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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**COMMENTS  
ON THE CONSTITUTION  
OF FINLAND**

by  
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*\*This document has been classified restricted at the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

1. The following observations focus on certain specific elements of the Constitution. They, therefore, do not lead to a complete evaluation, but may be combined with observations of other members of the working group on other elements.

## 1. Basic Rights and Liberties

### Section 6: Equality

2. The words “without an acceptable reason”, which are meant to determine whether a differential treatment is justified, are somewhat strangely formulated, at least in the English translation as well as in the French translation (“*sans raison valable*”), because they create the impression that those who are called upon to judge on the justification (administrative bodies; courts) may follow their own opinion on the acceptability. In international treaties, for instance Article 14 of the European Convention on Human Rights and Article 1 of Protocol No. 12 to the Convention, the term “discrimination” is used to indicate that only those forms of differential treatment are prohibited for which there is no objective and reasonable justification. It may be recommended to use the word “discrimination” also in Section 6, which will make it easier to give an interpretation and application that follows the international case law.

3. As far as the discrimination grounds are concerned, Section 6 contains a list that does not present an exhaustive enumeration but ends with the words “other reason that concerns his or her person”. That formulation is not very precise, because there are many reasons for differential treatment that “concern the person” in question but do not constitute discrimination, for instance differential treatment on the basis of a person’s financial situation. It has to be admitted that the words “any other status” in Article 14 of the Convention and Article 1 of Protocol No. 12 are also not very precise. What is determinant is that the reason behind different treatment constitutes an integral part of the person’s physical or psychological identity, from which he or she cannot free him/herself, or cannot do so without violating his/her conscience.

4. It is somewhat remarkable that “race” is not mentioned expressly, nor is “sexual orientation”, while “origin” is rather unspecified.

5. It is not clear why the promotion of equality of the sexes is restricted to societal activity and working life. Although these areas are quite broad, it is not evident, e.g., that family life is covered by societal activity.

6. Different treatment on the basis of nationality is not prohibited by international law in general. For the European Union, however, specific rules apply for the areas covered by Community law. Moreover, Article 26 of the International Covenant on Civil and Political Rights takes equal treatment as a starting point, while it represents also a general principle of international and national law. Therefore, preferential treatment of citizens may be justified but needs a specific justification, which requires that it serves a legitimate purpose and is proportional to that purpose.

7. It is recommended that Section 6 is formulated in a more precise way, taking into account Finland’s international legal obligations and obligations under the law of the European Union.

### Section 9: Freedom of movement

8. The grounds on which the law may limit the right to leave the country would seem to be formulated too narrowly. Article 2 of Protocol No. 4 to the European Convention on Human Rights also mentions as grounds: national security and public safety, the maintenance of *ordre public*, the prevention of crime, the protection of health and morals, and the protection of the

rights and freedoms of others. It is true that Article 53 allows the Contracting States to provide for a broader enjoyment of the rights under domestic law, but in this case the broader scope of the right to leave the country would be to the detriment of the protection of certain general interests and of the enjoyment by others of their fundamental rights.

9. The guarantee of Finnish citizens not to be extradited against their will requires some modification in view of Finland's obligations under the law of the European Union.

10. It is recommended that Section 9 is also formulated more in conformity with Finland's international legal obligations and obligations under the law of the European Union.

#### Section 10: The right to privacy

11. The grounds on which the different elements of the right to privacy may be interfered with are not indicated very specifically. The matter is delegated to the legislature, who will have to respect the minimum guarantees laid down in international law, in particular Article 8 of the European Convention on Human Rights and the relevant regulations of the European Community. As formulated Section 10 gives the impression – leaving apart the very broad reference to “the purpose of guaranteeing basic rights and liberties” – that the interferences that are justified, must have to relate to criminal proceedings.

12. It is recommended that Section 10 is formulated in a way that offers more specific constitutional guarantees.

#### Section 11: Freedom of religion and conscience

13. The provision as worded creates the impression that not only the right to freedom of religion and conscience is an absolute one, but also the right to profess and practice a religion and the right to express one's conviction have that absolute character. Here, again, it is clear that domestic law may provide for a broader guarantee than the relevant international standards do, but it is also clear that an absolute right to profess a religion and express a conviction may infringe upon the right of others to have their right to freedom of religion, or their reputation respected and protected.

