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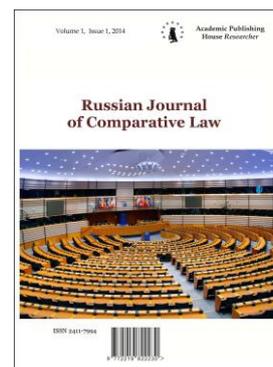
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Municipalities in Finland: Constitutional and Human Rights Related Issues

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Abstract

Departing from the principle of municipal autonomy the article overviews the history and the competence of modern municipalities in Finland. It moves to the issues of welfare functions of municipalities regarding implementing economic, social, and cultural rights. The main constitutional problem which arises when one focuses on the welfare functions of Finnish municipalities is the on-going social services reform in Finland, known as “SOTE”. This reform aims at creating new social and health service production districts replacing the existing municipalities currently carrying out such welfare functions. In the present constitutional settings of Finland several important public law dilemmas stem from the “SOTE” project. We analyze these problems and come to a conclusion that direct local elections to the social district management board would allow one to avoid decisive constitutional problems deriving from the constitutional right to local democracy.

Keywords: Finland, local self-government, municipal competence, welfare rights, administrative reform

Introduction

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Finland is a unitary state [1, Art. 119, Art. 121], composed of municipalities belonging to municipal districts or regions [1, Art. 119] and, of course, accommodating an autonomous region of Åland Islands [1, Art. 120]. In the 1940s the number of municipalities reached the record number of 603. Since then it has been gradually decreasing due to various administrative reforms entrusting municipalities with steadily enlarging duties to provide various public services. These obligatory tasks are financed partly by the state subsidies and partly by the competence of municipalities to collect taxes from inhabitants and businesses inside their borders. Too high municipal taxes, and as a result the inhabitants and businesses tend to leave; not enough municipal tax revenues or other municipal incomes – e.g. from its own energy production company or other businesses – and in the end the municipality will bankrupt. Moreover, the growth of urban municipalities is gradually circumscribing the autonomy of small country-side municipalities surrounding large urban districts, because the center city municipality and the countryside municipalities merge and often in terms clearly favorable to the city as “a gravity center”. The country side municipalities face also fatal challenges caused by the work related migration of

population to urban municipalities leaving them to struggle with ageing and retired population. As a result they might be forced to merge with their more vital neighbors. In this almost evolutionary 'survival of the fittest' process destiny of many municipalities has been to vanish. For example, only since 2013 the number of municipalities in Finland lost 19 entities, having decreased from 329 to 310 municipalities in 2016 [2].

The legally strong position of municipal democracy is in a sort of paradoxical contrast to the aforementioned struggle for survival many municipalities face in reality. In Finland the local self-government is constitutionally entrenched. Constitutional regulation of local self-government requires participation of citizens and foreigners permanently resident in Finland in municipal elections (Art. 14) and the competence of municipalities to decide on financial matters, including municipal taxes (Art. 121). The mechanism of realization of these constitutional provisions is stipulated by the 1995 Local Government Act, 365/1995 [3]. This Act gives due to the diversity of municipalities while recognizing the welfare of population as a primary goal of municipal administration. In accordance with this Act, the highest decision-making body in every municipality is a "local council," elected directly by the residents (Art. 1, par. 2).

In legal terms maintaining self-governance of municipalities has traditionally been an important issue for the Finnish constitutional law. Yet it is nowadays rooted also in the European law. The principle of local self-government, as enshrined by Art. 3, par. 1 of the 1985 European Charter of Local Self-Government, "denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population" [4]. This principle is recognition of direct citizen participation in managing public affairs as it is exercised "by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them. This provision shall in no way affect recourse to assemblies of citizens, referendums or any other form of direct citizen participation where it is permitted by statute" (Art. 3, par. 2).

Amidst modern reforms in Finland it is difficult to achieve an ideal of public participation due to the growing tendencies for rationalizing the production of public services for population, especially with respect to health care and social services. The more municipal administration becomes the executor of patient's or social services client's clear cut subjective rights, the less leeway there is for direct involvement of citizens' opinion in local decision making in these central matters.

Materials and Methods

The author addresses academic writings as well as legal sources from Finland. Government proposals regarding the administrative reforms in Finland are consulted with. Moreover, statistical data from the sources openly available in the Internet is also used. The method of legal textual analysis is primarily employed in this text. This analysis is conducted the context of the discussions regarding local democracy. For instance, S.H. Bailey in his book "Cross on Principles of Local Government Law" comments the case of Britain lacking a written constitution with a speculative question what it would mean from the standpoint of local authorities to introduce a written constitution. As an answer to his question Bailey maps a list of competence and, what Hans Kelsen would call, "competence-competence" issues [5]. Of course the competence matters get a way more complicated once the federalism is adopted as a key principle of the whole legal system saturating the legislative, executive and judicial branches of government, as e.g. in the United States [6].

