CONSTITUTIONAL ASPECTS OF THE EXERCISE OF THE FINNISH PRESIDENT'S POWERS AS COMMANDER-IN-CHIEF

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1. THE SUPREME COMMAND IN FINNISH CONSTITUTIONAL LAW

A. *Historical background*

Sec. 30 of the Finnish Constitution Act, 1919, states: "The President shall be Commander-in-Chief of the Armed Forces of Finland; he shall have the power in time of war to transfer his command to another person." This is generally associated with sec. 34, subsec. 4, of the Act, under which "special rules are issued on the reporting of matters concerning the military command or military appointments, and also regarding the countersigning of presidential decisions on such matters". As will be seen from what follows, sec. 34, subsec. 4, of the Constitution Act refers here to one of those rare cases in which the President does not make a decision in Cabinet upon hearing the report of the minister concerned. For this reason, an analysis of the exercise by the President of his powers as Commander-in-Chief may cast light from an unusual angle on the position of the President of the Republic, which, as a whole, is one of the most intricate and perhaps one of the most disputed subjects in Finnish constitutional law. The aforementioned rules of constitutional law derive their origins from far back in the political history of Finland and its mother country Sweden. The sovereign held supreme command of the armed forces from the time when Sweden became a unitary state, to which Finland was joined in the 12th and 13th centuries.[1] Subsec. 4 of sec. 34 of the present Constitution Act, regulating the Commander-in-Chief's exercise of powers, dates from the 18th century.

In the 18th century the administration of the armed forces in Sweden was dispersed among several organs. The officials of the Royal Chancellery who reported on military matters for the King's decision had no influence upon the administrative machinery. Towards the end of the 18th century the sovereign en-

[1] For details, see Eino Jutikkala & Kauko Pirinen, *A History of Finland*, London 1962, pp. 18 ff.

deavoured to create a system for the entire administrative machinery, by which the official making the report would concurrently be in charge of the respective branch of administration. In the case of the armed forces, these endeavours converged in the need to concentrate the command and administration of the armed forces. These endeavours had only partly come to fruition by 1809, when Finland separated from Sweden. Nevertheless, a result was the setting up in Sweden of the office of aide-de-camp general, perhaps after the Prussian model. It was laid down in 1796 that in all matters concerning the service and training of the armed forces the aide-de-camp general should receive the orders of the King, inform the persons concerned and supervise the observance of the orders. These matters concerning the military command were reported by the aide-de-camp general for the King's decision. Other matters concerning the armed forces were reported on by the secretary of state concerned, a civilian official of the Royal Chancellery. Thus matters concerning the armed forces were separated into two parts. The basis of this separation lies in the differences in the reporting procedure. The special position of military matters was emphasized by the fact that in all other branches of administration it was the secretaries of state of the Royal Chancellery who reported matters to the King.[2]

When Finland was annexed to the Russian Empire as an autonomous grand duchy in 1809, it retained the constitutional laws in force in Sweden at that time.[3] The Senate, a separate national organ, was set up as the central administration of Finland. In addition there was a ministerial Secretary of State for Finland who reported to the Emperor in the Russian capital on governmental affairs concerning Finland. Finland had a small national army, but neither the Senate nor the Secretary of State had anything to do with matters concerning the military command of these

[2] See Aug. v. Hartmansdorff, *Förslag till inrättningen af Sveriges statsförvaltning*, vol. 2, Stockholm 1823, pp. 70 ff.; Arne Forssell, "Kansliet 1720–1798", pp. 258 ff., in *Kungl. Maj:ts Kanslis historia*, vol. 1, Uppsala 1935; E. Leijonhufvud, "Några anteckningar om generaladjutantsbefattningar under tiden 1790–1840", *Kungl. Krigsvetenskaps-Akademiens Tidskrift* 1912, pp. 402 ff.; Manfred Lepper, *Die verfassungsrechtliche Stellung der militärischen Streitkräfte im gewaltenteilenden Rechtsstaat*, Bielefeld 1962; F. Freiherr Marschall v. Bieberstein, *Verantwortlichkeit und Gegenzeichnung bei Anordnungen des Obersten Kriegsherrn*, Berlin 1911, pp. 127 ff.; Rudolf Schmidt-Bückeburg, *Das Militärkabinett der preussischen Könige und deutschen Kaiser 1787–1918*, Berlin 1933, *passim*; Birger Steckzén, *Krigskollegii historia 1697–1965*, vols. 2–3, Stockholm 1937, *passim*.

[3] For details, see Paavo Kastari, "The Historical Background of Finnish Constitutional Ideas", 7 *Sc.St.L.*, pp. 73 ff. (1963).

armed forces. Whenever the Emperor had to decide on matters concerning the military command, these were prepared for him by the Governor General of Finland, who was commander of the troops stationed in Finland, and were reported to the Emperor by the Imperial Minister of War. The separation of military matters into two parts, with differing reporting procedures in the highest instance, thus remained in force in this form. The exceptional reporting procedure for matters concerning the military command derived partly from the earlier practice obtaining under Swedish rule, but also partly from the fact that by this arrangement the Russians sought to ensure uniformity of military activity throughout the Empire, including the autonomous Grand Duchy.[4]

In 1917 Finland declared its independence. Sovereignty was at first exercised by Parliament, but in the following year Parliament elected an Administrator who exercised largely the same powers as had the sovereign previously.[5] Members of the Senate at that time may be compared to ministers in the modern sense. The Administrator made his decisions in the presence of the members of the Senate, but matters concerning the military command were, once again, an exception: these were reported direct to the Administrator by the highest military commanders, outside the sessions of the Senate.[6] It was, presumably, owing to this practice, together with historical tradition, that sec. 34, subsec. 4, of the Constitution received its present content. The new Constitution Act was confirmed in July, 1919.

