

**CONSTITUTION, JUDICIARY AND PUBLIC POWERS STRUCTURE – FINNISH  
PERSPECTIVES<sup>1</sup>**

***CONSTITUIÇÃO, JUDICIÁRIO E ESTRUTURA DOS PODERES PÚBLICOS –  
PERSPECTIVAS FINLANDESAS***

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**ABSTRACT:** This papers analyses the main contents of the Finland Constitution and the Judiciary. Finland Constitution is the basis of all legislation . It exercises of government power, and it details the fundamental rules, values and principles of Finnish democracy. According to the Constitution, judicial power lies with independent courts of law. The courts are independent: they are bound only by the law in force. Finnish procedural law has been both internationalized and constitutionalized since the 1990s and the result of court proceedings plays a more significant role for the parties.

**KEYWORDS:** Constitution; Judiciary; Public Powers Structure; Finnish Perspective.

**RESUMO:** Este artigo analisa os principais conteúdos da Constituição da Finlândia e do Judiciário. A Constituição da Finlândia é a base de toda a legislação. Ela exercita o poder governamental e detalha as regras, valores e princípios fundamentais da democracia finlandesa. De acordo com a Constituição, o Poder Judiciário cabe a tribunais independentes. Os tribunais são independentes: eles estão vinculados apenas à lei em vigor. O direito processual finlandês foi internacionalizado e constitucionalizado desde os anos 90 e o resultado dos processos judiciais desempenha um papel relevante para as partes.

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**PALAVRAS-CHAVE:** Constituição; Judiciário; Estrutura dos Poderes Públicos; Perspectiva Finlandesa.

## 1. Introduction

### 1.1. The new Constitution and its main contents

The new Constitution (11.6.1999/731) entered into force on 1 March 2000. In Finland, sovereign power lies with the people represented by the Parliament in session.<sup>2</sup> The Constitution is the cornerstone of all legislation and exercise of public power.<sup>3</sup> It contains provisions on state organization<sup>4</sup>, checks and balances<sup>5</sup> and on civil rights<sup>6</sup>. No other enactment may contradict the Constitution.<sup>7</sup> To amend or change the constitution, the majority in two consecutive Parliaments must adopt the changes.<sup>8</sup> Also the new Constitution has been amended after its entry into force.

According to the Constitution, sovereign power rests with the people. Democracy entails the individual right to influence decisions that affect us all.<sup>9</sup> The Constitution furthermore guarantees civil rights and liberties;<sup>10</sup> it is the basis of all legislation and exercise of government power,<sup>11</sup> and it details the fundamental rules, values and principles of Finnish democracy. The Constitution thus specifies the foundations of the relationship between the individual and government. It also contains provisions about the principles of the exercise of power by government, government organization and the relationships between the highest organs of government.<sup>12</sup>

The Constitution thus emphasizes the parliamentary traits of the Finnish political system and the status of the Parliament as the supreme state organ: the Government must enjoy its confidence.<sup>13</sup> The President of the Republic makes decisions on the basis of proposals drawn up

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<sup>2</sup> The Constitution, Chapter 1, Section 2.

<sup>3</sup> The Constitution, Chapter 1, Section 2, Subsection 3.

<sup>4</sup> The Constitution, Chapters 3, 5 and 6.

<sup>5</sup> The Constitution, Chapters 3, 5 and 9.

<sup>6</sup> The Constitution, Chapter 2.

<sup>7</sup> The Constitution, Chapter 10, Section 106.

<sup>8</sup> The Constitution, Chapter 6, Section 73.

<sup>9</sup> The Constitution, Chapter 1, Section 2, Subsection 3.

<sup>10</sup> The Constitution, Chapter 2.

<sup>11</sup> The Constitution, Chapter 10, Section 106.

<sup>12</sup> The Constitution, Chapter 5.

<sup>13</sup> The Constitution, Chapter 1, Section 3, Subsection 2.

and presented by the Government.<sup>14</sup> The Parliament elects the Prime Minister who is appointed by the President. The other ministers the President appoints on a nomination by the Prime Minister.<sup>15</sup> The President of the Republic directs the foreign policy of Finland in conjunction with the Government.<sup>16</sup> Also in foreign policy, presidential acts are based on preparations by and cooperation with the Government. Finland is a Member State of the European Union. According to the Constitution, Finland participates in international cooperation in order to promote peace and to safeguard human rights.<sup>17</sup>

### **1.2. Judicial power and its control**

In Finland, everyone can have his or her case heard appropriately and without undue delay by a court or other public authority and everyone also has the right to have a decision affecting his or her rights and duties reviewed by a court or other independent organ for the administration of justice. Provisions dealing with the publicity of proceedings, the right to be heard, the right to receive a decision containing the grounds, the right to appeal and other guarantees of a fair trial and good governance shall be regulated by an Act.<sup>18</sup>

According to the Constitution, judicial power lies with independent courts of law. The courts exercise judicial power. The courts are independent: they are bound only by the law in force. Thus, no outside party can intervene in the decision-making of the courts. The independence of the courts is guaranteed by the Constitution. The President of the Republic appoints the judges. The first instance is the district court. Its decisions may be appealed against to a court of appeal. The Supreme Court wields supreme judicial power in civil and criminal cases. Administrative courts and the Supreme Administrative Court hear cases within that field. In addition, there is a Court of Impeachment and some special courts.<sup>19</sup>

The Chancellor of Justice and the Parliamentary Ombudsman supervise the President, the Government and the courts, and the legality of state and municipal acts. They also oversee that civil and human rights are respected and carried out. The institution of the ombudsman originated in Sweden. In 1809, the parliament created the post of a parliamentary ombudsman. Following the Swedish model, Finland created the post of a Parliamentary Ombudsman in 1920. The

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<sup>14</sup> The Constitution, Chapter 5, Section 58.