Discussion

Conventional problems of federalism include the issues of competence arrangements between the federal center, the territories, and municipalities - the subparts of the states with own jurisdiction in certain matters. These issues culminate in the notion of local democracy. However, stereotypical problems for federal states at a closer look are relevant also for unitary states. Legally this means that there should be clear division of competence the center as a top of hierarchical state administration, and the autonomous public entities - the municipalities. Moreover, the competence should be also divided between various public organs inside the municipalities. This article argues that the functional complexity of modern (post)welfare state as a social system

is among the main reasons for similar dilemmas in federal and unitary states when it comes to the division of competence. This is demonstrated with the case of Finland.

The origins of municipal autonomy in Finland

The history of Finnish municipalities date back to early XVII century. Originally the units which are nowadays known as municipalities were established according to the existing church parishes [7, P. 85]. The borders of a church parish, in their turn, imitated the borders of older, pre-Christian era venues for “semi-court districts” [8, P. 121]. These districts were called with the Scandinavian term “ting” - alike the U.S. English term “thing” in the sense of “the subject matter of a right” [9, P. 1518] – and were set up in order to administer justice. The Protestant parishes represented a platform for the later development of modern municipalities in Finland due to the reforms in Sweden in the 17 century [7, P. 123]. During those times the King of Sweden pursued a policy of establishing the so-called “true confession”, namely the overwhelmingly Lutheran variant of Protestantism religion for everybody and as a sort of official ideology. The pragmatic goal was to strengthen the position of the royal state administration in Stockholm. Yet the King’s administration was somewhat desperately lacking means of enforcing its policy at a local level. Although the Army of Sweden was present in Finland – which was an integral part of Sweden during those days and cannot be seen as a “colonized” area [10, P. 337] – other than military means of enforcement were weak at best. Hence in many important every day issues the state administration could hardly penetrate everyday life in Finland by influencing such processes as organization of economy, marriages, land sales, political beliefs, etc. Hence, the church parishes were entrusted with several tasks which in the Nordic context nowadays would be considered as “typical state functions”, i.e. they maintained population registers, acknowledged real estate deals by virtue of reading publicly in the churches these announcements as well as the various orders of the King of Sweden. Parishes also provided religious school education for children. Finally, the parishes – and later the municipalities – were granted a right to collect taxes to fulfill their tasks [7, P. 127]. Also in this respect the root was in the earlier practice of the Catholic parishes to collect tithes. Hence, the closely to state bound Lutheran church parishes combined the elements of local self-governance (by local elite) to the right to allocate own resources under procedural and material limits set by the King of Sweden.

Modern Finnish municipalities evolved in the course of secularization in Sweden and the Grand Duchy of Finland since the mid XVIII century. In Finland the decisive step towards the modern municipalities was taken in the “Municipality Act”, and “the Poor Act” of 1865 accepted by the Finnish Senate, i.e. the administrative body representing the Russian Emperor in the Grand Duchy, and confirmed by the Emperor ultimately. In the social dimension the 1852 “Poor Act” introduced the principle that local authorities were legally responsible for organizing the basic security of the poor [11, P. 61]. In the organizational dimension the 1865 “Municipality Act” entrusted parishes only with the function of keeping population records. Other tasks were entrusted in the secular municipalities which could establish a municipal council to be their supreme decision-making body. Whereas “the Poor Act” created a set of new social services and obligated municipalities to provide these services to those in need as well as to collect the required funding [7, P. 140]. The last mentioned aspect of administering their own budget presupposed a principle that municipalities would have a competence to collect new taxes for new tasks “inside the purpose of municipalities” [7, P. 141]. Politically the goal of the 1879 “Poor Act” was to limit the benefits for the poor in the spirit of liberal “Night Watch” state policy [7, Pp. 96-97]. But opposing this Grand Duchy Senate driven “minimum state” policy the wealthiest industrialized towns in Finland began to provide much better benefits than those set by the “Poor Act”. These towns claimed that public order and balance in the society would be better served by a higher level of benefits for poor.

