

# Equality and Social Rights within the Finnish Welfare State

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The text of the Constitution of Finland in comparison to many older constitutions sounds quite progressive. Section 1 of the Constitution provides that “the Constitution of Finland shall guarantee the inviolability of human dignity and the freedom and the rights of the individual and promote justice in society.” Section 6 (Equality) espouses one of the basic values of the Constitution, equality, telling us that:

[E]veryone is equal before the law. No one shall, without an acceptable reason, be treated differently from other persons on the ground of sex, age, origin, language, religion, conviction, opinion, health, disability or other reason that concerns his or her person. Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development. Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and the other terms of employment, as provided in more detail by an Act.

However, questions can be posed. Does the text of the law tell the entire truth? Is Finnish society as perfect as the Constitution promises it should be?

It is easy to see that the Constitution of Finland is quite recent, entering into force in 2000. Therefore, in many respects it reflects the “spirit of the Nordic welfare state”. The 2000 Constitution does not form any remarkably new structures but, on the other hand, it is not bound to the laws in force just now. The Finnish welfare state is responsible for maintaining a social safety net, for example, free education, day-care for children and services for the elderly. The Constitution can be seen as a guarantor of these social rights, even though their form and content may change over time.<sup>1</sup>

There are many similarities, but also several differences, between the constitutions of the Nordic states. We can easily explain these similarities with more general legal-cultural and historical aspects.<sup>2</sup> Nowhere has the Constitution itself built the Nordic welfare state.<sup>3</sup> Sweden is a good example of the

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<sup>1</sup> For more about the relationship between the Nordic welfare state and the Constitution of Finland see Martin Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic Countries*. Nordic Council of Ministers 2001. As a theoretical analysis on the relationship between social rights, human rights and the welfare state see Jeff King, *Judging Social Rights*. Cambridge University Press 2012, pp. 20-28. See also Pekka Lämsineva, *Fundamental Principles of the Constitution in Finland*, pp. 111-125 in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds.), *Introduction to Finnish Law and Legal Culture*. Forum Iuris 2012, pp. 119-120.

<sup>2</sup> Markku Suksi, *Common Roots of Nordic Constitutional Law? Some Observations and Legal-Historical Development and Relations between the Constitutional Systems of Five Nordic Countries*, pp. 9-42 in Helle Krunke and Björg Thorarensen (eds.), *The Nordic Constitutions, A Comparative and Contextual Study*. Hart Publishing 2018.

<sup>3</sup> There are differences between Nordic states but we can speak of a Nordic model of welfare having the following characteristics: 1) social policies as largely a public concern; 2) high employment rates and active labour-market policies; 3) a combination of universalism, occupational social rights, and means testing; 4) service and education states; 5) high levels of well-being, income equality, and low poverty; 6) high levels of political legitimacy; 7) social policies – and the prerequisite economic performance and international competitiveness, see Mikael Nygård, lecture “The Nordic Model(s) of Welfare, Origins, Developments and Future Challenges – Introductory Lecture”, Åbo Akademi University, 2020  
<<https://www.vasa.abo.fi/users/minygar/Undervisning->

complicated relationship between the constitution and the development of the welfare state. It was the first state to be called a Nordic welfare state, but its constitution at that time did not include any provisions on social rights. Not until the new constitutional act (Regeringsformen/Instrument of Government) of 1974 did it include a chapter on Fundamental Rights and Freedoms, and this catalogue is not as wide as in Finland and includes only a few provisions on social rights.<sup>4</sup> The Constitution of Sweden, however, does include a provision on basic principles in its Article 2:

The personal, economic and cultural welfare of the private person shall be fundamental aims of public activity. In particular, it shall be incumbent upon the public institutions to secure the right to work, housing and education and to promote social care, social security, and good living environment.

This is reminiscent of Chapter 1 of the Constitution of Finland (“Fundamental provisions”).

This chapter considers social, cultural and economic rights, especially from the perspective of equality as primarily in the Finnish legal context. Do differences exist in the right to social security between, e.g., men and women, or do those belonging to vulnerable groups (Sámi and Roma people) enjoy fewer rights compared with the majority? Case law from the Constitutional Law Committee of the Parliament and from the UN Committee on Economic, Social and Cultural Rights and the European Committee of Social Rights is also examined here.

## 1 Finnish Constitutional Rights, especially Social Rights

As this author has the greatest familiarity with the Finnish constitutional system, it will be the starting point and focus here with respect to this examination of social rights. The Finnish system will be briefly compared with the other Nordic countries’ constitutional systems, especially Sweden’s.<sup>5</sup> Research exists on fundamental and human rights in all the Nordic countries.<sup>6</sup> As Jaakko Husa

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filer/The%20Nordic%20model(s)%20of%20welfare\_introduction%20lecture.pdf> accessed 25 October 2021.

<sup>4</sup> For a short introduction to the history of the Swedish constitutional history, see Joakim Nergelius, *Svensk Statsrätt. Studentlitteratur* 2006, pp. 20-28. See also Karin Åhman, *Rättighetsskyddet i praktiken – skydd på papperet eller verkligt genomslag?*, pp. 172-204 in Eivind Smith and Olof Pettersson (eds.), *Konstitutionell demokrati*. SNS Förlag 2004.

The chronological relationship between the constitution and the welfare state is more remote in Norway and Denmark than in Sweden. Norway’s Constitution was adopted in 1814. Denmark’s Constitution is from 1849 but it has been amended many times, most importantly in 1953. The older constitutions do not include the same large catalogues of fundamental rights as Finland’s 2000 Constitution does. Social rights were largely unknown until World War II. See Jorgen Aall, *Rettsstat og Menneskerettigheter*. Fagbokforlaget 2004.

<sup>5</sup> In general on comparative constitutional law see Jaakko Husa, *Comparison*. Legal Studies Research Paper Series, paper No 51. University of Helsinki, Faculty of Law 2018.

