

HANNA HÄMÄLÄINEN

Pursuing Institutional Balance

The Institutional Relationship Between
the National Legislature and the National Courts
in the Contemporary Constitution

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ACADEMIC DISSERTATION

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<i>Responsible supervisor and Custos</i>	Director Pauli Rautiainen Kalevi Sorsa Foundation Finland	
<i>Supervisor</i>	Docent of Const. L Juha Lavapuro University of Turku Finland	
<i>Pre-examiners</i>	Associate Professor Ida Koivisto University of Helsinki Finland	Professor Tuomas Ojanen University of Helsinki Finland
<i>Opponent</i>	Professor Panu Minkkinen University of Helsinki Finland	

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Hanna Hämäläinen

ABSTRACT

This dissertation analyses the institutional relationship between the national legislature and the national courts in the contemporary internationalised and pluralistic Finnish constitution. The analysis is approached from the point of view of a British judicial self-restraint doctrine of deference. The research method used is theoretical legal dogmatics. In addition to the introduction, the study is divided into three main parts: the internationalisation of constitution and the constitutional review, the institutional relationship between the legislature and the courts in the United Kingdom, and the institutional relationship between the legislature and the courts in Finland. The aim of these analyses is to increase understanding of both the Finnish and the British basic constitutional solutions, and the institutional tensions involved in both systems. Part V presents conclusions and suggestions on the future development of the relationship between the legislature and the courts in the Finnish constitution.

The internationalisation of the constitution is closely linked to the empowerment of national courts and the growing importance of fundamental rights and human rights in legal argumentation. The dissertation demonstrates that, on the level of national constitutions, efforts have been made to control the effects of this development by producing judicial self-restraint doctrines, such as deference in the British constitution or the criterion of an evident conflict of section 106 of the Constitution of Finland, which can also be characterised as a mechanism of judicial restraint. These self-restraint doctrines aim to limit the jurisdiction of courts and emphasise the position of the legislature. The doctrines have profoundly affected the institutional relationship between the legislature and the courts.

The theoretical observations of this study point out that the doctrines of judicial self-restraint and their legitimacy are based on the established nation-state bound rationale of the constitutional concepts. This implies a requirement that the jurisdiction of the legislature and the courts is to be based on strictly predetermined criteria. This requirement is, however, problematic because it does not sufficiently take into account the multidimensionality of the pluralistic constitution. As the research demonstrates, constitutional concepts are evolutive in nature. Consequently, this thesis emphasises that this characteristic should be concretised in the contemporary constitution as a pluralistic understanding of constitutional concepts when analysing the premises of the institutional relationship between the branches.

This dissertation introduces the doctrine of deference to the Finnish constitutional debate. In the British context, deference is often connected to legislative supremacy and a court's duty to identify the limits of its own authority. As the research demonstrates, deference is actually a more value-sensitive and multidimensional concept, which may, however, also appear as a complexity. Nevertheless, the multidimensionality of deference allows for the constitutional control to be approached with the sensitivity the contemporary constitution requires, unlike its Finnish counterpart. Therefore, the research suggests that analysis through deference also adds value to the Finnish constitutional debate.

Based on the analysis of the jurisprudence in the study, courts' over-reliance on human rights arguments may seem problematic from the national institutional framework's viewpoint. Guaranteeing that fundamental and human rights are upheld is the duty of the courts. However, this should be put into practice in a sustainable way, also from the national institutional framework's point of view. Consequently, this dissertation argues for an interpretative model that is rights-based but also institutionally balanced. The suggested model would respect the national acts of parliament, the national Constitution, and the supranational constitutional obligations, but in a way that protects the national institutional mechanism.

The research demonstrates, that, on a practical level, the institutional relationship between the legislature and the national courts is set on a case-by-case basis depending on how actively or passively each branch acts. The choices the branches make result in them sending each other signals, which has an effect on their functioning. Occasionally, the situation results in a conflict of jurisdiction. However, sometimes, neither of the branches act and the issue remains open, which this study recognises as a significant problem. In the Finnish context one reason for the challenges is the problems with the mechanism of section 106 of the Constitution but also, for instance, the initiation criteria of the legislative process. Consequently, in order to strengthen the role of the legislature, it is essential to develop mechanisms that enable its effective intervention, rather than solely relying on emphasising the restraint of the courts.

Key words: legislature, court, deference, judicial self-restraint, constitutional review, constitution, constitutional pluralism, Finland, United Kingdom

TIIVISTELMÄ

Tässä väitöstutkimuksessa tarkastellaan kansallisen lainsäätäjän ja kansallisten tuomioistuinten välistä toimivaltasuhdetta suomalaisen kansainvälistyneen ja pluralisoituneen valtiosäännön nykytilassa. Kysymystä tarkastellaan brittiläisen tuomioistuinten itserajoitusopin (deference, pidättyväisyysoppi) kautta. Metodisesti tutkimus on teoreettisesti painottunutta lainopillista tutkimusta. Tutkimus jakautuu johdantokappaleen lisäksi kolmeen perusosaan, joissa tarkasteluissa ovat viime vuosikymmenten aikainen valtiosäännön muutos ja perustuslakikontrolli sekä lainsäätäjän ja tuomioistuinten väliset toimivaltasuhteet yhtäältä Isossa-Britanniassa ja toisaalta Suomessa. Tarkastelulla pyritään lisäämään ymmärrystä sekä Suomen että Britannian valtiosääntöisistä perusratkaisuista ja niihin sisältyvistä institutionaalisista jännitteistä. Viidennessä osassa esitetään johtopäätöksiä sekä kannanottoja lainsäätäjän ja tuomioistuinten välisten suhteiden kehittämiseen Suomen valtiosäännössä.

Valtiosäännön kansainvälistyminen on kiinteässä yhteydessä tuomioistuinten toimivaltuuksien laajenemiseen sekä perus- ja ihmisoikeuksien merkityksen kasvuun oikeudellisessa argumentaatiossa. Väitöstutkimus osoittaa, että kansallisen valtiosäännön tasolla näitä vaikutuksia on pyritty hallitsemaan luomalla kansallisiin valtiosääntöihin tuomioistuinten itserajoitusoppeja kuten pidättyväisyysoppi osana brittiläistä valtiosääntöä tai Suomen perustuslain 106 §:ssä säädetty ilmeisen ristiriidan vaatimus, joka myös on luonnehdittavissa tuomioistuinten itserajoitusmekanismiksi. Itserajoitusopit pyrkivät rajoittamaan tuomioistuinten toimivaltuuksia ja korostamaan lainsäätäjän asemaa. Näiden oppien kehityksellä on ollut syvällisiä vaikutuksia kansallisen lainsäätäjän ja kansallisten tuomioistuinten välisiin toimivaltasuhteisiin.

Tutkimuksen teoreettiset havainnot osoittavat, että tuomioistuinten itserajoitusopit ja niiden legitimitetti pohjautuvat valtiosääntöisten käsitteiden vakiintuneisiin, kansallisvaltioon sidottuihin määritelmiin. Tästä seuraa vaatimus lainsäätäjän ja tuomioistuinten toimivaltasuhteen pohjautumisesta tiukasti ennalta määritellyille kriteereille. Vaade ei kuitenkaan ota riittävästi huomioon nykyvaltiosäännön moniulotteisuutta, mikä tekee siitä ongelmallisen. Kuten tutkimus osoittaa, valtiosääntöiset käsitteet ovat luonteeltaan evolutiivisia. Tutkimuksessa painotetaan tämän ominaisuuden huomioimisen merkitystä lainsäätäjän ja tuomioistuinten institutionaalisia rooleja määritettäessä, mikä näyttäytyy nykyvaltiosäännössä valtiosääntöisten käsitteiden pluralistisena ymmärtämisinä.

Tutkimus tuo brittiläisen pidättyväisyysopin suomalaiseen valtiosääntökeskusteluun. Brittiläisessä kontekstissa pidättyväisyysoppi liitetään tavallisesti lainsäätäjän ensisijaisuuteen ja tuomioistuinten velvollisuuteen tunnistaa oman toimivaltansa rajat. Kuten tutkimuksessa tuodaan esiin, pidättyväisyysoppi on kuitenkin oikeudellisena käsitteenä paljon arvosensitiivisempi ja moniulotteisempi, mikä saattaa kuitenkin näyttäytyä myös monimutkaisuutena. Toisaalta opin moniulotteisuus mahdollistaa valtiosääntökontrollin lähestymisen valtiosäännön nykytilan edellyttämällä herkkyydellä, toisin kuin sen suomalainen vastine. Tutkimuksessa esitetäänkin pidättyväisyysopin kautta tehtävän jäsenyyksen tuovan lisäarvoa myös suomalaiseen valtiosääntökeskusteluun.

Tutkimuksessa analysoitu oikeuskäytäntö osoittaa, että tuomioistuinten liiallinen nojautuminen ihmisoikeusargumentaatioon saattaa näyttäytyä kansallisen institutionaalisen kehikon kannalta katsottuna ongelmallisena. Perus- ja ihmisoikeuksien toteutumisen turvaaminen on tuomioistuinten tehtävä, mutta se tulisi toteuttaa kestävästi myös kansallisen institutionaalisen rakenteen kannalta. Tutkimuksessa esitetään oikeuslähtöistä mutta institutionaalisesti tasapainotettua tulkintamallia, joka sekä kunnioittaisi niin tavallista lainsäädäntöä kuin kansallista perustuslakia ja ylikansallisia valtiosääntöisiä velvoitteita, että suojaisi myös kansallista institutionaalista mekanismeja.

Tutkimuksessa osoitetaan, että käytännön tasolla lainsäätäjän ja tuomioistuinten institutionaalinen suhde asettuu tapauskohtaisesti eritavoin riippuen siitä, kuinka aktiivisesti tai passiivisesti ne toimivat. Näillä valinnoilla lainsäätäjät ja tuomioistuimet lähettävät toisilleen signaaleja, joiden avulla ne pyrkivät määrittämään toimintatilaansa. Toisinaan tilanne päättyy toimivaltakonfliktiin. Toisinaan taas kumpikaan ei toimi ja kysymys jää avoimeksi, mikä tutkimuksessa nähdään merkittävänä ongelmana. Suomen kontekstissa yksi syy haasteisiin on perustuslain 106 §:n mekanismin toimintaan liittyvät haasteet, mutta myös esimerkiksi lainsäädäntöprosessin vireillepanokriteerit. Lainsäätäjän roolin vahvistamiseksi on tärkeää, että tuomioistuinten pidättyväisyyden korostamisen sijaan, kehitettäisiin järjestelmään mekanismeja, jotka mahdollistaisivat asioiden joustavan ohjautumisen eduskunnan käsittelyyn.

Avainsanat: lainsäätäjät, tuomioistuimet, pidättyväisyysoppi, tuomioistuinten itserajoitus, lakien perustuslainmukaisuuden valvonta, valtiosääntöpluralismi, valtiosääntö, Suomi, Iso-Britannia

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PART I: INTRODUCTION

1 Premise of the study

1.1 Background of the study

In this research, I analyse the institutional relationship between the national legislature and the national courts, which, together with the executive branch, exercise the supreme state power. Exercising the supreme state power is based on the constitution, which is traditionally perceived as an instrument bound to the nation-state. As a concept, the constitution is, however, multidimensional and, thus, before taking a more detailed view of the research setting, it is important to focus on a few conceptual questions. The concept of constitution can be defined in either a narrow or a broad sense. In a narrow sense, the concept is applied synonymously with an act or another written instrument of rules that regulate the governing of a state. For example, section 1.2 of the Constitution of Finland (731/1999) refers to the concept of constitution as synonymous with the constitutional act “the Constitution of Finland” (Suomen perustuslaki). Consequently, the Constitution, in a narrow sense, can be defined as an act accepted in a procedure of constitutional enactment, which, moreover, declares itself a Constitution. The Constitution regulates the competences of the supreme state organs and determines the production of legal norms. Moreover, the Constitution regulates the rights and responsibilities of people. An alternative way to apply the concept of constitution is to refer to all legal regulations that are connected to constitutional substances and

enact the governmental system. This is the broad sense of the concept.¹ Moreover, the broad sense of a constitution implies all constitutional regulations, principles, practices, and customs². Thus, the character of the broad sense of the concept is vaguer than the narrow one.

In addition to the division between the narrow and broad sense of the concept, a precise definition of the constitution has been argued to require making a distinction between the legal, the political, and the factual constitution. According to Jyränki, the legal constitution involves both a substantial and a formal dimension. The substantial form refers to the norms regulated in the field of constitutional law, in other words, rules and practices regulating the use of political power. The formal dimension, on the other hand, refers to the written instrument of rules that regulate the governing of a state and is, thus, able to be perceived synonymously with the narrow sense of the concept presented above. The concept of a political constitution involves the factual practices connected to the exercise of political power. Finally, the factual constitution refers to the construction of a constitutional system in practice. It answers the question of who enjoys the ultimate power.³ Based on these definitions, I apply the concept of constitution in this dissertation in its broader sense. However, if the concept is applied in its narrow sense, I spell it with a capital letter 'Constitution'. Furthermore, the concept is applied in its legal sense as a cluster of legal rules that regulate the exercise of power and its terms and obligations based on either statutory provisions or customary practice.

Another central concept in this research, closely connected to the constitution, is constitutionalism. Constitutionalism can be characterised as a concept that implies a supposition of an independent value and the significance of the constitution. Constitutionalism is often connected to the idea of the application of the

¹ Jyränki 2000, p. 39.

² Mutanen 2015, p. 274. There is also another way to approach the diversity of the concept. For instance, Kelsen applies concepts of formal (narrow) and material (broad) constitution, see Kelsen 1968, p. 240.

³ Jyränki 2003, p. 213.

constitution as a formally articulated structure constraining governmental power. As a concept, it is, however, also vague. Constitutionalism is connected to constitutional rules and principles, such as democracy, the separation of powers, the rule of law, and fundamental rights, all of which are in a state of mutual tension. Consequently, the exact definition of the concept depends on the mutual weight given to the elements.⁴ Similar to the concept of constitution, constitutionalism can also be understood as a state-centred idea, based on historical reasons. However, due to the intense integration development during recent decades, the supranational institutions, such as the human rights treaty system of the European Council and the European Union, have become increasingly significant actors in the constitutional orders of their Member States. Therefore, constitutional regulation and constitutions exist also outside the state level⁵. The development has created a new constitutional level, which is referred to as constitutional pluralism⁶, multilevel constitutionalism⁷, or intertwined constitutionalism⁸. Boaventura de Sousa Santos describes the variety and interaction of legal orders as interlegality⁹. A more detailed analysis of the phenomenon is presented in part II of the dissertation, but on a general level, constitutional pluralism implies plurality, overlap, and interaction of national and supranational constitutions¹⁰. It has affected the interaction between the national legal orders and supranational institutions, which is, thus, defined by the multiple instruments. These instruments are based either on a contractual basis or the interpretative practice of the European courts as the European Court of Human Rights (ECtHR) or the European Court of Justice (ECJ)¹¹. European constitutional

⁴ Husa 2009, p.1145–1146.

⁵ See Weiler and Wind 2003 and Weiler 1999, p. 342.

⁶ Walker 2002.

⁷ Pernice 1999.

⁸ Ziller 2007, p. 293–294.

⁹ De Sousa Santos 1987, p. 288–289. On interlegality, see also de Sousa Santos 1995 and 2002.

¹⁰ See Walker 2002, p. 317 and Ojanen 2011, p. 442.

¹¹ On the principles of interpretation of the ECtHR see, e.g., Pellonpää et. al. 2012, p. 283–222. On the relationship between the fundamental rights systems of the EU and the Finnish legal order see, e.g., Ojanen 2011, p. 449–452.

development has also significantly affected our understanding of constitutional principles, such as state sovereignty¹² or the separation of powers. Despite the plurality of the authoritative instruments, the ambiguous spheres at the interface of the national and supranational legal orders do exist. Thus, during recent years, different theoretical models have been developed to systematize these areas¹³. Consequently, based on the described development, in this research, the term “constitutionalism” is understood as a post-state, pluralist concept structuring governmental power.

Because of the evolution of the concept of constitution from constitutional state to constitutional pluralism, the national constitutions of the states do not entirely control the factors affecting them. National constitutions have internationalised and, at the same time, their contexts – previously strictly bound to the nation-state – have crumbled, which has caused tension and inconsistency in societal practices and discussions. The nationalistic and integration-critical tones in European social discussions during the past years, the division within the EU during the migration crisis in 2015-2016, and the tangled Brexit process all serve as examples of the development. The development has also created the need to approach the theoretical construction of constitutional principles and practices in a way that recognises the evolution and redefines their theoretical basis in this light.¹⁴ The development has also raised the need to re-estimate the relations between the institutions exercising the supreme governmental powers at the national level.

In this dissertation, I analyse the effects of European constitutional pluralism on the institutional relationship between the national legislature and the national courts, from the legal perspective. The study examines legislation and legal doctrines concerning the institutional relationship between the branches. The field of the study is constitutional law, and the subject is analysed in the context of European

¹² See Mutanen 2015.

¹³ In the Finnish context see, e.g., Salminen 2015 and Jääskinen 2008.

¹⁴ See Mutanen 2015, p. 390–393.

constitutional pluralism. In the background of the study lies an idea of a modern constitutional state, whose central characteristic is a commitment to rights in a way that recognizes individual rights as a limit on decision-making concerning the promotion of collective welfare. Despite the institutional nature of the study, it also has a fundamental and human-rights-based approach. The basis of the analysis of the institutional relationship between the national legislature and the national courts resides in the democratic legitimacy of the national legislature and the courts' duty to protect fundamental and human rights.

The research is positioned in the continuum of constitutional discussion, both on the European and the national Finnish level. It engages in discussions concerning the separation of powers, judicial activism, the significance of fundamental and human rights, and the effects of constitutional pluralism on national constitutional traditions. Through systematization of the general legal doctrines, the research enhances our understanding of and controllability to the constitutional discussions and creates predictability in the constitutional practices. Primarily, the study takes part in the Finnish discussion in the field of constitutional law. However, the theoretical views, for instance, on constitutional pluralism also have a more general value.

In the broader context, the dissertation locates itself at the boundary between law and politics, which serves as one of the eternal questions of law. The two spheres of law and politics cannot be completely disconnected. Hence, their relationship can be defined as ambiguous. In the research, the relationship between law and politics is approached through the institutional structures of government. Consequently, the analysis of the institutional relationship between the national legislature and the national courts in the research serves, at the same time, as an analysis of the relationship between law and politics. As the later analysis will demonstrate, the functions of law and politics in legal orders may diverge, which directly affects the institutional structures, for instance, the chamber system and constitutional review.

The analysis of this study will, furthermore, indicate that the discussion on deference also lies within the same spheres.

1.2 Deference as a core element of the study

The research approaches the institutional setting between the legislature and the national courts from the perspective of the British doctrine of judicial restraint¹⁵ – deference – implying the self-restriction of national courts. The doctrine of deference has developed as a national response to the internationalisation of the constitution, and it is based on Dicey’s theories of the rule of law and parliamentary sovereignty, and their established position in the British constitutional tradition¹⁶. The doctrine illustrates the relationship between the national courts and the other governmental branches, and it is often linked to the idea of the subsidiarity of the courts to the legislature. Hence, at its core, the doctrine specifies a court’s duty to identify the limits of its own authority and the stronger legitimacy of the political actors to avoid institutional conflicts in situations related to the interpretation of acts, especially the Human Rights Act (1998, the HRA)¹⁷. However, diverse views are also presented. For instance, the doctrine has been approached as a key mechanism through which a court can respect the representative democracy and fulfil its obligation to protect international human rights¹⁸. A more comprehensive overview of the doctrine is presented in chapter seven of the dissertation.

The central position of deference in the research is based on its nature as a doctrine of judicial self-restraint. The doctrine concretises explicitly the tension between procedural and substantive legitimacy since its application implies placing

¹⁵ For an overview of the various doctrines of judicial self-restraint, see Daley 2000.

¹⁶ Masterman and Leigh 2013, p. 1–2. Dicey’s theories of the rule of law and the parliamentary sovereignty are examined in chapter two of the dissertation.

¹⁷ *Ibid.*, p. 1-2. The HRA is an act of parliament incorporating the rights of the European Convention on Human Rights into the UK law. See more in chapter six of the dissertation.

¹⁸ Kavanagh 2009, p. 167–168.

on scales either the legislative supremacy or the legal protection of individuals through the human rights regulation. The traditional approach places more weight on the legislature's position, which seems, however, contradictory to the nature of a common European constitutional context. However, as we shall observe in the later chapters, the question is not that simple.

The relevance of the doctrine of deference in the study is based on two separate arguments. First, because of the European integration development, discussions containing common characteristics with the British discussions of deference occur throughout Europe. The political atmosphere in Europe and the crisis of liberal democracy, for example, in Hungary and Poland, serve as examples of contemporary development. On the other hand, analysing the doctrine of deference as a part of European constitutional research is important since the doctrine has relevance also in the supranational European law. In 2013, in the case “Animal Defenders International v. the United Kingdom” (22.4.2013), the Grand Chamber of the European Court of Human Rights formed a doctrine of “appropriate weighting” by which the Court refers to a duty to respect the national legislature. The circumstances behind the case, however, give cause for concern in relation to the future application procedure of the doctrine: In *Animal Defenders*, the Court continued its contextual¹⁹ interpretative tradition founded on the nationalistic and integration-critical emphasis of European social debate²⁰. The fundamental purpose of the European Human Rights System is to guarantee the legal protection of individuals

¹⁹ Contextual interpretation refers to the interpretative praxis of the ECtHR in which the Court interprets the ECHR in the case at hand by taking into account the specific context of a Member State. On contextualism and on the doctrine of margin of appreciation of the state which is closely connected to the contextualism, see, e.g., Letsas 2009 and Rautiainen 2011.

²⁰ In the case *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* (27.6.2017), which concerned the relationship between data protection and the freedom of the press, the ECtHR assessed the legislative choices behind the Finnish legislation and the quality of the parliamentary and judicial review of the legislation. Since parliamentary review was found both exacting and pertinent, the Court gave weight to the manifest intention of the Finnish legislature and concluded, in line with the approach set out in *Animal Defenders*, that the Finnish authorities enjoyed a wide margin of appreciation (paras. 192–196).

in the whole European legal area²¹. However, the Animal Defenders -case has raised a question in the scientific community of whether a responsibility of the legal protection of individuals is intended to transfer back to the Member States at least in certain types of cases. It is possible to argue that the doctrine of appropriate weighting reflects a genuine concern for national democracy. However, it may also represent a pursuit to shift the question of individual rights to the institutional level to avoid the interpretation of the rights themselves. Consequently, to avoid incorrect interpretations in the future, it is important to analyse the interpretative premises of the doctrine of deference.

In the study, I argue that the idea of the national legislature as a sovereign power, functioning as a foundation of the doctrine of deference, is applicable also in the context of the Finnish constitutional doctrine. Thus, in addition to examine the doctrine in the British context, I shall apply it also in my analysis of the relationship between the national legislature and the national courts in the Finnish constitutional context. As will be demonstrated in chapter two of the dissertation, there are, naturally, differences especially in the historical but also in the functional dimension of the concept of legislative sovereignty. Nevertheless, due to the pluralist constitutional development of the past decades, the United Kingdom and Finland have also a shared constitutional context, in which the institutional question is analysed in this research. The research finds that constitutional law is not culturally bound²² but is a pluralistic phenomenon absorbing cultural contexts. Consequently, the research identifies the national constitution as an imagined community²³ open to different contexts. Thus, the research setting does not involve a legal comparison between states but is, instead, focused on the states as participants in the same pluralistic constitutional development creating the context of deference. Moreover, as Husa has argued, the legal purity of institutions or doctrines of national law is

²¹Soering v. United Kingdom (7.7.1989), para. 87.

²² See Tuori 2007, p. 223.

²³ Anderson 2006, p. 6.

often more imagined than real because the adopted legal views and normative models affect each other. Thus, the interaction of legal cultures alters them, and they receive influences from each other.²⁴ On these bases, the fights against external influences appear paradoxical.

In the study, the doctrine of deference is treated as an interpretative mechanism applied to constitutional analysis on a more general level. Thus, the British discussion provides arguments for a more general constitutional analysis. Hence, the aim is not to transport the doctrine as a legal transplant²⁵ from one legal culture to another. It is not applied as a legal source. Instead, deference is applied similarly to, for instance, the idea of the constitutional court in the Finnish discussion. To be clear, I am not arguing that it is possible to define the relationship between the national legislature and the national courts according to the same features. Instead, due to the common constitutional context, I find the application of the doctrine in the manner chosen in this dissertation, despite the differences between the continental and the common law legal systems, provides an opportunity to approach the question in a new way. Since both, the Finnish and the British constitutional traditions are based on parliamentary sovereignty, the British discussion on judicial review has more to offer from the Finnish angle than, for instance, the American discussion based on the judicial activism.

The main difference between the continental and the common law legal systems is concretised in the position of case law. In continental legal system the legislation serves as the primary source of law while in common law system the primary source of law is derived from the judicial decisions of courts. In continental legal systems the judicial argumentation is based on deductive interpretation while in common law systems the interpretation is inductive. On a general level, the legal cultures differ also in relation to the concept of the rule of law. However, the internationalisation and the constitutionalisation seem to dilute the difference between the legal cultures

²⁴ Husa 2013, p. 35 and p. 55.

²⁵ See the opposing views on legal transplants in Watson 1993 and Legrand 1997.

since the development has reinforced the position of courts as a developer of the legal order also in the continental legal systems.²⁶

Lavapuro has also paid attention to the similarities between the British and the Finnish legal traditions, especially in the field of constitutional law. He argues that, apart from the lack of a written Constitution, the British understanding of the constitution is situated closer to the French model than to its counterpart in the United States. By emphasising the role of the legislature, Finland, as well as the other Nordic countries Denmark and Sweden, is located quite close to the British-French constitutional tradition. In addition, as a consequence of the changes caused by the internationalisation of constitutional law, the models of constitutional review both in Finland and in the United Kingdom have changed. The new forms of review are both able to be characterized as weak-form constitutional review²⁷. The weak-form review includes different models of constitutional review each of them containing a specific approach to the tension between the sovereignty of parliament and the protection of fundamental rights.²⁸ In addition, both in Finland and in the United Kingdom is a tendency to avoid open constitutional conflicts between the high public institutions²⁹. Based on these factors, I argue that the application of the findings of the British discussion as an intent to point out arguments outside the Finnish debate adds value in the domestic discussion.

1.3 Research questions and the structure of the study

The dissertation is divided into five main parts, which are organised as follows: The first part includes chapters one and two and introduces the premises of the study.

²⁶ On the main differences in judicial argumentation and the concept of rule of law in the continental and the common law legal systems see Rosenfeld 2004 p. 635 and p. 646–648.

²⁷ On the definition see chapter four.

²⁸ Lavapuro 2010b, p. 65–66. Husa 2004, p. 73–77.

²⁹ Husa 2011, p. 196.

Chapter one establishes the framework of the study and chapter two analyses the constitutional bases that form the background of the study. The second part, including chapters three to five, introduces the context of the study. Chapter three examines European constitutional development as a context for the national institutional setting. Chapter four concretises the institutional settings in the context of constitutional review and chapter five approaches the institutional relationship between the branches from a theoretical point of view. The third part of the study, chapters six to seven, focuses on the questions of the British constitution. Chapter six examines the British constitutional traditions and their transformation during the last decades. The British constitutional traditions serve as a framework of the doctrine of deference and, thus, to understand the doctrine, it is crucial to briefly illustrate these traditions. However, chapter seven focuses on the doctrine of deference³⁰. In the chapter, I examine the structure and interpretations of the doctrine. The aim is to draw a coherent picture of deference and to identify the central elements that form the foundation on which the doctrine is built.

The fourth part of the study, chapters eight to ten, introduces the Finnish constitutional context. Chapter eight examines the contemporary Finnish constitutional system and briefly highlights its development during the last decades from the dissertation's perspective. In chapters nine and ten, I concentrate on the relationship between the legislature and the national courts in the Finnish context. In chapter nine, I analyse the relationship between the branches from a contemporary perspective. In the last chapter of part four, I analyse some legal cases to illustrate the relationship in practice. The fifth part of the dissertation includes the two final chapters. In chapter eleven, I combine the doctrine of deference and the institutional relationship of the national legislature and the courts and analyse the relationship from that viewpoint in the Finnish context. The last chapter presents the theoretical analysis of the themes and summarises the study.

³⁰ Chapter seven is partly based on a Finnish article by the author published in *Oikeus* 1/2018, entitled "Oppi pidättyväisyydestä lainsäätäjän ja tuomioistuinten valtiosääntöisten roolien jäsentäjänä".

The research questions of the study are strictly connected to the constitutional theory and the general doctrines of constitutional law. The central hypothesis of the dissertation is that the internationalisation of constitutional law has profoundly affected the theoretical construction of the institutional relationship between the national legislature and the courts.

The major research question of the dissertation is:

1) What is the significance of the internationalisation of the constitution from the point of view of the institutional relationship between the national legislature and the national courts?

The major research question functions as the thread that runs through the research and, thus, the research consists of the analysis of its different elements. Consequently, each part of the study aims to answer the question from different angles. However, in the fifth part of the dissertation, all the elements are combined, and the major research question is answered through the research as a whole.

In addition to the major research question, the dissertation also includes the following minor research questions:

1) What kind of effects does the internationalisation of the constitution have on the separation of powers between the national legislature and the national courts?

On a theoretical level, the question is analysed in part two. A more practical approach to the question is taken in chapters six, eight and ten.

2) Is it possible to construe the separation of powers between the branches on a general level through the doctrine of deference and does that kind of approach correspond to the internationalised constitutional culture?

The structure and interpretations of the doctrine of deference are examined in chapter seven. Through the research as a whole, the question is answered in the final part of the study.

3) Is the approach applicable to the Finnish constitutional tradition?

The Finnish constitutional tradition is examined in part four. The question is especially analysed in chapter eleven.

The relationship between the national legislature and the national courts is traditionally bound to the constitutional doctrine and the other elements of constitutional culture. Hence, in the light of the research questions of the study, I examine the basis of the British constitutional debate and determine the main arguments of the discussion. By analysing the key concepts, theories, and principles of the British constitution, I will be able to locate the theoretical assumptions serving as foundations for the doctrine of deference. By defining the basis of the British constitution, I pursue a deeper understanding of the manner in which it constructs the institutional relationship between the national legislature and the national courts and thus defines the balance of constitutional and legislative sovereignty.

In the dissertation, I focus on the institutional relationship between the national legislature and the national courts. Consequently, the concepts of national legislature and national court are central in the study. In part two these concepts are referred to as more general concepts of constitutional theory. In parts three, four and five they are understood as special institutions of the national legal systems. Since the focus of the research is on the institutional relationship between the legislature and the courts, the institutional relationship between the executive and the legislature or the executive and the courts is not examined. In the British constitutional tradition, the legislature is closely intertwined with the executive, which causes difficulty in fully rotating the roles between each other. However, as far as it is possible, the focus

is on the relationship between the legislature and the courts. By court is referred to the national supreme general courts: In the British context, the Supreme Court of the United Kingdom (former the House of Lords), and in the Finnish context, the Supreme Court, and the Supreme Administrative Court as the highest courts of appeal. Thus, the special courts of law, such as the Labour Court and The Insurance Court in Finland, have been excluded from the analysis although the nature of their decision is partially comparable to the decisions of the supreme courts.

The institutional relationship between the national legislature and the national courts is concretised in the constitutional review. Consequently, the questions of constitutional review acquire a central position in this study. However, this is not a study of constitutional review. My aim is not to create a comprehensive picture of the structures of constitutional review, either from the Finnish or from the British point of view³¹. The theme is relevant as far as it is connected to the competences of the legislature or the courts. Instead of the practical approach, the study aims to focus on the general principles and doctrines that form a background to the structures of constitutional review.

1.4 Methodology and previous research

The study locates itself on the obscure border between the law and politics in the field of constitutional law. As already noted, the study employs a legal perspective, and the research methods applied are established methods of constitutional law. The diverse nature of the study, nevertheless, affects the research setting and the methods through which the theme is approached within the frameworks of legal research. A

³¹ There are also other organs involved in constitutional review. In the Finnish context the official acts of the Government, the ministries and the President of the Republic is supervised by the Chancellor of Justice. In addition, the Chancellor of Justice reviews that the courts and other authorities performing public tasks, comply with the law. In addition to the Chancellor of Justice, the Parliamentary Ombudsman reviews the legality of actions by the authorities, primarily by investigating the received complaints.

traditional way to perceive legal dogmatics includes systematization and interpretation of norms³². The method is based on the writings of Hans Kelsen and H.L.A. Hart.³³ The traditional legal positivism separates the factual and normative aspects of a phenomenon. A more recent form of legal dogmatics is formulated in the theory of critical legal positivism. In “Critical Legal Positivism”, (2000) Tuori modernizes legal positivism and defines the validity of a legal norm as an inter-legal question³⁴. He argues that legal discussion does not exclude the external side of the law but approaches it through normative lenses³⁵.

Furthermore, in the case of methods, while the research involves features or elements of legal comparison, the design of the study cannot be described as comparative. Legal comparison can be defined as a legal practice examining law in societies as a normative phenomenon³⁶. Consequently, legal comparison aims to define similarities and differences between legal orders. It is able to be characterized as an approach based on understanding and analyzing foreign law. However, as Husa reminds us, mere familiarisation with foreign law does not equate to legal comparison³⁷. As already noted, in this research, the doctrine of deference is treated as an interpretative mechanism applied to constitutional analysis on a more general level. The aim of the research is, thus, not to participate in the British discussion on the doctrine itself but through systematizing the discussion to reaching its premises and, on that basis, to produce conceptions that analyse a wider phenomenon. The methods of the study are applied as complementary to each other. The core of the research locates itself into the subsurface structures of law and, therefore, a mere legal dogmatic aspect could easily remain superficial. On the other hand, through the theoretical examination, it is not possible to reach the normative reality of the society.

³² Aarnio 1989, p. 48. Tuori 2002, p. 161–169.

³³ See Kelsen 1968 and Hart 1997. See also chapter five of the dissertation. On the systematization of the theories see Tuori 2007, p. 18, p. 52–53 and p. 221.

³⁴ Tuori 2000.

³⁵ Tuori 2007, p. 18.

³⁶ Husa 2013, p. 27. On legal comparison see also Zweigert and Kötz 1998.

³⁷ Ibid, p. 43.

Hence, in the study, the approaches intertwine and form a web through which the theme is examined.

Since the institutional relationship between the national legislature and the national courts is mainly constructed on the interpretations of legal doctrines as separation of powers or legislative supremacy, the theoretical analysis based on the doctrines has a central position in the study. In this regard, the legal theory and legal-philosophical reflections serve as the key methods. Legal theory and legal philosophy can both be approached as conceptual tools analysing legal questions. Consequently, a strict division between legal theory and legal philosophy may be difficult to determine. However, in this study, legal theory is determined as the instrumental application of legal theories to solve the problems of jurisprudence (*oikeustieteen tieteenteoria*). On the other hand, legal philosophy implies a more general approach to the law by examining, for instance, the nature of law.³⁸

In the dissertation, the law is considered multi-layered in the way Tuori describes in his theory of critical legal positivism. Tuori argues that law as a legal order can be approached both as a normative legal order and as specific social practices (legal practices) such as law making or adjudication. According to Tuori, the law as a legal order involves multiple layers. The law's surface implies normative material as statutes and regulations, court decisions and academic discussion. Moreover, the law includes subsurface structures that constitute the possibility for and imposition of restrictions on actions appearing on the law's surface. These subsurface structures, labelled as legal culture and deep structure of law, are products of a sedimentation process.³⁹ From the dissertation's point of view, it is essential to recognize that also the subsurface structures of law, including, for example, general legal principles and doctrines construing institutional relationship between the branches of government, transform and, thus, do not include permanent principles.

³⁸ See, e.g. Twining 2009, p. 21.

³⁹ Tuori 2000, p. 163. On the interaction between the levels see p. 219.

The study pursues comprehension. The study aims to create an understanding of the recent constitutional phenomena: thus, the approach of the study can be described as analytical. The research is based on an analysis of legal literature and theoretical reflections. To clarify the theoretical research material, I will also present legal cases in the relevant extent. However, the role of the case law in this research is to provide argumentative support. Consequently, the aim is not to comprehensively analyse cases related to the raised themes but to select those that clarify the subject of the study. The interpretative statements of the European Court of Human Rights and the case law of the European Court of Justice form a key part of the phenomenon I call European constitutional pluralism. Moreover, the position of common law in the British context is important. Consequently, the role of case law in my research cannot be ignored. However, I mainly approach it through the interpretative statements already made. Since the research aims to create a deeper understanding of the phenomena under consideration, a case-by-case examination is not, from my point of view, adequate.

The research material of the study consists of four basic categories. The sources to which I refer in brackets in this and the following three paragraphs are merely excerpts of the extensive works of the researcher referred to. The catalogue at this stage is by no means comprehensive, but I believe that highlighting even a few key works allows a better view of the discussions on which the research is built. The first category is the literature concerning the British constitutional law and traditions, especially the writings of the doctrine of deference and the institutional relationship between the legislature and the courts. Some central contributors in this field are, for instance, T. R. S. Allan (2006), Richard Clayton, Paul Craig, Stephen Gardbaum, Aileen Kavanagh (2009), Roger Masterman and Lord Steyn. From a historical point of view, important contributors are A.V. Dicey (1915) and Walter Bagehot (1867).

The second category includes literature of constitutional theory concerning the modern constitutional state and its normative presumptions. This category forms the theoretical basis of the study and includes both national and especially

international literature. The central contributors are, for example, Ronald Dworkin (1978), John Hart Ely (1980), Jürgen Habermas (1996), Jaakko Husa (2004), Kaarlo Tuori (2000, 2007) and Jeremy Waldron (2006).

The third category includes writings of European constitutional law and constitutional pluralism. There is much research on the theme both in Finnish and in the international field. In Finnish literature, important contributors include Niilo Jääskinen (2008), Tuomas Ojanen (2010) and Janne Salminen (2015). In the international field, contributors such as Neil MacCormick and Neil Walker (2002) are worth mentioning. In addition, Jaklic Klemen's "Constitutional Pluralism in the EU" (2014) offers a central overview of the theme. Moreover, the works of Mark Tushnet (2008) and Stephen Gardbaum (2001) serve as a central basis for the study.

The fourth category involves the discussions that focus on Finnish constitutional law. A central theme in this category is the research on constitutional review, especially Esko Riepula (1973), Mikael Hidén (1974), Antero Jyränki (1989), Veli-Pekka Hautamäki (2002) and Juha Lavapuro (2010). In addition, Anu Mutanen (2015) and Mikko Puumalainen (2018) share with the dissertation the idea of a pluralist approach as a basis of study. The Europeanisation of the Finnish courts has been analysed by Tuomas Ojanen (2011). Furthermore, in the field of Finnish research on fundamental rights, the works of Martin Scheinin (1991), Veli-Pekka Viljanen (2001) and Pekka Lämsineva (2002) are important.

2 The constitutional basis of the study

2.1 Rule of law: the frameworks of sovereignty

The traditional understanding of a constitution perceives constitution as an instrument that regulates the competences of the supreme state organs and determines the production of legal norms in the state and, thus, includes a strict connection between a constitution and a nation-state. The concept of a nation-state derives from the Peace of Westphalia of 1648. At that time, the concept of territorial state and the idea of nationality were born, and the era of sovereign states has been argued to have begun.⁴⁰ The emergence of the nation-state and the positivisation of law occurred simultaneously and influenced each other. Thus, modern law has been a law of a nation-state. International law has also been bound to the nation-states in several ways even though the regulation has transcended the borders of the states.⁴¹ The constitution, as a result of the American and French Revolutions in the late 18th century, expresses the legitimacy of the exercise of power based on the sovereignty of the people (*pouvoir constituant*) instead of the royal authority. Consequently, the constitution as a product of modern law has also been bound to the nation-state⁴². However, the emergence of supranational law has increased the number of constitutional legal sources and led to the denationalisation of constitutional law. The development and evolution of the pluralistic understanding of the constitution has challenged the traditional, kelsenian perception.

The relationship between the national legislature and the national courts is based on statutes and principles derived from the constitution. The most significant of these are rule of law, separation of powers, sovereignty of parliament and principle

⁴⁰ See Mutanen 2015, p. 30–32 and the sources she mentions.

⁴¹ Tuori 2007, p. 279–283.

⁴² Kelsen 1968.

of democracy. The principle of rule of law (also Rechtsstaat, État de droit) can be characterized as a concept of universal validity. Nevertheless, at the same time, it includes several connotations. On a general level, the rule of law is connected to the exercise of power and the relationship between the individual and the state⁴³. On a general level, the different approaches to the rule of law can be viewed as forms through which the constitutional doctrine has sought to control the tension between law and politics⁴⁴. The report of the Venice Commission of the Council of Europe⁴⁵ on the rule of law presents the principle as a value-based ideal against which the evolution of societies is able to be assessed. The rule of law is firmly associated with democracy and the demand for the enforcement of human rights.⁴⁶ The key question behind all approaches appears to be connected to the prevention of arbitrary state power and to the protection of individual rights, which facilitates comparisons between the different views⁴⁷.

The modern concept of rule of law derives from the British constitutional scholar professor A.V. Dicey's "Introduction to the Study of the Law of the Constitution" (1885). According to Dicey, together with the concept of parliamentary sovereignty⁴⁸, the rule of law forms the basis of the British Constitution. According to Dicey, the rule of law is primarily common (judge-made) law that aims to protect the rights of the individual against the arbitrary use of power. For Dicey, the rule of law implies absolute supremacy of law (defined as the absence of arbitrary power),

⁴³ Venice Commission: Rule of Law Checklist 2016, p. 5.

⁴⁴ Tuori 2007, p. 223. On the thin-thick dichotomy of rule of law see also Konstadinides 2007, p. 55–61.

⁴⁵ The Venice Commission is an advisory body of the Council of Europe. The members of the Commission are independent experts of constitutional law thus the work of the Commission is based on a strong expertise.

⁴⁶ Venice Commission: Rule of Law Checklist 2016, p. 14.

⁴⁷ Tuori 2007, p. 225. For a comparison between the different approaches to the rule of law see, e.g., MacCormick, Neil: Rechtsstaat und the Rule of Law. Juristenzeitung 1984, p. 65–70 and also Heuschling, Luc: État de droit – Rechtsstaat – Rule of Law. Paris 2002.

⁴⁸ Tuori points out that since the time of Dicey the relationship between the rule of law and the sovereignty of the parliament is usually discussed in the British constitutional literature according to the same formula: the problem is acknowledged, but it is considered only *prima facie* (Tuori 2007, p. 243–243.) On the internationalisation of rule of law see Tuori 2007, p. 244–245.

equality before the law and “the general principles of the constitution” as the results of judicial decisions of the courts.⁴⁹ Continental Europe’s counterpart to the rule of law “Rechtsstaat” derives from the jurisprudence of Germany and focuses more on the nature of the state. According to the doctrine, the exercise of governmental power is constrained by law as an opposition to the idea of an absolutist state. The state’s power is limited to protect citizens from the arbitrary exercise of authority.⁵⁰ The French approach to the doctrine is labelled “l’état de droit”. The concept places less emphasis on the nature of the state than its German counterpart does. Instead, “l’état de droit” implies a conception of a state as a protector of fundamental rights that are guaranteed in the Constitution against the legislature.⁵¹

In addition to the national level, the concept of rule of law can also be found at the international level. Currently, the rule of law has begun to be applied as a legal argument in EU-law. For example, in the context of this study, significant cases of judicial independence highlight a substantive conception of the rule of law⁵². Furthermore, Article 2 of the Treaty on the European Union (TEU) includes the principle of rule of law. According to the Article:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.”.

⁴⁹ Dicey 1915, p. 188, p. 195–196 and p. 202. On the British theory of rule of law, see also Allan 2001; Craig 1997.

⁵⁰ In Rechtsstaat, the legislature is expected to provide protection against absolutism. See Mohl (1831).

⁵¹ Loughlin 2010, p. 322–323.

⁵² See the cases “Portuguese judges” C-64/16, paras. 30 and 36, the LM-case C-216/18 PPU, para. 48 and the order of the president of the court in the case Commission v. Poland, C-619/18, , para. 21, stating: “ It must be recalled that the requirement of judicial independence forms part of the essence of the fundamental right to a fair trial, a right which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.”

Thus, rule of law has a strict normative basis in the EU law. It is also noteworthy that, therefore, rule of law is a normative rule throughout the Union. Since the courts of the Member States are also regarded as EU courts, the responsibility to maintain rule of law is also indicated on the national level. Moreover, the rule of law is presented in the case law of the European Court of Human Rights. The Court considers the rule of law as a concept inherent in all articles of the Convention⁵³, and the notion of the rule of law is applied to several issues as the principle of legality in the narrow sense, due process, legal certainty, and equality before the law.

Since a universal definition of the concept is difficult or even impossible to determine, the Venice Commission has developed a checklist that identifies the common features of the rule of law. The checklist involves the following elements or objectives: 1) legality including transparent, responsible, and democratic legislative process 2) legal certainty, 3) prevention of abuse of powers, 4) equality before the law and non-discrimination, 5) access to justice.⁵⁴ However, the states may have differences in their approaches to the features. The objectives of the Venice Commission serve as good guidelines for evaluation. However, also the states, in which the principle of rule of law is established, as a part of the constitution, may maintain traditions, which seems rather suspicious from the perspective of rule of law, especially if they are evaluated out of their constitutional context. As examples of that kind of traditions can be mentioned the nomination of the judges of the Federal Supreme Court of Switzerland on a political basis⁵⁵, or a highly respected parliamentary committee “The Constitutional Law Committee” (consisting of the members of parliament) assessing the constitutionality of law proposals (by parliament) in Finland⁵⁶. Hence, giving too much weight to individual elements of the checklist may not reveal much about the reality.

⁵³ *Stafford v. United Kingdom*, 28 May 2002, para. 63.

⁵⁴ Venice Commission: Rule of Law Checklist 2016, p. 8.

⁵⁵ See Suter 2014.

⁵⁶ See part IV of the dissertation.

The Finnish theory of rule of law originates from the German tradition. section 2.3 of the Constitution of Finland regulates the following: “The exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.” Section implies the ideas of popular sovereignty, representative democracy, parliamentary supremacy, legality, and equality. According to the Constitution of Finland, public power is based on law. Thus, the principle of rule of law limits the sovereignty of the people. The provision can also be viewed as a fundamental self-limitation of the state.⁵⁷ In the Finnish debate, the rule of law is often connected solely to the procedural questions and the principle of legal certainty, which reduces the scope of the concept. It is noteworthy that the concept of rule of law includes both a formal and a substantive dimension. The formal dimension emphasises the procedural questions, for example, the principle of legality, which requires compliance with the law. The substantive dimension of the principle is often considered ambiguous. It implies the description of the features of the legal order.⁵⁸ Understanding the rule of law only as a formal principle helps to avoid ambiguity and contradiction. However, it also leaves the definition of the concept partial.

2.2 Separation of powers

2.2.1 Defining the concept

In the tradition of Continental Europe, the institutional relationship between the legislature and the national courts is based on the principle of separation of powers. Defining the principle is, however, challenging since it is confusingly referred to by a variety of names: separation of powers, division of powers, or checks and balances.

⁵⁷ Jyränki 2000, p. 67. Mutanen 2015, p. 301.

⁵⁸ Craig 1997. See also Tuori 2007, p. 225–226 and Raz 1979, p. 210–229.

The separation of powers may be characterized as a “many-headed hydra” but at the same time, a central principle of liberal constitution⁵⁹. The doctrine of separation of powers originates in Aristotle's separation of states in “Politics” (Books VII and VIII) and Locke’s trisection of the powers in “Two Treaties of Government” (1698) in which he separates the legislative, executive, and federative power (foreign policy). The actual founding father of the doctrine of separation of powers is, however, considered to be Charles-Louis de Secondat de Montesquieu in his publication “The Spirit of Laws” (“De l’Esprit des Lois”, 1748). In “The Spirit of Laws”, Montesquieu develops his ideas on the separation of powers based on his observations of political institutions and aims to create the effects ensuring freedom on an institutional level.⁶⁰ For Locke and Montesquieu, the separation of powers was directed against tyranny and it served to protect individual freedom. In the United States, inspired by the ideas of Montesquieu, James Madison also developed a theory of separated powers in the “Federalist Papers”. Madison found it crucial to create various institutions that would keep each other in check and thus resist usurpation (“checks and balances”)⁶¹. However, Möller reminds us that these “classical ideas” on separation of powers have probably never been historically true and, therefore, should be treated with caution. Rather, they can be regarded as narratives petrified in a certain historical idea of statehood.⁶²

As with legal doctrines in general, also the doctrine of separation of powers consists of a set of interrelated legal concepts and principles, such as legislative, executive, and judicial powers. It also includes legal principles regarding the organisation of activities and the relationships between actors.⁶³ On a general level, the functions of separation of powers can be identified as either empowerment or limitation of government. The doctrine is commonly referred as a mechanism for

⁵⁹ Masterman 2011, p. 16.

⁶⁰ Montesquieu 1748.

⁶¹ Madison 2008, p. 256–260.

⁶² Möller 2013, p. 19.

⁶³ Tuori 2005, p. 1025.

restraining, limiting, dividing, or allocating governmental power. The “functional interpretation”, developed after the French Revolution, defines separation of powers as an instrument of organising public authority under conditions of democracy.⁶⁴ However, the constitutional traditions of separation of powers diverge in relation to its functions and meaning.

It is possible to identify at least three basic definitions for the doctrine of separation of powers. These are division, balancing and ban of usurpation. Division of power implies dividing the different functions of a state organisationally from one another. It aims to avoid the excessive concentrations of power in the hands of any one person or institution. The balancing involves a requirement of balance and a reciprocal check among the powers. Consequently, the exercise of power of an institution needs to be balanced and checked by the exercise of power by another institution. Ban on usurpation means that the separation of powers prescribes a prohibition against the exercise of power by an institution that has not been allocated this power. Möller finds that the ban on usurpation is the most important and the most complicated one of the three interpretations.⁶⁵ The strict separation of powers (“the pure form”) holds the complete separation of functions and personnel. However, complete separation can be problematic for multiple reasons.⁶⁶

Masterman notes that the idea of separation of powers is not fully adapted in any common law system. For instance, the United States’ form of separation of powers is connected to a system of checks and balances. The model emphasises the limitation of powers of the three branches of government. Moreover, each branch should be allocated a role in holding others to account. Instead of achieving a clear institutional or functional separation, the model is able to be described more as a mechanism for restraining governmental power.⁶⁷ Moreover, Möller argues that the legal status of the concept varies in different constitutional systems. However, these

⁶⁴ Möller 2013, p. 41–42.

⁶⁵ *Ibid.*, p. 49.

⁶⁶ Masterman 2011, p. 11–13. On the “pure form” see also Waldron 2013.

⁶⁷ *Ibid.*, p. 12–13.

systems do still have something in common: they all differentiate between three powers (legislative, executive, and judicial) and are all democracies.⁶⁸

However, it seems that at least general characteristics of governmental decision-making are possible. The task of the legislature is to make rules of general application for the governance and order in society. The administration of the state, in turn, is an assignment of the executive. Judiciary's task is an independent determination of law cases and the interpretation and application of the law. However, it is immediately evident that even such basic generalisations may be open to challenge⁶⁹. Barber argues that the enforceability of the distribution by the courts should be considered a priority. In cases of dispute or doubt, "the courts are entitled to take the final decision whether in practice a function is to be regarded as legislative, executive or judicial"⁷⁰. Masterman points out that, from the United Kingdom's perspective, it is difficult to reconcile such a position with the Diceyan conception of the sovereignty of Parliament⁷¹.

Möller reconstructs the traditional concept of the separation of powers as a theory of legitimate decision-making. He argues that mutual ignorance of political theory and constitutional scholarship comes at a price, and separation of powers could be the link bringing discussions closer together.⁷² For Möller, separation of powers merges the contradiction between individual and collective (democratic) self-determination into the form of law. In a legal model of separated powers, the task of the three branches is not the exercise of power, but the creation of law albeit in different forms shaped by the type of legitimacy they claim.⁷³ Möller also emphasises that the structure of the relationship between the branches is cyclic rather than hierarchical. Instead of balance or control, one might understand the relationship as

⁶⁸ Möller 2013, p. 50. On the characteristics in constitutional systems see Möller 2013, p. 17–40.

⁶⁹ Masterman 2011, p. 15.

⁷⁰ Barber 2001, p. 605.

