

## Presidential Elements in Government

### Finland: Foreign Affairs as the Last Stronghold of the Presidency

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Historical development of the Finnish system of government – A semi-presidential system necessary in the oppressive post-Civil War atmosphere – Reinforcement of the Presidency during World War II and the Cold War – 1982-1995: A reform process of partial revisions – ‘The Constitution of the year 2000’: a considerable step towards a genuine parliamentary form of government – The challenges of European integration for the dual executive.

#### INTRODUCTION

One of the principal aims of the complete reform of the Finnish constitution, which took effect in 2000, was to take a considerable step towards a genuine parliamentary form of government. If the original model of government had been semi-parliamentary in nature, the model presented by the Constitution of 2000 can be characterized as three-quarters-parliamentary. The Constitution still includes certain presidential elements, but their significance depends to a large extent on the interpretation of the constitutional text and its implementation.

The present President of the Republic, Ms. Tarja Halonen, who has been in office since 2000, has not hesitated to demonstrate with some of her decisions and statements that she does not want to be a merely symbolic figure representing the whole of the nation. She considers herself to be also a political decision-maker, with important constitutional powers, including the right to use these powers, ultimately even independently of what the Government (officially the ‘Council of State’) thinks. This is the version that has been offered to the public. Political negotiations between the President and the Ministers are not visible to the public, but it can safely be assumed that the President is not always the losing party in conflicts with the Government.

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The most remarkable power vested in the Presidency by the Constitution of 2000 is the power to conduct Finnish foreign policy in co-operation with the Government. Since the accession of Finland to the European Union in 1995, there has been an almost continuous debate on who should represent Finland in the Union's Common Foreign and Security Policy decision-making. For the time being, President Halonen maintains that she is not capable of fulfilling her constitutional obligation of conducting foreign policy unless she participates in defining this policy.

There are constitutional experts and politicians who disagree with the President on this issue. The President's position, however, also has its defenders, particularly in her own party, the Social Democrats. In principle, the conflict is between two differing constitutional interpretations. In practice, however, possible cases of actual conflict have mostly been concealed from the public eye. Moreover, the coalition Government of the Centre of Finland and the Social Democrats (2003-2007) has not wished to endanger the beneficial co-operation with the President by disputes about constitutional issues.

Still, in quite recent times, critical voices have been raised even by certain leading Social Democrats. The object of their criticism has not been President Halonen, but the Constitution itself. Perhaps the most significant message was delivered last January by a first-rate Social Democratic politician, Foreign Minister Erkki Tuomioja.<sup>1</sup> In a press interview dealing mainly with issues of the upcoming general elections in March 2007, Tuomioja also touched upon problems connected with the constitutional position of the President of the Republic. He said that in the Constitution there is an obscure area, which we have to get rid of and which concerns foreign policy decision-making. It compels ministers to co-operate with the President, but whether there is genuine co-operation entirely depends on the persons and situations involved. The Constitution should provide clear answers as to how decisions have to be made in all situations and, therefore, the Constitution must be amended, and the presidential powers concerning foreign affairs must be eliminated or at least reduced. The problem is a matter of principle, not of practice, the Foreign Minister continued and stated that there had not been any major practical problems between the President and the Government. However, if a fundamental disagreement between the President and the ministers should ever arise, the Constitution provides no answer as to how it should be resolved. There is no justification for such lack of clarity, Tuomioja said and pleaded for a transition to a 'full-scale parliamentary system'.

Those who desire to preserve the present constitutional regulations and favor the maximum exercise, or even an extension of the presidential powers, usually refer to the fact that the present Constitution was enacted only recently. The

<sup>1</sup> *Kaleva*, 21 Jan. 2007 p. 15 (interview of Foreign Minister Erkki Tuomioja).

defenders of presidential powers, of course, do not move in an ideological vacuum. The past experience of a long period of presidential rule is part of the collective memory of the Nation. The idea of the President as the Leader of national foreign policy goes back to World War II and the Cold War. Earlier, during the genesis of the first constitution of Finland as an independent State, in the aftermath of the bloody civil war of 1918, there was the old doctrine of the necessity of ‘a strong executive power’, with the President as Chief Executive securing ‘the public interest’. And still further back in the past, there can dimly be seen the Monarch, the Emperor of Russia in his title of the Grand-Duke of Finland, protecting the social stability of the country.

#### THE QUEST FOR A STRONG EXECUTIVE: THE LONG SHADOW OF THE CIVIL WAR

The Grand-Duchy of Finland declared its independence and separated from the Russian Empire in December 1917. The declaration was followed in the first half of 1918 by a civil war between ‘the Whites’ and ‘the Reds’, i.e., the bourgeois and socialist parties. After the war a new Constitution Act (‘the Form of Government’; ‘*hallitusmuoto*’ in Finnish) was adopted in 1919. It was *de facto* practically dictated by the winning side, the Whites, although the moderate elements of the Reds were allowed to run for parliamentary seats in the general election, which was organized before constitutional decisions were taken. For decades, the Civil War cast a long shadow over the Constitution of 1919 and its implementation. A strong Presidency was the answer of the republican fraction of the winners to those who had insisted on a monarchical constitution as a bulwark against political radicalism.<sup>2</sup>

The adoption of a semi-parliamentary – or semi-presidential – system was deemed politically necessary in the oppressive post-Civil War atmosphere. Even the Social Democratic Party, which had been on the losing side in the civil war but nevertheless had its representatives in the Parliament that approved the Constitution, acquiesced in the new system of government, hoping that it would offer a modicum of security in the post-war society.<sup>3</sup>

The monarchical principle was displaced by that of popular sovereignty and the Parliament (*eduskunta*), since 1907 elected on the basis of the general and equal franchise, was now recognized as the primary representative of the sovereign

<sup>2</sup> On the roots and origins of Finnish presidentialism see A. Jyränki, *Presidentti* [The Presidency] (Vammala, Suomalainen Lakimiesyhdistys 1978) p. 9-47.

