THE HISTORICAL BACKGROUND OF FINNISH CONSTITUTIONAL IDEAS

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In Finland the legal development in the sphere of fundamental rights, as in other parts of the legal system, was closely bound up with the legal development in Sweden, so long as the political union between the two countries lasted. Even though, since the breaking of the ties in 1809, Finland has had a completely different political destiny—until 1917 as a constitutional Grand Duchy within the realm of the autocratic Russian Czars and from that year as an independent parliamentary democracy—and this has had deep-seated effects, especially on the Constitution, there are nevertheless good grounds for maintaining that the common legal basis and the impact of old traditions can still be seen very clearly in the sphere of constitutional law.

It is probably justifiable to say that the ordinary basic provisions on civic rights which are to be found in the earliest collections of laws of several Germanic peoples are not, despite their great antiquity and high repute, of noteworthy importance for the investigation of the modern legal-technical problems connected with the institution of fundamental rights. Although, in certain Swedish provincial laws, there existed a "king's chapter", regulating the position of this most important organ of the State, these laws do not seem expressly to mention any special rights of the individual.[1] It is not until the King's oath in the King's chapters in the Rural Codes of Magnus Eriksson and Christopher (approximately 1350 and 1442) that we find the famous pronouncements that are sometimes regarded as a Swedish Magna Charta. As stated in Chap. V, sec. 3, of the Rural Code of Magnus Eriksson, the King should "ingen fattig eller rik fördärva till liv och lem, utan att han är lagligen förvunnen, som lag och rikets rätt säger" ("smite neither poor nor rich as to life or limb save upon lawful conviction as the code and the law of the land prescribes"). Later, the contents, and

[1] At the end of the King's oath of the Uppland Code, which was applied also in Finland, is included the often cited provision that the King should "strengthen the law and keep the peace", see Åke Holmbäck and Elias Wessén, *Svenska landskapslagar* I, 1933, p. 43.

partly also the wording, of this provision were carried, through the subsequent King's oaths and the Constitutions of 1719, 1720, and 1772, into Art. 16 of the present Swedish Constitution of 1809. Their substance coincides also with the most important provision on fundamental rights in the Finnish Constitution of 1919, Art. 6, para. 1.[2]

Evidently this provision has always been intended to guarantee justice for the individual, and in the direction in which, at any particular time, the need has been greatest. Thus the provision was at first directed against the then central organ of the State, the Royal power.[3] Similarly, the legal benefits mentioned in the provision refer to those aspects of the legal position of the individual which could at any time have been subjected to the punitive system of the State. The most important punishments during the period of the Rural Codes were capital and corporal punishment. It is understandable that, in view of the existence of punishment by forfeiture of limb, it was felt necessary to mention separately both limb and life. Later these words were left out and the change in the central point of the punishment system is reflected in the special term "individual freedom".[4]

More interesting than to follow the development of the wording of this admirable provision or those legal benefits which have

[2] "Every Finnish citizen shall be protected according to law as to life, honour, personal liberty and property."

[3] Not until after the Swedish Age of Freedom (1719–72) was a provision, directed towards Parliament, included in Art. 39 of the Constitution of 1772 and this provision was interpreted as involving a guarantee for vested rights: "Riksens ständer skola ... ej något af dessa fundamentallagar förbättra, ändra, tillöka eller förminska utan konungens samråd och samtycke, så att ingen olag skall gå öfver rätt och lag eller undersåtares frihet och konungens rättigheter blifva vanskötta och undertryckta, utan hvar och en åtnjute sina lagliga rättigheter och välfågne privilegier." ("The Estates of the Realm ... shall not amend, change, supplement or withdraw any part of these fundamental laws without the King's advice and consent thereto, so that no unlawfulness shall supersede justice and law and that the liberty of the citizens and the prerogatives of the King shall not be neglected and suppressed, but each shall enjoy his legal rights and vested privileges.")

[4] This is how the development of this provision is described by Sune Holm, "Utredning angående § 16 regeringsformen", *S.O.U.* 1941: 20, p. 93. The phrase "personal freedom" was first accepted in Sweden in Art. 16 of the Constitution of 1809 and in Finland in Art. 6 of the Constitution of 1919. It deserves to be mentioned, however, that Art. 39 of the Constitution of 1772 mentions "the freedom of the citizens".