<sup>6</sup> See Jaakko Husa, *Constitutional Mentality*, pp. 41-60 in P. Letto-Vanamo et al. (eds.), *Nordic Law in European Context*. Springer 2019; Tuomas Ojanen, *Human Rights in Nordic Constitutions and the Impact of International Obligations*, pp. 133-166 in Helle Krunke and

writes, “Nordic constitutions appear to be systems operating with similar foundational values, although differences exist in constitutional rules, institutions, and cultures.”<sup>7</sup> Even though it is difficult to compare, say, Denmark with Finland from the point of the protection of fundamental rights, it is easier if we also consider international human rights. All Nordic countries are bound by the most important UN and Council of Europe human rights conventions. The European Convention on Human Rights is the most important human rights instrument in all the Nordic countries.<sup>8</sup>

Finland already had a short catalogue of fundamental rights in its first Constitution (*Hallitusmuoto/Regeringsformen/Form of Government*, 1919) as an independent state (Chapter II: General Rights and Constitutional Protection of Finnish Citizens). It was a question of rights belonging only to Finnish citizens. Nowadays fundamental rights are granted to everyone.

The Constitutional Law Committee of the Parliament in Finland plays, originally for political reasons, a very important role in the protection of fundamental rights. Its role is preventive control, and in practice the Committee decides whether a proposed law conflicts with the Constitution or international human rights conventions. No other country has same kind of control system. Repressive constitutionality control has also existed from the beginning – at least in theory. However, judges began very slowly to refer to fundamental rights and later to international human rights treaties in the 1990’s.<sup>9</sup> This has become more common after the fundamental rights reform in 1995. In order to understand the Finnish constitutionality control system, we have to know the history of its development before its independence: Finland as a Grand Duchy of Russia in the 19<sup>th</sup> century and to the beginning of the next century.<sup>10</sup> In addition to the historical context, we also have to understand the impact of international obligations in Finland during recent decades.<sup>11</sup>

New provisions of fundamental rights were already added to the text of the former 1919 Constitution in 1995. The former Constitution included only provisions for traditional civil and political rights (freedoms). It was a typical document of that time, reflecting a model of a liberal society. In 1995, the ECHR and the Social Charter were incorporated into the 1919 Constitution. The catalogue of fundamental rights was included in Chapter 2 of the Constitution

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Björg Thorarensen (ed.), *The Nordic Constitutions, A Comparative and Contextual Study*. Hart Publishing 2018 and Anna Jonsson Cornell (ed.), *Komparativ konstitutionell rätt*. Iustus Förlag 2012. See also articles in Martin Scheinin (ed.), *International Human Rights Norms in the Nordic and Baltic Countries*. Martinus Nijhoff Publishers 1996 and articles written by Pekka Lämsineva, Tuomas Ojanen and Juha Lavapuro in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds.), *Introduction to Finnish Law and Legal Culture*. Forum Iuris 2012 and Jaakko Husa, *Nordic Reflections on Constitutional Law*. Peter Lang 2002.

<sup>7</sup> Husa 2019, p. 46.

<sup>8</sup> See David Thor Björgvinsson, *The Effect of the Judgments of the ECHR before the National Courts – A Nordic Approach?* *Nordic Journal of International Law*, Vol. 85 (2016), pp. 303-321.

<sup>9</sup> Scheinin 1996, pp. 260-266.

<sup>10</sup> Jaakko Husa, *Locking in Constitutionality Control in Finland*. *European Constitutional Law Review*, Vol. 16 (2020), pp. 249-274.

<sup>11</sup> Ojanen 2018, pp. 133-166.

(Section 5 – Section 16a). In 2000 the catalogue was transferred into the new Constitution.

The timing of the Finnish fundamental rights reform was not very good. At the time that the new Constitution, and especially the catalogue of rights, was being drafted, Finland was suffering from a deep economic recession. This posed a difficult test, especially from the point of view of economic, social, and cultural rights. The interpretation of those rights consequently was not as strict as it was planned to be during the process of drafting the law. The Constitutional Law Committee was criticised for political decision-making when interpreting the Constitution so that it allowed the cutting of many social benefits.<sup>12</sup> Another significant test has been the COVID crisis of 2020-2021. Such crises have been especially difficult for many vulnerable groups (children, old people, and persons with disabilities).

The question has been posed as to whether the equality provision of the Constitution means that different groups of persons cannot be treated differently, e.g., in unemployment benefits legislation. I refer here, for example, to foreigners. Do they have same rights as Finnish citizens? Is it discriminatory if they do not have the same rights? It is possible to treat, e.g., children differently from adults if there is an acceptable reason to do so? Some other groups are more complicated in this respect. The individual is no longer the only subject of law. We are also talking about groups, especially groups of ethnic minorities. Some of those groups (the Sámi and the Roma) are also mentioned in the text of the Constitution (Section 17: Right to one's language and culture).

### ***1.1 The 1919 Constitution of Finland (Form of Government)***

Finland gained its independence in 1917, and the first Constitution of Finland was adopted two years later in 1919. The title of the Constitution was the “Form of Government” after the Swedish model.<sup>13</sup> Chapter II (“General rights and constitutional protection of Finnish Citizens”) included 12 provisions on citizen rights. Among these rights was also a mention of equality (“Finnish citizens shall be equal before law”). There were only a few provisions for fundamental social rights: the protection of labour and the right to work, the right to free basic education, and a stipulation establishing the cultural and economic equality of the Finnish- and Swedish-speaking segments of the population.

The equality provision (Section 5) meant only formal equality: people must be treated in the same way in similar situations. This equality requirement was not directed at the legislator, only at public administration. It was understood as a “prohibition of despotism”. However, it was legal to treat men and women differently in law. For example, women did not have the right to become appointed to all public offices. Not until the 1970s did women acquire the same rights as men according to the civil servant legislation.

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<sup>12</sup> The Committee consists of politicians, but the role of outside experts is quite controversial. Who decides in the Committee? See Husa 2020 and Ida Koivisto, *Experts and Constitutionality Control in Finland: A Crisis of Cognitive Authority?* Retfard Nr. 2 (2017), pp. 24-46.

<sup>13</sup> Regeringsformen is translated into English in Sweden as “Instrument of Government”, but in Finland it is called “Form of Government”.