<sup>3</sup> S. Lindman, ‘Eduskunnan aseman muuttuminen 1917-1919’ [The Change in the Position of the Parliament in 1917-1919], in *Suomen kansanedustuslaitoksen historia, VI* [History of Popular Representation in Finland] (Helsinki, Eduskunnan historiakomitea 1968) p. 5 at 353.

people with the right to exercise the constituent power alone, if necessary. A legacy from the period of autonomy under the Russian Emperor was the dual executive, with a Head of State and a Government each existing with their own spheres of competence. In other ways, there was also a strong tendency towards structural continuity, particularly in the construction of relationships between the principal State organs. Parliament's powers and freedom of action were restricted in many ways, as was the case in the autonomous Grand-Duchy. However, in this new era, the custodian of Parliament entrusted with the task of maintaining social stability and warding off inordinately radical decisions would not be a Monarch, but the President of the Republic. There were intimations that the Presidency would be occupied by persons embodying bourgeois political values and social objectives. The anticipation proved to be correct during the subsequent sixty years.

The Presidency of the Republic created by the Constitution Act of 1919 reflected the thoughts of the Finnish statesman and leftist Hegelian philosopher, J.W. Snellman, who conceived of both the Monarch and Parliament as representatives of the Nation. He wrote in the 1840s:

The Executive shall maintain the right of the existing law against the reformatory opinion of the day, until it has been decided, that this opinion really expresses the new content of the National Spirit and not something else. More than this opportunity of resistance cannot be offered to a minority, which enjoys in this way protection by the Executive against the passions of a majority.<sup>4</sup>

The first President of Finland, K.J. Ståhlberg, who played a prominent role in the preparation of the 1919 Constitution Act, used the constitutional slogan: 'a solid and strong governmental power'. The solidity of the Presidency would be increased by the indirect mode of popular election: the President would be elected by 300 electors, who were themselves elected by popular ballot. The legality of the presidential decisions would be guaranteed by the provision that the Government would be empowered to repudiate the implementation of the President's illegal decisions.<sup>5</sup>

And what about the degree of parliamentary government in the original Finnish constitutional system? In 1917, before the Civil War, the commission preparing a first draft of a Constitution Act had written, reflecting then a minority opinion in the Parliament, that the model was based on the need:

<sup>4</sup> J.W. Snellman, *Läran om staten* [The Theory of State] (Stockholm, 1842) p. 396.

<sup>5</sup> On the constitutional thought of K.J. Ståhlberg see J. Inha, *Elämä ja oikeus* [Life and Law] (Helsinki, Suomalainen Lakimiesyhdistys 2005) p. 191-205.

... to secure to a necessary extent the independency of the Executive, reserving, however, to the Parliament the opportunity to prevent the exercise of governmental powers counter to the firm will of the people.<sup>6</sup>

Later, the republican fraction of the winners of the Civil War argued for the President's constitutional position against the monarchists by emphasizing his role as a supervisor of the public interest:

A sufficiently extensive and strong governmental power to discharge the duties in compliance with the general interest can more safely be entrusted to a government led by a President who is elected by popular ballot, than to a Head of State, starting as a strange ruler, not familiar with our conditions, and to his descendants.<sup>7</sup>

In 1919, the tradition of the constitutional monarchy was thus transposed to the republic in accordance with conditions prevailing in Finland. A constitution was constructed which combines features from both parliamentary and presidential systems, i.e., a President, independent from Parliament with respect to his election, his term in office and his freedom of action, and a Government politically responsible to Parliament. The Finnish Founding Fathers did not attempt to construct just a *pouvoir neutre* or *pouvoir préserveur* resembling the model of Benjamin Constant, but a much stronger State organ capable of *both* untying political knots produced by exceptional situations *and* using governmental powers in daily political life.

In practice, it became a characteristic of Finnish constitutional law that the formation of the Government was dependent on two actors, the President of the Republic and Parliament. A special doctrine was developed concerning the relationships between these three State organs, called the theory of presumed confidence: a Government appointed by the President was presumed to enjoy the confidence of Parliament until the opposite was proven true, i.e., until a vote of explicit no-confidence of Parliament. From time to time, depending upon the political situation, this doctrine gave the President more or less freedom to interfere in the negotiations on the forming of a new Government. Presidential influence was strongest when a minority Government or a non-political caretaker Government was appointed.

In individual cases, the President was able to exercise his powers against the advice of the ministers. This privilege was employed often enough to preserve it as

<sup>6</sup> Komiteanmietintö 1917:11, 2. [Commission report containing a proposition of a new Constitution Act; the series of official printings].

<sup>7</sup> 1917 II valtiopäivät, hallituksen esitys n:o, 62, perustuslakivaliokunnan mietintö, vastalause V [a minority opinion included in the Constitutional Law Committee report on the proposition concerning a new Constitution Act; the series of parliamentary records and documents].

a living institution. Before taking his decisions, the President had to give all the members of Government the opportunity to express their opinions on a certain matter, but, according to the prevailing constitutional doctrine, he was not legally bound by the ministers' opinions, not even if they were unanimous.

The most potent presidential weapon against Parliament was the power of dissolution, which could be exercised before the end of the ordinary parliamentary term. Practice showed that the President could dissolve Parliament without regard to the opinion of a majority of Parliament or the Government and for any reason.

The actual position of the President varied considerably in the inter-war period, depending on the political situation and who was holding office. What was constitutionally significant in the long run were the precedents set concerning the use of presidential powers. The later increase in presidential influence in the post-war era found, in part, its constitutional basis in these precedents.<sup>8</sup>

A parallel has sometimes been drawn between the Finnish governmental system of 1919 and that of the German Weimar republic. There is, however, no proof of any influence of the Weimar Constitution, nor of its *travaux préparatoires*, on the Finnish constitutional discussions or approaches. Moreover, at no stage did the emphasis of political activity in Finland shift towards the exercise of presidential powers, as was the case in Germany under Hindenburg since 1930 and the transfer thereafter.

