



COUNCIL OF EUROPE  
CONSEIL DE L'EUROPE

Strasbourg, 4 October 2007

**CDL(2007)091\***

**Opinion No. 420 / 2007**

Engl. only

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

**COMMENTS  
ON THE CONSTITUTION  
OF FINLAND**

by  
**Mr Michael JENSEN (Substitute member, Denmark)**

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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.*

## **I. Rank of international treaties – in particular in the field of human rights**

1. According to the first paragraph of section 94 the acceptance of parliament is required for treaties and other international obligations that contain provisions of a legislative nature. The acceptance or the denouncement is – according to the second paragraph of section 94 – made by a majority of the votes cast. If the proposal concerns the Constitution the decision shall be made of at least two thirds of the votes cast.

2. According to the first paragraph of section 95, the provisions of treaties and other international obligations of a legislative nature are brought into force by an Act. A government bill for bringing into force of an international obligation is – according to the second paragraph of section 95 – considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution it must be adopted by Parliament – without leaving it in abeyance – by at least two thirds of the votes cast.

3. It follows from these provisions that international obligations/treaties of a legislative nature are brought into force in Finland with the status of ordinary law – unless the obligations/treaties concern the constitution. Thus, the European Convention on Human Rights incorporated into Finnish law by an Act of Parliament does not have a higher hierarchical status than normal legislation.

4. However, the Constitutional Law Committee of the Parliament and the case-law of the Finnish Supreme Courts have recognised a basic principle of human rights friendly interpretation in relation to the application of European Convention on Human Rights – and the case-law of the European Court of Human Rights - within the national legal system. It seems that this principle of human rights friendly interpretation implies that the European Convention on Human Rights has a higher de facto status than a normal statute. On the other hand the principle is based on the presumed will of Parliament.

5. The delegation of the Venice Commission was at the University of Turku confronted with the view that provisions of the European Convention on Human Rights have an impact on the interpretation of other provisions in the Constitution.

6. Further the delegation was confronted with the opinion that in relation to human rights more provisions in the Constitution – for example section 22 - presuppose a monistic approach. This view, however, seems not to be in harmony with section 94 and section 95 of the Constitution. Both sections are based on a dualist principle. Confronted with this it was argued that the provisions implying a monistic approach in relation to section 94 and section 95 are *lex specialis*.

## **II. Status of the European Convention on the Human Rights**

7. Thus, there seems to exist some uncertainty concerning – especially – the status of the European Convention on the Human Rights within the legal order.

8. The status – especially – of the European Convention on Human Rights should therefore be considered carefully. Focus could be put on the following 3 models:

9. **A)** A continuation of the model of section 95 combined with human rights friendly interpretation of national law in order to comply with the requirements of the European Convention on Human Rights based on explicit statements in the preparatory works of the Constitution.

10. It must be remembered that the present principle of human rights friendly interpretation is solely based on the presumed will of Parliament, on the practice of Parliament. Explicit

statement of the principle in the preparatory works of the Constitution will serve as a clearer and more solid basis for application of the European Convention on Human Rights within the national legal system without questioning that compliance of national law with the Convention is basically the competence and responsibility of Parliament.

11. **B)** The fundamental human rights provisions of the Constitution could be formulated – more or less accurately – in accordance with the provisions of the European Convention on Human Rights.

12. This model could lead to a situation of a high degree of harmonisation between the levels of protection of human rights after the Constitution respectively the European Convention on Human Rights – especially if the case-law of the European Court of Human Rights is mentioned in the preparatory works as a relevant factor for interpretation of the Constitution.

13. Seen as an alternative to the European Convention on Human Rights incorporated into Finnish law by an Act of Parliament this model places the courts in a more independent and central role for the fulfilment of the requirements of the Convention. However, it must be taken into consideration that until now the Finnish courts seem to have been cautious to give primacy to provisions in the Constitution in cases where the constitutionality of a provision in a regular Act has been questioned. According to section 106 the courts shall give primacy to the Constitution in cases where the application of an Act would be in “evident” conflict with the Constitution. A modification of the condition for giving primacy to the Constitution from “evident” to for example “clear” could be considered.

