

**Finlande**

**Cour administrative suprême**

***Finland***

***Supreme administrative Court***

## ACA-Europe Seminar

*"soft law, legal norms and sources of law"*

18th December 2013

### Hierarchy of norms in Finnish law

#### 1 General Overview

Observing the subject of the current ACA-Europe Seminar "soft law, legal norms and sources of law" from the point of view of the judicial system of Finland that is based on strong legalistic tradition one would be tempted not to touch upon soft law as a source of law at all. The Constitution of 2000 repealing the earlier Constitutional acts<sup>1</sup> somewhat fortified this tradition e.g. by expressly regulating issuance of Decrees and delegation of legislative powers (Section 80) and by strengthening the primacy of the Constitution (Section 106). It is to be noted that most of the amendments introduced by the Constitution of 2000 were by their nature technical and clarificatory. Modern list of basic rights and liberties reflecting international obligations and general trends in European legal thinking as well as a general obligation on public authorities to guarantee the observance of these rights and obligations were incorporated in the earlier Constitutional acts by the mid 1990's<sup>2</sup>. During this era Finland also became Member State of the European Union. Both strengthening of the protection of fundamental rights and the membership of EU have had a significant impetus on the Finnish judicial system. EU law implied the introduction of directly binding EU regulations and decisions as well as transposable EU directives in our legal system thus extending its volume. The case law of the EU Court of Justice as well as European Court of Human Rights has had a more fundamental impact on our judicial system that has consequently become pluralistic by its nature.

The Kelsenian ideal of the unity of a normative order still serves at least as a reference point from which some the Finnish constitutional law scholars<sup>3</sup> deem to perceive our judicial system. Due to multiplication of sources of law - deriving from EU law in particular - the Kelsenian model has become less valid than earlier. A model that is founded on the binding

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1 i.e. the Constitution Act of 1919, the Parliament Act of 1928, the Act on the High Court of Impeachment of 1922, the Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman of 1922.

2 e.g. *Lavapuro, Juha*: Uusi perustuslakikontrolli, Suomalainen lakimiesyhdistys, Helsinki 2010, p. 21-22.

3 e.g. *Saraviita, Ilkka*: Perustuslaki, Talentum, Helsinki 2011, p. 35-38, *Jyränki, Antero*: Uusi perustuslakimme, Iura Nova,

force of legal sources has also an established position in the jurisprudence<sup>4</sup>. In recent legal philosophical thinking more dynamic models regarding the status of the case law of the EU Court of Justice as a source of law have evolved<sup>5</sup>. Regarding international obligations Finland applies a so called *dualistic system*. This entails that the provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act. Otherwise, international obligations are brought into force by a Decree (Constitution, Section 95.1).

Setting aside the evolution of the judicial system and scrutinizing legal sources whilst applying the law in a specific case reveals that not only the Constitution, Acts of the Parliament, EU regulations and the kind are pertinent sources of law but soft law has also its role to play both in national as in European context.

## 2 Legal sources comprising the Finnish legal system

The following list of the legal sources comprising the Finnish legal system may only serve as approximate and simplified presentation, an overall view, rather than an exhaustive in-depth analysis of the theme.

The chosen model does not follow the model of France since it was deemed insurmountable to combine purely "national" interpretation situation to a situation where EU law is at stake. Therefore the first set of legal sources concern national law sources. It is to be noted that the Convention for the Protection of Human Rights and the Lisbon Treaty (EU) are incorporated in national judicial system by legislative Act.

### 1. The Constitution of 2000

- *Procedure for constitutional enactment, amendment or repeal* of the Constitution is regulated by Section 73 of the Constitution.
  - Such proposal shall in the second reading be *left in abeyance*, by a majority of the votes cast, until the first parliamentary session following parliamentary elections. It shall then need to be supported by *at least 2/3 of the votes cast*.
  - If the proposal is *declared urgent* by a decision supported by *at*

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Turku 2000, p. 178-182.

4 e.g. *Aarnio, Aulis*: The Rational as Reasonable. A treatise on Legal Justification. Dordrecht/Boston/Lancaster/Tokyo: D. Reidel Publishing Company, 1987

5 *Siltala, Raimo*: Oikeustieteen tieteenteoria, Suomalaisen lakimiesyhdistyksen julkaisu, A-sarja N:o 234, Vammalan

*least 5/6 of the votes cast, it is not left in abeyance, and shall be adopted if supported by at least 2/3 of the votes cast.*

- *Supervision of constitutionality* (Section 74 of the Constitution)
  - The Constitutional Committee of the Parliament; on legislative proposals also on their relation to international human rights treaties.