⁷¹ Masterman 2011, p. 16.

⁷² Möller 2013 p. 2.

⁷³ *Ibid.*, p. 8 and p. 82–83. More precisely on the functions of each branch see Möller 2013, p. 84–101.

an instrument that allows all different parts of a system of separated powers to contribute to the process of law making in their own specific procedural way.⁷⁴

Möller identifies several problems in the separated powers in a constitutional state. The problems occur in the relationship between parliament and government⁷⁵ and in the constitutional review by courts, especially in the protection of fundamental rights and the position of constitutional courts⁷⁶. In addition, he finds it problematic to define the proper limits of judicial review of the administration⁷⁷. The institutional diversity of public institutions at the beginning of the 21st century has caused the dispersal of accountability, which has made it difficult to define political and legal responsibilities.⁷⁸ However, these abstract allocations reveal little about the contents of the doctrine⁷⁹.

2.2.2 Separation of powers in Finland and the United Kingdom

In Finland, the separation of powers is regulated in section 3 of the Constitution. According to the government proposal for the Constitution (HE 1/1998, p. 75), the foundations of section 3 lie in the traditional division of powers to legislative, executive, and judicial power. According to the provision:

“The legislative powers are exercised by the parliament, which shall also decide on State finances. The governmental powers are exercised by the president of the Republic and the Government, the members of the government shall have the confidence of the Parliament. The judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances.”

⁷⁴Möller 2013, p. 106 and p. 108.

⁷⁵Ibid., p. 111–126.

⁷⁶ Ibid, p. 126–142.

⁷⁷ Ibid, p. 142–148.

⁷⁸ Ibid, p. 232.

⁷⁹ Barber questions the relevance of discussions in abstract level by relying on the mastery of political theory over constitutions and the practical nature of constitutional drafting, see Barber 2001, p. 66.

Tuori has remarked that the contributions to the doctrine of separation of powers in the Finnish constitutional discussion are rare⁸⁰. However, it does not mean that the position of the doctrine as a part of the Finnish constitution would be clear. In fact, the situation may be described as quite the opposite. It is possible to observe a certain level of incommensurability between the factual powers of the governmental branches and the constitutional provision.⁸¹ The remark applies especially in relation to the convergence of the legislative and executive powers. This highlights the limited nature of a legal doctrine that focuses solely on the norms of competence: it is unable to properly include the institutional structures created by the interaction of constitutional provisions and factual practices. In fact, the situation in Finland resembles the institutional relationship between the executive and legislative branches in British constitutional tradition.⁸²

The question of the relevance of the doctrine of separation of powers in the British constitution is complex. A common view is that there is no separation of powers at all in the British constitution⁸³. Bagehot proposed that the idea of separated powers is incompatible with the idea of the parliamentary government⁸⁴. According to Bagehot, the British system of government is characterised by “the close union, the nearly complete fusion of the executive and legislative powers⁸⁵”. In addition, Dicey found the concept of separation of powers misleading⁸⁶. The debate on the relevance of the doctrine in the British constitution has been lively and the scope and the functions of the doctrine have been considered vague. In the British debate, the doctrine has been regarded as, in functional and institutional terms, flexible and, as a result, it has been identified as having little or no relevance⁸⁷. On

⁸⁰ Tuori 2005.

⁸¹ See also Minkinen 2015, p. 24.

⁸² Minkinen 2015, p. 25.

⁸³ Bogdanor 2009, p. 285.

⁸⁴ Bagehot 1867, p. 13–14.

⁸⁵ *Ibid.*, p. 12. Bogdanor disagrees with Bagehot and argues that borders exist albeit they may be blurred, see Bogdanor 2009, p. 285–287.

⁸⁶ Dicey 1915, p. 338.

⁸⁷ See discussion in Tomkins 2006.

the other hand, as Allison⁸⁸ suggests, some key characteristics of the constitution are able to be seen adhering to the requirement of a separation of governmental power. Thus, aspects of the British constitution reflect a separation of powers among the branches of government, both in a functional and an institutional sense⁸⁹. According to Bogdanor, there has always been at least a partial separation of powers in Britain even though the borders might be obscured. The doctrine of separation of powers can, thus, be characterized as Montesquieu proposed, as a doctrine of universal validity.⁹⁰ However, as Masterman suggests, we begin to face difficulty when we begin to clarify the motives of allocating a particular constitutional function to the branches⁹¹.

The role of parliament is central to any understanding of the constitution of the United Kingdom and, therefore, to understanding the position of the separation of powers within the constitution. Traditionally, the defining characteristic of the British system of government has been perceived as maintaining that parliament, not the constitution, is supreme. Thus, the parliamentary sovereignty both defines and delimits the doctrine of the separation of powers: Since the separation of powers as a constitutional principle must be normative rather than descriptive, suggesting that the separation of powers involves normative content, it means that parliamentary sovereignty is limited.⁹² Consequently, the status of the sovereignty doctrine in the constitution of the United Kingdom seems inevitable.

However, T.R.S. Allan argues that in the light of the right to a fair trial, separation of the judicial power from the power of the executive and legislature is the essential requirement of the rule of law.⁹³ Judicial independence could, therefore, be characterised as the one dimension of the separation of powers that is accepted in

⁸⁸ Allison 2007, p. 76.

⁸⁹ Masterman 2011, p. 19.

⁹⁰ Bogdanor 2009, p. 285–287.

⁹¹ Masterman 2011, p. 19.

⁹² Masterman 2009, p. 23–25.

⁹³ Allan 2001, p. 133.

the British constitution⁹⁴. Measures designed to protect the independent judicial process have a lengthy heritage in the development of the British constitution⁹⁵. In the often-quoted words of Lord Hewart CJ: “It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”⁹⁶. However, Masterman suggests that the importance of judicial independence is understood in terms of the independence of individual judges rather than in terms of division of power⁹⁷.

Notwithstanding the current position of the separation of powers, the British constitution appears to be at a turning point. According to Bogdanor, the era of constitutional reform has given new importance to the role of the separation of powers in the British constitution, especially through strengthening the position of the judiciary⁹⁸. Furthermore, Masterman argues that the recent development of the British constitution has been influenced by the perceived demands of the separation of powers⁹⁹. However, Bogdanor finds that the United Kingdom is in the process of becoming a constitutional state characterized by checks and balances between the governmental organs and with the separation of powers as a new bedrock of the constitution. In the process, the judiciary has a central role in the determination of individual rights and the scope of government action.¹⁰⁰

As demonstrated above, different variations of the doctrine of the separation of powers define the division of powers, or the principles behind it, in several ways. Therefore, to reach an accurate understanding, it is important to analyse the division of power together with the other key constitutional doctrines. In addition, according

⁹⁴ Hartley and Griffith 1981, p. 175. Also Stevens 2005, p. 79 and Lord Steyn 2002, p. 382–383.

⁹⁵ Already in The Magna Charta (1215) the independence of a court process was protected from the influence of prosecuting authority.

⁹⁶ R (McGarthy) v Sussex Justices (1924) 1 KB p. 250–260. The case concerned the impartiality and recusal of judges.

⁹⁷ Masterman 2011, p. 28.

⁹⁸ Bogdanor 2009, p. 287 in which he refers to the appointment of judges, the restriction of “double-membership” and the transformation of the highest court of appeal from the House of Lords to the Supreme Court. See more detailed in chapter six.

⁹⁹ Masterman 2011, p. 22.

¹⁰⁰ Bogdanor 2009, p. 289.

to Tuori, the doctrine and the discussion on the separation of powers must be approached historically. The contemporary doctrine of the separation of powers organises the functions of the modern state¹⁰¹ and the relationship between the governing institutions. Thus, the social context of the debate is completely different from the times of the classic works. Tuori reminds us that detaching the classic works from their context often makes the historical overviews unhistorical and, at the same time, irrelevant to contemporary debate.¹⁰²

2.3 Parliamentary sovereignty

The significance of the principle of parliamentary sovereignty is central to the study. The principle simply holds that the parliament, as a legislative body, has unlimited legislative authority and, consequently, is supreme over the other government institutions, including executive and judicial branches. According to the strict view of parliamentary sovereignty, the courts are not allowed to declare invalid the laws passed by the legislature. The principle of parliamentary sovereignty derives from the development of the concept of the sovereign as part of the social contract theory by the philosophers Thomas Hobbes, John Locke, and Jean-Jacques Rousseau in the Age of Enlightenment. Even today, parliamentary sovereignty is a key principle, for example, in parliamentary democracies such as the Nordic countries and the United Kingdom.

Parliamentary sovereignty forms a part of the foundation of the Finnish constitution. It is expressed in section 2.1 of the Constitution of Finland, which

¹⁰¹ According to Tuori, the connection of the doctrine of separation of powers to the modern state also manifests itself in the fact that the doctrine does not seem to be apt for structuring supranational organisations nor local government. Also Möller wonders whether a tripartite institutional structure of separation of powers can be found in the European Union and ends up arguing that European treaties do not explicitly recognise this distinction, see Möller 2013, p. 167.

¹⁰² Tuori 2005, p. 1026.

regulates the principle of popular sovereignty¹⁰³: “The powers of the state in Finland are vested in the people, who are represented by the Parliament.” Hence, the state powers belong to the people. Since the parliament alone represents the sovereign people, it is supreme over the other state bodies. In addition to the principle of popular sovereignty, the primacy of the parliament is established in the principle of parliamentarism: according to section 3 of the Constitution, the members of the government shall have the confidence of the parliament.¹⁰⁴ As noted in the previous subchapter, the parliament holds legislative power. Consequently, it also holds the competence-competence, which implies the power to decide on the powers of all state bodies, including itself, and its transition. The competence-competence can be characterized as the core of the internal sovereignty of the state.¹⁰⁵

In the British constitutional tradition, parliamentary sovereignty has a fundamental status. It is based on the works of A.V. Dicey (1885). According to Dicey, parliamentary sovereignty is the most significant constitutional principle and, thus, the dominant characteristics of the British political institutions form a legal point of view¹⁰⁶. It is noteworthy that in the United Kingdom, parliament consists of three parts – the Crown, the House of Lords, and the House of Commons. Dicey’s traditional definition of parliamentary sovereignty prescribes that: “Parliament has...the right to make or unmake any law whatever...no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament¹⁰⁷”. It is possible to identify three aspects in Dicey’s definition. First, parliament is the supreme legislature and thus, is allowed to enact any law it wishes. Second, the supremacy of legislation implies that neither the courts nor the executive is able to question the legislation. Third, the parliament is not able

¹⁰³ To the concept of popular sovereignty is also possible refer with the concepts as representative democracy or *pouvoir constituant*, see Puumalainen 2018, p. 29.

¹⁰⁴ Jyränki 2000, p. 90–91. Also contrasting views have been presented, see Minkkinen 2015, p. 24–27.

¹⁰⁵ *Ibid.*, p. 54 and p. 89. Mutanen 2015, p. 301.

¹⁰⁶ Dicey 1915, p. 36.

¹⁰⁷ *Ibid.*, p. 39–40

to bind its successors or, alternatively, be bound by its predecessors. The third aspect is the most interesting. It also indicates the complexity of the doctrine, which has been the subject of many theoretical discussions since the Age of Enlightenment¹⁰⁸. Evidently, another interpretation of the third aspect holds that if parliament can do anything, then it can also bind itself¹⁰⁹.

As mentioned, the multiple constitutional reforms since the late 20th century have fundamentally affected the balance between the main institutions of government in the United Kingdom, which has raised a question of the proper position of parliamentary sovereignty in the contemporary constitutional frameworks. The Diceyan constitution, which emphasised the parliamentary sovereignty as the basic rule of the British legal order, is but a shadow of its former self. Naturally, there is no consensus on whether Dicey's interpretation has been explicitly abandoned. However, Bogdanor argues that the idea of parliamentary sovereignty as a bedrock of the British constitution is gradually being replaced by the sovereignty of the constitution.¹¹⁰

2.4 Principle of democracy

Literally, democracy means the power (kratos) of the people (demos). Democracy is a political system in which decisions of the community are based on the will of the people. Currently democracy is commonly understood as a decision-making system, as a representative democracy, in which the governmental institutions are solely impartial executors of the will of the people.¹¹¹ However, democracy as a legal

¹⁰⁸ See Jennings 1933. Also the relevance of the principle of parliamentary sovereignty to systems of parliamentary government has questioned since the idea of an institution as the sovereign instead of an individual is not unproblematic. See Bogdanor 2009, p. 280–281.

¹⁰⁹ Bogdanor 2009, p. 281.

¹¹⁰ *Ibid.*, p. 281–285.

¹¹¹ Setälä 2003, p. 18.

principle is not that unambiguous. Aarnio points out that the concept of the will of the people is controversial. In democratic theory, however, it is approached as a political concept. The will of the people can be defined as the result of the democratic process, influenced by the opinions of individuals and groups. In addition, the will of the people implements certain democratic values, such as justice in society. However, Aarnio finds the arguments insignificant in the context of the relationship between democracy and the judiciary. Thus, he divides the concept of democracy into the form and the content.

The characteristics of formal democracy include the division of state power into the legislative, executive, and judicial powers, the choice of political decision-making bodies by free elections and the right to vote. Formal democracy is achieved when the decision-making process follows a majority principle supplemented by the mechanisms of minority protection. The substantive elements of democracy relate to the degree to which certain fundamental rights are reached, legal certainty, the substantive control of decisions and the accountability of decision-makers. In other words, substantive democracy emphasises the legitimacy of the results produced by the political system.¹¹²

The distinction between communal (*yhteisöllinen*), liberal and deliberative democracy may also be included in the definition of democracy, either as form or as content. Both communal and liberal democracy emphasise the substantive functions of democracy, whereas deliberative democracy finds procedural features more important¹¹³. Deliberative democracy regards fundamental rights and democracy as preconditions for one another: they both require and enable each other.¹¹⁴ Nevertheless, tensions may arise between fundamental rights and democracy in concrete legal practice. The tension appears in national solutions to protect

¹¹² Aarnio 1997, p. 419–422.

¹¹³ Lavapuro 2010b, p. 130. On deliberative democracy see Habermas 1996 and for a critical view, see Mouffe 1999. On the different approaches to democracy in the relationship between the legislature and courts see Lavapuro 2010b, p. 130–136. See also Setälä 2003, p. 61–64.

¹¹⁴ See also Tuori 2000, p. 105.

fundamental rights against infringements of majority decisions of legislative authority¹¹⁵.

According to Tuori, interpreting the empowerment of the judiciary as a threat to democracy is based on a simplified concept of democracy, which manifests itself as an appreciation of majority democracy and the supremacy of parliament¹¹⁶. In addition, democracy can also be approached from a multi-layered perspective of law. At the law's surface, democracy appears as a constitutional provision that regulates the autonomy of the members of society and the elected legislative body. At the level of legal culture, democracy is concretised as a legal principle. In the deep structure of law, democracy is connected to the principle of discourse, through which it is able to bind its legitimacy to the acceptability of open, free, and equal discussions.¹¹⁷ Thus, the definition of democracy is not bound to a written constitution. Instead, it is constructed on the deeper levels of law.

¹¹⁵ Lavapuro 2010b, p. 85–86 and also Scheinin 1991, p. 338.

¹¹⁶ Tuori 2000, p. 251–252. See also Husa 2004, p. 131.

¹¹⁷ *Ibid.*, p. 252.

PART II: CONSTITUTIONAL CHANGE AND CONSTITUTIONAL REVIEW

3 European constitutional development as the context for a national institutional setting

3.1 Constitutional changes behind the development

In this part, I examine the influence of constitutional change and development as the background to and context of the dissertation. In recent decades, societal change in Europe has been rapid. The development of European integration, the reinforcing of the European Union's constitutional dimension, the new position of human rights treaties – especially the European Convention on Human Rights¹¹⁸ of the Council of Europe and the human rights treaties of the United Nations¹¹⁹ – and the increased importance of the case-law of the European supranational courts at a national level all reflect the profound transition and evolution that influence the present understanding of constitution on both a national and a European level. The development has led to the changes to constitutional arrangements in national legal orders, especially in terms of the empowerment of national courts, which is a crucial factor when analysing a national institutional setting from a constitutional angle. Based on the development, Glenn has suggested that Europeanisation has bound the national legal orders to an unintended modification of legal culture¹²⁰. From this

¹¹⁸ Convention for the Protection of Human Rights and Fundamental Freedoms, no. 5; 213 U.N.T.S. 221, 4.11. 1950.

¹¹⁹ See chapter 3.3.3 of the dissertation.

¹²⁰ Glenn 2014, p. 291.

dissertation's point of view, this modification forms the basis of the examination. However, also critical views have been presented. For example Hirschl has criticised the development and the expansion of judicial power and described it as a transition to juristocracy. Hirschl describes the judicial empowerment through constitutionalisation as a by-product of a strategic interplay between political, economic, and judicial elites who advocate the constitutionalisation of rights and judicial review to protect their threatened power.¹²¹

The second part of the study includes three chapters. In the first chapter, I explore constitutional pluralism, which serves as a background defining both the context and the viewpoint of the dissertation as a whole. I present the different conceptions of constitutional pluralism by the leading authors of the discussion. I focus in particular on the question of ultimate authority. In other words, I question who should have the final say in situations wherein the interpretations of the institutions conflict. As I will indicate, the concept of constitutional pluralism is controversial. Thus, because of the importance of the concept in this dissertation, it is crucial to express my understanding of constitutional pluralism and indicate the basis of the interpretation adopted. Furthermore, in this chapter, I concretise the evolution of the pluralist constitutional context by examining the development of European integration¹²² and the implications of its constitutional development. In addition, I examine the evolution from the human rights' point of view. In the second chapter, I move towards constitutional institutional settings and examine the different models of constitutional review. Finally, the last chapter includes an analysis of the theoretical and normative framework of the different forms of constitutional review.

As pointed out in the previous chapters, the concept of the constitution is typically connected to a nation-state. Thus, some commentators have reacted with

¹²¹ See Hirsch 2004. On the alliance of the elites see p.43.

¹²² The aim of the analysis is not to be comprehensive but to provide an overview and background information.

scepticism to the idea that an international organisation such as the European Union would have a constitution in the real sense of the word. This kind of approach is based on the idea that a state can be the only possible source of constitutional authority, and the ultimate authority over the state's territory should remain with the state. The foundation of the claim is based on arguments such as a call for the ethnocentric demos or structural preconditions of democracy. On the other hand, it is also argued that international law remains the only appropriate legal register within which we can legitimately conceive of European integration.

However, contradicting views have also been presented. According to these arguments, Europe has been transformed into a hierarchical constitutional order. The approach can be labelled as “European constitutional monism” and it explains that, as the jurisprudence of the European Court of Justice (ECJ)¹²³, the foundation of Europe's constitutional authority is entirely independent of the constitutional authority of the Member States and ought to hierarchically override it.¹²⁴ For instance, according to Barents, the validity of the law of the European Community – present Union – in the Member States does not depend on the Member State's national legal order because of the autonomy of the law of the Community, which is based on the establishment treaty¹²⁵. On the other hand, Jääskinen argues that Barents' view is quite common but incorrect. According to Jääskinen, the legal order of the European Union is normative, and it is based on, through ratification of the treaty, the norms of competence of the national constitutions. Therefore, he defines Barents' angle as the internal approach of the EU¹²⁶. However, there are, naturally, variants between both monist approaches, but the main idea appears to be a hierarchical and monist constitutional order.

¹²³ In the case *Van Gend en Loos* (26/62) the foundation treaty is characterised as an agreement between the peoples of Europe, that creates a direct relationship between them and the EU law.

¹²⁴ Jaklic 2014, p. 1–4.

¹²⁵ Barents 2004, p. 239–240.

¹²⁶ Jääskinen 2008, p. 141–142.

3.2 Different approaches to constitutional pluralism

In recent decades, until the 2010-century, there was wide interest in constitutional pluralism in the field of European constitutional law. The discussion was perpetual and multiple rival interpretations were presented. For a moment, it appeared that constitutional pluralism had become the new paradigm representing the most informative description of the post-national constitutional order, and relationships between the constitutional orders in Europe¹²⁷. During the past decade, with the rise of populist and nationalist tones in the European political sphere, the relevance of a common constitutional order of Europe has been challenged and the contributions in favour of national sovereignty increased as, for instance, the developments in Poland and Hungary demonstrate. Constitutional pluralism, as a theory of the post-sovereign European states, has been questioned. However, despite the censoring voices, I still regard constitutional pluralism as a relevant means to understand the constitutional order in present-day Europe. Especially as a result of its gradual sedimentation from the surface of law to the subsurfaces¹²⁸. Nevertheless, constitutional pluralism is a contested branch and, despite its profound importance, a common understanding of the definition of the concept does not exist: the leading authors have each have their own approach. In addition, because of the lack of a coherent definition, each approach identifies the ultimate values underlying the particular vision. In the following chapters, I examine the most popular approaches to constitutional pluralism. The examination is broadly based on Klemen Jaklic's monography, "Constitutional Pluralism in the EU" (2014).

Neil MacCormick was the first to argue that the idea of constitutional sovereignty (monism) was obsolete. In his article "Beyond the Sovereign State" (1993), he

¹²⁷ Also contrasting views have been presented. For instance Hopgood (2013) suggests an idea of a renewed sovereignty and the stagnation of universal norms on human rights. See also Weiler's view in De Búrca and Weiler (Eds.) 2012, p. 14.

¹²⁸ See Tuori 2000, p. 219.

explains that the development of European integration has created circumstances wherein we should no longer accept that there is one ultimate constitutional authority in each state's territory or that it should be replaced by the European constitution. Instead, we should see both national and European constitutional authority as self-standing and coequal and recognize that an ultimate authority no longer exists.¹²⁹ MacCormick's article initiated a rival debate among the experts of constitutional law and soon, a common label "constitutional pluralism" was created. The main core of the discussion was that the whole assumed basic framework of constitutional discussion needed to be changed: the old monist approach to constitutional discussion should be replaced with the pluralist framework. It is relevant to recognise that the pluralist approach does not necessarily change the topics under discussion on constitutional law. Instead, it profoundly restructures the approach to the old topics and adds new dimensions to the discussion.¹³⁰

MacCormick's constitutional pluralism can be described as a theoretical, foundational discussion. It analyses the relationship between constitutional orders (legal and political) at a deep theoretical level.¹³¹ MacCormick's pluralism is a theoretical discussion about the basic foundations of heterarchically – as opposed to hierarchically – related constitutional authorities and their sources. In MacCormick's theory, the authority is understood in a political and a legal sense. Heterarchical coexistence at the foundational level is understood as the substantive territorial overlap.¹³² The central target of MacCormick's critique is sovereignty. He uses the concept of "sovereignty" instead of ultimate authority while examining the relationship between national law and EU law. According to MacCormick, no one is still able to claim ultimate authority. Instead, the relationship between a national and EU law must be outlined according to the presumption that both constitutions

¹²⁹ MacCormick 1993, p 8.

¹³⁰ Jaklic 2014, p. 5–6.

¹³¹ Ibid., p. 30.

¹³² MacCormick 1993, p. 8.

confess each other's validity albeit on different grounds. This implies that neither can acknowledge the other as the foundation of its own binding force.¹³³

In his early writings on constitutional pluralism, MacCormick argues that interpretative competence-competence is a characteristic of the highest court of each normative system. He calls that kind of approach “radical pluralism”. According to this view, it is a matter for political judgement to resolve the potential conflicts between the normative systems.¹³⁴ Jääskinen also considers radical pluralism as the most justifiable way to understand the relationship between national and EU law as legal orders. From that point of view, it is, according to Jääskinen, paradoxical that the legal orders are applied in a parallel manner because it contextualises the concept of legal order.¹³⁵

However, in his later writings, MacCormick introduced a concept of “pluralism under international law”. This version of pluralism also recognizes two sites of constitutional authority in Europe that are independent but interactive constitutional orders. Thus, they are heterarchical instead of hierarchical. This approach also understands the highest interpretive power as a matter of each legal order but the difference in radical pluralism is that, according to pluralism under international law, the duties of international law is to set conditions for and serve as a device to resolve conflicts between the orders without destroying the heterarchical nature of pluralism.¹³⁶ Thus, MacCormick's “pluralism under international law” is a unique solution within the theme of ultimate authority.

I present another leading author, Neil Walker. Walker describes his conception of constitutional pluralism as epistemic constitutional pluralism¹³⁷. His primary interest lies in the procedural questions. To him, constitutional pluralism is already established, and he is primarily interested in the right manner or method through

¹³³MacCormick 1999, p. 104

¹³⁴MacCormick 1995, p. 264–265.

¹³⁵Jääskinen 2008, p. 146.

¹³⁶MacCormick 1998, p. 529.

¹³⁷Walker 2002, p. 339.

which the constitutional discussion should take place. In other words, he focuses on the right form of constitutional discussion in Europe. Walker is interested in what can legitimately be argued as constituting the concept of constitutionalism. He also asks how any institution should or should not determine its decisions. On the other hand, Walker avoids the question of the appropriate content of the discussion. According to Walker, constitutional pluralism cannot simply concern a particular conception of the nature of the legal sphere but must also address the political dynamics and infrastructure that sustain the legal sphere. Thus, for Walker, constitutional pluralism represents a matter of both political and legal theory.¹³⁸

Walker's epistemic pluralism implies a theoretical premise according to which the EU and the constitutional systems of Member States are autonomously rooted and coexistent over shared territorial space. According to Walker's approach, heterarchical coexistence at the foundational level, thus, is procedurally understood.¹³⁹ At the core of Walker's pluralism is the endorsement of the axiom that the different constitutional authority and knowledge claims of the different sites claiming constitutional status in Europe should be seen as epistemically incommensurable, as they have their own rules of recognition, transition and adjudication.¹⁴⁰ Walker argues that different constitutional orders should be seen as self-referential, as plausible only from a system's own internal episteme. According to Walker, there is no common external epistemic scale on which the plausibility of these conflicting claims could be measured and assessed. Therefore, Walker proposes the adoption of an epistemically pluralist stance towards the validity of both claims. This means that we should not try to reconcile one with the other through some external balancing. Instead, we should recognize the absolute validity of both claims as measured from their internal perspectives. Walker argues that there are no objective, epistemic criteria for assessing the validity of both decision-making

¹³⁸Walker 2016, p. 337.

¹³⁹Walker 2002, 347 and Jaklic 2014, p. 37–38.

¹⁴⁰Walker 2003, p. 28.

authority claims. Thus, any external balancing would impose reasons that neither could agree upon.¹⁴¹

According to Jaklic the heterarchy of Walker's epistemic pluralism represents the normatively superior version of constitutionalism for Europe. Walker's epistemic pluralism involves two minimal procedural rules: At the second-order level of discussion, actors need to adopt the axiom that none of their conflicting claims could be understood as being right in the objective, inter-systemic sense. At the first-order level is a suggestion to negotiate substantive solutions between the actors.¹⁴²

According to Walker, under epistemic pluralism, the question of ultimate authority remains externally unresolved. Neither of the legal orders has the final say in deciding constitutional disputes between constitutional orders. In that sense, pluralism and ultimate authority seem to be incommensurable. In Walker's theory, any solution whereby final decision-making authority is exercised by any institution or another legal order, for example, an institution of international law, would be monist¹⁴³. Thus, according to Walker, we have pluralism only when the institutional question is left open.

As Walker's constitutional pluralism focused on the procedural side of the question, Joseph Weiler emphasises the substance of constitutional discussion. His "substantive constitutional pluralism"¹⁴⁴ focuses on the meaning of constitutional pluralism and the right content of constitutional discussion. At the centre of Weiler's theory is substantive reconciliation, which aims to improve the understanding of constitutional authority in pluralist terms.

Weiler embraces an abstract idea of heterarchy, as opposed to a hierarchy, of constitutional sources at the foundational level. For Weiler, the heterarchy of sources of constitutional authority implies the existence of two or more sources of

¹⁴¹Walker 2002, p. 338.

¹⁴²Jaklic 2014, p. 75.

¹⁴³In his recent writings Walker prefers to use the term "the particularist approach" instead of term monism, which he finds confusing. See Walker 2016, p. 337.

¹⁴⁴Jaklic 2014, p. 69.

constitutional authority. Neither is ultimately superior, but both are equally powerful and coexist at the same level with the others. This proposition includes the idea of the reconciliation of the opposing substantive values contained in each of the opposing monist sources. The outcome should represent neither of the monist sources but create a particular kind of mutual recognition that is substantially elaborated.¹⁴⁵

According to Weiler, neither of the different kinds of ultimate sources of constitutional authority should prevail and ultimately subsume the other. Instead, they need to be understood as coequal and mutually taming sources of constitutional authority. Weiler terms this rule “a principle of constitutional tolerance” as an alternative to both monist strategies. According to this principle, the sources of constitutional authority in Europe are heterarchically related and neither of them dominates the other.¹⁴⁶

The substantive content of Weiler’s “constitutional tolerance” is formed from the foundational substantive components of the European constitution. They include three ethical principles that point in specific substantive directions while excluding others. The ethical principles represent the meaning of Weiler’s constitutional tolerance and are balanced and mutually tamed. The principles include nationhood as belongingness, nationhood as originality and, also, nationality-associated humility.¹⁴⁷ In addition to the substantive components, Weiler’s approach recognizes the general interpretive rule. Thus, both European Union and member-state officials should use the particular normative spirit of constitutional tolerance in their further reconciliation through their everyday decision-making.¹⁴⁸

As regards the ultimate authority, Weiler proposes the creation of a special Constitutional Council. According to Weiler, a new institution would be necessary

¹⁴⁵Weiler 1999, p. 150.

¹⁴⁶Ibid., p. 61–62.

¹⁴⁷Ibid., p. 338-

¹⁴⁸Ibid., p. 21-22.

because there is a need to avoid both the national and the EU unilateral diktat as regards the authority issue. Weiler remarks that the special Constitutional Council would only have jurisdiction over questions of competence. He also proposes that the Council be composed in a way that recognizes the equal status of the two orders.¹⁴⁹

The next scholar Miguel Poiares Maduro focuses on the question of how pluralism might operate in practice. Thus, his orientation is rather practical. Maduro focuses on different types of constitutional interpretation in European constitutional orders and different ways to define participation in such orders under the new pluralist frameworks. Maduro's approach can be characterized as interpretive and participative pluralism¹⁵⁰.

According to Maduro, diverse voices are raised by different constitutional actors in Europe, not only relating to ultimate authority but also constitutional issues in general¹⁵¹. Maduro argues that the different voices should not be understood as in a hierarchical relationship. Instead, Maduro identifies the need to find a specific way to control the non-hierarchical relationship between the various constitutional actors that gains from the diversity without, at the same time, generating conflicts that could destroy the legal orders and the values they nourish. He recalls a common European legal order that integrates different constitutional sources in a specific, non-hierarchical way.¹⁵²

Maduro's constitutional pluralism consists of two main dimensions. These are the specific framework principles and a specific participation dimension to constitutional order. These two dimensions are linked to each other in a particular way. According to Jaklic's interpretation, they are complementary and should, thus, be considered together as representing Maduro's conception.¹⁵³ Maduro's

¹⁴⁹Weiler 1997, p. 156.

¹⁵⁰Jaklic 2014, p. 102–103.

¹⁵¹Maduro 2003, p. 501.

¹⁵²Ibid., p. 522–524.

¹⁵³Jaklic 2014, p. 103.

framework principles determine the common bias for discussion among the various constitutional actors in Europe. These principles function as rules of interpretation¹⁵⁴. According to the principles, 1) the relationship between constitutional actors in Europe must be understood in particular pluralist terms. Every constitutional order must respect the identity of the other legal orders¹⁵⁵ and 2) The constitutional actors engaging in the process of interpretation must reason and justify their decisions in the context of a coherent and integrated legal order¹⁵⁶. Maduro remarks that even in a plural situation of competing constitutional claims, a coherent legal order is possible if all the participants are committed to it. Maduro also notes that the coherence must be assured both vertically and horizontally.¹⁵⁷

In addition to framework principles, Maduro's approach includes the participation dimension that concerns improvements to the democratic process. According to Maduro, the dimension aims to enhance participation and representation through the common constitutional discussion. Maduro finds that dimension relevant in the transnational sphere, between national democracies and even in an internal national context.

As regards the ultimate authority, Maduro proposes to keep the issue open. According to him, the traditional understanding of constitutionalism concentrates power in a final authority through its hierarchical organisation, and that is the reason why fulfilling the normative goal of mutual self-limitations and adjustments between systems has failed. According to Maduro, in the European constitutional context, the failure can be remedied.¹⁵⁸ However, while it appears that Maduro prefers to leave the question of authority open, he, nevertheless, suggests a form of hierarchy. Maduro, thus, proposes that the final authority be divided according to the nature of

¹⁵⁴Maduro 2003, p. 524.

¹⁵⁵Ibid., p. 526.

¹⁵⁶Ibid., p. 533.

¹⁵⁷Ibid., p. 527–528.

¹⁵⁸Ibid., p. 522–523.

the conflict¹⁵⁹. According to Jaklic, the most relevant interpretation of Maduro's conflicting proposals is to recognize that the question of ultimate authority should not be left open in the conventional sense of the term as, for instance, Walker does but in a different and more limited sense following Maduro's division based on the nature of the conflict.¹⁶⁰

The final of the leading authors examined is Mattias Kumm. Contrary to other pluralists already examined, Kumm constructs the concept of pluralism almost exclusively in the sense of the institutional question of the theme. Kumm's pluralism concentrates on the questions of who, the national or the European institutions, should have the authority to decide in the cases of conflict in the first place and who should, on the other hand, have the final authority in the areas where interpretations of the institutions conflict. The concept of pluralism seems to have a different primary meaning for Kumm than for the others. Because of the importance of the institutional dimension, Kumm's pluralism is characterized as institutional pluralism¹⁶¹.

Kumm's conception of constitutional pluralism is based on three sets of partially conflicting values. These values provide the normative framework for the assessment of the relationship between the ECJ and national courts. Kumm labels the three sets of values as the principle of expanding the rule of law, the principle of democratic legitimacy and the principle of constitutional fit.¹⁶² Kumm's theory of constitutional pluralism lies in two stages. The first stage concerns the question of who should have the authority to decide on the constitutionality of EU law. In that stage, Kumm focuses on questions of jurisdiction and competence.¹⁶³ The second stage, on the other hand, concerns the question of the final authority in situations where two courts with jurisdiction reach different outcomes. Jaklic argues that the second stage

¹⁵⁹Maduro 2003, p. 533–534.

¹⁶⁰Jaklic 2014, p. 118–119.

¹⁶¹Ibid., p. 147.

¹⁶²Kumm 1999, p. 375–376.

¹⁶³Ibid., p. 377–379.

of Kumm's pluralism represents, in fact, the foundational level of the discussion¹⁶⁴. To solve the problem of final authority, Kumm has created a two-phased test called "the most appropriate standard of review".¹⁶⁵ Thus, in a way, Kumm also leaves the question of the final authority open, but this applies only in the narrower sense of the term. This means that neither the national institutions nor the European institutions have the final authority, which supports the notion of the supreme law of the land. Instead, Kumm's approach assumes its own division between both institutions and leaves the question open in that sense. Kumm's approach represents a particular conception within the narrower, institutional discussion on constitutional pluralism and it is, in this view, understood to represent pluralism primarily as opposed to monism.

From this dissertation's perspective, one of the most interesting aspects of the different approaches is how they relate to the question of the institutional dimension of the subject. In other words, I am referring to the question of the ultimate power. It is evident that, also in that sphere, the conceptions vary significantly. Walker's pluralism leaves the institutional question open, as does Maduro's, even if he does that in a narrower sense of the term. MacCormick, after his early writings on radical pluralism, argues that the highest interpretive power is a matter of each legal order but according to his pluralism under international law, the obligations of international law both set conditions to and serve as a device for resolving conflicts between the legal orders. Weiler, on his behalf, proposes a special Constitutional Council that would have jurisdiction only over issues of competence to avoid either a national or an EU unilateral diktat. Kumm's concept of pluralism is constructed almost exclusively in the sense of this institutional question of the theme. Furthermore, Kumm prefers to leave the question of final authority open but he does that in a narrower sense than MacCormick or Walker and, instead, suggests a unique division of final authority between both institutions.

¹⁶⁴Jaklic 2014, p. 129.

¹⁶⁵Kumm 1999, 380–383.

As illustrated above, the leading contributors approach the discussion from different angles. MacCormick's pluralism presents deep foundations of the system's theory. It can be argued that it is an independent and separate discussion. Walker's pluralism also includes foundational dimensions, but, after all, it focuses on the procedural side of the theme. Maduro's pluralism is also procedurally focused, and it has the most practical orientation to the subject of all. Weiler's pluralism focuses on the substantial side while Kumm concentrates on the institutional question. It is obvious that, on the grounds of the previous discussions, it is not possible to arrive at only one definition of constitutional pluralism. Instead, the concept includes different dimensions. The discussions differ from each other for both the subject matter and the point of view. Thus, the evident question here is: are they too different? Is it possible to determine any similarities between the approaches under the label? Is constitutional pluralism a branch, after all? And, if not, what is the option?

Nevertheless, even based on this brief examination, it is evident that the presented approaches under the label of constitutional pluralism are significantly different. It is essential to note that in important aspects, the pluralists do not even deal with the same subject matter or discussion. Instead, they approach the same question from different positions, and if their proposals were evaluated from each other's perspectives, the proposals would not be recognized as pluralism. Jaklic points out that these different ways to understand the concept are quite dangerous because it often leads to confusion and mistaken comparisons.¹⁶⁶

Jaklic approaches the question of whether constitutional pluralism is a branch from a theoretical perspective. He points out that MacCormick's theoretical discussion on pluralism encompasses the broadest subject matter. All approaches share common ground with MacCormick, but much less with each other. From that point of view, MacCormick's contribution could be considered the theoretical basis

¹⁶⁶Jaklic 2014, p. 163–164.

from which the other more focused conceptions of pluralism originate. Still, Jaklic does not approve this unconditionally. After an extensive analysis of the differences between the theories and some critical comments¹⁶⁷ also presented, Jaklic reaches a result. According to him, all the different approaches can be regarded as meta-constitutional theories, each of them identifying ultimate values that underlie each vision of pluralism¹⁶⁸. Thus, it can be argued that even if there are differences between the theories, they still have more in common with each other than either of them has with constitutional monism.

From the research's point of view, the value of the examination of the different approaches to the pluralism lies in recognising the European constitutional order as a heterarchical order that consists of several co-existing sources of constitutional regulation shared in all the approaches. However, it is noteworthy that all these theories are almost 20 years old. Consequently, the legal sphere has evolved and through the sedimentation, the pluralist approach to the constitution has taken its place as the determinant element of the constitution. On these bases, from an institutional point of view, in the discussions on deference, there is often a conflict between the international legislation and the national, nation-state-based understanding of the constitutional concepts that define the institutional relationship between the governmental branches. Thus, I find Weiler's proposal for abandoning the idea of understanding the constitutional authority in monist terms highly important. That is to say, all constitutional orders speak different languages and approach the question of pluralism from their own perspectives. In my opinion, the challenge is that all the approaches are based on monist premises and attempt to reach a solution to the institutional question on that basis. Instead, on the national level, there is a vital need for a recognition of the common grammar that all national

¹⁶⁷ The critical comments include claims that despite of pluralist and heterarchical discussions constitutional pluralism is eventually traditional monism, that constitutional pluralism defeats the value of integrity and that it fails to provide any clear idea or content for pluralism due to the tangled assumptions it is based on. See Jaklic 2014.

¹⁶⁸ Jaklic 2014, p. 168 and p. 231.

constitutions share. Despite, I do not suggest that all countries should begin to speak the same language. Rather, there is a need for an understanding which recognizes the shared pluralistic premises, but which would, at the same time, value and respect the individual legal orders originating from it.

3.3 European constitutional development

3.3.1 European integration in the EU framework

"World peace cannot be safeguarded without the making of creative efforts proportionate to the dangers which threaten it¹⁶⁹."

The foundations of the powers and competences of the European Union and its relations to the Member States are regulated in the EU treaties. The treaty structure is somewhat complicated and includes a series of founding treaties (or basic treaties) and their amending treaties, with the Treaty of Lisbon (66 –67/2009) as the most recent. The legal basis of the Union was constituted in the Treaties of Rome and the Maastricht Treaty by first establishing the European Economic Community and then, a few decades later, the European Union. I begin this chapter by presenting a summary of the integration of the EU during the past 70 years and by examining the present situation of the integration process. Then I examine the constitutional development of the Union. The constitutional dimension of the EU is a question that has deeply divided scholars' opinions. Even the question of its existence has been a subject of numerous debates. In these discussions, the main themes have centred on whether the EU already has a constitution, whether there should be one and what is the constitutional status of the EU's founding treaties: are they only

¹⁶⁹ Schuman, Robert: "The Schuman Declaration" 9 May 1950.

“treaties”? These discussions have been strongly connected to a more fundamental question of the nature and future of the EU. In the last chapter, I examine the constitutional nature of international human rights treaties and their relationship with the constitutional dimension of the EU. The purpose of the examinations is to identify the complexity of the European constitutional sphere modified during the past decades. In that way, we can indicate the profound change in the context in which the relationship of the national legislature and the national courts is analysed.

In 1950, the shadows of World War II hung over Europe, and the European governments were willing to prevent another war. They concluded that pooling their coal and steel industry, the most important materials for the armaments industry, would make war between France and Germany materially impossible. The idea was presented by the French foreign minister Robert Schuman on 9 May 1950, which is now regarded as the birth date of the European Union. In 1951, the European Coal and Steel Community (ECSC) was founded by “the six” founder states: France, West Germany, Italy, the Netherlands, Belgium and Luxembourg and it formed the basis for the future cooperation between European states on economic matters. Since then, economic cooperation and integration have been located at the core of the European process. However, at the core of the foundation, the ECSC aspired to maintain peace and solidarity among the nations of Europe, thus, the complete integration of Europe may be regarded as a major European peace project.

A few years later, in 1957, the economic cooperation within the ECSC extended by establishing the European Economic Community (EEC)¹⁷⁰, or “Common Market” and the European Atomic Energy Community (Euratom)¹⁷¹. The EEC aimed to coordinate the financial policies of the Member States. An important milestone in the realization of this objective took place in 1986, when the “Single Market” and the Customs Union were created by signing the Single European Act

¹⁷⁰ The Treaty Establishing the European Economic Community (25.3.1957, 298 UNTS 3, 4 Eur. Y.B. 412) also referred to as the Treaty of Rome.

¹⁷¹ The Treaty Establishing the European Atomic Energy Community (25.3.1957, 298 UNTS 259, 5 Eur. Y.B. 454)

(SEA)¹⁷², the first major amending treaty that altered the founding treaties. After the ratification process, the Single European Act came into force in 1987 and bound the Member States to implement the single-market program by the end of 1992. In 1993, the Single Market reached its culmination with the 'four freedoms' of movement of goods, services, persons, and capital. In addition to the Internal Market project, economic integration was furthered by the EMU (The Economic and Monetary Union) project, which was implemented in three phases from 1990 to 2002¹⁷³.

The political transformation in Eastern Europe in the late '80s and early '90s, the collapse of the former communist states, and the unification of Germany symbolize a major change in the history of European integration. The development of the European Political Union (EPU) was considered necessary by the Member States and the Community institutions. The Political Union was created by the Treaty of Maastricht¹⁷⁴ ("Treaty on European Union") in 1993 and it was based on the so-called three-pillar model. Since the development of the political Union, it was no longer meaningful to refer only to the economic community, thus, the European Economic Community was transformed into a European Community. The new community had a legal personality. The political Union also included EU citizenship. After the Maastricht Treaty, the role of the European Parliament was formally ratified by signing the Treaty of Amsterdam¹⁷⁵ in 1999.

At the beginning of the new millennium, the EU institutions were reformed by the Treaty of Nice¹⁷⁶ in 2001. The reformation prepared the EU for the important enlargements to the east and south in 2004 and 2007. In addition, at the Nice Summit, the Charter of Fundamental Rights of the European Union was signed as a solemn declaration. The precise legal status of the Charter was, however, left open¹⁷⁷.

¹⁷² OJ L 169, 29.6.1987.

¹⁷³ See Raitio 2016, p. 31–33.

¹⁷⁴ OJ C 191, 29.7.1992.

¹⁷⁵ OJ C 340, 10.11.1997.

¹⁷⁶ OJ C 80, 10.3.2001.

¹⁷⁷ On the evolution of the fundamental rights in the EU see, e.g., Craig 2010, p. 193–245.

After the Nice Summit, discussions began on the future of the Union. Discussed themes included, for example, the division of competences between the EU and the Member States and the definition of the role of the EU Charter of Fundamental Rights. In 2001, a European Convention was founded to prepare the EU Constitutional Treaty, the proposal of which was finally published in July 2003. The Constitutional Treaty was signed in June 2004, but it was rejected in referendums in France and Netherlands during summer 2005, which led to the collapse of the project.

The rejected Constitutional Treaty was replaced by the Treaty of Lisbon¹⁷⁸, also called the “Reform Treaty”. The Treaty of Lisbon was signed in December 2007. Much of the content of the Constitutional Treaty remained as a part of the new treaty. The Treaty of Lisbon amends the Maastricht Treaty, known as the Treaty on European Union (2007) or TEU, and the Treaty of Rome, known in its updated form as the Treaty on the Functioning of the European Union (2007) or TFEU. The Treaty of Lisbon introduced several changes, for instance, the title European Community remained in history, and the European Union became a legal person. Moreover, the three-pillar model of the Maastricht Treaty was abandoned. The abandonment of the pillar model led to new tasks and competencies for the EU institutions. It also affected the foundations of the legal order throughout the EU. With the Treaty of Lisbon, all fundamental legal principles of European law are, in principle, applied to all policy areas covered by EU competence and to all matters within the scope of EU law. The Charter of Fundamental Rights became an integral part of the Treaty. The Charter, thus, became legally binding. The Union's institutions must respect the rights and freedoms of citizens. The Charter also binds the Member States.¹⁷⁹

Thus far, the Treaty of Lisbon is the most recent Founding Treaty reform in the EU. After the Treaty of Lisbon, the Union became entangled with the global

¹⁷⁸ OJ C 306, 17.12.2007.

¹⁷⁹ For a more detailed analysis of reforms, see Ashiagbor, Countouris and Lianos 2012.

financial crisis of 2008 and the Eurozone crisis¹⁸⁰ since the end of 2009. As a result of the Eurozone crisis, a minor treaty reform took place in 2012 that created a permanent bailout fund, The European Stability Mechanism (ESM), which replaced the previous temporary EU funding programmes: the European Financial Stability Facility (EFSF) and the European Financial Stabilisation Mechanism (EFSM)¹⁸¹. In addition to the financial challenges, the EU faced the migration crisis in 2015. Furthermore, the rule-of-law crisis has been taking place in some EU Member States, such as Hungary and Poland, and it includes severe violations against the independence of the judiciary. In 2014, the European Commission sought to address the situation by adopting a framework that indicates systemic threats to the rule of law in the Member States¹⁸². Since the framework is almost entirely based on dialogue and recommendations, it is, however, inefficient. This led to calls for the European Council to trigger the Article 7 TEU sanction procedure against Poland and Hungary. Article 7 is a mechanism of the Treaty of Lisbon that aims to guarantee that all Member States of the Union respect the common values of the Union. If there is an evident risk that a Member State undermines the fundamental values of the Union, the mechanism is triggered. The Article 7 process begins with a proposal by one-third of the Member States or by the Commission triggering Article 7. The European Parliament must also support the proposal. The EU Council then determines whether a severe and constant violation by a Member State exists. Then, the Council, as a qualified majority, may implement sanctions against the Member State, such as, for instance, a temporary loss of EU Council voting rights.

In December 2017, the European Commission launched Article 7 against Poland over its controversial judicial reforms¹⁸³. In September 2018, the EU Parliament voted to launch the sanctions proceedings against Hungary. Since then, the process

¹⁸⁰ On the constitutional analysis of the Eurozone crisis see Tuori and Tuori 2014.

¹⁸¹ See Louis, Jean-Victor in Ashiagbor, Countouris and Lianos 2012, p. 284–320.

¹⁸² The Rule of Law Framework of the Commission, 11.3.2014.

¹⁸³ Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, 20.12.2017.

has been waiting for the Member States to take it forward. In June 2019, the EU Court of Justice ruled in the case *European Commission v. Republic of Poland* (C 619/18) that a new law in Poland to compel senior judges to retire from the Supreme Court was against EU law. In July 2019, Finland, as a President of the Council of Europe put rule of law issues on the agenda of the Council of Ministers. However, in the autumn of 2020 the process was still ongoing.

Another option is to place pressure on the Member States that violate the core values of the Union through economic means. In May 2018, the European Commission proposed¹⁸⁴ cuts to EU funding to the Member States that do not maintain the rule of law. In January 2019, The European Parliament gave its support to the Commission's proposal to exert a financial burden on the Member States, such as Hungary and Poland, which failed to engage to the core values of the Union¹⁸⁵.

In recent years, the United Kingdom's withdrawal process from the European Union ("Brexit") has also challenged the Union. Brexit as a process can be described as complicated, confusing, and frustrating. Sometimes it seems even overwhelming. The process started in June 2016 when the UK referendum on EU membership took place. The British people had to decide whether the United Kingdom should leave or remain in the European Union. As known, people voted to leave by 52% to 48%. On 29 March 2017, the UK government invoked Article 50 of the Treaty on European Union and started the withdrawal formally. Brexit was due to take place on 29 March 2019. After the resignations of two Prime Ministers, many votes against ratifying the withdrawal agreement by the UK Parliament occurred because of the Brexit date, and multiple other phases Brexit officially happened on 31 January 2020. However, the United Kingdom is in a transition period until the end of 2020, and in the autumn of 2020, the negotiations between the UK and the EU were still open.

¹⁸⁴ COM/2018/324.

¹⁸⁵ Politico: European Parliament backs plan to link EU funds to rule of law. 17.1.2019.

The most recent crisis affecting the Brexit negotiations and the whole EU is the coronavirus pandemic, the effects of which are still unclear in the autumn of 2020.

It has been a long way from the declaration of Robert Schuman in 1950 and the foundation of the ECSC to the complex, multilevel institution that the European Union is today. If the first decades of the integration were a time of growth and optimism, especially during the past ten years, the Union has sailed from one crisis to another, which has kept the Union occupied with managing the present situation and has blurred the future long-term evolution. Despite the challenges, the EU has, however, maintained its goal to prevent wars between the Member States. In the light of recent occurrences, it seems that the integration process has met its end, even for now. At the same time, it is evident that the Union is currently taking important steps to define the direction of the future evolution. However, the constitutional balance has not been reached and there may be more treaty reforms in the future.

3.3.2 The constitutional nature of the EU

The integration development of the EU during the past 70 years has pursued the aim of deeper legal and economic integration. However, the constitutional dimension of the EU has primarily developed based on the general principles that define the relationship between EU law and national law¹⁸⁶. These principles have been developed by the case law of the Union and are based on the landmark decisions of the European Court of Justice (ECJ), which is the supreme court of the European Union. The significant cases from that perspective are, for example, case *Les Verts* (C-294/83) from 1986 in which the ECJ suggested the founding treaties of the Union having constitutional character, the classic *Costa vs. ENEL* decision (C-6/64) from

¹⁸⁶ On the importance of constitutional dialogue for the constitutionalisation of the EU law, see Stone Sweet 1998, p. 303.

1964 in which the ECJ established that the Community law is an independent source of law, which cannot be overridden by a domestic legal provision, however framed, the cases of Von Colson (C-14/83) and Harz (C-79/83) in which the interpretative effect of EU law was formed and case Van Gend en Loos (C-26/62) from 1963, which stated the direct effect of the EU law. The case of Kadi (C-402/05 P and C-415/05 P) from 2005 can also be considered significant since, in its ruling, the ECJ established that the EU law has precedence over international law.¹⁸⁷ The role of active developer of the EU law adopted by the ECJ with the preliminary ruling procedure¹⁸⁸, brings to a national constitutional culture an element similar to a supranational constitutional court. As a consequence, one of the most essential effect on the national level is the empowerment of national courts in the national institutional hierarchy.¹⁸⁹

In addition to the general principles, EU law affects national legal orders through the principles concerning the access, correspondence, and effectiveness of EU law. Moreover, the national authorities and courts are, when making decisions in the scope of EU law, bound to the fundamental rights defined in the Charter of Fundamental Rights of the European Union.¹⁹⁰ The Treaty of Lisbon granted the binding legal force to the Charter. This means that it has the same judicial value and position as the Founding Treaties¹⁹¹. However, the Charter already had, *de facto*, judicial significance before the Treaty of Lisbon. Namely, the ECJ has regularly referred to it in its decisions since the middle of the 2000s.¹⁹²

Moreover, the position of the human rights treaties in the EU law was reinforced during the last decades. In addition to paying attention to the European Convention on Human Rights (ECHR), the ECJ has also referred to other international human

¹⁸⁷ The effects of the general principles on national level analyses, for example, Ojanen 2010, p. 58–83.