B. *Powers of the Commander-in-Chief in broad outline*

A military force is normally a model of centralized organization, and the Finnish armed forces are no exception. A direct right of command and a subordination to command are typical of an organization of this nature. Thus a military hierarchy has basically the structure of a pyramid.[7] In Finland the top of the

[4] See Robert Hermanson, *Anteckningar enligt professor R. Hermansons föreläsningar öfver Finlands statsförfattningsrätt*, vol. 3, Helsinki 1892, pp. 427 ff.; same author, *Finlands statsrättsliga ställning*, Helsinki 1892; Jutikkala & Pirinen, *op. cit.*, pp. 186 ff.; Leo Mechelin, "Das Staatsrecht des Grossfürstenthums Finnland", *Handbuch des öffentlichen Rechts der Gegenwart hrsg. von Heinrich Marquardsen*, vol. 4: 2: 1, Freiburg i.B. 1889, pp. 263 ff.

[5] See Jutikkala & Pirinen, *op. cit.*, pp. 253 ff.

[6] See S. R. Björksten, "De högsta statsorganens befattning med militära ärenden", *F.J.F.T.* 1929, pp. 12 ff.

[7] Cf. Hans Batschelet, *Die Abgrenzung von Zivilgewalt und Militärgewalt nach schweizerischem Recht*, Diss. Basel 1945, p. 12; John Robert Beishline, *Military Management for National Defense*, New York 1950, pp. 143 ff.

pyramid is the Commander of the Armed Forces, who, under the pertinent ordinance, is directly subordinate to the President of the Republic, and exercises power of command over the entire armed forces.[8] In virtue of his powers as Commander-in-Chief of the Armed Forces, the President has the power to give orders in matters concerning the military command, such as those relating to military operations and military training, to the military authorities, including the Commander of the Armed Forces. The President can act in place of the Commander of the Armed Forces, and assume duties that according to law devolve upon the latter.

When–as in Finland–constitutional law entrusts the head of state with supreme military command, two substantial advantages accrue. On the one hand, the arrangement meets the traditional requirement that the authority constituting the peak of the military hierarchy shall reside in one person. On the other, the peak of the state hierarchy is combined with the peak of the military hierarchy. This arrangement is lent support by the fact that the head of state is the symbol of the state. He personifies the state, the constitutional system and the prevailing social and political values, everything that the military forces are ordained to defend.[9]

If the supreme command of the head of state is based on reasons such as those just mentioned, it may be completely nominal. In this case the head of state is not expected to exercise supreme command himself, and it will be exercised by some other authority. In such a case, the supreme command of the head of state is not a real command.

The preparatory work on the Finnish Constitution reveals that the supreme command of the head of state was intended to be a real command. This was part of the old monarchical tradition, which exerted a powerful influence during the preparation of the Constitution Act. In respect of the supreme command, the committee preparing the draft constitution referred to the situation in the United States of America, where the president did, indeed, exercise his powers as Commander-in-Chief.[1] In the final stages of the passage of the Constitution Act, a stipulation was inserted in its sec. 30 whereby the President was given power in time of war to transfer his command to another person. Such a stipulation

[8] See The Finnish Ordinance on the Armed Forces, 1960. For details, see V. Merikoski, *Précis du droit public de la Finlande,* Helsinki 1954, pp. 57 f.

[9] Cf. Lepper, *op. cit.*, pp. 120 ff.

[1] For actions of the President of the United States in the Civil War and the First World War, see, e.g. *The Ultimate Decision. The President as Commander in Chief*, ed. by Ernest R. May, New York 1960, *passim.*

would hardly have been necessary for the transfer of nominal power. An examination of the practice adhered to during the last 50 years shows that the presidents of Finland have exercised the supreme command themselves, although the frequency with which this power has been exercised has, like the nature of the issues decided, varied greatly in different periods and in different situations. There is no detailed legislation on matters reserved to the President as Commander-in-Chief, but it has been explicitly laid down that the President in person must decide on certain matters concerning the military command.

When the Constitution Act was prepared, it was clearly desired that the dualism in matters concerning the armed forces, originating in the period of autonomy, should be retained. The defence administration subordinate to the President, and that subordinate to the Cabinet, were separated. In Finland the Cabinet acts, on the one hand, as a body preparing decisions for the head of state, and on the other as an organ of state wielding an independent power of decision. Some of the matters concerning the armed forces, chiefly those relating to finance, come under the Ministry of Defence and thus ultimately under the Cabinet. Conversely, the defence administration falling under the President of the Republic includes matters concerning the operations and training of the armed forces. The commissioning and discharge of officers in the armed forces are not within the powers of the Commander-in-Chief, but the posting and promoting of officers are matters concerning the military command. Under the Constitution, sec. 28, the President of the Republic has the power to rule by ordinance on the organization of the armed forces, but, in so far as such matters have not been regulated by ordinance, the President has the right so to regulate them by virtue of his powers as Commander-in-Chief.[2] The powers of the President as Commander-in-Chief are limited by, among other things, the stipulation in sec. 33 of the Constitution Act that the President shall decide on matters of war and peace in the presence of the members of the Cabinet and with the consent of Parliament. But it is the general opinion that the President in virtue of his powers as Commander-in-Chief can order the taking of defensive action against aggression already initiated.[3]

[2] For details, see Antero Jyränki, "Der Oberbefehl der Streitkräfte, Zusammenfassung", in his work *Sotavoiman ylin päällikkyys*, Vammala 1967, pp. 326 ff. Se also Björksten, *op. cit., passim.*

[3] Cf. Danish Constitution Act (1953), sec. 19.

