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RIGHTS, DEMOCRACY AND LOCAL SELF-GOVERNANCE SOCIAL RIGHTS IN THE CONSTITUTION OF FINLAND

by

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1. The argument from democracy

Economic, social and cultural rights, enshrined in the constitution, pose difficult problems as to their legal significance and their compatibility with such basic principles of the Constitutional State – the democratic *Rechtsstaat* – as democracy, the separation of powers and local self-governance. These rights, often termed second-generation constitutional rights, can be easily be interpreted as symptoms of an excessive constitutionalization of the legal order and of a development towards the so-called judicial state. Such a development involves – in a rather paradoxical way – the risk of both a politicisation of adjudication and a juridification of politics: a politicisation of adjudication in the sense that courts take position in issues of political nature which should be left to the domain of political decision making in Parliament and Government; and a juridification of politics in the sense that legislative activities are increasingly seen as a specification and carrying out of decisions already made at the constitutional level. If the municipalities are entrusted with the organization of, for instance, social and health services – as is the case in Nordic countries - the problems raised by the second-generation basic rights also touch on the relationship between the judiciary and local self-government. I shall try to analyse these general problems through the example provided by the Finnish constitution. However, I shall start with a brief discussion at the level of constitutional theory / philosophy.

At this level it can be demonstrated that constitutional economic, social and cultural rights do not stand in any necessary contradiction with the principles of democracy and popular sovereignty and that the realization of these principles, in fact, requires such rights. The so-called argument from democracy can be raised in relation to constitutional rights in general. The argument goes as follows. Provisions on constitutional rights exclude certain decisions on the common life of society from democratic political processes. They restrict the possibilities of Parliament and Government to regulate and steer societal development according to the demands of the situation and the political aims of the political majority. In addition, there occurs a transferral of power from Parliament and Government to the judiciary, which is not subject to democratic control and which lacks democratic legitimacy; it is the judiciary which ultimately monitors the observance of constitutional basic-rights provisions. Thus, constitutional rights may also accelerate the development towards a judiciary state.

However, it can be argued that democracy and constitutional rights presuppose each other and make each other possible in the first place. This holds for all the different groups of basic rights, that is, for both the liberty rights protecting private and public autonomy and the economic, social and cultural rights safeguarding the factual, material conditions for the exercise of the former rights.

There should be no objection to the claim that democracy is not possible without political constitutional rights guaranteeing political participation, communication and organization. Democracy cannot be realized without granting such citizenship rights. By contrary, to claim that democracy also requires liberty rights protecting private autonomy, as well as economic, social and cultural rights, is more controversial.

In relation to liberty rights safeguarding private autonomy the claim can be justified as follows. Only independent persons whose private autonomy is ensured are able to participate in public discourses and political decision making processes, essential to a functioning democracy. The exercise of public autonomy presupposes the protection of private autonomy. But legally ensured private or public autonomy does not have any significance for persons who do not possess the factual means of putting their autonomy into effect. The realization of public autonomy and the respective political rights is dependent on the economic, social and cultural preconditions which the second-generation constitutional

rights are supposed to protect.

2. The legal effects of economic, social and cultural rights

Thus, at the level of normative ideas, underlying the ideal of a democratic *Rechtsstaat*, it can be demonstrated that democracy and constitutional rights are in harmony with each other. But, of course, there is a long way to go from basic rights and democracy as fundamental, deep-structural normative ideas to a positive constitution and complementary legislation.

One of the crucial problems in regulating constitutional rights – and especially economic, social and cultural rights – is to obtain the apropriate middle ground between too detailed and too vague provisions. This problem must, of course, be solved on a case-by-case basis. However, one of the guidelines to be followed should be based on the distinction between preconditions of and restrictions on democracy. One should not freeze through too detailed constitutional provisions solutions to issues which citizens should deliberate in public discourses and which should be decided in democratic decision making processes. Basic rights as normative ideas are and should be open to interpretations and specifications which take account of the actual state of society. This is an important consideration for all constitutional rights but it has specific significance in the context of economic, social and cultural rights; the way they are to be realized is immediately dependent on concrete societal circumstances. Too detailed constitutional provisions on these rights constitute a clear case of the juridification of politics, that is, of reducing legislative activity to a concretization of decisions already taken at the constitutional level.

However, in the debate on constitutional economic, social and cultural rights, it is often ignored that their formulation as subjective, justiciable rights is only one available alternative. There are other alternatives, too, as the following list of the possible legal effects of economic, social and cultural rights indicates:

(1) establishment of a subjective, justiciable right;
(2) constitutional mandate;
(3) prohibition against retrogressive measures;
(4) interpretative effect;
(5) programmatic effect.

If the rights are formulated as constitutional mandates, their immediate legal effects concern state organs; they only receive legal effects with respect to individual citizens through ordinary legislation, carrying out the mandate. The constitutional mandate is usually complemented, as its reverse, with a prohibition against retrogressive measures, such as legislation weakening the already achieved level of the rights' realization. In their interpretative role, economic, social and cultural rights also function in a mediate way, through a "rights-affirmative" interpretation of ordinary legislation. The last alternative - programmatic effect - actually means the absence of any legal effect; the provisions, at the most, only impose political or moral obligations on constitutional organs, mainly Government and Parliament. What, of course, is important is that the constitutional legislature makes it clear to itself what the intended legal effects of economic, social and cultural rights are and also gives a clear expression of its intentions in the wording of the respective constitutional provisions.