The “Poor Act” represented a milestone in the genesis of modern Finnish municipalities. Before this Act was introduced, the collection of funds for the poor had remained a religious duty or a sign of mercy. After the “Poor Act” was enacted that duty transformed into a statutory obligation of municipalities. Although social benefits were limited during those days their entrenchment in statutory law gave impulse for new social law reforms which followed later. In this respect Finland followed the example of Sweden. Sweden enacted the town administration reform law in 1862 [7, P. 27]. Finally both towns and countryside municipalities got own statutes: the 1865 “Municipality Act” and the 1869 “Town Act.” The delay in adopting the “Towns Act” was

caused by the unwillingness of the officials to weaken the position of the poor by subsidizing them less. Yet eventually the towns were allowed to follow own policies in this respect. The events left a new principle in the Finnish administrative law: the municipal authority has a competence to provide better benefits or other benefits than those ordered by the legislator, if this is not explicitly prohibited. Respectively also countryside municipalities were entitled to alternate the quality and range of welfare services.

Welfare functions of municipalities

Later in the XX and early XXI century the history of Finnish municipalities linked with the processes of democratization in the society and the idea of a welfare state. The XIX century municipalities were ruled by the male council elected according to a voting system in which a number of votes were directly proportional to the amount of municipal taxes which individuals paid [8, P. 148-149]. In 1917 the suffrage in municipal election was extended to women. In 1917 the suffrage in municipal elections was extended to women and became equal for both sexes irrespectively of wealth or other facts [12, P. 3].

During the early development of the welfare state from the 1950s until 1980s the municipalities represented institutional organizations of local democratic power and division of labor which had differentiated from the central government and other state bodies. The production of new public welfare services followed a standard pattern inherited from the earlier centuries: parliamentary acts established new obligations to municipalities in service production, a central supervising bureau for the introduced services was established in Helsinki and possibly new supervisory tasks were addressed to provinces as part of state administration, and the duty to actually produce the services was addressed primarily to municipalities as “a statutory based obligation” [8, P. 150].

The transition to the welfare state resulted in a new budget policy of the state. Instead of outsourcing the problem of financing welfare services to municipalities the state began to subsidize those services which were compulsory. Subsidizing mechanisms also represented the means of a stricter supervision of municipalities [13, Pp. 17-18]. But the idea of municipal self-governance as a constitutional principle left its mark on the way in which financing municipal welfare functions is reflected in the laws. Laws provided that that central funding for welfare services allows wide discretion for municipalities to decide how the funds would be actually allocated to meet various needs inside the annual municipal budget. There was, hence, a constitutional tension between the intensified state supervision, culminating in the state’s competence to practice real time supervision over bankrupting municipalities, and the right to self-government of municipalities. It was also important that intensified state supervision over municipalities by various state bureaus would focus as main rule on the quality of produced services *ex post facto*. The state gave a lump sum as a state subsidy to the municipality which decided on the allocation of this funding inside limits prescribed by subjective rights to daycare, education, health care, aged persons services, housing, library services, sport venues and facilities etc. Nowadays the amount of state subsidies in annual municipal budget varies a lot between municipalities; the main reason for this is the Parliament’s willingness to use this funding in order to support decreasing municipalities. For example, Salla and Ranua - small municipalities in Lapland – receive 63 % and 70 % subsidies respectively. At the same time Espoo belonging to the Capital metropol district receives 2 % subsidies. Helsinki itself gets 9% subsidies. The amount of subsidies depends of the level of economic development in the municipality [14]. Would the service production fail in terms of quantity or quality the municipality would bear responsibility as sanctions, imposed by the state, as happened in the Supreme Court Case law of 1990s. These sanctions are cuts in subsidies, based on tort liability. This entitlement to use discretion inside the municipal decision-making and the *ex post facto* liability for the outcomes of municipal administration fortified municipal autonomy.

The autonomy of municipalities in budget matters was balanced by their responsibility to collect own funding on top of state subsidies. As mentioned before, already in the XIX century municipalities had gained an independent right to collect taxes from both natural and legal persons residing in their territory. Besides, the municipalities had a right to run own businesses with own risks. In this way the municipalities could combine the subsidies from the state, own tax incomes, and possible business profits in order to pursue their goals. For example, they could choose between providing compulsory welfare services at a high average quality level and most probably

high taxation level, on the one hand, or reaching rather a low taxation level by providing only basic services, etc.

Joint municipal authorities

Due to the processes of urbanization and the small population in Finland, municipalities were driven towards cooperation after the Second World War. Co-operation processes have resulted in creation of 184 regional joint municipal authorities which produce welfare services for more than one municipality [15]. The most important areas of cooperation are health care, social services, and education at the secondary level institutions, such as professional schools.