### *1.1 Act on the Autonomy of Åland*

- *Hierachycally* at the lower level than the Constitution of Finland but at the higher level than legislative Acts of the Parliament
- passed by the Parliament of Finland. An amendment of the Autonomy Act must follow the same legislative procedure as constitutional amendment but requires the consent of the Parliament of Åland.

## **2 Legislative Acts of the Parliament**

### *•2.1 Acts containing a limited derogation of the Constitution*

- Procedure for enactment Section 73 of the Constitution (see above)

### *2.2 Acts bringing into force of international obligations* (Section 95.2 of the Constitution)

- If the international obligation to be transposed concerns the Constitution, or a change to the national territory, or such transfer of authority to the EU, an international organisation or an international body that is of significance with regard to Finland's sovereignty -> adoption without leaving in abeyance by 2/3 of the votes cast

### *2.3 Specific provisions on e.g. the Church Act*

### *2.4. Act of the Parliament* (Section 72 of the Constitution)

- Pertinent Committee of the Parliament, proposal to be considered by two

readings in a plenary session of the Parliament. The proposal is adopted by the majority of votes cast.

- Supervision of constitutionality (see above)

#### 2.5 Acts bringing into force of international obligations (Section 95.2 of the Constitution)

- if no such situations as described in point 2.2 are at stake -> ordinary legislative procedure.

### 3. Decrees

- The issuance of Decrees is regulated by the Constitution (Section 80). The authorisation to issue a Decree derives from the Constitution or from a legislative Act. Principles governing the rights and obligations of private individuals and other matters that are under the Constitution of a legislative nature are governed by (legislative) Acts.
- The hierarchical status of Decrees is not unambiguous although normally Government Decree supersedes Decree of the Ministry. As regards the sphere of application of Presidential Decrees conflict of norms between other Decrees is not likely to occur.

#### 3.1 Presidential Decrees

- bringing into force certain international obligations.

#### 3.2 Government Decree

#### 3.3 Decree of the Ministry

- The above **national sources of law** (1 to 3) are considered to be strongly binding on the judiciary. Along with these also *sui generis* -type of "common law" (tavanomainen oikeus, tapaoikeus) was earlier considered to have a normative role in the interpretation of law.

### 4. Travaux préparatoires

- Government bills, reports and statements of the pertinent Committee of the

## Parliament

- the Constitutional Committee has an authoritative status vis-à-vis the constitutionality of the Government bill. Its reports and statements are generally important sources of law in cases where constitutional issues are at stake.
- As of the hierarchical status of different *travaux préparatoires* -> the most recent document is the most influential (i.e. report of a Parliamentary Committee prevail over Government bill should these two be incoherent).

## 5. Precedents of the Court

### 4.1 Precedents of the Supreme Court

- Section 99.1 of the Constitution: Justice in civil, commercial and criminal matters is in the final instance administered by the Supreme Court.
- establishes judicial precedents in leading cases thus ensuring uniformity in the administration of justice by the lower courts.

### 4.2 Precedent of the Supreme Administrative Court

- Section 99.1 of the Constitution: Justice in administrative matters is in the final instance administered by the Supreme Administrative Court.

The above sources of law (4 to 5) may be considered to be weakly binding. If the lower court does not take these into consideration whilst deciding the case it is probable that the end result of the case or its reasoning shall change at the higher level court.

## 6. Acceptable sources of law

The following sources of law may be applied as additional argumentation. If transposed to the theme of the seminar these may possibly be called "soft law" sources:

- comparative law
- legal history

- jurisprudence
- teleological arguments
- interpretative documentation (e.g. memorandums of the Ministry)

Should the case concern application of **EU law** the hierarchy of the sources of law does not follow the above described pattern. In the case law it is accepted that **EU law** - e.g. case law of the EU Court of Justice - **prevails over conflicting national law** (supremacy of EU law). As an example the Supreme Court decided earlier this year that since the national Act on Civil Damages was not coherent with the obligations arising from the case law of the EU Court of Justice on Member State liability -> EU law prevailed (KKO:2013:58). All sources of EU law may be applicable i.e. **Provisions of the Lisbon Treaty, EU Regulations, case law of the EU Court of Justice** when for instance a directive transposed into national legislation is being applied. **Communications/Guidelines of the Commission** may be pertinent sources of law for instance in cases concerning State Aid.

If the interpretation of EU law is pertinent for deciding the case and the Court is uncertain about the correct interpretation a request for preliminary ruling (Article 267 of the Treaty of Lisbon). Both the Supreme Court and the Supreme Administrative Court have issued such requests. Approximately half of the requests made by Finnish Courts are made by the Supreme Administrative Court.