Furthermore, during the Middle Ages the word "freedom" was not used in most other countries, even if it was meant, but it was replaced by several other expressions as in Germany "Privileg", "Recht", "Gesetz" or "Brauch". See Theo Mayer-Maly, "Zur Rechtsgeschichte der Freiheitsidee in Antike und Mittelalter", *Österreichische Zeitschrift für öffentliches Recht* 1955, p. 420.

been specially mentioned in it is to investigate, from the point of view of the present system of fundamental rights, the role played by this provision in the legal sphere in earlier periods. To obtain information on the specific practical importance of this provision seems in fact impossible; nevertheless the provision is worth investigating as a part of the totality created by the constitution and the legal system as a whole, a totality whose inner nature and working differs considerably from the conditions of today.

Even if the modern concept of a fundamental law, viz. that of an institution defending its superior place in the hierarchical order of the legal system, is a product of a relatively late historical development, the earlier provisions on the fundamental rights of individuals can also be shown to have included certain guarantees of a particular firmness. Constitutions in the proper sense of the word scarcely can be said to have existed in the Middle Ages; one can hardly speak of a specialized constitutional law at that time. Instead, the medieval way of thinking followed the lines which, since the days of Roman law, have been, and still are characteristic of private law.

The legal organization of the community should thus be investigated in the first place in the light of the contrasting positions of the ruler and the people, the latter divided into estates (*rex et regnum*). In this relationship the legal system was presumed to be based on the principle of contract. The rights of both parties were regarded as being based on this doctrine, whose binding legal force sprang from the principles of *pacta sunt servanda,* of good faith and of honour. In accordance with this way of thinking a new contractual relationship was established at each ascent to the throne and it was solemnized on both sides by oaths and assurances. The basic norm for State order at that time may be considered to have borne a more intimate reference to the human soul than does today's theory, which is based rather on the more rational idea of the superior order of constitutional provisions in the hierarchy of law. The medieval idea may be said to have had a renaissance during the period of Russian pressure on Finland (1899–1917) in that it was used as a fundamental argument in defending the legal position of our country, especially with reference to the Czar's oath and guarantee to uphold Finland's State system.[5]

[5] The medieval conceptions are clearly dealt with by Mayer-Maly, *op. cit.*, p. 420, whereas the idea held at the end of the Russian regime is explained by, e.g., Mechelin, *Précis de droit public du Grand-Duché de Finlande,* 1886, pp. 10 f., and Erich, *Das Staatsrecht des Grossfürstentums Finnland,* 1912, pp. 2 ff. and 225 ff.

Although the mystical obscurity of the Middle Ages may have left some traces on Finnish provisions on fundamental rights, it is nevertheless possible to state that new ideas began to appear even as early as the beginning of the Renaissance, when, with the help of a unified legal order, an attempt was made to organize the State. The most important of the then leading parts of the State structure, primarily the King and the nobility, were unified and systematized in the Constitution of 1634, and the rules on parliamentary procedure had been laid down in the Diet Procedure Act as early as 1617.[6] These two documents were, both in name and in content, the starting points for our present constitutional laws in Sweden and in Finland, and it is precisely here that the still characteristic division into two main constitutional laws, one concerning Government, the other Parliament, has its historical origin. At the beginning there was, however, nothing to reveal that, in their relationship to other laws, these two laws had any superiority in the legal hierarchy. It is characteristic of the nature of the Constitution of 1634,[7] and of the then prevailing conceptions on

[6] The differences between development of the legal conceptions characteristic of the Middle Ages and the Renaissance in Finland and Sweden are described by Fredrik Lagerroth, *Frihetstidens författning*, 1915, pp. 23 ff. and 102 ff., even if Lagerroth is not always critical enough. Lagerroth, who generally stresses the position of Sweden as a forerunner in constitutional development, refers to (pp. 99 ff. and 137 ff.) a proposal for a constitution, drafted by Erik Sparre and proposed in 1594 by the King's Council, but not adopted. This, for Lagerroth, is the breakthrough of modern constitutional-law thinking. In his opinion, final realization came with the Constitution of 1634, as the first codification in the world which systematically included the whole field of constitutional law.