3. The Finnish example

Striking an appropriate balance between constitutional economic, social and cultural rights, and the principles of democracy and the separation of powers is not only an issue confronting the constitutional legislature; it is an ever-new challenge facing all the constitutional organs: the

(ordinary) legislator, Government and the judiciary. I will try to thematize some of the relevant issues through an analysis of the constitutional situation in Finland.

One of the main aims of the 1995 reform of the chapter on constitutional rights in Finland was to create constitutional guarantees for social, economic and cultural rights. The two main premises in the assessment of the legal effects of the respective constitutional provisions are: on one hand, these provisions do not as a rule establish subjective, justiciable rights, but, on the other hand, they have legal relevance, *i.e.*, they are not of a mere programmatic nature. The main provisions on social rights are included in Art. 19:

Section 19 - The right to social security

Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.

Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.

The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the wellbeing and personal development of the children.

The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.

The right guaranteed in Art 19(1) constitutes an exception to the rule that the constitutional provisions do not immediately give rise to subjective, justiciable rights. It may have practical significance especially in the field of social services. But the clear emphasis in the effects of the provisions of Art. 19 lies on constitutional mandates and prohibitions against retrogressive measures. The main addressee of the provisions is the legislator (Parliament). There is no Constitutional Court in Finland, and the emphasis in the control of the constitutionality of law lies on *ex ante* scrutiny of the governmental bills. The main monitoring body is the Constitutional Law Committee of the Parliament, consisting of Members of Parliament but assisted by constitutional experts. This method of monitoring the realization of constitutional rights seems to avoid the pitfalls of a development towards a judicial state; the monitoring process can be characterized as a democratic self-control of Parliament.

However, the truth is not that simple: the Constitutional Law Committee is a quasi-judicial body within Parliament, with a quasi-judicial pattern of arguing. The role of the committee within the legislative process has clearly grown after the basic-rights reform of 1995 and the entering into force of the new constitution in 2000. Thus, in a slightly paradoxical way, we can argue that the enhanced position of the Constitutional Law Committee attests to a judicialization of the political process occurring within the main legislative body. In a constitutional system including a constitutional court, the potential threat of a step towards a judicial state, with the concomitant danger of the politicisation of adjudication and juridification of politics, is even more evident. It can only be warded off through judicial self-restraint, exercised by the constitutional court.

If the constitutional provision on a social right is of the character of a constitutional mandate, guaranteeing it as a subjective, justiciable right whose realization is not subjected to budgetary restraints is one way of fulfilling the mandate. The crucial question, of course, is who has the power to decide whether a social benefit is to be guaranteed as a subjective right. Should the exclusive competence fall on the legislator?

In a constitutional system like the Finnish one, the answer is in the affirmative. In some

constitutional provisions, the legislator is already indicated as the main addressee of the mandate. For example, Art. 19(3) of the Finnish Constitution lays down that "the public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population". In addition, and even more importantly, the exclusive competence of the legislator is supported by the principles of democracy and the separation of powers; these principles must be duly considered when determining the division of labour between the various branches of the state in the fulfilment of constitutional mandates.

Thus, the courts – in Finland the administrative courts – should respect the position of the legislator by, for instance, not treating as subjective rights social, health and medical services whose procurement the legislator has left to the care of the municipalities within their budgetary means and decisions. If the courts do not respect this premise, they intrude on the competence of the legislator and, simultaneously, violate the municipalities' right to self-governance. The new constitution of 2000 introduced a system of *ex post* constitutional review: according to Art. 106, in cases where the application of a provision in an ordinary law would lead to an apparent contradiction with the Constitution, the courts are obliged to give primacy to the latter. The position I have taken entails that the courts should not, on the basis of this provision, substitute their own view of how a constitutional mandate should be fulfilled for that adopted by the legislator.

This does not, however, mean that decision making in the municipalities on the allocation of budgetary means to social benefits and the distribution of these means in individual cases falls entirely outside judicial control. The municipalities have a legal duty to allocate sufficient means to services whose organization the legislator has entrusted to them. In addition, in individual decision making general principles of both administrative and social law should be respected, and even here administrative courts have a controlling role. These principles, in turn, may find their justification and institutional support in provisions on constitutional rights. When relying on principles anchored in these provisions, the courts also fulfil their obligation of a "basic-rights affirmative" interpretation, an obligation stressed in the *travaux preparatoires* of both the reform of the chapter on constitutional rights in 1995 and of the new constitution of 2000. And, it may be added, "basic-rights affirmative" interpretation is the main means by which the courts should contribute to the realization of the constitutional mandates concerning economic, social and cultural rights. From the perspective of the courts, the interpretative effect is the most important aspect in the functioning of the provisions on economic, social and cultural rights.

So, I think, it is possible to stake out an appropriate division of labour between the legislator, the municipalities and the judiciary in carrying out constitutional mandates concerning economic, social and cultural rights; to pay due attention to the fundamental principles of democracy, the separation of powers and local self-governance. It is not always easy to maintain this division of labour, and it cannot, of course, be excluded that administrative courts interfere with issues that should be left to the legislator or to local self-government. From the perspective of an eventual development towards a judicial state, we move in a risky territory.