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"COMBINING ABSTRACT *EX ANTE* AND CONCRETE *EX POST* REVIEW:THE FINNISH MODEL"

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1. Finland's constitutional development during the last 20 years is a Northern expression of the wave of New Constitutionalism - or World Constitutionalism, as it has also been called – which in recent decades has swept around the globe. The new constitutionalism has encompassed even such European countries - as the Nordic democracies of Sweden and Finland, or the UK with the enactment of the Human Rights Act 1998 - which have not been confronted with a similar constitutional *Vergangenheitsbewältigung* as the former totalitarian states. The most recent manifestation of new constitutionalism is the establishment of concrete *ex post* review of legislation in France, where legislative supremacy has, ever since the Revolution, been ideologically propped up by the Rousseauian notion of legislation as the untouchable expression of the General Will. In Finland, the main milestones in the constitutionalization of its legal order and legal system are the ratification and incorporation into domestic law of the European Convention on Human Rights in 1990; the reform of the Bill of Rights of the Constitution in 1995; and the new Constitution of 2000 which introduced *ex post* constitutional review of legislation.

The immediate backdrop to constitutionalization in Finland, as in many other Western European countries, too, lies in the Europeanization of the legal system, a two-pronged process with a human-rights and an EU (EC) law dimension. The Strasbourg Court of Human Rights not only complements national review mechanisms but has also provided an inducement to their development. Thus, even critics of constitutional review might prefer national over transnational control, and considerations of national sovereignty are likely to have played their part, not only in the incorporation of the European Convention into the domestic legal order, but also in the adoption or strengthening of institutionalised constitutional review in those Western European countries which have traditionally clung to the doctrine of legislative supremacy, such as the UK or France. The EC-law system of preliminary rulings, in turn, was designed after the German and Italian model of *ex post* concrete constitutional review, with the Luxembourg Court in the role of the guardian of "higher" law. An integral element in the constitutionalization of EC law was the assumption by the Court of EC law's direct effect and supremacy over conflicting domestic law. The upholding of these principles falls not only to the Luxembourg Court but also to national courts, which, in case of a contradiction, are supposed to give preference to EU law. Such powers of reviewing acts of the legislature in the light of EU law have presumably levelled the ground for the introduction of a national system of *ex post* constitutional review in such (former?) bastions of legislative supremacy as the UK and France, as well as – we may add – Finland.

2. Before discussing the Finnish model of constitutional review, let me briefly present my position on the general justifiability of external constitutional review of legislation. My stance is that of a moderate critic: I subscribe to what might be termed a *last resort -defence of constitutional review*, but I also concede the relevance of critical standpoints for staking out the limits of justifiable review.

From its early beginnings in the late-eighteenth-century USA, constitutional review and judicial supremacy have been accompanied by critical debates on the review's overall justification and legitimate limits. The global trend of new constitutionalism has entailed the globalization of the controversies over constitutional review. Not only in the US but in many other countries around the globe as well, *judicialisation* **(**Shapiro – Stone Sweet 2002**)** and the ensuing *courtocracy* or *juristocracy* (Hirschl 2007) have come under attack. The criticism, of course, displays variation, depending on the particular type of review the critic is focusing on. However, there are common themes, too, which Jeremy Waldron in his *The Core of the Case against Judicial Review* discusses in a representative way. He has construed his case on certain background assumptions and concedes that if these fail his argument may not hold, either. He makes four assumptions. We are dealing with a society with 1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; 2) a set of judicial institutions, again in reasonably good order, set up on a nonrepresentative basis to hear individual lawsuits, settle disputes, and uphold the rule of law;

3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and 4) persisting, substantial, and good faith disagreement about rights (i.e., about what the commitment to rights actually amounts to and what the implications are) among the members of the society who are committed to the idea of rights. (Waldron 2006, p. 60)

Waldron backs up his case with two arguments, which are familiar from other critical interventions as well. First, judicial review tends to obscure the real issues at stake when citizens hold diverging views about rights and to focus on "side-issues about precedents, texts, and interpretation". This might be called *juridification* of rights-issues. Secondly, judicial review is illegitimate from *democratic* point of view: "By privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality in the final resolution of issues about rights" (*ibid*., p s. 53). This is the famous *counter-majoritarian difficulty* (Bickel 1962).

