"COMMON CONSTITUTIONAL TRADITION" AS EUROPEANIZATION OF CONSTITUTIONAL CULTURE: THE FINNISH CASE

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Abstract

Finland acceded to the Council of Europe in 1989 and to the European Union in 1995. This signalled the Europeanization of Finnish law and legal culture. Nowadays, fundamental rights, as they are construed by the European Court of Human Rights in Strasbourg, play a major role in both the legislative process and judicial praxis in Finland. As the content of fundamental rights comes from Strasbourg, it is very difficult to distinguish anything very "Finnish" from Finnish constitutional law that could then contribute towards "the constitutional traditions common to the Member States" (Article 6(3) TEU). Some peculiarities can be distinguished from institutional constitutional law, but these, too, have been affected by Europeanization. Thus, Finland has been on the receiving end of Europe's common constitutional traditions.

TABLE OF CONTENTS

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1. Introduction

The intention of this European Law Institute (ELI) project is to decipher what constitutes the "constitutional traditions common to the Member States"[1]. Specifically, the purpose of this project is to build on a bottom-up approach in deciphering the content of such a tradition, namely due to the reasons that if it is truly "common" then its shared content can only be discovered from the individual constitutional traditions of the Member States. Thus, this starting point methodologically rejects the approach that the Court of Justice of the European Union (CJEU) seems to have favoured in deciphering the meaning of Article 6(3) TEU, as the CJEU has adopted a top-down approach; the CJEU constructs the content of the "common constitutional traditions", as they relate to Article 6(3) TEU, from the sources it sees fit.

An issue closely related to common constitutional traditions, and one that is also highly topical, is that of "national constitutional identity"[2]. The European Union is to respect the Member States' national constitutional identities, "inherent in their fundamental structures, political and constitutional", as stipulated in Article 4(2) TEU. One reason for the existence of this national identity clause in the EU Treaties is to counterbalance the ever-broadening competences of the European Union and the primacy of EU law; there exists a core of national constitutional identity that the EU is not to tamper with, but actually has to respect.

There are various ways in which the content of what counts as a common constitutional tradition or a national constitutional identity can be defined. As there is yet only scarce case-law on both topics by the CJEU, many of these attempts have been rather theoretical. Such theoretical accounts are perhaps useful – or maybe even inevitable – in the current phase; they might be parts of an exercise in the political epistemology of European constitutionalism[3], which is tantamount for our self-reflection on the constitutional nature of the European Union. There are, however, also more practical approaches to exploring the

[1] See Article 6(3) TEU and Case C-11/70 *Internationale Handelsgesellschaft*, ECLI:EU:C:1970:114, para. 4.
[2] See Article 4(2) TEU and Case C-208/09 *Sayn-Wittgenstein*, ECLI:EU:C:2010:806, paras. 83 and 92.
[3] See N. Walker, *European Constitutionalism in the State Constitutional Tradition*, 59 Current Legal Prob.s 51 (2007), 52.

genealogy of a particular Member State's constitutional tradition or national constitutional identity.

This project has adopted a practical approach, building on a questionnaire that focuses on both general features of the Member States' constitutional systems as well as three select fundamental rights. While providing rather schematized answers to these questions, in this country study on Finland I have to reject the proposed bottom-up approach. Instead, I argue that the content of constitutional law in Finland is so heavily influenced by Europeanization that identifying what constitutes the content of Finnish constitutional tradition is very much a top-down exercise. It is difficult to distinguish anything very "Finnish" from the content of fundamental rights in Finland. To the contrary, they have been introduced into Finnish constitutional law and legal praxis as a result of Europeanization. Moreover, current fundamental rights discourse and praxis in Finland is directly influenced by European, supra-national influences to a great extent. And it is not just the substantive issues (the content of fundamental rights) that have been affected by Europeanization, but also central elements of institutional constitutional law have changed due to Europeanization.