[7] When investigated in the light of the aim of modern constitutional law to attain a special permanence and binding force, a feature emphasized in the very expressions "fundamental" law and "the sanctity of fundamental law", it is almost paradoxical to find that the Constitution of 1634 was originally accepted by the estates only with reference to the period of Queen Christina's minority and that the Queen did not confirm it after coming of age, and that neither she nor her successor considered themselves bound by it. For the minority period of Charles XI the estates again accepted this Constitution—strangely enough—without altering its wording, but adding a special reference to the regency government. But after coming of age, Charles XI did not consider himself bound by it, and he even obtained in 1680 an assurance of the Diet of Estates that he now as being of full age was not bound by it and was completely free even to amend it. See Nils Herlitz, *Grunddragen av det svenska statsskickets historia*, 1957, pp. 95 ff., and Lagerroth, *op. cit.*, pp. 175 ff.

The paradox based on a change in the legal way of thinking is further evident from the fact that the Constitution of 1634, regardless of its expressly temporary character, was intended by its drafters to be in force "eternally", and this has later been regarded as a most significant innovation in the idea of the constitution. See Herlitz, "1634 års regeringsform och vår tid", *Nordisk administrativt tidsskrift* 1934, pp. 174 and 188.

fundamental rights, that the provisions of the King's chapters in the Rural Codes were not referred to, nor was there any trace of them in the Constitution, which otherwise strove after completeness.

The Constitutions of 1719 and 1720 during the so-called Swedish Age of Freedom were modern constitutions of a continental kind —even if more than a half century premature—in so far as they were reactions against the misgovernment of the absolute monarchy and were meant to afford stable and secure guarantees against abuses of the ruler's power. They were the first Swedish constitutional enactments which were designed to be in force over a considerable period of time. Their Article 2 also included, in a concentrated and advanced formula, a provision on the legal protection of the individual.

These constitutional laws, including Article 2, have not obtained international recognition as being the first in the world, as one might assume having regard to their nature and early origin. The reason for this international neglect of Sweden's contribution to our common legal heritage can hardly be merely Sweden's outlying geographical position and modest role in the cultural life of those times. Rather the explanation lies in the fact that her Constitution was scarcely an expression of the European flow of ideas, however closely followed they generally were here in the Northern countries; it was the fruit of Sweden's own experiences. Further, it has to be considered that the constitutional enactments of 1719 and 1720 had, neither in principle nor in their practical application, that absolutely binding force which is the characteristic of a hierarchical system. The most important organ of the then State, the Diet of Estates, regarded them in nearly the same way that rulers of full age regarded the Constitution of 1634, and their binding force was not admitted in principle even in regard to the Diet itself.[8] It is significant that the provision on the legal guar-

[8] See Lagerroth, *op. cit.*, pp. 290 ff. The author gives in the same connection and on pp. 732 ff. a description of the character of these laws as seen against a broad historical and comparative background and stresses the position of Sweden as a forerunner in the field of constitutional-law development, as well as pointing to the admiration that these laws drew from the great thinkers of the 18th century; however, he does not say that Sweden had any real influence on other countries, apart from Russia. Herlitz, *Nordisk administrativt tidsskrift* 1934, p. 175, seems to compare with some degree of poignancy the Constitution of 1634 and "the contemporaneous colonial charters in North America to which the scholars of posterity have paid so much attention", but here he merely states the older background of the Swedish provisions and does not try to delve into the question why they have failed to catch international attention.

antee of individual rights did not concern the Diet, but was so formulated that it was directed against abuses of power by the King.[1]

An attempt at the modern conception of constitutional law is in fact discernible in the preamble to the Constitution of 1719, in which the Constitution was declared to be a general, so-called fundamental law, which was to have perpetual validity. Further, the difference between the constitutional enactments of 1719 and 1720 and other statutory enactments is discernible even from a formal point of view, in so far as they were not included in the all-embracing law codification of 1734, when the already planned King's chapter, which had been included in the previous law codifications, was omitted during the final stage of the preparatory work. But no signs that the Constitution enjoyed a stronger hierarchical power were apparent at that time.