14. It is therefore recommended to expressly provide for limitations by law and to list the limitation grounds in Section 11.

15. The right to freedom of religion and conscience also encompasses the right to change one's religion. In view of the attitude of certain religions in that respect, it is recommended that this right be added to the right to be a member or to decline to be a member of a religious community.

#### Section 12: Freedom of expression and the right of access to information

16. It is not clear why the legal regulation on restrictions of pictorial programmes for the protection of children is expressly provided for, as this is already covered by the third sentence of the first paragraph, unless it also encompasses prior censorship. The latter, however, could lead to interventions that would encroach upon the essence of the right to freedom of expression. This provision needs some clarification.

17. The second paragraph is formulated in a somewhat unusual way. The right of access to public documents and recordings is a tautology, if “public” means public in the sense of the first sentence. The restrictions of publicity and the restrictions of access should be regulated in a more integrated way.

18. "Compelling reasons" sounds, on the one hand, very restrictive, but may, on the other hand, be interpreted very broadly. It is recommended to specify those reasons in somewhat more detail in the constitutional provision.

#### Section 13: Freedom of assembly and freedom of association

19. There would seem to be a possible contradiction between the first and the third sentence, as the right to hold meetings and demonstrations without a permit is formulated in an absolute way, while the third sentence provides for legal regulation of the exercise of that right by law.

20. Here, again, it is clear that an absolute freedom of demonstration may infringe upon the rights and freedoms of others.

21. It is, therefore, recommended to formulate the right and its possible limitations in a more integrated, and also more specific way.

#### Section 14: Electoral and participatory rights

22. It is somewhat remarkable that the active right to vote is presented as a fundamental right, while the passive right to be eligible for membership of national representative bodies is only mentioned as a matter to be regulated by law. For municipal elections the eligibility for membership of municipal representative bodies is not even mentioned.

23. On the other hand, the right to participate in municipal government is referred to in the second sentence, while the right to participate in the central government is not mentioned in the first sentence (see, however, Section 125).

24. There is no provision in the present Section concerning proportional representation and participation in government of national minorities, while Section 25, paragraph 2, contains a provision for the Aland Islands for parliamentary elections only.

25. It is recommended to bring the wording more in balance in these respects.

#### Section 15: Protection of property

26. The first sentence is formulated in too absolute a way, since it is obvious that expropriation is not the only ground on the basis of which property and the use thereof may be regulated by law.

27. It is recommended to formulate the first sentence in a less absolute way.

#### Section 16: Educational rights

28. The first sentence provides for free of charge education in the case of basic education only, which presumably means primary education. However, Article 13, paragraph 2 under (b) and (c) of the International Covenant on Economic, Social and Cultural Rights stipulates that the accessibility of secondary and higher education shall be made equal, in particular by the progressive introduction of free education. The guarantee as formulated in the second sentence with reference to "special needs" and "economic hardship" does not contain this element of progress.

29. Section 16 is formulated as a right of access to education only, presuming the availability of education. It does not, however, contain a reference to the free choice of education of a certain denomination or philosophy of life, let alone the right of parents to make such a choice and ensure the availability of education of their choice. In this way, Section 16 does not sufficiently

reflect the obligations under Article 2 of the First Protocol to the European Convention on Human Rights and Article 13, paragraphs 3 and 4 of the International Covenant on Economic, Social and Cultural Rights. The guarantee, in the third paragraph, of the freedom of higher education is not sufficient for that purpose.

30. It is recommended to bring Section 16 more in conformity with international standards.

#### Section 17: Right to one's language and culture

31. In this provision the constitutional guarantee of using one's own language as a cultural right only covers the Finnish-speaking and Swedish-speaking members of the population. For the Sámi, the Roma and "other groups" the guarantee is less specific (see, however, Section 120 in relation to the Åland Islands, and Section 121, paragraph 4 for the Sámi). Moreover, the reference to "other groups" in the third paragraph is not sufficiently defined. It is not clear from that provision whether such groups have to form a "national minority" in the sense of the Framework Convention on National Minorities.