It is true that in 1930 the Finnish Government for a brief period tried to eliminate the representation of the Radical Left in Parliament and to extinguish its political activities. To this end, the Government disregarded the immunity of members of Parliament, and intervened in the electoral process as well as in the freedom of political activities in a way that to a certain – though lesser – degree resembled the means exploited by the Nazis during the *Machtergreifung* at the beginning of 1933. The measures in Finland were carried out under the constitutional umbrella and with the approval of the President of the Republic, Lauri Kr. Relander (in office 1925–31). These repressive measures in part found no basis in existing law; rather, they enunciated an extra-constitutional *ius eminens* inherent in the powers of the Head of State.<sup>9</sup> However, this period characterized by authoritarian rule was very brief. Once the political goals of the Government had been achieved, semi-parliamentary democracy was restored, even if in a narrowed form.

<sup>8</sup> On the presidential authorities according to the 1919 Constitution Act (until 1976) see Jyränki, *supra* n. 2, *passim*.

<sup>9</sup> A. Jyränki, *Lakien laki* [The Law of the Laws, the Constitution and Its Binding Power in European and North-American Legal Thought from the Time of Great Revolutions to World War II] (Helsinki, Lakimislaiton Kustannus 1989), p. 527–538. On simultaneous use of violence by extreme right-wing movement see J. Siltala, *Lapuan liike ja kyyditykset 1930* [The Lapua Movement and the Forcible Ejections in 1930] (Keuruu, Otava 1985).

In 1937, the Agrarian party and the Social Democratic party reached agreement on a political strategy to oust the right wing President P.E. Svinhufvud (in office 1931-37) in the next election and to form a coalition Government. The plan was carried out successfully. President Svinhufvud, who had kept the Social Democrats out of government, was displaced by an Agrarian candidate, Mr. Kyösti Kallio (in office 1937-40), and the door was opened to a red-green coalition Government. The political situation seemed to lead to a gradual reduction of the actual position of the Presidency and the transition to a more parliamentary form of government. The war, however, changed everything.

#### THE REINFORCEMENT OF THE PRESIDENCY DURING WORLD WAR II AND THE COLD WAR

During the crisis and the war in 1939-45, political power in Finland, as in all so-called Western democracies, was in fact concentrated in the hands of a small inner circle of politicians. Foreign and security policy took precedence over normal domestic policy. The Government was formed on a broad party coalition basis. However, in the process of government formation, the President only negotiated with a few leading politicians and passed over the customary hearings with parliamentary groups. This led to tensions between the Government and Parliament during the entire war period. The voice of the Left Wing opposition within the Social Democratic party was silenced by taking six members of Parliament into preventive detention, on the basis of special emergency legislation.

The *de facto* governing inner circle in Finland originally consisted of Prime Minister, Risto Ryti, Commander-in-Chief Field Marshall Mannerheim, the Minister of Defense and the Foreign Minister. In 1940, President Kallio resigned and Mr. Ryti replaced him (in office 1940-44). Mr. Ryti's successor as Prime Minister, Mr. J. Rangell, inexperienced in foreign policy as he was, dismissed the idea of dealing with matters in this field. President Ryti, however, stayed in the inner circle and became its most prominent member. He tried to solve the problems of national security and the threat coming from the east by seeking military cooperation with Germany.<sup>10</sup>

A central element in the wartime ideology was the quest for national unity. The President of the Republic became the most prominent interpreter of National Opinion. Unreserved confidence in the political leadership watching over the national interest was demanded in order to legitimize the centralization of political decision-making. This leadership was often personified in the Presidency.

<sup>10</sup> On war-time governmental decision-making see S. Tiitonen, *Hallitusvalta* [Governmental Power] (Helsinki, Vap-kustannus 1991) p. 141-169.

During the war, the President for the first time was called 'the Leader of the National Foreign Policy'.<sup>11</sup>

As a result, the political reinforcement of the Presidency continued after the war. The country was not occupied by the Soviet Union, but the new constellation of world politics gave the Soviet Union an influential position in Finland, in particular, in setting limits to Finnish foreign policy and to some extent also to the forming of governments. In certain respects, the Finnish political leaders were obliged to pay attention to what the Soviet leaders regarded as the imperatives of their national interests. The consequence was that political leadership in Finland showed certain centralizing features, although the war was over. The issue then was how to establish personal connections with the Soviet leaders.

In Finland, the constitutional structures as well as the structures of the political parties tended to favor centralization of power in the Presidency rather than in the hands of the Prime Minister. The change in national power relations began with the leadership in foreign policy. To legitimize the changes, a constitutional law doctrine was developed, based on rather modest arguments, that foreign affairs were a constitutional prerogative of the Presidency, to be exercised by the President independently and, in extreme cases, even without any formal or substantive ministerial co-operation.<sup>12</sup> In this respect, some important precedents were set by President J.K. Paasikivi (in office from 1946-56), who concentrated on foreign affairs and left domestic policy to the Government. Since the second presidential term of Urho Kekkonen (1962-68), a total dominance of the Presidency in foreign affairs prevailed. The President dictated the most important foreign policy decisions. President Kekkonen employed a strategy of attaining the consent of Government and Parliament for the actions he was planning with public statements. Occasionally, he even presented the Government and Parliament with a *fait accompli*.

President Paasikivi had already presented the thesis of the essential distinction between foreign policy and domestic policy. Securing the independence of Finland set certain requirements for the composition of the national leadership: politicians who were unable to construct a confidential relationship with the Soviet Union ought to be prevented from dealing with issues of foreign affairs. Moreover, in the case of a conflict between these domestic and foreign policies, priority had to be given to foreign policy. Even when it came to domestic decisions affecting foreign policy, citizens had to place their confidence in those leaders who were sufficiently informed in the field of foreign policy. In this way, the concept of 'foreign affairs' gradually acquired a wider scope and legitimized the interference of the President of the Republic in political-societal matters in general.

<sup>11</sup> Jyränki, *supra* n. 2, at p. 224, 350-351.

<sup>12</sup> *Ibid.*, p. 221-263.



