The Fundamental Constitutional Principle of Democracy and the Rule of Law and the Supervision of Legality on the Grounds of the Basic Law of Finland

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Abstract:

The political system of Finland and the consciousness of the Finnish society are strongly attached to the rule of law and solidified democratic principles. Strict observance of the principles of democracy and the rule of law, including individual rights and freedoms, especially in the context of their relations with the state authorities, ought to be perceived as a peculiar characteristic feature and singularity of Finland, similarly as of the other Nordic states. In fact, the substance of an individual's status and the protection of his/her rights has always been and still remains a very significant area of these states' functioning. Hence, the principle of democracy and the rule of law on the grounds of the Basic Law of Finland, having been in force since 1 March 2000, was included into the catalogue of the fundamental constitutional principles, forming the basics of the state's political system. Among the Nordic traditions cultivated by Finland there can also be placed strongly preserved supervision of legality, performed not only by the judicial system, like for instance the control of the constitutionality of law and the liability of the supreme state officials, but also by the non-judicial authorities of legal protection, such as: the Chancellor of Justice of the Council of State (Government) and the Ombudsman of Eduskunta (Parliament), which are so characteristic and directly originate from the Nordic legal and constitutional culture. Therefore, a whole separate chapter of the Finnish Constitution has been devoted to the matters of the control over the legality. The hereby paper aims at conducting the analysis of the content and scope of the fundamental constitutional principle of democracy and the rule of law, as well as the questions of the supervision of legality, its comprehension and range on the grounds of the Basic Law of Finland.

Key words:

the principle of democracy and the rule of law, a fundamental constitutional principle, supervision over the legality, the Basic Law of Finland

Introductory remarks

The Finland belongs to the circle of the Nordic legal culture world (Serzhanova 2017b: 7; 2016: 363-377; 2015: 31; 2011: 270), or to formulate it more precisely, to the Eastern Nordic culture – together with Sweden, with which it has a lot of common history. Therefore, one of the most characteristic and peculiar features at the same time, distinguishing Finland, is the fact that the Finnish constitutionalism, as well as the numerous principles and constitutional system's institutions cultivated by it, go back and have their roots originating from the Nordic constitutionalism, particularly from the Swedish one.

Finland undoubtedly places itself among the states which strictly preserve the principles of democracy, the rule of law and the protection of individuals' rights and freedoms, especially in their relations with the public power authorities (Grzybowski 2010: 29). Finland drew the tradition of considering rights and duties as a largely significant substance for the state's and society's functioning from Sweden, for it has been for many centuries and still remains historically, constitutionally and culturally connected with it. It ought to be also added here, that the attachment to the legality in the activities of the public power authorities is deeply rooted in the Finnish consciousness.

The Essence and Scope of the Principle of Democracy and the Rule of Law

The Basic Law of Finland, being presently in force, is based on the democratic constitutional principles, guaranteeing the integrity of human dignity, the respect of the citizens' freedoms and rights, as well as social justice (Osiński 2003: 28, Fraś 2004: 13). However, their precise interpretation does not seem to be so easy and explicit at all[1].

Among the most significant constitutional principles in Finland[2], which are undoubtedly distinguished by the Finnish constitutional law doctrine, there is the principle of democracy and the rule of law, formulated in § 2 point 2 and 3 of the Basic Law. This principle contains two

[1] A peculiar characteristic feature of the Nordic states, including Finland, is the fact, that placing the fundamental constitutional principles in a separate chapter of the basic laws does not unambiguously close their catalogue at all, and does not exclude their interpreting from other constitutional provisions. A special singularity of the Nordic states is that some principles have been applied in the constitutional practice for centuries, but have never been directly and explicitly expressed, not formally sanctioned in the texts of the binding basic laws (e.g. the principle of the sovereignty of people or the representative form of exercising power in the Constitution of Denmark). See: Grzybowski 2010: 11.