14. Furthermore, the question should be raised whether formulating the relevant constitutional human rights provisions in accordance with the provisions of the European Convention on Human Rights could lead to a lower degree of protection of certain individual rights. This could be the case in relation to the protection of property. An assessment requires more detailed analysis of the relevant provisions.

15. If a provision in the Constitution is assumed offering a higher/broader degree of protection than the parallel provision in the European Convention on Human Rights a possible solution could be to formulate the relevant provision so that they cover both the existing constitutional protection and the protection according to the European Convention on Human Rights.

16. But still the question should be raised whether the reformulation of the fundamental rights provisions in the Constitution would represent such a change in the constitutional system that it could endanger established constitutional human rights positions – especially – in case-law.

17. **C)** The European Convention on Human Rights could be incorporated into the Constitution following the lines of the Swedish Constitution (The Instrument of Government). According to Chapter 2, section 23 of the Swedish Constitution “No act of law or other provision may be adopted which contravenes Sweden’s undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms”.

18. An incorporation following the lines of the Swedish Constitution clarifies that the European Convention on Human Rights is brought into force in the Finnish legal system with the status of constitutional law. Not only Parliament but also the courts are responsible for securing that Finnish legislation is in accordance with the European Convention on Human Rights. Even if Parliament intends to legislate contrary to the Human Rights Convention the courts shall give primacy to the relevant provisions in Convention – according to the present section 106 in case of evident conflict. Also here a modification of the condition for the courts giving primacy to the Constitution/the European Human Rights Convention from “evident” to for example “clear” could be considered.

19. Compared with the above mentioned model 2 this model of general incorporation does not affect the protection under the specific human rights provisions of the Constitution. The standards of both the specific provisions of the Constitution and the European Convention on Human Rights must be fulfilled.

20. A general incorporation of the European Human Rights Convention into the Finnish Constitution seems to represent an effective implementation of the Convention. Inter alia it implies that Parliament no longer has the competence to pass acts – in accordance with the ordinary legislative procedure – which are (intended) inconsistent with the European Human Rights Convention. This underlines that the decision concerning the model for implementation of the European Human Rights Convention into Finnish law must include the principles behind section 1-3 of the Constitution.

### **III. Rank of international treaties in general**

21. **A)** According to section 94 the acceptance of Parliament is required for treaties and other international obligations that contain provisions of a “legislative nature”. And according to section 95 the provisions of treaties and other international obligations are brought into force by an Act in so far as they are of a “legislative nature”.

22. It is somewhat unclear when treaties and other international obligations are of a legislative nature. The formulation of a more precise criterion/provision should be considered.

23. Apparently both in section 94 and section 95 the criterion “legislative nature” is based on section 3 of the Constitution which states that the legislative powers are exercised by the Parliament. Treaties and other international obligations of a “legislative nature” are apparently intended to be obligations of such of nature that their adoption – according to section 3 of the Constitution – belongs to the exclusive competence of Parliament.

24. In order to clarify the connection between section 94, section 95 and section 3 an express reference to section 3 in both section 94 and section 95 could be considered.

25. A formulation of the first sentence of the first paragraph of section 94 as follows could also be considered:

“The acceptance of parliament is required for such treaties and other international obligations which for fulfillment (according to section 3?) require the concurrence of Parliament, are otherwise significant, or otherwise require approval by the Parliament under this Constitution.”

26. **B)** Also the status of Acts bringing into force international obligations that concerns the constitution could raise questions.

27. According to section 94 the acceptance of treaties and other international obligations that contain provisions of a legislative nature is made by a majority of the votes cast. If the proposal concerns the Constitution the decision shall be made of at least two thirds of the votes cast. According to section 95 the provisions of treaties and other international obligations of a legislative nature are brought into force by an Act adopted by a majority of the votes cast - in accordance with the ordinary legislative procedure in section 72. If the international obligation concerns/is in conflict with the Constitution the Act must be adopted by Parliament – without leaving it in abeyance – by at least two thirds of the votes cast.