In the 1960s, the Presidency was transformed to a power centre, which clearly overrode the Government and in some respects Parliament as well. The Constitution was not changed. What was changed was the practice of State organs, which in some respects even ignored the letter of the Constitution. On account of his authority and prestige, which sometimes exceeded the institutional framework of his office, the President exerted influence over civil society as well.<sup>13</sup>

A gradually growing dependence of the Government on the Presidency was discernible in the 1960s and 1970s. The choice of the Prime Minister and the Foreign Minister were not the only objects of presidential interest in the process of forming a new Government. Since 1919, jurisprudence, the *doctorum opinio*, had without any foundation in the text of the Constitution defended the right of the President to dismiss a member of Government without a prior vote of no-confidence passed by Parliament. However, there was no practice confirming this. In the 1970s, scholarly interpretation carried the reasoning to its logical conclusion: a viable Government presupposed the confidence of the President. Consequently, a *consilium abeundi* expressed by the President, demonstrating the loss of his confidence, was generally regarded to be sufficient to make the Government resign. Apparently that was what had happened when the majority Government led by Dr. Ahti Karjalainen resigned in 1971 and the minority Government led by Mr. Rafael Paasio resigned in 1972.

In 1956, when Kekkonen was running for the Presidency for the first time, the Agrarian Party (later called the Centre of Finland) that supported him held about a quarter of the parliamentary mandates. During Kekkonen's rather long presidency (1956-1981), this party was unable to make any decision of importance without considering the opinion of the President. The party generally complied, though sometimes after a vote, with his wishes, directions and even dictates when the formation of a new Government was at stake.<sup>14</sup> When the political position of this party weakened in the general elections of 1970, President Kekkonen started looking for co-operation primarily with the Social Democrats.

The Kekkonen-era (1956-81) in Finland has been compared with the France of Charles de Gaulle. It is true that there are constitutional similarities between the two countries, but these are only to a minor extent based on the letter of their respective constitutions. The similarity concerns above all the fact that in periods

<sup>13</sup> For a survey of the power structures in the Kekkonen era see A. Jyränki, 'Kansanedustuslaitos ja valtiosääntö 1906-2005' [Parliament and Constitution 1906-2005] in *Eduskunnan muuttuva asema* (Changing Position of Parliament) Helsinki, Edita 2006) at p. 10 and p. 68-73 (constitutional history); O. Apunen, *Tilinteko Kekkonen aikaan* [Reckoning the Kekkonen Era] (Helsinki, Kirjayhtymä 1984) (political science); J. Nevakivi, *Miten Kekkonen pääsi valtaan ja Suomi suomettiin* [How Kekkonen gained power and Finland was Finlandized] Helsinki, Otava 1996) (political history).

<sup>14</sup> S. Kääriäinen, *Sitä niittää, mitä kylvää* [You mow what you sow, History of the Centre Party 1961-2001] (Jyväskylä 2002) p. 154-159.

when his political supporters held the majority in parliament, the President of the Republic in France was recognized as the *de facto* leader of this majority. On this basis, the French President could – and still can – exercise a decisive influence on the appointment of the Prime Minister and acquire an influential position, not only in matters of foreign and military policy, but also of domestic policy. On the other hand, the relationship between the French President and his parliamentary supporters seems to have been more transparent and open to the public eye than that of President Kekkonen and his growing number of adherents in the Finnish Parliament.

#### THE LONG MARCH TOWARDS A TOTAL REFORM OF THE CONSTITUTION (1969-99)

In 1969, the year of the 50<sup>th</sup> anniversary of the 1919 Constitution, the Government of Finland decided to examine the need for a revision of the Constitution. The decision was taken by a centre-leftist coalition Government led by a Social Democrat, Dr Mauno Koivisto. It was primarily based on an initiative from the Social Democratic party, but surprisingly won support from different quarters. Of course, opinions concerning the aim of the examination were divided. The *avant-garde* of the revision movement consisted of young scholars in sociology, political science and jurisprudence, who regarded the constitution, which was made in the aftermath of the 1918 Civil War, as outdated. This feeling was strengthened by the spirit of the sixties, the radicalized atmosphere, which had spread over all of Western Europe. The critics of the old constitution called to mind the circumstances which had prevailed in 1917-1919 and the specific constitutional objectives set by the ruling majority at that time. The revision movement was not primarily directed against the substance of Kekkonen's presidential politics. However, the critics were, of course, conscious of the experiences of 'the solid and strong governmental power' from the Kekkonen era up to that point.

In 1970, an all-party commission was set up by the Government with the task of examining, *inter alia*, how the relationship between the Parliament, the President and the Government could be developed. After nearly four years of work, the Commission submitted a report on the main points of the reform. Its most important proposals were supported by a narrow majority of its members, mostly belonging to the united Left plus two or three representatives from other political parties. The majority proposed, firstly, that the Prime Minister would be elected by Parliament and the other members of the Government by the Prime Minister. Secondly, it proposed that the presidential decision to dissolve Parliament could no longer be taken without the consent of another State institution. Thirdly, at least in certain matters, the President would be bound by the opinion of the

Government. Finally, a Presidential veto of legislation would result in the immediate return of the vetoed Bill to Parliament, instead of postponement of a new parliamentary reading until after the next general election. Furthermore, the Commission unanimously proposed that Parliament ought to have more influence on foreign policy decision-making.

Soon after publication of the report, the reform project lost its momentum. The nearly unanimous opinion among scholars of political and constitutional history holds that a public statement of President Kekkonen in a press interview put a stop to the project. His statement revealed irritation, which was caused by the Commission's proposal to interfere with his principal prerogatives.<sup>15</sup>

The reform process was briefly interrupted, but restarted in the form of a series of successive constitutional amendments after Kekkonen resigned from office and Mauno Koivisto was elected to the Presidency. Koivisto had always had a relatively positive attitude towards constitutional revisions, and he maintained this attitude after his election, however, he tried to supervise the reform process himself.<sup>16</sup> Most of the constitutional amendments which were adopted in the Koivisto era (1982-94) were initiated by the Government led by Prime Minister Harri Holkeri (1987-91), a conservative. Thus, a coalition government comprised of the conservative 'Kokoomus' party and the Social Democrats as leading partners demonstrated a reduced antagonism between the political Right and Left. Some of the amendments, e.g., the change of the mode of presidential election, could be interpreted as responses to the Kekkonen era but also speculations about the future holders of the Presidency influenced the positions the political parties took in the revision debates. What is perhaps most surprising was the role reversal of some political parties from supporters to critics of the President's traditional position, and vice versa.