The procedure of the Diet did in fact develop and, during the Age of Freedom, it was made considerably more precise. Thus in sec. 17 of the Diet Procedure Act of 1723 there was included a concise provision dealing with the procedure for legislation, which replaced the uncertainty resulting from the Diet Procedure Act of 1617. According to this provision, concurrent decisions of three of the four estates were to be regarded as the decision of the Diet, even if one estate dissented, in all matters which did not deal with the freedom of the Diet and the privileges of each state. In the Constitutions of both 1719 and 1720 it was presupposed that the Diet of Estates could make interpretations of and improvements in these fundamental laws, and the Constitution of 1719 even allowed amendments. However, there were no provisions on procedure in regard to these matters, so that even decisions on such matters might have been reached by a vote of three estates against the fourth. Similarly it was permissible to create new fundamental laws by applying the same procedure. In practice,

[1] The beginning of Art. 2 runs as follows: "Kongl. Maj:t tillhörer lag, rätt och sanning att styrkia, älska och gömma, men vrångvisa och orätt förbjuda, afskaffa och nedertryckia, ingen förderfva till lif och lem, utan han vare lagligen förvunnen och dömder, ej heller något gods, löst eller fast, någon afhända låta utan efter lag och föregången laga dom..." ("It lies upon the King to strengthen, care for and protect law, justice and truth, and to forbid, abolish and suppress wrongfulness and injustice, to smite no one as to life or limb unless lawfully convicted and sentenced, and to deprive no one of his goods, chattels or real estate, save in accordance with the law of the land after previous lawful decision...").

however, no amendment, no improvement and no interpretation of the fundamental laws occurred. On the other hand, in 1723—as previously mentioned—a new Diet Procedure Act was enacted, and in 1766 two quite new fundamental laws came into being, namely the Statute on the Freedom of the Press, and a so-called Statute on the Enforcement of the Laws which had a many-sided content.

Until 1766 the procedure for the enactment of fundamental laws was no doubt the same as that for ordinary laws. There was only one incident which can be said to have reference to some kind of hierarchical order in the laws, and this was the dispute as to whether an amendment of a fundamental law required the personal consent of the regent or whether the ruler of the State in these cases, as well as in the enactment of ordinary laws and other matters, was forced to accept the decision of the Council of State. It should be mentioned that in the Council the King was in a stronger position in regard to the other members only in so far as he had two votes as well as the casting vote in case of a tie. In actual fact, however, this problem, which then and later[2] played a central part in the speculations on the question what should be considered a monarchic as opposed to a republican form of government, is merely a product of the medieval doctrine *pacta sunt servanda,* a belief which presupposed that the basic order of the State could not be changed without the consent of the other party to the contract—i.e. the King. The power of parliament had grown so great that the prevailing opinion was not willing to allow the King any special position even in this respect.[3]

In regard to another medieval institution, namely privileges, it was possible for the Diet of Estates, as the central organ of the State, to agree upon the rule of procedure. Any change in the law required joint decisions of the four estates. It was, in the first place, natural that the consent of the estate concerned should be required for the abolition and reduction of privileges. On the other hand, in order to avoid a complete split in the community because of an all too generous distribution of privileges, it was regarded as essential that new privileges should not be granted without the consent of all estates.[4]

One might claim that the well-being of State and community,

[2] Among others see also Erich, *Suomen valtio-oikeus* I, 1924, pp. 129 ff.
[3] Lagerroth, *op. cit.*, pp. 440 ff. and 616 f.
[4] Lagerroth, *op. cit.*, p. 292.

which was based on the maintenance of proper relationships between the estates, was dependent on the matter of privileges. It was, however, thought that on this point it was not necessary to have an express stipulation that unanimity among the four estates be required, and this was so because actually the basis of State and community order was considered unamendable, a view which reflected the relative permanence of circumstances in those times as compared with the present. According to this static view, the fundamental laws were, in regard to the real structure of the State, if not actually perpetual, at least so permanent that there was no need to pay special attention to the possibility of their amendment.[5]