32. This raises the question of the scope of Finland's ratification of the Framework Convention on National Minorities, and whether that covers only the groups of the population expressly mentioned. The wording of Section 17 should more closely follow the obligations ensuing from the Framework Convention.

#### Section 18: The right to work and the freedom to engage in commercial activity

33. The first paragraph contains a reference to the right to employment, be it under the not very clear proviso "as provided by an Act", suggesting that the scope of this right is fully determined by the legislature and, consequently, does not lend itself for direct application by the court.

34. This impression is reinforced by the scope of the positive obligation laid down in the second paragraph: not a guarantee of work but the obligation to promote employment and work *towards guaranteeing* for everyone the right to work.

35. The third paragraph, dealing with dismissal, gives the provision an horizontal effect ("*Drittwirkung*") in the relation between employer and employee. This raises the question of whether, and if so, to what extent the right to employment of the first paragraph also has some horizontal effect. In that context, the words "lawful reason" in the third paragraph are not sufficiently clearly defined. It is recommended to replace them by the Finnish equivalent of "provided by law".

#### Section 19: The right to social security

36. It is not clear why the guarantees laid down in this section are differently formulated. Paragraph 1 contains a "right to receive indispensable subsistence and care"; paragraph 2 guarantees the right to basic subsistence in certain circumstances "by an Act"; paragraph 3 provides that the "public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services"; while paragraph 4 stipulates that the "public authorities shall promote the right of everyone to housing".

37. It is recommended to formulate the guarantees in all three cases as constitutional rights, leaving their further elaboration to the legislature.

38. From the Memorandum of the Ministry of Justice one gets the impression that the full guarantee of the economic and social fundamental rights laid down in the Constitution is hampered by lack of resources. That may bring Finland in conflict with its international obligations, since Article 2, paragraph 1 in connection with paragraph 2 of the International

Covenant on Economic, Social and Cultural Rights requires that the Contracting States "achiev[e] progressively the full realisation of the rights recognised" therein, without discrimination.

#### Section 21: Protection under the law

39. The inclusion of this section in Chapter 2 is not very well chosen. Placing it at the end of the social rights suggests either that it is also a social right rather than a civil right, or that it is not an autonomous right but concerns the legal protection of the afore-mentioned rights only.

#### Section 23: Basic rights and liberties in situations of emergency

40. It is preferable that the Constitution expressly lists the basic rights and liberties laid down therein that shall not be derogated from in any circumstances. That list has to be compatible with Finland's international obligations but may have a broader scope.

41. The words "according to an Act" are not totally clear. Do they mean that in case of any emergency that threatens the nation, other than an armed attack against Finland, the legislature has to make an assessment of its serious character before derogation measures may be taken? The emergency of the situation may not always allow for the delay caused by such a pre-condition.

42. It is recommended that Section 23 is elaborated and clarified.

## **2. Constitutional and legal review**

43. Chapter 6 of the Constitution, dealing with legislation, contains Section 74 on supervision of constitutionality. From the wording of the provision it becomes evident that the *ex ante* review of draft legislation by the Constitutional Law Committee for its conformity with the Constitution also comprises review for its relation to international human rights treaties.

44. On the contrary, Section 106 dealing with constitutional review of legislation by the courts only refers to the Constitution, not to treaties.

45. This may create the impression that the Constitutional Law Committee may, and perhaps should give priority to the provisions of human rights treaties over the human rights provisions of the Constitution, if there is a conflict, but that the courts are not allowed to do so after the law has been adopted and entered into force.

46. This is a difference between *ex ante*-review and *ex post*-review that would not seem to be justified and might be reconsidered.

47. In addition there are other constitutional bodies with the function of constitutional review: the Chancellor of Justice and the Parliamentary Ombudsman. Their review will, of course, also and even mainly concern the human rights provisions of the Constitution. However, whether and to what extent they may also take into consideration human rights provisions of treaties that are not covered by the Constitution or have a broader scope of protection is not clear.