In practice, the most important provision in the 1919 Constitution was Section 7: “Every Finnish citizen shall be protected by law as to life, honour, personal liberty, and property” and that “Expropriation for purposes of public utility with full compensation shall be regulated by law.” In practice, almost all fundamental rights discourses concerned property. The Constitutional Law Committee interpreted the right to property very strictly and scholars published on the right to property. Other rights as guaranteed by the Constitution were scarcely researched. The 1919 Constitution also included a provision on labour protection, Section 6.2: “The working faculties of citizens shall be under the special protection of the State”. This norm in practice was not very important.

The Constitution vouchsafed every citizen an area of freedom where he/she could be left alone. No one had a right to interfere in that area without permission, with the state referred to as a “night-watchman” state. The 1919 Constitution was, however, quite modern compared with the older constitutions of other Nordic countries.

## ***1.2 The 2000 Constitution of Finland***

The new Constitution of Finland (no longer referred to as the “Form of Government”) entered into force in March 2000. The catalogue of fundamental rights had already been totally reformed in 1995. It was transferred as such to the new Constitution (Section 6 – Section 23). The new Constitution is based on fundamental values, which differ in many ways from the values of the 1919 Constitution. However, the 2000 Constitution is a mixture of old and new fundamental principles. The inviolability of human dignity is a basic value of the Constitution and it clarifies the content in many respects. It is situated in Chapter 1 (Fundamental provisions), not in Chapter 2 where the fundamental rights provisions are. Fundamental rights are guaranteed only to living human beings (from birth to death), but human dignity may apply even to the unborn and deceased persons.<sup>14</sup>

The role of the state has changed parallel to the changing content of fundamental rights. Section 22 provides that the public authorities are to guarantee the observance of fundamental and human rights. These concern both traditional civil and political rights and social rights, as either in the Constitution or in international human rights conventions. Provisions of economic, social, and cultural rights are not only programmatic by nature. They are legally binding norms. This was unclear for quite a long time, but both the Constitutional Law Committee and the constitutional law scholarship have affirmed that they are binding conventions.<sup>15</sup> This has been expressed as follows:

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<sup>14</sup> See Liisa Nieminen, *Legalisation of Euthanasia in Finland: Via a Citizens’ Initiative?*, *European Journal of Health Law*, Vol. 25 (2018), pp. 407-425, 420-422.

<sup>15</sup> See Paula Ilveskivi, *Fundamental Social Rights in the Finnish Constitution, with Special Reference to their Enforcement by the Administration*, pp. 219-244 in Martin Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic Countries*. Nordic Council of Ministers 2001. As an older text see Heikki Karapuu and Allan Rosas, *Economic, Social and Cultural Rights in Finland*, pp. 195-223 in Allan Rosas (ed.), *International Human Rights in Domestic Law*. Finnish Lawyers’ Publishing Company 1990 (the implementation of the Covenant on Economic, Social and Cultural Rights in 1976). See also Martin Scheinin,

It is a duty of all public authorities to strike a balance between these competing constitutional ideals of liberal and welfare states. In order to fulfil its dual constitutional obligations, the state shall not only refrain from interfering in individual rights and liberties, but also shall take care of social welfare and the promotion of equality in society.<sup>16</sup>

Section 6 (Equality) has broader contents in the new Constitution than it had in the old. It covers not only formal equality but also substantive equality, and so-called affirmative action (or reverse discrimination) is allowed in some cases. The equality norm also binds Parliament when it passes laws. This resulted in many disagreements in the Constitutional Law Committee. Some members have sought to interpret the equality provision in the traditional way, that it binds only the administration. The final official interpretation of the Committee is that the equality provision of the Constitution also binds Parliament when enacting laws.

An example of how the equality norm of the Constitution works in the law enactment process can be seen with Government Proposal 55/2016. It was proposed that the Unemployment Allowances Act be changed so that immigrants who were unemployed applicants would be granted an integration allowance in the future instead of the usual labour market support. The size of the integration allowance would be 90 per cent of the basic daily unemployment allowance. However, the proposal would put the unemployed immigrants in a different position from other similarly unemployed persons. This distinction was caused by the status of an immigrant as unemployed, and thus on a basis that has been specifically mentioned in Section 6.2 as a forbidden ground for discrimination. The Constitutional Law Committee considered (Statement 55/2016) that no acceptable ground, as supposed in Section 6.2 of the Constitution, had been presented in the Government Proposal, because the level of the integration allowance received by the unemployed immigrants had been defined on similar grounds to be lower than the amount of unemployment benefits of other unemployed persons who receive labour market support.

The Nordic countries do not have constitutional courts. Finnish judicial review has long been different from that in other Nordic countries, because in Finland the Constitutional Law Committee plays the decisive role in judicial review. Such a strong preventive review does not exist in the other Nordic countries. However, in Sweden the role of preventive review has increased over time.<sup>17</sup> After the 2000 Constitution entered into force, the Finnish model of judicial review may be viewed in the light of three constitutional norms: 1)

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Finland, pp. 257-294 in Martin Scheinin, *International Human Rights Norms in the Nordic and Baltic Countries*. Martinus Nijhoff Publishers 1996.

<sup>16</sup> Länsineva 2012, p. 119.

<sup>17</sup> The Swedish Law Council is the important institution in this respect, but not a Constitutional Law Committee as in Finland. See Thomas Bull, *Institutions and Divisions of Powers*, pp. 43-66 in Helle Krunke and Björg Thorarensen (ed.), *The Nordic Constitutions, A Comparative and Contextual Study*. Hart Publishing 2018, pp. 54-57 and Maija Dahlberg, *Openness of Constitutional Review: A Comparative Analysis as to how Transparency is Ensured in Ex Ante Constitutional Review*. Forthcoming: in *European Yearbook of Constitutional Law*, Vol. 3 (2021). Discussion in Norway; see Anne Kieruf, *Judicial Review in Norway – A Bicentennial Debate*. Cambridge University Press 2018. See also Book Review by Jaakko Husa, *International Journal of Constitutional Law*, Vol. 17 (2019), pp. 1345-1347 (including comparison between Norway and Finland).