¹⁸⁸ See the next subchapter.

¹⁸⁹ Lavapuro 2010b, p. 15.

¹⁹⁰ Ojanen 2010, p. 135.

¹⁹¹ *Ibid.*, p. 44.

¹⁹² Ojanen 2010, p. 125.

rights treaties more frequently¹⁹³. However, the significance of the ECHR is emphasised since the rights of the Charter of the Fundamental Rights of the European Union correspond partly to the rights protected in the ECHR¹⁹⁴. Thus, the articles of the ECHR can be regarded as having a counterpart in the Charter of the Fundamental Rights of the European Union, which is included in the Primary law of the Union¹⁹⁵. The ECJ referred to the ECHR for the first time in 1975 in the case, *Rutili* (C-36/75). Interestingly, even up to the end of the 1990s, the EU court referred particularly to the ECHR instead of referring to the case law of the ECtHR specifying the Convention. However, the situation has developed and probably continues to develop further because the Treaty of Lisbon enabled the Union to acquire a legal personality and to access the ECHR¹⁹⁶. However, in that case, the case-law of the ECtHR would gain a new position with respect to the Union. The Treaty of Lisbon set a requirement of the EU to accede to the ECHR¹⁹⁷. The agreement was negotiated and addressed to the Court of Justice for opinion. In December 2015, the court ruled that the agreement did not sufficiently protect the EU's specific legal order and the Court's exclusive jurisdiction¹⁹⁸. A new accession agreement still has not been drafted. However, both the EU Parliament and the Commission highlight the need for EU accession since the accession to the ECHR would improve the constitutional and human rights protection in the whole Union. Through the accession, the same human rights norms applied in all the Member States of the Union would also bind the institutions of the EU.¹⁹⁹ However, it is

¹⁹³ Ojanen 2010, p. 127.

¹⁹⁴ *Ibid.*, p. 138–139. On the development of civil rights in the EU law, see Ojanen 2010, p. 119–127.

¹⁹⁵ Weiß 2011, p. 89.

¹⁹⁶ Also the ECJ has analysed the scope of the Charter of Fundamental Rights in landmark cases *Fransson* (C-617/10, 2013) and *Melloni* (C-399/11, 2013).

¹⁹⁷ According to the Article 6.2 TEU: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.” Also the ECHR was amended by the Protocol 14 (CETS 194) which inserted a new paragraph 59.2 “The European Union may accede to this Convention.” to the Convention.

¹⁹⁸ Opinion 2/13 of the court, 18.12.2014. See also Pellonpää 2018, p. 153–160.

¹⁹⁹ On the EU's accession to the ECHR, see Ojanen 2010, p. 146–147.

unlikely that the accession to the ECHR would proceed in the near future, since the societal crisis has kept the Union occupied.

3.3.3 The constitutional nature of the human rights treaties

In addition to EU law, international human rights treaties have also affected the development of the national constitutional law in Europe. Human rights are the most fundamental rights of individuals guaranteed under international law. Their evolution has moral and philosophical roots. From these bases, human rights have developed through the Age of Enlightenment and the revolutions in France (1789) and the United States (1776) to the current human rights system whose judicial background is rooted in the establishment of the international organisations the United Nations (UN, 1945) and the European Council (1949) after World War II.²⁰⁰ The events of the war created a need to establish an international treaty system to guarantee peace and security. For the first time, the individual's rights and freedoms were enshrined in 1948 in the Universal Declaration of Human Rights (UDHR, 10.12.1948) of the United Nations. The UDHR has significant historical and moral value. Moreover, the content of the UDHR has been concretised in the other human rights treaties of the United Nations.

When discussing human rights law in the European context, the most cited human rights treaty is the European Convention on Human Rights, which is an international treaty among the Member States of the Council of Europe. The implementation of the Convention is supervised by the European Court of Human Rights in Strasbourg. In addition to the ECHR, there is the European Social Charter

²⁰⁰ On the evolution of human rights see, e.g., Lauren 2013. As a critical view see Hopgood 2013. Hopgood defines the late 19th century humanism as the secular religion destroyed as a consequence of the Holocaust. During the 1970s the human rights became "Human Rights" which he describes as a globalized superstructure involving norms, institutions, and organisations that pursue to save an abstraction of humanity but serve primarily the interests of international elites.

of the Council of Europe, which protects fundamental social and economic rights. The Charter is supervised by the European Committee of Social Rights.

In addition to the UDHR the United Nation's human rights conventions include, for instance, the International Covenant on Economic, Social and Cultural Rights ((ICESCR, 1966, Finnish Treaty Series no 6/1976), the International Covenant on Civil and Political Rights (ICCPR, 1966, Finnish Treaty Series no 7-8/1976) and several other thematic conventions, such as the Convention on the Rights of the Child (CRC, 1989, Finnish Treaty Series no 59–60/1991). These conventions with their amendments have significant value. The implementation of the UN human rights treaties in the Member States is monitored by committees of independent experts. The contents of the human rights treaties of the UN and the Council of Europe mainly correspond to each other.

The international human rights treaties are legally binding on the states that ratified them. However, the international monitoring of the implementation of the treaties varies, which affects their enforcement on the national level. The monitoring instruments may be based on the individual complaint, state parties' periodic reports, interstate complaints or inspections. The ECtHR supervises the implementation of the ECHR mainly by examining individual complaints, which implies that after having exhausted all national remedies an individual is able to apply to the ECtHR and ask the court to examine whether the rights under Convention are violated by the state. The system is efficient since the judgements of the ECtHR are binding on the Member States.²⁰¹ A number of the most important UN human rights treaties include an individual complaint. The committees of the United Nations may issue general comments and general recommendations on the interpretation of the treaties they supervise. The comments of UN human rights monitoring bodies are not legally binding. They represent, however, an authoritative interpretation of the obligations of the contracting states under the treaty concerned.²⁰²

²⁰¹ More detailed on the ECHR system see, e.g., Pellonpää 2012.

²⁰² On the UN monitoring system see, e.g., Grover et al. 2012.

The nature of the human rights system emphasises the idea of human rights as the minimum standard of rights that states are obliged to guarantee on the national level. From the idea of minimum standard follows that in the national fundamental rights document, the protection level may be higher. The human rights provisions are general, as their application relies heavily on an interpretation that is based on the general principles of international law as defined in the Vienna Agreement of 1969 (Finnish Treaty Series no 33/1980). Moreover, the UN Committees guide the interpretation of the principles and provisions of the treaties in their general comments. ECtHR has developed its own principles of interpretation in the case law. The case law of the ECtHR is characterised by the evolutive interpretation of the Convention. This implies that the Convention is regarded as an instrument that reflects social development. The application of evolutive interpretation derives from the case of *Tyler*²⁰³ in which the Court described the Convention as “a living instrument”. In addition to the evolutive interpretation, the ECtHR has developed several other interpretative principles that it applies in its praxis. These principles include, among others, the doctrine of the margin of appreciation and the proportionality principle.²⁰⁴

In its case law,²⁰⁵ the ECtHR has developed the doctrine of the state's margin of appreciation. The margin of appreciation transmits the idea that the national legislature and the national courts are better placed to assess the necessity of human rights limitations since they have the essential current information on the relevant national specificities. The doctrine applies, in particular, to the interpretation of provisions including limitation clauses. However, the doctrine of the state's margin of appreciation has become a more general interpretative principle. The margin of appreciation is closely linked to the principle of subsidiarity and contextual

²⁰³ *Tyler v. United Kingdom* (1978) para. 31.

²⁰⁴ More detailed on the context of the ECHR see Pellonpää 2012, p. 284–298. In the UN context see Schlütter in Grover et al. 2012 p. 261–319.

²⁰⁵ See especially the *Handyside* judgment 7.12.1976, paras. 47–50.

interpretation²⁰⁶ It is characterised as a mechanism through which the principles are implemented. In cases where the limitations are required to be ‘necessary in a democratic society’, the ECtHR has left a certain margin of appreciation to the Member States to assess what they consider to be ‘necessary’ in each situation. In assessing the extent of the margin of appreciation, the Court shall consider, *inter alia*, the extent to which there is a European consensus on an issue.²⁰⁷

The margin of appreciation has been criticised since it has been considered to transfer part of the Court's discretion to the national level. The Court has, however, emphasised that the margin of appreciation is not unlimited²⁰⁸ and that the application of the doctrine requires that the limitation is accepted and in compliance with the principle of proportionality.²⁰⁹ Compliance with the principle of proportionality refers to the requirement of the act to be proportionate to the aim pursued by the state. The Court assesses whether the state has struck a fair balance between the interests through the balancing test. Through the balancing test, the Court assesses, on the one hand, whether the state's justification for the limitation is adequate and, on the other hand, whether the state's action to limit the right was proportionate to the objective pursued.²¹⁰ However, Tsakyrakis has argued proportionality as “an assault on human rights” because it appears to obscure the moral considerations forming the core of human rights issues²¹¹.

Niemi argues that attaching the international human rights development to the rights of the individual has significantly changed the dynamics of human rights protection from the state-centred approach to supranational co-operation²¹². While efforts have been made to ensure that action is kept as close as possible to the

²⁰⁶ Contextual interpretation means interpreting the Convention in the light of the specific context of a Member State. See, e.g., the case *Leyla Şahin v. Turkey* (29.6.2004).

²⁰⁷ On the margin of appreciation see, e.g., Legg 2012, Letsas 2009 and Benvenisti 1999.

²⁰⁸ *Handyside v. United Kingdom*, 7.12.1976, para. 49.

²⁰⁹ On the limitation clauses see Pellonpää 2012, p. 299. See also Viljanen 2003.

²¹⁰ See, e.g., Alexy 2002 and Beatty 2004.

²¹¹ Tsakyrakis 2009.

²¹² Niemi 2019, p. 119.

national level, for example, through the application of the interpretative principles, affects the development the institutional power relations on the sphere of the national constitutions. In addition, for example, in Finland, the ideas behind the national reform of fundamental rights relied heavily on international human rights development. Consequently, national systems reflect the background ideas of international human rights development²¹³.

European constitutional development has profoundly changed the landscape of constitutional law in the European states by creating a new network of actors and new legal sources. The integration process has also opened the national constitutions to the supranational effects and created new foundations on which to build. In addition, the development has affected the institutional relationship between the national legislature and the national courts by expanding judicial power of courts. The new environment has created a need to redefine the boundaries between the institutions, which are illuminated in the changes on the national doctrines of the constitutional review. We analyse these questions in the next chapters.

However, currently, the pluralistic approach is in crisis, which is illustrated by nationalism and the desire to return to the Westphalian, state-centric sovereignty²¹⁴. Brexit has also raised questions regarding the direction of the development of international co-operation in Europe. In addition, the future relevance of the human rights system has also been questioned. In his analysis, Hopgood has taken a somewhat sceptical view of the international human rights regime by arguing that it has come to its end. Hopgood's arguments are based on the future multipolarity of global power as a consequence of which the new powers will sustain the hierarchical system of human rights law, and international justice homogenizing differences appear, at the very least, questionable.²¹⁵ According to Hopgood, in the new world, there will be no room for the contemporary understanding of a human rights system,

²¹³ See also Niemi 2019, p. 121.

²¹⁴ More detailed in chapter 12.

²¹⁵ Hopgood 2013, p. 177.

which he describes as a product sold to the middle classes in Western countries²¹⁶. Hopgood's approach has, however, been criticised as vague and ignoring the complex details in the name of the cause²¹⁷.

²¹⁶ Hopgood 2013, p. 104.

²¹⁷ Forsythe 2017, p. 245.

4 Constitutional review: concretising the institutional relationship between the national legislature and the national courts

4.1 Premises of discussion

The national institutional setting, in relation to the assessment of the constitutionality of the law, concretises the relationship between the national legislature and the national courts. In other words, when analysing the institutional relationship between the national legislature and the national courts, the attention is directed to the relationship between the branches in the legislative process, which might be called the most central form of democratic decision-making. The analysis of the constitutional review is based on the fundamental questions of the separation of powers and the sovereignty of the legislative branch. Are the courts justified to overrule an unconstitutional law or is the legislature the ultimate interpreter of the Constitution? The constitutional review can occur either before (*ex ante* review) or after (*ex post* review) the law is in force. There are arguments in favour of both an *ex ante* and an *ex post* review of constitutionality. The legitimacy of the *ex post* review is frequently connected to legal certainty and the *ex ante* review, on the other hand, to the principle of democracy.

While everything appears quite simple, one must be aware of the fact that this kind of either–or layout always includes the presumption of a correct answer. In this context, either the legislature or the courts have the final authority in questions of constitutional review. In the light of the previous chapter, which discussed constitutional pluralism and the effects of EU-law and the international human rights treaties on the enforcement and interpretation of national law, it is obvious that the idea of one, final authority is undoubtedly obsolete.

The question of final authority has been a subject of rival discussion in the field of European constitutional law during the first decade of the 21st century. It is impossible, and also unnecessary, to repeat or summarize these discussions but as the question of the final authority still is a significant part of the dissertation, a brief examination of it is required. Thus, in the next chapters, I examine the different ways to approach the question of the constitutional review. First, I briefly present the traditional methods of constitutional review, which are based on either legislative supremacy or judicial review, to demonstrate the premises of the later discussion. Then I address the recent debates concerning the alternative approaches to the issue. In the last chapter, I analyse the different models in the context of the contemporary constitution.

4.2 Forms of constitutional review

Demand for the constitutionality of a law can be connected directly to the legal doctrines concerning the hierarchy of norms²¹⁸. For instance, in the Finnish constitutional context, this suggests that the content of all national statutes has been bounded to the Constitution of Finland, which is the supreme norm of the national, juridical order. The constitutionality of a law can be divided into formal and substantive constitutionality. Formal constitutionality is relevant when a law has been enacted in the order required by the Constitution. In the context of constitutional review, problems with this sphere are quite rare and are usually easily solved²¹⁹. Thus, the constitutional review is, typically, a matter of substantive

²¹⁸ By hierarchy of norms I refer to the hierarchical order in which a legal norm's validity is received from compliance with a higher standard. See Kelsen 1968.

²¹⁹ However, occasionally, the problems of the formal constitutionality occur, as the Finnish legislative process of the civilian intelligence legislation in 2018 illustrated.

constitutionality. In other words, the question is whether the content of a norm includes a conflict with the Constitution.²²⁰

The theoretical approach to constitutional review can be divided into two categories. The review can occur during the legislative procedure before the law is in force (*ex ante*). Thus, the review is preliminary, abstract and is not linked to a concrete case. However, the review can also occur after the law is in force (*ex post*). In these cases, the review can be either abstract or connected to a concrete case. Supervising bodies are able to be either the legislature or other external institutions such as general courts or a specific constitutional court.²²¹

The models of constitutional review are traditionally divided into three basic groups, which are described as a decentralised judicial review, review by the constitutional court and the model of the parliamentary sovereignty, in which the courts do not have authority to evaluate the constitutionality of laws²²². Furthermore, some models include elements from both judicial and parliamentary review. These models are often referred to as transmitting or hybrid models. In other words, the traditional models of judicial review may be referred to as a strong-form review and the transmitting models as a weak-form review²²³. Next, I examine the different approaches in more detail.

4.2.1 Traditional approach: The legislative supremacy

The legislative supremacy, or the idea of parliamentary sovereignty, is based on the idea of the absolute supremacy of the legislature. This implies that the legislature reviews the constitutionality of laws. The approach emphasises the idea of the

²²⁰ Jyränki 2000, p. 257.

²²¹ Jyränki 2003, p. 376.

²²² Spector argues that constitutional review is a complex institution because it involves various kinds of disputes: vertical and horizontal power disputes and rights disputes, Spector 2015, p. 20.

²²³ See Tushnet 2008.

inability of the Constitution to impose substantive limitations to the political decision-making of the majority of the parliament. Therefore, the formal validity of the norm serves also as the yardstick of the validity of its contents.²²⁴

The model of strong parliamentary sovereignty was applied, for example, in the United Kingdom before the constitutional reform of 1998²²⁵. Furthermore, in the Nordic countries, the legislature has traditionally had the power of constitutional review²²⁶. Thus, supervision is preliminary and abstract. For example, in Finland, a specific committee in the national parliament, called “The Constitutional Law Committee”, has a mandate to evaluate the constitutionality of the legislative proposals²²⁷. In addition to the Nordic countries, in France, the constitutional review is based on the preliminary assessment practised by the constitution council (Conseil constitutionnel)²²⁸.

4.2.2 Traditional approach: The supremacy of courts

Another traditional way to approach the constitutional review is to allow the courts to have the interpretative supremacy of the constitution. Either a special constitutional court or a general court, often the Supreme Court of the country, which is empowered to exercise constitutional review, can practise judicial review. Constitutional courts exercise only constitutional review²²⁹. Since constitutional courts exercise sole jurisdiction over constitutional issues, the system is often labelled as the centralized system of constitutional review. The model originates in the

²²⁴ Lavapuro 2010b, p. 67.

²²⁵ Tuori 2009, p. 327. The British model more detailed in part three.

²²⁶ See Husa 2002.

²²⁷ The Finnish system more detailed in part four.

²²⁸ Jyränki 2003, p. 379–380.

²²⁹ On constitutional courts see, e.g., Stone Sweet 2012.

writings of the Austrian legal scholar Hans Kelsen²³⁰. The model became popular in Europe and in new democracies, and it is consequently called the European system of constitutional review.

The model based on the constitutional court is applied, for instance, in Austria, Germany, Italy, Poland, Slovakia and Spain. The review by a constitutional court may be abstract or connected to a concrete case. However, for example, Germany's constitutional court cannot evaluate the constitutionality of the law in a concrete case without one of the two conditions being fulfilled. In the first option, the court is asked for a precedent by the general court. The second alternative for the constitutional court to examine the constitutionality of a law is a constitutional complaint. Generally, the constitutional complaint is only admissible if all legal remedies before the general courts have been exhausted. The constitutional court can also declare a law invalid²³¹. The judgements of the constitutional court are binding as far as they apply to the constitutionality or unconstitutionality of norms. The character of the review practised by the court indeed creates a so-called negative legislature.²³²

The other model of judicial review is applied in the United States. In this case, the constitutional review is decentralised to the general courts. The principle of judicial review was established in the case *Marbury v. Madison*²³³ in 1803. According to the court's ruling in the case, American courts have the power to strike down laws that violate the Constitution of the United States. Therefore, the competence of the courts in the US includes the supervision that takes place only in connection with a concrete case. Thus, the courts cannot examine the constitutionality of laws in

²³⁰ Kelsen, Hans: *La Garantie Juridictionnelle de la Constitution*, (1928) 45 *Revue de Droit Public* 197. Cited in Stone Sweet: 2012, p. 817. For Kelsen's defends on the superiority of the centralized model see Kelsen: *Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution*. *The Journal of Politics*. Vol. 4(2), 1942, p. 183–200.

²³¹ Tuori 2009, p. 328.

²³² Jyränki 2003, p. 377–378.

²³³ *William Marbury v. James Madison, Secretary of State of the United States*, 5 U.S. (1 Cranch) 137 (1803).

advance as constitutional courts can. If a conflict between law and the Constitution occurs, the court must give primacy to the Constitution and not adapt the conflicting provision. The constitutional interpretation of the regulation is also possible but if it is regarded as inadequate, primacy must be given to the Constitution. The judicial effects of the court's decision depend on the decision's precedent value and whether adapting the law has been assessed only for the case in question (invalid as applied) or has the unconstitutionality more comprehensive basis (facially invalid).²³⁴ Consequently, the orthodox approach to the judicial review is based on the oversight of the substantive outcomes of the legislative process, and not the process itself²³⁵.

As demonstrated above, the traditional models of constitutional review are based on institutional authority. Either the legislature or a court has the ultimate authority to evaluate the constitutionality of legislation. The justification of the traditional models is typically based either on the principle of democracy (legislative supremacy) or on the protection of individual rights (judicial review). At the same time, these two principles of justification form the basis of the criticism of the other model. On a general level, the traditional models can be criticised for reducing the content of the Constitution to the will of the authoritative interpreter, which, *de facto*, excludes the possibility of the Constitution to contain independent normative value. The modern constitutional theory has aimed to rationalize and justify the will of institutional authority. However, as Lavapuro suggests, theories have been formed using the conceptual division based on the traditional models, which has led to the ignorance of the institutional models that do not follow the division.²³⁶

²³⁴ Tuori 2009, p. 328 and Jyränki 2003, p. 376–377.

²³⁵ On the judicial non-intervention in internal parliamentary affairs see Gardbaum 2019, p. 3–8.

²³⁶ Lavapuro 2010b, p. 71–72.

4.2.3 Alternative approaches: Weak-form review and the judicial review on procedural grounds

During the past three decades new transmitting (hybrid) constitutional models have been developed. The new models break the traditional, institutional authority-based classifications of constitutional review. The alternative models are based on Stephen Gardbaum's article "The New Commonwealth Model of Constitutionalism" (2001). In his article, Gardbaum describes the New Commonwealth Model of Constitutionalism as an attempt to create "a coherent middle ground between fundamental rights protection and legislative supremacy". According to Gardbaum, it is possible to preserve the most valuable elements of each traditional approach without surrendering anything essential. Thus, the principles of fundamental rights protection and legislative supremacy are not necessarily mutually exclusive, as traditionally assumed. On the contrary, there are possibilities between the traditional either/or choices.²³⁷ Later, Mark Tushnet introduced a more generic concept of "weak-form review" to construe the new kinds of institutional settings to disperse Gardbaum's article's connection to the British Commonwealth, which Tushnet deemed historical rather than conceptual²³⁸. As an opposite to the concept of weak-form review, there is also the concept of strong-form review, which refers to the traditional models based on legislative or judicial supremacy²³⁹.

There are different variants of weak-form review. One version appears in the Canadian Charter of Rights and Freedoms (1982)²⁴⁰. The Canadian model is labelled dialogic by scholars Peter Hogg and Allison Bushell, who suggest that in Canada, the constitutional review process is best regarded as a "dialogue" between the courts and

²³⁷ Gardbaum 2001, p. 742.

²³⁸ Tushnet 2008, p. 24.

²³⁹ Kavanagh finds the typology based solely on the formal finality apt to mislead and argues for a multidimensional approach on strength and weakness. See Kavanagh 2015b, p. 1053.

²⁴⁰ The Canadian Charter of Rights and Freedoms (1982), § 1 and § 33.

the legislature²⁴¹. Another version of the weak-form review is based on the interpretative mandate given to courts and regarded as a form of judicial review. This model describes the doctrine, for instance, in New Zealand and the United Kingdom. In both countries, the national Bill of Rights directs courts to interpret legislation to be consistent with fundamental rights²⁴². However, in the British context, Kavanagh has described the weak-form review as “a matter of constitutional design” but, in practice, the court decisions have “normative finality”, which Kavanagh suggests is opposed to the idea of the weak form-review on the legislature as having “the last word.”²⁴³ Moreover, Kavanagh argues that analysing the UK system from the viewpoint of strong- or weak-form review distorts some of its key features²⁴⁴.

While the institutional setting for every variant of weak-form review differs, they, nevertheless, have much in common. Firstly, they have a bill or charter of rights. Moreover, to the weak-form review, it is characteristic to detach from the traditional legislative review based on the sovereignty of parliament. On the other hand, they also deny the supremacy of the courts. The weak-form review regards the constitutional review more as a continuous debate than as a question of absolute institutional authority.²⁴⁵ The advantages of the weak-form review are valued and effectively recognized fundamental and human rights, protected by both the legislative and judicial branches.²⁴⁶ Nevertheless, the weak-form review may be unstable – the lack of authority leads to the case-by-case nature of the review.

While the judicial review is traditionally directed to the outcome of the legislative process, in South Africa the Constitutional Court has expanded the oversight to the legislative procedures. The court’s playground, from non-intervention to the current

²⁴¹ See Hogg–Bushnell 1997.

²⁴² The New Zealand Bill of Rights Act (1990), § 6 and British Human Rights Act (1998) § 3 and § 4.

²⁴³ Kavanagh 2015, p. 1029.

²⁴⁴ *Ibid.*, p. 1010.

²⁴⁵ Gardbaum 2010, p. 169. Lavapuro 2010b, 80–82.

²⁴⁶ *Ibid.*, p. 174–175.

robust review, has increased by degrees during the 21st century. The development implies that, in addition to the different parts of the law-making process, the judicial review includes the definition of the mechanisms and processes that the establishment of the legislature's constitutional obligations require, especially in relation to holding the executive politically accountable²⁴⁷. In terms of the separation of powers and rule of law, the development may seem questionable. However, as Gardbaum indicates, in the specific context, the principles are, in fact, able to form the justification of the court's intervention: Gardbaum notes that, in addition to the division of the judicial and legislative power, the separation of powers also includes the division of the legislative and executive branch. In fact, the political accountability and responsibility of the executive to the legislative branch is, in parliamentary systems, primarily executed through the separation of powers²⁴⁸. However, since the legislative branch's diminished capacity to subject the executive to meaningful political accountability, the judicial intervention supplementing the legislative branch in its task may occasionally be required²⁴⁹. Building on Ely's idea of the existence of constitutional law for situations of distrust towards the representative government²⁵⁰, Gardbaum argues that reinforcing the participation of the elected legislature and preventing the executive's systematic abuse of its dominant position will justify the judicial review on procedural grounds²⁵¹.

4.3 From institutional authority towards a flexible discussion?

There are multiple ways to classify the constitutional review. The traditional strong-form models rely on institutional authority whereas the weak-form models approach

²⁴⁷ Gardbaum 2010, p. 16.

²⁴⁸ Gardbaum 2019, p. 27.

²⁴⁹ *Ibid.*, p. 20 and p. 24.

²⁵⁰ Ely 1980, p. 183.

²⁵¹ Gardbaum 2019, p. 28–30.

the discussion more specifically. Lavapuro argues that the models of the weak-form review describe constitutional review as an ongoing discussion. He remarks that the basic problem with this kind of approach is flexibility, which can be interpreted as unstableness. From the traditional models' point of view, which underline the formal predictability, this may seem problematic. On the other hand, the traditional approaches emphasise the sole authority and, thus, bind the review to the will of the institution instead of the normative requirements of the constitution.²⁵²

From that perspective, the traditional models of constitutional review may seem obsolete. While they have served well during the period of the nation-state, the modern, pluralistic constitutional order sets to review requirements that the authority-based models are not able to reach. Evidently, the development of law as a legal order is slow: it takes years or decades to sediment the present practices from the surface of the law to the deeper structures, which serves as the justification of the surface. The nature of law includes the pursuit of coherence and systematization. Due to the conflict between the structures of law the justification of the weak-form review may be challenged.

If we accept that the traditional models are incapable of reaching the complexity of the contemporary constitutional context, but, at the same time, find the flexibility of the weak-form review challenging, it is evident that a solution to configure the relationship between the legislature and the courts must be found outside the presented views of constitutional review. However, how is it possible to tame flexibility without chaining oneself, at the same time, to the challenges of traditional models? Could we combine the models of weak-form review with any other doctrinal approaches to the institutional question, thus providing structure and predictability to the discussion? Would it be possible to base the examination on interinstitutional respect? Is the doctrine of deference the missing part? The South African example indicates that the judicial review may acquire a new role in

²⁵² Lavapuro 2010b, p. 80–82.

reinforcing the participation of the elected legislature because government abuses its dominant position. Before we can answer these questions, it is necessary to examine the theoretical and normative frameworks that form the basis for the institutional setting. This is the theme of the next chapter.

5 Theoretical and normative frameworks of constitutional review

5.1 Criticism of the judicial review

Fundamental rights and democracy need each other: without democracy, fundamental rights do not reach their full potential, and without fundamental rights, the exercise of power may be arbitrary. However, at the same time, fundamental rights and democracy also function as premises for the criticism of each other. The perpetual tension between the fundamental rights and democracy concretises in the analyses of the institutional relationship between the legislature and the courts. Thus, attempts to control the tension have formed the mainstream of discussion of constitutional review.

The reason for the tension between the fundamental rights and democracy is the fundamental rights position as the sole norms capable to restrict the legislative power. However, the tension becomes overwhelming only if it is indicated that the limitations to the legislature's actions, appointed by the fundamental rights, are not, normatively estimated, judicial but political. In those cases, the courts establish their decisions on the political viewpoints even though canalising of those aspects to law belongs to the legislature²⁵³. Two main lines characterise the criticism presented towards the judicial review. Both are directed to the tension between the judicial review and the principle of democracy. They are based on the theory of legal positivism and the traditional, institutional approaches to constitutional theory.

The legal positivism-based criticism is founded on two basic assumptions, which are 1) the invalidity of application of fundamental rights and 2) the discretionary situations in which fundamental rights are applied. The legal positivism-based

²⁵³ Lavapuro 2001, p. 131–132.

criticism also enables defining the judicially significant purpose of democratic procedure only as enacted law. The approach regards the constitutional assessment in general and the constitutional restrictions directed to democratic legislature as problematic.²⁵⁴ The leading contributors in the field of legal positivism are, among others, H.L.A Hart and Hans Kelsen and their traditional ideas of the law. The constitutional theory-based criticism, on the other hand, includes discussion that emphasises the confidence in the national legislature and questions the court's role as a supervisor of the enforcement of fundamental rights. The constitutional theory-based criticism has been presented, for example, by Richard Bellamy²⁵⁵ and Jeremy Waldron²⁵⁶, and in Finnish discussion, by Kaarlo Tuori and Jaakko Husa²⁵⁷.

5.1.1 Legal positivism and judicial review

According to the doctrine of legal positivism, the law is a system of rules or legal norms. Legal norms can be identified based on the way they are established. Thus, the law consists of legal norms that have been enacted in a democratic procedure. Therefore, in legal positivism a connection between law and morals do not exist²⁵⁸. The works of Hans Kelsen and H. L. A Hart represent the traditional basis of the legal positivism of the 20th century. Their theories of the grounds of the validity and limits of law are essential premises of the doctrine. Kelsen's pure theory of law defines the law as a closed normative system based on a basic norm (Grundnorm). All other norms are related to each other by either being inferior or superior when compared to each other.²⁵⁹ Kelsen also finds that as legal norm is never perfect, they

²⁵⁴ Lavapuro 2010b, p. 85–88.

²⁵⁵ Bellamy 2007.

²⁵⁶ Waldron 2006.

²⁵⁷ See, e.g., Tuori 2002 and 2009 and also Husa 2004.

²⁵⁸ On the relationship between law and morals in legal positivism, see Kelsen 1968, p. 65.

²⁵⁹ Kelsen 1968, p. 208.

always require discretion²⁶⁰. According to Kelsen, the legal analysis of discretion and the choice made between the different interpretations of the legal norm on a legal basis is impossible. Thus, the determination of the correct interpretation appears as a question of legal policy.²⁶¹

Hart's theory, on the other hand, is based on the view according to which every legal norm has a certain core content ("core of settled meaning"). Based on the core of settled meaning, a norm is applicable for a large number of the most typical cases. Due to the openness of the legal concepts ("open texture of law"), the applicability of the legal norm in the concrete cases will raise questions concerning the meaning and scope of the rules, which causes uncertainty.²⁶² To balance this uncertainty, Hart establishes a general "rule of recognition" that serves as a fundamental rule by which all the other rules are identified and understood. However, it cannot cover all cases, thus, the discretion, based on argumentation external to law, cannot be completely overridden.²⁶³

As pointed out, both Kelsen and Hart regard the discretion of the courts as being based on arguments external to the law. The assumption implies that the beginning of the discretion signifies, at the same time, the internal end of the law. Thus, according to Hart's rule of recognition, the court's interpretative decision is included in the legal sources and the decision, based on non-judicial grounds, becomes a part of the law in force. A similar consequence is also possible to identify in Kelsen's theory: when a judge decides on the correct interpretation based on judicial policy discretion, the judge, at the same time, sets an individual legal norm. Therefore, in both theories, judicial decision based on discretion also means, *de facto*, setting a norm. From that perspective, it is quite logical that Kelsen regarded the court, based on evaluating the content of fundamental (interpretative) rights, as a positive legislature. Another problem deriving from legal positivism, in the context of the

²⁶⁰ Kelsen 1968, p. 364.

²⁶¹ *Ibid.*, p. 367–368.

²⁶² Hart 1997, p. 128.

²⁶³ *Ibid.*, p. 100 and p. 150–154.

judicial review, is that it considers the fundamental rights primarily as natural law.²⁶⁴ This viewpoint is problematic as it does not correspond to the current conception of law, wherein the fundamental rights are perceived as the norms of the positive law and fully applicable²⁶⁵.

From the premises of legal positivism, the functions of majoritarian democracy include transmitting the final result of the formation of public opinion to the justification of the state's exercise of power and producing politically valid legitimation to the central tool for exercising the power (a law enacted by the parliament). This reinforces the assumption that the whole legal order may be returned eventually to the legislature's expression of intent. This viewpoint also underlies the view that traditional legal positivism and the principle of majoritarian democracy, being compatible with the previous one, produce the central criticism of the judicial review. For example, Husa finds that courts' decisions directed by fundamental rights have been comprehensively bound to the elements external to the law and, as a result, the constitutional control should be tightly kept under democratic supervision²⁶⁶. Fundamental rights are also regarded as vague, indefinite, evaluative and contradictory and, thus, the adjudication based on fundamental rights may be regarded as a threat to the legal positivistic distinction between law and morals.²⁶⁷

The subject has also been criticised by arguing that every court's decision against the formulation of the enacted law undermines both the democratic chain of legitimation and the equal position of the citizens as subjects of the public authority²⁶⁸. Jyränki emphasises the significance of the principle of democracy by suggesting that when the general doctrines of the constitutional law conflict, a part of the general doctrines should be given a hierarchically higher position than the

²⁶⁴ Lavapuro 2010b, p. 93–94.

²⁶⁵ On fundamental rights adjudication, see, among others, Lämsineva 2002, p. 73.

²⁶⁶ Husa 2004, p. 136.

²⁶⁷ See, e.g., Husa 2004, p. 124.

²⁶⁸ Jyränki 2003, p. 446.

others. This part at the top of the hierarchy forms a so-called “principle of articulation” according to which the other parts of the general doctrines are analysed. In this way, the constitutional doctrine forms a coherent system. Jyränki suggests that, based on general experience, democracy protects human value better than other governmental systems. Therefore, the state’s exercise of power is justified primarily on the idea of democracy and, thus, democracy should be regarded as the principle of articulation.²⁶⁹

Jääskinen, on the other hand, finds that the core of democracy is the idea of people as sovereign of the political exercise of power. Since law and morals have been distinguished from each other in the theory of legal positivism, the legal order as a product of political power is based on arbitrary choices. Jääskinen argues that, on an abstract level, all rights are conflicting with democracy. Thus, the relationship between fundamental rights and democracy is a question of two competing normative authorities. According to Jääskinen, argumentation based on fundamental rights is a means to justify an alternative approach to the legal positivism without the demand to *openly* (the italics by author) accept the doctrines of natural law. The fundamental rights are based on a democratic constitutional choice. Thus, Jääskinen suggests that it is not justified to prefer fundamental rights over democracy.²⁷⁰ Jääskinen’s article reveals distinctly that he supports the traditional division of democracy and fundamental rights as alternatives to each other. Thus, I find it difficult to agree with his reference to the fundamental rights-based argumentation as a mask for accepting the doctrines of natural law, since the fundamental rights are positive norms as much as the other legal norms enacted by the legislature.

A common factor in all the views examined above is that they subordinate the contents of the Constitution to the legislature’s value choices. Lavapuro remarks that this is only a step away from understanding the enactment of law as an authoritative

²⁶⁹ Jyränki 2003, p. 39.

²⁷⁰ Jääskinen 2004, p. 103–107 and p. 117.

interpretation of the Constitution²⁷¹. I find this problematic. During the legislative process, it is impossible to define in advance all the possible situations in which the need for constitutional interpretation occurs. Even more serious problems are caused by the assumption that finding the legislature an authoritative interpreter of the Constitution would imply that the legislature would exercise powers indicated to the courts. This would be problematic from the perspective of the separation of powers even if the principle is understood in the sense that the traditional criticism of judicial review is based on. However, it seems that, at least to some of the authors, the problem is minor if the impartiality of the separation of powers prefers the legislature²⁷².

Therefore, the legal positivism-based criticism of judicial review establishes a normative premise, which ultimately interprets judicial decision-making as a legislative process. However, Lavapuro poses an essential question of whether the democratic constitutional state based on the separation of powers, democracy and human rights principles can be based on such an assumption.²⁷³ The answer is naturally negative. The principles in question serve as the reason for the assumption that, at least in ideal situations when examining the issue from the internal perspective on law, judicial decision-making should be perceived as being based on the law in force. However, when examining the question from an external perspective, the contradiction between law and judicial practices is an axiom.²⁷⁴ Tuori remarks that the constitutional democracy cannot be protected only by respecting democracy as a legal principle but also by protecting the legal principles considered as preconditions for the fulfilment of democracy and representativeness²⁷⁵.

²⁷¹ Lavapuro 2010b, p. 97.

²⁷² See, e.g., Hautamäki 2009.

²⁷³ Lavapuro 2010b, p. 102.

²⁷⁴ *Ibid.*, p. 103.

²⁷⁵ Tuori 2000, p. 253.

5.1.2 Constitutional theory -based criticism

In the context of the constitutional theory-based criticism of judicial review, especially the work of Jeremy Waldron is worth mentioning. In his article “The Core of the Case Against Judicial Review”, Waldron proposes the general case against a judicial review of legislation. Moreover, Waldron remarks that his critique can be directed to both strong- and weak-forms of constitutional review²⁷⁶. Waldron argues that the weak-form of judicial review may be a useful mechanism since it is impossible to comprehensively estimate in advance the future interpretative situations²⁷⁷. Waldron’s argumentation is based on two constitutionally significant arguments: the fairness of the process and the final results²⁷⁸. According to Waldron, the judicial review’s problem is that it distracts citizens with side-issues as precedents when disagreeing about rights. As far as democratic values are concerned, it is also politically illegitimate since, by assigning the moral decision-making power concerning the most foundational questions of the society to courts, it deprives ordinary citizens of the right to vote and, thus, dismisses principles of representation and political equality in the final statement on issues about rights.²⁷⁹

Waldron notes that his critique is not absolute or unconditional. Instead, he has made assumptions and established several conditions to the relevance of his argumentation. Waldron’s argumentation is connected to certain institutional and political characteristics of modern liberal democracies, such as those of the well-functioning democratic institutions of society in question, and that the rights are taken seriously by most of its citizens²⁸⁰. Waldron underlines that if the assumptions fail, his argumentation against judicial review lacks relevance²⁸¹. According to

²⁷⁶ Waldron 2006, p. 1358.

²⁷⁷ *Ibid.*, p. 1370.

²⁷⁸ *Ibid.*, p. 1375–1376.

²⁷⁹ *Ibid.*, p. 1353.

²⁸⁰ *Ibid.*, p. 1359–1369.

²⁸¹ *Ibid.*, p. 1360.

Waldron judicial review should not be approached as a battle between defenders and opponents of rights, but by how one views rights and democracy. Thus, Waldron's critique against judicial review is reconstructed on a robust and comprehensive commitment to rights²⁸².

Tuori is not convinced of the scope of Waldron's arguments. He argues that Waldron points out angles that are significant when evaluating the alternatives of the constitutional review but not actually in discussions of judicial review as the ultimate guardian of the limits of the law, which is also needed in established democracies. Tuori also points out that, as the other statements reaching for general validity, also Waldron's argumentation has a dichotomic basis. Tuori argues that Waldron's viewpoints are noteworthy, but they are based on assumptions lacking general value and, thus, their significance varies between institutional and doctrinal choices adopted in constitutional review.²⁸³ Lavapuro also critiques Waldron's proposition, especially the formation and controversiality of constitutional concepts²⁸⁴.

5.2 Justification of judicial review

5.2.1 Redefining the concept of law

The combination of the traditional legal positivism and the traditional idea of majoritarian democracy imply questioning fundamental rights if rights are given a position in which they set in advance substantial limits to the legislature or for the application of the law. However, the claims that criticise the fundamental rights by the rule-based thinking produced by the legal positivism can be questioned by denying the concept of law upon which they are based. Thus, it is possible to return

²⁸² Waldron 2006, p. 1366.

²⁸³ Tuori 2009, p. 326–327.

²⁸⁴ Lavapuro 2010b, p. 110.

the discussion to modern law's grounds of justification.²⁸⁵ Especially the internationalisation of law can be identified as the driving force that demanded to scrutinise the concept of law and the premises it is approached from. Although the legal positivists' view may have been considered explanatory and relevant a few decades ago, the complexity of the contemporary constitutional context has made it inadequate.

One of the theorists who examined the question is Ronald Dworkin. The core content of his criticism against legal positivism is that, in addition to positive legal norms, a legal order includes legal principles and standards of decision, whose validity is not bounded to the way they are set or recognized²⁸⁶. The significance of the legal principles becomes concrete in hard cases, in which they offer, besides the unambiguous rules, the ground to the judge's decision and, in this way, prevent the decision from being based on the discretion external to the law²⁸⁷. In Dworkin's theory, the courts cherish the principles that form the normative core of the law. In the conflict situation, the judge representing fundamental legal principles vanquishes the legislature directed by the political agenda.²⁸⁸

Dworkin's theory includes "a right answer thesis", which directs the interpreter to reach the best possible result in the context of the legal order as a whole. According to Dworkin also judicial decisions should be able to justify from the point of view of principles justifying the whole legal order.²⁸⁹ Thus, at the core of the right answer thesis is a demand for legitimacy and legal security. Aarnio criticises Dworkin's correct-answer thesis by suggesting that values and appreciations are a significant part of judicial decision-making. Thus, only Hercules would be able to set the only precedence applicable to a case in question²⁹⁰. Since it is not even claimed

²⁸⁵ Lavapuro 2010b p. 89 and p. 97.

²⁸⁶ Dworkin 1978, p. 22 and p. 40.

²⁸⁷ Ibid. p. 115–117.

²⁸⁸ Tuori 2000, p. 241.

²⁸⁹ Dworkin 1978, p. 115–117.

²⁹⁰ Aarnio 1989, p. 270.

that this could be possible, the only possibility remaining, according to Aarnio, is to admit that sometimes there are different solutions to the judicial problems, whose mutual superiority is not possible to weight²⁹¹. Lavapuro also remarks that if the constitution should be interpreted as a coherent whole, which also serves as a foundation for the individual decision, the problem is to find the explicit yardstick for the subsequent objective assessment of the validity of the decision.²⁹²

However, it can be argued that Dworkin's interpretive theory of law corresponds to the functions of the modern constitution better than legal positivism does since it attempts to circumvent non-judicial interpretative decisions and to use the interpretation based on the legal principles instead²⁹³. According to Dworkin, only rights can serve as a critical yardstick for the political objectives that justify judicial regulation. Thus, he solves the question of the separation between the legal principles and the political norms with the principle of the priority of rights²⁹⁴. Tuori also argues that, in conflict situations, legal principles have priority over politics. In other words, the difficult cases must be solved by applying the principles that justify individual rights and not by a political kind of legal norm that refers to the collective objectives of the society. Thus, according to Tuori, the political aspects canalised by the legislation affect the law primarily at its surface. Instead, the law's connections to morals are maintained, above all, at the levels of legal culture and the deep structure.²⁹⁵

²⁹¹ Aarnio 1989, p. 271.

²⁹² Lavapuro 2010b, p. 102.

²⁹³ See also Lavapuro 2010b, p. 103.

²⁹⁴ Dworkin 1978, p. 191–192.

²⁹⁵ Tuori 2002, p. 85.

5.2.2 A rights-based justification and the general principles

The national constitutions and the international human rights treaties are characteristically expressed vaguely and are, thus, interpretative. The fundamental concepts related to fundamental rights are also somewhat controversial. Thus, the criticism of judicial review based on the controversiality of fundamental rights may initially be considered justified. Evidently, the controversiality of fundamental rights and their close engagement to the moral aspects should be taken seriously. However, the unpredictability of an individual norm or legal principle does not signify the inapplicability of fundamental rights and the rational argumentation: fundamental and human rights are legally valid. Furthermore, the interpretative and argumentative structure is typical to them.²⁹⁶ However, since fundamental rights constitute an open and multidimensional system, their application includes many possibilities as well as risks. Therefore, it is important to define how and from what kind of premises they are applied.²⁹⁷

The modern fundamental and human rights have similar validity as the other legal norms of the legal order. Their validity is based on their position as norms of positive law. Therefore, there is a similar obligation to apply them as concretely as any other laws in force. Thus, it is also fallacious to refer to modern fundamental and human rights as identifying with the norms of natural law²⁹⁸. The factual judicial practices offer no grounds for the non-judiciality of fundamental and human rights. Instead, they are applied continuously in both national and international judicial practices. According to Lavapuro, the problem with an abstract-level criticism of fundamental rights is that it does not correspond with positivistic legal reality or institutional practices. The criticism is also able to be questioned by the observation that the

²⁹⁶ Lavapuro 2010b, p. 112–113.

²⁹⁷ Lämsineva 2002, p. 35.

²⁹⁸ See Aarnio 2002, p. 520–521.

courts' power to apply fundamental and human rights are generally accepted in democratic constitutional states.²⁹⁹

Mattias Kumm has criticized the criticism of judicial review. He argues that both Waldron's and Bellamy's concerns are relevant, but the outcomes are not convincing. According to Kumm, the fundamental and human rights practice in Europe is, above all, rationalist: as it is directed to the justification of acts of public authorities in terms of public reason. At the core of the rationalist argumentation (which Kumm refers to as a "Rationalist Human Rights Paradigm") is the proportionality test, which implies the determination of the appropriate scope of application of fundamental and human rights and, also, the necessity, suitability, and proportionality of possible limitations of rights with respect to objectives. This approach allows courts to explicitly engage essential moral and pragmatic arguments without legalist distortions that are typical of legal reasoning.³⁰⁰ The demand for proportionality is also described as a general structure of fundamental and human rights argumentation that forms the grounds for analysing the justification of exercising the public power. Furthermore, the scope of individual rights should be interpreted expansively. In such circumstances, the judicial review of fundamental rights improves the validity of the results of the interpretative issues.³⁰¹

According to Lavapuro, Kumm's approach implies that, in addition to applying the fundamental and human rights and interpreting the legal principles, courts also assess the justification of different arguments. He also argues that Kumm's approach emphasises the systematic character of fundamental and human rights and is, thus, comparable with the general doctrines of constitutional and human rights law.³⁰²

The critics and defenders of judicial review seem to disagree on the controllability of the weighting of the constitutional rights. The critics argue that the courts have captured political power in the name of proportionality balancing. The defenders,

²⁹⁹ Lavapuro 2010b, p. 114–115.

³⁰⁰ Kumm 2007, p. 2.

³⁰¹ *Ibid.*, p. 5–7.

³⁰² Lavapuro 2010b, p. 117.

instead, regard the principle of proportionality as a guarantee of the rationality and controllability of judicial decision-making.³⁰³ Traditional legal positivism proposes that the application of constitutional rights is non-judicial since there is no direct or uncontroversial way in their application. However, also fundamental, and human rights have their inner structure and logic, which was formed in judicial practices. Furthermore, in the field of constitutional and human rights, there are also general doctrines that maintain the coherence of individual judicial decisions in relation to judicial practice. On a more general level, the general principles direct the interpretation and systematization of the legal order.³⁰⁴

5.2.3 A democracy-based justification

As indicated in the previous chapter, it is possible to identify a rights-based justification for the judicial review of the constitutionality of laws. However, as there is a mutual dependence between democracy and law, a right-based justification can be considered insufficient. Also a democracy-based justification is needed.

A classical theory of democracy-based justification of judicial review is presented by John Hart Ely. His book “Democracy and Distrust” (1980) introduces a theory of a representation-reinforcing mode of judicial review. According to Ely, the principle of democracy is the central justification for judicial review, but only within certain limits. The legitimacy of a political system is based on representative democracy. Thus, the judicial review is justified only when it can be deemed to promote the operational preconditions of representative democracy³⁰⁵. In other words, the judicial review is justified when it controls the systematic functionality of the system. Consequently, according to Ely, the supervision of reaching the

³⁰³ Tuori 2009, p. 323.

³⁰⁴ Lavapuro 2010b, p. 118.

³⁰⁵ Ely 1980, p. 87.

conditions of the political processes should not be left to a democratic body. Instead, he addresses the task for courts. The position of courts as an independent institution of the representative democracy facilitates objective assessment.³⁰⁶ However, Ely's theory has also been criticised. The criticism has been directed primarily to the material bonds of the theory³⁰⁷, the vulnerability of the purely procedural constitutional theory to the substantial problems in hard, interpretative cases³⁰⁸ and a very formal concept of democracy in the core of the theory³⁰⁹.

Tuori suggests that it is not sufficient to understand the assignments of courts in a democratic constitutional state solely as the execution of the legislature's decisions³¹⁰. Thus, the judicial review – at least in a weak-form – does not lead to the conflict with democracy. The function of the constitutional review and the principle-based argumentation, which restricts the political legislature's instrumentalism, is, also, to protect the preconditions for democracy. Protecting the preconditions for democracy cannot, consequently, be considered as its restriction. However, the more emphasised position of courts requires the reassessment of the principle of the independence of the judiciary and the securing the effective access to justice.³¹¹ Also, Aarnio suggests that courts are one of the branches of government and, thus, a part of democracy. He reminds us the characteristic of substantive democracy as substantive control of decisions. Thus, expressing the arguments behind the decisions is a significant factor when analysing the relationship between courts and democracy. The control, however, succeeds only in an open system.³¹² Also Tuori emphasises the openness of reasoning adopted by courts as a condition to the

³⁰⁶ Ely 1980, p. 103.

³⁰⁷ Beatty 2004, p. 17.

³⁰⁸ Lavapuro 2010, p. 138–139.

³⁰⁹ Habermas 1996, p. 266.

³¹⁰ Tuori 2002, p. 270.

³¹¹ *Ibid.*, p. 270–272.

³¹² Aarnio 1997, p. 426.

acceptance of their reinforced position³¹³. The importance of reasoning is highlighted also in Waldron's argumentation³¹⁴.

³¹³ Tuori 2002, p. 259–260.

³¹⁴ Waldron 2006, p. 1383.

PART III: THE INSTITUTIONAL RELATIONSHIP BETWEEN THE LEGISLATURE AND THE COURTS IN THE CONTEMPORARY BRITISH CONSTITUTION

6 Transformation of the British constitutional tradition

6.1 Characteristics of the traditional British constitution

The third part of the study focuses on the questions of the British constitution. It examines the British constitutional traditions and especially the transformation of the institutional relationship between the legislative and the judicial branch in the British constitution. This part aims to determine the context for the separation-of-powers debate in Britain, which serves as a framework for the analysis of the doctrine of deference made at the end of the part. As this part will demonstrate, the British constitution is peculiar in several ways. Thus, to create a thorough understanding of deference, it is necessary, to first examine its home: the British constitution. Only by having at least a general understanding of the nature of the British constitutional tradition, it is possible to understand what deference is about. However, the relevance of the British context from the perspective of the study as a whole, will only be determined after these examinations. In the study, it is assumed that deference may be considered as a manifestation of the broader phenomenon created by the challenges of European constitutional pluralism at a national level and the implications of it for the institutional relationship between the national courts and

the legislature. Thus, to answer the question of whether the assumption is justified, it is essential to be familiar with the basis of doctrine.

This part is composed of two chapters. I begin the first chapter by briefly introducing the characteristics and development of the traditional British constitution. Then I examine the transformation of the British constitution during the first decades of the 21st century caused by the internationalisation of the constitution. In the focus of the chapter are especially the changes connected to the enactment of the Human Rights Act³¹⁵ and the Constitutional Reform Act (hereinafter the CRA)³¹⁶ which I find the most significant renewals of the British constitutional tradition from the dissertation's point of view³¹⁷. Through the examinations, I aim to determine the effects of the renewals on the institutional relationship between the legislature and the national courts. The second chapter of part concentrates on the analysis of the doctrine of deference. It aims to provide an overall view of the numerous interpretations of the doctrine and to create an understanding of the significance of the doctrine in the construction of the institutional relationship between the legislature and the courts.