The Constitutions of the Age of Freedom were in fact reactions against the evils of the preceding period. These enactments were regarded as a guarantee against the King's possible usurpation of power or efforts to reintroduce autocracy, whereas the long-wished-for freedom[6] was considered to be personified in the power of the estates. Thus the basic view was idealistic. However, the alternating and unruly party politics of the two leading parties, the Hats and Caps,—the reason, incidentally, for the present bad reputation of the Age of Freedom—led by and by to efforts to obtain guarantees that the estates themselves would comply with the fundamental laws. Considering the later development of these ideas, it is symptomatic that these guarantees were not sought in the courts but in the organs of the Diet and in the Council of State.

By the middle of the 1750's an influential group in the party of Hats had presented a proposal that the Expeditive Committee of the Diet should be given the task of checking that the Diet had acted in compliance with the fundamental laws, of calling attention to any possible breach of a fundamental law, and, as an ultimate way, of refusing to expedite decisions inconsistent with fundamental laws. Under this proposal, even the Council of

[5] Lagerroth, *op. cit.*, p. 446.

[6] It first became usual to talk of the freedom of the people (possibly also of the citizens) and to interpret the Constitution as a guarantee of this at the end of this period, but in Art. 2 of the Constitution there is no trace even of an intention to include the word "freedom" among the specially mentioned legal benefits. However, it was suggested in connection with the *proposition* of 1769, including extensive amendments to the Constitution, that solemn provisions should be inserted—of the type accepted in the British Magna Charta and Habeas Corpus Act—to guarantee the right of property and to prevent wilful detention, confession by torture and especially extraordinary courts, but these proposals were not adopted. Lagerroth, *op. cit.*, pp. 618 f., 625 ff.

State, the King and, in the last resort, the citizens were to refuse compliance with such decrees.[7]

These plans, which never became valid as law, were forerunners of a statute which was pushed through the 1766 session of the Diet by the Caps and proclaimed as a fundamental law, namely the Statute on the Enforcement of the Laws. With respect to fundamental laws, proposals concerning interpretation, additions or amendments, which had been introduced during one session of the Diet, had to be passed by all four estates during the following session.[8] Thus in Sweden, probably earlier than in the other countries, a clear distinction was made between ordinary and fundamental laws, with respect to the procedure for their enactment.

However, this did not imply that, in regard to the institutional difference between ordinary and fundamental laws, anything more had been accomplished than a very modest beginning. In fact, the conception of the legal system as a hierarchy with different levels has developed only during this century, and no signs of regarding even the fundamental laws as hierarchically superior to the ordinary laws and of possibly deciding conflicts between them on this basis seem to be found in the otherwise lively theoretical debates of the Age of Freedom.[9] The provisions of 1766 on the legislative procedure were never applied in actual practice before, together with the other fundamental laws of the Age of Freedom, they were annulled by the *coup d'état* of Gustav III and replaced by the Constitution of 1772. In fact the King's oath—the text of which was, after long and lively debates, finally accepted by all four estates—was regarded according to the old conception as belonging strictly to the fundamental laws, though valid only for the reign of the monarch who swore it. Incidentally, Gustav III did not even glance through the oath before signing it. It was dealt with and finally passed during one and the same session of the Diet. Despite the character of the King's oath as a fundamental law, this procedure was considered to be valid, because the provisions of the Statute on the Enforcement of Laws were so interpreted as to be inapplicable to this particular case.[1]

[7] Lagerroth, *op. cit.*, pp. 456 ff.

[8] Lagerroth, *op. cit.*, pp. 587 ff., and E. Arosenius, *Sättet för grundlagsändring under tiden 1809–1866*, 1895, pp. 3 ff.

[9] Yet Lagerroth, who published his study on the Constitution of the Age of Freedom in 1915, seems not to have been familiar with this point of view.

[1] Lagerroth, *op. cit.*, pp. 655 ff.