Section 2 provides background for the actual analysis by briefly explaining the constitutional history of Finland and the way in which constitutional review is conducted in the Finnish system. Section 3 discusses central elements of the Finnish constitutional system in light of what could count as a constitutional tradition or a national constitutional identity. Here, my point is to show what is meant by the Europeanization of the Finnish legal order in practice and why the bottom-up approach is thus unable to deduce anything very "Finnish", that could then contribute to the common European tradition. Section 4 contains discussion on freedom of speech, freedom of movement and judicial independence in Finland. Especially the first of these three topics further substantiates my top-down thesis of Europeanization. Section 5 concludes.

2. Two central aspects of the Finnish constitutional system

Before going into the substance of this study, two things about the Finnish constitutional system need to be explained, as they are

centrally related to the argument presented here and the substance of what counts as "constitutional tradition" or "national constitutional identity" in Finland. The first is the history of the Finnish state[4]. We can distinguish four different phases from Finland's constitutional past. *Swedish rule in Finland*, or the part of Scandinavia that we now call Finland, dates back to at least the 13th century. During the Swedish era, the principles of constitutional government and the rule of law (or the legalistic principle) were established as parts of the governing regime. The foundation of Finnish legal culture was established during this era. Some of the earliest codifications in Europe were enacted in Sweden during the 18th century. Take for example the Civil Code of 1734 (Swedish: *1734 års lag*). Parts of this codification were in force in Finland until the latter half of the 20th century.

In 1809 the Russians conquered Finland and *the Grand Duchy of Finland* was established as an autonomous region of the Russian Empire. The Swedish laws were kept in force in Finland despite Russian rule. These laws played a central part during the Russification attempts that started in 1899. Legalistic arguments – stemming from the way in which the Grand Duchy was established and the formal decision to uphold the laws from the Swedish era – were presented against attempts to annex Finland more strongly to the Russian Empire and subjugate Finland under the Tsar's rule. This legalistic tradition is according to many still reflected in the Finnish attitude towards constitutional norms.

Finland became independent in 1917 following the Great October Socialist Revolution by the Bolsheviks in Russia. Finland's development into a modern, Nordic welfare state begun after the Second World War. However, despite formal independence, Russia had a big influence on Finnish politics; politics was marked by what was called Finlandization (German: *Finnlandisierung*), which referred to politics that tried to appease Russian interests both when it came to Finnish foreign affairs and internal political questions. Somewhat due to this, Finland started to participate in European integration only at the end of the 1980s.

Finland acceded to the Council of Europe in 1989 and the European Convention on Human Rights (ECHR) became effective in Finland the following year. In 1995 Finland became a Member

[4] See J. Husa, *The Constitution of Finland: A Contextual Analysis* (2011), 11–27; I. Saraviita, *Constitutional Law in Finland* (2012), 19–28.

State of the European Union. These events marked the *Europeanization of the Finnish legal order*. The Constitution of Finland was modernized in parallel to this process. In 1995 a new bill of rights was adopted and in 2000 the old constitution, dating back to 1919 (Finnish: *Hallitusmuoto*; Swedish: *Regeringsform*), was replaced by the current Constitution (Finnish: *Suomen perustuslaki*; Swedish: *Finlands grundlag*)[5].

The second important thing to take into consideration is the way constitutional review is currently organized in the Finnish Constitution. The Finnish system has been categorized as a "hybrid" system in comparison to the centralised model in Germany and the decentralised model in the US[6]. *Ex ante* review of legislative proposals is carried out by the Parliament's Constitutional Law Committee (Finnish: *perustuslakivaliokunta*; Swedish: *grundlagsutskottet*) (Section 74 of the Constitution), while *ex post* review is carried out by all courts when deciding on individual cases (Section 106).

The Committee reviews Government Bills (proposals for laws) on the basis of the Finnish Constitution and international human rights treaties, mainly the ECHR. If the proposal is deemed unconstitutional, then it either needs to be amended, or the constitution needs to be amended to accommodate for such a law. Previously it was common to adopt such unconstitutional laws as exceptive acts; that is, normal laws that are contrary to the Constitution and thus need to be adopted in accordance with the requirements set for amending the constitution[7]. This procedure is no longer used. Adopting acts that breach the Constitution therefore requires to first amend the constitution, after which the law can then be adopted[8].