[2] Helpful and the most scientifically credible in the reflections over the catalogue and content of the fundamental principles contained in the constitution of Finland are undoubtedly the achievements of the Finnish doctrine in this field, mainly the works published after the basic law came into force: Pöyhönen 2002, comprising a chapter of Martin Scheinin's authorship related to the constitutional law. In the Finnish language see: Jyränki 2000; 2002, Saraviita 2000; 2005. In Swedish see: Suksi 2002.

elements: democracy and the rule of law. § 2 point 2 is related to the concept of democracy and explains its essence, which in the lights of this provision, in fact, consists in the realization of the principle of a civil society, i.e. on 'the right of an individual to participate in and influence the development of the society and his or her living conditions'. In this way this provision underlines the opportunity of the citizens' active participation in the forming of the directions of the state policy, for this kind of activeness determines the citizens' empowering and being co-liable for its lots.

The most important regulations assuring the democratic governing can be found both in the Basic Law and the provisions related to the elections to the Parliament, for the office of the President and local self-government authorities, contained in the ordinary law (the Election Act 714/1998[3]). The foundation of the democratic system are the constitutional provisions referring to the basic political rights and freedoms, guaranteeing the freedom of political parties' activities, the freedom of speech and publishing, as well as the freedom of association.

Whist, the principle of the rule of law, which is referred to in § 2 point 3, states that the exercising of public powers is based on the acts of law. Moreover, the law must be strictly observed in every public activity. The principle of democracy and the rule of law originates from the common Swedish-Finnish tradition. In the presently binding Constitution it performs several functions. The Constitution guarantees the democratic system of supreme public legitimacy. It is deeply rooted in the human subconscious and is expressed in a so-called legalist society. It is also manifested in the numerous further constitutional provisions, which aim at obliging to strictly observe legalism in the activities of the state authorities: the Parliament, the Head of State, the Government and the courts (Saraviita 2005: 28 & the subs., Serzhanova 2016: 371 & the subs.).

Supervision of Legality

The Constitution of Finland has dedicated a whole separate chapter 10 (§§ 106-118) to the supervision of legality, which is traditionally an extremely essential substance for the Finns. This chapter contains provisions related to the supremacy of the Constitution and the control of the constitutionality of law, which essence is followed from the hierarchy of the legal sources on

[3] Election Act 714/1998 (with later amendments, the last ones of 2004 made by the Act 218/2004), which came into force on 8 October 1998, available on the Finnish, Swedish and English languages in the electronic collection of the Finland's legal acts at: http://www.finlex.fi. It has been analyzed in detail by Serzhanova (2014: 144 & the subs.). Moreover, the constitutional principles of the electoral system in Finland are acutely analyzed by Saraviita (2005: 94 & the subs). In the Polish literature compare also: Grzybowski 2007: 67 & the subs.; 2010: 53-57.

the grounds of the Finland's Basic Law (Serzhanova 2007a: 89 & the subs.; 2007b: 91-99). Apart from these, this chapter also comprises provisions related to the non-judicial authorities of legal protection, such as the Chancellor of Justice of the Council of State (Government) and the Ombudsman of *Eduskunta* (Parliament)[4], being so characteristic for the constitutional system of Finland, the supervision of the lawfulness of the official acts of the Government and the President of the Republic[5], as well as the legal responsibility of the Chancellor of Justice, the Ombudsman and the officials' accountability, which are the matters of considerable importance for the feeling of legalism formed in Finland and solidified in the Finns' mentality.

Control of the Constitutionality of Law

The system of the centralised control of the constitutionality of law, based on the Kelsen's model of constitutional judiciary, being so popularized in numerous states, both in Europe and worldwide, does not exist in Finland, similarly to other Nordic states[6]. On the one hand, it is the result of a certain very strongly rooted and solidified tradition, so characteristic for the Nordic world, which has elaborated its own, original mechanisms, based mainly on the inter-parliamentary control, assuring a relevant and adequate level of the Basic Law protection[7]. While, on the other hand, within the area of the practical application of legal provisions, the performance of such control has been entrusted to ordinary and administrative courts. In fact, the main accent in this field is rather put to the preventive control, which is strictly connected with the legislative procedure in Finland. However, the ordinary and administrative judiciary conducts a certain degree of the assessment of the constitutionality of the legal provisions of the lower level normative acts with the Basic Law on the occasion of settling particular cases.