In all, this process of partial constitutional revisions was not coherent and suffered from a lack of co-ordination. The revisions were implemented separately without a clear general view of the type parliamentary system that should be introduced. Many revisions strengthened the parliamentary elements in the government-system, most importantly, the amendment permitting the President to dissolve Parliament only on the initiative and with the consent of the Prime Minister (1991). Also of great importance was how the constitutional regulation of the competences of the President and the Government in European Union mat-

<sup>15</sup> On the reform process in the years 1969-74 see A. Jyränki, 'Vuosien 1970-74 valtiosääntökomitea: mitkä tavoitteet ovat toteutuneet' [The Constitution Commission of 1970-74: which goals have been realized], 101 *Lakimies* (1999) p. 856-866; Jyränki, *supra* n. 13, p. 74-80.

<sup>16</sup> On the period of partial revisions of the constitution (1982-95) see Jyränki, *supra* n. 13, at p. 81-124. On President Koivisto and his attitude toward the political decision-making system: J. Kalela, 'Mauno Koivisto and the Framework of Foreign Policy in the Nineties', in K. Immonen (ed.), *Pitkä linja / The Long Perspective* (Helsinki, Kirjayhtymä 1993) p. 254 at p. 258-273.

ters were constitutionally regulated in 1994, as a result of the Finnish accession to the Union (*see* below). On the other hand, a clear step in the opposite direction was taken when the mode of the presidential election was altered. The transition from indirect popular elections with 300 electors to direct elections with two voting rounds (the French model) strengthened the political position of the President.

The party consensus on the constitutional revisions dissolved when the reform touched upon the core powers of the Presidency, foreign policy and the forming of the Government. In 1992, a preparation group set up by the Ministry of Justice drew up a scheme to reform the management of foreign affairs, which included some participation of Parliament in the negotiation of international treaties and the partial transfer of presidential powers to the Government, the Prime Minister and the Foreign Minister. After a mild rebuke from President Koivisto, the Government led by Prime Minister Esko Aho (Centre) put an end to this attempt at reform.

In the same year, Mr. Aho's Cabinet proposed the submission of a constitutional amendment to Parliament. The submission was to take place formally by a decision of President Mauno Koivisto, who did not oppose the content of the bill. The aim of the bill was to detach the President from the negotiations on the formation of a government and to have the Prime Minister elected by Parliament. This rearrangement seemed to gain the support of a majority of the members of Parliament, but not of the Social Democrats. They opposed the bill and, in fact, put a stop to that amendment. In their opinion, the President should retain his influence in the formation of a new Government as well as preside over foreign policy; the two powers were intertwined.

In 1995, a new Government led by Prime Minister Paavo Lipponen (Social Democrat) promised in its programme a total reform of the constitution. The promise was kept. Presidential elections had been held in 1994 and the next were planned in March 2000. This deadline determined the schedule of the reform project. The assumption was that a consensus on possible changes of presidential powers could be achieved most easily 'under a veil of ignorance', in other words, without knowing which candidate from which party would become the first President with reduced powers.

After an all-party commission consisting mostly of members of Parliament had prepared a first draft of the new Constitution,<sup>17</sup> a group of ministers dealt with the most problematic provisions. This group made some alterations in the draft in order to strengthen the presidential powers, referring specifically to the stand-

<sup>17</sup> *Komiteanmietintö 1997:13* [A commission report on a total revision of the Constitution; the series of official printings].

point President Ahtisaari had taken.<sup>18</sup> The Constitutional Law Committee in Parliament, however, removed these alterations and even strengthened the role of Parliament.<sup>19</sup> Having been informed of what was going on in the Committee, the Prime Minister stated that the reform project lay in the hands of Parliament. In fact, the Parliament, as a holder of the constituent power, largely eliminated the direction of the legislating activity customarily exercised by the Government, and then took control.

The new Constitution of Finland was almost unanimously approved by Parliament on 22 June 1999 and entered into force on 1 March 2000, the same day as the inauguration of the new President of the Republic, Ms. Tarja Halonen (Social Democrats). The new constitution is commonly called 'the Constitution of the year 2000'.

#### THE PRESIDENCY IN THE 2000 CONSTITUTION

One of the paradoxes of the Finnish constitutional history is that in the late 1990s the Social Democratic party, which traditionally had been the sharpest critic of the presidential elements in the constitution, appeared now as that one of the three great parties which was keenest to preserve some of the President's more noteworthy powers. The two other great parties, the Centre and the conservative 'Kokoomus', were more amenable to a transition to a purely parliamentary system of government, even though they had to pay some attention to the ideas of President Ahtisaari. It is difficult to disregard the possibility that this shift of attitude by the Social Democrats was dictated more by power politics than by a genuine reconsideration of values. The Presidency had been held continuously by Social Democrats since 1982 (Mauno Koivisto (1982-94) and Martti Ahtisaari (1994-2000)). This could not have been predicted in 1919.

Parliamentary government did not triumph completely in 2000. The new Constitution in principle maintains the old idea of sharing the executive power between the two institutions, the Government and the President of the Republic, each maintaining its own sphere of competence. It is true, however, that the powers of the President are considerably reduced. The recognition of this fact is hindered by the indefinite and fragmentary motives for the new Constitution formulated in the documents. They contain no analysis of the combination of parliamentary and presidential systems that the Constitution was supposed to

<sup>18</sup> 1998 valtiopäivät, hallituksen esitys n:o 1 [the bill submitted to the Parliament on the total revision of the Constitution; the series of parliamentary records and documents].

<sup>19</sup> 1998 valtiopäivät, perustuslakivaliokunnan mietintö n:o 10 [the report of the Constitutional Law Committee on the new Constitution; the series of parliamentary records and documents].

postulate, of the general role of the President in the system and, more generally, the need at all for the Presidency. All changes concerning the constitutional position of the Presidency were on-the-spot decisions, akin to those included in the amendments in the 1980s and 1990s. In short, the preparation of the reform was characterized by the almost complete absence of a systematic approach to and a discussion of basic principles. Perhaps the lack of available time contributed to this state of affairs. During the preparation period, public opinion was soothed by assurances that no remarkable change in the system of government was on its way. The illusion of a constitutional standstill was strengthened by the preservation of some nearly century-old expressions in the text of the new Constitution, a solution that also tended to reduce the precision of the regulations.