Section 22 of the Constitution: a general obligation to protect fundamental rights and human rights; 2) the principles of fundamental rights and human rights - friendly interpretation; and 3) Section 106 on the primacy of the Constitution. Section 106 explicitly gives all courts the power to review constitutional conformity. Section 106 is designed to be applied only in cases where interpretative methods are not reasonably able to resolve the tension between an Act of Parliament and the Constitution.<sup>18</sup>

## 2 Human Rights

In addition to constitutional and fundamental rights, attention must be given to rights as protected under international law, human rights. Finland is bound by many Council of Europe and UN human rights conventions. The UN General Assembly adopted the Universal Declaration of Human Rights in 1948 and there was a plan to adopt a legally-binding international human rights convention on the same basis. It turned out to be impossible as the Eastern part of the world (the Soviet Union and its socialist allies) had such different conceptions of the concept of human rights. Therefore, the conventions have different control systems. The UN General Assembly adopted two different human rights conventions in 1966. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) from 1966 are the most well-known UN Conventions. They did not enter into force internationally before 1976.

The European Convention on Human Rights is the most important convention in Finland, as in all Nordic countries. Finland became a member of the Council of Europe later than the other Nordic countries, and so Finland ratified the human rights conventions much later. Finland ratified the ECHR in 1990, whereas Sweden, Norway, Denmark, and Iceland had already ratified it in 1953. Finland had foreign-policy reasons for this late date.

### 2.1 *The Council of Europe*

Finland's late entry into the Council of Europe posed challenges, but on the other hand, Finland adopted in 1995 many rights from the ECHR as such into the 1919 Constitution. This catalogue of rights was later adopted as such into the 2000 Constitution.

The ECHR is not the most important human rights convention from the point of view of this article, even though it has the most efficient control system: the European Court of Human Rights. Like the UN, the Council of Europe has also adopted human rights conventions of two kinds: on the one hand the ECHR (1950) and on the other hand the European Social Charter (1961) and the Revised (Social) Charter (1996). The monitoring of the Social Charter is not as effective as that of the ECHR. Finland has ratified both Charters. The Revised (Social)

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<sup>18</sup> Juha Lavapuro, *Constitutional Review in Finland*, pp. 127-140 in Kimmo Nuotio, Sakari Melander and Merita Huomo-Kettunen (eds.), *Introduction to Finnish Law and Legal Culture*. Forum Iuris 2012, pp. 132-137.



Charter strengthens the supervisory system, notably through the collective complaint procedure, but the Committee is not a court.<sup>19</sup>

There are many other human rights conventions in addition to these two. Included here are only those conventions having something to do with social rights and that Finland has ratified: The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997), and the Council of Europe Convention on Action against Trafficking in Human Beings (2005). The Biomedicine Convention (Oviedo Convention) requires that “parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.” Non-discrimination is the leading principle.<sup>20</sup>

## 2.2 *The United Nations*

Besides the general UN human rights conventions, many UN human rights conventions are very important to a special group (women, children, persons with disabilities) even though the general human rights conventions also protect them. The new UN conventions differ from older conventions in that they include provisions on both traditional civil and political (freedom) rights and social rights. The most important conventions are the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, (1979), the Convention on the Rights of the Child, CRC, (1989), and the Convention on the Rights of Persons with Disabilities, CRPD, (2006). Finland ratified the CRPD quite late in 2016.<sup>21</sup>

All the conventions include provisions for periodic reporting on their implementation, after which the Committee will make recommendations for each state based on the reports. The Committee on Economic, Social and Cultural Rights published its Concluding observations on the seventh periodic report on Finland in 5 March 2021.

Originally, only the ICCPR had a monitoring system based on individual complaints to the Human Rights Committee. This system is included in the first Optional Protocol. Finland ratified the Optional Protocol. Later both the ICESCR, the CEDAW and the CRC adopted the same to submit complaints to the international committees.<sup>22</sup> Finland has ratified all these optional protocols

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<sup>19</sup> See articles in Niko Johanson and Matti Mikkola (eds.), *Reform of the European Social Charter*. Publications of the Ministry for Foreign Affairs 2011.

<sup>20</sup> See Liisa Nieminen, *Terveys ihmisoikeuskysymyksenä* (in English: *Health as a Human Rights Question*). *Suomalainen Lakimiesyhdistys* 2015, pp. 45-57. See also Maite San Giorgi, *The Human Right to Equal Access to Health Care*. Intersentia 2012.

<sup>21</sup> See Liisa Nieminen, *Human Rights of Persons with Disabilities*. *Scandinavian Studies in Law*, Vol. 55 (2010), pp. 376-390. See also *Update to the 2012 Analytical Outcome Study on the Normative standards in International Human Rights Law in Relation to Older Persons*, Working paper prepared by the Office of the High Commissioner for Human Rights, March 2021.

<sup>22</sup> See Human Rights Commission Cayman Islands, *Human Rights Treaties*, <<http://www.humanrightscommission.ky/human-rights-treaties>> accessed 25 October 2021.

and so it is possible to submit complaints (communications) when the state party, Finland, has failed to comply with its Convention obligations.

It was long a problem when only the ICCPR had an individual complaint system. It includes a provision on non-discrimination (Article 26). Does it apply also to socio-economic rights, which are dealt with separately under another UN Convention, the ICESCR? In the important case, *Broeks v. The Netherlands* (172/1984) in 1987 the Human Rights Committee rejected the state's argument that Article 26 does not apply to socio-economic rights because they are dealt with separately under the ICESCR. It was a question of a married woman who was required to prove that she was a "breadwinner" in order to receive unemployment benefits. The same condition did not apply to married men.<sup>23</sup> Article 26 does not of itself contain any obligation with respect to matters that may be provided for by legislation. Thus, it does not require any state to enact social security legislation, but if such legislation is adopted, it must comply with Article 26 of the ICESCR.

### 3 Economic Recession and Other Exceptional Times as Challenges

It is important for constitutions and human rights conventions to be realistic, so that the rights can be upheld. Even though there are two main conventions in both the UN and the Council of Europe, it must be stressed that economic, social, and cultural rights and civil and political rights are in many ways indivisible, interrelated, and interdependent, as are constitutional rights.<sup>24</sup> This is a fine idea in theory but not always in practice. In good times, it is easy to stress the importance of social rights, even though they are in practice even more important during bad times. Lately, even civil and political rights have proven to be exceptionally important though we often take them for granted.