Understanding the present requires knowing the past. I find this also applies to the constitutions. Reaching a proper understanding of the present constitutional traditions requires knowledge of their evolution³¹⁸. In the aftermath of the major constitutional reforms of recent decades, it is occasionally difficult to remember that not so long ago the European constitutional field was quite different. Unlike most modern democracies, the United Kingdom does not have a Constitution in the narrow sense of the word. Instead, the British constitution consists of several elements as acts of parliament, common law, and conventions. The reasons for the

³¹⁵ The Human Rights Act 1998, c 42.

³¹⁶ The Constitutional Reform Act 2005, c 4.

³¹⁷ Masterman argues that the Human Rights Act 1998 and the Constitutional Reform Act 2005 are two of the most significant constitutional reforms of the period (Masterman 2011, p. 3).

³¹⁸ Husa reminds on the importance of the historical dimension especially in common law. See Husa 2013, p. 208.

lack of a written³¹⁹ constitution in the United Kingdom are primarily historical but also conceptual. The enactment of a Constitution is often connected to the creation of a new state, a new beginning – a constitutional moment. The evolution of a British society does not, however, recognize that kind of moment. Instead, the British constitution has developed in its own way. It has grown from the days of the Magna Charta (1215) through the Bill of Rights (1689), the European Communities Act (1972), Human Rights Act (1998) and the Constitutional Reform Act (2005) to its present form. The most recent fundamental effects on the British constitution derive from Britain’s EU-withdrawal agreement (2020)³²⁰, however, in the autumn of 2020, the process is still ongoing, and the exact effects of the EU-withdrawal are undefined. Since the nature of the British constitution is a result of historical development rather than a product of intentional design, it is often referred to as a historic constitution³²¹.

The conceptual structure of the British constitution is defined by A.V. Dicey in his book “An Introduction to the Study of the Law of the Constitution” (1885). As already discussed in chapter two, according to Dicey, the cornerstones of the British constitution are the doctrines of rule of law and sovereignty of parliament. In addition to these doctrines, Dicey recognises another fundamental feature in the British constitution: the constitutional conventions, which he defines as understandings or practices not enforced or recognised by the courts³²². Barber has, however, found Dicey’s claim too broad and argued that the question of the enforcement of the constitutional conventions is more a matter of degree³²³.

³¹⁹ Some commentators rather characterise the constitution as uncodified. The term unwritten may be considered misleading since several constitutional rules are technically documented in the acts of parliament or court judgements.

³²⁰ Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, 30.01.2020, TS No. 3/2020, CP 219.

³²¹ Dicey’s unpublished lectures on the Comparative Study of Constitutions, Codrington Library, All Souls College, Oxford: MS 323 LR 6 b 13 (Bogdanor 2009).

³²² The differences between law and conventions see Dicey 1915, p. 277.

³²³ Barber 2009.

However, the most important feature to Dicey is the sovereignty of parliament, which he describes, “from a legal point of view, the dominant characteristic of our political institutions”³²⁴. The one dimension of the sovereignty of parliament as a fundamental basis of the British system of government manifests itself as a lack of a codified Constitution: The idea of parliament as the superior authority and, thus, able to legislate as it chooses questions the purpose of a written Constitution. After all, one fundamental idea of a Constitution is to limit the legislative powers.³²⁵

The other important contributor to the discussion on the traditional basis of the British constitution is Walter Bagehot. In “The English Constitution” (1867)³²⁶, Bagehot analyses the relationship between the governmental branches, especially the functioning of the parliamentary government. Bagehot defines the British system of government as “the close union, the nearly complete fusion of the executive and legislative powers³²⁷”. The institutional overlaps and functional obscurity are connected to the fact that the British constitution has never been implemented. Instead, it has rather developed over time³²⁸. Consequently, the key elements of the traditional British constitution are the rule of law, parliamentary supremacy and the close connection between the legislature and the executive. I examined the rule of law and parliamentary supremacy in more detail in chapter two.

³²⁴ Dicey 1915, p. 3.

³²⁵ Bogdanor 2009, p. 10–14.

³²⁶ Bogdanor points out that the title of Bagehot’s book is curious. As he notices there had been no strictly English constitution since 1536, when England was joined with Wales, see Bogdanor 2009, p. xi–xii.

³²⁷ Bagehot 1867, p. 12.

³²⁸ Masterman 2011, p. 1.

6.2 Era of constitutional reforms

The transformation of the British constitution has altered the balance of power in the constitution in several ways³²⁹. The most effective factors on the relationship between the legislative and the judicial branches are the enactment of the Human Rights Act in 1998 and the Constitutional Reform Act in 2005. The HRA fundamentally transformed the constitution by guaranteeing the rights under the ECHR to be protected also in British courts and the reform of the House of Lords (the upper house of the parliament of the United Kingdom) through the CRA 2005 by establishing a Supreme Court of the United Kingdom. These significant reforms are examined in more detail in the next subchapters. Another central change that affected the balance of institutional power involves the devolution legislation in the late 20th century. The devolution legislation refers to the subordinate legislatures and assemblies created in Scotland, Wales, and Northern Ireland. The devolution has reformed the constitutional relationship between the different parts of the United Kingdom. All of these parts are now governed in their own unique ways, which has led to suggestions of a quasi-federal nature of the British constitution.³³⁰ Moreover, the sovereignty of parliament has been challenged through the national referendums (in 1975, 2011 and 2016). The national referendums were previously considered unconstitutional since they reflect the idea of a constitution as a composition of the sovereignty of people. All of these renewals have transformed the constitution by reshaping the balance of power: the HRA and the CRA between the three branches of government, the devolution legislation by altering the balance of power between England, Scotland, Wales and Northern Ireland, and the referendums between the parliament and the people.³³¹

³²⁹ The main constitutional reforms since 1997, see, Bogdanor 2009, p. 53–213.

³³⁰ Bogdanor 2009, p. 89, p. 93, p. 111 and p. 116.

³³¹ *Ibid.*, p. 121.

The constitutional development towards a weak-form³³² review has weakened the traditional Westminster³³³ model of government referring to the single-party majority government. However, the Human Rights Act does not impose explicit limitations on the sovereignty of parliament. Nevertheless, the HRA has affected the doctrine since the parliament is not able to impliedly repeal the HRA and, thus, there is at least one thing out of the reach of the legislature.³³⁴ As discussed in part II of the study, the demands of creating a balance between the protection of fundamental rights and legislative supremacy have initiated debates on the traditional model of government being replaced by a new Commonwealth model³³⁵. Those who argue in favour of the transformation base their arguments on the interpretative power of courts under section 3(1) of the HRA as the main remedial tool, the inability of courts to strike down legislation due to the declarative nature of the declaration of incompatibility under section 4 of the HRA and the role of the legislature in rights scrutiny and protection under the model. Masterman and Leigh argue that the institutional behaviour of national courts and political actors influences comprehensively on the possibility to identify a practical difference between the Westminster and Commonwealth models.³³⁶

The development has also affected the idea of judicial review in the British constitution. Before the enactment of the Human Rights Act, the subsidiary of the role of the judiciary was a central element of the constitutional tradition³³⁷. Moreover, the rights of the individual were approached largely through negative terms³³⁸. For Dicey, the common law protected liberties by providing remedies rather than by enforcing rights. Dicey stressed that in the United Kingdom the protection of individual rights was the function of the common law, and,

³³² See chapter 4 of the study.

³³³ See Erdos 2010.

³³⁴ Bogdanor 2009, p. 60.

³³⁵ See Gardbaum 2001 and Gardbaum 2010.

³³⁶ Masterman and Leigh, p. 8. See the discussion on constitutional dialogue in chapter 6.4.

³³⁷ Gearty 2004, p. 24.

³³⁸ Bogdanor 2009, p. 275.

consequently, there was no need for the specific rights code. The standard of judicial review was set by the *Wednesbury*³³⁹ unreasonableness that refers to a principle according to which courts are able to intervene in the exercise of executive discretion if the decision taken was “so unreasonable that no reasonable authority could have come to it”. However, since the position of the *Wednesbury* review has changed. In the landmark case *Daly*, the court argued that the grounds of review between the *Wednesbury* review and the proportionality test of the Convention rights review bound to section 6 of the HRA differ³⁴⁰. The new approach demanded the domestic courts themselves “to form a judgment whether a Convention right has been breached (conducting such inquiry as is necessary to form that judgment) and, so far as permissible under the Act, grant an effective remedy³⁴¹”.

However, the courts were not able to review the primary legislation, which implied that defending human rights in the United Kingdom was the duty of a legislature³⁴². Thus, the question of the appropriate constitutional boundaries of the judicial function in relation to primary legislation has become reality, as a result of the interpretative powers under the HRA³⁴³. However, the echoes of the pre-HRA conceptions of the judicial power still resonate³⁴⁴. The new powers of courts under the HRA have also in the United Kingdom raised the question of the nature of rights. The views of whether human rights are suitable for judicial argumentation have polarised commentators.³⁴⁵ Due to the development, attempts have been made to balance the judicial power through several interpretative mechanisms, such as the proportionality test and deference, which is discussed in more detail in the next chapter.

³³⁹ *Associated Provincial Picture Houses v Wednesbury Corporation* (1948) 1 KB 223.

³⁴⁰ *R. Daly v Secretary of State for The Home Department* (2001), 2 WLR 1622, para. 26. The case concerned a prisoner's right to private correspondence contravened by cell searches.

³⁴¹ *Daly* (2001), para. 23 (Lord Bingham).

³⁴² Bogdanor 2009, p. 55.

³⁴³ Klug 2003, p. 125.

³⁴⁴ Masterman 2011, p. 50.

³⁴⁵ See Masterman 2011, p. 34–39. See the debate in, e.g., Allan 1996 and 2008, Lord Bingham 2007 and Barendt 1995.

The radical constitutional reforms have also raised the question of enacting a written Constitution for the United Kingdom, consolidating the constitutional reforms achieved since 1997. The 2010 Coalition agreement demanded the establishment of a Commission to examine the creation of a British Bill of Rights based on the obligations under ECHR.³⁴⁶ As suggested in the literature, preparing a codified constitution would include several difficulties concerning its scope and authority³⁴⁷. Consequently, when the commission delivered its report in 2012, it did not reach a consensus³⁴⁸. Before the general elections of 2015, the government was committed to continue the project but did not set specific timeframes. Since then, the renewal has been delayed several times due to the Brexit negotiations.³⁴⁹ Bogdanor's characterisation of the constitutional development as the transformation of "an uncodified constitution into a codified one, but in a piecemeal and ad hoc way, unique in the democratic world"³⁵⁰ has not, at least for the time being, reached its endpoint.

Despite the fundamental changes in the constitutional landscape, the ideas of Dicey and Bagehot are still significant in the analysis of the British constitution among the majority of the contemporary contributors. However, Bogdanor suggests that the constitutional reforms have brought into question Dicey's analysis. He argues that, due to the uncodified nature of the constitution and the sequential introduction of the reforms over the years, the pervasive significance of the changes has not been sufficiently recognised. The constitution has transformed and, thus, the analyses of Bagehot and Dicey as the cornerstones of the constitution have become insufficient.³⁵¹

³⁴⁶ The Coalition: Our programme for government, 2010.

³⁴⁷ Masterman 2011, p. 216–217.

³⁴⁸ Commission on a Bill of Rights: A UK Bill Of Rights: The Choice Before Us (2012). See also a review of Klug and Williams 2013.

³⁴⁹ See Donald in Masterman and Leigh 2013, p. 281–307.

³⁵⁰ Bogdanor 2009, p. 231.

³⁵¹ Bogdanor 2009, p. xiii and p. 5. See also p. 23–49.

6.3 Redefinition of the institutional relationship

6.3.1 Key provisions of the HRA

The Human Rights Act (1998) incorporates the rights guaranteed in the European Convention on Human Rights (ECHR) into British law and, thus, guarantees the fundamental rights and freedoms that everyone in the United Kingdom is entitled to³⁵². It came into force in October 2000. The HRA facilitates the application of the Convention rights also in the national courts. The United Kingdom ratified the ECHR in 1951. However, due to the doctrine of the sovereignty of parliament, the Convention was not incorporated into British law. The right of individual petition to the ECtHR was, however, accepted in 1966. Since the non-incorporation of the Convention, the national courts were not able to apply the Convention rights. Consequently, enforcement of the rights of the ECHR caused inordinate delays and costs to British litigants.³⁵³ It was also deemed controversial that the British government had accepted being bound by Convention rights but would not allow them to be protected in British courts. Consequently, the HRA attempts to resolve the question without formally rejecting the sovereignty of parliament.³⁵⁴

As already proposed, the Human Rights Act pursues the balance between statutory protection for rights and the primacy of parliament. In the White Paper on the Human Rights Bill, the government argued that the “enforcement of Convention rights will be a matter for the courts, whilst the Government and the Parliament will

³⁵² The United Kingdom has three jurisdictions: England and Wales, Scotland, and Northern Ireland. Northern Ireland, Scotland and Wales have devolved legislatures which have varying degrees of competence or jurisdiction independently of the UK parliament. The protection of human rights, through the HRA, is, however, embedded into the devolution statutes (Section 126 Scotland Act 1998, section 98 Northern Ireland Act 1998, section 158 Government of Wales Act 2006). Thus, public authorities of Wales, Scotland, and Northern Ireland are subject to the requirements of the HRA in the same way as public authorities elsewhere in the United Kingdom.

³⁵³ Home Office: Rights Brought Home: The Human Rights Bill. Cm 3782, 1997.

³⁵⁴ Bogdanor 2009, p. 59.

have the different but equally important responsibility of revising legislation where necessary". Moreover, the government found highly desirable that the legislative branches ensure "as far as possible" that the legislative proposals are compatible with the Convention rights and the human rights implications of the legislation are properly considered before the legislation is enacted.³⁵⁵ For this purpose, the parliament has established a Joint Committee of Human Rights (JCHR) to scrutinise the human rights aspects of legislation and to offer recommendations. However, it has been criticised that the JCHR as a forum for collaboration between the three branches of government on human rights has allowed ministers to delay or sideline its reports on politically controversial issues³⁵⁶. It has been argued that by involving all three branches of government in the protection of human rights, the HRA represents a clear departure from the traditional parliamentary protection of human rights standards³⁵⁷. The division of power in HRA makes human rights the question of both law and politics³⁵⁸. However, the judges are not empowered to strike down legislation contravening the Convention. Instead, they are permitted to strive for compatibility by interpretative means, as expressed in sections 3 and 4 of the Act. The relationship between these sections is central to the balance between parliamentary democracy and judicially enforced human rights³⁵⁹.

Section 2 of the HRA regulates courts' duty to consider the jurisprudence of the ECtHR when determining a question raised in connection with a Convention right. However, the scope of the duty has been under various discussions. Commentators have questioned whether the purpose of the HRA was to enforce compliance with the international obligations and, thus, develop the jurisprudence of domestic

³⁵⁵ Rights Brought Home: The Human Rights Bill. CM 3782, 1997, para. 3.1.

³⁵⁶ See Murray 2011, p. 57 and p. 74. Murray also argues that the JCHR has given numerous reports which indicates a deficit of human rights awareness in parliament (2011, p. 75).

³⁵⁷ Masterman 2011, p. 245. For a critical view, see also Hiebert 2005. Hiebert underlines the importance of the engagement of parliament in legislative rights review and suggests means to strengthen it.

³⁵⁸ Masterman 2011, p. 45.

³⁵⁹ Gearty 2002.

constitutional rights, which would bind the British courts to the jurisprudence of the ECtHR or to simply be a practical measure that allows remedies to be provided to British litigants³⁶⁰. Section 2 (1) of the HRA involves a degree of flexibility by allowing the judges to assess the appropriate way to give effect to the Strasbourg case law in the domestic context, which exposes the provision to several interpretations. Section 6 of the HRA reinforces the provision of section 2 by regulating the acts of public authorities. Section 6 (1) provides that acts of a public authority are compatible with Convention rights. Section 6 extends the obligation to act in a way that is compatible with the Convention rights regulated in section 2 to all public bodies and private persons exercising public functions. However, according to section 6 (3), “public authority” does not include parliament.

Through section 6 of the Act, the HRA has the potential to reach every sphere of judicial decision-making. This also concerns the common law and, thus, provides to courts a way to develop the common law in a way that is compatible with the Convention. Furthermore, the HRA allows judges to influence the interpretation and scope of the Convention rights when applied in domestic adjudication.³⁶¹ Nevertheless, the common law adjudication has not been regarded as an appropriate mechanism by which to design and implement widespread legal changes³⁶². However, the courts have incorporated the view that their duty under section 6 of the HRA implies, at least, applying existing common law principles in a Convention-compatible way.³⁶³

The significance and the application of the Convention rights in the HRA adjudication, especially the interaction between the two regimes, raised discussion during the first years after the enforcement of the HRA³⁶⁴. The question of the

³⁶⁰ Hickman 2010, p. 27.

³⁶¹ Masterman 2011, p. 181.

³⁶² See, e.g., *Malone v Metropolitan Police Commissioner* (1979) 1 Ch 344, 372 in which Sir Robert Megarry argued: “It is no function of the courts to legislate in anew field...”

³⁶³ Masterman 2011, p. 186. See, e.g., case *Campbell v MGN Ltd* (2004) UKHL 22.

³⁶⁴ On a general level on the national application of the ECHR under the HRA 1998, see Fenwick and Phillipson 2001.

significance of the Strasbourg jurisprudence is linked to sections 2 and 6 of the HRA. Lord Hoffman argued in the case of *Re McKerr* (2004) for the approach that emphasises the independent and domestic nature of the Human Rights Act and its interpretation:

“Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention...their meaning and application is a matter for domestic courts, not the court in Strasbourg.”³⁶⁵

Nevertheless, since the aim of the implementation of the HRA was to create a domestic sphere for the enforcement of individual rights, as Masterman suggests, separating the domesticated rights from their Strasbourg-implemented relations would be untenable³⁶⁶. The Convention rights under section 1 of the HRA cannot be “entirely autonomous from the Convention from which they find their original legal source.”³⁶⁷ The courts’ duty to take into account the jurisprudence of the ECtHR regulated in section 2 of the HRA combined with the duty of courts as public authorities to provide adequate protection for Convention rights under section 6 illustrates the Convention systems as a minimum standard.³⁶⁸

Based on the case-law, the British courts have adopted a restrictive approach to domesticated readings of the Convention rights³⁶⁹. The obscure position of the Convention rights as legal standards in the domestic context³⁷⁰ led to the adoption

³⁶⁵ *Re McKerr* (2004) UKHL 12, para. 65, Lord Hoffman. Also, Bogdanor argues that it is incorrect to use the term ‘incorporated’ since the courts are not able to guarantee the rights of the individual (2009, p. 60).

³⁶⁶ Masterman 2011, p. 195.

³⁶⁷ Kavanagh 2009, p. 156.

³⁶⁸ Masterman 2011, p. 195.

³⁶⁹ See case *Do (Ullah) v Secretary of State for the Home Department* (2004) UKHL 26, para. 20 (Lord Bingham). See also Masterman 2011, p. 196–197.

³⁷⁰ See Hickman 2010, p. 24–49 for a comprehensive discussion on the constitutional status of the HRA.

of a “mirror principle”³⁷¹. The principle implies that the scope of the Convention rights, on both the domestic and Strasbourg levels, should be virtually identical³⁷². The mirror principle has been argued to promote legal certainty since it stabilizes the relationship between the HRA and the jurisprudence of the ECtHR. On the other hand, the mirror principle has been criticised since it oversimplifies the structural requirements of the HRA adjudication³⁷³

The aim of the ECHR is not to harmonize the constitutional traditions of the contracting parties but to internationally protect the Convention rights. The Convention does not demand that countries incorporate “theoretical constitutional concepts as such³⁷⁴”. However, the separation of governmental power has achieved significance in the case-law of the Strasbourg court³⁷⁵. Consequently, although the doctrinal division of governmental powers is not the objective of the ECtHR, it may be the result³⁷⁶. Furthermore, the requirement of the proportionate limitations³⁷⁷ on Convention rights has led to a departure from the *Wednesbury* review and introduced a more intensive standard of review in domestic law.³⁷⁸ Consequently, the domestic courts’ obligation to take into account the jurisprudence of the ECtHR places proportionality at the centre of interpreting the Convention.

Section 3 of the HRA regulates the interpretation of legislation. It implies a demand for interpreting the national legislation in a Convention-compatible way as

³⁷¹ Lewis: *The European ceiling on rights* (2007) PL 270.

³⁷² See the case *R. (on the application of the Alconbury Developments and others) v Secretary of State for the Environment, Transport and the Regions* (2001) UKHL 23; (2003) 2 A.C. 295 in which was argued that the domestic case law should mirror its counterpart of the case law of the ECtHR. See also the case *R. (on the application of Quark Fishing Ltd.) v Secretary of State for Foreign and Commonwealth Affairs* (2005) UKHL 57; 2006 1 A.C. 529 in which the mirror principle was argued to extent the substantive protection under the HRA to the interpretation of the HRA as a whole.

³⁷³ Masterman in Masterman and Leigh (Eds.) 2013, p. 119–125. See also Amos in Masterman and Leigh (Eds.) 2013, p. 139–159.

³⁷⁴ *McGonnell v. UK* (2000) 30 EHRR 289, para. 51.

³⁷⁵ *Stafford v. UK* (2002) 35 EHRR 32, para. 78, *Benjamin and Wilson v. UK* (2003) 36 EHRR 1 para. 36.

³⁷⁶ Masterman 2011, p. 60–61.

³⁷⁷ *Immobiliare Saffi v. Italy* (2000) 30 EHRR 756, para. 49.

³⁷⁸ See Leigh and Masterman 2008 chapter 6.

far as possible. According to section 3 (1): “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.” Section applies to past and future legislation, but according to section 3 (2), a law that proves to be incompatible with the ECHR does not lose its general validity or enforcement. The interpretative duty of courts under section 3 has been described as “a modified judicial review of statutes³⁷⁹” providing that the laws are enacted by the legislature and the judiciary is empowered to interpret them “so far as possible” to be compatible with the Convention.

If compatibility with the Convention is not reached by interpretation, courts may make a declaration of incompatibility, as regulated in section 4 of the HRA, which empowers courts to examine primary legislation and declare it conflicting with the fundamental norms. According to section 4, the court may make a declaration of incompatibility if it is “satisfied that the provision is incompatible with a Convention right, and that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility.” In section 4, “court” includes certain higher courts mentioned in section 4 (5). It is noteworthy that the declaration of incompatibility “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and is not binding on the parties to the proceedings in which it is made.” The provision implies that the courts may not strike down legislation. Thus, the declaration of incompatibility has no legal effect on the legislative branch, which is under no obligation to amend the legislation that the courts had identified as contravening the standards of the Convention. Since the Human Rights Act came into force until the summer of 2020, 43 declarations of incompatibility have been made³⁸⁰ and the legislature has complied with almost every

³⁷⁹ *Matadeen v Pointu* 1999 1 A.C. 98, p. 110, Lord Hoffmann.

³⁸⁰ Responding to human rights judgments. Report to the Joint Committee on Human Rights on the Government’s response to human rights judgments 2019–2020, p. 30.

one of them. The number of declarations of incompatibility issued seems relatively low, which indicates that the courts find them as “the measure of last resort³⁸¹”.

The declaration of incompatibility aims to emphasise the role of the legislative branch in solving the inconsistency between domestic legislation and the Convention rights. It has been argued that, since the legislative branch is not bound by the declarations of incompatibility, the HRA does provide a judicial remedy. Lord Scott has characterised the declarations of incompatibility as being essentially political rather than legal. Finding that domestic legislation does not correspond to the Convention’s standards may cause political pressure, which Masterman and Leigh argue to be the coercive force of section 4.³⁸² The application of section 4 has also been connected to the discussion on the constitutional dialogue between the courts and the political branches in terms of the weak-form review. These questions are examined in more detail in the following subchapters.

Ewing has argued that parliament’s ability to disregard a declaration of incompatibility is only theoretical since, in practice, the declarations are followed “as a matter of routine”³⁸³. Furthermore, Masterman has argued that rejecting either a section 3 (1) interpretation or a declaration of incompatibility is, in practice, difficult for the elected branches due to the respect of the institutional competence and expertise of the courts as interpreters of the compatibility of legislation with the Convention rights. Consequently, recognizing the ability of the judicial branch to authoritatively determine the demands of the law would make the ability of the legislature to ignore a declaration of incompatibility an entirely extraordinary response.³⁸⁴ As Lord Bingham argues in the case of *re McFarland*:

“Just as the courts must apply the Acts of Parliament whether they approve of them or not, and give effect to lawful official decisions whether they agree with them or

³⁸¹ *R. v A (No 2)* (2002) 1 AC 45; (2001) 3 A11 ER 1, para. 44.

³⁸² Masterman and Leigh in Masterman and Leigh (Eds.) 2013, p. 7.

³⁸³ Ewing 2004, p. 829.

³⁸⁴ Masterman 2011, p. 169–172.

not, so Parliament and the executive must respect judicial decisions whether they approve them or not, unless and until they are set aside.”³⁸⁵

However, the practical reasons why legislature may be unable to reverse the interpretative rulings of courts lie in the pressures of party politics and the inability of legislative programmes dominated by the executive’s policy choices to accommodate ad hoc responses to judicial decisions³⁸⁶.

Section 10 of the HRA is linked to section 4 since it regulates the power of a minister responsible for granting a “remedial order” in response to either a declaration of incompatibility made under section 4 or a ruling of the ECtHR: “If a minister considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility.” The remedial order must be submitted separately for approval by both chambers of parliament. However, parliament may at any time revoke an amending order that has already been adopted. Section 10 has been applied to adjust small incompatibilities between the national legislation and the ECHR. However, in some cases, there has been a need for entirely new legislation³⁸⁷.

According to section 19 of the HRA, the responsible minister who introduces draft legislation into parliament is required to make “a statement of compatibility”, which implies that the provisions of the bill are compatible with the Convention rights. However, if the responsible minister is unable to make a statement of compatibility, the minister must announce that the government, nevertheless, wishes the parliament to proceed with the bill. Consequently, the Act does not require compatibility with the Convention and the bill but, rather, observing of the question

³⁸⁵ McFarland, Re (2004) UKHL 17, para. 7 (Lord Bingham).

³⁸⁶ Huscroft 2006, p. 19–22.

³⁸⁷ The court’s declaration of incompatibility in case of Anderson (2002) resulted the enactment of the Criminal Justice Act 2003. In the case Bellinger v Bellinger (2003) the declaration of incompatibility affected the enactment of the Gender Recognition Act 2004.

during the law drafting process. This, from my point of view, does not leave a clear perspective of the importance of the Convention rights in the law drafting process.

6.3.2 The HRA and the courts' powers of judicial review

As a weak-form review of constitutional review, the courts' powers of judicial review regulated under the HRA consist of the interpretative powers under section 3 (1) and the duty to make a declaration of incompatibility if compatibility with the national provision and the Convention is not able to be reached through interpretative means. The traditional way of judicial interpretation of legislation in Britain is based on the sovereignty of parliament. It approaches the statutory interpretation by suggesting that the words of the legislation serve as evidence of its meaning (literal approach). The approach has, however, been criticised as restrictive. Another, more permissive, way to approach the interpretation holds that the intentions and objectives of legislature beyond the words of the provision serve the meaning to the words chosen (purposive approach).³⁸⁸ The literal approach to interpretation was dominant also during the early years of the HRA but the situation has since begun to change³⁸⁹. As the Administrative Court has argued in the case *R. (Cart) v Upper Tribunal*: "Texts cannot speak for themselves...They have to be interpreted. The interpreter's role cannot be filled by the legislature or executive³⁹⁰." However, beyond the sphere of influence of the HRA, a more formalist approach to statutory interpretation continues³⁹¹. Moreover, Beatson argues that section 3 (1) allows wider conceptual interpretation than ordinary principles of statutory interpretation.³⁹²

³⁸⁸ Slapper and Kelly 2009, p. 77.

³⁸⁹ Masterman 2011, p. 148.

³⁹⁰ *R. (Cart) v Upper Tribunal* (2009) EWHC 3052 (Administrative court), para. 37.

³⁹¹ Masterman 2011, p. 176.

³⁹² Beatson in Masterman and Leigh 2013, p. 168.

The questions of judicial interpretation have been aligned in the case law concerning section 3 of the HRA. The amount of the early case law from the very beginning of the 21st century, containing cases such as *Anderson*³⁹³, *Lambert*³⁹⁴, *Offen*³⁹⁵, *R. v A.*³⁹⁶, *Bellinger*³⁹⁷ and *Roth*³⁹⁸, indicates that the courts were prepared to use their new powers³⁹⁹. The question of the scope and limits of interpretation in terms of linguistic features or parliamentary intent as guidelines of the interpretation caused, nevertheless, difficulties in the early case law. The earliest decisions under section 3 were *Lambert* (2001) and *R. v A* (2002). In *Lambert*, the court had to decide whether a legal burden of proof based on a defendant under the Misuse of Drugs Act 1971 contravened a defendant's right to a fair trial. The court found an incompatibility with the Convention and applied the 3 (1) by reading the provision of the legal burden of proof against its ordinary meaning as an evidential burden of proof. The case of *R. v A.* concerned a question of whether admitting sexual history evidence of complainants under section 41 of the Youth Justice and Criminal Evidence Act 1999 would contravene a defendant's right to a fair trial in a rape trial. The court argued that section 41 of the Youth Justice and Criminal Evidence Act was able to be interpreted as a subject to an implied provision to meet the expectations of the Convention. In this case, Lord Steyn argued that the declaration of incompatibility ought to operate as a "measure of last resort", which "must be avoided unless it is plainly impossible to do so".⁴⁰⁰ Together with the case *Offen* (2001), the case *R v A* is characterised as the creative deployment of 3 (1), in which the words chosen by the legislature no longer alone determine the effects of a provision.

³⁹³ *R. (Anderson) v Secretary of State for the Home Department* (2002) UKHL 46.

³⁹⁴ *R. v Lambert (On Appeal from The Court of Appeal (Criminal Division))* (2001) UKHL 37.

³⁹⁵ *R. v Offen* (2001) 2 A11 E.R. 154.

³⁹⁶ *R. v A (No 2)* (2002) 1 AC 45; (2001) 3 A11 ER 1.

³⁹⁷ *Bellinger v Bellinger* (2003) UKHL 21, (2003) 2 A.C. 467.

³⁹⁸ *International Transport Roth GmHh v Secretary of State for the Home Department*, 2002 EWCA.

³⁹⁹ Section 3 was applied in cases *R. v A*, *Lambert* and *Offen*. In cases *Anderson*, *Bellinger* and *Roth* the court issued a declaration of incompatibility.

⁴⁰⁰ *R. v A (No 2)* (2002) 1 AC 45; (2001) 3 A11 ER 1, para. 44.

Nevertheless, it seems that invalidating the statutory provisions by judicial interpretations under section 3 (1) is not permitted.⁴⁰¹

The decision on *R. v A.* led to the adaptation of a purposive interpretation of legislation in the leading case of section 3 *Ghaidan v Mendoza* (2002)⁴⁰². In this case, the word “spouse” under the Rent Act 1977 was interpreted to refer also homosexual partners. According to Lord Nicholls, section 3 (1) of the Act enables the judiciary to “modify the meaning, and hence the effect” of primary legislation⁴⁰³. The court suggested that the linguistic features and the legislative intent have “a constraining effect on the possibilities of interpretation but do not pose an automatic barrier to its application”.⁴⁰⁴ The case has been argued to provide an example of “acceptable judicial legislation”⁴⁰⁵. Kavanagh argues that the key aim of the interpretation under section 3 (1) is to determine a Convention-compatible meaning of the statute in a particular context rather than to examine the intention of the legislature when the provision was enacted⁴⁰⁶. Masterman has notified that if Kavanagh’s suggestion is accepted, sustaining the argument of the determinative nature of the legislative expressions or intentions in human rights adjudication when giving meaning to the legislative provision becomes impossible. Thus, section 3 (1) of the HRA tests the statutory interpretation in the Convention right-cases connected to the statutory language or questions of the intent of parliament.⁴⁰⁷

The cases of *R. v A.* and *Anderson* are criticised since they represent contrary decisions in situations in which the interpretation contravened legislative intent. In *Anderson*, Lord Steyn argued on the application of section 3 (1) by stating the following:

⁴⁰¹ Masterman 2011, p. 159–160.

⁴⁰² *Ghaidan v Godin-Mendoza* (2002) EWCA Civ 1533; (2004) UKHL 30.

⁴⁰³ *Ghaidan v Godin-Mendoza*, (2004) 2 AC 557, para. 32 (Lord Nicholls).

⁴⁰⁴ Kavanagh 2009, p. 90. See also Masterman 2011, p. 160–163.

⁴⁰⁵ Young 2005, p. 27.

⁴⁰⁶ Kavanagh 2006, p. 196.

⁴⁰⁷ Masterman 2011, p. 177.

“It would not be interpretation but interpolation inconsistent with the plain legislative intent to entrust the decision to the Home Secretary, who was intended to be free to follow or reject judicial advice. Section 3(1) is not available where the suggested interpretation is contrary to express statutory words or is by implication necessarily contradicted by the statute.”⁴⁰⁸

This differs from the view presented in *R. v A*.

In the case of *Bellinger v Bellinger* (2003), the House of Lords issued a declaration of incompatibility under section 4 of the HRA for the first time. The case concerned recognition of the marriage of a transsexual female under the Matrimonial Causes Act 1973. In the case, the court assessed whether the word “female” may be given an extended meaning. According to Lord Nicholls, expanding the definition:

“would represent a major change in the law, having far-reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion...The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject⁴⁰⁹.”

Hence, while the court recognised that the Matrimonial Causes Act deprived the claimant’s right to marriage, it found that the question was beyond the constitutional competence of the courts, and it issued a declaration of incompatibility.

Masterman argues that the decision in *Bellinger* indicates respect for the decision-making domain of the legislative branches. Furthermore, it also demonstrates both the limits of the law-making power of the judiciary under the HRA and the awareness of the judiciary of them. Consequently, the ability of courts to make comprehensive reforms would not be legitimate. Instead, discrete, or incremental changes would be possible.⁴¹⁰ Phillipson and Fenwick criticised the decision and argued that the

⁴⁰⁸ Anderson para. 59 (Lord Steyn).

⁴⁰⁹ *Bellinger v Bellinger* (2003), para. 37 (Lord Nicholls).

⁴¹⁰ Masterman 2011, p. 166–167.

application of section 4, instead of interpreting the legislation under section 3, increased constitutional confusion⁴¹¹.

A common feature of all the early section 4 cases is the fundamental constitutional dimension of the legislation under scrutiny⁴¹². The decisions in *Anderson* and *Bellinger* were criticised by commentators as departures from the creative interpretative approach adopted in *R. v A.*⁴¹³ However, the critics were rejected by the House of Lords in *Ghaidan v Mendoza*. *Kavanagh* points out that the issue indicates a more fundamental problem. Seeking to balance the competing values is a nature of interpretation and the outcome of that will vary according to the context of the case. Thus, the expectation of the courts to settle on an approach that favours either 3 or 4 is not realistic.⁴¹⁴

The views concerning the primacy of the interpretation under section 3 reflect commentators' perception of the nature of the judicial interpretation. It has been argued that the primacy of the interpretation under section 3 could be controversial to the parliamentary sovereignty and the central position of the legislative branch⁴¹⁵. However, the primacy of the interpretation under section 3 has also been regarded as a valuable domestic remedy as opposed to the declaration of incompatibility under section 4. Furthermore, it has notified that the framing of section 4 suggests the interpretation as a preliminary step⁴¹⁶. Moreover, the legislative procedure in parliament is heavy and, thus, it should be the last option.⁴¹⁷

⁴¹¹ Phillipson and Fenwick 2006, p. 66.

⁴¹² *Kavanagh* 2009, p. 46.

⁴¹³ *Gearty* 2003, p. 552.

⁴¹⁴ *Kavanagh* 2009, p. 47.

⁴¹⁵ *Klug* 2001, p. 361.

⁴¹⁶ *Masterman* 2011, p. 163.

⁴¹⁷ *Beatson* in *Masterman and Leigh (Eds.)* 2013, p. 163–164 and *Gearty* 2004, p. 169–171.

6.3.3 Range of judicial review

The enactment of the HRA has expanded the power of courts and, thus, realigned the balance of power between the three branches of government⁴¹⁸. The development has been criticised by arguing that the empowerment of courts occurs to the detriment of the legislative branch. The argument has, however, been characterized as an oversimplification since the HRA addresses quite distinct roles for each branch of government⁴¹⁹. Nevertheless, the legitimate scope and exercise of the extended powers of courts have been a central theme in discussions concerning the constitutional effects of the HRA.

During the first years after the enforcement of the Act, the justiciability⁴²⁰ of the Convention rights based on section 1 of the Act and, consequently, the limits of the court's jurisdiction was debated. The debate reflects the pre-HRA conceptions of the limits of the enforceable legal standards. The phenomenon is noticeable also in the contemporary British constitutional debate as an attempt to pre-define judicial “no-go areas”. Since then, however, the justiciability of the Convention rights has been recognised⁴²¹, which has justified courts to also examine the questions that were previously considered political, for example, the decisions relating to resource allocation or national security. However, in some comments, the idea encapsulated in the judicial “no-go areas” has attempted to transform into the analysis of deference⁴²². Consequently, while the judicial review under the HRA is not

⁴¹⁸ See House of Lords Select Committee on the Constitution, Relations between the Executive, the Judiciary and Parliament (HL 151), July 2007, para. 32. See also Klug 2001.

⁴¹⁹ Masterman 2011, p. 90. See also Rights Brought Home: The Human Rights Bill. CM 3782, 1997, para. 3.1

⁴²⁰ According to Marshall the term justiciability has both a “fact-stating” and a prescriptive sense. See Marshall 1961, p. 265–269.

⁴²¹ Beatson et al. 2008, p. 436 and p. 439.

⁴²² See, e.g., Lord Hope in *Kebilene* 2000, A.C. 326 at 380G.

comprehensive, governmental power may not be regarded as being entirely immune to review⁴²³.

A descriptive example of the courts' extended range of review is the case of *Jackson* (2005)⁴²⁴. The case concerned the legality of parliament's deployment of legislative power under the parliament acts. In its decision, the court argued that any subsequent legislation passed under the parliament acts procedure was invalid. In *Jackson*, the doctrine of parliamentary sovereignty was analysed in several degrees, which produced a modified interpretation of the doctrine under which legislative supremacy may be subject to an unspecified degree of judicial review. According to Lord Nicholls: "The proper interpretation of a statute is a matter for the courts not Parliament"⁴²⁵". Consequently, *Jackson* marked a significant but limited extension of the courts' power to review the legality of primary legislation⁴²⁶.

The traditional idea of parliamentary sovereignty implies that the British parliament is able to do whatever it chooses. However, the consequences of Parliament's legislative contraventions of the Convention rights or the constitutional principles under the HRA are not clear.⁴²⁷ Thus, it is no longer obvious that the British courts would inevitably concede the legislature's right to disregard fundamental rights and constitutional principles.

Masterman has identified three spheres in which the judges might be considered to apply legislative powers under the HRA adjudication. The first is the judicial interpretation under section 3 (1) of the HRA. The second is to filter the effects of Strasbourg's law to the national common law and the third is the ability of the courts to creatively influence the meaning of "the Convention rights" under the HRA.⁴²⁸ The HRA has expanded the court's powers of interpretation and, thus, the variety

⁴²³ Masterman 2011, p. 114.

⁴²⁴ *Jackson v Attorney-General* (2005) UKHL 56; (2006) 1 AC 262.

⁴²⁵ *Jackson* (2006), para. 51, (Lord Nicholls).

⁴²⁶ Masterman 2011, p. 107.

⁴²⁷ *Ibid.*, p. 112.

⁴²⁸ *Ibid.* p. 146.

of choices that the judge can make when giving effect to sections 3 and 4 of the HRA is, therefore, considerable.⁴²⁹

Beatson has observed that the HRA has also led to several changes in judicial technique. Instead of the misuse of public power, the Convention is concerned with rights. Moreover, the scope of the rights protected under the Convention is wider than the protection under common law. The traditional principle of common law according to which everything that is not expressly prohibited is permitted has met the requirements of “legality” and “justification”⁴³⁰. Furthermore, sections 3 and 4 of the HRA reach areas such as Articles 2, 14 and 12 of the ECHR that the common law is not able to reach.⁴³¹ The language used by courts is also changed to correspond to the language of the ECHR, for instance, proportionality has replaced unreasonableness, and questions of justiciability are referred to with terms deference or institutional competence⁴³².

6.3.4 From individual independence to institutional independence

Judicial independence has served as a central part of the British constitution since the days of the Magna Charta (1215). As Lord Hewart CJ argues in his often-referred citation: “It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done⁴³³”. However, in the British constitutional tradition, judicial independence is commonly understood and

⁴²⁹ Masterman 2011, p. 153.

⁴³⁰ See the interception case *Malone* 1979 ch 344 and *Malone v. The United Kingdom* (1984) 7 EHRR 14.

⁴³¹ Beatson in Masterman and Leigh (Eds.) 2013, p. 163–164 and Gearty 2004, p. 160.

⁴³² *Ibid.*, p. 166.

⁴³³ *R. (McGarthy) v Sussex Justices* (1924) 1 KB 256, 259. The case was on the impartiality and recusal of judges.

protected in the common law in terms of independence of individual judges as the ability to impartially determine the individual cases.⁴³⁴

However, in addition to the independence of individual judges, the term judicial independence implies also an institutional dimension concerning structural independence, which refers to the separation of the judicial branch from the other branches of government⁴³⁵. It is noteworthy that the lack of the institutional independence of courts in the British constitution has not been considered conflicting with the constitution and, consequently, the need for it has been rejected.⁴³⁶ For instance, Kate Maleson has argued that structural, institutional or collective judicial independence lacks a justification aside from their reinforcement of the individual equality of judicial decisions and “claims to collective judicial independence are generally weak since constitutional separation is neither a necessary nor sufficient condition for protecting party impartiality in individual cases.”⁴³⁷ Moreover, as a result of “a broad overlap between the functions of the judiciary, the executive and Parliament...a definition of judicial independence as a constitutional requirement based on the separation of powers cannot be sustained⁴³⁸”. However, the ECtHR decisions taken under Article 6 (1) of the Convention do not share the view. In the case of *Burden and Burden v. the United Kingdom* (2006)⁴³⁹, the ECtHR declared that the HRA did not provide an effective remedy but if legislative branches regularly comply with declarations of incompatibility by the courts, this practice will harden into a convention in the future.

On the other hand, Woodhouse has argued that it is more appropriate to find judicial independence serving as a means to several ends rather than as an end in itself. A broader construction of judicial independence emphasises the value of

⁴³⁴ Masterman 2011, p. 27–28 and p. 207. See also Lord Hope 2002.

⁴³⁵ *Ibid.*, p. 217.

⁴³⁶ *Ibid.*, p. 210–211.

⁴³⁷ Maleson 1999, p. 63 and p. 69.

⁴³⁸ *Ibid.* p. 62.

⁴³⁹ *Burden and Burden v. the United Kingdom* (13378/05) 2006 para. 40.

“maintaining public confidence in the system of justice” and more broadly still “in the system of government” as a whole.⁴⁴⁰ Lord Reed has argued in the case of *Starrs v Ruxton* as follows:

“Although the Convention protects rights which reflect democratic values and underpin democratic institutions, the Convention guarantees the protection of those rights through legal process rather than political process. It is for that reason that Article 6 guarantees access to independent courts. It would be inconsistent with the whole approach of the Convention if the independence of those courts rested upon convention rather than law”⁴⁴¹.

The independence of the courts in the British constitution has been supported by statutory devices, such as regulating the salaries or the procedure of the judicial appointments by statute. The measures have aimed to separate courts from pressures of party politics and, thus, maintain the legitimacy of the judicial process.⁴⁴² Developments in the common law of procedural fairness have also been affected by the division between the functions of the judiciary and the other branches of government⁴⁴³. The most significant renewals have, however, been executed through the Constitutional Reform Act (2005) which abolished the appellate jurisdiction of the House of Lords and established a Supreme Court of the United Kingdom. The CRA aimed to depart from the traditional “fusion” model of the British constitution and create a more explicit separation of powers between the legislative branch and the judiciary.⁴⁴⁴

The Constitutional Reform Act serves as a landmark of the structural change in the relationship between the legislature and the judiciary. By removing the highest court of appeal from the House of Lords, it formally abolished the institutional link between the highest court of appeal and the legislature and, thus, separated the

⁴⁴⁰ Woodhouse 2007, p. 157.

⁴⁴¹ *Starrs v Ruxton* 2000 JC 208, p. 250 (Lord Reed).

⁴⁴² Masterman 2011, p. 209.

⁴⁴³ See especially cases *Davidson v The Scottish Ministers* (2004) UKHL 34 and *R. v Secretary of State for the Home Department, ex. parte Al-Hassan* (2005) UKHL 13.

⁴⁴⁴ House of Lords Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament* (HL 151), July 2007, para. 31.

judges from the legislative branch. The Supreme Court of the United Kingdom, formally established in 2009, became the highest court of appeal. In his speech during the opening of the Supreme court in October 2009, the court's first president Lord Phillips of Worth Matravers, highlighted the symbolic importance of establishing the independence of the United Kingdom's highest court from legislature:

“For the first time, we have a clear separation of powers between the legislature, the judiciary and the executive in the United Kingdom. This is important. It emphasises the independence of the judiciary, clearly separating those who make the law, for those who administer it.”⁴⁴⁵

Behind the establishment of the Supreme Court were the pressures deriving from Article 6 (1) of the ECHR protecting the right to a fair trial. Before the renewals, the Law Lords (formally the Lords of Appeal in Ordinary) had a dual role both as judges and as members of the legislature, which was considered inadequately impartial from the angle of a fair trial⁴⁴⁶. The CRA aimed to separate the judicial branch from the legislative branch of government on an institutional level and “to secure the independence of the judiciary by redrawing the relationship between the judiciary, the executive and the Parliament⁴⁴⁷”. In addition to the establishment of the Supreme Court, the CRA created the office of Secretary of State for Constitutional Affairs, reformed the office of Lord Chancellor, and redistributed its functions to other

⁴⁴⁵ Lord Phillips in Press Notice 01/09, “Supreme Court of the United Kingdom comes into existence” (1 October 2009), available at: www.supremecourt.gov.uk/docs/pr_1019__2_.pdf.

⁴⁴⁶ On the dual roles of the judges see Gee et al. 2015, p. 92–98. The confusion over the boundary between the dual roles was apparent during the case *Hart v Pepper* as “several of the Law Lords hearing the case had expressed strong feelings for or against the principle in a debate in Parliament two years previously”.

⁴⁴⁷ The report of House of Lords Select Committee on the Constitution, *Relations between the Executive, the Judiciary and Parliament* (HL 151) July 2007, appendix 3: Paper by Professor Kate Maleson: *The Effect of the Constitutional Reform Act 2005 on the Relationship between the Judiciary, the Executive and Parliament*, p. 60.

offices⁴⁴⁸ as well as established a Judicial Appointment Committee to appoint the judges for English and Welsh courts.⁴⁴⁹

Despite redetermining the relationship between the judiciary and the legislative branch, the CRA did not entirely remove the link between the legislature and the courts since section 39 of the CRA regulates a supplementary panel of judges. The supplementary panel may be convened to support the judges of the Supreme Court. According to section 39 (2), membership of the supplementary panel is conditional on membership of the House of Lords, which recreates a connection between the two branches of government. This besides the court's powers of review demonstrates the nature of the Supreme Court as an institution designed to fit into the UK's unique constitutional frameworks.⁴⁵⁰

Judicial independence is also protected under section 3 (1) of the CRA. According to which the Lord Chancellor must assure that judicial independence is not violated. The provision was tested when the government ministers publicly attacked judges by questioning the severity of the sentence in the case Sweeney⁴⁵¹ concerned the convicted paedophile. However, the Lord Chancellor did not succeed to fill his duty. The Sweeney case indicated that the new relationship between the Lord Chancellor and the judiciary included a systemic failure.⁴⁵² To reinforce the provisions of the Act, the Constitution Committee recommended that the Ministerial Code would be amended to contain “strongly worded guidelines setting out the principles governing public comments by ministers on individual judges”⁴⁵³

⁴⁴⁸ Before the reform the Lord Chancellor was both a member of the executive and a head of the judiciary. On the reform of the Lord Chancellor's office and the distributed functions, see Masterman 2011, p. 221– and the report of the House of Lords Select Committee on the Constitution, Relations between the Executive, the Judiciary and Parliament (HL 151) July 2007. See also Woodhouse 2002.

⁴⁴⁹ Masterman 2011, p. 219. Consultation papers: Department for Constitutional Affairs: CP 10/03, July 2003, CP 11/03, July 2003, CP 13/03, July 2003.

⁴⁵⁰ Masterman 2011, p. 226.

⁴⁵¹ Case Sweeney, Crown Court in Cardiff, T20067014, 12.6.2006.

⁴⁵² House of Lords Select Committee on the Constitution, Relations between the Executive, the Judiciary and Parliament (HL 151) July 2007, para. 49.

⁴⁵³ *Ibid.*, para. 51.

The CRA has established the institutional independence of the judiciary as a distinct institution of government. However, interpreting the doctrine of the separation of powers as a need to isolate the judiciary from the other branches would be a misunderstanding of the doctrine. Rather the point is that judges need to be independent instead of being accountable to Parliament.⁴⁵⁴ Nevertheless, the constitutional role of the judicial branch has been described “as a matter of inference rather than express provision⁴⁵⁵”. Consequently, the discussion of the constitutionally separate judicial branch in terms of separation of powers to draw a line between the three branches have been remarkable. Masterman argues that the division of power is increasingly used as a tool for judicial reasoning, thus serving coercive support to limitations placed on the legislative branch. However, the signs of judicial activism or strict distinction between governmental functions have not yet been observed. The variable requirements of the separation of powers may, however, be sensitive to judicial restraint if the context of the case demands. While the increased independence from the judicial branch underpins the engagement of courts with politically contested issues, it does not automatically legitimate intervention. Thus, understanding the contemporary constitution requires to recognize the fundamental nature of the dynamic relationships between the three branches. However, the realignment of judicial status and authority that has resulted from the HRA may well prove to be of enduring influence.⁴⁵⁶

6.4 Institutional relationship as constitutional dialogue

As discussed in part two of the study, the discussion on constitutional dialogue implies the constitutional review of legislation as the dialogue between the legislature

⁴⁵⁴ Bogdanor 2009, p. 84.

⁴⁵⁵ Lady Justice Arden 2007, p. 192.

⁴⁵⁶ Masterman 2011, p. 244 and p. 253.

and courts characteristic to the weak-form review. Also in the contemporary British constitutional discussion, the interaction between courts and legislature under the HRA has been described in terms of dialogue. The deliberative process between the courts and parliament has been considered the most important feature of HRA's model of rights protection⁴⁵⁷. Even though the HRA does not technically signify the beginning of the judicial dialogue with the legislative branch, it has enabled judicial interventions⁴⁵⁸.

Some of the commentators have strongly supported constitutional dialogue⁴⁵⁹ but also reserved comments have been presented⁴⁶⁰. In the early days after the enforcement of the HRA Lord Bingham argued: "The business of the judges is to listen to cases and give judgment. In doing that, of course, they will pay attention to the arguments that are addressed to them...but I do not myself see it as the role of the judges to engage in dialogue"⁴⁶¹. Furthermore, the nature of the dialogue has raised questions. It has been described, for instance, as a model⁴⁶², metaphor⁴⁶³, constitutional theory⁴⁶⁴ and an ideal vision of constitutional democracy⁴⁶⁵. Consequently, dialogue did not form the predominant paradigm to characterize the institutional relationship between the judicial and legislative branches under the HRA. However, recently there have been signs of increasing interest in the matter⁴⁶⁶.

In British debate, the constitutional dialogue is generally linked to the declarations of incompatibility under section 4 of the HRA. Since the declarations of incompatibility do not legally bind the legislative branches, they resonate with the

⁴⁵⁷ Gardbaum 2010, p. 78.

⁴⁵⁸ Murray in Masterman and Leigh (Eds.) 2013, p. 63.

⁴⁵⁹ See, e.g., Young 2009, Hickman 2005 and Klug 2001.

⁴⁶⁰ See, e.g., Kavanagh 2016 and Ewing 2012.

⁴⁶¹ Minutes of Evidence to the Joint Committee on Human Rights, 26, Marc 2001, question 78 (Lord Bingham).

⁴⁶² Davis and Mead 2014, p. 66.

⁴⁶³ Kavanagh 2016.