When delving into the Constitution in greater detail, we see that the reduction of the presidential powers, in addition to the changes included in the amendments of the 1980s and 1990s, has been brought about in two ways. First, there were transfers of competences from the Presidency to Parliament or to the Government. Secondly, presidential decision-making and action was linked more closely to ministerial co-operation than had been done earlier.<sup>20</sup>

So, what powers were left for the Presidency in 2000? The catalogue includes the leadership of foreign policy, the position of Commander-in-Chief of the armed forces, the right to initiate bills in the Parliament, the sanctioning of laws adopted by Parliament, pardoning crimes, and appointing the highest civil servants, as well as the tenured judges and all the officers of army and navy.<sup>21</sup>

The President takes his/her decisions in the presence of the Government on the basis of proposals by the Government. If the President does not want to decide in conformity with the proposal, the matter must be returned to the Government 'for preparation'. Thereafter, if the matter concerns a legislative initiative, the President has to comply with the Government's resuscitated or revised proposal (Article 58 Constitution). For the other presidential powers, the Constitution lacks an explicit conflict regulation. According to the traditional interpretation, in these cases the President has the right to overrule the Government's proposal.

The present constitution has transferred the direction of the negotiations on forming a new Government from the President of the Republic to actors within Parliament. In practice, the President has an active and independent role only if

<sup>20</sup> For a survey of the contemporary governmental structures and the relationship of the Presidency and the Government, see A. Jyränki, *Uusi perustuslakimme* [Our new Constitution] (Turku, Iura nova 2000) p. 65-67, 110-145; A. Jyränki, *Valta ja vapaus* [Power and Freedom, General Doctrine of Constitutional Law] 3<sup>rd</sup> edn. (Helsinki, Talentum 2003) p. 145-170; I. Saraviita, *Perustuslaki 2000* [The 2000 Constitution] (Helsinki, Kauppakaari Oyj 2000) p. 271-331. See also A. Jyränki, 56 'Die neue Verfassung Finnlands', *ZÖR* (Zeitschrift für öffentliches Recht, Wien) (2001) p. 113 at p. 121-124.

<sup>21</sup> On the reform process in 1996-98 concerning the presidential powers, see Jyränki, *supra* n. 13, p. 158-171.

the Speaker notifies him that negotiations have come to a deadlock. In other cases, the President acts only as a conveyor of messages: the Speaker of the House informs him/her of the name of the candidate for Prime Minister which has emerged in the parliamentary negotiations, and the President is then obliged to present this name to Parliament for a vote. The Prime Minister is elected by the Parliament, and no longer nominated by the President (Article 61 Constitution).

Keeping the leadership of foreign policy in the hands of the President appeared to be the aim particularly of the Social Democrats in the late 1990s. In the preparation of the new Constitution, wording was sought which would satisfy this demand and at the same time link the management of foreign affairs more to the parliamentary principle. President Ahtisaari informed the Government that only one of the alternative wordings presented to him was acceptable, simply because it confirmed the practice up to that moment. Not even the Constitutional Law Committee of Parliament, which otherwise acted very independently, dared to risk the reform project by proposing another formulation. Parliamentary actors considered the terms established by the President to be absolute and categorical. The shadow of the so-called monarchical principle of the 19<sup>th</sup> century flickered on the wall of the House of Parliament.

The result was that Article 93(1) of the Constitution was approved containing the following provisions:

The foreign policy of Finland is conducted by the President of the Republic in co-operation with the Government.

[...]

The communication of important foreign policy positions to foreign States and international organisations is the responsibility of the minister with competence in foreign affairs.

Of course, the form of co-operation mentioned can vary, depending on the stage of preparation of a certain matter and its significance, and beginning with presidential meetings with the Prime Minister or the Foreign Minister. Before the present Constitution became effective, the Ministerial Committee for Foreign and Security Policy, chaired by the President, had become the central organ where the President met members of the Government. Before deciding, the President verifies the opinion of the ministers present at the meeting. Nevertheless, the presumption is that in the case of a controversy with ministers, the opinion of the President is decisive.

#### THE CHALLENGES OF EUROPEAN INTEGRATION FOR THE DUAL EXECUTIVE

With the dissolution of the Soviet Union, the latitude of the Finnish foreign policy grew considerably, which then made it possible for Finland to take further steps

towards European integration. Finland acceded to the European Economic Area (in 1994) and the European Union (in 1995). In this context, the Finnish Constitution was amended, reorganizing the competences of the President and the Government.

The first stage of a more comprehensive Finnish participation in European integration was membership in the European Economic Area. The EEA Treaty transferred a rather extensive part of the domestic legislative competences to an international authority, the Mixed Committee of the EEA. Since it would have been a foreign policy competence of the President to determine the behavior of the Finnish representatives in the Mixed Committee, the Treaty would have brought about an extension of the powers of the President. To avoid this, a 1993 constitutional amendment stipulated that European Economic Area matters belonged to the competence of the Government.

The following year the accession of Finland to the European Union was prepared. It was evident that upon membership, the area of the suprastatal and supranational exercise of power was to increase considerably. Upon opening the legislative session of the Finnish Parliament in January 1994, President of the Republic Mauno Koivisto stated:

If Finland is going to be a member of the European Union, there will arise the question, who will represent Finland on the highest level of decision-making of this organization, the European Council. In this connection either the powers of the President of the Republic in the field of domestic policy must be increased, or the role of the Prime Minister in the field of international policy is to be strengthened.<sup>22</sup>

The constitutional amendment concerning accession of Finland to the European Economic Area had, according to President Koivisto, strengthened the position of the Prime Minister and the Government. Although he had been critical of limiting the foreign powers of the president in the past, Koivisto now seemed to be fully conscious of the consequences of enhanced integration. The agenda of the European Council used to include matters of Common Foreign and Security Policy and other union matters, often intertwined with each other. Hence, if there were to be only one Finnish representative in the European Council, the constitution had to be altered, Koivisto said. There were two real alternatives. If the President of the Republic were to act successfully as Finland's representative in the European Council, this would require a constitutional reinforcement of the presidential powers. On the other hand, making the Prime Minister a credible representative presupposed giving him an enhanced role in managing the national foreign policy in general.