#### 3.1 1990's Recession in Finland

When the new catalogue of fundamental rights was being drafted in the 1990s, Finland was undergoing a deep economic recession. Provisions on social rights were then reduced, mostly on economic grounds, which made it politically possible for the Parliament to pass the catalogue of fundamental rights

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See also Helen Keller and Geir Ulfstein (eds.), *UN Human Rights Treaty Bodies*. Cambridge University Press 2012.

<sup>23</sup> See Ben Saul, David Kinley and Jaqueline Mowbray, *The International Covenant on Economic, Social and Cultural Rights*. Oxford University Press 2014, pp. 690-694. Another important case is *Zwaan de Vries v. The Netherlands* (182/1984) from the same year; see *Leading Cases of the Human Rights Committee* (Compiled by Raija Hanski and Martin Scheinin). Institute for Human Rights, Åbo Akademi University 2003, pp. 335-341.

<sup>24</sup> See Maija Dahlberg, *Should Social Rights be Included in Interpretations of the Convention by the European Court of Human Rights?* *European Journal of Social Security*, Vol. 16 (2014), pp. 252-276 and Ida Koch, *Human Rights as Indivisible Rights*. Martinus Nijhoff Publishers 2009.

unanimously as a new part of the 1919 Constitution.<sup>25</sup> When the Government submitted proposals that meant cutting social security benefits to the Parliament, the Constitutional Law Committee had to interpret new fundamental social rights norms for the first time. These interpretations were decisive for the future and therefore very important.<sup>26</sup>

As a good example of the interpretation of the Committee, I refer to the statement 15/1995 (Sickness Insurance Act). The Government proposed extensive changes in the main principles of the sickness insurance. The principle that everyone is entitled to daily sickness allowance was not accepted as a basic principle, but instead, it was affirmed that sickness insurance could only compensate for lost income. Section 19.2 of the Constitution allows the introduction of a closer connection between income losses and sickness insurance benefits. If a person's basic subsistence were guaranteed through other arrangements, sickness insurance benefits could be denied for a short period of time. The statement referred to dependence on the income of another person in the family. The interpretation was criticised by the opposition parties and scholars, but it was soon stabilised.

The Constitutional Law Committee has often taken a stand as to whether unemployed parents must have the same rights as employed parents. Government Proposal 208/1996 included a provision on the possibility to exempt from day care payments persons with low salaries, students and those unable to work, but not unemployed parents. The Constitutional Law Committee stated that this was discriminatory under Section 6.2 of the Constitution (Statement 39/1996).<sup>27</sup>

In addition to the Constitutional Law Committee, there are also cases from the courts, especially from the Supreme Administrative Court. Social rights were a difficult task for the courts. As a judge of the Supreme Administrative Court stated in 2003:

The economic crisis in the early 1990s and the fact that the realization of social rights from 1993 came totally to depend on the result of whether decisions taken by the individual municipalities under their self-governance, led to the administrative courts facing an unforeseen task. Individual people argued that their constitutional right to health services had not been fulfilled while the municipality in turn referred to its right to arrange the services from its budgetary power.<sup>28</sup>

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<sup>25</sup> More about the law drafting process see Pauli Rautiainen, *Perusoikeuden heikennyskielto* (Summary in English: Constitutional Obligation not to Take Retrogressive Measures), *Oikeus*, Vol. 42 (2013), pp. 261-283.

<sup>26</sup> All documents of the Parliament are available also in Swedish <<https://www.eduskunta.fi/SV/Sidor/default.aspx>> accessed 25 October 2021.

<sup>27</sup> Martin Scheinin, *Protection of Economic, Social and Cultural Rights in Finland – A Rights-Based Variant of Welfare State*, pp. 245-285 in Martin Scheinin (ed.), *The Welfare State and Constitutionalism in the Nordic Countries*. Nordic Council of Ministers 2001.

<sup>28</sup> ”Den ekonomiska krisen i början av 1990-talet och den omständigheten att förverkligandet av de sociala rättigheterna från 1993 så gott som helt kom att bero på huruvida beslut de enskilda kommunernas fattade inom ramen för sin självstyrelse, ledde till att förvaltningsdomstolarna ställdes inför en oförutsedd uppgift. Enskilda människor hävdade att deras grundlagsenliga rätt till hälso- och sjukvårdstjänster inte hade uppfyllts medan kommunen i sin tur hänvisade till sin rätt att utforma tjänsterna från sin egen budgetmakt.”

It is difficult to conclude that the benefits of social rights were viewed as constitutional rights during the economic recession of the 1990s, but as Martin Scheinin has said: “There are good grounds to state, that Finland does, at the end of 2000, represent a rights-based variant of the welfare state.”<sup>29</sup>

### 3.2 COVID-19

As another example of a situation in which the limits of fundamental and human rights are put to the test is the COVID-19 outbreak and its fundamental and human rights implications.<sup>30</sup> The Government decided in March 2020 on the enforcement of some sections of the Emergency Powers Act. These were the provisions aiming to safeguard the performance of the social and health care system by allowing deviations from rules on working time, overtime, on holidays, and restrictions on the right to resign from work within the social and health care system.<sup>31</sup> Openings of restaurants were restricted by a new temporary provision of the Communicable Diseases Act. It restricted the number of customers, spacing of seats, opening hours, and requirements on hygiene.

There were many restrictions that were of great significance to special groups, even though they were general in principle. The Ministry of Social Affairs and Health updated its instructions on the prevention of coronavirus infections in units providing 24-hour care and treatment in May 2020.<sup>32</sup> The instructions also apply to all housing units for people with disabilities, which accommodate clients belonging to at-risk groups (persons over 70 years, and persons with diabetes or a severe heart or lung disease). Asymptomatic family members or close friends should, however, be allowed to visit seriously ill clients who are in

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See Marita Liljeström, *De grundläggande sociala och kulturella rättigheterna i högsta förvaltningsdomstolens rättspraxis*, pp. 105-114, *Festskrift till Edward Andersson 1933 – 31/12 – 2003. Juridiska Föreningen in Finland 2003*, p. 114.