<sup>15</sup> The Constitution, Chapter 5, Section 61

<sup>16</sup> The Constitution, Chapter 8, Section 93.

<sup>17</sup> The Constitution, Chapter 1, Section 1, Subsection 3.

<sup>18</sup> The Constitution, Chapter 2, Section 21.

<sup>19</sup> The Constitution, Chapter 2, Section 21 and Chapter 9.

Ombudsman is a supreme overseer of legality elected by the parliament. S/he exercises oversight to ensure that those who perform public tasks obey the law, fulfill their duties and implement fundamental and human rights in their activities. The scope of the Ombudsman's oversight includes courts, authorities and public servants as well as other persons and bodies that perform public tasks. By contrast, private instances and individuals who are not entrusted with public tasks are not subject to the Ombudsman's oversight of legality. Nor may the Ombudsman examine the Parliament's legislative work, the activities of parliamentarians or the official actions of the Chancellor of Justice.<sup>20</sup>

Everyone may file a complaint with the Ombudsman and there is no fee for investigating a complaint. A complaint in a matter within the ombudsman's remit may be filed by anyone who thinks a subject has acted unlawfully or neglected a duty in the performance of their task. Therefore, it is possible to complain in a matter concerning oneself, but a complaint can also be made on behalf of someone else or together with others. The complaint shall be filed in writing. It shall contain the name and contact particulars of the complainant, as well as the necessary information on the matter to which the complaint relates. The Ombudsman then investigates a complaint if it gives ground for suspicion that an authority or official has acted unlawfully.<sup>21</sup>

Investigating complaints is the Ombudsman's central task and activity. The Ombudsman investigates those complaints that are within the scope of his/her oversight of legality and with respect to which there is a reason to suspect an unlawful action or neglect of duty, or if s/he takes the view that this is warranted for any other reason. Arising from a complaint, s/he takes measures that s/he deems justified from the perspective of observance of the law, legal protection or implementation of fundamental and human rights. In addition to matters specified in complaints, the Ombudsman can also choose on his or her own initiative to investigate shortcomings that manifest themselves. The Ombudsman is required by law to conduct inspections of official agencies and institutions. If the Ombudsman concludes that a subject has acted unlawfully or neglected a duty, but considers that a criminal charge or disciplinary proceedings are nonetheless unwarranted in this case, the Ombudsman may issue a reprimand to the subject for future guidance. If necessary, the Ombudsman may express to the subject his or her opinion concerning

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<sup>20</sup> The Constitution, Chapter 10 and Parliamentary Ombudsman of Finland, The Summary of Annual Report 2011, p. 23. Available on the web: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=in29012125858656&cmd=download>, visited 06.06.2015.

<sup>21</sup> Parliamentary Ombudsman Act, Chapter 1, Section 2 and <http://www.oikeusasiamies.fi/Resource.phx/eoa/english/complaints/index.htx>, visited, 06.06.2015.

what constitutes proper observance of the law, or draw the attention of the subject to the requirements of good administration or to considerations of fundamental and human rights. In a matter within the Ombudsman's remit, s/he may issue a recommendation to the competent authority that an error be redressed or a shortcoming rectified. In the performance of his or her duties, the Ombudsman may draw the attention of the Government or another body responsible for legislative drafting to defects in legislation or official regulations, as well as make recommendations concerning the development of these and the elimination of the defects.<sup>22</sup>

In 2014, the amount of pending cases was 6478, where the amount of inhabitants in Finland is about 5 million. There were 4558 complaints to the Ombudsman, which is 9 % less (400 cases) than in 2013. Most cases concerned social security. Other substantial groups of cases concerned the police, health care, and prison administration. 48 complaints were transferred from the Chancellor of Justice. 60 cases were taken up on the Ombudsman's own initiative. In addition, there were 84 submissions and attendances at hearings, and 292 other kinds of written communications. The total amount of resolved cases was 4757. Of these, 242 cases were regarding courts, and in 203 cases the question concerned civil and criminal courts, while there were 38 cases concerning administrative courts and one case concerning a special court. If we look at the measures taken by the Ombudsman in Finland, the number of decisions leading to measures on the part of the Ombudsman was 736 in 2014. There were no prosecution cases, 15 reprimands, 563 opinions of which 325 were rebukes, and 238 for future guidance. In 4 cases, s/he took an initiative to develop legislation or regulations, and 11 cases concerned the provision of compensation for a violation. This means that 16 % of all decided cases led to some measure.<sup>23</sup>

## **2. Historical background**

Finland was a part of the Kingdom of Sweden from the 13th century to 1809, when the vast majority of the Finnish-speaking areas of Sweden were ceded to the Russian Empire (excluding the Finnish-speaking areas of modern-day Northern Sweden), making this area the autonomous Grand Duchy of Finland. The Swedish legal order was based on the continental system, and it

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<sup>22</sup> Parliamentary Ombudsman Act, Chapter 1, Sections 4 and 5 and Parliamentary Ombudsman of Finland, The Summary of Annual Report 2011, p. 25. Available on the web: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=in29012125858656&cmd=download>, visited 06.06.2015.

