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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 paper deals with some of the most important issues raised in the note of the Ministry of Justice of Finland and during the visit of the delegation of the Venice Commission to Finland, that is:

- decision-making process in foreign and European policies
- election of the President
- judicial review of legislation
- rank of international treaties

Judicial review of legislation

2. In principle, even from the point of view of the Venice Commission and its "jurisprudence", the adoption of the European (kelsenian) model of the constitutional justice could be considered not mandatory. It could be sufficient that the Finnish system guarantees some specific elements especially relevant in view of the safeguard of the human rights. Therefore it could be decisive that, on the one side, the access to the judicial review is open to all interested persons, that is to all persons potentially exposed to the danger of unlawful violations of their rights, and, on the other side, the decision of the competent judicial authority produces effects which comply with the principle of the certainty of the law. If these two exigencies are satisfied, the adhesion of the Finnish Constitution to the Nordic model of the judicial review of legislation could not be objectionable.

3. As a matter of fact, the interpretation of art. 106 of the Finnish Constitution is at stake. According to this provision, "if, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution". It strictly connects the settlement of a conflict between the Constitution and a legislative Act with a judicial decision of a case: therefore, we can say that all the persons affected in the fruition of their rights by an act of legislation are allowed to ask a decision about such a conflict to the judge of the case as far as the principles of art. 13 ECHR are complied with. But it is also evident that the effects of the judicial decision are limited to the case and to the persons who are interested in the case: the Constitution is silent about the general effects of the decision that is art. 106 does not provide for its erga omnes effects. This lacuna is coherent with the choice of making the decision about the review of the legislation incidental to "a matter being tried by a court of law", however it is not helpful for the certainty of the law. It could be helpful only if in the Finnish system the effects of the decisions of the superior courts were assisted by the stare decisis principle, but the papers offered by the Finnish authorities don't give any positive evidence on this point.

4. We can say that the Finnish constitutional rules dealing with the judicial review of legislation are not satisfactory. Moreover two other elements support this conclusion.

5. Mr Van Dijk criticised in his paper the participation of the Supreme Court and of the Supreme Administrative Court in the legislative decision-making process as consultative bodies. I fully share his opinion that the objective impartiality of the superior judges is at risk if they are called to deal with the conformity of a bill with the Constitution or with the international or European law and, in a following case, are allowed to raise the same question in deciding a case. But there is another set of provisions which are not mentioned by Mr van Dijk and raise similar objections.

6. The entrenchment of the Aaland Islands autonomy, which is expressly covered by art. 75 of the Constitution, provides for the participation of the Supreme Court in the procedure aimed at organising the control of the Aalandic legislation: an Aalandic act - when it is presented to the President of the Republic - is submitted for an opinion to the Supreme Court which have to judge about its compliance (or not) with the division of legislative competence between the Aaland legislative assembly and the Finnish Parliament. Even if we follow the generally

accepted opinion that the Supreme Court expresses an authoritative interpretation of the question concerning the compliance with the division of the legislative competence, we cannot refrain from underlining the incompatibility between the judicial functions of the Supreme Court and its role in the control procedure of the Aalandic legislation. Our concern on this point could be bypassed only by supporting the opinion that art. 106 does not regard the Aalandic legislative acts, but in this case we would be confronted with a default of the system of the judicial review of legislation and new reasons of criticism would be added.

Decision-making process in the international and European policies

7. According to art. 93, "the foreign policy of Finland is directed by the President of the Republic in cooperation with the Government ". But it is the Government which is "responsible for the national preparation of the decisions to be made in the European Union, and decides on the concomitant Finnish measures". In any case the approval of the Parliament is required for the acceptance of Finland's international obligations (ratification) and their denouncement, the Parliament decides on the bringing into force of Finland's international obligations and participates in the national preparations of decisions to be made in the European Union.

8. There are some doubts about the participation of Finland in the decision-making relating to military crisis. If our interpretation is correct, military crises should be dealt with under the direction of the President when they fall in the area of the international affairs. But the Government pretends to be competent when the European Union is taking care of the management of the military crisis.