Joint municipal authorities are established by specific acts and operate in a similar way as other legal persons such as firms or foundations. Such joint authorities for social and health care service production are steered by “general assemblies”, i.e., the supreme decision-making bodies, according to Art. 51 of the Municipality Act of Finland No. 10.4.2015/410. As an example one can mention the special health care districts. Each district has a professionally distinguished university central hospital, as stipulated by Art. 52 of the Health Care Act of Finland No. 30.12.2010/1326. The membership of municipality in one of the districts is compulsory, and members pay the operational costs of university hospitals as well as other special health care units by paying per use fees and fixed membership fees as agreed. The key operations and budget are controlled by the general assembly of the district.

Kainuu and Åland Islands Regional Assemblies are the exceptions from the typical goal specific regional assembly arrangements. These two regions accommodate directly elected Regional Assemblies animating rather traditional municipal councils with a wide, though not universal, competence instead of just a task specific service production assembly. Although Kainuu and Åland Islands are in the terms of population and economy small regions they are important experiments of regional self-governance.

Members of the municipal assemblies, as joint authorities, are not directly elected but are nominated by municipal councils. Member municipalities are responsible for funding the joint authority, as laid down in their Charters. Typically, similar municipalities, in terms of population or budget resources, have been willing to form a joint authority. Yet the recent planned administrative reform in the welfare services production will inevitably mean a change with respect of the competence of joint municipalities.

Whereas Regional Councils are joint municipal boards including representatives of municipalities in the region. Presently there are 18 regional councils in Finland [16]. These complement the role of joint municipal authorities. Regional councils are statutory bodies. These councils are rather discussion forums responsible for regional development and supervision of the interests of regions and provide a platform for voluntary co-operation. Respectively the regional councils have no independent budget-making power. According to par. 4 of the Regional Development Act of Finland No. 17.1.2014/7, regional development authority in each region is responsible for managing functions, related to regional development.

Ensuring welfare rights and the “SOTE” reform

Implementation of welfare - i.e., economic, social, and cultural - rights (ESCRs) stipulated by the Constitution of Finland and amplified, among human rights instruments, especially by references to the European Social Charter, is a special issue associated with functioning of municipalities. ESCRs require the state to provide services to everybody. Yet the state of Finland decides on its own how exactly to organize the production of these services. Therefore, inside the manifold Finnish public service model the issue of implementing ESCRs turns easily into a jurisdictional dispute between, on one hand, the state and its central agencies and, on the other hand, the municipalities and their various combinations.

The “SOTE” project [17], i.e., the recent administrative reform in Finland plans to set up new joint social and health care districts charged with the provision of welfare services. These joint districts will substitute the functions of the existing municipalities regarding the provision of these services. The new districts will substitute autonomous budget powers of municipalities and the present joint municipal authorities. This will mean most probably an increased central control over the most important of functions of municipalities, namely the production of health care and social services.

The latest pending SOTE proposal by the government in the Autumn 2015 suggests 15 service production districts based model to replace the existing almost 190 various joint authorities [18]. Again the proposal brings in constitutional problems mapped and explicated by the Constitutional committee of the Parliament in its statement 67/2014 (released actually on 19.2.2015) in relation to the earlier similar style proposal of by the then government [19]. The most serious of these concern the municipal autonomy which is guaranteed by the Constitution. Article 14 of the Constitution stipulates that: *"every Finnish citizen and every foreigner permanently resident in Finland, having attained eighteen years of age, has the right to vote in municipal elections and municipal referendums, as provided by an Act. Provisions on the right to otherwise participate in municipal government are laid down by an Act."* An essential part of this constitutional right is the right of municipality residents to influence the decision making by elected organs, i.e. municipal councils, in matters of producing health care, social services, and the related public spending as well as taxation.