⁴⁶⁴ Hickman 2008.

⁴⁶⁵ Yap 2012, p. 544.

⁴⁶⁶ R (Nicklinson) v Ministry of Justice, (2014) UKSC38 (Lord Neuberger). See also, e.g. Young 2011, Yap 2012 and Phillipson 2013.

idea of the dialogue. However, it has been proposed to reduce the coercive force of a declaration of incompatibility, thus contributing to the broader dialogue on the meaning of the Convention rights⁴⁶⁷. Moreover, the dialogue is connected to the question of the judicial selection between sections 3 and 4 of the HRA. The supporters of the dialogue prefer the declarations of incompatibility instead of the interpretation under section 3, since the declaration of incompatibility involves the legislature in the process while the judicial interpretation has been argued to marginalize the democratic process.⁴⁶⁸ The dialogue is approached through the legislative responses on declarations of incompatibility. However, this has led to disappointments since the legislative branch has complied with practically every declaration of incompatibility issued and, thus, the discussion between the branches has been limited.⁴⁶⁹ Furthermore, the question of judicial deference has been linked to the debate on dialogue. It has been argued that judicial deference provides a good example of dialogue due to the concern of the legislature's decisions about rights. On the other hand, the idea of judicial deference is incongruent with the connotations of dialogue since the presumption of the submission of the other party does not serve as a fruitful basis for it.⁴⁷⁰

However, based on the case law, both approaches to dialogue have led to disappointments. The courts have relied on the declarations of incompatibility under section 4 as a measure of last resort and, on the other hand, the legislature has complied with most of them. This has raised criticism towards the courts for over-relying on section 3 of the HRA⁴⁷¹ and for being too deferential⁴⁷². Furthermore, the legislative branch has been criticised for capitulation and passivity⁴⁷³.

⁴⁶⁷ Masterman 2011, p. 170.

⁴⁶⁸ Gearty 2004, p. 504.

⁴⁶⁹ Davis and Mead 2014, p. 62–84.

⁴⁷⁰ Phillipson 2013.

⁴⁷¹ Klug 2003, p. 130–132 and Kavanagh 2009, p. 128–132.

⁴⁷² Murray in Masterman and Leigh (Eds.) 2013, p. 75.

⁴⁷³ Davis 2012, p. 9 and Nicol 2004, p. 454.

It has been argued that, based on the debate, the dialogue has become a normative ideal against which the functioning of the branches is assessed and which they constantly fail to reach.⁴⁷⁴ Moreover, the dialogue has been described as a misleading metaphor which ought to be abandoned in British constitutional debate since it distorts the comprehension of the institutional relationship between the judicial and legislative branches by, for instance, presenting the legislative compliance with declarations of incompatibility in a negative light and underestimating the idea of final authority in the human rights adjudication.⁴⁷⁵ The idea of dialogue involves a free and frank exchange of views, which does not fit with the finality of judicial decisions.⁴⁷⁶ However, the debate on dialogue seems to divide opinions in several ways. Thus, it is clear that when assessing the behaviour of the governmental branches against the idea of the dialogue, most will be disappointed. Based on these remarks, the shared conception of the constitutional dialogue in the British constitutional debate appears to be absent. The diverse conceptions produce confusion, which may serve as a reason for why the dialogue has not become the predominant paradigm to characterize the institutional relationship between the judicial and legislative branches.

6.5 From the sovereignty of parliament to the sovereignty of the constitution?

As indicated in the chapter, the United Kingdom has also met the challenges of the pluralisation of the constitutional landscape, which is common to all European countries. However, due to the characteristics of the traditional British constitution facing the challenges may have been even harder for the United Kingdom than for

⁴⁷⁴ Kavanagh 2016, p. 106.

⁴⁷⁵ Kavanagh 2016, p. 106.

⁴⁷⁶ Masterman 2011, p. 57.

the majority of the others. Despite, also the British constitution has in a piecemeal adapted the changes. The Human Rights Act has strengthened the position of the judiciary, and the Constitutional Reform Act has complemented it by explicitly recognising the judicial branch as a third branch of government separated from the political process. The new powers of review addressed to courts, including the ability to interpret the legislation in a Convention-compatible way, issue a declaration of incompatibility if the compatibility is not able to reach through interpretation and to develop the common law in the light of the Convention rights illustrate the fundamental transformation in the position of the judicial branch.

Nevertheless, the constitutional reforms reflect the peculiar nature of the British constitutional system, which appears as an attempt to reconcile the expanded role of the judges in rights protection with demands of the traditional British constitutional doctrine. In the contemporary constitution, rights are judicially protected but not to the detriment of parliament's sovereignty. As demonstrated in the chapter, multiple of the substantive debate on the right interpretation of the provisions of the HRA is connected to the reconciliation of the court's new role with democratic governance.⁴⁷⁷ The pursuit of balance has led to the development of the interpretative tools and standards of enforceable legal provisions reflecting the idea of the legislature as a primary source of rights. On a general level, the problem of these standards, which we shall analyse in the next chapter is the categorisation of legal cases based on general classifications and, thus, the lack of recognising the sensitiveness to the specific circumstances of each case typical to fundamental and human rights adjudication.

While the HRA has been characterized as “a cornerstone of the new British constitution”⁴⁷⁸ and “a defining moment in the life of the British constitution”⁴⁷⁹, introducing the idea of individual rights against the state has exerted great effort in

⁴⁷⁷ See also Masterman and Leigh 2013, p. 5.

⁴⁷⁸ Bogdanor 2009, p. 116.

⁴⁷⁹ House of Lords Debates, vol 582, col 1234, 3 November 1997, Lord Kingsland.

the context of the traditional British conception of rights. Moreover, among the British people, the HRA is not very popular. Most of the HRA cases are concerned with the rights of small, unpopular minorities, such as suspected terrorists, asylum-seekers, and prisoners. As a consequence, the HRA has been criticised for being an elite project designed solely to protect unpopular minorities.

The constitutional reforms have been argued to signify “a revolution” in the British constitutional thinking, which has led the United Kingdom to the process of becoming a constitutional state and has replaced the sovereignty of parliament with the sovereignty of the constitution characterised by a separation of powers.⁴⁸⁰ It has been also suggested that the principle of the rule of law may be coming to challenge the sovereignty of parliament as the rule of recognition of the British legal order.⁴⁸¹ The fundamental significance of the renewals is not able to be questioned but in the light of the development during recent years, there is still ground to cover.

⁴⁸⁰ Bogdanor 2009, p. 276 and p. 285.

⁴⁸¹ *Ibid.*, p. 73–74.

7 Deference: a pursuit to maintain parliamentary supremacy?

7.1 Defining the concept of deference

As demonstrated in the previous chapter, the Human Rights Act has significantly affected the human rights adjudication in the British constitution. The development has challenged the traditional grounds of judicial review, the effects of which multiple commentators have analysed. A few years after the enforcement of the HRA, Lord Steyn argued in the case of *Daly*⁴⁸² that the proportionality test demanded under the European Convention on Human Rights should replace the traditional *Wednesbury* approach to judicial review. One theme of particular interest to commentators concerns the constitutional competence of national courts when reviewing the compliance of national legislation with the European Convention on Human Rights. The competence is often analysed through the obligation of courts to comply with the decisions of the legislative branches of government⁴⁸³. In the post-HRA constitutional context, the obligation is often referred to with the term deference, which some commentators have found as an alternative way to analyse the scope and frameworks of the review⁴⁸⁴. In fact, deference was a part of the British constitution already before the enforcement of the HRA, but predominantly in exceptional circumstances, such as during the world wars or, occasionally, in legal cases of national security or resource allocation that were considered inherently political. However, deference was integrated into the constitutional tradition and, thus, rarely needed to be judicially remarked. Nevertheless, after the enforcement of

⁴⁸² *R (Daly) v Secretary of State for the Home Department* (2001) UKHL 26.

⁴⁸³ The focus of this chapter is on judicial deference to the legislature or, to be more exact, to legislation. Due to the overlapping relationship between the executive and the legislature in the British constitution the branches are occasionally almost impossible to separate.

⁴⁸⁴ See, e.g., scholars as Kavanagh, Edwards, Hunt and Clayton. For discussion, see King 2008.

the HRA, a new, human-rights-based discussion on deference has become accurate.⁴⁸⁵

The constitutional boundaries of judicial decision-making became a central topic of the human rights discussion for two main reasons. First, the Convention rights are inherently broad and general, which implies a notable contrast to the traditional detailed legislation of English law. Thus, dividing the line between interpretation and legislating requires systematization. Second, due to the doctrine of “a margin of appreciation” of the European Court of Human Rights, there is a certain amount of flexibility, which allows national courts to assess and determine the meaning of human rights provisions in particular contexts.⁴⁸⁶

Deference as a mechanism of judicial self-restraint was developed in the British constitutional debate between the scholars and judges⁴⁸⁷. It is not explicitly articulated in legislation. However, some of the commentators find that it is implicitly included in the design of sections 3 and 4 of the HRA regulating the interpretation of the law under the ECHR and the declaration of incompatibility of the national legislation with the Convention⁴⁸⁸. The idea of a court’s duty to defer to the legislative branches is based on the established position of Dicey's ideas of the sovereignty of parliament and the rule of law in the British constitutional tradition. Apart from the institutional relationship between the legislature and the courts,

⁴⁸⁵ See Gearty 2004, p. 121 and Kavanagh 2008, p. 184.

⁴⁸⁶ Klug 2003, p. 126.

⁴⁸⁷ See, as examples of the discussion R Edwards, ‘Judicial Deference under the Human Rights Act’ (2002) 65 MLR 859–882; Hunt ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in Nicholas et al. (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 337; Lord Steyn: *Deference: A tangled story* 2005 PL 346; R Clayton, ‘Principles for Judicial Deference’ (2006) JR 109–35; Kavanagh: *Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication*. 2008. in (G. Huscroft ed.) *Expounding the Constitution Essays in Constitutional Theory*, Cambridge University Press; Klug, ‘Judicial deference under the Human Rights Act’ (2003) EHRLR 125-133. and Jowell, J.; (2003) *Judicial deference: servility, civility or institutional capacity?* *Public Law*, 2003 (Winter) p. 592-601. See also Lord Woolf in case *Brown v Stott* (2001) 2 W.L.R. 817 at 842; Lord Bingham in *R. (on the application of Pretty) v DPP* (2001) UKHL 61, at paras. 2 and 120; Lord Hoffman in *R. v Secretary of State for the Home Department Ex p. Simms* (2000) 2 A.C. 115 at 131F-G.ma.

⁴⁸⁸ Klug 2003, p. 128. See also Phillipson 2007.

deference is also closely linked to the debate on human rights adjudication and its significance and the impact of the judgments of the European Court of Human Rights.

According to Masterman and Leigh, at the core of deference lies a court's duty to identify the limits of its own authority and the stronger legitimacy of the political actors to avoid institutional conflicts in situations related to the interpretation of acts, especially the Human Rights Act⁴⁸⁹. The definition of Masterman and Leigh reflects an idea of submission and the inferior position of courts compared to the political actors. Perhaps, one of the most delicate analyses of the doctrine is, however, provided by Aileen Kavanagh⁴⁹⁰. Kavanagh determines the doctrine as follows: "judges assign varying degrees of weight to the judgement of elected branches out of respect for their superior competence, expertise and/or democratic legitimacy"⁴⁹¹. Consequently, Kavanagh links deference to respect but also highlights that the degree of weight varies with the context of the case. Hunt also approaches deference by asking when it is appropriate for courts to intervene with decisions made by other branches and, furthermore, what approach should courts take when analysing the circumstances in which the judicial interference is appropriate.⁴⁹² On the other hand, Bickel argued that deference to the branches of government is one of the "passive virtues" that good judges should display instead of being a judicial vice⁴⁹³.

In the cases of *Pro-Life Alliance* (2003)⁴⁹⁴ and *Rehman* (2001)⁴⁹⁵, Lord Hoffmann presents his view of the nature of deference. In *Pro-Life Alliance*, he argues: "...when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law⁴⁹⁶". In

⁴⁸⁹ Masterman and Leigh 2013, p. 1–2.

⁴⁹⁰ See also King 2008.

⁴⁹¹ Kavanagh 2009, p. 169.

⁴⁹² Hunt 2003, p. 338.

⁴⁹³ Bickel 1961.

⁴⁹⁴ *R (Prolife Alliance) v British Broadcasting Corporation* (2003) UKHL 23.

⁴⁹⁵ *Secretary of State for The Home Department v Rehman* (2001) UKHL 47.

⁴⁹⁶ *Prolife Alliance* (2003), para. 76 (Lord Hoffmann). See Jowell 2003, p. 592–601. See also King 2007.

Rehman, he argues: “a court...is exercising a judicial function and the exercise of that function must recognise the constitutional boundaries between judicial, executive and legislative power.⁴⁹⁷” and adds: “The need for restraint flows from a common-sense recognition of the nature of the issue⁴⁹⁸.” Consequently, Lord Hoffmann regards deference as a matter of judicial restraint out of respect for the appropriate constitutional boundaries derived from the law instead of a matter of normative limits of jurisdiction. He also finds these limits to be effortlessly observed by common sense. Lord Hoffmann’s analysis appears to be oversimplified. It is also difficult to find common sense as an objective and, thus, a reliable indicator for analysis.

While deference is one of the most discussed issues connected to human rights adjudication under the HRA, a general understanding of it appears to be obscure. Most commentators agree that deference is a question of judicial self-restraint, thus, its premises appear to be broadly clear. However, there are multiple conceptual and substantial confusions connected to the doctrine. At first, identifying an unambiguous definition of deference is challenging since the word implies several meanings. According to the Oxford Dictionary of English, deference means either *polite submission* or *respect*. For example Dyzenhouse determines deference as either respect entailing respectful consideration of the reasons offered in support of a decision, or submission requiring judges to submit to the decisions of the legislative branches of government⁴⁹⁹. However, the Oxford Thesaurus of English presents the other side of the word with an impressive list of possible definitions: **respect**, respectfulness, regard, esteem; consideration, attentiveness, attention, thoughtfulness; courteousness, courtesy, politeness, civility, dutifulness, reverence, veneration, awe, homage; **submissiveness**, submission, obedience, yielding, surrender, accession, capitulation, acquiescence, complaisance, and obeisance⁵⁰⁰.

⁴⁹⁷ Rehman (2001), para. 49 (Lord Hoffmann).

⁴⁹⁸ Ibid., para. 58 (Lord Hoffmann).

⁴⁹⁹ Dyzenhouse 1997, p. 279 and p. 286.

⁵⁰⁰ The Oxford Thesaurus of English, boldings included.

The several alternative meanings imply different connotations that do not clarify the definition of the concept. For example, respecting the legislature, complying with the will of the legislature, or submitting to the legislature approaches the concept from completely different points of view. Consequently, the definition chosen directly reflects and determines the angle from which the doctrine is approached. Nevertheless, Kavanagh argues that, while deference is sensitive to negative connotations, it is inherently neutral – neither good nor bad⁵⁰¹. However, the value-sensitivity of the concept produces the multidimensional and complex nature of the doctrine. Furthermore, it has produced conceptual alternatives also in the argumentation of some judges adding complexity around the concept. The judges find deference inappropriate to describe their action because of the “overtone of servility”, or “gracious concession”⁵⁰² connected to the concept and prefer to use other terms such as “demarcation of functions” or “relative institutional competence”⁵⁰³ instead.⁵⁰⁴ In addition to deference, several other conceptual alternatives have been introduced that refer to judicial self-restraint under the human rights adjudication, for instance, due-deference⁵⁰⁵, discretionary area of judgement, proportionality and a margin of discretion.

Moreover, defining the concept becomes even more complicated when considering the rather varied manner in which doctrine has been approached in the constitutional practices and literature. These approaches have generated different meanings to the concept through rather general considerations. As a result, the overall picture requiring a more profound analysis has remained incomplete. However, under the various approaches to deference, it is possible to identify three

⁵⁰¹Kavanagh 2009, p. 178–179.

⁵⁰²Prolife Alliance (2003) para. 75 (Lord Hoffmann).

⁵⁰³Belmarsh Prison case: A and others v Secretary of State for the Home Department [2004] UKHL 56 para. 29 (Lord Bingham).

⁵⁰⁴See also Kavanagh 2009, p. 178 and the case *Huang v Secretary of State* 2007 2 A.C. 167 para. 16.

⁵⁰⁵Hunt 2003. Hunt argues that “due deference” guides the courts between the two extremes of excessive judicial submission to elected branches, on the one hand, and excessive intervention, on the other.

main groups gathering together suggestions with similar features. The first category includes an idea of a 'culture of justification'⁵⁰⁶, which implies that judges should approach the question of the scope of the review and justiciability from an expansive perspective. The second category highlights the idea of pursuing a balance between or assigning weight to the views of other branches⁵⁰⁷. The third category emphasises structuring the analysis of deference by referring to principles or factors.⁵⁰⁸ The approaches are examined in more detail in the following subchapters.

The complex nature of deference has been noted by several commentators. Lord Steyn's characterization of deference as "a tangled story", thus, aptly illustrates the essence of the doctrine. However, in addition to the conceptual and applicative variability, the complexity of deference relates also to the nature of the separation of powers in the traditional British constitution. The dual role of courts referring to the demand both to respect for representative democracy and, at the same time, protect the rights guaranteed under the ECHR, has been described as almost impossible⁵⁰⁹. However, Kavanagh finds deference as a key to reaching the balance between the demands. Kavanagh approaches the question of the complexity of the doctrine through its multidimensionality as contrasting the general view and argues that in order to provide a more precise understanding of the doctrine, the examination must be based on recognising its multidimensional nature.⁵¹⁰ All of the different approaches to deference and their principles of justification are not analysed in detail, which makes the question confusing and contradictory. On the other hand, also the persistent pursuit of spatial metaphors or general categories has led to confusion and misunderstanding in the interpretation of the doctrine.

The obscure nature of deference also raises the question of whether there is a need or even a possibility to refer to deference as a doctrine due to the lack of

⁵⁰⁶ Dyzenhaus 1998 and Hunt 2003.

⁵⁰⁷ See, e.g., Kavanagh 2009 and Hunt 2003.

⁵⁰⁸ See, e.g., Clayton 2006 and Lord Steyn 2005.

⁵⁰⁹ See, e.g., Gearty 2004 ch 3.

⁵¹⁰ Kavanagh 2009, p. 167–168.

generality and continuity of the determination of the core content of the concept. For example, Hunt⁵¹¹, Kavanagh⁵¹² and King⁵¹³ argue that there is a specific role for a doctrine of judicial deference. On the other hand, the doctrinal approach to deference is rejected, for instance, by Allan who finds a doctrinal approach as a possible abdication of the judicial duty of rights protection⁵¹⁴ and, in the case of Huang (2007), in which a doctrinal approach was found as “a tendency... to complicate and mystify”⁵¹⁵. These views are based on arguments, such as the claim that the structures for judicial restraint are already provided by legal concepts such as proportionality or *Wednesbury* reasonableness and the view that weighing up the competing considerations is a part of an ordinary judicial decision-making process.

Also Hickman finds labelling deference as a doctrine both unnecessary and undesirable, even though he accepts its role in weighting and guiding the application of principles. Hickman argues that the introduction of terminology or doctrinal categorisation only complicates and mystifies the law in the area of human rights adjudication⁵¹⁶. In this research, the doctrinal nature of deference is accepted. However, I find that the question of whether deference is an actual doctrine is not essential from this research’s perspective. Nevertheless, this is not a study on deference as a part of a British constitutional tradition. Instead, the focus of the research lies on the ability of the pluralised constitutions to balance the complexity connected to the institutional relationship between the national legislature and the national courts.

⁵¹¹Hunt 2003.

⁵¹²Kavanagh 2009.

⁵¹³King 2008.

⁵¹⁴Allan 2006. On the contextual institutional approach, see King 2008.

⁵¹⁵Huang (2007) para. 14.

⁵¹⁶Hickman 2010, p. 130.

7.2 From formal categorisation to contextual interpretation

According to Kavanagh's analysis, the doctrine of deference implies three elements: respect or courtesy, uncertainty, and context. The respect refers to conventional courtesy between state institutions, which is manifested by giving appropriate weight to the decisions of another institution. Judicial courtesy is an important element of deference since, through it, the courts express their comity with the elected branches⁵¹⁷. The question of the "appropriate weight"⁵¹⁸ is, however, contextual and it is closely linked to the question of the degree of deference – its variability. Deference may be partial, whereby there is room also for the judge's assessment of the issue. However, it may also be absolute or complete. In cases of absolute deference, courts rely solely on the legislature's assessment. It is noteworthy that the cases of absolute deference also imply an assessment of the justiciability of the issue.⁵¹⁹

In the British HRA-case law, however, deference has mainly been partial which indicates that it does not include unconditional, blind acceptance of the legislature's decisions.⁵²⁰ As Hunt aptly points out, the legislature must earn the judicial deference instead of taking it for granted⁵²¹. In situations in which the legislature has greater expertise, competence, or legitimacy in respect of an issue courts owe, in addition to the conventional courtesy, substantial deference to the legislature.⁵²² I will examine

⁵¹⁷ Kavanagh 2009, p 181.

⁵¹⁸ In the case law judges refer to "appropriate weight" by terms "attributing weight", "degree of deference" or "give weight".

⁵¹⁹ Kavanagh 2009, p. 172 –174. Hickman (2010, p. 171) suggests that Kavanagh argues that court should defer to a decision of the legislature as a whole which is not the case. On the contrary Kavanagh explicitly argues that deference may be partial.

⁵²⁰ See, e.g., cases *Brown v Scott* 2001, *Rehman* 2002 and *R (On the Application of) v Secretary of State for Culture, Media and Sport* [2008] UKHL 15 (*Animal Defenders International*) reflecting the idea of "weighting".

⁵²¹ Hunt 2003, p. 351.

⁵²² Kavanagh 2009, p. 169.

these situations separately later. However, it is noteworthy that the conditions for substantial deference are also contextual.

The second key element of deference is uncertainty, to which, as Kavanagh points out, deference is a rational response⁵²³. Consequently, the doctrine actualises in situations in which there is uncertainty about the correct outcome. Alternatively, there may also be a disagreement between the legislature and the court, regardless of whether the court assesses that it is appropriate to give weight to the legislature's view since, for example, the concerns about legitimacy or relative institutional competence (“second-order reason”⁵²⁴). It should be noted that when the outcome is unanimous, it is not a matter of deference but a discretionary judgment by the court with the same autonomous outcome as the legislature.⁵²⁵

The third central part of deference is its contextuality referring to the close connection between the doctrine and the facts and merits of the case at hand. Thus, the doctrine is closely linked to the unique context the case provides. It is noteworthy that, according to Kavanagh, the doctrine does not assume the inferiority of courts in any area. No category or context can be predefined as an area where deference would automatically apply. Deference is, thus, not a substance-related mechanism. Thus, the pursuit of such an archaic connection demonstrates a lack of understanding of the nature and purpose of the doctrine.⁵²⁶

As discussed in the previous chapter, there is the pursuit of construing the judicial review through the formal categorisation. The approach is based on both the position of judicial review related issues between the law and politics and the manner the judicial powers is perceived in the traditional British constitution. Consequently, attempts have been made to also approach deference through that kind of

⁵²³ Kavanagh 2009, p. 171.

⁵²⁴In his theory of practical reason and norms Raz distinguishes between reasons for action (“a first-order reason”) and reasons to act or to refrain from acting for a reason (“a second-order reason”). See Raz 1999. See also Perry 1989.

⁵²⁵Kavanagh 2009, p. 170–171.

⁵²⁶Ibid., p. 175 and p. 203.

categorisation. One of these models attempts to define a discretionary area of judgement or a margin of discretion presupposing the existence of a categorical constitutional boundary between legal and political spheres. The debate was opened by Lord Hope soon after the enforcement of the HRA in the case *Kebilene* (2000) in which he argued that “in some cases the domestic courts, when reviewing decisions of public authorities under the Convention, may defer on democratic grounds to those elected bodies”⁵²⁷. Consequently, according to Lord Hope, the courts should, in certain situations and certain areas, accept the legislature’s views on a democratic basis. This is particularly relevant in the areas of social and economic policy and has minor importance in cases with significant constitutional value.

The approach has been confirmed in several cases after the HRA came into force⁵²⁸. For example, Lord Woolf argues in *Lambert* (2001) that:

“...legislation is passed by a democratically elected Parliament and therefore the courts under the Convention are entitled to and should, as a matter of constitutional principle, pay a degree of deference to the view of Parliament as to what is in the interest of the public generally when upholding the rights of the individual under the Convention.⁵²⁹”

However, the idea has also received criticism. One of the critical commentators is Murray Hunt, who recognizes the pursuit of categorisation as the main problem of the debate on deference. Consequently, Hunt argues that by setting certain areas of decision-making beyond the reach of legality, spatial metaphors as a discretionary area of judgement also prevent the assessment of the legitimate reasons for deferring. He also points out that understanding sovereignty as competing supremacies conflicts with several layers of constitutional actors and suggests that it is time to move to the language of justification in public law instead. Hunt also highlights that

⁵²⁷*Kebilene* 2000, A.C. 326 at 380G.

⁵²⁸See, e.g., cases *Roth* (2002) paras. 69–79 (Laws L.J.), *Huang* (2007), para. 48 (Laws L.J.), *Lambert* (2001) at 1022E (Lord Woolf) and *Kay v Lambert* (2006) para. 77 (Lord Hope).

⁵²⁹*R v Lambert* (2001) UKHL 37, (2002) 2 AC 545. Compare, however, with Lord Bingham in *A v Secretary of State for the Home Department* (2004) UKHL 56, 2 AC 68.

only a few cases are usually connected to the exercise of only one right. Instead, rights are overlapping. Hunt, thus, rejects Hope's idea of delimiting areas of judicial review, especially, since the constitutionally important issues often raise in the areas of social and economic policy.⁵³⁰

Moreover, Lord Justice Laws has contributed to the debate in the case of *Roth* (2002) in which he describes deference as a means of resolving the tension between parliamentary sovereignty and fundamental rights caused by the enforcement of the Human Rights Act⁵³¹. In *Roth*, there was also formulated four jurisprudence-based principles that courts should use to assess the degree of deference⁵³². The analysis is also characterized as finding deference bound in one way or another to formal categorisations. According to case law, judges who base their judgment on such general principles and classifications are more accommodating of the legislature's views than those who approach the doctrine of deference as a variable and contextual instrument⁵³³. The approach has been criticised as an abandonment of the judicial duty to enforce human rights since the provisions of the HRA does not support the almost absolute deference in specific areas of decision-making⁵³⁴.

However, Klug criticises the debate on the discretionary area of judgment and, in fact, the relevance of the whole doctrine of deference. She argues that there is no further need for these discussions since the pursuit of balance between the legislative branches and courts is implicitly integrated into the design of the Human Rights Act. The Act is structured to create a new kind of dialogical dynamic between the judiciary and the legislature, which would allow the courts to protect human rights and respect legislative branches. Klug argues that the Human Rights Act and particularly sections 3 and 4 regulating the interpretation of the law with the compliance of the European

⁵³⁰Hunt 2003, p. 337–339.

⁵³¹*International Transport Roth GmHh v Secretary of State for the Home Department*, 2002 EWCA, para. 75 (LJ Laws). The case concerned the question of whether the punishment of a transport company that unlawfully imported immigrants infringed Article 6 of the ECHR (right to a fair trial).

⁵³²*Roth* (2002) paras. 83–86.

⁵³³Kavanagh 2009, p. 206.

⁵³⁴*Roth* 2002, para. 27 (Lord Justice Simon Brown).

Convention on Human Rights (section 3) and the court's ability to issue a declaration of incompatibility if it found a provision incompatible with the Convention (section 4) were carefully designed to differ from both of the traditional models of constitutional review. Thus, including deference to the court's assessments under the HRA will disturb the new dynamics established in the Act. Klug argues that if the Act is properly appreciated and applied, the development of complex theories of judicial deference is unnecessary⁵³⁵.

However, the close connection between deference and sections 3 and 4 of the HRA has been analysed from another perspective. With regard to section 3 of the HRA, deference is connected to the scope of the court's interpretation. Consequently, deference answers to the question of the limits of the interpretation. The assessment connected to the legal interpretation under section 3 of the HRA can be either substantive or institutional. The substantive assessment refers to an assessment of a particular provision and the institutional assessment defining the limits of constitutional competencies in the particular case. Deference is specifically related to the institutional assessment of which integral part it is.

In addition to the institutional assessment, deference is concretised in the court's choice between the application of sections 3 and 4 of the HRA.⁵³⁶ This leads us to the question of whether it is more radical for the courts to interpret the law in accordance with to the ECHR or to declare national law incompatible with the Convention. Again, the answer depends on the context of the case. Different factors, for instance, the facts of if the legislation has been enacted by the previous or present government, influence the interpretation. However, in the literature, section 4 is generally considered to be more sensitive for deference since making a declaration of incompatibility is able to be interpreted as passing the will of the legislature⁵³⁷. On the other hand, the declaration of incompatibility gets more attention in the press,

⁵³⁵ Klug 2003, p. 128. See also Phillipson 2007.

⁵³⁶ Kavanagh 2009, p. 176–177.

⁵³⁷ Klug 2003.

due to which the government may argue the application of section 3 preferable. Thus, whilst the interpretation under section 3 may be considered more activist in legal terms, in political terms the matter is often vice versa. However, this does not suggest that the interpretation under section 3 should always be radical. Finally, the most deferential option is to avoid the application of both sections without considering the observed human rights violation at all.⁵³⁸

7.3 Variability of the intensity: minimal deference and substantial deference

As described above deference is often viewed as an either-or question. Despite this, one of the most characteristic features of deference is the variability of restraint. Kavanagh approaches the variability by separating the minimal deference, which courts always owe, and the substantial deference, which the legislature needs to earn in specific circumstances determined in respect of an issue. Primarily, courts need to defer to the legislature's assessments. The presumptive weight for the legislature's decisions is the duty of courts and serves as the premise in all cases. The presumptive weight may be referred to with the concept of minimal deference. However, despite the minimal deference is an integral part of the court's interpretation, the presumptive weight is quite faint. It simply implies that the legislature's assessments must be respected and taken seriously: legislation should be approached as a legislature's genuine, sincere attempt to solve social problems ("bona fide attempt").⁵³⁹

However, in exceptional circumstances, minimal deference may be insufficient. In such cases, courts owe substantial deference to the legislature's assessments. It is essential that such a more intensive deference always requires specific, case-by-case

⁵³⁸Kavanagh 2009, p. 228–230.

⁵³⁹Ibid., p. 181–182. Also Masterman finds deference as a variable standard (2011, p. 164).

criteria. The criteria, already mentioned in the previous subchapter, include the institutional competence and expertise of the legislature and the democratic legitimacy.⁵⁴⁰ Nevertheless, none of these criteria implies a presumption of an automatic or absolute restraint. Rather, they suggest that courts should pay particular attention to the case. I will now examine each of the criteria independently.

Substantial deference based on the institutional competence of the legislature may occur, for example, in cases of major or significant social reforms that require an assessment of many interlinked areas of the law. For instance, in the case of *Bellinger v Bellinger* (2003), introduced in the previous chapter. The case implied a contradiction between the British marriage laws and the Articles 8 (Respect for Private and Family Life) and 12 (Right to Marriage) of the ECHR. In the case, the House of Lords (present Supreme Court) ruled that the national law could not be interpreted in the light of the ECHR because it would have presented a major legal change with far-reaching, complex consequences. According to the House of Lords, solving the issue would require extensive research and public debate.⁵⁴¹ Such a situation involves a basis to enable a wider scope of assessment to the legislature. Despite, cases connected to widespread social reforms do not imply a presumption of courts' duty to substantial deference. It is the courts' task to balance between the judicial obligation to guarantee the fulfilment of rights in individual cases and the potential disadvantages of partial reform due to their interpretative decisions connected to social reforms.⁵⁴²

Another criterion for the substantial deference is the legislature's expertise in social questions. According to the traditional view, the expertise of the courts is in law, and not in politics, which is considered the legislature's area. Consequently, the traditional view implies a demand to leave policy issues to the legislature. The dichotomy between law and politics reminds one of Dworkin's famous distinction

⁵⁴⁰Kavanagh 2009., p. 182.

⁵⁴¹*Bellinger v Bellinger* (2003) 2 A.C. 467, paras. 37–42 (Lord Nicholls).

⁵⁴²Kavanagh 2009, p. 183.

between moral principles and political norms that promote the public's interest⁵⁴³. However, as already discussed in chapter five of the study, the division is questionable since making such a distinction in practice is impossible⁵⁴⁴. The courts do not function in a vacuum, isolated from social questions, but instead, aim to balance the values they reflect. Furthermore, legal decisions have an impact on society, which must be taken into account so that the decision is fair. Thus, to reach a fair decision, the facts of the case must be examined in light of the social realities affecting them. It should also be noted that the expression "necessary in a democratic society", used as a basis for limitation to many of the rights guaranteed by the ECHR, requires courts to consider the need for limitations in the context of a democratic society. Therefore, to the extent that a provision explicitly promotes social objectives, the courts cannot interpret it carefully without an overall consideration of the promotion of those objectives.⁵⁴⁵

Instead of a strict Dworkinian distinction between legal principles and policy norms, in the context of deference, the term expertise refers also to the public interest related decisions appropriate for courts to make. Thus, the fact that the case has social implications does not automatically mean that courts must defer. Instead, it imposes on the courts an obligation to weigh the limitations of their own expertise, competence, and legitimacy in the case at hand, serving as a basis for an obligation to defer and to consider whether they support reliably deciding on the case.⁵⁴⁶

The third criterion for the substantial deference is democratic legitimacy, which implies that the legislation is enacted by a democratically elected parliament, and as a result, it reflects the will of the people. Therefore, it has been argued that the courts should defer when interpreting the ECHR⁵⁴⁷. However, opposing views have also

⁵⁴³See more specifically Dworkin 1978, p. 22.

⁵⁴⁴Kavanagh 2009, p. 184. According to Raz (1995), the principles of law and policy cannot be described to be contrary as proposed by Dworkin, since the protection of the fundamental rights of individuals also encompasses the public interest. See also Gearty 2004, p. 121–122.

⁵⁴⁵Kavanagh 2009, p. 184–186.

⁵⁴⁶Ibid., p. 186–187.

⁵⁴⁷Kavanagh 2009, p. 190. See, e.g., Lord Woolf in Lambert (2001) para. 16.

been presented. For instance, Jeffrey Jowell argues that accepting the argument of democratic legitimacy would lead to requiring the courts to defer automatically on a constitutional basis in cases, which a provision has been restricted based on public interest⁵⁴⁸. Jowell also notes that the change in the constitutional field through the enactment of the HRA has “erased” the position of the parliamentary supremacy as the core of the constitution. According to Jowell, the fact that parliament represents the people and is politically accountable does not signify that it would also directly be constitutionally the most appropriate to decide on a matter.⁵⁴⁹ Third, Jowell highlights that a courts’ submission to the decisions of the legislature would also imply the rejection of the constitutional responsibilities of the courts.⁵⁵⁰

When analysing Jowell’s argumentation through Kavanagh’s characterization of deference as a mechanism of varying intensity, Jowell’s arguments may seem unconditional. As suggested, the argument of democratic legitimacy does not imply an obligation to courts to automatically delegate all public-interest decisions to the legislature. Instead, the nature of deference as a matter of degree and contextuality are the central features in analysis. Furthermore, according to Kavanagh, democratic legitimacy alone cannot determine the intensity of deference. Instead, courts must take it into account as a one factor when weighing the appropriate degree of deference. With regard to Jowell’s argument on the position of parliamentary supremacy, Kavanagh suggests that, despite the changes introduced by the HRA, nothing has been erased. The mandate given by the people and parliament’s accountability for it is a matter which obliges the courts to respect the legislature. The key question, however, is how much. How to respect the mandate given by the people while also respecting the constitutional responsibilities of the courts? As a response to this problem, Kavanagh offers the already discussed distinction between

⁵⁴⁸Jowell 2003, p. 73

⁵⁴⁹Ibid., p. 75

⁵⁵⁰Ibid., p. 80.

minimal and substantial deference. Thus, the democratic legitimacy may serve as a basis for deference only to extent of minimal deference.⁵⁵¹

Democratic legitimacy implies the requirement for courts to give the presumptive weight to the legislature's decisions⁵⁵². In special circumstances, however, the democratic legitimacy-based deference may also be substantial. These circumstances are often connected to the legislature's institutional benefits in particularly sensitive and contradictory issues, in which the change is probably to be better accepted in society if it is introduced by the legislature. The legislature is, also, in a better position to assess the manner and timing of such reforms.⁵⁵³ Hence, the democratic legitimacy-based substantive deference is complementary and secondary as it always requires a specific justification connected to the particular case.

Even though there are not predefined areas beyond the reach of judicial interference in certain particular contexts the courts are quite sensitive to defer to the legislature. As already discussed, a good example of that kind of context serves national security cases⁵⁵⁴. However, even in the particular context, the degree of deference is ultimately determined by the nature of the decision, namely its severity, urgency, sensitivity, and impact on human rights issues⁵⁵⁵. A good example of the importance of these factors is the Belmarsh Prison case (2005) which concerned foreign persons held at Belmarsh Prison in London on suspicion of terrorism without charges or convictions. The case represents a major turning point in the development of the doctrine of deference in cases of national security since before the Belmarsh-decision, national case law on national security was determined by

⁵⁵¹Kavanagh 2009, p. 191–192.

⁵⁵²See also Lord Bingham in Belmarsh Prison case (2004).

⁵⁵³See, e.g., case *M v Secretary of State for Work and Pensions* (2006) 2 A.C. 91 which concerned differences in targeting child support to homosexual couples which led to a conflict between national legislation and Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the ECHR. See also case *Rehman* (2003) concerning the expulsion of a migrant suspected of terrorist connections.

⁵⁵⁴For arguments for restraint see *Gillan (R. v Metropolitan Police Commissioner)* (2006) 2A.C. 307. A stricter view is presented by Lord Hoffmann in *Rehman* (2003, para. 62) According to him, deference in cases related to national security should be absolute.

⁵⁵⁵Kavanagh 2009, p. 215.

almost absolute deference⁵⁵⁶. Another example of a particular context is cases connected to economic policy. The central question in this area of decision-making is whether saving public resources is an acceptable justification for the courts to defer⁵⁵⁷. Again, in this context, it is essential to find a clear human rights dimension in the case, which allows the court to impose a financial burden on the state.⁵⁵⁸

Hickman criticises Kavanagh's approach by two arguments. He suggests that there is no need for terms such as comity or deference to describe or structure judicial attribution of weight to the other branches. He argues that the only justification for such an approach would be its remarkable explanatory force which, from his point of view, Kavanagh's suggestion does not reach. On the contrary, he finds it unclear what Kavanagh intends to describe with minimal and substantial deference.⁵⁵⁹

7.4 Prudential reasons

Kavanagh argues that, in addition to the criteria deriving from the actual case, the reasons behind the courts' deferential decisions may, in certain situations, be prudential. Particularly in the years following the enactment of the HRA, the courts were uncertain about their role in the new constitutional field. This resulted in extreme restraint and modesty in their activities. According to Kavanagh, the desire of the courts to maintain their reputation as an impartial enforcer of the law and unwillingness to burden on court's resources influences judicial decision-making. Courts have been criticized for closing their eyes to serious violations of law and

⁵⁵⁶Kavanagh 2009, p. 219.

⁵⁵⁷See, e.g., *Southwark London Borough Council v Tanner* 2001, 1 A.C. 1 that concerned installing sound insulation in a rental apartment.

⁵⁵⁸Kavanagh 2009, p. 222–228.

⁵⁵⁹ Hickman 2010, p. 169.

abdicated their enforcement responsibilities by hiding behind a veil of legal modesty, which also affects the bad reputation of the doctrine of deference.⁵⁶⁰

Moreover, courts may occasionally emphasise the substantive assessment that leads to the judgement and conceal the prudential reasons for deferring behind it. Kavanagh points out that judges tend to underestimate the political issues that influence in their decisions. Courts are often under enormous political pressure to make their decisions appear to be based on a purely factual assessment of the case, without broader policy or moral connections. That kind of concealment is questionable from the point of view of the absolute candour in judicial reasoning. However, making the actual reasons for deference explicit may occasionally be damaging also. On the other hand, courts may also be strategic in their reasoning and present the decision in a deferential manner. The danger is that deference begins to appear ostensible. Kavanagh reminds that since the presumptive weight of the minimal deference serves as a basis of the doctrine, respect for the decisions of the legislature is always present. Consequently, the only way for the courts to protect the core of deference is to conceal their reservations about the decisions of the legislature.⁵⁶¹

Furthermore, it has been argued that judges should concentrate on the substantive assessment and forget worrying about the consequences of the outcome⁵⁶². For instance Allan argues that courts should focus on legal issues and ignore the broader (political) consequences of their decisions⁵⁶³. The argument suggests that the only function of courts is to mechanically enforce existing rights. The approach seems quite narrow, especially in the complex constitution-connected cases. Consequently, Kavanagh suggests that instead of only one function the judiciary would have two key functions which they had to take into account in

⁵⁶⁰Kavanagh 2009, p. 197–198.

⁵⁶¹Ibid., p. 198.

⁵⁶²Phillipson and Fenwick 2006, p. 66.

⁵⁶³Allan 2006, p. 688–689.

decision-making. These are both deciding on the substantial merits of the case and defining the limits and the extent of their institutional role. Kavanagh argues that ignoring the consequences of their decisions would be irresponsible for courts since, in addition to protecting the rights of individuals, the courts must ensure that their actions receive the respect of the other branches of government and the people. Therefore, they must also understand the political context in which they operate. As the courts are largely dependent on the respect they receive from the other branches of government, deference in judicial decision-making for prudential reasons is occasionally justified. Thus, institutional reasons may sometimes override the substantive legal reasons in constitutional adjudication. Kavanagh argues that the ability of the judicial branch to determine the limits of their own institutional role would make judicial restraint a mechanism through which the courts could both respect representative democracy and protect the rights deriving from international regulation.⁵⁶⁴

7.5 Doctrine of deference and the ECHR

The doctrine of deference as a part of the British constitutional tradition is closely connected to the European Convention on Human rights. Some commentators have even defined deference as a national margin of appreciation in the spirit of the interpretative practice of the ECtHR⁵⁶⁵. The margin of appreciation has been examined in chapter three. The margin of appreciation is a doctrine created by the European Court of Human Rights in the case of *Handyside*⁵⁶⁶. Through the doctrine, the ECtHR maintains the principle of subsidiarity⁵⁶⁷. Consequently, the doctrine

⁵⁶⁴Kavanagh 2009, p. 198–199.

⁵⁶⁵See Edwards 2002, p. 860.

⁵⁶⁶*Handyside v. United Kingdom* (1979–80) 1 EHR R 737, para. 48.

⁵⁶⁷*Belgian Linguistic case*, p. 35, para. 10 in fine.

aims to allow a certain amount of flexibility for each Contracting State in the application of the ECHR. The doctrine is based on the idea that states are, at least in principle, in a better position to assess the necessity of domestic human rights limitations. It also emphasises that, at the principle level, the responsibility for the implementation of human rights is primarily national and only secondarily international.

As Lord Hope suggests in the case of *Kebilene*, the margin of appreciation is not applicable when the national courts are assessing domestic Convention-related issues⁵⁶⁸. However, a pursuit to identify the analogy between deference and the doctrine of the margin of appreciation may seem logical, if the question is not profoundly analysed, since as a nature the margin of appreciation is also a doctrine of judicial self-restraint. The function of the margin of appreciation is to determine to what extent and with what intensity the European Court of Human Rights may intervene in a state's national decision connected to the ECHR. In other words, it is a question of how much latitude a country has in relation to a specific right⁵⁶⁹. Hence, from a conceptual and logical point of view, the doctrine of deference and the doctrine of the margin of appreciation are similar⁵⁷⁰. According to Kavanagh, they are also structurally consistent but differ in the basis of restraint. Contrary to the national context, the ECtHR emphasises complementary competence according to the principle of subsidiarity.⁵⁷¹

However, there is substantial similarity between the doctrine of the margin of appreciation and the discussion on a “discretionary area of judgement” often associated with the doctrine of deference. The debate on deference has in this respect been influenced by the debate on the margin of appreciation. Both discussions emphasise the question of whether the subject matter falls within a predefined area

⁵⁶⁸ *Kebilene* (2000).

⁵⁶⁹ Rautiainen 2011, p. 1153–1154. On the margin of appreciation see chapter 3 of the study.

⁵⁷⁰ For an opposite view see Tierney 2005, p. 670.

⁵⁷¹ Kavanagh 2009, p. 207–208. See also Letsas 2009, p. 84–98.

or frameworks beyond the reach of the judicial interference and whether there is wide or narrow room for latitude within it.⁵⁷²

As suggested, the case-law of ECtHR is often influenced by the margin of appreciation. Consequently, if the national judges hesitate between developing an autonomous constitutional rights jurisprudence and applying Strasbourg standards, which they often do, there is a danger of the situation that Phillipson and Fenwick have labelled “a double dose of deference⁵⁷³”. When the national courts apply the deferential decisions of the ECtHR, the margin of appreciation doctrine unintentionally transports into the domestic decision-making. Consequently, the standard which the national courts apply is already deferential. If the national courts find reasons to defer to the national legislature the decision issued has been exposed to democratic supremacy twice.⁵⁷⁴

7.6 A framework for value-sensitive analysis

In this chapter, I have examined the doctrine of deference as a part of the British constitution. As demonstrated in the chapter, the discussion on the subject is broad and partly obscure. The complex nature of the debate is explained by two reasons, which are, at first, the conceptual variability connected to deference and, second, the position of the questions of deference between the law and politics. The value-sensitive nature of deference has created multidimensionality and complexity to both the definition and the application of the concept. It is noteworthy that the definition given to the concept is central since it reflects one's understanding of the contents of the doctrine and, thus, directs the interpretation in legal cases, as the case law introduced in the chapter has indicated. While Kavanagh finds the concept

⁵⁷²Kavanagh 2009., p. 208.

⁵⁷³ Phillipson and Fenwick 2006.

⁵⁷⁴ Phillipson 2007, p. 70.

inherently neutral, I find reaching that neutrality challenging. However, courts do not function in a vacuum, isolated from valuations. Consequently, the danger in relying on the inherent neutrality of deference is that its meaning will be determined in each case individually.

In all its analyticity, I find Kavanagh's approach to deference fascinating; however, its practical value remains partially unclear. Hickman has criticised Kavanagh's ideas to be too inclusive and too slippery, obscuring more than revealing.⁵⁷⁵ I partially agree with Hickman, even though I find the inclusiveness of Kavanagh's approach more as a value of her analysis. For instance, the division between minimal and substantive deference serves as a useful basis for the discussions. Furthermore, deference functions in the complex sphere on the border between law and politics, and, consequently, constructing a systematic, clear theory describing these complex questions may be impossible. On this basis, Kavanagh's contribution succeeds in serving the guidelines for the function of deference. After all, it is clear that the explanatory force of a model emphasising contextuality and variability of degree may not be at its best on a general level. It is noteworthy that the different dimensions of deference appear in different contexts, and thus the more precise meaning of deference is formed through the merits of the case as a whole.

The remarks of deference made in this chapter also illustrate the essence of the weak-form review. Also in that respect the research finds Kavanagh's approach to deference as a fruitful basis for future examination. However, it is also found insufficient. Consequently, through the analysis of the research, we are able to form a more profound understanding of the essence of the weak-form review.

The relationship between the law and politics in human rights adjudication is evolutive. The context determines the values taken into account and the proper balance between them. Consequently, also the institutional roles of the legislature and the courts are ultimately determined by the context of the case at hand, in a way

⁵⁷⁵ Hickman 2010, p. 169–172.

that recognizes their multidimensionality rather than by strict preliminary limitations. Thus, also the mechanism through which the balance is pursued must be flexible and sensitive to variety. The value of deference as a means of construing the institutional relationship between the judicial and legislative branches is, from my point of view, clear. Despite its complexities, deference provides several tools to scrutinize the institutional relationship. Moreover, when compared to the options available such as the margin of discretion or the discretionary area of judgement, both of which involve an idea of the predefined areas beyond the reach of judicial interference, deference appears to be the most enabling.

The chapter indicates that discussions connected to deference provide an interesting framework for assessing institutional questions also on a more general level. Consequently, the essential is not the essence or status of deference but the value-sensitivity it provides. The variability and contextuality of deference allow us to approach the issue of judicial review with the sensitivity required in a dynamic, constitutional context. However, only by recognising the multidimensionality of the questions of judicial review, are we able to approach them with the sensitivity they required, and deference has the potential to fulfil this task.

PART IV: THE INSTITUTIONAL RELATIONSHIP BETWEEN THE LEGISLATURE AND THE COURTS IN THE CONTEMPORARY FINNISH CONSTITUTION

8 Transformation of the Finnish constitutional tradition: A short history

8.1 Premises of the constitutional development

The fourth part of the study focuses on the questions of the Finnish constitution. It examines the formation of the contemporary constitutional traditions and especially the transformation of the institutional relationship between the legislative and the judicial branches in the Finnish constitution. In this part, the theoretical viewpoints presented in the earlier chapters are analysed on a more practical level. The part begins with a chapter with a short historical overview of the Finnish constitutional development describing the premises for the latter massive changes. Being familiar with these aspects is significant for understanding the institutional setting of the constitutional review in the contemporary Finnish constitution and the evolution of the constitutional review doctrine. In addition to determining the context and premises of the constitutional review debate in Finland, this part aims to analyse the relationship between the national legislature and courts in the light of the recent praxis of the institutions.

The part is composed of three chapters. In chapter eight, I briefly examine the development of the Finnish constitutional system from the late 19th century to the

contemporary, multilevel system it is today. The focus is, however, on the changes during the last decades connected to the Europeanisation of the constitution and especially on the institutional setting connected to the relationship between the national legislature and the national courts which are analysed in chapter nine. In chapter nine the angle is particularly on the normative basis and doctrinal traditions structuring the institutional relationship. In chapter ten the relationship is analysed from a more practical viewpoint.

As discussed in the first chapter of the study the term constitution implies both a narrow and a wide sense. As opposed to the British jurisprudence which involves constitution only in its wider, material sense referring to all constitutional regulations, principles, practices and customs, the Finnish jurisprudence recognises constitution in both senses. The Finnish term *valtiosääntö* refers to the wider sense of the term, constitution, and it is generally understood to cover the Finnish, material constitutional law regulating the division of powers between the state organs and between the society and the state. To the narrow sense of the concept is, on its behalf, referred with the Finnish term *perustuslaki*, Constitution, which is currently connected to the constitutional document, the Constitution of Finland (*Suomen perustuslaki*) enacted in the procedure of constitutional enactment.

Although the practices related to the terminology are clear in principle, there are some difficulties due to the complicated use of terminology in the Constitution itself. Specifically, the Constitution refers to itself with both terms by describing itself, on the other hand, as the constitution (*valtiosääntö*) in section 1 (2) and, on the other hand, using the term Constitution (*perustuslaki*) in multiple other sections, for instance, in sections 14 and 34. Consequently, in the Constitution also the term constitution is exceptionally applied in the narrow sense⁵⁷⁶. The terminological difficulties appear also in the English translations⁵⁷⁷. Nevertheless, in this research,

⁵⁷⁶ Jyränki 2003, p. 214.

⁵⁷⁷ Husa has argued that instead of the established way to refer to the constitutional act as “the Constitution of Finland” a more accurate way would be to use the term “the Finnish Constitution Act”. See Husa 2011, p. 7.

the constitutional act of Finland is referred to in line with the choices made in the first chapter of the research as Constitution or according to the title of its unofficial English translation “the Constitution of Finland”.

Finland's geographical location between Russia and Sweden – East and West – and its history alternately under the control of both states have significantly influenced the development of the Finnish society and its legal order. Finland was under Swedish rule for centuries until 1809⁵⁷⁸ and an autonomous Grand Duchy of Russia between 1809 and 1917⁵⁷⁹. As an autonomous Grand Duchy, Finland's inherited Swedish traditions remained intact, which applied also to the legislation. The common history with these countries and particularly the last dark decades under the Russian rule (1899 – 1917) has affected profoundly also on the formation of the basis of the constitutional relationship between the national legislature and national courts. To a small country between East and West, the constitutional development has often signified complying with external demands but also taking advantage of the opportunities they offer. In this light, the connection of the major constitutional changes in the immediate history of Finland with the turning points of international politics and especially with Finland's relations to its eastern neighbour appears obvious. The effects of the historical background appear also in Finland's aspiration to develop its constitution under the Nordic and Western models which reflects Finland's desire to identify itself as a western country. For instance, the parliament act of 1906 with the modern 200-seat unicameral parliament elected by universal suffrage illustrates this desire.⁵⁸⁰

As a legacy of the social evolution during the era under Russian rule, the traditional Finnish legal order contained some peculiar characteristics that profoundly influenced the later formation of the constitutional system. The fundamental instrumental status of the national Constitution and highly formal

⁵⁷⁸ On the period under the Swedish rule, see Riepula et al. 2019, p. 27–55.

