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THE RULE OF LAW AND CONSTITUTIONAL JUSTICE IN THE MODERN WORLD

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ANSWERS TO THE QUESTIONNAIRE – THE SUPREME ADMINISTRATIVE COURT OF FINLAND

General remarks

The Finnish system of constitutional control is quite different from other European states. In order to make the following answers more comprehensible it may be useful to give some background information.

There is no Constitutional Court in Finland. Instead, we have a multi-layered system of constitutional control that differs quite clearly from other European systems. There are several institutions that are responsible for the supervision of constitutionality. Constitutional control can – for the purposes of this questionnaire - be divided in two phases. The *ex ante* abstract control of legislation is vested on the Chancellor of Justice and the Constitutional Law Committee of the Parliament. The *ex post* concrete review is performed by the courts, most notably by the Supreme Court and the Supreme Administrative Court.

The main characteristic of the Finnish system has been the emphasis on the *ex ante* review of the Acts of Parliament. The most important institution in this respect is the Constitutional Law Committee of the Parliament which ensures in advance (i.e. before the Acts are passed) that legislation is in conformity with the Constitution. According to Section 74 of the Constitution it is the task of the Committee to supervise constitutionality:

"*The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.*"

The courts do not have power to annul legal provisions. The *ex ante* review of constitutionality is, however, supplemented by *ex post* review by the courts in individual cases. The courts were expressly given this role in the new Constitution of 2000. Section 106 ("Primacy of the Constitution") of the Constitution reads as follows:

"*If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.*"

The courts have been quite restrictive in their use of the primacy provision. Instead, they frequently use an interpretation method in which the Acts are interpreted in a manner which is best compatible with the Constitution (fundamental / human rights friendly interpretation). The enhanced role of constitutionally guaranteed fundamental rights and international human rights has, in general, necessitated the weighing of competing rights and interests in the courts in a way which formerly was rather regarded as something belonging merely to the competence of the legislature.

The principle of rule of law is occasionally referred to in the opinions and reports of the Constitutional Law Committee. The courts do not usually refer directly to the principle. They do, however, frequently adjudicate on issues that contain elements which are part of the rule of law as a wider concept.

Answers to the Questionnaire

A. The rule of law and constitutional justice in the modern world

I. The different concepts of the rule of law

1) What are the relevant sources of law (e.g. the Constitution, case-law, etc.) which establish the principle of the rule of law in the legal system of your country?

The principle of the rule of law is, *sensu stricto*, expressly stipulated in Section 2.3 of the Constitution. It reads as follows:

”The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.”

In addition to this rather formalistic notion of the rule of law principle[1] a number of other provisions of the Constitution emphasise different aspects of the principle[2]. Examples of those are equality and non-discrimination (Section 6), the principle of legality in criminal cases (Section 8), the right of access to information (Section 12) fair trial / access to justice / good administration (Section 21) and official accountability (Section 118). These and other elements of the rule of law are further realised in ordinary laws, practice of the Constitutional Law Committee and case-law of the courts.

2) How is the principle of the rule of law interpreted in your country? Are there different concepts of the rule of law: formal, substantive or other?

In Finland the principle of rule of law has, traditionally and for historical reasons, been considered mainly as a formal concept emphasising the legality principle in its different forms. In recent decades there has emerged a wider conception of the principle especially in legal literature. The rule of law in a democratic society (or, democratic Rechtsstaat) has been seen to contain also such elements as constitutional political rights, active civil society,

[1] See Venice Commission Rule of Law Checklist (CDL-AD(2016)007), p. 6.
[2] About the core elements of the Rule of Law, ibid. p. 7

equality and non-discrimination, openness and transparency of public administration, and democratic legislative process.

3) Are there specific fields of law in which your Court ensures respect for the rule of law (e.g. criminal law, electoral law, etc.)?

Not usually expressly by referring to the principle as such but, by and large, the core elements of the principle underlie all fields of law applied by the Supreme Administrative Court. As such, it is one of the main tasks of our Court to ensure that all public authorities act in accordance with the law in their respective fields of competence.

4) Is there case-law on the content of the principle of the rule of law? What are the core elements of this principle according to the case-law? Please provide relevant examples from case-law.

See the previous answer.

As an example of the more direct application of the legality principle in our Court one could mention the case KHO (this abbreviation stands for the Supreme Administrative Court) 2016:80. In that case the Court stated that the principle of legality in Section 2.3 of the Constitution means, among other things, that an administrative authority must in its decisions reach an outcome which is in accordance with the law. Correspondingly, in legal proceedings the administrative authority is obliged to act in such a manner that it takes appropriately into account circumstances and documents speaking both in favour and against its own decision.