I am not wholly convinced by Waldron's pleading. If we enlarge our definition of democracy from the majoritarian principle in the direction of a deliberative conception, no *a priori* obstacles exist to even constitutional adjudication being surrounded by critical debates and thus acquiring democratic traits; to consider adjudication as somehow necessarily undemocratic is simplistic and one-sided. Another problem in Waldron's pleading relates to his background assumptions, which tend to exclude such rights-violations that defenders of constitutional review have in mind and that in their view constitute the legitimate object of review. Even in a "healthy", functioning democratic *Rechtsstaat* – among which I would like to include Finland – individual cases can appear where the need of constitutional review is apparent. Waldron does not really address the defence of constitutional review to which I would like to subscribe and which I call the *last-resort argument*.

When arguing for his case against judicial review, Waldron alludes to controversies, such as those surrounding abortion, which have a conspicuous ethical or moral nature and where the policy aspect, i.e. the instrumentalist dimension of practical reason, plays a secondary role. When a court strikes down legislation pertaining to such issues, it does not invalidate the legislature's policy choices but, rather, its ethical or moral standpoints. If the lawmaking procedure has already included ethical and moral deliberations and if the legislature has explicitly based its decision on ethical or moral grounds, the last-resort argument for constitutional review does not justify the court's intervention.

Abortion cases may be the most-heatedly discussed instances of constitutional review but treating them as paradigmatic examples might be ill-advised. Most legislative projects aim at policy goals and pursue economic or social policies, security objectives and suchlike. In standard cases, the legislative motive is of a primarily pragmatic nature, and moral and ethical considerations play merely the role of side-constraints; the relation of pragmatic to ethical and moral aspects is exactly opposite to their respective significance for the law on abortion. And it is such standard cases that the last-resort argument addresses.

The concerns about democracy and politicization of adjudication are warranted and caution against constitutional review's overstepping its legitimate boundaries, and reversing explicit policy or value choices of the legislature. They do not**,** however**,** deliver a fatal blow to justifiable judicial review but serve merely as a reminder of its limits. Equally relevant is the threat of juridification of politics which can ensue from an overly "thick" interpretation of the constitution. Attempts to nail down controversial policy or value choices in constitutional interpretation are prone to restrict the freedom of democratic political deliberation and decision-making. One should also be aware of the dangers of ossified constitutional doctrine. Nevertheless, the juridification argument should not be let to obscure the positive role doctrine plays in ensuring the consistency and controllability of constitutional adjudication. In constitutional law, just as in

other fields of law, doctrinal constructions are needed but they should not be allowed to petrify into ideological formations which obstruct, rather than facilitate, the framing of the relevant issues.

3. Debates on constitutional review are usually centred around three basic constitutional models: the US model of diffused judicial review; the German centralized model of a constitutional court: and the (pre-1998) British model of parliamentary supremacy which does not accept external review of parliamentary legislation. Although the case against judicial review, based on the counter-majoritarian difficulty or the democracy argument and juridification of rights-discourse, is claimed to have a more general reach, it has primarily been based on the US experience. Nonetheless, similar concerns have been made in the criticism of the German model, too. Critics see in the Constitutional Court a third legislative chamber, which has not been content with the role of Kelsen's negative legislator but has developed into a most significant positive legislator (Kelsen 1929).

The German model has attained global fame as an alternative to US-type constitutional review. But it is important to note that post-War development has brought about novel, intermediary or hybrid forms which cannot be attached to either the German and American models or the model of legislative supremacy. These are often ignored, although they can be understood as experiments that concede the principal need of constitutional control but attempt to avoid the problematic consequences of which the critics have warned us. This holds for the innovations that Stephen Gardbaum (2001) has gathered together under the label of the *New Commonwealth Model of Constitutionalism*.