Formally, the legal empowerment of the judiciary to realize the dispersed control of the constitutionality of law has been sanctioned by §§ 106 and 107 of the Basic Law. § 106 stipulates an entitlement of the courts to recognize the primacy of the constitutional norms in the situation, when in a matter, being tried by a court of law, the application of an ordinary act's

[4] About the genesis of these two authorities, originating from the Nordic states' tradition compare: Serzhanova 2007a: 182 & the subs.; see also Grzybowski 2007: 137 & the subs.

[5] This substance has remained the subject of constitutional regulation in the Finland's tradition since the beginning of its independency. This thesis can be proved by the fact, that in the previously binding Constitution there existed a separate Act related to the ministerial liability: Act on the Right of the Parliament to Examine the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Ombudsman of *Eduskunta* of 1922.

[6] A more detailed analysis of the model of the constitutionality of law control in Finland is made by Serzhanova (2017a: 802-816).

[7] An interesting discourse on the inter-parliamentary control of the constitutionality of law can be found in: Piotrowski 1997: 108 & the subs.

provision would be in an evident conflict with the Basic Law. A similar disposition, but referring to the under law acts, can be found in § 107, allowing first and foremost the courts, but also the public authorities not to apply a provision of a Decree or another statute of a lower level than an Act, in case it is in conflict with the Constitution or another Act[8]. Administrative courts examine the conformity of both an administrative act and the Act of law, on the basis of which it was issued, with the Constitution (Serzhanova & Sagan 2012: 185).

A natural consequence of these provisions in practice seems to be the fact, that the courts have a possibility to assess the constitutionality of the lower level acts and, in case they state such a collision, not to apply them in a concrete case. It also seems, that the apprehension of § 106, comprising in its content a notion of the conformity of the acts of law with the Basic Law (Fin. *perustuslain kanssa*), and not only with its particular provisions, may imply, that the courts can make an extended interpretation of the Constitution, reaching to both its 'spirit' and values contained in it[9]. An identical result can be achieved by the courts if they interpret (or create) a provision or a legal rule in a 'pro-constitutional' or 'pro-human rights' way.

It does not obviously mean at all, that the courts are empowered in the competences or equipped with any legal instruments enabling them to adjudicate on the inconformity of such a provision or a normative act with the Constitution in the generally binding sense, and that on this basis the provision recognized as unconstitutional in the exact case may not be applied by other courts. The activities of the ordinary and administrative courts in this field do not have the same legal effects as the judgements of constitutional courts, for they do not have an abstractive and universally applicable character.

Moreover, it is worth reminding, that the Supreme Court can exercise a preventive control of the Government's legislative initiatives on various stages of the procedure lasting in the Parliament. While the President of *Eduskunta* is entitled to request an opinion on an adopted act of law, although he can do it before the President of the Republic signs it. The Supreme Administrative Court is also empowered in such a right[10].

[8] The entitlement of public authorities in the field of the control of the constitutionality of law is a very original solution, seldom and rather unprecedented in other states. It is a display of the tradition of the Eastern Nordic legal culture.

[9] About the interpretation of § 106 of the Finland's Constitution, as well as more extendedly on the judicial control of the constitutionality of law in the Nordic states, including also Finland, compare: Serzhanova & Sagan 2012: 184. See also: Serzhanova 2017a: 802 & the subs.

[10] The Supreme Administrative Court was empowered in the right to express its opinion on the draft laws submitted in *Eduskunta* in 1919. In this context it is worth to reach the commentary contained in the work by Grzybowski (1990: 203). Compare: Serzhanova & Sagan 2012: 185.

Non-Judicial Authorities Established to Protect Lawfulness

In order to watch lawfulness the Basic Law of Finland has established a series of bodies and institutions, which task is to control the activities of the constitutional state authorities as to their conformity with the Constitution. Such regulations are rare and difficult to be found in any other contemporary Constitutions.

Among the brightest examples of such legal mechanisms, instruments and institutions are two independent from each other state authorities: the Chancellor of Justice (Fin. *oikeuskansleri*) and the Ombudsman of *Eduskunta* (Fin. *Eduskunnan oikeusasiamies*). According to the Basic Law they guard lawfulness. The Chancellor of Justice oversees the official acts of the Government and the President of the Republic, and together with the Ombudsman of *Eduskunta*, they monitor the observance of basic rights and liberties and human rights, as well as ensure that the courts of law, the other public authorities and the civil servants, public employees and other persons, when the latter are performing public tasks, obey the law and fulfil their obligations (§§ 108 and 109 of the Constitution).

