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Freedom of the arts as a fundamental right under the Finnish constitution

English Abstract

The purpose of this study is to explicate the actual interpretation to be given to the provision in the Finnish constitution stating: "*The freedom of art is guaranteed*" (article 16.3). The study deals with constitutional law. Methodologically it is based on legal dogmatics and comparative law. The Constitution of Finland dates from 1919. It was originally a typical constitution of a democratic state guaranteeing the protection of classic civil freedoms for the state's own citizens. In the 1990s the Constitution went through two large reforms. The first involved the system of fundamental rights in 1995. The rest of the Constitution was reformed in 1999. The reform of the system of fundamental rights was aimed at (1) extending the protection of fundamental rights to cover all persons within the jurisdiction of Finland; (2) including economic, social and cultural rights in the Constitution and (3) increasing the direct applicability of the fundamental rights.

The fundamental rights enumerated in the Constitution are binding on the use of all public power, including Parliament's legislative power. Parliament may not by ordinary law limit the key fundamental rights protected under the Constitution nor delegate essential regulatory power to the government or administration. The protected freedoms are directly applied rights to which every individual may appeal in case an authority or a civil servant attempts to limit his or her fundamental rights.

The 1995 reform added several totally new fundamental rights to the Constitution. One of these was the freedom of art. Article 16 paragraph 3 states: "*The freedom of science, art and higher education is guaranteed.*" Semantically the sentence is very similar to article 5(3) of the Federal Constitution of Germany (*Grundgesetz*), which states: "*Art and scholarship, research, and teaching shall be free....*" Nevertheless the context is different. In Germany the sentence is written under the article

(art. 5) which deals with the freedom of expression. In Finland the articles dealing with the freedom of expression (art. 12) and the freedom of art (art. 16.3) are written separately. The freedom of art is written under the article (art. 16) which deals with the right to education and culture. The context indicates that in Germany the freedom of art originates from a negative freedom (freedom as a prevention of state actions) and that in Finland the freedom of art originates from a positive freedom (freedom as an ability to do a certain thing). In the German doctrine art is primarily a tool for communication. In the Finnish doctrine art is primarily a tool to increase the welfare of the citizens. In Finland the justification of the freedom of art derives from the chain of ideas in which free art creates welfare (connected to education and culture), welfare creates a platform for discussions within the civil society and those discussions prepare the way for further development of the democratic constitutional state.

The freedom of art as a fundamental right is connected with several international human rights -- especially article 10 of the European Convention on Human Rights (ECHR), article 19 of the International Covenant on Civil and Political Rights (ICCPR) and article 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). It is also closely linked to the other fundamental rights. It often overlaps with the freedom of expression (art. 12) and the right to develop oneself without being prevented by economic hardship (art. 16.2.). In the overlapping areas it is useless and artificial to identify the exact articles that rights and obligations derive from, because particularly the rights connected to the concept of positive freedom derive from the co-operative action of those articles.

This study has distinguished three key elements in the freedom of art as a fundamental right. Firstly, freedom of art prevents the state from interfering in artistic processes (production, distribution and reception of art). Secondly, it obligates the state to protect freedom of art against interference by a third party. Thirdly, it obligates the state on a general level to secure – with respect to the autonomy of the art world – the availability of adequate material resources for the production, distribution and reception of art.

The freedom of art prohibits all kinds of prior censorship and other types of governmental manipulation, although limited film censorship (only for child welfare) is allowed by special constitutional restrictive provision connected with the freedom of expression (art. 12). The freedom of art limits legislators' power to enact criminal legislation which regulates the form, shape or content of artistic expression (i.e. criminal legislation concerning different aspects of decency - for example, obscene or blasphemous publications). As a constitutional obligation for positive state actions, freedom of art obligates the state to have and develop different forms of direct and indirect support to art and artists, although it does not establish a subjective right

for grants to anyone. The freedom of art is the constitutional cornerstone of the development process of grant acts and degrees.

This study has also shown that the constitutional provision of freedom of art has been very rarely, if at all, mentioned in the main documents of Finnish cultural politics. It is unfortunate that the actors in the field of cultural politics have not utilized their strongest legal argument, because in the developing process of a welfare society law and politics should always go hand in hand.