The Constitutional Law Committee has in recent years referred to the principle of rule of law in quite different contexts. Such include e.g.

a) general notions about the rule of law in the context of reviewing Acts of Parliament (e.g. that the competencies of all institutions using public authority must be based on Acts of Parliament);
b) specific notions concerning especially restrictions on fundamental rights (e.g. that a mere approval by a person does not, as such, legitimate restrictions on fundamental rights);
c) lately, in the context of economic downturn, the Committee has emphasised that fair trial and access to justice remain the corner stones of the rule of law which entails that adequate resources must be provided to guarantee those rights.

5) Has the concept of the rule of law changed over time in case-law in your country? If so, please describe these changes referring to examples.

As stated above, there has traditionally been an emphasis on the legality principle as the main feature of the principle of rule of law. The more substantive conception is mainly – if not perhaps entirely – due to the internationalisation and Europeanisation of the Finnish society and the legal system (membership of the Council of Europe and the European Union in the 1990's, constitutional revisions of 1995 and 2000).

6) Does international law have an impact on the interpretation of the principle of the rule of law in your country?

See above.

II. New challenges to the rule of law

7) Are there major threats to the rule of law at the national level or have there been such threats in your country (e.g. economic crises)?

Because of relatively stable political and legal culture, there have been no major threats to the principle of rule of law at the national level in recent times. The economic downturn after 2008 has, however, caused some challenges especially through limiting the resources to finance e.g. the court system. Recent political turmoils, including the rise of the social media, have been considered by some observers to pose a threat to the principle in the future.

8) Have international events and developments had a repercussion on the interpretation of the rule of law in your country (e.g. migration, terrorism)?

There have been some changes or proposed changes on the level of fundamental rights protection especially concerning migration (rights of asylum seekers and persons with valid residence permits) and terrorism (data protection, competencies of internal security officials). So far, at least, these developments have been dealt with in ordinary legislative processes which include constitutional supervision.

9) *Has your Court dealt with the collisions between national and international legal norms? Have there been cases of different interpretation of a certain right or freedom by your Court compared to regional / international courts (e.g. the African, Inter-American or European Courts) or international bodies (notably, the UN Human Rights Committee)? Are there related difficulties in implementing decisions of such courts / bodies? What is the essence of these difficulties? Please provide examples.*

The Supreme Administrative Court (and the Supreme Court) apply binding international / European legal norms side by side with national norms. In their interpretation they regularly take the case-law of the international / European courts into account. There have been no major collisions between national and international legal norms. In some cases, however, there have been minor differences. Such include e.g. questions of balancing of certain basic rights (e.g. freedom of speech / privacy rights) or the interpretation of some rights (e.g. the *ne bis in idem* principle). The courts in Finland normally change their position in line with the international / European interpretation.

In rare cases there have been difficulties in implementing decisions of the international courts. For example, in one case it happened that in our Court's view the European Court of Human Rights had adopted an erroneous understanding of Finnish law (the Mental Health Act). In that kind of situations it can be difficult to follow the interpretation of the international court.

III. The law and the state

10) What is the impact of the case-law of your Court on guaranteeing that state powers act within the constitutional limits of their authority?

Under the Constitution of Finland, the Supreme Administrative Court is the court of last resort in administrative cases. It deals with appeals against decisions of administrative authorities and other holders of public power (including municipal authorities). Normally the appeal is first made to the regional administrative court. In an increasing number of questions (esp. tax law and aliens law) the Court deals with the merits of the case only provided it has first granted a leave to appeal.

The Supreme Administrative Court decides on the legality of administrative decisions. However, when deciding on the legality the Court has wide powers to examine also questions of fact and the exercise of discretion by the authorities. In most cases the Court has power to annul the decision or change it. In certain cases, typically when it concerns so-called municipal appeals (i.e. appeals against the authorities of municipalities which enjoy certain autonomy), the appeal is of a cassatory nature meaning that the Court can either uphold the decision or quash it but, in principle, not change it.

11) Do the decisions of your Court have binding force on other courts? Do other / ordinary courts follow / respect the case-law of your Court in all cases? Are there conflicts between your Court and other (supreme) courts?

The Supreme Administrative Court has no general competence to act preventively in the sense that it could give binding preliminary rulings on the interpretation of certain legal provisions. The Court can, however, often act preventively by giving precedents in cases brought to the Court through the ordinary channels. The lower courts and authorities normally follow the precedents of the Court in their subsequent decisions and activities. Decisions intended to have precedent value (189 decisions year 2015) are published as so-called Yearbook decisions on the web site of the Court.

There have been no major conflicts between the Supreme Administrative Court and the Supreme Court. In the interpretation of certain norms falling within both Courts' area of competence there have been some differences (e.g. concerning administrative sanctions, *ne bis in idem* and trademark law).

12) Has your Court developed / contributed to standards for law-making and for the application of law? (e.g. by developing concepts like to independence, impartiality, acting in accordance with the law, non bis in idem, nulla poena sine lege, etc.).