Because the Constitution of 1772, Art. 39, had cancelled all fundamental laws since 1680 and among these the Statute on Enforcement of Laws of 1766, there were no provisions left that drew a line between the order of procedure for handling fundamental laws and ordinary laws.[2] Further, during the parliamentary session of 1786, all estates laid down an interpretation of the fundamental law (later confirmed by the King), according to which the enactment of ordinary laws required the consent of three estates, except in regard to questions of privileges and revenue duties, for which the Constitution required the consent of all estates.[3] The real purpose behind this decision interpreting the Constitution seems to have been to prevent the King from applying in future the wide powers accorded to him in the revived Diet Procedure Act of 1617 to choose freely between differing opinions of the estates in matters concerning ordinary laws. But as the decision itself did not refer to the specific provision in the Constitution of 1772 which concerned the legislative procedure (Art. 57), it was asserted that matters of fundamental law required the consent of all four estates. There were vehement conflicts on the issue. The opposition gained ground especially after 1789, when Gustav III, disregarding the opinion of the Estate of Nobles, pushed through the Act of Union and Security with the concurrence of only three estates, and by means of this Act altered in several material aspects not only the Constitution of 1772 but also the vested privileges, among them those of the Estate of Nobles. Not until 1800, when, at the Coronation of Gustav IV, the Estate of Nobles joined in the coronation oath, which contained a vow of compliance with the Act of Union and Security, could all doubts concerning this Act and its binding force as fundamental law be set aside.[4]

Because these fundamental laws of Gustav III were open to

[2] Art. 40–42, 57.

[3] Art. 45, 52, 54.

[4] The fundamental laws of Gustav III were characterized by their vagueness. It should be mentioned that the Act of Union and Security, in regard to the amendment procedure, went to the opposite extreme, by providing in Art. 8, in accordance with a static conception, that no bill concerning the slightest amendment of its contents, its wording, or its interpretation should ever be presented. The attitude of Gustav III was characterized in other respects also by an indifference to the means to be applied. not to mention the constitutional forms, when he wished to push through his ideas. As is well known, he compelled the Diet of Estates to pass the Constitution of 1772 under threat of military action. In connection with the passing of the Act of Union and Security in 1789, he made use of threats and violence to an extent which, according to modern conceptions, is astonishing.

broad interpretations, and were even intentionally phrased in vague words, the conflict between them and the ordinary laws could not seriously develop during his reign. In this regard, however, Finland's annexation to Russia in 1809 brought about so material a change that the grounds for judging the legal status of the fundamental laws can be said to have been completely altered.

To begin with, it was found necessary to apply very broad interpretations to some fundamental-law provisions, because within their framework the Czar of Russia had to be placed on the throne of the Grand Duchy of Finland, and his representative the Governor General, a Russian, had to be accepted as the highest government official in the country. The fundamental laws permitted such wide powers of manœuvre on the part of the government that within their framework the country could be governed for half a century without even summoning the Diet. But when the winds of liberty began to blow during the latter part of the century the Diet was faced, as a result of its own legislative activity, with a delicate problem. At times it had to realize that a new law, or an amendment of an existing law, was not in conformity with the fundamental laws. The Diet had to take a stand in such a case of conflict, especially after a clear and binding provision had been inserted in the amended Diet Procedure Act of 1869, Art. 71, in accordance with which the creation, amendment, abolition and even interpretation of a fundamental law had to be done by a procedure different from that employed in normal legislation.[5] The conflict could not be avoided by amending the Constitution, because the Russian holders of the supreme power felt a certain uneasiness about amendments of the Constitution of 1772, as the position and powers of the Czar himself were based upon it. On the other hand, respect for the same constitution and its scrupulous observance were a matter of prime importance from the Finnish point of view, because it was the basis on which the autonomous position of a small country, and indirectly also the national individuality, rested at the side of an autocratic giant State during

[5] The special feature of the enactments of fundamental laws was—in addition to the fact that action to this end could only be taken on the initiative of the regent—that a proposal for amendment of a fundamental law had to be passed by all four estates. These provisions, however, conformed to the provisions of the 1766 law only to a certain extent, in that a matter concerning constitutional-law legislation could, at the request of two estates, be postponed until the following session for final decision. In actual practice the questions concerning fundamental laws were decided during the session in which they were initiated.

the era when the storm clouds of Panslavism were gathering on the horizon.