⁵⁷⁹ On the period under the Russian rule and the events related to the Finland's independence, see Riepula et al. 2019, p. 57–109.

⁵⁸⁰ OM 2019:22. Ojanen 2013, p. 93–94.

legalism are products of that era. As a background to the development is the Finns' resistance to the Russian efforts to abolish Finland's autonomy at the beginning of the 20th century. The Finnish resistance relied heavily on the claim of the demand under the new legislation of the Finnish Constitutions according to which the Constitutions were considered to bind all authorities in the Grand Duchy. However, as Jussila has indicated, the Emperor of Russia Alexander I confirmed Finland's constitution in general terms without specifying which laws the confirmation covered. Due to the different semantic and terminological development in Finland (and Sweden) and Russia, the confirmation was interpreted in multiple ways that resulted in conflicts.⁵⁸¹ As a result of these events, rule-focused legalism set considerable weight on the letter of the law, and a highly valued status of the Constitution was inherited into the Finnish legal culture.

Another peculiarity of the Finnish constitutional system, originating from the years under the Russian rule, is the institution of exceptive enactments (*poikkeuslaki*).⁵⁸² An exceptive enactment is an act of parliament adopted according to the procedure for constitutional enactments. Exceptive enactments enabled enacting laws substantially conflicting with the Constitution. The institution of exceptive enactments reflected the idea of formal protection of fundamental rights implying solely the question of a proper parliamentary procedure instead of effective substantive protection. However, due to the fundamental and human rights development in the late 20th century, the significance of exceptive enactments began to decrease. Thereafter, in the Constitutional Reform of 2000, the Constitutional Law Committee formulated a restriction of the exceptive enactment procedure when enacting national legislation. Based on the preparatory works on the Constitutional Reform the contradiction between the legislative proposition and the Constitution should primarily be removed. If the enactment of an exceptive enactment would be estimated necessary, the exemption should be as limited as possible and the law

⁵⁸¹ Jussila 1969, p. 21 and p. 236.

⁵⁸² Ojanen 2013, p. 94.

should primarily be enacted for a limited period.⁵⁸³ Lavapuro has argued that the principle of avoiding exceptive enactments reflects also the change in the Finnish constitutional control system from authority-based control to the weak-form review since the exception from the Constitution requires a substantive justification which directs the legislature to remedy appearing problems as a part of the legislative process.⁵⁸⁴

The Finnish state development has been a central premise for the formation of the Finnish legal order and the constitutional culture. It provides a significant background also for the massive evolution of the current Finnish constitution that began in the late 20th century. Even though the development was strictly connected to global constitutionalisation, recognising the national premises provides tools to analyse the constitutional evolution in the national context. In the next subchapter, I examine national development in more detail.

8.2 Dynamics of the constitutional development

8.2.1 Finland's membership in international human rights treaties as a source of the constitutional change

European, supranational constitutional development serves as a central driving force in the evolution of the Finnish constitution during recent decades⁵⁸⁵. On a general level, the effects of European constitutionalism on the national constitutional orders are presented in chapter three. Consequently, the focus in this chapter is on the concrete changes in the Finnish constitution. Finland had joined the United Nations

⁵⁸³ HE 1/1998 vp and PeVM 10/1998 vp p. 22–23.

⁵⁸⁴ Lavapuro 2010b, p. 166.

⁵⁸⁵ However, Riepula et al. argue that the roots of the Finnish constitutional development lie in the 1970s in the establishment of the Constitutional Committee (valtiösääntökomitea) and the European development serves solely as its driving force. See Riepula et al. 2019, p. 349.

in 1955 and ratified during the 1970s and 1980s several of its human rights treaties such as the International Covenant on Economic, Social and Cultural Rights (Finnish Treaty Series no 6/1976) and the International Covenant on Civil and Political Rights (Finnish Treaty Series no 7-8/1976). However, even the protection of the human rights and fundamental freedoms of individual received more attention in legislation and case law already in the early 1980s⁵⁸⁶ Finland's accession to the Council of Europe in 1989 and the ratification of the European Convention on Human Rights (Finnish Treaty Series no 18–19/1990) in 1990 is generally considered the main driving forces behind the constitutional changes at the turn of the 21st century. In the international context, the constitutional importance of the events has been compared to the enactment of the Human Rights Act in the United Kingdom⁵⁸⁷.

Compared to the other European countries, Finland joined the Council of Europe rather late. The delay relates to Finland's geographical location and the disagreements over the organisation's human rights mission between East and West. However, before becoming a full member, Finland co-operated with the Council of Europe as its external member. After the change in the political situation, Finland's actual membership in the Council of Europe actualised relatively rapidly. Before the ratification of the ECHR, the Ministry of Justice prepared a report on the relationship between the Finnish national law and the Convention. The report revealed a surprising number of deficiencies in the national legislation concerning, for instance, enforcement of sentences and court proceedings. Nevertheless, the problems were mainly resolved before the Convention was ratified by amendments to national law. In the end, the only deficiency that remained in the national law was

⁵⁸⁶ Jääskinen 2001, p. 604. He refers to the enactment of the Administrative Procedure Act (598/1982, hallintomenettelylaki), the pursuit of better implementation of legal protection of individuals in Coercive Measures Act (450/1987, pakkokeinolaki) and increasing attention to the UN Convention on Civil and Political Rights in the legal praxis.

⁵⁸⁷ Lavapuro et al. 2011, p. 512–513.

the question connected to the oral procedure's accordance with Article 6 of the ECHR. However, the question was resolved by a reservation made by Finland.⁵⁸⁸

The ratification of the European Convention on Human Rights, and thus becoming the subject of the jurisdiction of the European Court of Human Rights, had significant implications for both the content of national law and national legal practice. Human rights development increased the significance of both the international human rights treaties and the interpretative practice of the supervisory bodies as the substantive limits of both judicial and political decision-making.⁵⁸⁹ Moreover, for future integration, the experiences of the ratification process of the ECHR were particularly important. During the ratification of the European Convention on Human Rights Finland was, for the first time, in a situation in which a national legislative process was accelerated due to external factors. In addition, the process provided an interpretative, constitutional model to enter into force an international treaty involving significant, constitutional effects. The restrictions on Finland's external sovereignty were also discussed during the transition under the jurisdiction and supervision of a supranational system.⁵⁹⁰ Due to the central role of the ECtHR's interpretative practise in the substantive development of the rights guaranteed in the Convention, it has been characterised as a type of European Constitutional Court, the effects of which also extend to Finnish legal culture⁵⁹¹.

The effects of the jurisdiction of the European Court of Human Rights on Finland's sovereignty were significant and appeared also in the legislative process. The European Convention on Human Rights was enacted in a narrowed procedure for constitutional enactments (*supistettu perustuslainsäätämisyjärjestys*). The procedure for enactment was chosen since it was possible that in the future a decision of the European Court of Human Rights confirming a human rights violation could force

⁵⁸⁸ Jääskinen 2001, p. 604–605.

⁵⁸⁹ Lavapuro 2010b, p. 10. On the general significance of the transformation of the human rights culture in Finland see, e.g., Lämsineva 2002 and Viljanen 2001, p. 1–12.

⁵⁹⁰ Jääskinen 2001, p. 605 and Pellonpää 2009, p. 104.

⁵⁹¹ Lavapuro 2010b, p. 9.

changes in Finnish legislation. The second reason was the jurisdiction of the European Court of Human Rights to order the state to pay financial compensation to the injured parties.⁵⁹² In addition to the prejudicative value of the ratification process, the Convention has also affected legal practices. The effects are reflected through the principle of a human-rights-friendly interpretation of the law (*ihmisoikeusmyönteinen laintulkinta*) by the Constitutional Law Committee. According to the principle, courts and authorities must interpret the provision of law in a manner that secures the effective protection of human rights and is, therefore, the most human rights-friendly interpretation.⁵⁹³

8.2.2 Finland's membership in the European Union

In addition to the ratification of the international human rights treaties, Finland's membership in the European Union has significantly affected the changes in the Finnish constitution. Finland joined the European Union in 1995. From a constitutional point of view, the implementation of the Accession Treaty (Finnish Treaty Series 103/1994) was a relatively simple process, since similar constitutional questions had already been considered when ratifying the European Convention on Human Rights. In Finland, the most comprehensive constitutional changes were institutional. Thus, in the Finnish discussions on the national, constitutional effects of the EU membership, the focus has been on institutional questions and power distribution. Mutanen notes that, in many other countries, the question has, however, been approached through the fundamental rights protection and democracy⁵⁹⁴.

Finland's membership of the EU has reinforced the position of national courts in the national institutional hierarchy. The membership has increased both the

⁵⁹² Pellonpää 2009, p. 104–105. PeVL 2/1990 vp, p. 2.

⁵⁹³ PeVL 2/1990 vp, p. 3.

⁵⁹⁴ Mutanen 2015, p. 380.

functions and the institutional significance of national courts. The decentralized enforcement of EU law through national courts allocates most of the jurisdiction over EU law to national courts. Moreover, membership in the EU has affected the content of substantive law, principles of interpretation and application of the law, sources of the law and the position of the courts in relation to the other governmental branches and supranational actors.⁵⁹⁵

The European Union law is voluminous and extensive. Consequently, Finland's accession to the European Union significantly increased the number of written sources of law. EU legislation has also traditionally been rather vague, goal-oriented, and – as a result of political decision-making – compromised. These features of the EU legislation underline the role of the national courts in determining the content of EU law. Consequently, contrary to the traditional Finnish approach, the written legislation alone was no longer sufficient to determine the content of the law. Instead, the impact of case-law on the formulation of the content of legal norms increased. Moreover, the central role of the legal principles as central guiding elements in judicial decision-making modified the role of Finnish courts from strictly legalist practices to balancing interests and principles between norms.⁵⁹⁶ Moreover, the multilingual nature of EU law, which imposes requirements on the interpretation of EU law and its national implementation, has created challenges for the courts.⁵⁹⁷

In addition to the effects connected to the nature of the EU law, the empowerment of courts was also concretised in other ways: the courts have a central role in guarding the rights of individuals under the EU law, promoting the application of EU law, and guarding its observance. To accomplish these functions, the national courts are provided with several jurisdictions, for instance, the possibility to examine the adequacy of national implementation of directives and the primacy

⁵⁹⁵ Ojanen 2000, p. 165–167.

⁵⁹⁶ *Ibid.*, p. 175–176.

⁵⁹⁷ *Ibid.*, p. 172–173.

of EU law over the national law. Moreover, the courts have a possibility to issue an opinion on the compatibility of the decisions of public authorities with EU law.⁵⁹⁸

Nevertheless, EU law was adopted in national legal practices surprisingly fluently and without significant obstacles. The jurisprudence emerged at all levels of the judicial hierarchy and, consequently, EU law did not remain merely a tool for the highest courts (the Supreme Court and the Supreme Administrative Court). The general principles of EU law were also applied. In contrast, the primacy of European Union law has not been applied very often. This indicates not only the successful implementation of the EU law at the national level right from the beginning of the membership but also the relatively low number of the difficult cases that have an explicit conflict between EU law and national law, and the reluctance of courts to apply radical means. Thus, in conflicts, interpretative means have often remained sufficient.⁵⁹⁹ Moreover, Finnish courts adopt EU law predominantly as the will of the national legislature, which may also facilitate its application. Consequently, the courts' approach to EU law is predominantly technical and decisions are not justified by the nature of EU law as an autonomous legal order.⁶⁰⁰

Finland's membership in the European Union has significantly influenced on the position of the Finnish courts. The expanded role of the courts appears as their several new obligations. Specifically, the national courts must take into account the case law of the European Court of Justice, to interpret national law in a compatible way with EU law, to examine the compatibility of national law with EU law and to request a preliminary ruling on the interpretation of EU law.

⁵⁹⁸ Ojanen 2000, p. 176.

⁵⁹⁹ Ojanen 2009, p. 201–203.

⁶⁰⁰ Jääskinen 2008, p. 49–53.

8.2.3 Fundamental Rights Reform of 1995

European constitutional development also led to foundational evolution in the domestic, constitutional legislation. The international human rights development and the increasing importance of the human rights provisions as a part of the national constitution also catalysed the change in the national fundamental rights culture⁶⁰¹ and produced significant legislative reforms on the national level. The first of the reforms was the Fundamental Rights Reform, which came into force in 1995 (Finnish Treaty Series no 969/1995). The Constitution Act of 1919 (Finnish Treaty Series no 94/1919, hallitusmuoto) included a catalogue of fundamental rights. However, the provisions of the Constitution Act were understood primarily as obligations for the legislature and, thus, not as a source of directly applicable individual rights. Nevertheless, after the enforcement of the ECHR, the national fundamental rights catalogue was found obsolete⁶⁰². Consequently, there was a risk that, over time, the European system would override the national fundamental rights provisions.⁶⁰³ In the reform, the fundamental rights provisions were entirely reformed. The preparation process of the Fundamental Rights Reform was relatively fluent if compared to the number of critical remarks made during the accession to the European Convention on Human Rights. Lämsineva has argued that perhaps the relatively fluent process reflected that, at that time, the significance of fundamental rights to the legal order was not yet completely understood.⁶⁰⁴

According to the preparatory works, the Fundamental Rights Reform aimed to expand and strengthen the constitutional protection of individual rights, to increase equality in the society and to expand the possibility of individuals to invoke fundamental rights. Moreover, the aims included the harmonization of the

⁶⁰¹ On the evolution of the fundamental rights culture see Lämsineva 1998, p. 103–119.

⁶⁰² Also the ICCPR of the UN (Finnish Treaty Series no. 7-8/76) was significant. See V-P Viljanen 1996, p. 789.

⁶⁰³ Jääskinen 2001, p. 605.

⁶⁰⁴ Lämsineva 2004, p. 277.

fundamental and human rights regulation and an increased application of fundamental rights in national courts and authorities.⁶⁰⁵ Achieving these objectives required taking into account the decisions of the ECtHR, both in domestic case law and in legislation. Application of the case law of the ECtHR by national courts has had a positive effect on legal certainty and the relationship between fundamental and human rights.⁶⁰⁶

The wordings of the provisions of the fundamental rights catalogue are in many respects in line with the European Convention on Human Rights. Partially, however, fundamental rights go beyond the standard of protection guaranteed in the human rights treaties. This reflects the principle according to which the human rights treaties set only the minimum standard of the rights of the individual.⁶⁰⁷ Thus, although the fundamental rights catalogue goes beyond the requirements of the ECHR, the provisions of the Convention cannot, naturally, reduce the protection guaranteed by national fundamental rights⁶⁰⁸. Due to the several fundamental rights provisions contain an explicit reference to Finland's human rights obligations, the development has been referred to as the constitutionalisation of the human rights obligations.⁶⁰⁹

The significance of the effect of the Fundamental Rights Reform on the relationship between fundamental and human rights was concretised in the transformation of the interpretative line of the Constitutional Law Committee. In 1982, the Constitutional Law Committee had issued that the international human rights treaties binding on Finland did not supplement or clarify the content of the provisions of the Constitution Act of 1919⁶¹⁰. Thus, the interpretation of provisions of the Constitution Act was not able to be based on an assumption of the substantive correspondence between them and the human rights treaties (*erillisyysteesi*). The view

⁶⁰⁵ PeVM 25/1994.

⁶⁰⁶ Pellonpää 2009, p. 107 and p. 113.

⁶⁰⁷ Viljanen 1996, p. 797–798. Heinonen and Lavapuro 2012, p. 8–11.

⁶⁰⁸ Pellonpää 2009, p. 108.

⁶⁰⁹ V-P Viljanen 1996, p. 806–807.

⁶¹⁰ PeVL 12/1982 vp, p. 4.

was based on the dualistic model adopted in Finland to structure the relationship between international and domestic law⁶¹¹. However, in the Fundamental Rights Reform, the interpretation of the Committee was changed. The Committee stressed the need for the interpretive harmonization between the fundamental and human rights systems.⁶¹² Despite, in the context of certain social rights, Finland has experienced difficulties meeting the international objectives. Rautiainen recently indicated that, in the context of these social rights, the minimum level of protection provided by the human rights obligations is, in fact, higher than the level of protection at the national level. Consequently, a human rights violation does not serve as a basis for the violation of a fundamental right and, thus, the demand for the harmonization is not categorical.⁶¹³

Despite the numerous similarities, the purpose of the Fundamental Rights Reform was not merely the incorporation of the ECHR into the national constitution. The fundamental rights catalogue includes also provisions based on domestic premises, such as social and cultural rights. However, Veli-Pekka Viljanen has argued that despite the domestic factors, the Fundamental Rights Reform, signified, above all, the opening of the national fundamental rights system and the constitution to international influences. As a result of the reform, the isolation of the fundamental rights debate solely at the national level was over. The effects of the human rights perspective on the perception of fundamental rights were visible immediately after the reform.⁶¹⁴ On the other hand, Hallberg has argued that the main function of the Fundamental Rights Reform was in strengthening the common values. The reform provided the basis for their development and turned attention from systems to people and their rights.⁶¹⁵

⁶¹¹ Scheinin 1991, p. 300.

⁶¹² PeVM 25/1994 vp, p. 5.

⁶¹³ Rautiainen's presentation in a seminar of the Finnish League for Human Rights "Riittävä toimeentulo – kyse on ihmisoikeudesta!" in 28.3.2019.

⁶¹⁴ V-P Viljanen 1996, p. 791–792.

⁶¹⁵ Hallberg 1996, p. 844.

In the Fundamental Rights Reform to the fundamental rights catalogue was adopted a provision of the duty of the public authorities to guarantee the protection of fundamental and human rights (section 16a of the old Constitution Act and section 22 of the new Constitution). The obligation represents a significant difference between the old constitutional tradition and a novel approach to the fundamental and human rights obligations⁶¹⁶. In the preparatory works of the reform (HE 309/1993 vp) the provision is characterized as a general provision applicable to all fundamental and human rights provisions guaranteed in the human rights treaties binding on Finland. Furthermore, the provision emphasises the pursuit of substantially guarantee fundamental rights.⁶¹⁷ The government proposal highlights the equal importance of fundamental and human rights. Consequently, the fundamental and human rights systems should, thus, not be understood as separate. Instead, the systems should rather be approached as complementary, recognizing the several connections and interactions between them⁶¹⁸. Thus, the current Finnish system for the protection of fundamental and human rights consists of different levels of sources (fundamental rights, EU law, international human rights obligations) and aims to establish an as high level of protection as possible⁶¹⁹.

In its report on the Fundamental Rights Reform, the Constitutional Law Committee emphasised the interpretative effect of the fundamental rights and addressed to courts a general duty to interpret the legislation in a fundamental rights-friendly way (*perusoikeusmyönteinen laintulkinta*). Applying the fundamental rights-friendly interpretation implies an obligation to courts to interpret the legislation in a manner that secures the effective protection of fundamental rights.⁶²⁰ The Constitutional Law Committee argued that when a court applies fundamental rights in a case, the decision is usually based on both the fundamental rights provisions and

⁶¹⁶ Lavapuro 2010b, p. 14.

⁶¹⁷ See HE 309/1993 vp: detailed arguments -> 16a §.

⁶¹⁸ Ojanen 2010, p. 118.

⁶¹⁹ Ojanen 2011, p. 455.

⁶²⁰ On the interpretative effect of fundamental rights, see Lämsineva 2002, p. 75–76.

the provisions of an act of parliament. The Committee argued that situations in which the contradiction between the law and the Constitution would be clear and unresolved and, thus, could not be eliminated by interpretation would be, in practice, very exceptional. However, the Committee also reminded that in a situation of a clear conflict the courts were not empowered to give primacy to the fundamental rights. Moreover, the court must also take into account the interpretative practice of the Constitutional Law Committee when assessing the case. However, since the Constitution does not bind the courts to this practice, the Committee's interpretative practice can solely be a secondary source of law.⁶²¹

8.2.4 Constitutional Reform of 2000

The international effects on the Finnish constitution served also as a basis for the Constitutional Reform which came into force on 1 March 2000. As a consequence of the reform, the Finnish constitutional provisions are included in a single constitutional act, the Constitution of Finland, instead of the previous four separate constitutional statutes: the Constitution Act of Finland of 1919 (*Suomen hallitusmuoto*), the Parliament Act of 1928 (*valtiopäiväjärjestys*), the Act on the High Court of Impeachment of 1922 (*laki valtakunnanoikeudesta*) and the Act on the Right of Parliament to Inspect the Lawfulness of the Official Acts of the Members of the Council of State, the Chancellor of Justice and the Parliamentary Ombudsman of 1922 (*laki eduskunnan oikeudesta tarkastaa valtioneuvoston jäsenten ja oikeuskanslerin sekä eduskunnan oikeusasiamiehen virkatointen lainmukaisuutta or ministerivastuulaki*).

The main goal of the Constitutional Reform was the harmonization and modernization of Finland's Constitutions.⁶²² The Constitutional Law Committee

⁶²¹ PeVM 25/1994 vp, p. 4. Jyränki 2000, p. 266–267. V-P Viljanen 2011, p. 127. On the human rights and fundamental rights-friendly interpretation, see. Scheinin 1991, p. 197 and 321–324.

⁶²² HE 1/1998, p. 30.

had already in the early 1990s outlined in favour of comprehensive constitutional reform.⁶²³ On the other hand, several fundamental substantive renewals were already made in the Fundamental Rights Reform. Although the substantive renewals were not the main goal of the reform, some normative reforms were made. One of the most important of them was the national courts' new assignment in judicial review regulated in section 106. The enactment of section 106 of the Constitution was significant from an institutional and doctrinal perspective. Moreover, it promoted the enforcement of fundamental rights. The significance of section 106 is analysed in more detail in chapter 9.

After the profound reform of 2000, the Constitution has been amended four times: in 2007, 2012 and 2018. In 2007 and 2018, the amendments were connected to changes in ordinary legislation that raised the demand to also change the Constitution. More comprehensive modifications were made in 2012 when the amendments were based on the work of the Parliamentary Commission on the Revision of the Constitution (*perustuslain tarkastamiskomitea*). The central modifications of the 2012 reform were connected to the role of the president in foreign affairs and mentioning Finland's membership in the EU in the text of the Constitution, which enjoys at least a principal importance since it makes the membership visible.

8.3 On the verge of the new constitutionalism

Finland's membership in international human right treaties and the European Union served as a central source of the constitutional change triggered the comprehensive evolution of the Finnish constitutional culture. The evolution is reflected by the constitutional reforms at the national level. The developments represent the Finnish

⁶²³ PeVM 16/1994.

vein of the new constitutionalism⁶²⁴ which has appeared especially in the transformation of the fundamental and human rights culture, institutional structures of constitutional review and the courts' power to enforce fundamental rights. Moreover, the evolution has been strictly connected to the international evolution. Consequently, Lavapuro has observed that the Finnish development follows the international development line of the new constitutionalism⁶²⁵.

The development of the significance of the human and fundamental rights obligations in the Finnish constitution was relatively rapid. The normative frameworks of the new Finnish constitutional system were profoundly changed in less than 20 years. As demonstrated above the normative changes were adopted to the legal practices quite rapidly. Nevertheless, the profound change of the constitutional culture has been significantly slower. Combining the traditional characteristics of the Finnish constitution such as formal legalism and the institution of exceptive enactments – reflecting the idea of the solitary formal protection of fundamental rights – with the idea of the substantive protection of fundamental rights proved to be a rather challenging process. One may say that the process of transformation is continuing. After the era of the fundamental reforms, the constitutional tradition has continued its evolution in legal practices.

One of the major consequences of the change in the Finnish constitutional culture is the expansion of the scope of the application of the fundamental rights. In the past, fundamental rights were only associated with the vertical relationship between the individual and the state, but the current understanding connects them also to the horizontal relationship between individuals. Thus, the fundamental rights cover the entire legal order.⁶²⁶ Lämsineva has noted that a rapid and widespread diffusion of fundamental and human rights into the legal order would not have been possible without a strong and genuine social need. The fundamental rights represent

⁶²⁴ For the discussion on the concept see chapter one.

⁶²⁵ Lavapuro 2010b, p. 21.

⁶²⁶ Nieminen 2004, p. 227.

a compact and current overview of the common core of law and function as an anchor which structures the contemporary multidimensional legal problems.⁶²⁷

The evolution towards the new constitutionalism has affected, particularly on the national courts. The effects of both the human rights development and the membership in the European Union reinforced the role of the courts by improving the importance of courts' decisions as a source of law and by changing the legal reasoning.⁶²⁸ The European development also catalysed the evolution on a national level which led to the engagement of courts in the constitutional review. As a consequence of the reforms the national courts have become important factors in interpreting and enforcing fundamental and human rights. In the next chapter I examine more detailed the comprehensive change in the court's position and the evolution of the Finnish doctrine of constitutional review.

⁶²⁷ Lämsineva 2004, p. 276–277.

⁶²⁸ Ojanen 2000, p. 182.

9 The Finnish model of constitutional review

9.1 Evolution of the Finnish model of constitutional review

The traditional Finnish model of constitutional review was based on the strict legislative supremacy: the ex ante review exercised by the Constitutional Law Committee of the parliament. The position of the Constitutional Law Committee has long roots. As early as in the 1880s, its predecessor the Legal Affairs Committee (*lakivaliokunta*) of Finland's Diet of the Four Estates examined a relationship between legislative proposals, the Constitutions, and the privileges of the estates. At that time, Finland was an autonomous Grand Duchy of Russia inherited its Constitutions from the pre-autonomy period under the Swedish rule. As explicated in the previous chapter protecting the inherited Constitutions was important to Finns. In this protection the Legal Affairs Committee had a central function. The role of the Legal Affairs Committee in constitutional review instead of the courts was supported by both the prevailing legal thinking and the interests of the estates to protect their privileges in the Finland's Diet of the Four Estates. The interpretative position developed for the Legal Affairs Committee was a peculiar model of parliamentary constitutional review. It was unique also internationally. In the parliamentary reform in 1906 the former four-chamber Diet was replaced with a unicameral parliament with 200 members of parliament. As a result of the reform, the interpretative position of the Legal Affairs Committee was transferred to the newly established Constitutional Law Committee. The Constitutional Law Committee functioned as a permanent parliamentary committee and defended Finland's constitutional status with legal arguments.

After Finland gained independence in 1917 and the new Constitution Act of Finland of 1919 was enacted, the ex ante constitutional control system remained unchanged. When enacting the Constitution Act it was considered to authorize the

Supreme Court to review the constitutionality of the legislation but in the end of the legislative process the provision was removed. The decision to reject the ex post review was affected by the collapsed authority of the Supreme Court: During the russification years the Constitutional Law Committee had actively defended Finland's autonomous status. The judiciary, on the other hand, was perceived to have acted passively. In addition, the Finnish Supreme courts (the Supreme Court and the Supreme Administrative Court) were and still are regularly heard during the legislative drafting process if necessary. Thus, they were considered to have even a diminutive role in legislative process.⁶²⁹

For the next 80 years, the debate over the constitutional review was determined by section 92 (2) of the Constitution Act of 1919 according to which courts and authorities were not allowed to apply government decrees conflicting with the Constitution or Acts of Parliament. The Constitution Act of 1919 did not explicitly regulate on the judicial review of the constitutionality of the acts of parliament. However, section 92 (2) was interpreted as a prohibition to courts of examining constitutionality of acts of parliament. Formally the prohibition was based on *e contrario* reasoning on the content of section 92 (2). Soon the interpretation was adopted as a doctrine which was maintained in the interpretative practise of the Constitutional Law Committee during the following decades⁶³⁰. Later the doctrine was clarified by lining that if the conflict between the act of parliament and the Constitution is interpretative, making the final solution will be remained in parliament's discretion. The prohibition of judicial review led also to the *de facto* standard of nonapplicability of fundamental and human rights norms in adjudication⁶³¹. The prohibition doctrine of judicial review over the acts of parliament has also been connected to the class tensions and the instability of the Finnish political situation in the late 1910s. The benefits of the ex ante review,

⁶²⁹ On the historical background of the Finnish model of constitutional review see Jyränki 2003, p. 385–391 and Hidén 1974.

⁶³⁰ PeVM 8/1931 vp and PeVL 2/1990 vp.

⁶³¹ Scheinin 1991, p. 196–203.

specifically the capability of the parliament centred review to insulate the central property right questions and to vest rights from normal democratic politics, were promptly noticed by the political and economic elite.⁶³² The judicial review, on the other and, did not involve such strategic benefits.

9.2 Authoritative position of the Constitutional Law Committee

According to section 2 of the Constitution of Finland (731/1999), the powers of the state in Finland belongs to the people represented by the parliament (principle of democracy). The constitutional basis of the roles of the legislature and the courts are identified in the separation of powers provision in section 3 of the Constitution. According to section, “the legislative powers are exercised by the Parliament” and “judicial powers are exercised by independent courts of law, with the Supreme Court and the Supreme Administrative Court as the highest instances”. According to the government proposal to amend the Constitution the independence of courts implies their independence from the influence of the other actors in adjudication⁶³³. The requirement applies to the legislature, the government, and the authorities, as well as the parties to a dispute. Furthermore, the independence of the judiciary is profoundly connected to the requirement of a fair trial as a fundamental and human right (section 21 of the Constitution of Finland and Article 6 of the ECHR). Moreover, protecting the independence of the judiciary is essential for the due process.

The basis of constitutional review in Finland is regulated in section 74 of the Constitution which provides as follows: “The Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.” The provision of section 74 is supplemented by section 106 of the

⁶³² Lämsineva 2002 p. 43–44. Ojanen 2013, p. 97.

⁶³³ HE 1/1998 vp, p. 76.

Constitution, which regulates on the primacy of the Constitution and addresses courts a limited role in constitutional review. However, according to the government proposal to amend the Constitution, section 74 of the Constitution expresses the idea of the central role of the Constitutional Law Committee in supervising the constitutionality of laws and maintains the focus of supervision in *ex ante* review. The Constitution addresses the competences to review the constitutionality of legislative proposals during the legislative process also to the Chancellor of Justice in section 108 the Speaker of Parliament in section 42 (1) and the President of the Republic in section 77 (1) Their roles are, however, complementary. Moreover, the duties of the Chancellor of Justice (section 108) and the Parliamentary Ombudsman (section 109) include the review of the legality of the actions of courts, authorities and civil servants, public employees and other persons performing a public task.

Over the years the Constitutional Law Committee has become an authoritative interpreting body of the Constitution. The Committee examines the constitutionality of legislative proposals *in abstracto* by issuing its statements or reports if doubts about the constitutionality of the legislative proposal arise. The constitutional review is, consequently, connected to the legislative process. In the Fundamental Rights Reform the Constitutional Law Committee was also addressed a duty to review the compliance of the legislative proposals with the international human rights obligations binding on Finland⁶³⁴. Therefore, the Committee actively observes also the central international human rights praxis. However, the Committee emphasises particularly the decisions of the ECtHR which have raised critical voices. In addition, the Constitutional Law Committee issues statements on the constitutional dimension of the EU-connected draft legislation or other projects.⁶³⁵

The Constitutional Law Committee is a political organ, and it consists solely of the members of parliament. Nevertheless, the members of the Committee are supposed to exercise a quasi-judicial function when interpreting the constitution.

⁶³⁴ PeVM 25/1995 vp, p. 29.

⁶³⁵ Jyränki and Husa 2012, p. 353–354.

Despite the political nature of the Committee its argumentation is characterized formalistic as its interpretative practice is based on textual interpretation of the text of the Constitution, preparatory works, and its own precedents. In addition, committee frequently hears external experts of constitutional law, notably academics, whose opinions have a considerable significance on the functioning of the Committee. According to section 37 (1) of the Parliament's Rules of Procedure (40/1999) the Committee *may* (the italics by author) hear experts. Thus the hearing procedure is not obligatory. Due to the nature of the Committee's argumentation its decisions contain strong *de facto* normative value, albeit they are not legally binding⁶³⁶. The other parliamentary committees take properly into account the statements of the Constitutional Law Committee⁶³⁷. If the Committee finds a legislative proposal to be unconstitutional in one or several respect it generally requires amendments to the proposal. The majority of the Committee's decisions are unanimous; thus, votes or dissenting opinions are exceptional.

Consequently, the decisions of the Constitutional Law Committee have *de facto* similar normative value as decisions of constitutional courts. Ojanen has argued that the legally binding nature of the statements of the Committee in legislative process is clear based on sections 74 and 42 (2) of the Constitution⁶³⁸. The authority of the Constitutional Law Committee is based, on the other hand, on its composition of democratically elected members of parliament and, on the other, the high valuation of the opinions of the experts it hears. Thus, the expert hearings serve as a central basis for the functioning of the Committee. However, despite the advantages, the institution of the expert hearings is not entirely unproblematic: especially the lack of transparency and selectivity are sensitive for criticism.⁶³⁹ In addition, the flexible formulations of the critical expert opinions are criticised⁶⁴⁰. Lavapuro has argued

⁶³⁶ HE 1/1998 vp, p. 126 and PeVM 10/1998 vp, p. 23. Jyränki 2003, p. 408. Scheinin 1991, p. 285.

⁶³⁷ Keinänen and Wäiberg 2012, p. 103. See also Saraviita 2012, p. 303 and Keinänen et al. 2013.

⁶³⁸ Ojanen 2008, p. 150.

⁶³⁹ Jyränki and Husa 2012, p. 353.

⁶⁴⁰ Saraviita 2009, p. 439.

that there are strong constitutional arguments connected to the principle of democracy to support the Constitutional Law Committee's position in the constitutional review. Thus, authority of the Committee is worth to be cherished even though, the Committee, however, cannot be considered infallible.⁶⁴¹

The authoritative position of the Constitutional Law Committee is entirely dependent on the appreciation it receives from the members of parliament, government, and society. The number of cases examined by the Committee has increased year by year⁶⁴². Moreover, due to time pressures on the law drafting, the quality of legislative proposals has deteriorated, which has caused the accumulation of work in the Committee. Moreover, it seems that occasionally the statement of the Committee on the government proposals is requested as a precaution. The trend may be due to limited time resources or lack of expertise in the responsible ministry. These factors put pressure on the Committee's functioning and also effect on the quality of the argumentation. On the other hand, also the steering force of the government program and the desire of political actors for prompt solutions have caused challenges to constitutional control. According to the Chancellor of Justice there have been occasionally major constitutional problems within government proposals. The constitutional remarks of the Chancellor of Justice on the government proposals have, however, been ignored. When the same problem has raised in the proceedings of the Constitutional Law Committee, the government proposal has been withdrawn⁶⁴³. It appears the pursuit of government to test the limits of the Constitution and even underestimate the significance of these limits in legislative work⁶⁴⁴. Moreover, occasionally the control of the Constitutional Law Committee has sought to be dispensed due to the urgency. This illustrates that the

⁶⁴¹ Lavapuro 2010b, p. 226–227.

⁶⁴² The parliament of Finland: Statistics on the Committees of the Parliament.

⁶⁴³ K 13/2017, p. 13–16. See, e.g., HE169/2016 vp especially the unemployment benefit for asylum seekers and the statement of the Constitutional Law Committee on it (PeVL 55/2016).

⁶⁴⁴ See, e.g., the statements of the Constitutional Law Committee related to the establishment of the Aalto University (PeVL 11/2009 vp) and the social, health care and regional government reform (PeVL 15/2018).

principle of rule of law is prepared to be compromised if the urgency and political pressure are adequate high.⁶⁴⁵ In addition, the Committee has been instructed in preliminary debates in a plenary session in the parliament and the frequently heard experts of the Committee have been publicly criticised.⁶⁴⁶ All these features negatively affect the authority of the Constitutional Law Committee and simultaneously question the adequacy of the *ex ante* constitutional review.

Occasionally the *de facto* position of the Constitutional Law Committee has been compared to the constitutional courts. The question has been, however, approached sceptically in the legal literature. For instance, Hautamäki has argued that in a functional sense the Committee cannot be compared to the constitutional court but some characteristics of the constitutional courts, nevertheless, fit also to describe the Constitutional Law Committee⁶⁴⁷. In addition, Husa has remarked that the constitutional position of the Committee and the established interpretative tradition is stronger than the regulation on the Committee suggest⁶⁴⁸. However, as pointed out, the Committee is a political body of the parliament and, thus, its members cannot be contrasted with judges in terms of the independence and responsibility. In addition, the Committee's connection to the legislature separates it from the constitutional courts which generally are separate and independent institutions. However, Hautamäki argues that as the main reason behind the view that the Committee cannot be considered as a court serves the Committee's lack of competence to settle the disputes between the highest governmental bodies⁶⁴⁹. On the other hand, in terms of appointing the members, the Committee seems to fit in the frameworks of the constitutional courts since also the members of the courts are appointed on political grounds⁶⁵⁰.

⁶⁴⁵ K 5/2015, p. 15–16.

⁶⁴⁶ See also Tuori 2014, p. 96–97.

⁶⁴⁷ Hautamäki 2006, p. 586.

⁶⁴⁸ Husa 2004, p. 69–70.

⁶⁴⁹ Hautamäki 2006, p. 592.

⁶⁵⁰ *Ibid.*, p. 590 and p. 599.

The key function of a constitutional courts is constitutional review. From that point of view the competences of the Committee remain weak due to the lack of the *de jure* legally binding statements of the Committee especially outside the legislative process. Consequently, Hautamäki argues that a minimum condition for characterising the Committee as constitutional court would be the clarification of the legally binding nature of its statements issued in the context of the constitutional review⁶⁵¹. In addition, the significance of the expert hearings for the functioning of the Committee, which Jyränki has characterised as an integral part of the Committee⁶⁵², separates it from the constitutional courts in which the role of the judges is to serve as experts. Thus, the dependence on the external expertise further distances the Committee from the courts. The private procedural rules of the Committee have the same effect. Moreover, Puumalainen has pointed out that the Committee has not access to certain processes addressed to courts. It cannot, for instance, participate in the preliminary ruling procedure. Moreover, the inability of the Committee to discuss on the content of the Constitution in the context of individual cases due to the *ex ante* nature of the review separates the Committee from the courts. The capability to either present a view in an individual case or on a general level, diversify the range of means to take part in the discussion available to constitutional courts.⁶⁵³

Based on the discussion it seems clear that in the formal functional sense characterizing the Constitutional Law Committee as constitutional court lacks normative basis. However, as suggested, and as the analysis on the legal praxis in the study will demonstrate, the established position of the Committee in the constitutional review is stronger than the normative instruments indicate. Consequently, in that sense, characterizing the Committee *de facto* constitutional court is not as excluded as the presented arguments suggest. In addition to the

⁶⁵¹ Hautamäki 2006., p. 606.

⁶⁵² Jyränki 2003, p. 397.

⁶⁵³ Puumalainen 2018, p. 361–362.

discussion on the role of the Constitutional Law Committee, the question of the constitutional court arises occasionally in terms of a need to establish a constitutional court in Finland. From that point of view the discussion is examined in the following subchapters.

9.3 Limited judicial review under section 106 of the Finnish Constitution

9.3.1 Primacy of the Constitution as a fountain of jurisdiction

In the Constitution Reform of 2000, the provision on the primacy of the Constitution (section 106 of the Constitution) was adapted in the Constitution. Section 106 regulates on a limited ex post review of the constitutionality of laws by the courts. Since the basis of the constitutional review in Finland lies on the abstract, ex ante review by the Constitutional Law Committee the adaptation of the substantive judicial review in the Constitution Reform of 2000 reflects a significant, constitutional importance: a shift from the legislative-based model of review to the weak-form review⁶⁵⁴. According to section 106: “If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.” Section 106 of the Constitution is, consequently, secondary and its application is limited solely to individual cases and situations which are not able to be resolved by interpretative means (fundamental rights-friendly interpretation). In addition, the conflict between the act of parliament and the Constitution must be evident. The primacy of the interpretative means connects the Finnish model to the Human Rights Act of the United Kingdom which also is based on the primacy of interpretation.

⁶⁵⁴ Lavapuro 2010b.

As already suggested, before the Constitutional Reform the national courts had a duty to give primacy to EU law if the national and EU law contradicted but, due to the doctrine of prohibition of judicial review, they were not authorised to give primacy to the domestic Constitutions in the situations of contradiction between the act of parliament and the Constitutions. Moreover, the power of the supranational courts to supervise the compliance of the domestic legislation with the international obligations highlighted the institutional bias⁶⁵⁵. In the Fundamental Rights Reform, the Constitutional Law Committee addressed to courts an interpretative mandate to give effect to the fundamental rights⁶⁵⁶ which improved the position of the national fundamental rights provisions in adjudication. Nevertheless, from the national constitution's point of view the situation was unsustainable. Consequently, although the enactment of section 106 of the Constitution was constitutionally significant, in the light of the preceding constitutional evolution, it was a rather natural, almost inevitable step. In addition to the profound institutional significance of section 106, its adoption was significant also for the enforcement of the fundamental rights since its enactment raised the Constitution within the scope of the directly applicable law.

During the Constitutional Reform there was a vivid debate on the scope of the new powers of the courts. The wording of section 106 of the Constitution raised many questions during the legislative process, and it was modified several times. In the end, however, the jurisdiction addressed to the courts was a rather limited. The Constitutional Law Committee declares in its report that the application of section 106 is the court's last resort to ensure that its decision does not conflict with the Constitution⁶⁵⁷. For the application of the provision exists two preconditions. First, the review must be connected to a specific case. The case may, however, be of any quality. The requirement of a connection to a concrete case means that the

⁶⁵⁵ Karapuu 1999, p. 873.

⁶⁵⁶ PeVM 25/1994, p. 4.

⁶⁵⁷ See PeVM 10/1998 vp, p. 30–31.

Constitution does not recognise abstract ex post review. Second, the conflict between an act of parliament and the Constitution must be evident. The criterion of an evident conflict, which is examined more detailed in the next subchapter, was inspired by the similar provision in the Swedish Constitution⁶⁵⁸ which, however, has since been removed in the revision of the Constitution in 2011⁶⁵⁹. The jurisdiction under section 106 of the Constitution applies equally to all courts at any degree, but not to public authorities⁶⁶⁰. The case law indicates that the provision has been applied on different degrees. Moreover, the primacy to the Constitution is not required to be claimed by the parties but must be given *ex officio*.⁶⁶¹

Giving primacy to the Constitution implies that the court may not apply a provision conflicting with the Constitution in the case at hand. Thus, the court does not have the competence to annul the act as unconstitutional as, for instance, the Supreme Court in United States. The aim of the review in the Finnish model is to ensure the constitutionality of the outcome of an individual case. Consequently, section 106 of the Constitution does not interfere with the power allocation based on the doctrine of the separation of powers. The question is not about monitoring the limits of the legislature's powers but empowering the judicial review on a case-by-case basis. Already before the Constitutional Reform, Scheinin has suggested that the application of the fundamental rights in the courts should not be based on examining the powers of the legislature but the intention of the legislature. The premise is closely connected to the rule of presumption applied in interpretative situations between national law and the ECHR. The rule of presumption implies that the intent of the legislature was not to violate human rights obligations and, in the national context, fundamental rights. According to Scheinin, the rule of presumption would solve the problems connected to the "intention of the legislature": when no other intention could be indicated, it should be assumed that the legislature did not

⁶⁵⁸ HE 1/1998 p. 54.

⁶⁵⁹ Nergelius 2013, p. 376–377.

⁶⁶⁰ Saraviita 2000, p. 515–518.

⁶⁶¹ Jyränki and Husa 2012, p. 358.

aim to contravene the Constitution.⁶⁶² However, if section 106 is read in the light of the intention of the legislature, it restricts the application of the provision since the application would escalate solely in the undisputed situations. On the other hand, perhaps that is the logic laying behind the requirement of an evident conflict of section 106. The discussion reminds also what Kavanagh has argued on the presumptive weight (minimal deference) for the legislature's decisions (examined in chapter 7.3) implying that legislation should be viewed as a genuine, sincere attempt by the legislature to solve social problems⁶⁶³.

According to the government proposal to amend the Constitution section 106 does usually not apply to exceptive enactments⁶⁶⁴. However, if an exceptive enactment has been enacted a long time ago, it may be appropriate to assess the situation on a case-by-case basis⁶⁶⁵. As already suggested in chapter 8, the enactment of an exceptive enactment is usually based on the need to abolish the formal unconstitutionality of a law that is substantially unconstitutional. Consequently, an exceptive enactment could not be unconstitutional in a way understood in section 106. However, on the other hand, section 106 could be applicable if the exceptive enactment had been enacted a long time ago and the Constitution has since been amended in a way essential to the content of the exceptive enactment. In addition, if the Constitutional Law Committee has changed its interpretative practice of the Constitution section 106 may be applicable.⁶⁶⁶

The question of application of section 106 of the Constitution connected to an exceptive enactment has been quite recently analysed in the decision of the Court of Appeal of Helsinki (HelHO:2018:4). The case concerned the question of whether the application of section 74 of the Non-Military Service Act (1446/2007, siviilipalveluslaki) to a conscientious objector ("total objector", totaaliikieltäytyjä) led

⁶⁶² Scheinin 1991, p. 205.

⁶⁶³ Kavanagh 2009, p. 181–182

⁶⁶⁴ HE 1/1998 vp, p. 54.

⁶⁶⁵ Jyränki 2003, p. 439.

⁶⁶⁶ PeVM 10/1998 vp, p. 31. Jyränki 2003, p. 267.

to an evident conflict with the Constitution. In addition to the constitutional quality of the decision's argumentation the case involves a significant analysis of the relationship between section 106 and an exceptive enactment. The context of case is exceptionally complex and multidimensional. It involves multiple separate elements which the court needed to analyse. The question was about the significance of the institution of exceptive enactments on a general level combined with the effect of the Constitution Reform of 2000. In addition, section 74 of the Non-Military Service Act did not serve as a basis of the conflict alone, but the conflict arose indirectly from another provision. Moreover, the exceptive enactment in question was enacted before the Fundamental Rights Reform of 1995 in which the central fundamental rights regulation was transformed.

In its analysis of the case the court stressed the importance of the temporal perspective and the contextual assessment. The court declared that the exceptive enactment was in evident conflict with the Constitution which implied, as well, the deconstruction of the inapplicability of section 106 to the exceptive enactments. The decision is particularly interesting since the court was not unanimous. Instead, three of the seven judges disagreed with the majority since they argued that the preconditions for the evident conflict did not fulfil. According to the opinion of the minority, neither the Constitution nor its interpretations had changed adequate significantly that the legitimacy of the exceptive enactment would have been disappeared. The lack of unanimity is interesting primarily because the reasoning behind both views was constitutionally robust and thus illustrated the possibilities of the multidimensional argumentation. Moreover, the prosecutor's petition to the Supreme Administrative Court for leave to appeal of decision of the Court of Appeal of Helsinki was rejected. The rejection may illustrate the Supreme Administrative Court's desire to leave the question to the legislature for institutional reasons. Consequently, the judgement gained legal force. Thereafter the case has led to

legislative amendments⁶⁶⁷. I will return to the case in chapter 10 in which I analyse the nature of the constitutional argumentation and the institutional setting of the case more detailed.

9.3.2 Requirement of an evident conflict

Section 106 of the Constitution empowers the judicial review only if the application of an act of parliament would be in an evident conflict with the Constitution. The court assesses the nature of the conflict by comparing the outcome of a case decided based on a provision of an act of parliament with the Constitution. If an evident conflict with the Constitution is identified the provision of the act of parliament is not applied. Thus, the requirement of an evident conflict in section 106 emphasises the secondary role of the judicial review and it is therefore able to be characterised as a self-restriction of the courts reflecting the central role of the legislature.⁶⁶⁸

In the report of the Constitutional Law Committee on government proposal to amend the Constitution the “evident conflict” is defined to imply that the conflict between a provision of an act of parliament and the Constitution is clear, undisputed, and therefore simple to recognize and, moreover, not interpretative as a legal question⁶⁶⁹. In addition, in the report is suggested that when assessing the conflict, attention must be paid to whether the Constitutional Law Committee has already assessed the constitutionality of the provision during the legislative process. If the constitutionality has already been assessed by the Committee, it is improbable that the preconditions for the application of section 106 of the Constitution would be reached. However, due to the abstract nature of the Committee’s review it is possible

⁶⁶⁷ HE 139/2018 vp.

⁶⁶⁸ V-P Viljanen 2005, p. 322–323.

⁶⁶⁹ PeVM 10/1998, p. 31. The requirement of an evident conflict has been interpreted also literally as a requirement of the full unanimity of the court, see Husa 1998, p. 205–206. See also V-P Viljanen’s response 2005, p. 319–320.

that in a court emerges a situation which has not been assessed by the Committee. In such a situation, the requirement of an evident conflict may exceptionally be met even though the Committee would have examined the constitutionality of the legislative proposal.⁶⁷⁰

Jyränki has argued that when considering the application of section 106, the court should follow the opinion expressed in the statement of the Constitutional Law Committee if it has examined the issue. Therefore, judicial review could be exercised only when the provision in question has not been assessed in advance by the Constitutional Law Committee.⁶⁷¹ From these premises, it is interesting that when the first decisions under section 106 were declared⁶⁷² neither of the conflicting acts was examined by the Constitutional Law Committee. However, in both of the cases the supreme courts did not identify an evident conflict between the act and the Constitution. In the other case (KHO 2007:77) the Supreme Administrative Court, in fact, invalidated the decision of the lower courts in which the evident conflict was identified. Thus, the supreme courts did not find the lack of the examination of the Constitutional Law Committee decisive in the case.⁶⁷³

However, the statement expressed by the Constitutional Law Committee during the legislative process provides a strong premise for the interpretation. In practice, this implies anchoring court's reasoning to the interpretation practice of the Constitutional Law Committee. Based on the case law the courts actively refer to the decisions of the Committee when assessing the nature of the conflict. However, the central role of the Committee's decisions in the adjudication is not completely unproblematic. This applies especially in situations in which the law has been enacted before the Fundamental Rights Reform or the practice of the Constitutional Law Committee is otherwise unable to be considered to illuminate the current

⁶⁷⁰ PeVM 10/1998, p. 30–31.

⁶⁷¹ Jyränki 2003, p. 431–447.

⁶⁷² The decisions are the Supreme Court's decision KKO 2003:107 and the Supreme Administrative Court's decision KHO 2007:77.

⁶⁷³ See critical analysis on the cases in Scheinin 2004 and in Ojanen 2008.

understanding. Moreover, if the law was enacted before the Fundamental Rights Reform the fundamental right provisions enacted in the reform, for example, the provision of the responsibility for the environment (section 20 of the Constitution) have not been considered in the legislative process which makes the situation challenging. In such situations, courts' excessive reliance on the legislature's reasoning is even detrimental.⁶⁷⁴

The criterion of an evident conflict is problematic also since it directs courts to distribute cases in different categories based on the nature of the conflict instead of approaching the case on a contextual basis. The categories are interpretatively constitutional cases, unconstitutional cases without an evident conflict with the Constitution and manifestly unconstitutional cases. Cases in the second category are remarkably problematic since unconstitutionality has been observed but since it is not evident, the decision must be based on the provision of the act of parliament. The situation is contradictory since the unconstitutionality already observed is ignored. It follows that the court's decision is unconstitutional or at least tense with the Constitution.⁶⁷⁵ The situation is challenging also from the hierarchy of norms point of view, since the application of a provision of the act of parliament is set in an individual case above the Constitution.

Second, there is a risk that assessing the nature of the conflict overrides the substantive question as the main legal issue in the case. Kaarlo Tuori has emphasised the primacy of the Constitutional Law Committee's *ex ante* review and argued the role of judicial review to be merely complementary. Therefore, according to him the requirement of an evident conflict involves important normative messages of the legislative supremacy and judicial restraint.⁶⁷⁶ As a result the main function of the criterion of an evident conflict would be the determination of the appropriate jurisdictions between the legislature and the courts which effects directly to

⁶⁷⁴ See also Lavapuro 2010b, p. 197.

⁶⁷⁵ Scheinin 1998, p. 1128–1129.