Our Court has interpreted the constitutional norms considered to be part of the rule of law principle in several cases (see e.g. concerning the legality principle KHO 2016:80, above in A.I.4). The Court has, for example, developed the interpretation and application of the *ne bis in idem* principle in line with the case-law of the European Court of Human Rights in several decisions during 2011-2016.

13) Do you have case-law relating to respect for the rule of law by private actors exercising public functions?

There is a provision in the Constitution of 2000 dealing with the delegation of administrative tasks to others than the public authorities. Section 124 of the Constitution reads as follows:

"*A public administrative task may be delegated to others than public authorities only by an Act or by virtue of an Act, if this is necessary for the appropriate performance of the task and if basic rights and liberties, legal remedies and other requirements of good governance are not endangered. However, a task involving significant exercise of public powers can only be delegated to public authorities."*

The Constitutional Law Committee of the Parliament has developed the general interpretation of the provision in its practice over years. The Supreme Administrative Court has applied the provision of the Constitution in a number of individual cases.

According to the so-called Acts of general application within administrative law (Administrative Procedure Act, Language Act, Act on the Openness of Government Activities), these Acts are also binding on private actors exercising public administrative tasks. There is case-law of the Court dealing with actual obligations of such private actors.

14) Are public officials accountable for their actions, both in law and in practice? Are there problems with the scope of immunity for some officials, e.g. by preventing an effective fight against corruption? Do you have case-law related to the accountability of public officials for their actions?

Public officials are accountable for their actions both in law and in practice. The relevant provisions of Section 118 of the Constitution read as follows:

"*A civil servant is responsible for the lawfulness of his or her official actions. (--)*

Everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person performing a public task shall have the right to request that the civil servant or other person in charge of a public task be sentenced to a punishment and that the public organisation, official or other person in charge of a public task be held liable for damages, as provided by an Act. (--)"

The main Act governing good administration and access to justice in administrative matters is the Administrative Procedure Act. The regional administrative courts and the Supreme Administrative Court, as a court of last instance, control that public officials have acted in accordance with the law in cases brought before them. In principle, a person can be entitled to damages owing to an erroneous decision by a state or municipal authority only if he / she has been successful in appealing against the said decision in the administrative court.

The Chancellor of Justice and the Ombudsman, within their competence prescribed in law, also exercise oversight to ensure that public authorities and officials observe the law and fulfil their duties. They have competence to investigate complaints, launch own investigations and carry out on-site inspections in official agencies and institutions.

Chapter 40 in the Criminal Code contain provisions of crimes conducted while exercising public authority (e.g. bribery, breach of official secrecy, abuse of public office and violation of official duty). The general courts deal with these criminal matters. The Supreme Court has given several precedents concerning the criminal accountability of public officials for their actions.

According to Section 114 of the Constitution a charge against a Member of the Government for unlawful conduct in office is heard by a specialised court, the High Court of Impeachment. The decision to bring a charge is made by the Parliament, after having obtained an opinion from the Constitutional Law Committee concerning the unlawfulness of the actions of the Minister. The threshold of impeachment in these cases is somewhat higher than against public officials. A decision to bring charges against a Member of the Government may be made if he or she has, intentionally or through gross negligence, essentially contravened his or her duties as a Minister or otherwise acted clearly unlawfully in office. Charges against the President of the Republic are also heard before the High Court of Impeachment after a vote by three fourths of the votes cast in the Parliament. The criminal liability of the President can only be triggered on the basis of treason, high treason or a crime against humanity (Section 113 of the Constitution).

IV. The law and the individual

15) Is there individual access to your Court (direct / indirect) against general acts / individual acts? Please briefly explain the modalities / procedures.

The courts do not have the power to annul general acts. They can, however, in individual cases disapply a provision of Act which is in evident conflict with the Constitution (Section 106 of the Constitution, see KHO 2008:25) or a Decree or another statute of a lower level which is in conflict with the Constitution or another Act (Section 107 of the Constitution, see KHO 2010:27).

Any individual affected by an administrative decision in a way defined by the law can bring the case to the regional administrative court. There are some limitations in law concerning the right to bring the case to the Supreme Administrative Court (e.g. leave to appeal). For more details, see A.III.10 above.

16) Has your Court developed case-law concerning access to ordinary / lower courts (e.g. preconditions, including, costs, representation by a lawyer, time limits)?

Our Court has a large amount of case-law concerning Section 21 (Protection under the law) of the Constitution and ordinary Acts implementing that provision. The right of appeal / access to justice in administrative matters is mainly covered by the provisions of the Administrative Judicial Procedure Act which is one of the main sources of law in our Court.

17) Has your Court developed case-law on other individual rights related to the rule of law?

There is a wide range of case-law related to e.g. equality / non-discrimination, right of access to information and good administration.

18) Is the rule of law used as a general concept in the absence of specific fundamental rights or guarantees in the text of the Constitution in your country?

No, rather the opposite. The courts apply the provisions of the fundamental rights catalogue included in Chapter II of the Constitution and human rights treaties, not the concept of rule of law as such.