<sup>23</sup> The Parliamentary Ombudsman of Finland. The Annual report 2014. Available on the web: <http://www.oikeusasiamies.fi/dman/Document.phx?documentId=wy15315115910430&cmd=download>, visited 06.06.2015.

was accepted in Finland as well. In the 12th century, centralised power started to develop, which was beneficial for the development of the procedural law, too. The adjudication and the administration of justice thus started to move from parties and their families to the societal organs. In the beginning of the 13th century, the western legal order started to take root in Finland coincidental with the spread of Christianity. At this time, Sweden-Finland also began to establish national legislation, though provincial rule was still typical in medieval Sweden-Finland. Those provincial laws still included substantial aspects of ancient common law and originally existed only in an oral form. Later on, in the 12th and 13th centuries, they were subsequently written down by the Catholic Church and by the then more powerful monarch. The provincial laws included e.g. family justice, canon law and the king's orders. Family justice affected, for instance, the legal/societal position of a victim and his/her relatives; these laws will have played a central role, and substantial decision power was vested in the procedure. In addition, the provincial laws enabled a wide choice of procedural conduct. That being said, state adjudication proper was not fully instituted until the 16th century.<sup>24</sup>

Despite the fact that Finland was an autonomous part of Russia from 1809, Swedish laws were still valid in Finland and they were valid throughout the whole Russian period. From 1890 on, so-called 'Russification' was the prevailing policy and that era is therefore called the period of oppression. The aim was to make Finland more 'Russian' and consequently certain administrative changes were introduced also in the field of legislation. As a result, the Finnish authorities protested widely and the new system was never fully followed. Notably, the changes, or exceptions, made in the field of legislation covered only *some* parts in the legal order while the remaining aspects were both officially and formally still legislated by Finnish laws only. Thus, for instance, the Code for Juridical Procedure has been valid without any breaks from 1734 until today, despite Finland's variegated historical status as a part of Sweden, an autonomous part of Russia, and an independent state. Russian adjudication did not in fact have much effect in Finland compared to the Swedish model, which has been the predominant legal model since Finland gained full independence in 1917, and from then onward.<sup>25</sup>

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<sup>24</sup> ERVO, Laura: Pääsykoekirja 1/2007. Turun yliopisto, Oikeustieteellinen tiedekunta, 2007, p. 67, Jokela 2005, p. 6, LETTO-VANAMO, Pia: Käräjätehtävien oikeus. Oikeudenkäyttö Ruotsi-Suomessa ennen valtiollisen riidanratkaisun vakiintumista. Helsingin yliopisto. Rikos- ja prosessioikeuden sekä oikeuden yleistieteiden laitos, 1995, p. 6, 10 - 13, 84 - 101, 127 - 132, 142, 221 - 233, 255, 264 - 268 and 307, NOUSIAINEN, Kevät: Prosessin herruus. Suomalainen Lakimiesyhdistys 1993, p. 319 - 320 and 327, TIRKKONEN, Tauno: Suomen siviiliprosessioikeus 1. WSOY 1974, p. 48, YLIKANGAS, Heikki: Miksi oikeus muuttuu? WSOY 1983, pp. 7 - 19.

<sup>25</sup> See further, for instance: JUSSILA, Osmo: Suomen suuriruhtinaskunta 1809 - 1917, WSOY 2004, pp. 232 - 254, JUTIKKALA, Eino - Pirinen, Kauko: Suomen historia, Weilin + Göös 1966, p. 231, POHJOLAN-PIRHONEN,

When the Finnish Parliament adopted the Declaration of the Independence of Finland on 6 December 1917, the new state already had a rich national culture and centuries of experience in managing its own affairs. The makings of an independent nation derived partly from the times of Swedish rule (from the 12th century until 1809) and especially from the period when Finland was an autonomous Grand Duchy of the Russian Empire (from 1809 until 1917).

### **3. Judiciary**

#### **3.1. Bodies**

The district courts deal with criminal and civil cases. The decision of a district court can normally be appealed in a court of appeal. The decisions of the courts of appeal, then, can be appealed in the Supreme Court, provided that the Supreme Court grants leave to appeal. The administrative courts review the decisions of the authorities. The decisions of the administrative courts can be appealed in the Supreme Administrative Court. There are also certain special courts. These are the Market Court, the Labour Court, the Insurance Court and the High Court of Impeachment.<sup>26</sup>

To ensure a well-functioning judicial system it is important that the courts are independent and autonomous in relation to the Parliament, the Government and other government agencies. This is guaranteed, among other things, not only in the Constitution but also through the provisions of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and through provisions in the constitution. To guarantee the independence of courts a judge shall not be suspended from office except by a judgment of a court of law and a judge shall not be transferred to another office without his or her consent except when the transfer concerns reorganization of the judiciary.