<sup>22</sup> 1994 valtiopäivät, pöytäkirjat s.18 [records of parliamentary sessions; the series of parliamentary records and documents].



The Government, led by Prime Minister Esko Aho, chose the latter alternative. It drafted a proposal for a constitutional amendment according to which it would be the Prime Minister's responsibility to provide Parliament or a parliamentary Committee with information on European Council meetings, beforehand as well as afterwards. A statement of reasons for the amendment also included the recommendation that the Prime Minister would represent Finland in the Council.

Meanwhile, there was a change of Presidents. Martti Ahtisaari, another Social Democrat, who unlike his predecessor did not favor the strengthening of parliamentary influences, replaced Koivisto as President. Under the pressure of the new President, the Government agreed to remove the passages referring to the Prime Minister's role from the amendment bill. An exceptional spectacle emerged. After the bill had been submitted to Parliament, Minister of Justice, Anneli Jäätteenmäki, held a press conference and announced that the Government disagreed with the President on the content of the bill. Supported by the Prime Minister, Ms. Jäätteenmäki invited Parliament to reformulate the amendment in accordance with the original objectives of the Government, which then ensued.

Unfortunately, the new amendment only stipulated that the amendment of 1993 on the European Economic Area was to be applied *mutatis mutandis* to the European Union. However, in the parliamentary records concerning this new amendment, the Constitutional Law Committee included an official statement that the competence of the Government would cover all Union matters, including those pertaining to Common Foreign and Security Policy. President Ahtisaari reacted promptly. When he gave his sanction to the 1994 amendment in the ministerial session on the last day of the year, he made a statement to be recorded in the minutes of the session expressing his opinion that Common Foreign and Security Policy matters would remain in his competence regardless of this amendment. Since this was the case, he said, he was ready to sanction the amendment. The making of this recorded statement by President Ahtisaari is one of the most extraordinary incidents in Finnish constitutional history, not of its kind – it was not the first presidential statement recorded in the minutes of the ministerial session – but because he openly opposed a statement of Parliament, which is a source of constitutional law as to constitutional intent. Ahtisaari asserted in his statement that precedence still had to be given to the 1919 constitutional provision making it the responsibility of the President to decide matters of foreign policy. According to Ahtisaari, this provision was to be applied to EU decision-making in matters of the Common Foreign and Security Policy as well.<sup>23</sup>

<sup>23</sup> Valtioneuvoston pöytäkirja n:o 144/1994 k. 3, esittely tasavallan presidentille [the minutes of the ministerial session, presentation to the President of the Republic].

In the spring of 1995, after the general elections, Paavo Lipponen, a Social Democrat, was appointed Prime Minister. Having at first disagreed with the President on Finland's representation in the Union, Lipponen finally yielded to the President's position. In a public statement on 31 May 1995, he announced that an understanding had been reached between him and the President. The President would in the future 'after due consideration' participate in the meetings of the European Council and preside over the Finnish delegation when the Council dealt with Common Foreign and Security Policy or other matters 'within his competence'. In this way, the Prime Minister accepted the presidential interpretation that Common Foreign and Security Policy matters do not belong to the competence of the Government.

In subsequent years, the Lipponen/Ahtisaari agreement was followed. In its capacity as a separate state organ, convened without the President, the Government authorized the Prime Minister to represent Finland at the European Union summits. The announcement sent by the President to the Ministry of Foreign Affairs concerning his participation in the summit was recorded just as a notification in the minutes of the governmental session. No decision on the President's participation was made by the Government, nor was there any further analysis of the matters the President was going to deal with at the meeting. Consequently, Finland sent two representatives to most summit meetings: the President and the Prime Minister. Finland had entered the era of double representation.<sup>24</sup>

This was the state of affairs when the preparatory work for the complete reform of the constitution started in 1996. The Constitution of the year 2000 came to include an Article on foreign policy (Article 73). As mentioned above, this Article contains the provision on presidential leadership of foreign policy (paragraph 1). Paragraph 2 provides that the Government is responsible for the preparation of European Union decisions and decides on the concomitant Finnish measures as well. No particular group of Union matters is excluded from the Government's competence. The Constitutional Law Committee of Parliament stated in the rationale of the new constitution – for a second time – that it would be up to the Government to decide on the participation of the President in summit meetings, with the exception, however, of negotiations on amending the founding treaties of the Union – in these participation of the President was required. The competence of the Government, the Committee said, includes Common Foreign and Security Policy matters; however, the Government ought to deal with them in close co-operation with the President.

<sup>24</sup> On the constitutional revisions caused by the Finnish participation in the European integration and their implementation until 1995, see A. Jyränki, 'HM 33 a § ja *ratio constitutionis*' [Art. 33 a of the Constitution Act and *ratio constitutionis*] 30 *Oikeustiede-Jurisprudentia* (1997) p. 100-124.

The problem was that this distinction between the competences of the President and those of the Government was drawn only in the *travaux préparatoires* of the *Verfassunggeber*, but not in the proper text of the Constitution. This omission left room for a political game based on constitutional interpretation. From the year 2000 onward, the manner of how the Government dealt with presidential announcements of her participation in a Union summit meeting changed. After the President's written announcement has been received at the Ministry of Foreign Affairs, the Government (convened without the President) takes a separate decision to authorize the President's participation. In reality, however, this seems to be a *pro forma* decision. Nothing indicates that the Government ever seriously considered refusing authorization.

In her first term (2000-06) as well as in her second term (from 2006 onwards), President Tarja Halonen participated with the Prime Minister in most European Council meetings. In the years 2004-2006, she attended seven of the eleven meetings. The President commented on her practice as follows:

It is not possible that somebody (i.e. the President) deals with matters of foreign and security policy without having any connection with the European Union. The Union penetrates everything. Finland is in all respects a part of the EU.<sup>25</sup>

In general, it has been the Prime Minister who has spoken on behalf of Finland in these meetings. Also, the interventions of the President have been prepared by the Ministers.