When, in the event of war, the President of the Republic transfers his powers as Commander-in-Chief to another person, the supreme command is transferred to the wartime Commander-in-Chief. Differing opinions have been presented in legal writing as to whether the President, notwithstanding this transference, has power to issue orders to the wartime Commander-in-Chief in cases where the military operations assume a notably political character. In my own opinion, positive law offers no support to the President's possessing such powers of command.[4] The wartime Commander-in-Chief is independent of the President, and it is possible to interfere with his actions only by relieving him of his command.

2. FORMS OF THE EXERCISE OF POWER, AND LEGAL RESPONSIBILITY

Under the Finnish Constitution the head of state makes his decisions in Cabinet sittings, i.e. in the presence of the ministers and upon the report of the minister concerned. For a decision of the President to enter into force, it must be signed by him and countersigned by the appropriate minister. If the minister finds that the President's decision is contrary to constitutional law, it is his duty to refuse to countersign it. In other cases, he has no right to refuse to countersign. If the Cabinet finds the President's decision to be contrary to law, it has a duty to refuse to execute the decision.[5] Thus a Cabinet decision regarding execution of a decision made by the President is a contributory act of the same consequence as is countersigning in the Central European system.

There are some exceptions to the rule of the necessity of ministerial participation. The President acts outside the Cabinet and independently of the ministers when, for instance, he makes a decision to bring a charge against a minister on account of an unlawful act of office. Nor is the above procedure on reporting

[4] For differing opinions, see, e.g., Björksten, *op. cit.*, p. 131; Esko Hakkila, *Suomen Tasavallan perustuslait*, Porvoo 1939, p. 131; Paavo Kastari, *Lakimies* 1968, p. 422. On the dualistic system of conduct of war, see also K. Killinen, "The Relation Between Political and the Military Direction in Finland" in *Democracy in Finland*, publ. by The Finnish Political Science Association, Helsinki 1960, pp. 78 ff.

[5] See *The Finnish Legal System*, ed. by Jaakko Uotila, Helsinki 1966, pp. 34 f.; Merikoski, *op. cit.*, pp. 35 f.

and countersigning adhered to when the President decides to dismiss the Cabinet and appoint a new one. The third exception to be noted is the stipulation, discussed above, in the Constitution Act, sec. 34, subsec. 4, stating that separate enactments shall be made on the reporting and countersigning of matters concerning the military command.[6]

Stipulations on the procedure in matters concerning the military command are laid down by ordinance. In practice, these stipulations have been concerned only with the reporting of matters to the President; nothing has been laid down on the signing and countersigning of the decisions. It has always been the duty of the higher military authorities to report to the President outside the Cabinet on matters concerning the military command. At present, these matters are, with some exceptions, reported to the President by the Commander of the Armed Forces.[7]

In practice a specific procedure of official "audience" has been developed, whereby matters concerning the military command are reported to the President outside the Cabinet in accordance with a report list. The Commander of the Armed Forces acts as reporter, and the proposed decision is entered in the report list. No minutes of the occasion are kept, in contradistinction to those cases in which the President decides matters in Cabinet. If the President accepts the proposal in the report, he signs the report list as an indication of his decision. The reporting military officer does not countersign the President's signature.

In some instances, mainly in situations of crisis, the President has issued oral commands. There is no doubt of their being binding, for the ordinances concerning the exercise of the powers of the Commander-in-Chief do not require that a written procedure shall be employed. Such commands have been given at

[6] The Swedish Constitution Act, 1809, is apparently the first of the constitutional laws introduced in the early 19th century in which matters of military command were given a special position with respect to the countersigning of the decisions of the ruler. Cf. Hans v. Frisch, *Die Verantwortlichkeit der Monarchen und höchsten Magistrate*, Berlin 1904, pp. 359 ff. The constitution preceding this, i.e. the Swedish Constitution Act of 1772, had already placed matters concerning the military command in a similar exceptional position, but in the framework of this constitution countersigning had no significance in constitutional law. See Fredrik Lagerroth, "Det svenska statsrådets ansvarighet i rättshistorisk belysning", *Scandia* 1939, p. 64. When the Finnish Constitution Act of 1919 was prepared, the Swedish Constitution Act of 1809 was in part employed as a model. In framing the procedure of countersignature, inspiration was drawn from the old Finnish practice which is explained at the beginning of the present paper.

[7] See the Finnish Ordinance on the Armed Forces, 1960, sec. 2.

official audiences. On the other hand, it is much more difficult to appreciate the legal significance of statements made by the President to the military commanders outside the official audience.[8] In this event, however, it is the President's opinion that must be regarded as being decisive: if he did not intend such statements to be binding, they will not be binding. Here, there may arise difficult situations in respect of legal responsibility, as will be discussed later.