I would also include the Finnish system of constitutional review in the novel hybrid forms. As regards *ex post* constitutional review of legislation, Finland – in line with other Nordic countries – has opted for the US diffused or decentralised model. The uniqueness of the Finnish system lies in its particular combination of abstract *ex ante* and concrete *ex post* review.

In the Finnish democracy, just as in other Nordic countries too, the parliament has traditionally enjoyed a very prominent status, also *vis-à-vis* the courts. Its elevated position has been manifest in, for instance, the high ranking of *travaux préparatoires* in the hierarchy of legal sources; higher than that of precedents of the supreme courts. Before the constitutional reform of 2000, the Finnish system did not allow for any *ex post* control by courts of the constitutionality of parliamentary legislation. The control of constitutionality consisted exclusively of abstract *ex ante* review, exercised by the *Constitutional Law Committee of Parliament*.

The Constitutional Law Committee is a peculiar quasi-judicial body. Like other Committees, it is composed of Members of Parliament and, insofar, displays a political character. But its deliberations are based on the opinions given by constitutional experts - mostly university professors - and, as a rule, the Committee abides by their view. In their adherence to a legal rather than political pattern of argumentation, reports of the Constitutional Law Committee are notably different from those of other Parliamentary Committees. For instance, reports routinely invoke constitutional precedents as settling the issue at hand, although by no means has the Committee bound itself to a strict doctrine of *stare decisis*. The experts of the Constitutional Law Committee do not have any official status, nor is their role even mentioned in the Constitution or the Rules of Procedure of Parliament. Still, it is quite decisive, and it is hardly conceivable that the Committee would depart from a unanimous expert view. If there is diversity

among expert opinions, the political stance of the Members has more leeway and voting reflecting the Government / Opposition dividing-line occurs, although relatively seldom.

Although the Committee belongs to the institutional organisation of Parliament, its deliberations are not part of the regular parliamentary procedure. It is only called on when doubts about the constitutionality of a bill have been raised. In contrast to the abstract *ex ante* review by many constitutional courts or such a quasi-court as the French *Conseil constitutionnel*, the Committee has not been turned into an instrument of political opposition. On the contrary, in standard cases it is the Government which, in the bill it submits to Parliament, advises the latter to consult the Committee. The initiation of constitutional review very rarely causes political controversies. The Committee's assessment is binding on Parliament. However, ever since the 19th century, an essential feature of the Finnish model has consisted in Parliament's power to override the Committee's ruling through a *statute of exception*: a bill which the Committee has found to be unconstitutional can still be enacted in the qualified procedure required for amending the Constitution.

The new Constitution of 2000 did not bring about any formal changes to the *ex ante* control through the Constitutional Law Committee. The major novelty was the introduction of concrete *ex post* control. Art. 106 of the Constitution provides that "if in a matter being tried by a court, 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". Nonetheless, it would be hasty to conclude that Art. 106 has introduced a radical break in Finnish constitutional tradition, a decisive transition from the *ex ante* control of the Constitutional Law Committee in the direction of judicial *ex post* review. Courts have only been entrusted with a weaker form of strong judicial review: they have the power, not to declare a piece of legislation null and void, but merely to set it aside in the case at hand. As was explicitly emphasised in the *travaux préparatoires* to the Constitution, the primary means for the courts to contribute to the implementation of the Constitution remains their duty to construe statutes consistently with constitutional provisions. The *travaux préparatoires* stressed the primacy of *ex ante* control under the new Constitution, too. Correspondingly, in its only ruling appealing to Art. 106, the Supreme Court stated that "the control of the laws' constitutionality falls mainly to the Constitutional Law Committee, which in the legislative process exercises *ex ante* supervision" **(**KKO 2004:26**)**. It may well be that in practice, the major alteration, induced by the availability of concrete *ex post* control, will be more thorough *ex ante* monitoring. And indeed, the Constitutional Law Committee's workload, as measured by the number of its reports, has significantly increased after the basic-rights reform of 1995 and the entering into force of the new Constitution in 2000.