⁶⁷⁶ Tuori 2009, p. 332–333.

enforcement of fundamental rights. The foundational and logical sustainability of Tuori's argumentation has, however, been questioned. Moreover, the requirement of the restraint and the passivity of the courts appears also concern solely the interpretation of fundamental rights. Instead, for example the principle of democracy should, nevertheless, be actively protected by the courts.⁶⁷⁷ The case law, especially the supreme courts' decisions KKO 2003:107, KKO 2004:26 and KHO 2007:77 indicate the described problems valid⁶⁷⁸. However, these cases alone are not adequate to provide a comprehensive picture of the entire interpretation line. I will analyse the courts' interpretation lines in the section 106 cases more detailed in chapter 10.

Due to the challenges raised by the requirement of an evident conflict, its necessity has been the subject of considerable debate among the experts of constitutional law. Procedural options have also been suggested to clarify the situation⁶⁷⁹. The abolition of the criterion of an evident conflict was involved in the preparatory work of the revision of the Constitution in 2011. The Constitution 2008 Working Group (Perustuslaki 2008 -työryhmä), appointed to examine the needs for amend the Constitution, supported the abolition of the requirement⁶⁸⁰. The Working Group argued that the abolition of the requirement would harmonize the powers of the courts and also remove the problematic situations connected to the cases in which the contradiction between the act and the Constitution is not evident. The Working Group also suggested to a consider means to promote better enforcement of the statements of the Constitutional Law Committee.⁶⁸¹

However, the Parliamentary Commission on the Revision of the Constitution (perustuslain tarkastamiskomitea) whose suggestions formed the basis of the

⁶⁷⁷ Lavapuro 2010b, p. 219–222.

⁶⁷⁸ See also Lavapuro 2010b, p. 214. Jyränki and Husa 2012, p. 366.

⁶⁷⁹ Hautamäki has suggested an obligation for the courts to request from the constitutional Law Committee for a binding, abstract decision whether a conflict is identified (tulkintaratkaisumenettely), see Hautamäki 2009.

⁶⁸⁰ OM 2008:8, p. 60–62 and Tuomas Ojanen's expert opinion p. 134–151.

⁶⁸¹ Ibid., in which Tuomas Ojanen's expert opinion p. 145–.

government proposal (HE 60/2010 vp) on the amendment rejected the abolition of the criterion⁶⁸². The main arguments for the decision were a low number of cases in which the provision was applied and a view according to which the interpretative practice is still evolving⁶⁸³. Consequently, the requirement of an evident conflict remained as a part of the preconditions of the judicial review. The question was raised again in 2019 in the Ministry of Justice's Report on the functioning of the Constitution and the possible needs for its amendment in which the abolition of the requirement during the following revision process was supported⁶⁸⁴.

9.4 Constitutional dialogue in Finland

The contemporary Finnish constitutional debate on the interaction between national courts and legislature has also been approached in terms of constitutional dialogue. In the Finnish debate the constitutional dialogue is generally connected to the court's reliance on the interpretative practice of the Constitutional Law Committee and, on the other hand, the constitutional assessment of courts' decisions by the Committee. The debate cannot, however, be characterised as vivid. In fact, the Finnish practices are more aptly described as monologue in which the Constitutional Law Committee issues abstract statements on the constitutionality of draft legislation and the courts interpret and apply constitutional provisions in individual cases⁶⁸⁵. In the traditional Finnish constitutional doctrine, the constitutional relationship between the Constitutional Law Committee and the courts appeared as hierarchical, unidirectional and, in general, anything but dialogical. The interpretative authority of the Constitutional Law Committee on constitutional questions implied for courts a duty to take into account the interpretative practice of the Committee. The role of

⁶⁸² OM 9/2010, p. 126–128.

⁶⁸³ *Ibid.*, p. 128.

⁶⁸⁴ OM 2019:22, p. 31.

⁶⁸⁵ Ojanen 2009, p. 249–250.

the courts as an active developer of the constitution was not even considered. On the other hand, the nature of the Constitutional Law Committee's practice was legalistic and, thus, it was not specifically supposed to apply the court practice in its assessment. Consequently, the premises for the dialogue were not remarkable.

Currently, the Constitutional Law Committee seldom applies the decisions of the domestic courts involving the substantial interpretation on fundamental rights provisions. It is conceivable that the Committee does not find itself competent to the constitutional assessments of the jurisprudence. However, although the Constitutional Law Committee does not take into account the courts' interpretation on fundamental rights it occasionally includes in its statements views which are specifically intended to guide the courts. In addition, despite of the lack of the references on the domestic court practice the Constitutional Law Committee occasionally refers to the decisions of the European supranational courts, as well as to the opinions of the Human Rights Committee. The application of the international practice is significant because it also forms a basis for the minimum level of the domestic fundamental rights protection.

On the other hand, also the significance of the Constitutional Law Committee's practice for adjudication may be described mainly as formal. The courts do not take the Committee's practice into account consistently and comprehensively. However, in cases related to the primacy of the Constitution the Committee's decisions have gained relevance – even overemphasised, since the courts appear to adhere strictly to the statements issued during the legislative process. As suggested in the previous chapter mere technical references to Committee's decisions are not adequate but also courts' excessive reliance on the legislature's reasoning may be detrimental. Ignoring the Committee's interpretative practice results in constitutional problems. Nevertheless, the intention is not to take into account the interpretative practice in

a way pursuing of the mechanical compliance, but to give weight to the differences in the interpretation situations.⁶⁸⁶

The practical possibilities of constitutional dialogue in the Finnish context have been analysed by Lavapuro. His analysis indicates that in the Finnish context the situations with the elements of dialogue appears as a conflict of authority.⁶⁸⁷ The conflict-based approach represents the traditional paradigm of constitutional review emphasising the competitive institutions and control of authority. Consequently, a precondition for the increase of the dialogical perspective is the adoption of the new approach based on profound, substantial argumentation on the Constitution.

9.5 Establishment of a Constitutional Court as the last resort of the rule of law?

As already suggested even though the Finnish model of constitutional review is principally functioning, the establishment of a constitutional court has occasionally raised debate. Also in the Constitutional Reform, the possibility of the establishment of a constitutional court in Finland was under discussion. However, the model based on the *ex ante* review by the Constitutional Law Committee was desired to maintain.⁶⁸⁸ Thereafter, from time to time, the question of the establishment of a constitutional court arises in a public debate often triggered by the collisions between legal and political interests. On politically sensitive issues the binding nature of the statements issued by the Constitutional Law Committee on parliament has provoked opposition among political actors. For instance, the constitutional problems of the

⁶⁸⁶ Ojanen 2009, p. 243 and p. 249–250. Lavapuro 2010b, p. 150.

⁶⁸⁷ Lavapuro 2010b, p. 151–153. The case is connected to the relationship between the act on the Autonomy of Åland and a provision of the Lotteries Act (1047/2001, arpajaislaki) in legislative process.

⁶⁸⁸ Opinions on Perustuslaki 2000 -työryhmän mietintö. Oikeusministeriö 1996.

social and health care reforms have delayed the reform already a decade⁶⁸⁹ which has caused criticism of the system. Also in the context of coronavirus crisis the political actors suggested a need for debate on the position of the Constitutional Law Committee and the establishment of a constitutional court⁶⁹⁰. Behind these suggestions may lay the aspirations to juridificate the politics. Juridicating the difficult political issues permits the politicians to withdrawal from responsibility since the question is out of their reach.⁶⁹¹ On the other hand if the ex post review of the Constitutional Court would replace the ex ante review of the Constitutional Law Committee the constitutional review during the legislative process would significantly decline. However, it is probable that the role of the Constitutional Court would solely be complementary to the parliamentary review.

Traditionally an opinion of the establishment of a constitutional court in Finland has been negative. The current model of constitutional review has been considered well-functioning. For instance, Riepula et al. argue that as the Constitution of 2000 has clarified the constitutional review in Finland grounds to the discussion on constitutional court have disappeared⁶⁹². On the other hand, the judicial review has been perceived unapt to the Finnish legal culture.⁶⁹³ In addition, when the review is exercised by parliament's own body, the tension between law and politics does not escalate into a contradiction between parliament and the judiciary⁶⁹⁴. Moreover, as Tuori has reminded, the constitutional courts are traditionally established after the World War II in states recovering from totalitarianism to monitor the enforcement of fundamental and human rights in the new democracies. Consequently, the establishment of a constitutional court in a country with a stable, rule of law -based democracy appears unnecessary. Nevertheless, as described in chapter 8.2, due to

⁶⁸⁹ See, e.g., the statement of the Constitutional Law Committee on the government proposal on social, health care and regional government reform PeVL 65/2018 vp.

⁶⁹⁰ Suomen Kuvalehti: Perustuslakituomioistuon taas esille. 23.4.2020.

⁶⁹¹ See also Nieminen 2007, p. 6.

⁶⁹² Riepula et al. 2019, p. 362–363.

⁶⁹³ Nieminen 2007, p. 23.

⁶⁹⁴ Tuori 2014, p. 96.

the questioning of the Committee's authoritative position through the efforts to influence its work, on the one hand, and the instrumental attitude towards the Constitution within the government, on the other, part of the critical voices have dispersed.⁶⁹⁵

Nieminen has discussed in her article on the several normative and practical dimensions involving in the question of establishment of a constitutional court in Finland.⁶⁹⁶ The questions are connected, for example, to the differences between the models of review, the procedural questions, and the nomination process for judges. In a small country like Finland, the choice for judges would ultimately be rather limited. Consequently, even though in the certain recent practices the tension between law and politics has occasionally taken forms threatening the entire system of constitutional review, I find the establishment of a constitutional court in Finland unnecessary. However, Tuori reminds that the achievements of the constitutional culture are not irreversible. Recession is also possible. Finland's peculiar constitutional system is dependent on the appreciation of the Constitutional Law Committee in the Finnish society⁶⁹⁷. Thus, the authoritative position of the Constitutional Law Committee should not be taken for granted. This applies both on the external factors but also to the Committee itself.

The evolution of the Finnish model of constitutional review from the strict legislative supremacy combined with the absolute prohibition of judicial review to the new constitutional structures of the weak-form review has been comprehensive. The shift has empowered the national courts and, on the other hand, set the constitutional limits for the legislative supremacy for the first time in Finnish constitutional history. However, the requirement of an evident conflict of section 106 of the Constitution has complicated the court practice under section. Moreover it produces mixed messages on the constitutional position of the national courts. As

⁶⁹⁵ See also Tuori 2014, p. 98.

⁶⁹⁶ Nieminen 2007, p. 23–24. See also Hautamäki 2006b.

⁶⁹⁷ Tuori 2014, p. 95–96.

a result, the Finnish model of judicial review can be characterised as an obscure creation which roots are half in the past and half in the present. These questions are examined more detailed in the next chapter in which I analyse the relationship between the legislature and the courts from a more practical perspective.

10 Judicial review in the Finnish legal praxis

10.1 From normative to substantive protection of fundamental rights?

The Finnish model of constitutional review has been subjected to a fundamentally significant transformation during the past decades. The enactment of section 106 of the Constitution granted courts the power to enforce fundamental rights and, thus, abolished the prohibition doctrine of judicial review over the acts of parliament. As a consequence, the application of fundamental rights in the courts and their effectiveness in general have been improved. Moreover, from the point of view of the constitutional tradition the evolution emphasises the diminution of the legislature's unquestioned supremacy. However, the traditional approach to the constitutional competences has affected as a persistent guideline in the enforcement of constitutional provisions. As a consequence the nature of the Finnish model of the limited judicial review has proven to be complex which has produced unstable interpretative practice. Lavapuro has in his doctoral dissertation (2010) examined the constitutional review and divided the interpretative lines of the Finnish judicial review to the authority-centric reading (*normikontrollihakuinen tulkintaperuste*) emphasising the role of the Constitutional Law Committee's ex ante review, and the legal protection-based reading (*oikeusturvahakuinen tulkintaperuste*), providing priority for the constitutionality of the decision of an individual case.⁶⁹⁸ This research shares Lavapuro's view of the Finnish constitutional control. Thus, since the view does not significantly differ with Lavapuro's view, the case law analysed in his study is not analysed in this research. Instead, the legal cases analysed in this chapter represent the legal praxis of the second decade of the millennium.

⁶⁹⁸ Lavapuro 2010b, p. 190–194. The English translations by the author.

In the authority-centric reading the authority of the statements of the Constitutional Law Committee is unquestioned. As a consequence, the requirement of an evident conflict directs the courts to solve the conflict between the act of parliament and the Constitution through an “all or nothing” approach in the same way as conflict of rules (*sääntökonflikti*) leaving no room for balancing between the rights protection and parliamentary sovereignty.⁶⁹⁹ Moreover, the court may approach the question of the constitutionality on a more general level instead of focusing on the individual case which may lead to the assessments of the constitutionality of the enactment procedure⁷⁰⁰. The authority-centric reading may also distort time-perspective, produce passivity towards the informative nature of the statements of the Constitutional Law Committee and constitute the assessment of the nature of the conflict a decisive factor of the constitutionality.⁷⁰¹

Gardbaum argues that the authority-based approach leads to constitutional minimalism, which reverses the interpretative obligation to enforce fundamental rights addressed to the courts. Instead of interpreting the provision of the act of parliament applicable to the case in the light of fundamental rights, the courts interpret the Constitution in the light of the provision of the act of parliament. This may lead to substantial under-enforcement and under-protection of fundamental rights. Consequently, the legal status of rights does not indicate the effectiveness of rights protection. On the other hand, the legislature has no legal power to intervene if a court identifies an evident conflict which could violate parliamentary sovereignty. Consequently, authority-centric reading may be an inferior approach with respect to both rights’ protection and parliamentary sovereignty.⁷⁰² The case law under section 106 of the Constitution indicates that the concern is not trivial. A traditional,

⁶⁹⁹ Lavapuro 2010b, p. 224.

⁷⁰⁰ See, e.g., the case KKO 2006:71, para. 31 in which the court declares that section 106 of the Constitution enables to avoid infringements caused by the unconstitutional enactment of the act of parliament. See also Husa: Vallanjako, vahingonkorvaus ja perustuslainmukaisuus – koskiensuojelun kiemurat tapauksessa KKO 2006:71, Lakimies 4/2007, p. 618–621 for analysis.

⁷⁰¹ Lavapuro 2010b, p. 190–191.

⁷⁰² Gardbaum 2001, p. 751. See also Lavapuro 2010b, p. 224.

authority-centric reading is applied in a significant number of section 106 cases. Constitutional approach highlighting authority-centric reading is transmitted, for instance, in the Supreme Court's decisions KKO 2003:107⁷⁰³, KKO 2004:26⁷⁰⁴ which was the first case decided under section 106 of the Constitution, and in the Supreme Administrative Court's decision KHO 2007:77⁷⁰⁵.

On the other hand, the case law under section 106 of the Constitution involves also examples of the legal protection-based reading. The Supreme Administrative Court's decision KHO 2008:25⁷⁰⁶, the Supreme Court's decision KKO 2012:11⁷⁰⁷ and the decision of the Court of Appeal of Helsinki HelHO:2018:4 emphasise the reach of balance between the enforcement of fundamental rights and legislative supremacy. Similar characteristics are able to locate in the Supreme Administrative Court's decision KHO 2009:15⁷⁰⁸ even though the court held that an evident conflict with the Constitution was not able to be identified. The legal protection-based reading analyses if and to what extent the statements of the Constitutional Law Committee are valid in the particular case at hand. The approach is justified by the preparatory works of the Constitution Reform since they suggest taking distance to the statements of the Constitutional Law Committee in particular circumstances⁷⁰⁹. Even though the statements of the Constitutional Law Committee are highly valued on the democratic grounds, in the legal-protection based reading their value is, however, more informative than absolute. In addition, the legal-protection based reading is supported by the duty of the public authorities to guarantee the protection of fundamental and human rights of section 22 of the Constitution. As a consequence, the fulfilment of the requirement of an evident conflict does not represent an individual, interpretative problem but a result of exceeding the limits of

⁷⁰³ The case concerned the establishment of paternity. See chapter 10.3.1.

⁷⁰⁴ The case concerned the protection of buildings.

⁷⁰⁵ The case concerned the car taxation.

⁷⁰⁶ The case concerned the application of the prohibition against appeal.

⁷⁰⁷ The case concerned the establishment of paternity. See chapter 10.3.1.

⁷⁰⁸ The case concerned the marriage of a transsexual person.

⁷⁰⁹ See HE 1/1998, p. 163–164 and PeVM 10/1998, p. 30–31.

fundamental rights-friendly interpretation.⁷¹⁰ The model has been, however, criticised especially since it questions the interpretive authority of the Constitutional Law Committee⁷¹¹. However, it is noteworthy that if the court's decision is reached through the legal-protection based reading the authority-centric approach is usually transmitted in the dissenting opinions as we shall observe in the next pages.

The low number of individual cases serves, naturally, as a basis for questioning the relevance of the significance of the different approaches to apply section 106. However, in addition to the problems related to the under-enforcement of fundamental rights the authority-centric reading may transmit the argumentation model to other constitutional practices as, for instance, in the Supreme Administrative Court's case KHO 2008:20⁷¹² has occurred. Thus, the institutional setting of constitutional review is probably to affect the premises of constitutional proceedings in general.⁷¹³ Karhu has also argued that the application of section 106 on a divided premise is not entirely unproblematic since the court praxis will inevitably partly determine the precise content of the provision. Consequently, even if the judicial decision of the content of the law, *obiter dicta*, remains a case-by-case reflection, the legal rationale of the decision, *ratio decidendi*, is able to be generalized.⁷¹⁴

A common feature in all of the cases representing the legal-protection based reading is that in all of them the problem of the legal order has reflected a broader societal problem which solving the courts have identified to require legislative actions. Despite, the courts have held that due to the legal protection function of individual cases they must decide as they did. However, in all decisions the primality of resolving the situation by legislative manners was emphasised which reflects court's respect towards the legislative branch as a primary actor when solving broader societal problems.

⁷¹⁰ Lavapuro 2010b, p. 192–194.

⁷¹¹ See, e.g., Helin 2012, p. 23–24, Hautamäki 2013, p. 79 and Hautamäki 2002.

⁷¹² The case concerned a prisoner's right to religious fast.

⁷¹³ Lavapuro 2010b, p. 223.

⁷¹⁴ Karhu 2008, p. 185.

Another interesting aspect characterising the judgements connected to the application of section 106 is that the decisions have not been unanimous. In the report of the Constitutional Law Committee on government proposal to amend the Constitution the “evident conflict” is defined to imply that the conflict between a provision of an act of parliament and the Constitution is clear, undisputed, and therefore simple to recognize and, moreover, not interpretative as a legal question⁷¹⁵. The case law based on the provision speaks, however, another language. The view of the report as detached from its contexts represent the legalistic vein of the Finnish constitutional tradition which conveys through the authority-centric reading of judicial review. It suggests that the simple, easy-to-understand solutions to every difficult problem exists which connects it to the pursuit of spatial metaphors and formal categorisations of the constitutional enforcement.

10.2 Deference in the Finnish legal praxis

10.2.1 From the primacy of the Constitution to the interpretative *contra legem* decision

As pointed out in chapter nine, the application of section 106 of the Constitution is considered to be the court's last resort to ensure that its decision does not conflict with the Constitution. Primarily the conflict between the provision of an act of parliament and the Constitution ought to be solved by interpretative means (fundamental and human rights-friendly interpretation). The principle appears practical and simple. However, as Lavapuro suggests, the nature of the authority-centric reading of the judicial review may, however, lead to the bipolarity and

⁷¹⁵PeVM 10/1998, p. 31.

overshadow the possibility to assess the interpretative options⁷¹⁶. However, the evolution of the case law under section 106 of the Constitution and the way courts has applied the different instruments raises the question of whether the choice between the options is connected solely to the substantive dimension of the decision. In the end, what precisely are the premises behind court's choice?

The question can be retrieved to the Supreme Administrative Court's cases connected to the prohibition against appeal of civil servants. In the cases the prohibition against appeal was assessed in relation to the Constitution's provision on legal protection (section 21) and its counterpart in the European Convention on Human Rights (Article 6 (1)). The question of the prohibition against appeal is analysed in four individual cases. Two of them concerned section 58 of the old State Civil Service Act (750/1994), which regulated on changes in the status of a civil servant in office (KHO 2008:25 and KHO 2012:54), one concerned section 59 of the old State Civil Service Act regulated on the prohibition against appeal in appointment decisions (KHO 2011:39) and one (KHO 2012:53) transferring an office by an administrative order. In the cases concerning the status of a civil servant in office (KHO 2008:25 and KHO 2012:54) the court approaches the relationship between the application of section 106 of the Constitution and the interpretative means in a peculiar way due to which the two cases are worth of a more detailed examination.

As already suggested in the previous subchapter, in the case KHO 2008:25 the court approached the question of the evident conflict through the legal-protection based reading for the first time. In the case, the prohibition against appeal was not applied since the court identified an evident conflict between the provision of an act of parliament and the Constitution. However, in the subsequent case, KHO 2012:54, which facts were comparable with the case KHO 2008:25, the court did not apply section 106 of the Constitution but decided the case by interpreting the provision of

⁷¹⁶Lavapuro 2010b, p. 204–207. See also Scheinin 2004, p. 541.

the act in a fundamental rights-friendly way. In the case the court declares that the prohibition against appeal has recently been interpreted both in the case law (KHO 2008:25) and in the statement of the Constitutional Law Committee (PeVL 51/2010 vp) to be in harmony with the Constitution only within relatively narrow limits. In addition, the court declares that the application of the prohibition against appeal would directly effect on applicant's rights and leave the applicant without legal remedies. "In such an interpretatively ambiguous situation, field of the prohibition against appeal must be interpreted in a fundamental rights-friendly way, that is to say in this case narrowly"⁷¹⁷. In the case KHO 2012:54 the court's fundamental rights-friendly interpretation signified, *de facto*, the interpretation against the wording of the act. Thus, the fundamental rights-friendly interpretation led to the same result as the application of section 106 of the Constitution in the case KHO 2008:25. Koivisto concludes that the decision signifies that apparently a conflict between a certain legal provision and the Constitution is able to be evident only once. Thus, the first articulation serves as a sufficient basis for removing the evident nature of the conflict. The decision of the case KHO 2012:54 illustrates that even an ambiguous conflict is able to lead to a *contra legem* decision in which a formally unlawful decision gains justification through a fundamental rights-friendly interpretation.⁷¹⁸

The court's decisions in the cases raise the question of the purpose and necessity of section 106 of the Constitution. If the same legal status is able to be achieved by fundamental rights-friendly interpretation of the law, the role remaining for section 106 appears relatively narrow. A one way to approach the issue could be to approach the courts' decisions based on section 106 of the Constitution as signals to the legislature reflecting the need to amend the legislation. After all, the increased threshold for the application of section 106 expressed in the requirement of an evident conflict potentially raise the level of abstraction of the conflicts identified. Consequently, also the effects of section 106-decision potentially exceed the effects

⁷¹⁷ KHO 2012:54, judicial assessment.

⁷¹⁸Koivisto 2013, p. 1041.

of the individual case. The more obvious the conflict is, the more clearly it is directed to the act itself rather than to the individual case.⁷¹⁹ Thus, when the court has articulated the evident conflict between the act and the Constitution in a one case, it has given a signal of a defect to the legislature and fulfilled its constitutional duty. Then, if a case with comparable facts will subsequently come before a court and the legislation has not amended, the court defers from the application of section 106 but is, however, able to reach the same result by deciding the case *contra legem* combined with fundamental rights-friendly interpretation. In the cases connected to the prohibition against appeal of the Supreme Administrative Court the legislature, however, captured the signal after the *contra legem* decision and the State Civil Service Act was amended in 2013 by enacting a general right of appeal in civil servant matters⁷²⁰. The amendment repealed section 58 of the old act.

Approaching the decision of the primacy of the Constitution as signal to the legislature involves, however, problems. Evidently, an evident conflict once identified and articulated does not make the nature of the legal conflict less evident in the subsequent cases. Moreover, if the court has once decided a case under section 106 of the Constitution, would it be essential from the equality's point of view that the decision on the similar cases would be decided on the same basis. In addition, the number of the court decisions based on the application of section 106 is minor and, thus, the constitutional value of the decisions is notable. Applying section 106 as a signal only in the first case diminish the constitutional value of the subsequent, similar decisions decided on interpretative basis. The question is, at least principally challenging since, court's choice always implies a statement of the constitutional value of the decision.

The situation is able to be described questionable also from the separation of powers point of view. In the Finnish legal literature the court's choice between the

⁷¹⁹ Lavapuro 2010b, p. 185.

⁷²⁰ Act amending the State Civil Service Act (177/2013). From 1.1.2019 also the prohibition against appeal in appointment decisions was repealed by the Act amending the State Civil Service Act (883/2018).

application of section 106 and the interpretative means is discussed relatively slightly from the separation of powers point of view. The low number of debate due probably to the established status of the Constitutional Law Committee's statements and the primacy of the interpretative means expressed in the preparatory works of the Constitution Reform. However, as presented in chapter 6.4, for instance, in the United Kingdom the discussion on the judicial choice between sections 3 (interpretation) and 4 (declaration of incompatibility) of the HRA has been more vivid. Hitherto the Finnish discussion may have appeared to be unnecessary. Nevertheless, after the court's decision in the case KHO 2012:54, we ought at least to ask what the relationship between the available instruments in jurisdiction and the limits of the separation of powers is. However, based on the argumentation presented in chapter 6.4 the application of section 106 of the Constitution involves the legislature to the process when the *contra legem* decision through judicial interpretation seems to marginalize the democratic process. Nevertheless, the question is not that simple. *Contra legem* interpretation represents a form of teleological interpretation which means interpretation of the legislation in accordance with its objective purpose (*ratio legis*)⁷²¹. Consequently, finding the *contra legem* interpretation undemocratic includes a presumption also the undemocratic nature of teleological interpretation. That kind of perception on its behalf reflects a narrow conception of the doctrine on sources of law transmitting, for instance, in the writings of Aarnio and Peczenik in which the question of the democracy is connected to the legislative branch⁷²². On the other hand, if the question is analysed through Tolonen's dynamic doctrine on sources of law which finds law as a dynamic process, the democratic empowerment is conveyed through the sources of law⁷²³.

⁷²¹ See Virolainen and Martikainen 2010, p. 462–464. Virolainen and Martikainen argue that determining the *ratio legis* is based on variety of arguments. The legislative intent articulated in the preparatory works is one argument among others (p. 394). However, Tuori (2003, p. 54) finds the position of the historical interpretation more important.

⁷²² Aarnio 1989, Aarnio 2006 and Peczenik, Aleksander: *On Law and Reason*. 1989, p. 313–.

⁷²³ Tolonen 2003.

Thus the *contra legem* decision may be interpreted as marginalizing the democratic process if the democratic legitimacy is bound on the idea of democracy as a parliamentary-centric institution. Democracy as the parliamentary-centric institution is conveyed also in the discussion on the judicial state in which the expanded position of courts in the legal order is found a threat to the democracy. The discussion reflects the idea of courts having powers without democratic mandate at the expense of the legislature.⁷²⁴

10.2.2 Legislative action required: KKO:2012:11 and KKO:2013:59

In the previous subchapter I discussed courts' choice between the application of section 106 of the Constitution and the fundamental and human rights-friendly interpretation as signals through which courts communicate to the legislature. In addition to these nonverbal expressions courts occasionally present their views on the constitutional competences directly in their decisions by holding that legislative action is required to solve the problems of the legal order. For instance, in the case HelHO:2018:4 of the Court of Appeal of Helsinki⁷²⁵ the court emphasises the need to resolve the situation in a sustainable way through legislative means. In addition, it is possible to locate at least a few cases in which the court has examined the question of the competences more detailed. These assessments of the jurisdiction of court include in the dissenting opinions of the cases concerning the establishment of paternity (KKO 2012:11) and the application of the *ne bis in idem* principle between administrative and criminal sanctions of the Supreme Court (KKO 2013:59). The cases examined in this subchapter have already been analysed in the literature and, thus, a detailed description of the cases or a legal, detailed analysis is not necessary

⁷²⁴ On the Finnish discussion on judicial state see especially Tuori 2003. See also Jääskinen 2001, Husa 2004 and Mähönen 2005. In the global context see Hirschl 2004.

⁷²⁵ The case concerns the equal treatment of conscientious objectors. See chapter 9.3.1.

in this context⁷²⁶. Consequently, I focus on the expressions of the institutional competences and describe the facts of the cases only in the extent necessary for understanding the discussion on competences. Both the case KKO 2012:11 and the case KKO 2013:59 are parts of a cluster of cases and represent the end of the sage which interpretative tradition has evolved over time in the interaction of the national and European courts and the legislature. Thus, the chain of evolution is worth of a closer observation. I begin with the paternity cases and continue then to the cases connected to the *ne bis in idem* principle.

The precedent case KKO 2012:11 is connected to the tension between the fundamental and human rights obligations and the rigid time-limit to institute proceedings for the establishment of paternity. The discussion on competences was connected to the court's consideration of whether the obligations arising from fundamental and human rights are compatible with the established legal status and the provisions of the Implementing Act of the Paternity Act (*laki isyyslain toimeenpanosta*, 701/1975) formulated in the absolute form by the legislature. Consequently, before we are able to scrutinize the institutional discussion on the case KKO 2012:11 it is necessary to examine where the story begins. Section 3 of the old Paternity Act of 1975 (*isyyslaki*, 700/1975) provided that paternity is established either by acknowledgement or by a decision of the court. According to section 22 (1) the child has a right to institute proceedings for the establishment of paternity. According to section 4 of the Implementing Act of the Paternity the provisions of the Paternity Act also applies if the child was born before the Paternity Act entry into force unless otherwise provided. The problems of the paternity cases were connected to section 7 (2) of the Implementing Act which provided that proceedings for the establishment of paternity must be initiated within five years from the entry into force of the Paternity Act. The Paternity Act entry into force on 1 October 1976.

⁷²⁶ See, e.g., Husa 2008 and Scheinin 2004. See also Lavapuro 2010b.

In addition to the time-limit no proceedings were allowed to be instituted if the man was deceased. According to the preparatory works of the act the five-year time-limit was based on the fathers' legal security⁷²⁷. On the other hand, as in the government proposal (HE 90/1974 vp) is suggested behind the regulation was a pursuit to ensure equal treatment of children before the law. The Paternity Act of 1975 was a significant improvement in the position of children. It repealed the Act on Children Born out of Wedlock (laki avioliiton ulkopuolella syntyneistä lapsista, 173/1922) which provided that a child born out of wedlock had a father if a man acknowledged paternity (section 20). Consequently, paternity was not able to be established against a man's will which put children in unequal position.

After the enforcement of the paternity legislation the Supreme Court's legal praxis began to emerge. The court strictly applied the five year time-limit of the Implementing Act on several cases. In its precedent case KKO 1982-II-165 the Supreme Court held that the five year time-limit of section 7 (2) of the Implementing Act was not such a time-limit which could be restored by seeking extraordinary remedies (menetetyin määräajan palauttaminen). However, in its precedent decision in KKO 1984-II-95 the Supreme Court interpreted section 42 (1) of the Paternity Act regulating on the annulment of paternity in a manner differing from the wording of section and referred to the equality provision of the Constitution. Ten years later, the Supreme Court issued a new precedent decision KKO 1993:58 and established paternity which had been instituted after the five year time-limit since there had been a legal impediment to institute the establishment of paternity within the due time in the case. Court's arguments were based on the objective of the Paternity Act, on the legal equality of children and on human rights treaties which supported the interpretation.

Another ten years later, in its precedent case KKO 2003:107 the Supreme Court, however, dismissed the claim for the establishment of paternity since, unlike in the

⁷²⁷ See Report of the Legal Affairs Committee LaVM 5/1975 vp, p. 10 and the government proposal HE 90/1974, p. 1–3 and p. 36.

case KKO 1993:58, it held that there had been no legal impediment to raise the claim in the due time. In addition, the man was deceased and, thus, the establishment would have affected solely inheritance and on general legal certainty. However, the case was taken to the ECtHR (the case Grönmark v. Finland 6.7.2010) and in its decision the ECtHR held that a violation of Article 8 of the Convention regulating on the right to respect for private and family life had occurred. Since, the ECtHR has delivered three other decisions on the violation of the Article 8 of the Convention connected to the application of the time-limit regulated in section 7 (2) of the Implementing Act of the Paternity Act⁷²⁸.

The legislature was also aware of the problem. Nevertheless, in the beginning of the 21st century the legislature rejected a legislative proposal connected to the amendment of the 7 (2) of the Implementing Act (136/2004 vp). The bill proposed the abolition of the provision of the five year time-limit. The Legal Affairs Committee examined the legislative proposal and issued that the government shall evaluate the problems due to section 7 (2) of the Implementing Act and submit to parliament necessary legislative proposals based on the assessment (LaVM 1/2005). The statement of the Committee did not, however, led to legislative action.

Finally, in the precedent case KKO 2012:11 the Supreme Court applied section 106 of the Constitution and left the provision of the five year time-limit of the Implementing Act unapplied since it held that the provision was in an evident conflict with section 10 of the Constitution guaranteeing the right to private life. The decision was primarily based on the interpretative praxis of the ECtHR in the similar cases. In the paragraphs 21-22 of the judgment, the court assesses that section 7 (2) of the Implementing Act is written in an absolute and unambiguous form that it leaves no room for a fundamental rights-friendly interpretation of the provision. Thus, the court needed to determine whether the conflict between the application of section 7 (2) and the Constitution was evident. The court declares also that a legal

⁷²⁸ The cases are Backlund v. Finland, 6.5.2010; Röman v. Finland 29.1.2013 and Laakso v. Finland, 15.1.2013.

impediment to institute proceeding for the establishment of paternity could constitute a continuing violation of human rights⁷²⁹. In its reasoning, the court emphasis of the *in casu* assessment suggested in the case law of the ECtHR. Thus, the application of a rigid time-limit and, especially, the national courts' lack of possibilities to balance the competing interests, effected negatively on the right to respect for one's private life under Article 8 of the Convention. However, the ECtHR holds that determining a fair balance between the competing interests falls within the margin of appreciation of the state.⁷³⁰

The case KKO 2012:11 also discusses on the legal effects of paternity. The majority held that the legal effects of the establishment of paternity are based on other legislation and, thus, cannot be limited in the context of the case but will be decided separately if necessary. In addition, the court suggests that based on the equality provision of the Constitution (section 6) and the aim of the Paternity Act to improve the equality of children limiting the legal effects is not justified.⁷³¹ The legal effects of the paternity were discussed also in the dissenting opinions of the case which were delivered by three justices. The first of the dissenting opinions agrees with the majority of the evident conflict between the Constitution and section 7 (2) of the Implementing Act and the establishment of paternity but rejects the possibility of the normal legal effects of the established paternity. In the other two dissenting opinions the question of the normal legal effects was also rejected. In addition, the evident conflict was not identified but one's right to know one's biological origin was accepted. The question of the paternity was thus divided, on the one hand, to one's biological origin and, on the other, to established paternity involving the legal effects of the paternity. In the dissenting opinions was concluded that in the case the

⁷²⁹ KKO 2012:11, para. 24.

⁷³⁰ Ibid., paras. 28–29. On the reasoning of the ECtHR, see, e.g., *Phinikaridou v. Cyprus* 20.12.2007, paras. 53–54, *Grönmark v. Finland* 6.7.2010, paras. 48–49, *Backlund v. Finland* 6.7.2010, paras. 46–47, *Laakso v. Finland* 15.1.2013, paras. 45–49 and *Röman v. Finland* 29.1.2013, paras. 50–54.

⁷³¹ Ibid., para. 32. Later, in the precedent case KKO 2020:3 a child's right to inherit was assessed and reinforced.

human rights violation identified was narrower than the legal effects of the remediation.

The most comprehensive assessment of the constitutional competences was, however, presented in the dissenting opinion of the President of the Supreme Court Koskelo who explicitly notes that the case concerns the court's competence to override an unambiguous provision of the act of parliament. Koskelo argues also that the content of the human rights obligations and their enforcement at the national level are two separate issues: enforcement takes place in accordance with the national constitution and the competences based on it. Koskelo argues that even though the legislature has been aware of the problematic situation it has not proceeded legislative action. Apparently, Koskelo's argument suggests that the legislature approved the status quo and, thus, deciding against the legislature's will would be beyond court's jurisdiction. Koskelo's opinion include a separate section, labelled as "Court's jurisdiction", in which she assesses the various factors connected to the institutional competences. She suggests that due to the absolute formulation of the time-limit provision the application of the interpretative means is impossible which actualises the assessments of the application of section 106 of the Constitution. Koskelo argues that solving fundamental rights issues connected to ensuring equality and legal certainty requires, nevertheless, legislative actions and thus the court need to defer. Instead of leaving the question dependant on a case-by-case assessment, the problems of the time-limit provision should be primarily evaluated and remedied by legislature with generally applicable criteria. Koskelo also refers to the recent reassessment of the need to amend the Constitution and argues that since the need to amend section 106 and the requirement of the evident conflict was not recognised a justification for a broader interpretation of section by the court does not exist. According to Koskelo the duty of the public authorities to guarantee the protection of fundamental and human rights under section 22 of the Constitution also binds the courts but does not, however, change the competences between state bodies. Consequently, harmonising the national legislation with

human rights obligations, insofar as it is not possible through the interpretative means, is legislatures not the courts task.

In the scientific discussion the KKO 2012:11 has been widely accepted probably due to the courage rights-based approach it illustrates aiming to reconcile fundamental and human rights. However, the court's approach in the case is also able to be questioned. In the Finnish Constitution the right to family life is not guaranteed under section 10 of the Constitution in a way it is guaranteed in the Article 8 of the ECHR based on the explicit aim of the legislature of the Constitution (perustuslainsäätäjä)⁷³². However, in the case KKO 2012:11 the content of section 10 of the Constitution is replaced by human rights practice without more detailed analysis. In fact, the case remains principally silent in respect of how the human rights content is imported as the content of the Constitution. However, for the possibility to apply section 106 of the Constitution the move was naturally inevitable since the evident conflict may be identified solely between the Constitution and the act of parliament, not between the ECHR and the act of parliament. Consequently, in the case the court imports the human rights content as the content of the Constitution and then declares the evident conflict between the "modified" Constitution and the act. The conflict seems, however, artificial. Nevertheless, despite the critique, I find that there was a relevant legal protection dimension in the case and the substantial outcome of the case was right. However, could the court have directly applied the supranational law, which would have been contrasted with the application of the Constitution? On the other hand, could it have extended the interpretation of section 106, for instance, through section 22 of the Constitution instead of replacing the content of section 10 of the Constitution with the human rights practice? In such a way the case would have been solved more in a way respecting the national institutional framework.

⁷³²HE 309/1993 vp, p. 53.

After the case KKO 2012:11 the question was before the court again in the case KKO 2014:13. In the case the Supreme Court held that based on the recent legal praxis the application of the time-limit provision would be in an evident conflict with the Constitution and thus unapplied section 7 (2) of the Implementing Act and established paternity. However, on the contrary, in the case KKO 2014:14 the Supreme Court declared in the paragraph 37 of the judgement that based on the recent legal praxis the time-limit provision cannot be applied unquestionably and inflexibly. Consequently, in the application of the provision must be taken into account whether the child has had a factual opportunity to have paternity established in a court. Nevertheless, the court held that the requirement of equality serves not as an absolute obstacle for the application of the time-limit provision of instituting the establishment of paternity. Based on its analysis on the facts of the case the court held that the application of the time-limit provision was not in an evident conflict with the Constitution and, thus, did not establish the paternity. In both of the cases the court assessed the situation at hand with the sensitivity required by the nature of the case.

Eventually, as a consequence of the legal praxis of the Supreme Court and the European Court of Human Rights the legislature initiated a work to amend the paternity legislation⁷³³. The new Paternity Act (11/2015) came into force in January 2016 and repealed the old Paternity Act and its Implementation Act. The new act restored the right to institute the establishment of paternity retroactively to children born out of wedlock before the entry into force of the Paternity Act of 1975. The time-limit provision of the old Implementation Act or a final judgment based on the act have not since affected the examination of the new paternity claim.

Another case including a direct reference to the constitutional competences is the precedent case KKO 2013:59 of the Supreme Court. The case represents a change of interpretation connected to the application of the *ne bis in idem* principle between

⁷³³ See the government proposal HE 91/2014 vp.

administrative and criminal sanctions (tax increase and tax fraud in the case). In 2010 the Supreme Court had held in the precedent case KKO 2010:45 that a prescribed tax increase precludes the examination of a tax fraud charge raised on the same basis if the decision on the tax increase has become final before the prosecution is initiated. In the paragraph 13 of the case KKO 2010:45 the court assess:

“Extending the *ne bis in idem* principle to the relationship between administrative and criminal sanctions, as has been done in the case law of the European Court of Human Rights, requires, more generally, a reassessment and coordination of sanctioning regimes. Judicial decisions on individual cases and the interpretations adopted in them do not enable a comprehensive and adequate organization of the relationship between sanctioning regimes. From the point of view of the division of powers of the state, the responsibility for the broader formulation and coordination of the various sanctioning regimes falls within the scope of executive and legislative powers.”

Thus, the interpretation was not broadened to parallel proceedings.

Since, based on the European Convention on Human Rights and the legal praxis of the ECtHR, the Constitutional Law Committee suggested in 2012 that the *ne bis in idem* principle applies both to successive and to parallel proceedings⁷³⁴. However, in 2013 in its statement the Committee argues that the statement PeVL 9/2012 concerns the new law enacted and, thus, no direct conclusions are able to be drawn from its interpretation to laws in force⁷³⁵. The statement left to the courts a possibility to interpret the *ne bis in idem* principle more narrowly than the Committee in its previous statement. However, due to the punitive nature of the tax increase as an administrative sanction and the possibility to prescribe criminal punishment on the same basis, the Committee argued that the *ne bis in idem* principle must be taken into account when imposing sanctions⁷³⁶. In addition, it held that the proposed regulation on tax increases (government proposal HE 191/2012

⁷³⁴ PeVL 9/2012, p. 4.

⁷³⁵ PeVL 17/2013, p. 3.

⁷³⁶ *Ibid.*, p. 5.

vp), preventing parallel administrative and criminal proceedings on the same subject, is able to be considered justified in the light of the ne bis in idem principle⁷³⁷.

As a consequence, in the precedent case KKO 2013:59 the court held that exercising the power to decide on tax increase precludes the examination of a tax fraud charge raised on the same basis. Consequently, the ne bis in idem principle applies both successive and parallel proceedings. The court emphasises the constitutional status of the Constitutional Law Committee and declares that the Committee's interpretations of fundamental and human rights play an important role in the enforcement of law. However, the weight of the statements of the Committee depends on the original context they are presented. Even though the Constitutional Law Committee has declared that no direct conclusions are able to be drawn from its interpretation of the legislative proposals to the laws in force, the statement of the Constitutional Law Committee involves, however, a clear statement rejecting the limitation of the bis in idem prohibition to successive proceedings. Consequently, the significance of the key principles and objectives of the statements of the Constitutional Law Committee exceeds the limits of the legislative proposition they are addressed to and must, thus, be taken into account when interpreting the law in force. The fact that the legislative proposal was connected to the application of the ne bis in idem principle supports the status of the Committee's statement in the case at hand. Moreover, the provision of equality of section 6 of the Constitution requires the court to take into account the statements of the Committee in similar interpretative situations. The court argues that it must comply with the law in force when deciding the case. The duty of the public authorities to guarantee the protection of fundamental and human rights of section 22 of the Constitution also binds the courts. However, the court also holds that in an individual case, the court cannot give weight on the possible practical effects of a change in interpretation in the same way as the legislature when assessing the legislative proposals.

⁷³⁷ PeVL 17/2013, p. 3.

In addition to the decision of the majority two dissenting opinions were issued in the case KKO 2013:59. Both of them rejected the idea of expanding the interpretation to the parallel proceedings by the judicial branch. The justices noted that in its statement PeVL 17/2013 vp the Constitutional Law Committee has clarified its previous statement of 2012 and thus the statement must be assessed as such as the Committee itself has expressed. Since the Constitutional Law Committee has suggested that the question is partly ambiguous, the established interpretation of the Supreme Court should not be altered. The justices argued also that the established interpretation should not be changed also since the legislative process in the parliament. Moreover, the case law of the European Court of Human Rights or the European Court of Justice had not altered since the preliminary ruling of the Supreme Court in 2010. The justices held that applying the established interpretation until the new legislation enters into force also promotes equal praxis. Finally they concluded that organising the relationship between administrative and criminal sanctions and the adoption of systemic solutions, is primarily the task of the legislature, as stated in the 2010 preliminary ruling.⁷³⁸

10.2.3 Passivity of the legislature as a premise for judicial power

In the cases examined above the will of the legislature was explicitly expressed although its enforcement would have led to a conflict with the Constitution. However, there are also cases in which the legislature's will is unclear. One of these cases is the recent decision of the Court of Appeal of Turku (THO:2019:12) which is also connected to the questions of paternity. In the case the court assessed if the prohibition of section 5 (2) of the Act on Forensic Genetic Paternity Tests (*laki oikeusgeneettisestä isyystutkimuksesta*, 378/2005), according to which a paternity

⁷³⁸ KKO 2013:59, dissenting opinions.

test cannot be ordered to perform on a buried deceased, was in an evident conflict with the Constitution. In the case the alleged father was deceased and cremated. Thus, the applicant requested to perform a forensic genetic paternity test on parents of the alleged father who were both deceased and buried. The Court of Appeal dismissed the request, and the case is at the moment in the Supreme Court. However, what is particularly interesting in the case is the court's assessment on the role of the tacit approval of the Constitutional Law Committee when assessing the premises of the judicial review.

The court notes that during the enactment procedure in 2005 the legislative proposal on the Act on Forensic Genetic Paternity Tests was not in the Constitutional Law Committee. However, the act was amended in 2015 in the reform of paternity legislation. The Committee issued a statement on the reform (PeVL 46/2014 vp) but did not examine the prohibition to order to perform a paternity test on a buried deceased. The question is, however, assessed in the decision of the ECtHR on the *Jäggi v. Switzerland* (13.10.2006). According to the ECtHR taking a DNA sample from the deceased person could not impair his/her private life. In its reasoning the Court of Appeal argues that in 2014 the *Jäggi* decision was already eight years old and, thus, the Constitutional Law Committee may be assumed to have been aware of it when it issued the statement on the reform of paternity legislation. The court assesses that, since the reform of the paternity legislation was partly based on the national human rights violations, the alleged conflict in the present case is not an unexpected but, instead, a clear choice made by the legislature. Since the Constitutional Law Committee did not issue a statement on the relationship between the reform and the *Jäggi* decision, it, *de facto*, accepted the restriction on the one's right to know one's biological origin. However, the court argues that it is clear that when assessing the constitutionality of a provision, the tacit approval of the Constitutional Law Committee cannot be given the same weight as an explicit statement. In addition, the court suggests that the assessment of the constitutionality of the provision in the case at hand is more important than the *ex ante* assessment

of the constitutionality. However, as the decision, the court declared that an evident conflict is not able to be identified and, thus, dismissed the applicant's request.

The argument behind the court's decision was the legislature's deliberate decision which the Constitutional Law Committee has not intervened despite the request for a statement addressed to the Committee. Consequently, the court appears to assume that the Committee's tacit approval of the prohibition to order to perform a paternity test on a buried deceased implies that the Committee has examined the constitutionality of the provision but found it unnecessary to issue an explicit statement. The assessment implies that if the court has strong enough reasons to assume that the Constitutional Law Committee may have been aware of the altered circumstances connected to the interpretation of the legislation, and still has not issued a statement the will of the legislature has not altered. The question is not, however that simple. According to the report of the Constitutional Law Committee to amend the Constitution the question of if the Committee has assessed the issue effects on the threshold to apply section 106 of the Constitution. However, in the report the Committee argues that the effects of the statement depend on whether the facts of the assessments correspond the facts of the particular case.⁷³⁹ Consequently, as the court itself suggests, the tacit approval of the Constitutional Law Committee cannot be given the same weight as an explicit statement. Thus, it is at least unclear whether the tacit approval exceeds the requirement of the particularly heavy reasons needed to reject one's right to know one's biological origin⁷⁴⁰. However, the tacit approval of the Committee was not the sole argument behind of the court's decision and, thus, my aim is not to criticise the decision as such, but the weight given to the passivity of the legislature. The case is at the moment in the Supreme Court thus the judgement is not final. However, the Court of Appeal's deferential approach to the tacit approval of the Constitutional Law Committee is noteworthy since it narrows the field of the judicial review by giving

⁷³⁹ PeVM 10/1998 vp, p. 31.

⁷⁴⁰ See KKO 2012:11, para. 29.

the passivity of the legislature unnecessarily high weight. After all, the question is solely on an assumption.

Legislature's passivity raised also in connection with the partial outsourcing agreements analysed as a part of the social and health care reform. During the legislative process, a complex constitutional tension between the partial outsourcing agreements and the protection of the property right was recognised. The Constitutional Law Committee addressed a statement on the issue to the Supreme Administrative Court which held that it is not competent to assess the question since the Finnish model of constitutional review is based on the *ex ante* review by the Committee. Later, in its statement on the partial outsourcing agreements the Committee, however, remains silent of the issue.⁷⁴¹ The bill has since expired but if the parliament would have enforced the legislative proposal and the question of the constitutionality of the partial outsourcing agreements would have later become in front of the Supreme Administrative Court as a legal case what would the court have done? It would have been forced to solve the issue but what kind of weight would have been given to the Committee's statement?

The question of the partial outsourcing agreements illustrates the special characteristics of the Finnish model of constitutional review and the authoritative position of the Constitutional Law Committee. In the Finnish model the Committee is able to hear the supreme courts as external experts during the legislative process. Consequently, the courts may issue a statement on the issues they are probably going to assess subsequently as a part of an individual case. However, the Committee is able to assess the value of the opinion of the supreme courts on the same basis it assesses the value of the opinions of the other external experts. Thus, the Committee is competent either to take into account or to ignore the court's opinion. Moreover, the Committee may also decide whether or not it, at the first place, requests a statement from the court at all. Consequently, the legislature determines the course

⁷⁴¹ See Siitari's, Tuori's, Viljanen's and Rautiainen's expert opinion for the Committee on HE 16/2018 vp and HE 47/2017 vp and the statement of the Committee PeVL 15/2018.

of the process. The question remains of how much weight the courts should give on the legislature's silence.

10.3 Inconsistency in the legal praxis or contextual interpretation?

The traditional Finnish constitutional tradition emphasised the principle of representative democracy, the formal enforcement of fundamental rights and the Constitutional Law Committee as the primary interpreter of the Constitution. These traditional premises for interpretation are reflected in the authority-centric reading in the assessment of whether the requirement of an evident conflict of section 106 of the Constitution is met. The authority-centric approach is argued to undervalue the substantial enforcement of fundamental rights and, thus, not fulfilling the duty of courts to enforce the rights of individual. It may also lead to bipolar “all or nothing” approach ignoring the interpretative frameworks enabling the more sensitive solutions in the context of the individual case. Approaching the requirement of an evident conflict of section 106 of the Constitution on this basis detaches the provision from its significance expressed in the Constitution and, thus, takes the judicial restraint too far⁷⁴².

Another way to approach the assessment of whether the requirement of an evident conflict is met, the legal-protection based reading, finds the statements of the Constitutional Law Committee more as informative sources than unquestionable statements on the interpretation of the Constitution and is, thus, more sensitive to the individual context of the case. The case law of the national courts indicates that both readings have been applied in the decisions. Nevertheless, in the recent case law the legal-protection based reading of the nature of the conflict appears to be more common but since the number of the cases is low the comprehensive

⁷⁴² Lavapuro 2010b, p. 222.

estimation is only directional. However, a significant factor is that almost all of the decisions of the supreme courts under section 106 of the Constitution have been voting decisions in which the opinions of the justices have been divided. In addition, if the majority has relied on the legal-protection based reading, the authority-centric view has been reflected from the dissenting opinions. Consequently, the legal premises of the justices appear to serve as a more determinant factor when deciding on the case than their assessment of the substantial dimension of the case as a legal question.

Lavapuro argues that the perceptions behind the court decisions remain often without explicit reasoning⁷⁴³. The convention is problematic since, as suggested in the previous chapters, the democratic legitimacy of the decisions is connected to the scope and quality of argumentation. Consequently, Kavanagh's suggestion of the other key function of judiciary, specifically defining the limits and the extent of their own institutional role besides deciding on the substantial merits of the case, could provide transparency and, thus, legitimacy on the court decisions also in the Finnish context. Kavanagh's suggestion is examined in chapter 7.4.