The President of the Republic may be made legally responsible for an unlawful act of office only in the event that the act in question involves high treason or treason.[9] Otherwise, the legal responsibility for the official acts of the President devolves upon the cooperator stipulated in constitutional law, i.e. the Cabinet or a member of it, i.e. the appropriate minister.[1]

When the President exercises powers as Commander-in-Chief, the cooperators are not ministers but military persons. The reporter is subject to military discipline. In my opinion, this state of affairs does not in itself prevent the reporter from releasing himself from responsibility by having his dissenting opinion entered in the minutes, as is done in other branches of the administration. Court practice and the works of legal writers, however, have been almost unanimous in finding that the stipulations in constitutional law regarding the responsibility of the reporter are not applicable to the armed forces, although the Constitution Act does not make any explicit exceptions. If this attitude is adopted, it will not be possible to make even the Commander of the Armed Forces legally responsible for decisions that the President makes upon his report. From the viewpoint of checks on the legality of the presidential exercise of power, this state of things is not of great significance, for in no case could the reporter by expressing a dissenting opinion prevent the coming into force of an unlawful decision.

As there are no regulations on the countersigning of decisions made by the President in matters concerning command, the ques-

[8] A case in point of a measure of this kind taken in peacetime is the following. In 1963 President Kekkonen sent a letter to the Commander of the Armed Forces in which he stated that special formations had been established in the French forces for athletes, in which athletes were given not only military training but also training for sports contests. The President enquired "Could not the same thing be done here?" The letter eventually resulted in the military authorities' ordering that special units for athletes should be set up in the Finnish armed forces.

[9] See the Finnish Constitution Act, 1919, sec. 47, subsec. 2.

[1] See *The Finnish Legal System*, pp. 35 f.

tion of guarantees of legality centres on whether the reporter or any other military person has the right to refuse to execute an unlawful decision made by the President. Anyone subject to military discipline has the duty and the right to refuse to execute an order only when it is clear to him that by obeying the order he would break the law.[2] Military discipline may thus extend also to unlawful orders, for the execution of an unlawful order may remain unpunished. In this event the superior is punished as indirect perpetrator. But as under constitutional law the President is free from legal responsibility, it is possible that no one could be made legally responsible for an unlawful decision made by him in matters concerning the military command.

3. EXTENT OF THE PRESIDENTIAL EXERCISE OF POWER

A. *Practice up to the present*

In practice, at least in so far as normal circumstances are concerned, the President exercises his powers as Commander-in-Chief only rarely. The annual number of decisions in this respect was at its greatest in the 1920s, when the armed forces had not yet been placed on a regular footing. Since that time, the number of such decisions has constantly declined, if certain crisis situations are disregarded. Before the Second World War the matters concerning the military command decided by successive Presidents were of only minor importance. The really important decisions, such as confirmation of the defence plans, were made by the military authorities, and these decisions were thus left without the official confirmation of the President.

In the postwar period the matters reported to the President have touched upon foreign policy in some way or other. Thus preparations for mobilization, a matter of routine for the armed forces, were abandoned with the President's consent in January 1945 after the Allied Control Commission had drawn attention to the matter. The question was intimately bound up with the interpretation of the 1944 Armistice Treaty. In March 1948 the President decided that preparations for mobilization should be

[2] See the Finnish Military Penal Code, 1919, sec. 35.

resumed, after having decided to send a delegation to Moscow to negotiate the Treaty of Friendship, Cooperation and Mutual Aid between Finland and the Soviet Union.[3] The question of the nation's defence preparedness had entered an entirely new phase owing to these negotiations. A third important presidential decision was the confirmation in 1959 of the plans for the military protection of the country's neutrality.

Decisions concerning the armed forces have been referred to the President in various situations of external and internal crisis when the question was not one of war. This happened, for instance, in the summer of 1920 when the separatist movement in the Aaland Islands had brought relations between Finland and Sweden to a crisis. Additional Finnish troops had been dispatched to the islands. Later in the summer disagreement arose between the Minister of War and the Commander of the Armed Forces on whether the troops should be reduced for the winter or their number maintained pending the decision of the League of Nations on the Aaland question. The matter was referred to the President, who made a decision in favour of the reduction advocated by the Commander.[4] When, in 1932, the anti-communist movement in Finland came to a head in the "Mäntsälä Rebellion", with armed troops gathering in southern Finland near the nation's capital, the President assumed supreme direction of the restoration of order. The military measures, which mainly implied various movements of troops, were subsequently made either upon the direct order of the President or, at least, with his consent from case to case. True, it should be noted that the "Rebellion" was ended mainly as a result of a radio speech made by the President. In March 1948, when wide-spread rumours regarding a threatened overthrow of the Government were circulating in the country, President Paasikivi directed by order to the Commander of the Armed Forces that the forces should in part be placed in a state of readiness.

There is not much experience in Finland regarding the exercise of presidential powers in time of war. From 1939 to 1944 the supreme command was transferred to another person.[5] During

[3] On this treaty, see *The Finnish Legal System*, pp. 255 ff.

[4] The Finnish government regarded the situation as being so critical that—according to a document in the Finnish war archives—it considered that a landing of Swedish troops in the Aaland Islands was a possibility. The Finnish troops were ordered to use armed force to repel any such action.