<sup>29</sup> Scheinin 2001, p. 284. See also Sanna Hyttinen, *Sosiaalset ihmisoikeudet ja suomalaiset tuomioistuimet – otetaanko sosiaalset oikeudet vakavasti?* (Summary in English: Social Human Rights and Finnish Courts Are Social Human Rights taken Seriously?). *Oikeus*, Vol. 41 (2012), pp. 496-515.

<sup>30</sup> See Martin Scheinin, *Finland’s Success in Combating COVID-19: Mastery, Miracle or Mirage?* Forthcoming: in Joelle Grogan and Alice Donald (eds.), *Handbook on Law and the COVID-19 Pandemic*. Routledge 2022. See also Maija Dahlberg, *Finland – Ex Ante Constitutionality Review of Laws Relating to the COVID-19 Pandemic*. *European Public Law*, Vol. 27 (2021), pp. 819-822.

<sup>31</sup> *Coronavirus Pandemic in the EU – Fundamental Rights Implications*. European Union Agency for Fundamental Rights. 2020.

<sup>32</sup> “Communication with family members or close friends supported, despite the ban on visits. As a rule, visits to units providing 24-hour care and treatment are still prohibited. Asymptomatic family members or close friends should, however, be allowed to visit seriously ill clients who are in a critical state and clients in hospice care, provided that safety precautions are taken. Consideration must be given to permitting visits on a case-by-case basis.

The emergency conditions have continued for a long time now, and for this reason, we need practices that allow other residents or clients to meet their family members or others close to them face-to-face in a safe environment provided by their care or treatment unit.” (Ministry of Social Affairs and Health, 15.5.2020).

a critical state and clients in hospice care, provided that safety precautions are taken. Consideration is to given to permitting visits on a case-by-case basis. Units can set up places or rooms for their clients where they can meet and communicate with their family members or close friends in a safe manner. These could be moveable modules that might be located in a safe place inside the premises, for example in the lobby, or outside.

These instructions were assessed in case law by the Supreme Administrative Court (KHO 2021:1) and the Parliamentary Ombudsman (EOAK/3847/2020). At issue in the first case was the prohibition to visiting a 24-hour housing unit for people with disabilities. A father could not visit his son, who was living in such a unit. The Court concluded that the ban was not legally-binding because it was not based on law but on the instructions given by the Ministry of Social Affairs and Health. This instruction was a violation of Article 8 (Right to family life) of the ECHR and Section 10 of the Constitution of Finland. The second case comes from the deputy Ombudsman of the Parliament. In that case, it was a question of visiting elderly persons. The family members could not meet them even though they wore protective equipment. The Ombudsman considered the instructions of the Ministry unlawful. In another case (EOAK/2889/2020), the Ombudsman concluded that the instructions concerning people over 70 years of age given by the Ministry of Social Affairs and Health were also unlawful.<sup>33</sup> People were discriminated against because of age when they were advised to stay in isolation from other people.

Not only were senior citizens discriminated against due to age. The Deputy Parliamentary Ombudsman reprimanded the Ministry of Social Affairs and Health (STM) and the Finnish Institute for Health and Welfare (THL) over instructions to vaccinate 65-69 years old persons with the AstraZeneca vaccine, despite it having a lower efficacy than other vaccines and being linked to serious but rare causes of unusual blood clots. It no longer was recommended to other age groups: “In regards to equality and the prohibition of discrimination, I believe 65–69-year-olds have been treated unfavourably compared to people in other age groups on grounds of their age when carrying out the coronavirus vaccinations,” the Deputy Ombudsman reasoned. The patient’s right to self-determination means that if patients refuse a specific therapy or medical procedure, they must be treated, with their consent, with another medically-justified method. This was not possible in this case. The conclusion of the Deputy Ombudsman was that this method contravened the Constitution, Section 6.2, the Non-discrimination Act (1325/2014), Section 8 and the Patient’s Act (785/1992), Section 6.<sup>34</sup>

Homeless persons are another group that has been faced with serious problems during COVID-19. Shelters and day centres were either closed or access restricted. When many public places, e.g., libraries, were closed, there were very few places where homeless people persons could stay. COVID-19 has had negative effects also on children and young people. Inequality has increased

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<sup>33</sup> For more about the problems which elderly and persons with disabilities have met during COVID, see *Coronapandemins inverkan på tillgodoseendet av de grundläggande fri- och rättigheterna och de mänskliga rättigheterna*, pp. 15-19. Människorättsdelegationens rekommendationer. Människorättscentrets publikationer 3/2020.

<sup>34</sup> EOAK/3432/2021.

among children. Differences between fortunate and unfortunate children have visibly been exacerbated with distance education.<sup>35</sup>

It is problematic that certain governmental policy measures have been implemented by using non-binding guidelines and recommendations, soft law, which is not binding in the same way as laws enacted by the Parliament. Using soft law is very problematic from the view of the fundamental and human rights protection.<sup>36</sup>

#### 4 Discrimination in Finland

Based on the discussion above, a conclusion on the problems faced almost daily by some minority groups (ethnic groups), the elderly or persons with disabilities, or those who belong to vulnerable groups (especially irregular migrants) is drawn here. Recent international research has come to a similar conclusion. The UN Committee on Economic, Social and Cultural Rights considered the seventh periodic report of Finland in February 2021 and adopted concluding observations in March 2021 (E/c.12/FIN/CO/7). Finland had submitted its seventh periodic report to the Committee in April 2020 (E/c.12./FIN/7). The Committee also received a parallel report from the Human Rights Centre and a joint report of 24 civil society organisations.

The Committee found many positive aspects in Finland but also noted many problems, especially in equality. ICESCR does not require merely formal but also *de facto* equality. The Committee also recommended that Finland improves its data-collection system. Nowadays, marginalised populations and those who are excluded from traditional household surveys are not always identified.<sup>37</sup>

The Committee paid particular attention to the rights of persons with disabilities, equal rights of men and women, rights of older persons, cultural rights of the Sámi, and irregular migrants. The Committee recommended that Finland expand the scope of its legislation to cover discrimination committed by individuals, and improve the effectiveness of the anti-discrimination institutional framework. Moreover, Finland had to increase the visibility of those groups that do not belong to the ethnic majority. General Comment No. 20 (2009) on non-

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<sup>35</sup> Lasten ja nuorten hyvinvointi koronaviruksen jälkihoidossa. Lapsistrategian koronatyöryhmän raportti lapsen oikeuksien toteutumisesta. Valtioneuvoston julkaisu 2020:21. (Summary in English: Wellbeing of Children and Young People in Post-crisis Measures Related to COVID-19 – Report on the Realisation of the Rights of the Child, Coronavirus Working Group Linked to the National Child Strategy).