In the inner circles of the Presidency, it is underlined that the President, sticking to her right to participate in these meetings, has primarily done this with a view to engaging in the dinner talks of the Heads of State or Government. These talks may concern any subject within the political sphere of the Union, regardless of which State institution has the power of dealing with it on the national level. In this regard, the approach of President Halonen seems to express an aspiration for the kind of all-embracing presence of the Presidency in politics that was typical of the Kekkonen era.

All in all, the dual representation of Finland in the European Council may sometimes cause confusion among representatives of foreign States about the leadership of Finnish Union policy.

<sup>25</sup> 'Presidentti ei voi olla reservissä' [The President cannot stay in reserve] An interview of President Tarja Halonen, *Helsingin Sanomat*, 24 Dec. 2004.

## EU BATTLEGROUPS AND EU CONSTITUTION: INCREASE OR REDUCTION IN THE PRESIDENT'S ROLE?

The tension concerning the national competences surrounding Union matters became visible when the Finnish legislation on international crisis management was revised to correspond to present-day needs. In the 1990s, the President of the Republic had been authorized by an Act of Parliament to decide at the national level on Finnish participation in international peacekeeping operations. At the time, the legislature took into account operations organized by the UN. This context changed after the Helsinki European Council at the end of 1999, which formulated the so-called 'Petersburg tasks' in the field of military crisis management for the European Union. At a conference 22 November 2004, the Defense Ministers of the member states reaffirmed on this basis their commitment to develop the necessary military capabilities to launch and conduct EU-led military operations in response to international crises. In this context, Finland committed itself to participate in two EU-Battlegroups, the first of which would be on duty as of 1 January 2007.

This commitment was one of the motives for bringing the national legislation on international crisis management up to date. The Government wished to incorporate into the Act in question a provision that a mandate for a military crisis management operation could also be given directly by the European Union. The bill was based on the assumption that the decision to participate in a crisis management operation could constitutionally be split into two: firstly, the Government would be responsible for the *European Union Council decision* to establish an operation with the Finnish participation (Article 93(2) of the Constitution), and, secondly, the President of the Republic would take *the national decision* to participate in the operation with staff or other resources (Article 93(1) of the Constitution).

The idea of the Government was that a national decision to participate in a military crisis management operation would contain a considerable amount of discretion in the field of foreign and security policy, which was the constitutional responsibility of the President. Furthermore, in this context, the President's position as Commander-in-Chief of the Finnish armed forces had to be taken into account.<sup>26</sup>

The Constitutional Law Committee of Parliament, entrusted with the task of reviewing beforehand the constitutionality of bills submitted to Parliament, took the opposite view and rejected the idea of a split in decision-making, holding that in the process of decision-making on participation in a crisis management operation, the various phases are very closely linked. All phases of the decision-making

<sup>26</sup> 2005 valtiopäivät, hallituksen esitys n:o 110 [the bill submitted to the Parliament on international crisis management; the series of parliamentary records and documents].

procedure concern either the preparation or execution of a Union decision. As Article 93(2) of the Constitution of 2000 entrusts both the preparation and execution of Union acts to the Government, the national decision-making on these matters is also a responsibility of the Government, acting in a close co-operation with the President. For this reason, the committee deemed the bill unconstitutional.<sup>27</sup> However, it admitted that a crisis management operation may be organized, e.g., jointly by the United Nations and the European Union, which would complicate the application of the Constitution.

When the statement of the Committee was published, some leading members of the Government blamed the Committee for politicizing constitutional interpretation. The bill was withdrawn from the Parliament, but later an almost identical bill was submitted to Parliament. The main difference was, however, that the new bill had to be approved as a limited derogation of the Constitution, i.e., according to the same procedure as an amendment of the Constitution, although it is not formally recognized as a constitutional amendment.<sup>28</sup> The result was a slight increase in the presidential elements in the constitution.

The opposite may happen when the Constitutional Treaty for the European Union enters into force. In the context of the Finnish Parliament's approval of this Treaty, the Constitutional Law Committee stated that the alteration of the functions of the European Council might also affect the presuppositions for the President's participation in EU summit meetings. With the Constitutional Treaty in force, the European Council would become an institution of the Union entrusted with legal powers. Particularly, as far as the decision-making system of the Union is concerned, the European Council would be authorized to specify the content of the treaty provisions in question and even to alter them, e.g., to adopt a European decision establishing the list of configurations for the Council of Ministers, other than that of the Foreign Affairs Council. According to the Constitutional Law Committee, this change in the position of the European Council strengthens the position of the Prime Minister as the leader of the European policy

<sup>27</sup> 2005 valtiopäivät, perustuslakivaliokunnan lausunto n:o 54 [the statement of the Constitutional Law Committee on legislation concerning international crisis management; the series of parliamentary records and documents].

<sup>28</sup> Säädoskokoelma 211/2006 [the official collection of enactments and ordinances] The Constitution of the year 2000 explicitly provides for the possibility of enacting legislation which is a 'limited derogation of the Constitution'; Art. 73: '(1) A proposal on the enactment, amendment or repeal of the Constitution or on the enactment of a limited derogation of the Constitution shall in the second reading be left in abeyance, by a majority of the votes cast, until the first parliamentary session following parliamentary elections. The proposal shall then, once the Committee preparing the matter has issued its report, be adopted without material alterations in one reading in a plenary session by a decision supported by at least two thirds of the votes cast. (2) However, the proposal may be declared urgent by a decision that has been supported by at least five sixths of the votes cast. In this event, the proposal is not left in abeyance and it can be adopted by a decision supported by at least two thirds of the votes cast.'

of Finland and as the representative of Finland in the European Union. The change cannot be without significance for the practices followed between the President of the Republic and the Government in the Union matters.<sup>29</sup>

It is indeed possible that Finnish membership in the European Union is ultimately the factor which directly or indirectly, and let us say in the next ten years, will lead to a further reduction of the presidential elements in the Finnish Constitution.



<sup>29</sup> 2006 valtiopäivät, perustuslakivaliokunnan lausunto n:o 36 [the statement of the Constitutional Law Committee on the Treaty establishing a Constitution for Europe; the series of parliamentary records and documents].