[5] On this, see Killinen, *op. cit.*, pp. 78 f.

two relatively short periods, 1919–20[6] and 1944–45, the President has exercised supreme command during war. The latter of these occasions is exceptional in that the President appointed by enactment in 1944 was the Marshal of Finland, Mannerheim, Commander-in-Chief up to that date, who until the end of 1944 kept the operational command of the forces firmly in his own hands, first in the continuing battles against the Soviet troops and later against the Germans.[7]

B. *Theoretical aspects*

Thus in peacetime the military command has generally been the business of the Commander of the Armed Forces. The reason for this is partly that the President of the Republic is not likely to be so well acquainted with military affairs as is the Commander of the Armed Forces, and partly that a specific relationship of confidence prevails between the two. And the only essential thing in terms of the Constitution Act, sec. 30, is that the armed forces shall be subject to the President's authority, and that the President always has the option of exercising his supreme command should he so wish. But it must be concluded that while the present organization prevails, the independence of the military authorities in respect of Cabinet and Ministry of Defence proves to be as important as the subordination of the military to the President of the Republic.

The centralization of the military command is a restriction upon the President's real freedom to make decisions, for it means that there will not be two or more competing opinions for him to choose between.[8] Actually, it seems to be the rule that in matters concerning the military command the President makes his decision in accordance with the view of the reporter.

Whether in times of crisis or in normal conditions, the activities of the armed forces, i.e. the military measures for national defence, must be coordinated with the activities of the other parts of the governmental machinery. A system like this, in which the military and the political aspects could be suitably combined, was

[6] When K. J. Ståhlberg, Finland's first President, took office in July 1919, there was a state of war between Finland and Soviet Russia, which ended only with the Peace Treaty of Tartu in 1920.

[7] As can be seen, what Nils Herlitz, *Nordisk offentlig rätt*, vol. 3: 1, Stockholm 1963, p. 178, states regarding the President of Finland as Commander-in-Chief is not completely accurate.

[8] Cf. the discussion in the United States on the same question in *The Ultimate Decision*, pp. 234 f.

the aim when the Defence Council was set up in 1957.[9] The Defence Council functions as the highest advisory and planning organ and as the President's advisory committee in matters relating to the defence of the realm. Its members are the Prime Minister, the Minister of Defence, the Minister of Foreign Affairs, certain other ministers, the Commander of the Armed Forces, and the Chief of the General Staff. The Prime Minister is chairman of the Defence Council, but the President may take the chair when attending meetings of the Council.

It may be thought that, prior to the setting up of the Council of Defence, the coordination of military activities with other measures of national defence would in particular have been the main task of the President as holder of the supreme command. If the Defence Council as a collective body is now responsible for coordination, the President's role as Commander-in-Chief should in normal conditions, be a rather modest one. This, however, presumes that matters concerning the military command are dealt with in the Council of Defence. If they are not, and this seems largely to be the case,[1] or if the Council is not successful in its task of coordination, that task will remain with the President. More could not be expected of the President. His position as head of state prevents him from penetrating deeply into military matters, even should his knowledge of these justify his doing so.

Much more problematic than the situation in peacetime is that prevailing in time of war or during periods of crisis in general. The use of armed force against a foreign power or against the country's own citizens is always an exceptional phenomenon, with unforeseeable consequences to the state. The military authorities are obliged by law to ward off violations of territorial integrity, and it is these authorities who generally have to make the first decisions when territorial violations occur. Yet decisions concerning the taking of defensive action should be referred to a political organ of state, the President of the Republic, as soon as the opportunity arises. Because of their significance, decisions of this kind should not be left to the military authorities. If the crisis does not flame up into war between Finland and a foreign state, this principle will also apply to military precautions that may affect the relations between Finland and foreign states.

[9] See the Finnish Defence Council Ordinance, 1957.

[1] The Defence Council deals chiefly with questions within the jurisdiction of the Ministry of Defence, such as the procurement of war material and the peacetime garrisoning of units.

During wartime the President should, then, not be able to transfer the supreme command as happened in 1939–44. It should remain the business of the President to coordinate the military aspects with the political aspects, and military operations with other war efforts. The President's say in operational matters, however, should not extend beyond basic strategic decisions. The preparation of the operational plans and the execution of these should remain the province of the professionals.[2]

4. POWERS OF THE COMMANDER-IN-CHIEF, AND PARLIAMENTARISM

A. *Parliamentarism in Finland*

The Finnish Constitution Act, sec. 36, states that the members of the Cabinet must enjoy the confidence of Parliament. This rule has been given a very extensive significance in principle. Under it, the principle of parliamentarism is considered to have been incorporated into Finnish constitutional law. In countries that have adopted a constitutional form of government, the ministers participating in the decisions of the head of state can avoid the legal responsibility deriving from these decisions by preventing their coming into force, i.e. by refusing to countersign. In a parliamentary system an equivalent right of refusal has been provided for, either in practice or directly in constitutional law, to avoid political responsibility also. Thus the countersigning minister is completely free to bring influence to bear upon the material content of the decisions of the head of state.

The power formally belonging to the head of state, then, has in reality been transferred into the hands of the ministers. It is generally considered that the power of the Cabinet to lay down governmental policy, on the one hand, and the political responsibility of this organ, on the other, are natural correlatives.[3]

Almost everywhere, a parliamentary form of government is held to presuppose that the head of state will not exercise his powers in a manner contrary to the will of the cooperating organ,

[2] See Louis Smith, *American Democracy and Military Power*, Chicago 1951, p. 48, on the President of the United States as Commander-in-Chief.