Publicity is one of the main tools to control the courts in the Finland. The public has access to hearings and other meetings of the court and that they have the right to access documents

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Helge, *Kansakunnan historia* 3 1809 – 1855, WSOY 1973, pp. 157 - 186 and VIRTANEN, Kari O., *Kansakunnan historia* 5 1890 – 1917. WSOY 1974, pp. 11 – 410.

<sup>26</sup> English information on the Finnish court system can be found here: <http://www.oikeus.fi/tuomioistuimet/en/index.html>, visited 06.06.2015 and HÄMÄLÄINEN, Merva: Court system. In *In Civil Justice in Finland*. Jigakusha 2009, pp. 17 – 32.

pertaining to a specific case or matter. To protect individuals and the public this insight may in some cases be restricted by secrecy. These restrictions must be explicitly defined in Acts.<sup>27</sup>

It has been typical for the Scandinavian countries that there have existed different types of boards for solving disputes especially between consumers and entrepreneurs. Besides facilitating arbitration, in more wide-reaching and complicated matters of civil litigation - like business matters - the boards have been original tools of ADR in minor cases, especially in consumer cases. These boards deal with complaints from consumers concerning goods and services provided by businesses. The boards can give recommendations on how a given case should be solved. However, the decisions are not binding. The recommendation is given by the board, which functions more or less like a court. Hence the procedure can be seen as one kind of conciliation.<sup>28</sup>

The Ministry of Justice drafts the provisions which aim to ensure fair trials and good governance. The Ministry also prepares the laws relating to enforcement, bankruptcy and debt adjustment. The independent courts are responsible for the actual realization of legal protection. Other judicial authorities are the prosecutors and the enforcement authorities. Also legal aid has an important role in the legal protection. The Ministry of Justice is responsible for sustaining and developing the operation of courts and other judicial authorities. It ensures that the courts and the legal aid can, with respect to service ability, costs for the parties, and processing times, guarantee the factual realization of legal protection according to the Finnish legislation and the international treaties binding Finland.<sup>29</sup>

### **3.2. Professional judges**

Tenured judges are appointed by the President of the Republic. A person who is appointed to a position of a judge must be a Finnish citizen who has a Master of law (LLM) degree and who, by virtue of previous activity in a court or somewhere else comparable, has shown both professional competence and the personal characteristics needed for successful performance of the judicial role. The President and the justices of the Supreme Court and the Supreme

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<sup>27</sup> The Constitution, Chapter 2, Section 21.

<sup>28</sup> See ERVO, Laura – Persson, Annina H.; Finnish and Swedish Legislation in Light of the ADR Directive – Boards and Ombudsmen. In: Collective Redress in Europe – Why and How? British Institute of International and Comparative Law 2015, p. 463 – 465.

<sup>29</sup> <http://oikeusministerio.fi/en/index/basicprovisions/oikeusturva.html>, visited 06.06.2015.



Administrative Court must be distinguished legal experts. Moreover, the President of the Supreme Court and the Supreme Administrative Court and also the head judges of other courts of law must possess leadership skills. The independent Judicial Appointment Board prepares and makes a reasoned proposal on an appointment to a tenured position in the judiciary and delivers it to the Government to be presented to the President of the Republic. The Judicial Appointment Board is determined by the Government for five years. The Board consists of 12 members who are representing the judiciary, the public prosecution service, the advocacy and the research and teaching of law. The Chairman of the Judicial Appointment Board is a member nominated by the Supreme Court and the Vice-Chairman is a member nominated by the Supreme Administrative Court.<sup>30</sup>

The Judicial Appointment Board makes proposals on an appointment, for example, to the following positions: President of a Court of Appeal, Senior Justice of a Court of Appeal, Justice of a Court of Appeal, Chief Judge of an Administrative Court, Administrative Court Judge, Chief Judge of a District Court and District Judge. The Supreme Court makes a reasoned proposal concerning an appointment as a Justice of the Supreme Court and the Supreme Administrative Court makes a proposal concerning Justice of the Supreme Administrative Court.<sup>31</sup>

### 3.3. Lay judges

There are also lay judges in Finland, and serving as a lay judge in a court is an honorary task. A system of lay adjuration arguably helps maintain public confidence in judicial administration and is a way for the public to gain insight into the operations of the courts. The varying background and experiences of lay judges give the courts a broad picture of the general conception of justice in society. It is commonly accepted that the system is particularly valuable for assessment issues, such as, for example, evaluation of evidence, reasonability issues and choice of sentence. These are official and traditional reasons for using lay judges in the judiciary. However, the legislation has been changed and the use of lay judges has become rarer in Finland. They are nowadays only used in more serious criminal cases and no longer in civil cases at all. Earlier, lay judges were used more in criminal cases and it was possible to have lay judges in the

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<sup>30</sup> <http://www.oikeus.fi/tuomioistuimet/en/index.html>, visited 06.06.2015 and HÄMÄLÄINEN, Merva: Description of legal professions. In *Civil Justice in Finland*. Jigakusha 2009, pp. 33 - 34.