The Chancellor of Justice and his/her substitute – the Deputy Chancellor of Justice, attached to the Council of State, are appointed according to § 69 of the Basic Law (chapter 5 of the Constitution, regulating the matters related to the Government of Finland). This provision also contains regulations determining the procedure of appointing this authority, as well as the qualifications required from the candidate for this office. The Chancellor of Justice and the Deputy Chancellor of Justice are appointed by the President of the Republic and have to possess outstanding knowledge of law. In addition, the presently binding text of the Basic Law also stipulates appointing a substitute for the Deputy Chancellor of Justice, by the President, for a term of office not exceeding five years. What is interesting, however, is that the Constitution does not provide any term of office for the Chancellor himself. When the Deputy Chancellor of Justice is prevented from performing his/her duties, the substitute shall take responsibility for him/her. The provisions on the Chancellor of Justice apply, in so far as appropriate, to the Deputy Chancellor of Justice and the substitute.

According to § 108, determining the duties of the Chancellor of Justice of the Government, his/her task is to oversee the lawfulness of the official acts of the Council of State and the President of the Republic. Moreover, the Chancellor of Justice has to assure that the courts of law, the other public authorities and the civil servants, public employees and other persons, when performing public tasks, obey the law and fulfil their official obligations properly.

Within the scope of the Chancellor's competences, there is also watching the observance of the fundamental rights and freedoms and human rights. Furthermore, upon a request, the Chancellor of Justice has to provide the President, the Government and the Ministries with information and his/her opinions on legal issues. In addition, the Chancellor has an obligation to submit an annual report to the Parliament and the Government on his/her activities and observations on how the law has been obeyed[11].

The other non-judicial authority, supervising lawfulness and watching the observance of law in Finland, established in accordance with § 38 of the Basic Law, is the Ombudsman of *Eduskunta*[12]. Contrary to the Chancellor, this authority, although strongly connected with the Parliament, is much more autonomic and independent than the Chancellor, who is attached and subordinate to the Government. The Ombudsman is elected by the Parliament, he/she exercises his/her duties during a term of office and is subjected to a larger parliamentary control. And this is not only about his/her reporting obligation before *Eduskunta*, for the same duty obliges the Chancellor of Justice, too. This is about a possibility of his/her dismissal by the Parliament, though only in utmost and justified situations, while in the case of the Chancellor the Parliament does not have such influence.

Eduskunta appoints its Ombudsman and his/her two deputies for the term of four years. The only constitutional criteria, required from the candidate for this office, is outstanding knowledge of law. The Deputy Ombudsman can also have his/her substitute. The Parliament, after having obtained an opinion of the Constitutional Law Committee, may, for extremely weighty reasons, dismiss the Ombudsman before the end of his/her term of office. It can accomplish this by a decision supported by at least two thirds of the votes cast.

In accordance with § 109 of the Basic Law, stipulating the Ombudsman's competences, his/her scope of tasks, similarly to the Chancellor, contains ensuring that the courts of law, the other authorities and civil servants, public employees and other persons, when the latter are performing public tasks, obey the law and fulfil their official obligations. Moreover, in the performance of his/her duties, the Ombudsman monitors the implementation of basic rights and liberties and human rights. Likewise the Chancellor, the Ombudsman is obliged to submit an

[11] More detailed regulations related to the organization and functioning of the institution of the Chancellor of Justice are contained in the Act on the Chancellor of Justice of the Council of State 25.2.2000/193. It is available in Finnish and Swedish in the electronic collection of the Finnish legal acts at http://www.finlex.fi/

[12] The constitutional position, organization and competences of this authority is acutely analyzed by Serzhanova (2006: 59-68; 2007a: 182 & the subs.).

annual report to the Parliament on his/her work, including observations on the state of the administration of justice and on any shortcomings in legislation[13].