#### Section 74: Supervision of constitutionality

48. It is not clear from this provision what the status of the statements of the Constitutional Law Committee on constitutionality and relation to international human rights treaties is, and whether a special procedure for the adoption of the legislative proposal applies if the Constitutional Law Committee finds the proposal to be in violation of the Constitution or a treaty.

### Section 77: Confirmation of Acts

49. The same applies with respect to the status of statements of the Supreme Court and the Supreme Administrative Court at the request of the President.

50. The Supreme Court and the Supreme Administrative Court, under this Section, do not act in a judiciary but in an advisory capacity. They may be called to give an opinion about the constitutionality or legality of the legislative proposal, or on the conformity of the proposal with international law or European law, while at a later stage they may be called to judge on the same legal question when applying the Act after its adoption in a case before them. This may, in certain circumstances, raise an issue about their objective impartiality in view of the Procola judgment of the European Court of Human Rights.

51. This issue needs special attention.

### Sections 108, 111 and 112: Duties of the Chancellor of Justice of the Government

52. This provision is very unclear and has some dangerous implications.

53. It is unclear what powers the Chancellor has if he or she finds an act of Government or the President to be unlawful. What measures may be taken under Section 112 if his or her comments are ignored by the President or Government? Before whom may he or she bring charges under Section 111 (see Section 118), and what will be the procedure and the possible outcome? May he or she also advise the Government to withdraw its act? There should be a reference to Section 115 which implies that the Chancellor may bring the matter before the Constitutional Law Committee.

54. The same questions arises if the Chancellor finds that another public authority or person has acted unlawfully. This needs clarification.

55. The power of the Chancellor to ensure that "the courts of law ... obey the law" is clearly in violation of the independence of the judiciary. Review of the legality of acts and decisions of a court lays with the higher court alone, in accordance with the division of jurisdiction.

### Sections 109, 111 and 112: Duties of the Parliamentary Ombudsman

56. This provision raises the same issues: what are the powers of the Ombudsman in case he or she finds an act to be unlawful, what measures may be taken, before whom may he or she bring charges under Section 111 (see Section 118), and how does the legal review by the Ombudsman of decisions of the courts relate to the normal appeal system and the principle of independence of the judiciary?

57. This issue also needs clarification.

### Section 118: Official accountability

58. There is a need for clarification as to which court is/courts are competent in the case of unlawful public action, since both criminal and civil, as well as administrative issues are involved.

59. It also has to be clarified whether charges may be brought by those who deem themselves victims only, or also by the Chancellor of Justice and the Parliamentary Ombudsman (see Section 111).

### **3. Acceptance of international obligations**

#### Section 94: Acceptance of international obligations and their denouncement

60. It is not clear from the first paragraph who determines, and by what criteria, whether a treaty or other international obligation is of a legislative nature or is otherwise significant, and thus requires approval by Parliament.

#### Section 96: Participation of Parliament in the national preparation of European Union matters

61. The same lack of clarity exists with respect to the question which draft decisions or measures of the European Union fall within the competence of Parliament and thus require the involvement of Parliament in the determination of the Finnish position in the EU decision making.

62. It might also be advisable to expressly state that Parliament has the power to decide whether a certain matter is appropriate for EU decision making or should be left to the member States to decide, on the basis of the subsidiary principle.

### **4. Relation between international and domestic law**

#### Section 94: Acceptance of international obligations and their denouncement

63. It is not clear from the second sentence of the second paragraph whether Parliament may also, by a two thirds majority, approve a treaty that is not in conformity with the Constitution, and whether, if such a treaty is ratified, it has to be applied by the Finnish courts even if deemed or found to be in violation of the Constitution.

64. This issue needs further clarification.

#### Section 106: Primacy of the Constitution

65. This provision raises the issue of the primacy of self-executing international legal provisions, and their status *vis-à-vis* the Constitution. As far as the law of the European Union is concerned, its primacy over Finnish law, including the Constitution, follows directly from Community law but may also be conformed in the Constitution.