<sup>31</sup> <http://www.oikeus.fi/tuomioistuimet/en/index.html>, visited 06.06.2015 and HÄMÄLÄINEN, Merva: Description of legal professions. In *Civil Justice in Finland*. Jigakusha 2009, pp. 33 – 34.

composition of the court in some family cases as well, even if in practice those cases were decided mostly by a professional judge (also before the reform). The reason for reducing the number of cases where lay judges are included in the composition of the court is partly the economic crisis and partly restricted state budgets. Another reason might be that the general public no longer appreciates lay members in the composition. Interviews thus reveal that quite often people place greater trust in professionals than in lay members of society also in legal matters. Thus, the legal system, like society, is becoming increasingly complicated as knowledge comes to play a bigger role than pure fairness based on common sense.

In brief, in the district courts lay judges are used in criminal cases. In Finland, there are no lay judges in the Court of Appeal, Supreme Court, Administrative Courts or Supreme Administrative Court. Lay judges are elected to Finnish courts in the municipal council or county borough council after nomination by political parties. If a person wishes to be a lay judge, he or she contacts a political party and puts forward their interest. The municipal councils appoint the lay judges for four years. The lay judge should represent the age, sex, occupation and language structure of the municipality as closely as possible. A lay judge must be a Finnish citizen and resident within the judicial district of the district court. A lay judge must not be bankrupt or under guardianship. Finally, a lay judge must be suitable for the position and when appointed a lay judge must be 25 - 63 years old. Persons working in the courts or penal institutions or prosecutors, advocates or police officers cannot be a lay judge.<sup>32</sup>

Regarding the nomination process, the general public might have some cause for concern because of lay judges' political background. If lay judges are locally active politicians and their election is based on the proposals made by parties, as explained above, this is, granted, a rather strange starting point for a legal career as an independent and impartial lay judge. From an American point of view, this type of election is hardly understandable and has been criticized accordingly in spite of a perhaps common perception that lay judges could also be a tool to control the judiciary. However, especially when proactive, lay judges might cause more risk than guarantees to legal protection because as lay members they have little idea about the contents of law and if they understand that risk by themselves and stay passive as court members, then their role becomes effectively obsolete — an unnecessary relic.

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<sup>32</sup> <http://www.oikeus.fi/tuomioistuimet/karajaoikeudet/en/index/layjudges.html>, visited 07.06.2015 and HÄMÄLÄINEN, Merva: Description of legal professions. In *Civil Justice in Finland*. Jigakusha 2009, pp. 35 – 36.

A lay judge also has the right to ask additional questions during the presentation and hearing. After the hearing, possible decisions and views are discussed and viewpoints are expressed, for or against. Normally, the discussion results in an agreement on the outcome. If during the deliberations there are different opinions that cannot be resolved, a vote is taken in which the lay judge's vote carries the same weight as that of the professional judge. The lay judges have individual votes.<sup>33</sup>

The court must dismiss a lay judge who has committed an offence or in another manner has proven to be clearly unsuitable for the commission. If a lay judge is permanently incapable of performing his or her tasks, the municipal council shall without delay elect a replacement. A lay judge takes a judge's oath or gives the corresponding solemn affirmation before he or she begins to serve as lay judge. The aim is that each lay judge serves in a hearing approximately once a month or 10-15 times a year. The lay judge gets a *per diem* payable remuneration from state funds and compensation for loss of income and travel expenses. In Finland, there are now approximately 2,202 lay judges.<sup>34</sup>

#### **4. People's trust in courts and court control**

In Finland, people generally trust courts quite considerably, and more so than they do other authorities. However, a number of people do not trust courts at all. According to surveys, 2/3 of Finns place a lot or quite a lot of trust in courts, whereas 1/3 trust courts only a little or not at all. The same result covers not only courts but also the Chancellor of Justice, the Parliamentary Ombudsman and prosecutors. Notably, advocates/lawyers and legal aid given by legal aid counsels are trusted relatively less. Fewer than 50 % of inhabitants trust civil servants, the government and the parliament as well as the European Union a lot or quite a lot. Less than 1/5 trust political parties a lot or quite a lot. In Finland, 1/3 - 1/4 of the respondents thought that civil servants in a high position, politicians, and economic aspects can affect court decisions considerably. Conversely, respondents very rarely believed that the media could affect judgments. According to the survey, the general public thought that a distorting effect of these kinds of external distractions was higher than any 'distortion' coming from internal distractions. 1/5 respondents replied that they believe that judges' friendships can affect a decision-making

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<sup>33</sup> <http://www.oikeus.fi/tuomioistuimet/karajaoikeudet/en/index/layjudges.html>, visited 07.06.2015 and HÄMÄLÄINEN, Merva: Description of legal professions. In Civil Justice in Finland. Jigakusha 2009, pp. 35 – 36.