9. If we have in mind that even in the recent European Council of Bruxelles (June 21 - 22, 2007) it was decided to underline in art. 11 of the Treaty of the European Union that the competence of the Union in the field of foreign policy and of the common security regards all the sectors of the foreign policy and all the questions concerning the security of the Union (including the formation of a policy aimed at the establishment of a common defence), it is evident that the interpretation of the Finnish Constitution has to be elaborated in view of a coordination of the enlargement of the scope of the European policies and the safeguard of the competence of the President, whose functions cannot be progressively eliminated by the negotiation of new amendments of the European Treaties. Therefore the Constitution should be construed or revised in view of keeping and guaranteeing the direction of the President as far as the definition of the foreign policy affecting the management of military crisis is at stake.

10. Moreover another question regards the participation of Finland to the summits of the European Council which don't directly touch the matter discussed above. The entrusting of the function of representing Finland in the meetings of the European Council to the Prime Minister can be approved, but it is evident that the participation of the President is required when revisions or modifications of the European Treaties are in the agenda. Revisions or modifications of the European Treaties are part of the European policies. However - for the reason that they differ from the ordinary decisions of the European authorities - they require a parliamentary decision of acceptance (ratification) and are - at the same time - part of the foreign policies because they imply a redefinition of the place of Finland in the international scene. In some way the adoption of the European Treaties and their revision, as far as it precedes the development of the European policies, define the respective sphere of the European and of the foreign policies of Finland and - therefore - they directly interest the President of the Republic. Correctly a paper of the Law Drafting Department of the Ministry of Justice remarks that "the membership in the EU has converted many traditional foreign policy issues into EU-policy issues".

11. This aspect of the problem could be dealt with in a specific Europe Article if Finland would decide to adopt a provision similar to those which other European States adopted.

Rank of international treaties in the hierarchy of the sources of law

12. While the position of the European law in relation with the internal national law directly follows from the provisions of the European Treaties, the place in the hierarchy of the sources of law which is occupied by the international treaties is not clear. Art. 94 requires a parliamentary vote for the acceptance of the international obligations, underlining that the decision shall be made by at least two thirds of the votes cast, "if the proposal concerns the Constitution or an alteration of the national borders". It follows that international treaties cannot contradict the Constitution, but it is not clear if the national legislator has to comply with the international obligations and if - after the ratification of the treaties – it is constitutionally bound not to adopt new legislation contradicting the international obligation. The absence of such a specific constitutional obligation could be justified by the characteristics of the Finnish legal order which is apparently a dualistic legal order, but perhaps a special position should be recognised to the international treaties providing for the protection of the basic rights and liberties: according to art. 23 only provisional exceptions to basic rights and liberties which are compatible with Finland's international obligations may be provided by an Act, if they are deemed necessary in the case of an armed attack or if an Act declares the emergency so serious that it can be compared with an armed attack. This provision can be the basis for judicial review of legislation in case of conflict between a piece of legislation and Finland's international obligations. This conclusion obviously puts in the hand of the Finnish judicial authorities the power of guaranteeing the compliance with the international obligations in the field of the basic rights and liberties, but it does not imply a limitation of the power of international authorities deriving from the international treaties binding Finland in the matter of protection of the basic rights and liberties. But if the conclusion is correct, it could be advisable to introduce into the Constitution a provision supporting it and, perhaps, to extend the scope of its application to all international treaties binding Finland.

Election of the President

13. If I understand correctly, the provisions dealing with the election of the President don't need revision, notwithstanding the fact that the Constitution gives more emphasis to the parliamentary aspect of the Finnish political system. Actually the President has to make decisions in Government on the basis of proposals put forward by the Government, however the President can return the matter to the Government when (s)he does not agree with the proposal, but (s)he has to accept the new proposal and cannot refuse the adoption of the decision at the second reading. Moreover there are decisions which the President can adopt without Government's proposal and - as we saw above – (s)he has the power of directing the foreign policy. Therefore, the President has functions which can require a legitimacy deriving from a popular vote. Especially in the field of the foreign policy (s)he is entrusted with responsibility which affects the main lines of the national foreign policy and (s)he certainly is the guarantor of the continuity of this policy, of the international alliances of Finland and of its adhesion to the European Union. This responsibility is certainly strengthened by the support of the popular vote expressing the consent of the public opinion to the guidelines of the presidential foreign policy.