The "SOTE" model is based on the present government proposal that all important budget decisions will be made by 15 joint authorities. Municipalities have to pay for welfare services, according to the rates, established equally *per capita* to all member municipalities of the joint authority, as assumed by the abovementioned Government proposal No. 268/2014. Another constitutional problem reveals itself at this point. Municipalities will have own representatives in decision making bodies of the forthcoming joint authorities, according the size of population. The decisions will be made, according to a qualified majority rule so that at least the majority of representatives of two municipalities must support the initiative. As a result, small municipalities will have no opportunity to influence the initiatives, supported by the municipalities with the greatest population inside the joint authority. In effect, this is capable of in fact eroding the right of the residents in small municipalities, set up by Article 14 of the Constitution of Finland. The "SOTE" project tried to balance this situation by introducing the duty of the joint authority to hear closely the people to whom the services are produced. Yet this recommendation does not establish any right of municipal residents to actually participate in the decision making. The overall erosion of municipal autonomy is fostered by the governmental plan to establish a new central agency to monitor and steer activities of joint "SOTE" authorities [20]. Finally, state subsidies will be paid directly to the new joint authorities, instead of municipalities. For now, it remains open whether the new "SOTE" districts would have or not their own right to collect taxes or should they rather get per inhabitant fixed subsidies from the state. The main argument for their own taxation competence is a classic in the Finnish context; the electorate which wants to enjoy the ESCRs related services must also pay a substantial part of the bill in the end of the day. If there is an option to send the whole service bill to the state, as an outcome is a risk of free riding at the expense of all districts' all tax payers who would pay the bill as the state taxes. Whereas the main argument against this "economic responsibility" is its younger nemesis: the goal to guarantee as good as possible right to equal social and health care services for all in Finland due to human and constitutional rights. To put it bluntly this turns into a clash between the long term experience and ideal principle of human rights. The experience (of the Finns) says a sound welfare economy cannot spend more than the people and businesses inside its reach earn and are able to pay in taxes; the human rights emphasize says that the public sector must meet its obligations to provide high level services to all. It might be so that the decisive argument will finally be Finland's economic crisis and its current trend to drop down in the international credit ranking reviews, yet this remains to be seen.

Results

We pursued to claims that one of the main constitutional problem of the "SOTE" reform is ensuring the right of the residents in the municipalities to take part in local self-government. In other words, the "SOTE" project brings in the need to choose between the long-term experience in administration and the ideal principle of human rights. The experience prompts that welfare economy cannot allow more spending than its subjects earn and pay as taxes. Adherence to human rights would mean that public sector must meet its obligations to provide high level services to everybody and the service addresses should be able to affect decision-making. More particularly, indirect way of establishing managing boards in new social and health-care districts contradicts the principle of electing the supreme decision-making bodies at the local level. Direct elections to the

boards of new districts would allow to avoid decisive constitutional dilemmas derived from the constitutional right to local democracy.

Conclusion

Implementation of municipal autonomy is a mode of indirect public participation in the conduct of public affairs. In Finland it culminates in the power to collect and allocate municipal budget and introduce, if needed, municipal taxes and businesses. The new administrative reform in Finland - the "SOTE" project – illustrates the importance of the local budgetary powers; its key democratic dilemma is to define which subjects – states, municipalities, or SOTE districts themselves - should collect taxes in order to pay the bills of new joint authorities. The parallel development to strengthen patient rights to choose service providers rather strengthens the position of the public services. At the political level the choices should be made when SOTE districts will set specific rules for organizing offer competitions to make contracts with various service producers. At the same time, the choice of how public resources will be exactly spent is supposed to be made in other ways than the established municipal self-government via elected councils. To safeguard the constitutional right to local democracy, new democratic mechanisms are necessary in order to link the new "SOTE" districts with the self-government right of individuals who reside in municipalities or inside the SOTE district. This necessitates a rejection of certain parts of the present municipal democracy as why to have any more overlapping elections on two local levels if the power to make budget decisions shifts from municipalities to SOTE districts. The introduction of a requirement of direct elections in joint authorities and representative boards would allow to observe the principle of local self-government. Further, without own taxation powers the new SOTE district councils would be in a weak position to practice effective decision-making.

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Муниципалитеты Финляндии: конституционно-правовой анализ с точки зрения прав человека

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Аннотация. Исходя из конституционного принципа самостоятельности местного самоуправления, настоящая статья рассматривает историю создания муниципалитетов в Финляндии и генезис их компетенции. Автор комментирует и социальные функции муниципалитетов в области обеспечения экономических, социальных и культурных прав. Говоря о социальной функции муниципальных образований в Финляндии, нельзя не затронуть важных конституционно-правовых проблем, связанных с проведением социально-административной реформы под названием "СОТЕ". Эта реформа нацелена, во-первых, на создание новых округов, ответственных за организацию социальных услуг и услуг здравоохранения. Иными словами, новые округа будут выполнять функции, которые в настоящее время выполняют муниципалитеты. Во-вторых, данная реформа нацелена на расширение прав пациентов по выбору конкретного поставщика услуг здравоохранения. В современных конституционно-правовых условиях Финляндии проект "СОТЕ" порождает ряд дилемм. Автор анализирует эти дилеммы и приходит к выводу о том, что в целях сохранения принципа самостоятельности местного самоуправления необходимо предусмотреть прямое избрание населением управляющих органов новых округов.

Ключевые слова: Финляндия, местное самоуправление, компетенция местного самоуправления, социальные права, административная реформа.