<sup>36</sup> See Emilia Korkea-aho and Martin Scheinin, “Could You, Would You, Should You?” Regulating Cross-Border Travel Through COVID-19 Soft Law in Finland. *European Journal of Risk Regulation*, Vol. 12 (2021), pp. 26-44. In general about soft law and human rights protection see Stéphanie Lagoutte, Thomas Gammeltoft-Hansen, and John Cerone, *Tracing the Roles of Soft Law in Human Rights*. Oxford University Press 2016. “Protection by the Law”, What Does it Mean According to the European Convention on Human Rights?, see Laurens Lavryson, *Protecting by Law: The Positive Obligation to Develop a Legal Framework to Adequately Protect ECHR Rights*, pp. 69-130 in Yves Haeck and Eva Brems (eds.), *Human Rights and Civil Liberties in the 21<sup>st</sup> Century*. Springer 2014.

<sup>37</sup> Para. 13.

discrimination in the enjoyment of economic, social, and cultural rights must be taken seriously in Finland.<sup>38</sup>

#### **4.1 Gender Discrimination**

The Committee was dissatisfied with the condition of gender equality in Finland. The Constitution of Finland includes a special provision (Section 6) on gender equality: “Equality of the sexes is promoted in societal activity and working life, especially in the determination of pay and other terms of employment, as provided in more detail by an Act.” This does not resolve all the problems. More concrete laws and policies are needed.

The Committee was worried about gender segregation in the labour market and in educational choices. The Committee recommended, for example, that Finland: 1) implement temporary special measures in order to accelerate representation in educational and occupational fields where either gender is underrepresented; 2) strengthen legal protection of pregnant workers against discrimination and unfair dismissal from work; 3) review the parental leave system and consider introducing non-transferable parental leave for either parent, with a view to encouraging men to take up care responsibilities.<sup>39</sup>

The Committee was concerned about the gender pay gap and recommended that Finland put into place an institutional mechanism for the promotion of equal pay and the monitoring of progress, and legislation on remuneration transparency with a view to making it easier to challenge unequal pay.<sup>40</sup>

#### **4.2 Children’s Rights**

The equality provision of the Constitution also includes a special provision on children’s rights: “Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.” All children are equal, which means that the age, skin colour, language, religion, etc. of a child or parents must not affect the rights of the child.<sup>41</sup>

The Committee paid serious attention to reports of more frequent recourse to placing children in alternative care and of insufficient assistance for children of undocumented migrants. The Committee recommended that Finland prioritise

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<sup>38</sup> Para. 15. General Comment No. 20, para. 3 stresses that “the principle of non-discrimination and equality are recognized throughout the Covenant. The preamble stresses the “equal and inalienable rights of all” and the Covenant expressly recognises the rights of “everyone” to the various Covenant rights as such, inter alia, the right to work, just and favourable conditions at work, trade union freedoms, social security, an adequate standard of living, health and education, and participation in cultural life.”

<sup>39</sup> Para. 19.

<sup>40</sup> Para. 21.

<sup>41</sup> In general about children’s right to participate in Finland, see Hannele Tolonen, *Children’s Right to Participate and Their Developing Role in Finnish Proceedings*, pp. 225-247 in Trude Haugli, Anna Nylund, Randi Sigurdson and Lena R.L. Bendiksen (eds.), *Children’s Constitutional Rights in the Nordic Countries*. Brill Nijhoff 2020.

efforts to keep children in, or return them to, the care of their families, and to ensure families' access to various forms of support in the caregiving role.<sup>42</sup>

The Committee was satisfied with the extension of compulsory education to 18 years of age, and to upper secondary education and the adoption of the National Child Strategy in 2021.<sup>43</sup> The idea of the Strategy is that children's equality will be promoted through systematic measures. Data on wellbeing gaps and their causes will be collected. Effective measures are necessary to narrow these gaps. Those measures must respect the rights of the child. Moreover, it was stressed that equal and non-discriminatory access to various services, forms of support, and channels of participation must be ensured for all children.<sup>44</sup>

### **4.3 *Rights of Older Persons and Persons with Disabilities***

The Committee was concerned about the right to self-determination of older persons. It recommended Finland to guarantee in its legislation the rights of older persons to both independent living and self-determination.<sup>45</sup> This process has gone forward too slowly.

The Committee paid attention to the poor situation of persons with disabilities because of the spread of COVID-19, such as isolation and lack of access to services. The State should consult and co-operate more with organisations and representatives of persons with disabilities in order to be able to do more preventive work. The Committee also recommended that Finland ensure that workers with disabilities enjoy the right to just and favourable conditions of work on an equal basis with others.<sup>46</sup> It recommended that Finland discontinue the practice of segregating workers with disabilities in sheltered workplaces.<sup>47</sup>

### **4.4 *Rights of Ethnic Minorities***

The Sámi are a very complicated minority group from the perspective of fundamental rights. The Constitution has a provision on the right to one's own language and culture: "The Sámi, as an indigenous people, as well as the Roma and other groups have the right to maintain and develop their own language and culture." Provisions on the right of the Sámi to use language before public authorities are laid down by an Act, but the rights of Sámi-speaking customers are not realised equally in comparison with Finnish- and Swedish-speaking

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<sup>42</sup> Paras. 32-33.

<sup>43</sup> Finnish Government, First National Child Strategy Aims to Build a Finland that Respects Children's Rights 2021. <<https://valtioneuvosto.fi/en/-/1271139/first-national-child-strategy-aims-to-build-a-finland-that-respects-children-s-rights>> accessed 25 October 2021.

<sup>44</sup> Child Strategy, p. 23.