[3] See, e.g., Georges Burdeau, *Droit constitutionnel et institutions politiques*, 8th ed., Paris 1959, pp. 144 ff.

whether this be the politically responsible minister or the cabinet. This, indeed, does not mean that certain powers of the head of state (e.g. dissolution of Parliament) may not be exempt from ministerial cooperation and may be exercised independently by the head of state.[4]

But in Finland and Sweden the position of the head of state has been understood differently, at least in legal terms. In Sweden the question is no longer much more than one of a speculative structure maintained by theoreticians and having no basis in political reality.[5] In Finland the situation is different. Legal scholars in Finland have racked their brains over the problem of how to resolve legally a situation where the President and the Cabinet are in conflict on the content of a presidential decision.

The majority of the scholars have resolved the problem by having recourse to the so-called resignation construction. The Cabinet is held to have the opportunity to refuse cooperation in the event of a conflict by submitting its resignation.[6]

In seeking the real limits of the President's independent exercise of power, the resignation theory offers a very good starting point. A Cabinet resignation, however, must be dealt with as a reality only. It may lead the President into opposition to Parliament, and in the ensuing conflict the President is equipped with the power to dissolve Parliament, and Parliament with the power to pass a vote of no confidence in the Cabinet. If the Cabinet resigns, Parliament may deny confidence to the new Cabinet appointed by the President. In response the President may dissolve Parliament, but if the new Parliament that convenes after the election in turn refuses to give its confidence to the Cabinet, an untenable situation for the President will soon arise.

Thus the President may in individual cases act contrary to the opinion of a Cabinet that enjoys the confidence of Parliament, but governmental functions in Finland cannot perpetually be

[4] See, e.g., Hans Nawiasky, *Allgemeine Staatslehre*, vol. 2, Einsiedeln 1952, p. 267.

[5] See a criticism of the Swedish theory by Paavo Kastari in the article "Om ministermedverkan i de nordiska länderna", *Nordisk administrativ tidskrift* 1941, pp. 97 ff.

[6] Cf., e.g., Robert Hermanson, "Den senaste riksdagsupplösningen och grundlag", *F.J.F.T.* 1924, pp. 64 ff.; Kaarlo Kaira, "Tasavallan presidentin itsenäinen päätösvalta ja valtioneuvosto", *Lakimies* 1941, p. 385; Merikoski, *op. cit.*, p. 40; K. J. Ståhlberg, *Parlamentarismi Suomen valtiosäännössä*, Helsinki 1927, pp. 56, 80. See also a work by Paavo Kastari which aims at a synthesis of various opinions, *La présidence de la république en Finlande*, Neuchâtel 1962, pp. 53 ff.

directed contrary to the lines approved by Parliament if Parliament takes a determined stand against such a development.[7]

B. *The Commander-in-Chief's powers: a gap in parliamentarism*

With minor exceptions, ministerial cooperation has not in the past extended and does not extend even today to the exercise of the supreme command. It follows from this that no organ, formally at least, bears political responsibility for the exercise of the powers of Commander-in-Chief. But as the share of the parliamentary element in the Finnish political system is still, despite all modifications, a fairly large one, it is to be expected that external parliamentary pressure will be brought to bear upon this gap in political responsibility.

Since 1957 the Council of Defence has been the official forum for discussions between the President and members of the Cabinet on matters concerning the military command. No such official forum existed before 1957. It seems that the President did not always, even unofficially, discuss with the Cabinet members the most important decisions made by him as Commander-in-Chief. It seems probable, for instance, that Paasikivi did not consult the Cabinet or even either of the two ministers in the Ministry of Defence when, in March 1948, he made his far-reaching and politically significant decision to resume mobilization preparations.

Since 1957 the situation has altered somewhat. The Cabinet members make up a substantial majority of the Council of Defence. Although the decisions of the Council are only recommendations, and are thus not legally binding, they are generally put into execution. If it is assumed that the Council makes its recommendations as a collegiate body, the Cabinet members are by virtue of their majority able to determine the content of the recommendations issued by the Council.

The distinction should, however, be made between those matters concerning the military command that are decided by the Commander of the Armed Forces, and those that are submitted for presidential decision. The Commander of the Armed Forces

[7] This attitude was also adopted by President Urho Kekkonen in a lecture given in Helsinki in 1967. Among the theoreticians, it seems that a view close to the one put forward in the text is held by, e.g., Jan-Magnus Jansson, "Die Verfassungsentwicklung in Finnland seit dem Jahre 1939", *Jahrbuch des öffentlichen Rechts* N.F. 6, 1957, p. 229.

seems to regard the recommendations of the Council as being valid. It is for this reason that the Cabinet's influence in matters concerning the military command will increase if the number of matters concerning the military command that reach the Council of Defence is increased. So far, the number of such matters has not been great. On the other hand, the Council of Defence is the President's advisory committee. This circumstance emphasises the President's position in respect of the Council of Defence. The President need not ask the opinion of the Council, nor does he make decisions in matters concerning the military command—any more than in other matters within his jurisdiction—at the sessions of the Council. It is possible that the Council of Defence, in accordance with the practice prevailing in the Cabinet, will give way and leave the actual decision to the President, for instance in questions touching upon foreign policy. The collegiate procedure will then result in the President's view being decisive in determining the content of the Council's recommendation.

Up to now the number of matters concerning the military command that have been dealt with in the Council of Defence has been so small that it is impossible to say whether it is the opinion of the President or that of the Cabinet that has prevailed in these matters.