In the *travaux préparatoires* to the new Constitution, the primacy of *ex ante* review was anchored in the requirement of an *evident* conflict established by Art. 106. If the Constitutional Law Committee, in its *ex ante* review, has explicitly stated that the controversial statute is not in breach of the Constitution, it is hardly conceivable that a court could find an evident conflict with a constitutional provision.

Parliament's power to override the Constitutional Law Committee's ruling bears a resemblance to the Canadian notwithstanding-clause. In the decades preceding the constitutional reforms of 1995 and 2000, some constitutional scholars criticised statutes of exception for weakening the protection of basic rights and for transforming *ex ante* constitutional review into a merely formal assessment of the legislative procedure to be followed. Indeed, the number of statutes of exception diminished considerably even before the constitutional reforms of 1995 and 2000. According to the *travaux préparatoires* to the new Constitution, statutes of exception should be resorted to very sparingly, as a rule merely when they are needed for incorporating an international treaty or some other international-law obligation. Statutes of exception have lost most of their previous significance, and when finding a conflict with the Constitution, the Constitutional Law Committee no longer contents itself to pronounce on the procedural question, but indicates how the bill should be amended in order to remove the conflict.

In sum, through the central role of the Constitutional Law Committee the Finnish model of constitutional review has retained a notable parliamentary label. The judiciary has not acquired such a dominant role which the critics of the US and German models have attacked, but accomplishes merely a complementary function. Still, signs of judicialisation and juridification of politics are detectable in the Finnish development as well. After all, the Constitutional Law Committee represents a quasi-judicial element within the legislature, and its increased significance may result in a certain juridification of legislative politics. In the governmental bills submitted to Parliament, an augmentation of references to constitutional basic-right provisions is visible. This reflects a heightened awareness of basic rights in legal and political culture and, hence, can in principle be deemed a positive phenomenon. Nevertheless, the danger of juridification inherent in this development should not be ignored, either.

4. The criterion of an evident conflict with the Constitution as a presupposition of the courts' power to set aside a parliamentary law fulfils even other important functions than just establishing the primacy of the *ex ante* review exercised by the Constitutional Law Committee. Thus, with this criterion, explicitly spelled out, the Finnish and Swedish constitutions have, as it were, positivised the plea for *judicial restraint*. Related to the general requirement of judicial restraint, the criterion of an evident conflict entails the primacy of interpretive means for avoiding contradictions with the constitution. Accordingly, the *travaux préparatoires* to the Bill of Rights of 1995 and the new Constitution of 2000 stressed the courts' obligation to construe statutes consistently with the Constitution. This obligation connects the Finnish model to such examples of the New Commonwealth Model of Constitutionalism as the New Zeeland Bill of Rights and the UK Human Rights Act 1998 which also are premised on the primacy of interpretive tools.

In Germany, the alleged danger of politicisation of adjudication and juridification of politics – a development which has been characterised as a "transition from a parliamentary legislative state to a constitutional-court state"[1] - has been related to particular doctrines, adopted by the Constitutional Court; such as basic-rights norms as legal principles; basic-rights norms' horizontal effect (*Drittwirkung*); and the state's protective duty (*Schutzpflicht*). In connection with the 1995 reform of the constitutional Bill of Rights, these doctrines made their entry into Finnish constitutional law, too. However, the evident-conflict clause restrains their impact. Thus, invoking this clause, it can be argued that it is up to the legislator, and not the courts, to decide on basic rights' direct horizontal effect in the relationships between private subjects. This holds both for liberty rights' traditional *Rechtsstaat* function as a bulwark against arbitrary power exercise and for their role as general legal principles with potential consequences in every field of law. A statute's alleged negligence of basic rights' horizontal effect could hardly be warranted to amount to an evident conflict with the Constitution.

Originally, the criterion of evident conflict was borrowed from the Swedish constitution. At present, constitutional reform is under deliberation in both Sweden and Finland. Voices have been raised for abolishing this restriction on *ex post* constitutional review. However, as I have argued, it implies important normative messages which have lost nothing of their pertinence.

[1] "Übergang vom parlamentarischen Gesetzgebungsstaat zum verfassungsgerichtlichen Jurisdiktionsstaat". Böckenförde 1991, p. 190.

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