28. Thus, section 95 of the Constitution allows an Act bringing into force international obligations that are in conflict with the Constitution without amending the Constitution.

29. **C)** Section 95 seems to be based on the general provision in section 73 of the Constitution.

30. According to section 73 of the Constitution a proposal on the enactment, amendment or repeal of the Constitution or the enactment of a limited derogation to the Constitution shall in the second reading by a majority of the votes cast be left in abeyance until after elections – unless the proposal is declared urgent by a decision supported by at least five sixths of the votes cast. The proposal shall then be adopted by a decision supported by at least two thirds of the votes cast.

31. Thus, the Constitution generally allows adoption of Acts that are in conflict with the Constitution if the Acts are approved by the same procedure as is required for an amendment of the text of the Constitution.

32. But even though section 95 seems to be based on section 73, section 95 is not only a special reflection of the model of derogation in section 73. The procedure of adoption of Acts bringing into force international obligations which are in conflict with the Constitution according to section 95 does not follow the procedure of adoption of laws in conflict with the Constitution according to section 73. Section 95 only requires that the proposal is supported by two thirds of the votes cast.

33. This raises the question of the rank of an Act bringing into force international obligations that are in conflict with the Constitution. The fact that the Constitution is not amended, that the international obligation is brought into force by an Act and that the adoption of the Act does not follow the normal procedure for enactments of Acts in conflict with the Constitution, but only requires a majority of two thirds in Parliament indicate – strongly, in my opinion – that such an Act is at the same hierarchical level as ordinary Acts of Parliament. Consequently, an Act bringing into force international obligations that are in conflict with the Constitution can be amended by an Act adopted according to the normal procedure in section 72 of the Constitution. However, if the amendment implies an extension of the conflict with the Constitution the procedure in section 95 (or section 73) of the Constitution must be followed.

34. Also the rank of Acts in conflict with the Constitution which are adopted according to the procedure in section 73 of the Constitution could be questioned. In my opinion also such Acts are on the same hierarchical level as ordinary Acts of Parliament and the consequences concerning amendment of these Acts are the same as mentioned in relation to Acts bringing into force international obligations that are in conflict with the Constitution.

35. This issue should be considered further.

#### **IV. The relationship between EU-law and the Constitution**

36. The Constitution contains no specific provisions on the relationship between EU-law and Finnish law. The Constitution contains three provisions concerning the EU – section 93, paragraph 2, section 96 and section 97 – which all deal with the Finnish participation in EU affairs.

37. Thus, the relationship between EU-law and Finnish law is based on the general provisions in section 94 and section 95. As mentioned these provisions are based on a dualistic principle. As a consequence EU-law has to be brought into force by Acts adopted by Parliament.

38. As mentioned an Act bringing into force international obligations is at the same hierarchical level as ordinary Acts of Parliament. This is also the case in relation to an Act bringing into force international obligations that are in conflict with the Constitution in accordance with the procedure described in the second sentence of section 95, paragraph 2.

39. Therefore it seems that from a Finnish constitutional law perspective the EU-law including its direct effect and primacy – at least in principle – is placed at the same hierarchical level as

ordinary Acts in that respect that Acts bringing into force EU-law can be amended by a ordinary Act of Parliament – unless the amendment implies (an extension of) a conflict with the Constitution.

40. The hierarchical level of the EU-law seems no to be an obstacle to an effective implementation of EU matters in the domestic legal order. Even in case of a conflict between EU-law and the Constitution Parliament can implement the relevant EU measure. As mentioned section 95 allows the adoption of an Act bringing into force an international obligation which is in conflict with the Constitution – by at least two thirds of the votes cast.

41. However, seen from a human rights perspective the question should be asked whether the possibility of adopting an Act bringing into force an EU – or other international – obligation which is in conflict with the fundamental rights of the Constitution according to the procedure in section 95 should be upheld.