The division between the approaches is aptly illustrated in the cases discussed in the chapter. A key issue in the cases KKO 2012:11 and KKO 2013:59 is the role of the courts and the legislature in resolving the problems of the legal order and thus the division of state power between them. The dissenting opinions of the cases reflect a legalistic approach to law emphasising the passivity of courts. They maintain the perception according to which courts are not allowed to develop the law on constitutional basis without the support of an act of parliament. The argumentation of the dissenting opinions in both cases is similar and emphasises the higher position of the national competence norms in relation to the obligation to guarantee the human rights obligations, the passivity of the legislature as a request to judicial deference and the general aims of legal certainty and the protection of the prevailing

⁷⁴³ Lavapuro 2010b, p. 194.

circumstances exceeding the duty to guarantee individual rights. Thus, the decisions of majority and the dissenting opinions of the cases illustrate the dialogue of the old and the new constitutionalism.

Despite the several similarities there are also a few differences significant to the constitutional assessments of the decisions. The most essential one concerns the relationship between the timing of judgements and the legislative process. When the decision on the case KKO 2013:59 was given the work to amend the applicable legislation was already in action. In the case KKO 2012:11 the situation was different: The legislative proposal to amend section 7 (2) of the Implementing Act of the Paternity Act was rejected in 2005 by the legislature. The work to amend the paternity legislation began only after the court's decision in 2014. In the paternity cases the legislature failed to fulfil its obligation to remediate the fundamental and human rights problems of the legal order despite the numerous signals of national and international courts. However, the threshold to apply section 106 was higher in the KKO 2013:59 since the legislative process was already proceeding. On the other hand, the statement of the Constitutional Law Committee supported the court's decision and, as the court itself argues, due to its duty to guarantee the protection of fundamental and human rights in an individual case, the court was not able to give weight on the possible practical effects of a change in established interpretation.

The case of the forensic genetic paternity test (THO:2019:12) and the case of the conscientious objector (HelHO:2018:4), discussed in the previous chapter, represent a more deferential approach to the theme. In the conscientious objector case the last word was left to the legislature. The decision of the Court of Appeal was given in the February 2018. In November 2018, the Supreme Administrative Court rejected the prosecutor's petition for leave to appeal of the decision of the Court of Appeal. The legislative proposal to amend the act exempting Jehovah's Witnesses from military conscription was in the parliament in September 2018. In the timeframe it is possible that the Supreme Administrative Court deferred and left the final word to the legislature. In any case, the decision raises a question of why the court did not

follow its own path of the *ne bis in idem* -case? What contextual differences justified the different approach? Was the conscientious objector case perhaps more societally sensitive, which would justify leaving it to the legislature? On the other hand, the constitutional importance of the decision in the context of the relationship between section 106 of the Constitution and the exceptive enactments would have supported the examination of the petition. The answer to the question remains hidden as frequently tends in deferential decisions.

In the case of the forensic genetic paternity test the Court of Appeal gave considerably weight on the tacit approval of the Constitutional Law Committee. However, court's deference to legislature based on the legislature's silence is not, however, unproblematic since it may be concretised as violations of individuals' rights. Legislature has the sovereignty to be passive, to ignore or to remain silent which it occasionally applies as the case of the outsourcing agreements illustrates. The reasons for legislature's silence may be political. Occasionally silence might also be a sign of negligence. Whatever the reasons are, they remain hidden. Courts, however, are in a different position. Each case must be decided. Nevertheless, despite the sovereignty of the legislature, the passivity of the legislature is problematic since section 22 of the Constitution regulating on the duty of the public authorities to guarantee the protection of fundamental and human rights appoints the obligation to guarantee the rights also to the legislature. In addition, based on the good administration and the good legislative practice the problems of the legal order must be reacted without unnecessary delay especially if the question is connected to the fundamental and human rights violations. From that point of view the passivity of the legislature in the question of the partial outsourcing agreements, towards the Jäggi decision in the case of the forensic genetic paternity test or towards the

statement of the Legislative Affairs Committee indicating the need to evaluate the problems due to section 7 (2) of the Implementing Act was inappropriate.⁷⁴⁴

If the discussed cases are approached as signals between the legislative and judicial branches can be observed that no pattern of action exists. In the paternity cases and the conscientious objector case the legislature captured the court's signal after the judgement under section 106 of the Constitution. In both cases the legislature had been passive towards the problems of the legal order before the court's decision under section 106 of the Constitution. However, in the latter case the Supreme Administrative Court defer and left the final word to the legislature. On the other hand, in the *ne bis in idem* case the court and the legislature operated simultaneously and reached the similar results. In the civil servant cases the court had to give signals twice, at first as a 106-decision and then as a *contra legem* decision before the legislature's response. These various patterns to operate appears to reject the idea of the choices connected to the judicial review as signals between the branches or at least illustrate the inconsistency in their operation. However, the amount of the cases is limited which effects on the nature of the analysis. After all, it is possible that the courts have analysed the significance of the decisions also from the wider perspective. Nevertheless, similarly as in the context of the statements of the Constitutional Law Committee we know only what is written in the decision.

As a consequence of the analyses presented in this chapter it appears that one of the most prevalent problems connected to all of the cases is the uncertainty of the purposes of the actions of the legislative and judicial branch expressed through the judgements and statements. The courts and the legislature have a selection of tools constitutionally legitimate to apply. The arguments for the application of a specific one remains however frequently hidden. The choices have been made on purpose or unconsciously. On whichever basis the choice lays, especially in constitutionally

⁷⁴⁴ As an example of the current problems there are the right's violations of the transsexual people which, despite of the signals from several sources such as United nations, ECtHR (the case *A.P., Garçon and Nicot v. France*, 6.4.2017) and the Council of Europe's Human Rights Commissioner the legislature has not remediated the legislation.

complex cases, the premises ought to analyse explicitly. The court's decision on the KHO 2012:54 has opened the gates of interpretation through which any result is able to be generated without the application of section 106 of the Constitution but as an interpretative *contra legem* -decision. The court's interpretative sphere has, thus, expanded which courts has utilised occasionally more actively and occasionally more passively.

The structures and characteristics of the Finnish constitution presented in this part reflect the structural changes of the legal order due to the internationalisation of the constitution. On the other hand, they also reflect the special solutions which in a long run challenge the coherence of the legal order. One of these solutions is connected to judicial deference articulated in the requirement of an evident conflict in the national Constitution which has led to complexity in the legal practice. It has been argued that “the form of judicial review under section 106 is certainly very peculiar, perhaps even quirky, in a European and international context⁷⁴⁵”. The case may be so in the context of the text of the Constitution of the judicial review. On a more general level the provision and its interpretative practice reflects, however, similar concerns and values as in their counterparts in European and international context. These themes I am going to analyse in the next and the last part of the research when it is time to conclude the case.

⁷⁴⁵ Lavapuro et al. 2011, p. 518.

PART V: CONCLUSIONS

11 Deference in the institutional relationship between the legislative and judicial branch

11.1 From legislative supremacy to weak-form review

In this final part of the dissertation, I discuss the possibility of structuring the Finnish constitutional debate through deference. The part includes two main chapters. In chapter eleven, I analyse the question on a more practical, detailed level. First, I summarise and analyse the common factors related to the nature and characteristics of the discussion, of both in Finland and in the United Kingdom, discussed in the previous chapters. The aspects are related to the constitutional development as a background of deference and the changes in the legal order the evolution has caused. In addition, I highlight a few structures and features related to the Finnish constitution, the purpose of which is to map the common contact surface more profoundly. These include the pursuit of formal categorisations on a substantial basis, distinction between the national legislation and the supranational norms, the central status of the acts of parliament and the respectful attitude toward the legislature. Second, I analyse the theme through the opportunities and challenges it offers from the perspective of the Finnish constitution. On these bases, I produce the answer to my third sub-research question of whether the Finnish constitutional tradition is able to be approached through deference. In chapter twelve, I present the theoretical analysis of the internationalisation of the institutional relationship between the two branches and answer the other research questions that are connected to the significance and effects of the internationalisation of the

constitution on the institutional relationship between the national legislature and the national courts and the possibility to construe their relationship through deference on a general level. In addition, chapter twelve summarises the study and presents the concluding remarks.

As indicated in chapters three, six and eight of the study, the constitutional development in the Europe during recent decades has profoundly affected the legal environment of the national legislative and judicial branches. As a consequence, the relationship between the institutions in Finland and the United Kingdom has altered from the legislative supremacy to the more dialogical model labelled by Tushnet as the weak-form review. The transformation, however, has also raised critical tones that emphasise the primacy of the democratic, national legislature and demand restraint in the judicial adjudication. In terms of deference, the demand implies a view of court's duty to identify the limits of its own authority and the stronger legitimacy of the political actors to avoid institutional conflicts in situations related to the interpretation of acts, especially the Human Rights Act in the UK and the acts of parliament in the light of the Constitution in Finland⁷⁴⁶. The approach highlights the connection between the contemporary British debate on deference and the European human rights development that led to the plurality of constitutional instruments being binding on the national level. Consequently, as demonstrated in chapter six, the constitutional development serves as a basis for the current discussion on deference in the United Kingdom.

The factors behind the discussion on deference in the United Kingdom are, thus, predominantly the same as the changes that led to the current state of the separation of powers in Finland. As explained in the previous chapters, taking the international obligations, particularly those deriving from the European Convention on Human Rights and the other human rights treaties, into account at the national level has raised criticism also in the Finnish constitutional debate. Consequently, the study

⁷⁴⁶ The definition of deference is from Masterman and Leigh 2013, p. 1–2.

argues that the supranational constitutional evolution serves as the shared context of the British and the Finnish constitutional discussion. The analyses of the study illustrate that both the British and the Finnish constitutional debate includes tones that are able to be characterised in terms of deference. On a general level, deference, therefore, may be characterised as a national-level resistance to the same phenomenon – the enforcement of the supranational, constitutional evolution. Thus, deference as a reflection of the crumbling of the constitution as solely a nation-state bound instrument is the first noteworthy aspect of my analysis.

In addition to the similar premises of the national level development, the concrete national level changes in the legal orders in both Finland and in the United Kingdom are similar in content. Consequently, the second noteworthy aspect concerns the substantive changes in the national legal orders. As a consequence of the supranational, constitutional evolution, the interpretative powers of the courts have increased. Moreover, in the countries in which the role of the legislature has traditionally been strong, such as Finland and the United Kingdom, the role of the legislature has decreased. The previously unquestionable legislative supremacy is currently able to be questioned on a fundamental and/or human rights basis, which produces challenges to the systematics of the national legal orders. Nevertheless, despite the common characteristics, the concrete national level changes in Finland and the United Kingdom are not commensurate. In the United Kingdom, the enactment of the Human Rights Act with its constitutional features was a far more extensive change than the constitutional reforms in Finland. Despite, in Finland, the reforms were also constitutionally remarkable since they broke the prohibition doctrine of judicial review over the acts of parliament. However, as a result of the constitutional reforms at the turn of the 21st century in both countries, the national courts gained the power to examine the compatibility of laws with constitutional obligations. In the British constitution, the new powers are articulated through sections 3 and 4 of the HRA. In the Finnish system, they are conveyed through the principle of the fundamental and human rights friendly interpretation of law and

section 106 of the Constitution. The primacy of the interpretative means, thus, unites both constitutional orders. Due to these changes, the both constitutional orders, which were previously based on legislative supremacy, transferred towards the weak-form model of judicial review.

The third noteworthy aspect relates to the nature of deference as a self-limitation doctrine of courts. In the British context, deference is not explicitly articulated in legislation. Nevertheless, it has been argued that it implicitly is included in the design of sections 3 and 4 of the HRA⁷⁴⁷. The Finnish constitution also contains a provision on the self-limitation of courts, although the theme has not frequently been discussed explicitly through the concept. However, the function of the criterion of an evident conflict in section 106 of the Constitution is precisely the expression of the self-limitation of the courts⁷⁴⁸. According to the definition of the nature of the evident conflict, the conflict must be clear, undisputed, and not interpretative as a legal question. The definition imposes a strict framework on the discretion of the courts. In fact, Finland has thus gone further than the United Kingdom on the self-limitation of courts, because the criteria are precisely defined and, thus, the discretionary powers of courts regarding the constitutionality of acts of parliament is very limited. The strict criteria produce, however, certain problems, as we have observed in chapter nine.

11.2 Formal categorisations as a pursuit to preserve legislative supremacy

Deference is frequently connected to the pursuit of construing the court's duty to defer based on the formal categorisation of cases, for example, in terms of the discretionary area of judgment. The pursuit of pre-defining groups of cases in which the court should automatically narrow its assessment or refrain from judicial

⁷⁴⁷ Klug 2003, p. 128.

⁷⁴⁸ V-P Viljanen 2005, p. 322–323.

assessment at all, is a theme that also appears in the Finnish constitutional debate. In the Finnish discussion, the approach is reflected in the arguments connected to the politicisation of justice and to the interpretative limits of the fundamental and human rights, as explained in part four. In these situations, the courts' duty is reduced to the determination of whether the present case fits into one of the pre-defined categories. In the context of the complex, constitutional cases that usually are connected to the exercise of multiple, overlapping rights, the approach appears unsustainable. Consequently, the pursuit of categorisation has been identified as the main problem of the debate on deference⁷⁴⁹. In addition, in an attempt to set certain areas of decision-making beyond the reach of legality, spatial metaphors as a discretionary area of judgement also prevent the assessment of the legitimate reasons for deferring. As a background of the pursuit of the categorisation serves the outdated black-and-white approach to the courts' discretion that perceives the judicial assessment as an either or question. In the Finnish law, such an archaic view is partly maintained by the criterion of an evident conflict in section 106 of the Constitution. However, understanding constitutional authority as competing supremacies conflicts with the constitutional reality which comprises several constitutional actors whose jurisdictions are partly overlapping. Thus, the pursuit of formal categorisations is the fourth noteworthy aspect of analysis.

Approaching deference through the formal categorisations shifts the centre of the case from the substantive decision to the question of jurisdiction. The same danger has also been identified in the Finnish discussion connected to the criterion of an evident conflict⁷⁵⁰. The removal of the criterion, therefore, would be the natural first step towards a more sensitive practice. An even more sensitive practice would, however, be attained if the question of the limits and scope of the institutional role of the court was approached, as Kavanagh has suggested, through the idea that, instead of only one function, the judiciary would have two key functions to take into

⁷⁴⁹ Hunt 2003, p. 337–339.

⁷⁵⁰ Scheinin 1998, p. 1128–1129. Lavapuro 2010, p. 214.

account in decision-making. The functions include deciding on the substantial merits of the case and defining the limits and the extent of their own institutional role. As explained in chapter seven, Kavanaugh argues that ignoring the consequences of their decisions would be irresponsible for courts since, in addition to protect the rights of individuals, it is the duty of the courts to ensure that their actions receive the respect of the other branches of government and the people. Therefore, the courts must also understand the political context in which they operate. As the courts are highly dependent on the respect they receive from the other branches of government, deference in judicial decision-making for institutional reasons could occasionally override the substantive legal reasons in constitutional adjudication. Kavanaugh argues that the ability of courts to define the limits of their own institutional role would make judicial restraint a mechanism through which the courts could both respect representative democracy and protect the rights deriving from international regulation.⁷⁵¹

The positive element of Kavanaugh's suggestion of the two main functions of courts is that it would allow more flexibility to the constitutional adjudication. If the courts were expected to explicitly give weight both to the institutional and the substantive dimension of the case, the possibility of a more constitutionally balanced outcome would increase. Nevertheless, from perspective of the separation of powers, the suggestion may appear questionable. Kavanaugh does not present an explicit analysis on the frameworks of the institutional discretion, which I regard as a clear weakness in her analysis. However, I assume that the analysis on the institutional role of the court would be performed in the frameworks of deference following the guidelines that Kavanaugh provides in her theory. Regardless of whether the analysis is performed in these frameworks, the threat to the separation of powers seems, in my opinion, irrelevant since the core of Kavanaugh's analysis is to provide a theory of deference that enables a constitutionally balanced approach to the

⁷⁵¹Kavanaugh 2009, p. 198–199.

institutional question. However, as argued in chapter seven, due to the complexity of Kavanagh's analysis, its practical value remains questionable. Consequently, the analyses on the two roles of the court that are based on her theory may also prove to be vague. As a consequence, the research finds Kavanagh's suggestion on the second function of the courts at least questionable. However, the suggestion is not rejected outright. The question will be revisited in greater detail in the next chapter.

11.3 Distinction between the national legislation and the supranational norms

The fifth noteworthy aspect of analysis is the traditional approach to deference, which implies a strong presumption of the distinction between the national legislation and the supranational norms. That is to say that, in weighing, the national legislation serves as a premise that restricts the application of the supranational obligations. However, in the Finnish jurisprudence, the national legislation as the basis of the restrictions seems to involve solely the acts of parliament and to exclude the provisions of the Constitution. However, the setting between the national and the supranational law appears irregular and does not correspond to the principle of the minimum level protection established by the human rights treaties in relation to the national legislation. In the Finnish context, the setting resembles the assumption of the substantive disparity between the fundamental rights and the human rights treaties (*erillisysteesi*) formulated by the Constitutional Law Committee referred to in chapter eight. Although the Constitutional Law Committee has altered its approach in relation to the distinction between the national and international obligations in its report on fundamental rights reform⁷⁵², the spirit has, however, remained as a part of the Finnish legal culture, at least in certain fields of law. In

⁷⁵² PeVM 25/1994 vp, p. 5.

particular, with regard to the case law connected to social rights, it appears that the distinction has not yet entirely disintegrated⁷⁵³.

The theme of distinction is also manifested in the praxis of the Constitutional Law Committee, in which it appears in the application of the human rights treaties. Specifically, the European Convention on Human Rights plays a key role in the praxis of the Committee. In addition, the Committee often refers to the case law of the ECtHR while other human rights treaties are overshadowed. The trend is also reflected in the national case law, when the courts, either through the statements of the Constitutional Law Committee or directly, refer to human rights obligations with a strong emphasis on the case law of the ECtHR. On these bases, the courts can also be interpreted to defer in relation to other human rights treaties.

11.4 On the supremacy of the acts of parliament

The final noteworthy aspect of my analysis is the connection between the discussion on deference and the position of the acts of parliament, which is prominent in the Finnish legal culture and the Finnish society. The acts of parliament, perceived as the expressions of the will of the democratic legislature, command great respect. In addition, they bear a fundamental intrinsic value that is connected solely to the acts of parliament as *eduskuntalaki*, not to the Constitution. Behind the phenomenon are various historical factors, such as the symbolic value of national legislation during the period of autonomy appeared as the formal legalism of the Finnish legal order and the superior position of the acts of parliament in the legal praxis. The superior position of the acts of parliament was conveyed through both the doctrine of the prohibition of the judicial review until the entry into force of the new Constitution in 2000 and the status of the fundamental rights perceived as vertical provisions

⁷⁵³ Hyttinen 2012, p. 509.

functioning mainly as restrictions for the public power⁷⁵⁴. In addition, as Lavapuro has remarked, in the Finnish jurisprudence, the institution of exceptive enactments and the tradition of formal enforcement of fundamental rights has permitted constitutional flexibility in relation to the political aims of the legislature. From that kind of pragmatic flexibility, it follows that, instead of the legitimacy and limits of the democratic decision-making set by the constitution, the democratic decision-making sets those limits to the constitution. Lavapuro has termed the phenomenon “constitutional managerialism”.⁷⁵⁵ These aspects have been examined in detail in chapter eight. Nevertheless, due to the central status of the acts of parliament, the debate on deference in terms of respect of the legislature has, in Finland, focused on them. In practice, the valuation of the acts of parliament appears to be superior in relation to the national Constitution and obligations of the supranational human rights. These debates appear to forget that both the Constitution and the supranational obligations are also parts of the Finnish legal order and, thus, expressions of the will of the legislature. Do they not deserve the same respect?

The intrinsic value connected to the acts of parliament represents the phenomenon that Määttä has labelled as a respectful attitude toward the legislature (*lainsäätäjän kunnioittamisasenne*). He argues that the respectful attitude toward the legislature is manifested in the case law of the supreme courts as the comprehensive references to the government proposals and the statements and reports of the parliamentary committees. Moreover, it is reflected in the interpretation of the legal provisions in relation to their general objectives and the purpose of the legislature. The approach is also similar in situations in which the preliminary works are old, unclear, or contradictory. The tradition is rooted in the principle of democracy and in the principle of the separation of powers, as regulated in sections 2 and 3 of the Constitution.⁷⁵⁶ As a result of the respectful attitude toward the legislature, in certain

⁷⁵⁴ See, e.g., Lämsineva 2006.

⁷⁵⁵ Lavapuro 2010b, p. 243.

⁷⁵⁶ Määttä 2011, p. 209–211.

cases, the case law of the supreme courts reflects a deferential attitude toward the active development of law⁷⁵⁷. Moreover, such an approach can also lead to the disregard of human rights arguments⁷⁵⁸. Consequently, Määttä points out that, based on the reasoning of the decisions of the supreme courts, the respectful attitude toward the legislature determines a more central part in the courts' argumentation than could be concluded from the jurisprudence. Thus, the respectful attitude toward the legislature appears to be a central part of the judicial ideology of a Finnish judge.⁷⁵⁹

In the Finnish legal tradition, the will of the legislature is articulated, in addition to the text of the acts themselves, in the preparatory works. Virolainen and Martikainen emphasise that these documents illustrate legislature's original, historical will. However, to determine the purpose of the act of parliament at the present time, in addition to the preparatory works, the interpretative weight is given also to preliminary rulings and legal literature (*ratio legis*). Virolainen and Martikainen point out that when determining the purpose of the act of parliament, the supreme courts usually refer only to the preparatory works. The application of other sources of law, and in particular, the deviations from the preliminary works on their basis, is extremely rare.⁷⁶⁰ By giving substantial weight to the historical will of the legislature, analysed from the perspective of deference, the respectful attitude toward the legislature represents the pursuit to maintain the legislative supremacy as an authority-bound element. From this perspective, a challenge may be that the courts limit their interpretative powers in an attempt to interfere as little as possible with the original will of the legislature. The approach challenges the legal protection of individuals by ignoring the uncertainty and contextuality inherent in the doctrine of deference. The same risks can also be identified when placing too much weight on the preparatory works.

⁷⁵⁷ See, e.g., case KKO 2010:81 and the dissenting opinion of justice Välimäki.

⁷⁵⁸ Virolainen and Martikainen 2010, p. 392.

⁷⁵⁹ Määttä 2011, p. 212. See also Syrjänen 2012, p. 343.

⁷⁶⁰ Virolainen and Martikainen 2010, p. 394.

According to Kavanagh, variability is characteristic to deference. As suggested in chapter seven, Kavanagh approaches the variability through separation as minimal deference, which courts always owe, and substantial deference, which the legislature needs to earn in specific circumstances determined in respect of an issue⁷⁶¹. If the Finnish discussion on the respectful attitude toward the legislature is approached from Kavanagh's division's point of view, one may ask whether the debate is able to be interpreted in a way that suggests that the legislature or, more specifically, the acts of parliament already enjoy such a special weight, which Kavanagh finds appropriate only in special cases, in other words, substantial deference. In this case, solely the status of an act of parliament would, thus, as itself, form the basis for substantial deference instead of enjoying minimal deference. The approach turns the norm hierarchical justification function upside-down. However, at the normative level, such a model of interpretation is supported by the criterion of an evident conflict, through which the interpretation, emphasising the status of acts of parliament, is conveyed in relation to the Constitution. After all, this question seems to reflect more nature of the constitutional tradition than the normative solution as such.

11.5 Toward a more inclusive analysis on the institutional relationship in Finland

As the discussions in the previous subchapters illustrate, the constitutional development in both Finland and the United Kingdom analysed through deference involve similar features. Deference connected to the legalistic legal positivism produces interpretative frameworks in which the jurisdiction of courts is highly limited, and the fundamental and/or human rights provisions serve solely as decorations of political speeches. Deference aptly describes the reactions of

⁷⁶¹ Kavanagh 2009, p. 176.

legislative sovereignty based national constitution to the constitutional evolution and the contradictions the development has generated to the systematics of the national constitutions. Consequently, the research argues that as the descriptive element deference in negative terms fits to describe also the Finnish constitutional practice.

However, as noted in chapter seven, there is also another side in the story. Specifically, despite the sensitivity of deference to the negative connotations, according to Kavanagh, deference is primary an inherently neutral concept⁷⁶². Consequently, while the research finds that it is challenging to attain neutrality due to the reasons explained in chapter 7.6; the question remains of whether Kavanagh's approach to deference has something more to offer to the Finnish discussion? As discussed in chapter seven, according to Kavanagh's analysis, deference implies three elements: 1) Respect as conventional courtesy between state institutions manifested by giving appropriate weight in terms of the minimal or substantive deference to the decisions of another institution. 2) Uncertainty about the correct outcome of the case reflecting the complexity of the constitutional cases and 3) The contextuality referring to the close connection between the degree of deference and the facts and merits of the case at hand. According to Kavanagh the contextuality also implies that deference does not contain any assumptions of the inferiority of courts in any field of law. Thus, no category or context can be predefined as an area where deference would automatically apply.

As argued in chapter seven, the practical value of Kavanagh's analysis remains partially unclear⁷⁶³. This applies especially when approaching the Finnish discussion through Kavanagh's inclusive distinctions. However, Kavanagh's profound analysis produces a comprehensive description of the nature of deference and from that angle the inclusiveness of her approach is able to find also as a value of her analysis. For instance, the division between minimal and substantive deference serves as a useful basis for the discussions since it increases the awareness of the variability of

⁷⁶² Kavanagh 2009, p. 178–179.

⁷⁶³ See also Hickman 2010, p. 169–172.

deference in terms of the mutual respect between the institutions. The approach highlights that the different dimensions of deference appear in different contexts, and thus the more precise meaning of it is formed through the merits of each case as a whole. The observation summarises aptly what the analysis has to offer on a more general level. That is the multidimensional, contextual, value-sensitive nature of the core of the institutional relationship between the legislature and the courts. Consequently, Kavanagh's approach to deference provides a comprehensive legal framework on the variable nature of the institutional relationship between the legislature and the courts. However, on these bases, I find that developing deference as a doctrine as a part of the Finnish legal order is not necessary but the variable nature of the institutional relationship it indicates is valuable also from the Finnish perspective.

One value of the analysis of the Finnish discussion on deference's point of view is the awareness it produces on the questions of judicial self-restraint. As already suggested, the Finnish constitutional debate in terms of judicial restraint has been rare – mostly because the structure of the constitutional order has made it unnecessary. As indicated in the research, during the past decades the question of the constitutional roles of the legislature and the courts has, however, actualised also in Finland. As a consequence, a silent practice on judicial restraint has been established in the Finnish constitutional tradition. A more precise analysis on the practice is, however, necessary. To perform the analysis the appropriate conceptual tools are, however, needed. At this point deference becomes involved. As explained in chapter one, the value of the analysis from deference's point of view in the Finnish context lies in the profound significance of the parliamentary sovereignty and in the weak-form constitutional review both countries apply. The analysis of deference provides a more inclusive approach to the complex relationship between the institutions than the traditional either – or approach or the current Finnish mechanism manifested in terms of the requirement of an evident conflict.

Analysing the Finnish discussion on the institutional relationship between the national legislature and the national courts against the characteristics of deference illustrates that the debates have same roots. As examined in part four of the study the Finnish understanding of the jurisdiction of the courts has been characterised by the deferential attitude toward the judicial powers. In this chapter I have analysed the discussion both from Finnish and the British perspective and identified the six similar aspects they share. Even though, the research does not argue for developing deference as a doctrine in the Finnish jurisprudence, the analysis of the institutional relationship between the national legislature and the national courts performed in this research produces value by creating conceptual mechanism which allows the more detailed structuring of the discussion. In addition the analysis provides understanding of the national discussion on a more general level. The specific value of the research is, nevertheless, based on the awareness of the contextuality of the institutional relationship it provides. Consequently, the research argues that the essential is not the essence or status of deference but the value-sensitivity it provides.

Deference is primarily about the balance between politics and law that is located through the context of each individual case. The context determines the values taken into account and also the weight given to them. Consequently, the institutional roles of the legislature and the courts are eventually determined by the context of the case in a way that recognizes their multidimensionality instead of strict, preliminary limits. The variability and contextuality inherent in deference allow one to approach the division of power with the sensitivity required by a dynamic, constitutional context. Although the application of deference as a doctrine outside the British legal context can be viewed with caution, the research indicates that it provides an interesting framework for assessing institutional questions at a more general level as well.

12 Internationalisation of the constitution in the institutional relationship between the national legislature and the national courts

12.1 Pluralistic constitution as a premise of the institutional relationship

As demonstrated in the research, the internationalisation of the constitution has had a profound influence on the institutional relationship between the national legislature and the national courts. In the Finnish legal order, the most important change has been the transition from the strict *ex ante* constitutional review to the weak-form constitutional model which has increased the power of courts. The effects of the development are manifested explicitly in the national legislation on the competencies of the courts such as section 106 of the Constitution in Finland or sections 3 and 4 of the Human Rights Act in the United Kingdom. Moreover, the development has also affected the constitutional concepts and, thus, on the general legal principles constructing the surface of law, by questioning the justification of their nation-state-bound rationale. The development of the supranational constitutional level besides the national constitutions has altered the monistic constitutional context to a pluralistic one based on the multiple, heterarchical, co-existing sources of constitutional regulation as explained in chapter three of the study. The evolution has not, however, been accepted without critical remarks. For instance, Baquero Cruz has argued that as a consequence of the lack of hierarchy pluralism in the judicial activity may endanger the rule of law, legal certainty and the effective protection of individual rights which may produce “dramatic consequences for the situation of individuals”⁷⁶⁴.

The systematic transformation of the national legal order has been notable which has created a contradiction between the surface and the deeper structures of law. As

⁷⁶⁴ Baquero Cruz 2006, p. 236–237.

Tuori has remarked one function of the deeper structures of law is to justify the phenomena on the surface of law⁷⁶⁵. As a consequence of the development, the law has generated mechanisms to protect the deeper structures of the national constitutions from the evolution on the surface. As examples of these mechanisms in the research serves the doctrines of judicial restraint, deference and the criterion of an evident conflict in the Finnish Constitution. Nevertheless, these reactions of national constitutions can also be seen in a positive light, as they demonstrate the functioning of the legal order as an interaction between the layers of law.

The point of view of the research is constitutional pluralism. However, the relevance of the pluralistic viewpoint in contemporary discussion has occasionally been questioned. The critical voices argue that pluralism is dead, and we are moving beyond the post-sovereign states⁷⁶⁶. The societal development in Europe during the past decade with the rule of law crisis, Brexit, nationalist movements pursuing the return to the nation-state centred society represent all current reactions to the change. These reactions ought to be taken seriously. Despite, the globalised world with cross-border problems such as climate change and the probable refugee crisis as its side effect is the reality, we live now and in the future. The only way to address these challenges is through international co-operation, perhaps on an even larger scale than before. During the past decades, the pluralistic elements have sedimented to the deeper structures of law and shaped them to be ready for the new kinds of challenges. The current crisis of pluralism does, thus, not imply the failure of the project. Rather, it points out its weaknesses, the strengthening of which allows the new rise of pluralism to be even stronger. Considering the different theoretical conceptions of the interaction between the international and domestic legal orders against the societal development the inevitable question is, if the pluralism is out of the play, what is the option⁷⁶⁷. Nevertheless, it is noteworthy that finding the global,

⁷⁶⁵ Tuori 2000, p. 184.

⁷⁶⁶ Postel 2011 and Wilkinson 2019.

⁷⁶⁷ See also Walker 2016.

pluralistic approach relevant, does not imply the rejection of the significance of the national constitutional order. On the contrary, as I will explain later in this chapter, the research argues taking the national Constitution and the national institutional framework into account highly relevant.

12.2 Evolution of the constitutional concepts

The relationship between the national legislature and the national courts is strictly connected both to the legal provisions regulating the constitutional review and to the general doctrines and established practices of the constitution which represent the more durable principles of law⁷⁶⁸. Nevertheless, the internationalisation development has raised the law, especially the fundamental rights and the human rights, into a specific position as a living instrument⁷⁶⁹ and emphasises the evolutive nature of the general doctrines of law. As the research has indicated the internationalisation of the constitution has generated a need to re-evaluate the rationale of the constitutional concepts such as “separation of powers” and “constitution” functioning as the basis of the general doctrines or as the grammar of constitutions as suggested in chapter three. As Möller has reminded us, the ideas on these concepts are primarily narratives petrified in a certain historical idea of statehood, rather than historical facts⁷⁷⁰. Thus, solely by reassessing these concepts from premises recognising the internationalisation development we are able to reach the rationale corresponding to the denationalised surface of constitutional law. Also Syrjänen has suggested that the change of the society requires the revaluation of the applicable theoretical models which also produces a need to develop legal thinking. The function of science is to test the prevailing truths and traditions. As the world

⁷⁶⁸ Lavapuro 2010b, p. 218 and Tuori 2009, p. 333.

⁷⁶⁹ On the notion see for instance Rehnquist 1976. In the context of the ECtHR see Letsas 2012.

⁷⁷⁰ Möller 2013, p. 19.

changes hidden or outdated perceptions of law need to be brought into the light and elements and doctrines that have been taken for granted need to be tested and reconsidered⁷⁷¹.

The theoretical observations of the study point out that the problems related to the institutional relationship between the legislative and judicial branches, expressed in terms of deference, are based on the established, nation-state bound rationale of the constitutional concepts that form the basis for the justification of the institutional setting. The observation questions the relevance of the concepts connected to the state. However, the replacement of the concepts with more accurate ones does not appear adequate or even possible. Moreover, as demonstrated in chapter two of the study, the constitutional concepts are multidimensional rather than unambiguous and have, in fact, already evolved during the time. Thus, the evolutive nature serves as a part of their character. Mutanen has also argued that there is a need to reform the constitutional concepts “in a way that takes into account the development of post-modern society and law”⁷⁷². Thus, there is a need to take into account the evolution of the legal order in the analysis of the rationale of the constitutional concepts.

Also Tuori has suggested that the denationalisation of the society and law has set conditions for the reform of constitutional concepts. Since the established meaning of the concepts derives from the period of the modern nation-state their connection to the nation-state is evident. However, the problems are not solved by dismantling the conceptual framework but by detaching the concepts from their outdated rationale in a way that recognizes the effects of Europeanisation on the constitution of the nation-state.⁷⁷³ Sand has also argued that, from the viewpoint of the

⁷⁷¹ Syrjänen 2012, p. 339–340.

⁷⁷² Mutanen 2015, p. 389.

⁷⁷³ Tuori 2007, p. 148–149.

constitutional concepts, the supranational development may challenge the durability of constitutions⁷⁷⁴.

Mutanen has analysed the evolution of the concept of state sovereignty in the context of constitutional pluralism. Her analysis indicates the evolution of the concept from the absolute-natured sovereignty of the national Constitutions as a part of the social contract theory in the Age of Enlightenment to the shared sovereignty between the national and EU level – the pluralistic sovereignty. Mutanen suggests the pluralistic understanding of state sovereignty, which implies that state sovereignty is a compromise, reflecting the need for international cooperation, the existence of multilevel competencies, and the acknowledgement of the country-to-country differences.⁷⁷⁵ Mutanen's definition reflects multidimensionality which also this research has identified as one of the key characteristics when analysing the bases of the institutional relationship between the legislature and the courts in the contemporary constitution.

In the context of the study, the need to reform the constitutional concepts in terms of the theoretical and normative frameworks of constitutional review has been analysed more precisely in chapter five. As a summary of the discussion, it may be argued that the traditional legal positivism and the traditional idea of majoritarian democracy do not correspond to the current conception of the fundamental and human rights as norms of positive law or the premises from which they are applied. The main problem of the traditional approach is that it is constructed on the strict premises, which leaves no room for weighting. Nevertheless, in the pluralistic context, it is central that the procedures are not tied in advance to too strict preconditions. However, democracy requires the controllability of contents. The requirement sets the openness of the argumentation behind the decisions to the central part. The contemporary understanding of the concepts connected to the institutional relationship between the two branches ought, thus, both to reflect

⁷⁷⁴ Sand 2010, p. 66.

⁷⁷⁵ Mutanen 2015, p. 392.

variability and to fulfil the requirement of the controllability of contents. This would imply for instance understanding the legislative supremacy more through the legislation instead of the institution. In other words, the argument emphasises binding the democratic legitimacy to the legislation as an evolutive mechanism instead of to the legislature as an institution which connects the content of law to its literal and historical meaning as suggested in chapter ten. The approach would also affect the unbalance between the acts of parliament and the Constitution and, thus, enable the Constitution's more efficient implementation. As a consequence, the Määttä's characterization of the respectful attitude toward the legislature would turn to the respectful attitude toward the legislation.

12.3 Variations of the institutional setting

Based on the analysis of the study, the institutional setting between the legislature and the national courts can be approached from, at least, four different angles. The conflict between the institutions is most intensive in the situation wherein both the legislature and the court are active. An example of such a setting is manifested in the sage of the private parking control. The conflict arose between the Supreme Court's decision KKO 2010:23, in which the court interpreted the private parking control as a contract, and the statement of the Constitutional Law Committee (PeVL 57/2010 vp), in which the Committee found the private parking control to be the significant exercise of public powers. In this setting, the two institutions expressed differing legal views leading to the institutional conflict between them. However, in the legal literature and the public debate, both views were criticised for their lack of profound substantive reasoning concerning the nature of the parking control. Eventually, the tension was resolved by the withdrawal of the parliament.⁷⁷⁶

⁷⁷⁶ On the discussion see, e.g., Mäkinen 2011, Karhu 2011 and Koivisto 2014.

In contrast to the setting of the sage of the private parking control serves the cases in which both institutions have remained passive. At the moment, the most current example of such a setting is connected to the reform of the law concerning transsexuals (Act on Legal Recognition of the Gender of Transsexuals, 563/2002). Several human rights organisations have found that Finland's legislation on gender recognition violates the rights of transgender people⁷⁷⁷. Nevertheless, no government has succeeded to reform the legislation although its urgency has been expressed also on the national level by the Parliamentary Ombudsman and by the Human Rights Delegation of the Human Rights Centre⁷⁷⁸. The initiation of the legislative process through a citizens' initiative has also not succeeded. As a consequence, Finland maintains a continuous human rights violation that cannot be solved either by the legislature or the judiciary.

The problems related to the “translaw” highlights the complexity of the multilevel constitutional context. Even though the supranational opinion is clear and under section 22 of the Constitution the state is obliged to guarantee the protection of fundamental and human rights, the questions of implementation may occasionally be complex. Similar problems were connected to the paternity case KHO 2012:11, which was analysed in chapter 10, but in contrast to the problems with the translaw, the case was resolved through the intervention of the court. Moreover, the problems connected to the case of the Court of Appeal of Helsinki (HelHO:2018:4) regarding the conscientious objectors, discussed in part four of the study, fell into this category but were, however, also able to be fixed through the intervention of the court. On the other hand, the reform of the Marriage Act (234/1929) to enable equal marriage between same-sex partners, initiated through a citizen initiative to the legislative process represents one possible way to answer to the need of complex social renewals. Nevertheless, in such situations in which the confirmed human rights

⁷⁷⁷See more detailed in Otava 2018. See also the judgement of the ECtHR in the case *A.P., Garçon and Nicot v. France* (6.4.2017).

⁷⁷⁸ EOAK/2842/2017 and the Letter of Human Rights Delegation of the Human Rights Centre 13.12.2017.

violation cannot be fixed either by citizen engagement or by the judiciary, the Finnish legal order appears to lack the mechanism to act. There is a need for an instrument which would enable the initiation of the legislative process inside the existing institutional system. From deference's point of view, the better the constitutionally complex issues can be directed to the parliament the better the courts are able to restrain the action. Consequently, such a mechanism would balance the relationship between the legislature and the judiciary. Even though some of the legal cases connected to the need for social renewals, have been able to be solved by the court from an institutional viewpoint that kind of development is not sustainable. On the other hand, to remedy the confirmed human rights violations by a citizen initiative appears not to correspond with the function of the initiative. The legislature with a weak capacity to act directs the courts to assume a pioneering role in solving the complex societal issues similar to as the Supreme Court of the United States during the period in the middle of the 1900s – referred to as the Warren Court – when Earl Warren served as Chief Justice of the court⁷⁷⁹. The President of the Supreme Administrative Court Kuusiniemi has also expressed in favour of deference of the courts in complex societal issues. He has argued that the primary responsibility for the decisions related to, for instance, climate change belongs to the legislature; the courts have no right to intervene, nor can they be obliged to do so.⁷⁸⁰

In addition to the institutional settings in which both the courts and the legislature either act or remain passive, naturally there exist variations in which one branch is active and the other not. These, potentially contradictory settings are typically the ones in which the questions of deference are involved. The dissenting opinion of the President of the Supreme Court Koskelo in the case KHO 2012:11 represents a textbook example of an institutional setting of deference arguing for the passivity of the courts and emphasising the activity of the legislature. The other side of the

⁷⁷⁹ See, e.g., Cox 2013.

⁷⁸⁰ Kuusiniemi's opening speech at the seminar "Are Climate Impacts Environmental Impacts?" 26.2.2019.

institutional setting, with active courts and a passive legislature, is represented in the case of the partial outsourcing agreements, analysed as a part of the social and health care reform, and examined in chapter 10.2. In this case, the legislature defers and directs the issue to the courts. As such, the setting is not problematic. The legislature is able to consciously direct issues to the judiciary and in those cases, the courts are also obliged to intervene. However, in these situations, the key challenge is whether the legislature has expressed its will clearly enough to the courts.

From the perspective of Finnish jurisprudence, the situations in which both of the two branches are either active or passive seems to be more common than “the either-or setting” which is, in its turn, more common in the British constitutional context. In Finland, the function of section 106 of the Constitution is to control these situations and direct the questions to the legislature. However, due to the problems associated with the provision, the mechanism does not function in the best possible way. As a consequence, the situation may escalate and lead to the activity of both of the institutions as in the case of the private parking control. The lack of clear doctrinal mechanisms to balance the institutional relationship may, thus, lead to constitutional conflict. Consequently, the conflict is inherent in the normative structure of the Finnish constitutional system and can, thus, only be completely fixed by removing either the ex post review of courts or the Constitutional Law Committee based ex ante review and relying on a judicial review.

These examinations indicate that the initiation criteria of the legislative process profoundly affect which institution the question is directed to for a decision. A similar effect can be identified on the criteria connected to the position of a litigant as the cases connected to the legal protection of a person subjected to involuntary care illustrate. In the cases the ECtHR⁷⁸¹ and the Supreme Administrative Court (KHO:2012:75) disagreed on the legal protection of a person subjected to involuntary care. The saga begins with a decision by the ECtHR in which it declares

⁷⁸¹ X v. Finland (34806/04) 3.7.2012.

that Finland has violated Article 5 (1) of the Convention in respect of the applicant's confinement for involuntary care. Soon after the decision, the Administrative Court of Kuopio decided its case (HAO 21.08.2012, 12/0521/7) by following the decision of the ECtHR. However, in the next month the Supreme Administrative Court delivered its decision on the case KHO 2012:75 and issued an opposite view to the question. The decision was a unanimous plenum decision, which has the strongest possible prejudicative function of national legal decisions. As a consequence, a contradiction between the national courts, and the Supreme Administrative Court and the ECtHR had emerged. However, the decision of the Administrative Court of Kuopio was not able to be appealed to the Supreme Administrative Court since the authority as the other party of the case lacks the position of a litigant. Later the Mental Health Act (mielenterveyslaki 1116/1990) was reformed and in its statement, the Constitutional Law Committee (PeVL 5/2014 vp) referred solely to the decision of the ECtHR and ignored the view of the Supreme Administrative Court. Thus, also the involvement of the authority affects how the institutional setting between the two branches is formed.

These remarks of the case law indicate that, in addition to the choices made by the judicial and legislative branches, the formation of the institutional relationship between them is affected also by the regulation connected to the initiation of the legislative process and the position of a litigant, all of which direct the issues either to the legislative or to the judicial branch. From deference's point of view, society should be organised in such a way that issues were able to be directed efficiently to the legislature. Consequently, in order to strengthen the role of the legislature, it is essential to develop mechanisms that enable its effective intervention, rather than solely relying on emphasising the restraint of the courts.

As suggested, from deference's point of view the incapacity of the legislature to act and the obstacles to direct the constitutionally sensitive issues to parliament serves as a threat. However, under section 22 of the Constitution, the courts are obliged to guarantee the protection of fundamental and human rights. Consequently,

at some point, the courts are obliged to act. On these bases, the mechanisms guaranteeing the capacity of the legislature to act is found to be highly significant. Based on the analysis of the research the national courts are prepared to respect the legislature's will if only they have means to do so.

12.4 A rights-based institutionally balanced review: The new way

As already suggested, deference in negative terms has developed as the pursuit to balance the nation-state-bound constitutional doctrines with the effects of pluralism deriving from the surface of law. From that perspective, the study argues that deference represents a suspicious and cautious attitude toward constitutional development. The approach is understandable in a transition phase. It may be interpreted as an indication of the effective functioning of the legal order. Nevertheless, the initial stages of the transition phase have long since been passed, which is why the justification of the precautionary mechanisms such as deference is able to be questioned. Consequently, despite reflecting the contradiction in the national level discussion, as demonstrated in the previous chapter, deference in negative terms does not contain much to offer. However, as indicated in the study deference also includes another side. If deference is approached in line with Kavanagh's argumentation combined, however, with the reservations also presented in the previous chapter, we will reach the value-sensitivity enabling contextuality in the judicial adjudication it provides.

As explained in chapter nine, deference functions in the complex sphere on the border between law and politics. Consequently, constructing a systematic, clear theory describing these complex questions is challenging. In her theory of deference, Kavanagh has thus suggested addressing the decision on the scope of the judicial role to the courts. The suggestion implies that in addition to deciding on the substantial merits of the case, courts ought to define the limits and the extent of their

own institutional role separately in each case. The research finds Kavanagh's suggestion reasonable, albeit, with modest modifications: instead of a function to determine their own institutional role for courts, the research suggests more awareness of the national institutional framework in which the courts are functioning when deciding a substantive issue. The suggestion implies a demand to courts to pay more attention to the national, institutional framework they are functioning in and, as a consequence, produce more balanced decisions also from the viewpoint of the national institutional constitutional law.

As noted several times in this research, the constitutional legal cases are often complex and multidimensional, thus, when deciding a case the court frequently applies both the national and the supranational legislation. However, it is important to note that if the national constitutional doctrines or the established content of a provision of the Constitution are bypassed, the court would explicitly open the arguments behind its decision. In this way, the court could indicate that it has assessed the case also from the institutional perspective. The suggested approach would improve the status of the national Constitution and also produce a way to protect the national institutional mechanism. Thus, what is important is to refer to the national instruments whenever possible, and if the national instruments are bypassed to explain openly the reasons behind the decision. The suggestion calls for awareness of the institutional framework in which the courts function and perhaps, even more importantly, indicating it through more open argumentation.

As suggested in chapter ten the research finds Lavapuro's legal protection-based reading (*oikeusturvahakuinen tulkintaperuste*), emphasising priority of the constitutionality of the decision of an individual case, as an interpretation line for the judicial review more accurate than the authority-centric approach based on the institutional authority. Consequently, Lavapuro's right-based approach serves also as a basis for the suggested model. However, as, for example, the analysis of the case KKO 2012:11 in chapter ten illustrates, from the point of view of the national institutional constitutional law, the right-based approach is not completely

unproblematic. The challenge of the approach is that when deciding a case courts may excessively focus on weighting the substantive issue and, as a consequence, may ignore the sustainability of the decision from the institutional point of view. The decisions in which the concern is actualised may represent the minority of the cases – frequently the application of the interpretative means enables a balanced outcome – but the possible marginality does not invalidate the problem. On the other hand, the institutionally balanced approach suggested refers also to the need for the effective structural framework that enables the direction of issues to the parliament and thus guarantees the enforcement of rights in an institutionally balanced way. However, by taking the institutional dimension more comprehensively into account the suggested interpretative model that is rights-based but also institutionally balanced would – in Kavanagh’s terms – enable the minimal deference toward the national acts of parliament, the national Constitution, and the supranational, constitutional obligations, but in a way that protects the national institutional mechanism. The reformed, more sensitive understanding of the constitutional concepts would justify the suggested approach.

In 2004 Ojanen has remarked that the Finnish constitutional tradition has traditionally set the authority-based approach in a prominent position. However, after the constitutional reforms at the turn of the 21st century, the fundamental and human rights dimension has gained more emphasis.⁷⁸² The analysis of the study has, however, raised the question of whether the constitutional tradition has shifted too far to the other extreme. Nevertheless, Ojanen points out also that it is noteworthy that in the constitutional assessment of the supranational obligations it is possible to take into account both the fundamental and human rights as well as the institutional and division of power-related questions⁷⁸³. The model suggested in the research enables the taking into account of both sides of the assessment more efficiently.

⁷⁸² Ojanen 2004, p. 423.

⁷⁸³ *Ibid.*, p. 424.

12.5 Concluding remarks

The research argues that globalism and the internationalisation of the constitution have created a new supranational constitutional level, which has produced the need to evaluate the phenomena originating from it at the level of the national constitution. The effects of the development, from the perspective of the institutional relationship between the national legislature and the national courts, are noticeable. Especially the need for sensitivity in the construing of the institutional relationship and the need for openness in the court's argumentation are the central characteristics of the evolution. As the research illustrates, the increased level of understanding of the complex nature of the institutional question rejects one-sided arguments whose explanatory force remains, however, often minor. As Syrjänen reminds us, the simple, easy-to-understand solutions to difficult problems are often wrong⁷⁸⁴. However, the question of the limits of the court's discretion is unclear. Different perceptions of legal reality produce different perceptions of the boundaries of the law. While it is agreed that a judge must remain in his/her role when deciding a case, there may be legitimate disagreement on what that role is.⁷⁸⁵

The contrast to the effective, evolutive judicial role is the danger of the politicization of justice. In the context of the societally sensitive cases, the courts may, therefore, need to allow the legislature time to take the necessary steps. For instance, in these situations, the institutional arguments may override the substantive legal reasons in constitutional adjudication. The temporal flexibility of courts can be approached in terms of Kavanagh's substantive deference, according to which the societal sensitivity may function as a reason for courts to defer when deciding a legal case. Despite this, and also for that reason, it is noteworthy that flexibility on an institutional basis may not be indefinite. As the legal cases presented in the research

⁷⁸⁴ Syrjänen 2012, p. 340.

⁷⁸⁵ Ibid.

illustrate, occasionally, the change has required the intervention of courts. As the final guardians of the constitution the courts ought to have the courage to fulfil their duty.

The courts and the legislature have a selection of constitutionally legitimate tools. The arguments for the application of a specific one remains, however, frequently hidden. The choice to remain silent has been made intentionally or unconsciously. Regardless of the basis for the choice, especially in constitutionally complex cases, the premises ought to be analysed explicitly. However, the purpose of the call to also take the institutional side of the constitutional case seriously does not imply underestimating the significance of the enforcement of fundamental and human rights but to ensure that a decision is sustainable from both the substantial and the institutional aspect. The core function of a court is to provide legal protection in individual cases, and they need to have the means to fulfil this function. The question is more about how the goal may be achieved in a sustainable way, also from the institutional perspective. To maintain the functioning administration in the future, the variable nature of the institutional relationship between the branches needs to receive increasing attention. The profound connection between law, politics, and morality as a central part of the nature of the constitution does not make the task easier. However, respect for national constitutional identity is important. Thus, instead of focusing on courts' duty to defer – in the negative sense of the word – to the legislature, it would be more fruitful to approach the question through the sensitivity of the institutional framework besides adjudicating the substantive dimension of the case.

The driving force of the research has been the awareness of the contradictions of the time in which we live. At the same time, the strong impact of the past on current discussions appears to be increasingly relevant. As the research has indicated, the observation applies also to the law – the present legal phenomena cannot be profoundly understood without a perception of the past. Thus, the pursuit of the study to understand the recent discussion on the institutional relationship between

the legislative and judicial branches has also led us to examine the past. Already in the early stages of the research, the connection of the constitution to its own history and, more broadly, to the history of society, has proved to be essential. During the research, the experience has intensified. Moreover, the connection also underlines the home of the constitution in the sphere of influence of both law and politics. During the research, the dependence between the story of the constitution and its narrator has also proven significant. The narrator determines which issues are raised as relevant and which issues are mentioned only in the footnotes or are, perhaps, completely silenced. In this study, I have presented my own perception of how the constitutional evolution has affected the institutional questions of constitutional law and, on these bases, produced an understanding of the institutional relationship between the national legislature and the national courts in the contemporary constitution.

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