<sup>34</sup> <http://www.oikeus.fi/tuomioistuimet/karajaoikeudet/en/index/layjudges.html>, visited 07.06.2015 and HÄMÄLÄINEN, Merva: Description of legal professions. In Civil Justice in Finland. Jigakusha 2009, pp. 35 – 36.

process a lot. Every seventh or eighth respondent thought that judges' values, attitudes and the impression they have on the parties can affect a decision-making process a lot.<sup>35</sup>

Finland's legal culture, which leans heavily on the legalistic tradition, has long guaranteed the functioning of the legal system and the legal handling of matters. In accordance with this tradition, Finnish society arguably functions in a formal, rational manner. For the integrity of the system, this means that if there is legislation on a subject, it usually also works in practice. One weakness of the legalistic tradition (cf. systemic integrity), however, is that modern society needs matters to be handled flexibly and often also quickly. It is vital to react dynamically, since later corrective measures are not equally effective. Thus, as active citizenship and participation increase, so does the importance of following, first and foremost, the *spirit* of the law as the citizens understand and experience it. In addition, legislation cannot completely replace ethical codes.

As far as the courts are concerned, the legislation on publicity legally guarantees transparency in courts. The practice, however, is more problematic. Information is available, but it is questionable just how accessible the information is in practice; or, in other words, how effectively the information reaches citizens and interested parties. Often, matters are handled and decisions are made within processes that are not understandable to ordinary citizens and decisions are justified by referencing legislation. Intelligibility is not always equal for citizens and for administrative experts.

In addition, especially in Finland, the judiciary is strained by a lack of resources, which has led to some unreasonably long processing times in the courts. Longer processing times frequently break the principles of fair trial. Lack of resources too causes problems, usually in special cases or suddenly arising situations. As a case in point, the budget of the National Audit Office seems insufficient in relation to the workload. Merely obeying the law is not enough to guarantee morally acceptable operations. Similarly, so many complaints are filed with the Parliamentary Ombudsman institution that the adequacy of resources comes into question. New legislation may have given the Ombudsman more authority to decide which cases to pursue. Yet, this, in turn, apparently undermines the tradition that anyone can file a complaint and always have their complaint handled.<sup>36</sup>

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<sup>35</sup> TALA, Jyrki: Luottamus tuomioistuimiin – mitä se on ja tarvitaanko sitä lisää? *Lakimies* 2002, pp. 3 - 6.

<sup>36</sup> See more in ERVO, Laura – Dahlqvist, Amie: Delays in Civil Proceedings: Comparative Studies Between Finland and Sweden. In: *The Future of Civil Litigation. Access to Courts and Court-Annexed Mediation in the Nordic Countries*. Springer 2014, pp. 249 – 280.

I would say that social control is the most important control measure in the Nordic countries. The relationship between citizens and the judiciary is, on the one hand, about the values that are important to the citizens, and, on the other hand, about the importance of civil society as a protector of integrity. From the citizens' point of view, the realization of justice and equality creates a strong foundation for a national system of great integrity. Honesty, openness, and responsible action are emphasized in a political-administrative system. The cornerstones of fair trial and good administration similarly include transparency, responsibility, accountability and integrity. It is important to citizens that they can, to some extent, oversee and 'check' integrity. Civil society has thus long held the role of a "watchdog" of the state and municipalities while the media, in turn, play a central role in revealing corruption cases.<sup>37</sup>

Despite the fact that media can operate freely in Finland, it is commonly agreed that there is very little investigative journalism. Due to a lack of resources, small local newspapers, for example, have very limited abilities to support investigative journalism. Another problem is that in small municipalities everybody knows one another. This can make it quite difficult for reporters of local newspapers to write impartially and critically about local issues. Regional newspapers also put very little effort into developing investigative journalism. As for large newspaper corporations, unilateral ownership, and in some cases an excessive pursuit of scandals, poses some additional difficulties.<sup>38</sup>

## 5. Trends and peculiarities

Finnish procedural law has been both *internationalized* and *constitutionalized* since the 1990s.<sup>39</sup> This means that international norms like the European Convention on Human Rights and constitutional norms like fundamental freedoms play a more significant role in Finnish procedural law and the judiciary than earlier. Based not only on case law and the legal literature but also on my personal experience, this seems very true. All actors, including judges, prosecutors, attorneys, and legislators, do their best to observe both human and fundamental rights in the judiciary and when drafting new Acts. Thus, for instance, the European Court for Human Rights is highly influential on the Finnish judiciary in all aspects. It is very typical in the

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<sup>37</sup> See more in ERVO, Laura: Liability and social control of Scandinavian judges. In: Liability of public officers: selected issues / [ed] Monika Giżyńska, Anna Piszcz, Plock: Oficyna Wydawnicza Szkoły Wyższej im. Pawła Włodkowica, 2013, pp. 124 – 127.

<sup>38</sup> Finland's National Integrity System Assessment 2012, [http://www.transparency.org/whatwedo/nisarticle/finland\\_2012](http://www.transparency.org/whatwedo/nisarticle/finland_2012), visited 07-06-2015.