The dilemma received an emergency solution: the Constitution of 1772 was left intact, but a bill, some provisions of which were considered to be in conflict with the Constitution, was dealt with as if it were a fundamental law itself. After some minor laws had been dealt with in this way, i.e. in accordance with the procedure for the enactment of fundamental laws, it was found necessary in 1878 to enter into a deeper investigation of this peculiar procedure and its consequences in connection with a matter of great importance. In this year the military forces, the old-fashioned principles for which had been laid down in Art. 18 of the Constitution of 1772, were reorganized on the basis of general compulsory military service. The situation was further complicated by the fact that some provisions of the bill were held to have the force of fundamental law, whereas most of them were of the nature of ordinary law. As to the last-mentioned, sec. 119 of the bill, in accordance with which matters concerning the Finnish military forces were to be presented to the Czar by the Russian Minister of War, constituted a deviation from the provision of Art. 10 of the Constitution of 1772, which provided that Finnish matters could only be dealt with by citizens of Finland. Even this provision, therefore, had to be dealt with by the Diet according to the procedure prescribed for enactments of fundamental laws. Thus a line had to be drawn between two kinds of provisions enacted in accordance with this procedure: (1) those which themselves were intended to come into force as fundamental laws, and, on the other hand, (2) those which, like the provisions of sec. 119, were as such only ordinary laws, but, nevertheless, had to be enacted in the manner prescribed for fundamental laws, because they represented deviations from the Constitution of 1772 which was, however, itself left intact.[6] In this connection the basic difference between these two types of provisions became clear: the latter provisions had to be amendable in exactly the same way as ordinary laws, provided that the new amendment did not widen an exception earlier made to the Constitution by means of an original law of exception.

This practice, introduced only a little earlier as a groping

[6] The same method was practised in Germany during the 19th century and also during the Weimar Republic, but in the present constitution of the German Federal Republic it has been prohibited (§ 79). See Paul Laband, *Das Staatsrecht des deutschen Reiches*, 1911, pp. 38 ff., and Carl Loewenstein, *Erscheinungsformen der Verfassungsänderung*, 1931, pp. 282, 293 ff. and 304.

emergency solution, was later used as the model of a most peculiar system. Although the method concerned was utilized only rarely at that time because of the open wording of the Constitution, in connection with the reform, in 1906, of the Parliamentary body and of the legislative procedure, specifically favourable modes of speedy legislation by the application of the procedure for enacting fundamental laws were introduced. In Art. 60 of the new Parliament Act it was provided as the normal procedure for the enactment of fundamental laws that the bill before coming into force should be passed again by Parliament after a new election and with a two-thirds majority. However, even final approval was possible immediately, if Parliament declared by a five-sixths majority[7] that the matter was urgent. Thus a method was created enabling even the new one-chamber Parliament to solve, in a similar way and with the same speed as the old Diet of Four Estates, possible conflicts between a fundamental law and a bill concerning an ordinary law. In order to avoid such a conflict a disputed bill concerning an ordinary law was dealt with in accordance with the procedure prescribed for the creation of fundamental laws.

When Finland became independent this practice had already become so firmly established that, without any hesitation, it was made part of the new Constitution of 1919. In Art. 95, which is the last article, it is expressly provided that the Constitution is an "irrevocable Constitutional Law', and therefore it cannot be "amended, interpreted or repealed, *nor can it be departed from* except in accordance with the procedure prescribed for Constitutional Laws in general". The italicized words are an addition to the comparable wording in earlier fundamental laws. They apparently refer—although during the discussion in Parliament no suggestions about this were made[8]—to precisely this peculiar

[7] The committee that drafted the proposal for a new order of procedure did not give any reason for Art. 60 in the Parliament Act of 1906. The matter was touched on neither by the Government in the bill, nor in the discussions of the estates, nor in the statements made by the committee.