I have suggested above that when the President leaves decisions on matters concerning the military command largely to the military authorities subordinate to him, questions of personnel in the armed forces become of special importance, at least in times of peace. The present system presupposes that a relationship of confidence prevails between the President and the highest military command. Thus decisions made in personnel questions regarding the highest military command will largely determine the course of the activities of the armed forces in times of peace. If disagreement later arises between the President and the military command regarding the course of action, the ultima ratio will be a change of the person in military command.[8]

The gap in parliamentarism which occurs in the supreme command owing to the absence of ministerial cooperation has not been filled by other factors. It is obvious, on the other hand, that the President cannot exercise in perpetuity his powers as Commander-in-Chief, any more than his other powers, contrary to

[8] Cf. Fritz Erler, "Heer und Staat in der Bundesrepublik", in *Schicksalsfragen der Gegenwart*, vol. 3, Tübingen 1958, p. 240.

the will of Parliament and of the Cabinet politically responsible to it. A united and determined Parliament can, when necessary, also assert its will in matters concerning the military command by resorting to a vote of no confidence.

5. ALTERNATIVE ARRANGEMENTS FOR THE EXERCISE OF POWER: CONSTITUTIONAL PROBLEMS

The most disputed question relating to the President's supreme command is whether constitutional law allows the President's exercise of powers as Commander-in-Chief to be transferred by law or ordinance so as to take place in Cabinet. It seems that during the preparation and passing of the Constitution Act of 1919 recognition was only given to the truly exceptional character of matters concerning the military command, and, consequently, that the regulating of the procedure of these matters should be determined by rulings at a lower level. Thus sec. 34, subsec. 4, of the Constitution Act provided that matters concerning the military command could be dealt with and decided by a procedure different from that employed in other governmental matters.

The intention of the legislators can hardly be traced any further than this. On the other hand, that intention, even if it could be clarified, need not be binding or even guiding in the interpretation of the rule of the Constitution. Rules of this nature always serve some specific social aims that in turn are determined by the circumstances, needs and views prevailing at the time when the rule came into being. This basis may alter with time, and the original aims of the rule cannot be adhered to in perpetuity. Consequently, in the construction of the rules "reasons of legislation" will give way to "reasons of being in force" i.e., to reasons based upon the purposes which the rule is regarded as serving in the present and perhaps altered circumstances.[9]

In interpreting the constitutional rule, attention should be paid, among other things, to how the cooperation of a minister in present conditions may affect the exercise of the powers of the Com-

[9] O. E. Germann, *Grundlagen der Rechtswissenschaft*, Bern 1950, pp. 29 ff. Cf. also W. Burckhardt, *Methode und System des Rechts*, Zürich 1936, p. 276 ff.

mander-in-Chief, for the development in the techniques of war and in the character of warfare during the last 50 years must not be overlooked. After all the mode of thought prevailing at the time when the Constitution Act was drawn up has, at least in military matters, a closer affinity to that of the 18th century than to that of the 1970s. It should also be noted that it was not possible, when the Constitution Act was passed, to appreciate accurately what the position of the head of state would be like in practice.

In the 1920s and 1930s the opinion was generally affirmed in legal writing that the exercise of the Commander-in-Chief's powers in Cabinet sessions would be unconstitutional.[1] A reason put forward in support of this opinion was that the paralysing of the Commander-in-Chief's powers by such an arrangement could not be permitted.

If the exercise of the powers of the Commander-in-Chief were to be transferred so as to take place in Cabinet, the guarantees of legality would have the same force as in the exercise by the President of his other powers. Undeniably, a paralysis of the Commander-in-Chief's powers would then become possible should the Cabinet refuse to execute any order it might find unlawful. The legal responsibility and power of veto of the Cabinet would hardly be of any practical significance, as the Cabinet has so far not made use of its powers to refuse to execute the decisions of the President in other respects.

On the other hand, opinions might differ about whether the political responsibility of the ministers would paralyse the powers of the Commander-in-Chief should this power be exercised in Cabinet. The conclusion will depend chiefly upon the attitude that is adopted regarding the relations between President and ministers in general. According to the view I have presented above, the question in the Finnish parliamentary system is mainly one of who will gain the upper hand in a far-reaching conflict between President and Parliament. The question does not concern the solution of an individual case, but rather poses a general problem. Accordingly, the political responsibility would not handicap the exercise of the Commander-in-Chief's powers in an individual case should the President regard the execution of this decision as being of sufficient importance.

Doctrinal study of law, like the application of law in general,

[1] See, e.g., Björksten, *op. cit.*, pp. 117 ff.; Robert Hermanson, *Utlåtanden och betänkanden*, Helsinki 1933, pp. 192 f.

is inseparably associated with an element of evaluation. As Alf Ross has put it, the idea of a purely logical interpretation free of all pragmatism is an illusion.[2] According to Kelsen, a doctrinal study of law may present alternative interpretations as allowed by the wording of a statute, but the choice between these alternatives is reserved to legal policy. The choice, which is based on a subjective appreciation of political values, must not be presented as a scientific truth, but must be left to the administrators of justice.[3]

I wish, however, to align myself with Ross in the view that it is possible in legal studies to advance beyond the stage at which various alternative interpretations are presented, provided that the results are clearly presented as recommendations and not as scientific truths. As application is ultimately based on subjective attitudes and values, this must be brought out clearly in the studies.[4] The social and cultural environment has a very great influence upon the interpretation of constitutional law. He who interprets the law must express his own values and must himself recognize their influence on the attitudes he adopts.[5]

This can be directly applied to the interpretation of sec. 34, subsec. 4, of the Constitution Act. The wording of this rule allows of several alternative interpretations. The choice between them is ultimately based on evaluations.