<sup>39</sup> JOKELA, Antti: Oikeudenkäynnin perusteet. Oikeudenkäynti I. Talentum 2005, pp.31 – 34 and pp.39 - 42

Finnish judiciary that the procedural human and fundamental rights are the most important issue when applying and interpreting norms. This means that legal protection is taken seriously even at grass-root level.

It is also typical in recent-day Finland that the legislator has *delegated* its power to actors in practice and that consequently judges have a lot of *discretionary power* to find the best and most reasonable solution in a case, e.g. in the form of more or less open norms and with the use of open terms like fair, reasonable and so on. Ultimately, the decision, application and interpretation in single cases depend on the judge's discretion,<sup>40</sup> and perhaps therefore court proceedings can in fact be seen as *micro politics* and a place for *moral discussions*<sup>41</sup>. This delegation of legislative power to judges in the form of open norms has spurred critical discussion and doubts have been raised whether this practice is a risk to democracy and whether the trend will lead to overly powerful judges, placing the parliamentary system at risk<sup>42</sup>.

However, recently there have been many cases in Finland which have societal relevance also outside the court room, and where the discussion and argumentation during proceedings holds greater relevance from a general point of view than as the result of one single court case. Some notable examples include the cases against the tobacco industry, cases concerning the bank crises in the beginning of the 1990s, and certain cases concerning bullying. In these situations, aided by the media, the public procedure has become a new arena for moral discussion.<sup>43</sup> In *multicultural* procedures, which are nowadays part of daily life in Finnish courts, and where different ethical and cultural codes easily surface or even collide, the challenge of moral discussion is perhaps even more acute. Clearly, the current multicultural societal challenges are also challenges for the law and the courts.<sup>44</sup> Perhaps, globalization indeed means not only the

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<sup>40</sup> ERVASTI, Kaijus: Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa. Oikeuspoliittinen tutkimuslaitos 2004, p. 168, ERVO, Laura: Changing Civil Proceedings: Court Service or State Economy? In: Recent Trends in Economy and Efficiency of Civil Procedure, Vilnius: Vilnius University Press, 2013, p.51, HAAVISTO, Vaua: Court Work in Transition. An Activity-Theoretical Study of Changing Work Practices in a Finnish District Court. University of Helsinki, 2002, p. 20, LAUKKANEN, Sakari: Tuomarin rooli. Suomalainen Lakimiesyhdistys, 1995, p. 214, SOU, Ökat förtroende för domstolarna – strategier och förslag – Statens offentliga utredningar (SOU 2008:106). Betänkande av Förtroendeutredningen, Stockholm 2008, p. 26, TAKALA, Jukka-Pekka: Moraalitunteet rikosten sovittelussa. Oikeuspoliittinen tutkimuslaitos, 1998, pp. 3 – 5, TALA, Jyrki: Luottamus tuomioistuimiin – mitä se on ja tarvitaanko sitä lisää? Lakimies 2002, pp. 21 – 23, TYLER, T. R.: Why people obey the law? Yale University Press, 1990, pp. 94 and VIROLAINEN, Jyrki – Martikainen, Petri: Pro et contra: tuomion perustelemisen keskeisiä kysymyksiä. Talentum, 2003, p. 5.

<sup>41</sup> WILHELMSSON, Thomas: (Media) julkinen oikeudenkäynti moraalikeskustelun tilana. Oikeus 2002/3, pp. 252 – 253.

<sup>42</sup> See for instance TUORI, Kaarlo: Tuomarivaltio uhka – vai myytti? Lakimies 2003, 915 – 943.

<sup>43</sup> WILHELMSSON, Thomas: (Media)julkinen oikeudenkäynti moraalikeskustelun tilana. Oikeus 2002/3, pp. 252 – 253.

<sup>44</sup> ERVO, Laura – Rasia, Carlo: Legal bilingualisation and factual multilingualisation: a comparative study of the

duty to be attentive to the differences between cultures but also that culture is becoming a genuine source of law in itself.<sup>45</sup> At its best, such moral discussion means that the legal discourse in trials becomes more transparent and democratic.

At the same time, the parties are able to choose - more often than earlier - the most suitable way of proceedings to solve their conflict and even to some extent the substantive basis for the final decision. Thus, one can truly say that the main function of civil proceedings nowadays is aimed at *conflict resolution* instead of the traditional dispute resolution (sanction mechanism) or legal protection. Both the procedural and substantive party autonomy therefore play a significant role. That is why there has been a radical change from adjudication, ideals of material law, and a substantively correct judgment towards the ideal of negotiated law and pragmatically acceptable compromise. The most important function in adjudication is that contextual decisions, which the parties are satisfied with, are produced through fair proceedings. Consequently, two main goals exist, namely procedural fairness and substantial satisfaction. There has, moreover, been a change from formal justice towards perceived procedural justice and from judicial power towards court *service*, which means that it is not enough to follow normative fairness but the actors should additionally feel that the procedure was pleasant. This kind of experiential or perceived fairness is nowadays a significant factor in due procedure. Arguably, adjudication can now be called court service.<sup>46</sup>

In the current post-modern and more global procedural world, the result of court proceedings plays a more significant role for the parties, especially in civil litigation, than before. The parties prefer controlling the outcome and they do not want to take risks of surprising decisions made by judges. This perception coincides with similar societal changes. People are increasingly more aware of their individuality and human dignity; they are aware of their rights. In their relation to the authorities they consequently demand service instead of obeying. The institutes have lost their intrinsic value, as it were. This change applies not only to society as such,

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protection of linguistic minorities in civil proceedings between Finland and Italy. In: International journal of law, language & discourse, ISSN 1839-8308, Vol. 2, no 4, p. 63.

