

even on parliament's power to approve a treaty (although it will be parliament which decides whether this rule is applicable or not) in that an international obligation "shall not endanger the democratic foundations of the Constitution". Finland is a dualist state, and treaties falling within the legislative area are required to be in statute form (section 95). Treaties falling within presidential authority can be brought into force by the President by decree.

23. The provisions for parliamentary control over treaties seem to be relatively strong, I would say in practice stronger than a number of parliamentary democracies, such as the UK. The mechanisms for control over treaties bear strong resemblances to the Swedish system, which I have analysed in detail and which works satisfactorily.⁴ However, foreign policy is not simply making treaties. Moreover, the parliamentary control over the President's conduct of foreign policy is indirect, through the mechanism of parliamentary accountability for the *government*. There is thus scope for avoiding accountability. The government can avoid accountability for certain decisions, by stressing the President's final say over the issue. It is difficult to see how this can be wholly avoided while retaining a semi-presidential system. The risk will nonetheless be lessened if and to the extent that the parliament, through the Foreign Affairs Committee, has access to the – obviously confidential – governmental proposals which would make plain whether the President diverged from the advice he/she received from the government. The Foreign Affairs Committee has a duty of confidentiality (Section 50.3). Nor does a purely parliamentary system necessarily result in a greater degree of control over governmental conduct of foreign policy. The secrecy which surrounds, and necessarily must surround, certain aspects of foreign policy leads to dissatisfaction, whatever the system. For example, in Sweden, some critics have regarded the role of the Prime Minister, for a variety of reasons, including the EU summit practice of making package deals over ministerial areas of responsibility, as becoming increasingly "presidential" in foreign policy.

24. As regards the EU, under section 93.2, the Government is responsible for the "national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures, unless the decision requires the approval of the Parliament. The Parliament participates in the national preparation of decisions to be made in the European Union, as provided in this Constitution." More detailed provisions are to be found in Sections 96 and 97.2.⁵ The Finnish provisions provide for strong parliamentary control. The fact that the Grand Committee and the Foreign Affairs Committee usually receive the basis for EU decisions before they are taken allows it to influence Finnish government policy, which in turn can influence the EU decision maker(s). The control exercised, and capable of being exercised, compares favourably to that of other countries, e.g. Sweden. In Sweden, the equivalent EU Committee does not always have expertise in the material area of EU decision-making and is

⁴ Swedish Parliamentary Participation in the Making and Implementation of Treaties, 74 Nordic Journal of International Law 429-483 (2005).

⁵ Section 96 provides that "The Parliament considers those proposals for acts, agreements and other measures which are to be decided in the European Union and which otherwise, according to the Constitution, would fall within the competence of the Parliament.

The Government shall, for the determination of the position of the Parliament, communicate a proposal referred to in paragraph (1) to the Parliament by a communication of the Government, without delay, after receiving notice of the proposal. The proposal is considered in the Grand Committee and ordinarily in one or more of the other Committees that issue statements to the Grand Committee. However, the Foreign Affairs Committee considers a proposal pertaining to foreign and security policy. Where necessary, the Grand Committee or the Foreign Affairs Committee may issue to the Government a statement on the proposal. In addition, the Speaker's Council may decide that the matter be taken up for debate in plenary session, during which, however, no decision is made by the Parliament.

The Government shall provide the appropriate Committees with information on the consideration of the matter in the European Union. The Grand Committee or the Foreign Affairs Committee shall also be informed of the position of the Government on the matter.

Section 97.2 provides that "The Prime Minister shall provide the Parliament or a Committee with information on matters to be dealt with in a European Council beforehand and without delay after a meeting of the Council. The same applies when amendments are being prepared to the treaties establishing the European Union.

The appropriate Committee of the Parliament may issue a statement to the Government on the basis of the reports or information referred to above."

not capable of expressing the view of (and so binding) the Parliament as a whole (as the Finnish committees are). In Sweden, the views of parliament, if they are expressed at all, have thus often come too late to be able to influence the government.

25. As a concluding remark on parliamentary control, if, and to the extent that some Finnish parliamentarians feel that the parliament should have more insight into, and more to say about, foreign policy, the insight and control role of parliament is anyway likely to gradually expand with the expansion of the areas subject to the CFSP.