If the person who interprets the constitutional rule takes a favourable attitude towards the independent role of the President in external and internal policy, especially during crises, and is prepared in such situations to make concessions in respect of legality in favour of efficiency in the exercise of power,[6] he will be able to argue about the constitutionality of ministerial cooperation in the exercise of the powers of the Commander-in-Chief in view of the danger of paralysis referred to above. During wartime and in situations of crisis in general, strict legality must give way to higher interests. When the very existence of a nation is at stake, the efficiency of the armed forces must not be jeopardized to ensure the observance of a legal clause.

On the other hand, we may proceed from the idea of the rule

[2] Alf Ross, *On Law and Justice*, London 1958, p. 338.
[3] Hans Kelsen, *Reine Rechtslehre*, Vienna 1969, p. 353.
[4] Ross, *op. cit.*, pp. 315 ff.
[5] See also Jan-Magnus Jansson, "Grundlagsutskottet som grundlagstolkare", *F.J.F.T.* 1955, pp. 285 ff.
[6] Such a view is put forward with great emphasis by, e.g., K. Killinen, *Demokratia ja totaalinen sota*, Porvoo 1956, pp. 276 ff.

of law. Regardless of whether it is permissible or not in a situation of crisis to set aside the legal order, it must be presupposed that someone will assume the legal responsibility for such a procedure. If the head of state exercises his powers as Commander-in-Chief without the cooperation of a minister, it is possible that no one will bear the responsibility for the setting aside of the statutes that occurs in connection with such exercise of power. In such an event, the head of state may by his acts do severe harm to the very values that a war is held to be in defence of.[7] In matters of foreign policy and in questions concerning the military command, the question is one of political decisions, and it is in the nature of these that the Cabinet should participate in decision-making.

If, then, it is desired that priority should be given to the principles of the rule of law and parliamentarism, there are grounds for finding that the Constitution Act allows a sliding scale within the framework of which the legal checks on the exercise of the Commander-in-Chief's powers, and the influence of parliamentary government on that exercise of power, can be adjusted rather freely.[8] To tie the exercise of the powers of Commander-in-Chief to Cabinet cooperation would, then, be constitutional.

When a choice is to be made between the two alternatives presented, this choice will be based upon evaluations arising out of the experience and the philosophy of the person making the choice. A choice of this kind cannot be reasoned out by ordinary scientific means. Personally, I would choose the latter alternative and proceed from the principles of the rule of law and parliamentarism. As I understand it, experience shows that political and legal responsibility cannot be overemphasised when the question is one of the exercise of the powers of the Commander-in-Chief in times of crisis.

This choice of grounds of evaluation, however, does not in itself finally resolve the problem of interpretation at hand. We shall next have to enquire whether ministerial cooperation will have such actual consequences as to prevent the effective employment of the armed forces for the purposes foreseen in the Constitution.

First, the question is whether ministerial cooperation in matters concerning the military command would slow down the Presi-

[7] This opinion is held by Y. W. Puhakka, *Ministerien vastuunalaisuus nykyajan valtoissa*, Helsinki 1923, p. 71.

[8] Cf. criticism of the lack of ministerial cooperation in the exercise of the powers of the Commander-in-Chief, by Nawiasky, *op. cit.*, p. 267, and Lepper, *op. cit.*, p. 122.

dent's exercise of power to such an extent that this arrangement might be regarded as preventing the President from exercising the power belonging to him. In my view, the President has no reason to exercise his powers as Commander-in-Chief so extensively as, say, a wartime Commander-in-Chief exercises his. That is to say, the President does not need the same freedom of action as a wartime Commander-in-Chief, who concentrates entirely upon the commanding of the armed forces. The President's contacts with the wartime headquarters can be managed by modern means of communication. This is necessary because the President must, in order to be able to perform his other duties as head of state, remain close to his Cabinet in any event. The basic strategic decisions, and the politically significant decisions concerning the military forces which the President must take during war or crisis usually require a long period of preparation. Cabinet cooperation would thus not encumber or retard the exercise of the powers of the Commander-in-Chief.

The only exception would seem to consist of the decisions that are concerned with the commencement of the use of armed force. As I have stated above, decisions concerning the initiation of defensive action should be referred to a political organ of the state, the President of the Republic, as soon as is technically feasible. The President must have an opportunity of considering the scale of the military actions to be initiated, and of whether all such actions are being dictated by immediate military necessity or whether such initiation should be referred to Parliament for its approval.

If the exercise of the powers of Commander-in-Chief is transferred so as to take place in Cabinet, it is to be assumed that the decision on the use of armed force will be reached by the President of the Republic later than would otherwise be technically feasible.

The question is thus one of whether the actual decision on these matters vital to the state should be left to the military authorities, or whether, at least at some stage, it could be transferred to a political organ of the state. The order of reporting, which favours the former alternative, may not be in accordance with the general principles of the Constitution Act. The actual decision on whether to initiate the use of armed force will tend even otherwise to remain with the military authorities because of the weight of circumstances. This line of development should not be encouraged by statute. For this reason, and only for this reason, I adopt

a hesitant attitude towards the constitutionality of a statute under which the President's decision in operational matters would be transferred to take place in Cabinet. The initiation of the use of armed force in the case of defence is an operational decision. The President must be able to make such a decision in as unhampered a manner as possible.

Such doubts do not arise regarding other matters concerning the military command, and in my view the transfer of the powers of the Commander-in-Chief so as to take place in Cabinet would, in their case, not be contrary to constitutional law.