<sup>45</sup> GEPHART, Werner: Recht als Kultur. Für eine geisteswissenschaftliche Erforschung von Recht in Globalisierungsprozess. Vittorio Klostermann, 2010.

<sup>46</sup> ERVASTI, Kaijus: Käräjäoikeuksien sovintomenettely. Empiirinen tutkimus sovinnon edistämisestä riitaprosessissa. Oikeuspoliittinen tutkimuslaitos 2004, p. 433, ERVO, Laura: Changing Civil Proceedings: Court Service or State Economy? In: Recent Trends in Economy and Efficiency of Civil Procedure, Vilnius: Vilnius University Press, 2013, p. 52, HAAVISTO, Vaula: Sovinnot – ikkuna tuomioistuintyön muutokseen. In: Sovittelu ja muut vaihtoehtoiset konfliktinratkaisujärjestelmät. Ed. Soile Pohjonen. WSOY, 2001, pp. 98 – 102 and HAAVISTO, Vaula: Court Work in Transition. An Activity-Theoretical Study of Changing Work Practices in a Finnish District Court. University of Helsinki, 2002, pp. 165 – 251, 260 – 262 and 287.

as a whole, but to the courts, to court procedure, and to the judges, too. Nowadays, legitimacy has to be deserved. It has to be deserved in each and every single case and every time once again. The manner in which the system can legitimate itself and earn certification is to make the procedure fair and of high quality. The good and social behavior of a judge is one ‘sub-tool’ in this process. The other instrument is to give comprehensive grounds in the judgment, which convince the parties and also the general audience. The public is looking for help and, notably, service in their cases. They are no longer satisfied with distant and formal judges whose authority is based on the law and the institution as such. In conclusion, members of the public are no longer looking for authoritative and final decisions made by figures of power, but are instead seeking co-operative skills to help resolve a conflict in order that they might move on with their lives.<sup>47</sup>

There is discussion in the East-Scandinavian countries (Sweden and Finland) whether even more power should be delegated to the parties to choose the procedural frames for their conflict resolution and at the same time grant them the possibility to decide even issues of material law in order to serve them better in their conflict resolution. This kind of a delegation model may be the future vision of the courts and their role. In such a world, the court house would be more like a shop where the client can choose the most suitable clothes for his or her purposes, served and assisted by professional shopkeepers instead of the house of a sovereign full of coercion and authority. This kind of paradigm shift also means changes to the notion of democracy. In the traditional model, the power to adjudicate generally has been, and so far still is, delegated from the people to the administrator of justice; that is, to the courts. But in the current model, democracy means that the courts have to meet the needs of the democracy incessantly and *in casu*. They are expected to meet the expectations of the people and the parties in each and every single case. The courts thus have to satisfy the needs of legitimacy via the current parties and with their help, by making decisions which help the parties move on.<sup>48</sup>

To sum up, given that court proceedings can be seen as micro politics and as a forum for moral discussions, and since the function of proceedings is now moving more towards resolving conflicts, to serve parties as clients and to look towards guaranteeing a better life in the future for the parties rather than to find legally correct solutions for events that happened in the past, more discretion has been delegated from the legislator to judges, and consequently judges’

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<sup>47</sup> ERVO, Laura: Changing Civil Proceedings: Court Service or State Economy? In: Recent Trends in Economy and Efficiency of Civil Procedure, Vilnius: Vilnius University Press, 2013, p. 55.

<sup>48</sup> ERVO, Laura: Changing Civil Proceedings: Court Service or State Economy? In: Recent Trends in Economy and Efficiency of Civil Procedure, Vilnius: Vilnius University Press, 2013, p. 57.



liability is no longer only legal and but also moral and societal. At the same time, this development can be seen as a risk, and we have to bear in mind that courts cannot make decisions based on public opinions or the most vocal voices of the public. Judges may not seek the popularity of the public or fulfill their own valuations or goals. And yet, the judgments have to follow general moral and political values in the society in question. In cases where judgments have receded too far away from current societal norms, it will weaken decisions (in the sense of making them less binding *vis-à-vis* the norms on which they are based). Judges nowadays are societal and moral actors who need social and ethical competence. Consequently, modern judges cannot hide behind law books but are responsible for their decisions not only formally and legally but also materially and morally.<sup>49</sup>

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<sup>49</sup> ERVO, Laura: Liability and social control of Scandinavian judges. In: Liability of public officers: selected issues / [ed] Monika Giżyńska, Anna Piszcz, Plock: Oficyna Wydawnicza Szkoły Wyższej im. Pawła Włodkowica, 2013, p. 132.

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