As far as it can be seen, the competences of both authorities are very similar, hence § 110 of the Constitution implements the principles of the division of their responsibilities between them and their right to bring charges. A decision to bring charges against a judge for unlawful conduct in office is made by the Chancellor of Justice or the Ombudsman. Likewise, both the Chancellor and the Ombudsman may prosecute or order that charges be also brought in other matters falling within the purview of their supervision of legality. Provisions on the division of responsibilities between the Chancellor of Justice and the Ombudsman may be laid down by an Act, without, however, restricting the competence of either of them in the supervision of legality. Considering the judges' independent status, the right to bring charges against them seems to be a very significant competence.

According to § 111 both the Chancellor of Justice and the Ombudsman have a right to receive from public authorities or other entities performing public duties any information needed for their supervision of legality. The Chancellor of Justice obligatory participates in the Government meetings and, when matters are presented to the President of the Republic, also in the Government meetings with the President's attendance. While the Ombudsman only has a right to attend these meetings and presentations.

Additionally, the Constitution in its § 117 provides mechanisms enabling to bring charges against the Chancellor of Justice and the Ombudsman for unlawful conduct in office. The provisions of §§ 114 and 115, concerning the analysed hereinafter responsibility of the members of the Government, also apply to an inquiry into the lawfulness of the official acts of the Chancellor of Justice and the Ombudsman, the bringing of charges against them for unlawful conduct in office and the procedure for the hearing of such charges.

As it is followed from the argument presented above, the Chancellor of Justice and the Ombudsman, also called the 'guards of legality', providently supervise strict observance of law and legalism in the activities, official acts and decisions taken by the lower level administrative authorities.

[13] The development of the constitutional provisions related to the organization and functioning of the institution are found in the Act on the Ombudsman of *Eduskunta* 14.3.2002/197. It is available in Finnish and Swedish in the electronic collection of the Finnish legal acts at http://www.finlex.fi Access to its English language version is made on the Ombudsman's website http://www.oikeusasiamies.fi/Resource.phx/eoa/english/lawlinks/act-ombudsman.htx

Supervision of the Lawfulness of the Official Acts of the Supreme State Authorities

The matters of the supervision of the lawfulness of the official acts of the Council of State and the President of the Republic have been regulated in the further provisions of the same chapter of the Basic Law. In accordance with § 112, if the Chancellor of Justice becomes aware that the lawfulness of a decision or measure taken by the Government, a Minister or the President of the Republic gives rise to a comment, he is obliged to present the comment, with reasons, on the aforesaid decision or measure. If the comment is ignored, the Chancellor of Justice must have the comment entered in the minutes of the Government and, where necessary, undertake other measures. The Ombudsman has a corresponding right to make a comment and to undertake measures. If a decision made by the President is unlawful, the Government, after having obtained a statement from the Chancellor of Justice, is obliged to notify the President that the decision cannot be implemented, and ask him to amend or revoke it.

The provision of § 113, related to the criminal liability of the President of the Republic, stipulates that if the Chancellor of Justice, the Ombudsman or the Government deem that the President of the Republic is guilty of treason or high treason, or a crime against humanity, they are obliged to communicate this matter to the Parliament. In this event, if the Parliament, by three fourths of the votes cast, decides that the charges are to be brought, the Prosecutor-General prosecutes the President in the High Court of Impeachment[14], and the President abstains from his/her office for the duration of the proceedings. In other cases, no charges can be brought for the official acts of the President.

As far as the question of the legal liability of the Government members is concerned, it is regulated in § 114, providing a possibility to bring charges against them for unlawful conduct committed in office to be heard by the High Court of Impeachment. The decision to bring such a charge is taken by the Parliament, after having obtained an opinion from the Constitutional Law Committee concerning the unlawfulness of the actions of the Minister. Before the Parliament decides to bring charges or not, it allows the Minister an opportunity to give an explanation.

[14] The High Court of Impeachment, as one of the authorities in the judicial system and wider comprehended justice, was established on the basis of § 101 of the Basic Law, for the purpose of examining the charges against the members of the Government, the Chancellor of Justice, the Ombudsman of *Eduskunta* and the judges of the Supreme Court for unlawful conducts committed by them in office. The Court also deals with the charges on the criminal liability of the President of the Republic. Additionally, the Constitution also determines the internal organization of the High Court of Impeachment. While more detailed regulations related to the composition, organization, the scope of competences and the proceedings before the Court on the legal liability of the Head of State and the members of the Government are contained in the Act on the High Court of Impeachment and the Proceedings on the Cases of the Ministers' Liability 25.02.2000/196. It is available in Finnish and Swedish in the electronic collection of the Finnish legal acts at http://www.finlex.fi

When considering a matter of this kind the Committee is empowered to take decision, having a quorum of all of its members present. The member of the Government is prosecuted by the Prosecutor-General.