<sup>45</sup> Para. 35. See Hanna-Kaisa Hopponia, Anna Mäki-Petäjä-Leinonen and Henna Nikumaa, (Un)equal treatment? Elderly Care and Disability Services for People with Dementia in Finland. *European Journal of Social Security*, Vol. 19 (2017), pp. 225-241.

<sup>46</sup> See Report of the Ministry of Economic Affairs and Employment on Barriers to Employment of Persons with Disabilities. 22.6.2020.

<sup>47</sup> Para. 29.



customers. The Parliamentary Ombudsman has stated that the public authority Kela (Social Insurance Institution) must aim to ensure equal rights for Sámi-speaking customers, especially in cases of urgent social assistance, the application for which requires personal service (EOAK/3774/2018).

The Committee on Economic, Social and Cultural Rights found many problems in those rights in practice and recommended that Finland recognise education of and in Sámi language as a right. It also encourages Finland to expedite the ratification of the ILO Convention on Indigenous and Tribal Peoples Convention No. 169. The Committee referred to the General Comment No. 21 (2009) on the right of everyone to take part in cultural life.<sup>48</sup>

#### 4.5 *Vulnerable Groups*

It is not easy to identify those groups belonging to “vulnerable groups”, but included here at least are migrants and especially irregular migrants. The Roma, and often even persons with disabilities can also be included in these groups.<sup>49</sup> They face difficulties in the availability of health and social services.<sup>50</sup> However, there is the General Comment No. 14 (2000) on the right to the highest attainable standard of health. Therefore, the Committee recommended that Finland ensure that all persons, including migrants, have – both in law and in practice – equal access to health services, regardless of their legal status and documentation.<sup>51</sup>

### 5 **Conclusions**

Both the Constitution of Finland and international human rights conventions have taken *de facto* equality as a goal, not only formal equality. Both the ICCPR and the ICESCR are interpreted so that the states are to take positive action to achieve *de facto* equality, and the equality norm of the ECHR is based on the same principle.<sup>52</sup> The CEDAW includes an explicit article (Art. 4) about affirmative (positive) action: “Proportionate different treatment that aims to promote *de facto* equality, or to prevent or remove the disadvantages attributable to discrimination, does not constitute discrimination.” Affirmative action is also known in the Finnish Constitution, but not as directly as in the CEDAW. The

<sup>48</sup> Paras. 48-50. See also Realisation of Fundamental and Human Rights in Finland – Observations from 2019. Human Rights Centre’s Publications 1/2021, pp. 47-48 (Rights of Indigenous Peoples). See also more generally, Reetta Toivanen, Saami in the European Union. *International Journal on Minority and Group Rights*, Vol. 8 (2001), pp. 303-323.

<sup>49</sup> See Francesca Ippolito and Sara Iglesias Sánchez (Ed.), *Protecting Vulnerable Groups, The European Human Rights Framework*. Hart Publishing 2015.

<sup>50</sup> See Iipo Keskimäki, Eeva Nykänen and Hannamaria Kuusio, *Paperittomien terveystalvet Suomessa*. (Summary in English: Health Care Services for Undocumented Migrants in Finland). THL 2014.

<sup>51</sup> Para. 42.

<sup>52</sup> See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights*. Oxford University Press 2013, pp. 811-814; Ben Saul et. al., 2014, pp. 208-210 and Laurens Lavrysen, *Human Rights in a Positive State*. Intersentia 2016, pp. 110-112.

goal of the equality norm (Section 6 of the Constitution) is *de facto* equality, even though we cannot see it directly from the text.<sup>53</sup>

The original function of positive action was to remedy past discrimination (“reverse discrimination”). It can also be used to promote *de facto* equality without the idea of compensation. Elderly people in particular may be eligible for some social benefits that do not belong to younger persons. According to the Finnish Social Welfare Act (1301/2014), in non-urgent cases, the municipality is responsible for providing persons aged 75 years or over with access to an assessment of the need for social services in order to obtain services.<sup>54</sup> Besides elderly people, children also have some privileges. According to Section 53 of the Health Care Act (1326/2010) “any treatment of an individual of less than 23 years of age deemed necessary on the basis of the assessment of the need for treatment shall begin within 3 months of the need for treatment having been ascertained, taking into consideration the urgency of the case, unless otherwise required on medical, therapeutic, or other comparable grounds.”<sup>55</sup>

Quotas are the most usual way to promote *de facto* equality. In Finland, quotas are used to help minority-language speakers in universities (Swedish-speaking students at the University of Helsinki and Sámi-speaking students at the University of Lapland). Such quotas are justified by the need for lawyers and physicians who can help Swedish- or Sámi-speaking clients and patients.

It is often said that it is a political decision to practice affirmative action. The legislator decides about it after the Constitutional Law Committee has assessed that it conforms with fundamental and human rights norms. Then the courts have the ability to exert constitutional control (Section 106), but only in the concrete case if there is “an evident conflict with the Constitution”. The court has no power to invalidate legislation *per se*. We must, however, also differentiate between general justice, which the state has to promote (Section 1 of the Constitution), and justice at the individual level. These may at times seem to be in conflict with each other. A person may think he/she is discriminated against when instead it is a question of promoting justice at the societal level.<sup>56</sup>

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<sup>53</sup> *Travaux préparatoires* show this directly, see Government Proposal 309/1993, pp. 42-46.

<sup>54</sup> Statement 34/2005 of the Constitutional Law Committee.

<sup>55</sup> This is not discriminatory. See Statement 41/2010 of the Constitutional Law Committee. On priority setting in healthcare in general see Kaisa-Maria Kimmel, *Service Choices: Priority Setting in Finnish Health Care*. Retfard, Nr. 4 (2019), pp. 9-25.

<sup>56</sup> See in general about affirmative action (reverse discrimination), Valérie Verbist, *Reverse Discrimination in the European Union*. Intersentia 2017. See also Liisa Nieminen, *Positiivinen erityiskohtelu: tehokas keino kohti tosiasiallista yhdenvertaisuutta vai tyhjiä sanoja vain?* (Summary in English: *Positive Action: An Efficient Method to Promote De Facto Equality or Mere Empty Words?*). *Lakimies*, Vol. 117 (2019), pp. 580-607.