66. This issue has to be regulated.

### **5. Administration of justice**

#### Section 27

67. From the third paragraph it ensues that members of other courts than the two highest courts are eligible as members of Parliament. Although this possibility does not violate any express rule of European or international law, it would lead to a combination of legislative and judicial power in one and the same person and might create doubt as to the objective impartiality of the judge concerned, especially in cases where he or she has to interpret and apply laws in the discussion, in possible amending and adoption of which he or she has participated.



#### Section 98: Courts of law

68. Since Finland has a separate system of administrative jurisdiction, the qualification of the Supreme Court, the Courts of Appeal and the District Courts as “general courts of law” does not seem correct; their jurisdiction is limited to civil (and commercial) and criminal law cases.

#### Section 99: Duties of the Supreme Court and the Supreme Administrative Court

69. The word “supervise” in the first sentence of the second paragraph creates the wrong impression that the highest courts may also intervene *proprio motu*, without an appeal having been lodged, in the administration of justice by the lower courts. The appropriateness and meaning of the provision should be reconsidered.

70. To the second sentence of the second paragraph applies what has been said in relation to Section 77: if the highest courts participate in the drafting of law, this may raise doubts as to their objective impartiality when they are called upon to interpret and apply that law in a case before them (Procola).

#### Section 101: High Court of Impeachment

71. In view of the jurisdiction of the High Court of Impeachment and its composition (50% judges and 50% appointed by parliament) it is recommended to fix the required quorum in this constitutional provision instead of delegating this issue to the legislature.

#### Section 102: Appointment of judges

72. Since the appointment of judges is of vital importance for guaranteeing their independence and impartiality, it is recommended to regulate the procedure of appointment in more detail in the Constitution. Special care has to be taken that appointment by the Executive – and possible involvement of Parliament - is always based on a nomination procedure in the hands of an independent and a-political body.

#### Section 103: The right of judges to remain in office

73. For the same reason of independence and impartiality, the grounds for suspension, dismissal or resignation should be laid down in the Constitution, and the competent court should be specified, as well as the right of appeal of the judge concerned.

#### Section 105: Presidential pardon

74. The court that has imposed the sanction should be consulted in the pardon procedure, either instead of the Supreme Court or by the Supreme Court before it gives its opinion.

### **6. Protection of national minorities**

#### Sections 120 - 122: Self government and use of languages

75. The Constitution contains provisions on self-government for the Åland Islands, and on linguistic self-government with respect to the Sámi and the Finnish-speaking and Swedish-speaking populations. Cultural self-government is only expressly provided for in relation to the Sámi in their native region. This raises the question whether these provisions cover Finland's obligations under the framework Convention on National Minorities. This depends on the scope of Finland's ratification of that convention.

76. The conclusion must be that the Constitution is not very specific about minority rights.

## **7. Concluding remarks**

77. On the whole, the provisions of the Constitution examined in the above observations, are in conformity with European standards of democracy, the rule of law and human rights.

78. For a young Constitution as the Finnish one is, it is somewhat surprising that Chapter 2, dealing with basic rights and liberties, is not more closely tuned to the regulation of these rights and freedoms in the European Convention on Human Rights and its Protocols and in the European Social Charter, both as concerns the selection of rights and freedoms, their formulation and scope, and the conditions for the limitation of and derogation from some of them. In Section 1 of the Constitution, where it is said that the Constitution "shall guarantee the inviolability of human dignity and the freedom and rights of the individual" there is also no reference to the international legal obligations of Finland in this area. There is, of course, no obligation for Finland to implement these international obligations by incorporating them literally in its Constitution, but a deviating or more restrictive constitutional guarantee can never be used as a defence against allegations of non-fulfilment of these obligations. It is, therefore, in general advisable to take these international obligations into close account in drafting or amending the constitutional provisions concerning human rights and freedoms.

79. The procedure and status of the *ex ante* and *ex post* constitutional review of legislative proposals and international treaties is not clearly regulated.

80. Some provisions concerning the judicial system need clarification since they leave room for implications that cannot have been meant. The advisory function of the judiciary in legislative matters has to be duly reconsidered.

81. Several issues are raised in connection with legality review of governmental action; the powers of the different review authorities, and their relation to judicial review are not clearly regulated.

82. Finally, the Constitution is not very specific and detailed about minority rights.