The proceedings in the matter of the Minister's legal liability is started on the basis of § 115 of the Basic Law. An inquiry into the lawfulness of the official acts of the Minister may be initiated in the Constitutional Law Committee on the basis of: a notification submitted to the Constitutional Law Committee by the Chancellor of Justice or the Ombudsman, a petition signed by at least ten Representatives or a request for an inquiry addressed to the Constitutional Law Committee by another Committee of the Parliament. The Constitutional Law Committee may also open the inquiry into the lawfulness of the Minister's official acts on its own initiative (Grzybowski 2007: 136-137).

The conditions of bringing charges against the members of the Government are determined by § 116 of the Basic Law. A decision to bring charges against the Government member may be made if he/she has, intentionally or through gross negligence, essentially contravened his/her duties as a Minister or otherwise acted clearly unlawfully in office.

Accountability of the Civil Service Officials

The accountability of civil service official has been stipulated and regulated as the last matter by § 118 of the Basic Law. A civil servant is responsible for the lawfulness of his/her official actions, as well as for decisions taken by an official multi-member body that he/she has supported as one of its members. If the decision has been taken upon his/her presentation, being its rapporteur, he/she is also responsible for it, unless he/she has filed his/her objection to it. Moreover, this regulation provides a possibility to request punishment in a judicial proceedings and search for compensation of damages made by a civil servant. This is a strong accent and underlining of the legalism, which has been mentioned above, as well as the proof of the attachment of the Finns in their consciousness to the rules of good administration, being the characteristic feature of the legal culture of the Nordic states. Everyone, who has suffered a violation of his/her rights, or sustained a loss through an unlawful act or omission of a civil servant, or any other person performing public tasks, has a right to request this person to be sentenced to a punishment. Then the public organisation, official or any other person in charge of public tasks is held liable for damages, as provided by an Act (§ 118 of the Constitution). However, the matters of the charges which are to be heard by the High Court of Impeachment under the Constitution, are the only exception from this rule.

Additionally, it is worth to mention in this context, that according to § 21 of the Constitution everyone has a right to have his/her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his/her rights or obligations reviewed by a court of law or other independent organ for the administration of justice. Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance are laid down by an Act.

Conclusions

In its historical traditions Finland has always been and still remains a state of a very high feeling of legalism and constitutional pathos. This reflections can undoubtedly be referred to the Finnish society, too. A particularly significant place in this context is occupied by the substance of the constitutional principles, including those which are connected with democracy and the rule of law, the protection of the fundamental rights and freedoms and the human rights guaranteed in the Basic Law, as well as the supervision of legality. These issues are situated on the highest level of the constitutional values and occupy the central place in the arrangements and decisions taken by the constitutional legislator related to the state's organization and functioning. Furthermore, these aspects play a very considerable part in the political discussions.

It ought to be underlined that a high level of the observance of the principles of democracy and the rule of law, the legalism in the public powers' activities and human rights in Finland are derived not only from a certain solidified historical tradition in this field, being strongly rooted in the mentality and the national consciousness of the Finns, but also from the legal instruments of their protection, sufficiently constructed by the state. The catalogue of their legal guarantees itself has been determined by the multi-aged Finland's traditions, formed by their own experiences, as well as also obtained from Sweden and other Nordic states.

Additionally, it is worth to emphasize a feature distinguishing Finland, i.e. the supervision of legality exercised by the non-judicial authorities of legal protection, which include very original in the world scale institutions , established on the grounds of the Eastern Nordic tradition. The speech is about the Chancellor of Justice of the Council of State and the Ombudsman of *Eduskunta*, who are entitled to submit motions to the Parliament to remove the contradictions in law, as well as bring charges against the supreme state officials, including the supreme judges, for their unlawful conduct in office.

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