[8] In the report of the constitutional-law committee under the chairmanship of K. J. Ståhlberg (No. 7/1917, p. 51) a statement is included which may be regarded as an indirect explanation of this procedure. In the suggested Art. 6 of the Constitution—even if it was, during the last stage of the discussion in Parliament, left out—the provision on the guarantee for vested rights (i.e., the theoretical "core" of fundamental rights) was prefaced by saying that while retroactive laws concerning vested rights were an exception to fundamental law, such laws should be legislated for in the manner laid down for the amendment of a fundamental law. Concerning this procedure the report of the committee uses the phrase "a principle which the legislator of our country has accepted and applied".

procedure whereby the legislator, when faced with a conflict with the fundamental law, eliminates the conflict not by passing the necessary amendments to the provisions of the fundamental law but by making an "exception" thereto and passing the bill concerned, although as such an ordinary law, in accordance with the procedure prescribed for fundamental laws. The details of this procedure were, however, not provided for, and it was not expressly stated who should decide whether a bill was to be considered to conflict with the fundamental law and therefore require a special order of procedure.

In another forum,[9] I have described in broad outlines how this peculiar procedure, which is not found in other countries, developed in Finland into a real system, during the crisis period of the 1930's and, above all, in the period immediately before and during the Second World War. The system, operating as a prior control on the constitutionality of the laws, is a substitute—materially, although not functionally or institutionally—for the subsequent control by the courts in other countries. It has brought with it a clear emphasis on the nature of constitutional laws as laws of a superior order, compared with ordinary laws. On the other hand, it must be stressed even in this connection that the basically different system for ascertaining the existence of a conflict between two laws of different hierarchical order reveals a noticeable difference in outlook towards the operation of the constitution in Finland and in other countries, especially in regard to fundamental rights. Naturally, the inner nature of the citizens' fundamental rights, as based upon the provisions of the Constitution, is related to the way of investigating and solving possible conflicts between the provisions of the Constitution and the provisions of ordinary law, and it is a result of the functioning of the system in actual practice.

It also seems probable that the adoption of a similar system by another country may be envisaged only under especially favourable circumstances. In Finland this system has in fact worked out satisfactorily—since the adoption of the Constitution of 1919 more than 600 laws have been dealt with as exceptions to the Constitution. One reason for this is almost certainly the circumstances under which this system originated towards the end of the last century. Perhaps another reason is the earlier historical factors

[9] "The Constitutional Protection of Fundamental Rights in Finland", *Tulane Law Review* 1960, pp. 697 ff.

which influenced the formation of the idea of the constitution.[1] Apparently, however, the most important factor is no more than half a century old: the long anticipated storm from the Imperial Russian side that broke out at the turn of the century in a sudden spate of ruthless measures, the intention of which was to destroy the Finnish constitution and Finnish autonomy forever. Faced with this situation, the Finnish people accepted the challenge and started a strong and lasting opposition within the rank and file of the nation in which almost the only means of defence was the law, and especially the Constitution. The legal battle that started lasted for almost two decades, and the traumatic experiences from this period explain why respect for the rule of law and for the Constitution remains to this day so deep in the hearts of the Finnish people.

[1] It is worth noticing that in Sweden and Finland the origin of the constitutional guarantee for the citizens' rights is to be found as early as in the provisions on the King's oath in the Rural Code (1350), whereas in other Scandinavian countries the conceptions of natural law and the declarations on fundamental rights in the revolutions of France and North America are referred to. This difference of attitudes has naturally been most affected by the fact that in Sweden and Finland the historical continuity of the provisions on fundamental rights has been unbroken—in Art. 2 of the Constitution of 1772 the validity of the provisions of the Rural Code was again reaffirmed—whereas the validity of the respective old provisions in Denmark and Norway was discounted during the long centuries of autocracy. Compare C. A. Reuterskiöld, *Sveriges grundlagar* I, 1934, p. 32, and Robert Malmgren, *Sveriges grundlagar*, 1951, p. 21, and Poul Andersen, *Dansk Statsforfatningret*, 1954, pp. 587 ff., and Frede Castberg, *Norges statsforfatning* II, 1947, p. 241.

When, in 1940, Nils Herlitz introduced in the First Chamber of the Swedish Parliament a private member's bill (No. 1/1940) for a speedier method of amending the Constitution by means of a qualified majority, he mentioned (p. 4) that Finland in this connection had shown the way to Sweden, but the grounds he suggested did not indicate that he was thinking of an acceptance of the Finnish system as a whole.