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[5] The Constitution of Finland (731/1999) and all of the other acts referred to in this study can be accessed in English at <http://finlex.fi/en/>.

[6] See K. Tuori, *Combining Abstract Ex Ante And Concrete Ex Post Review: The Finnish Model*, Venice Commission, CDL-UD (2010)011 (2010), 4.

[7] See J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 227–232; I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 45–48.

[8] The last time this happened was with the new Civilian Intelligence Act (528/2019), which sought to improve Finland's national security by giving the Finnish Security Intelligence Service various powers related to gathering intelligence information in the digital realm. See Government Bill HE 202/2017 vp and the Committee's statements PeVL 35/2018 vp (15 November 2018) and PeVL 75/2018 vp (27 February 2019). This issue is discussed below in Section 3.2.

Concrete *ex post* review was introduced into the Finnish system fairly recently, mainly due to the Europeanization of the Finnish legal order as a result of Finland acceding to the ECHR in 1989 and the EU in 1995[9]. The concrete *ex post* review power of courts means that they can set aside a norm of national law that is contrary to the constitution[10]. However, their decision to do so does not result in the law being declared null and void. The practical significance of such concrete review has been only minor, due to the high threshold set for such review: a court can give primacy to the Constitution only if the normal law is in "evident conflict" with the Constitution (Section 106)[11]. If the law has been reviewed *ex ante* and the Committee did not identify any constitutional issues in that specific part of the law, then a court is in practice barred from finding a breach with the Constitution.

Before deciding on an issue, the Committee hears experts on the Finnish Constitution and the matter in question. Most often these are constitutional law professors. Usually the Committee follows their opinion. If the experts' opinions on the correct interpretation of the Constitution differ, then there is more room for the Committee to construct its argument[12]. The work of the Committee in deciding issues has been described as being "characterized by a search for constitutionally well-founded interpretations and consistent use of precedents"[13]. Thus, the Committee seems to function, at least to a degree, in a manner similar to constitutional courts. Furthermore, the Committee's

[9] See J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 78–83; J. Lavapuro, T. Ojanen & M. Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, 9 Int'l J. Const. L. 505 (2011).

[10] There is a strict demarcation between normal courts and administrative courts in Finland. Normal courts function in three tiers (district courts, courts of appeals and the Supreme Court) whereas administrative courts in two tiers (regional courts and the Supreme Administrative Court). There are also several specialized courts (e.g. the Market Court and the Labour Court), from which there is a possibility to appeal either to the Supreme Court or the Supreme Administrative Court. All courts can utilize the *ex post* review power of Section 106.

[11] The Supreme Court has so far done this only in nine cases and out of these half relate to a very peculiar situation related to changes in the laws governing the validation of paternity.

[12] I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 161–162.

[13] T. Ojanen, *EU Law and the Response of the Constitutional Law Committee of the Finnish Parliament*, 52 Scandinavian Stud. L. 203 (2007), 205. Similarly, see K. Tuori, *Combining Abstract Ex Ante And Concrete Ex Post Review: The Finnish Model*, cit. at 6, 4–5.

opinions on the interpretation of a given norm are *de facto* binding on courts when they are applying that norm[14].

This somewhat unique role of the Committee has certain benefits as well as setbacks. On the one hand, in Finland courts do not face strong public or academic criticism of "judicial activism" because the way that constitutional review is organized has meant that courts have had to decide very few controversial issues. Furthermore, the *ex ante* review powers of the Committee have enabled its participation to European level political and legal discussion to the degree that its opinions have been seen to have affected the outcome of European politics during the Eurozone crisis[15]. On the other hand, the fact that the Committee is neither a purely legal nor political institution has made it susceptible to criticism especially from politicians. For example, some high-profile Members of Parliament have argued that the Committee relies too heavily on the opinions of a few constitutional law professors. The criticism is that it is actually the professors and not the members of the Committee that are ultimately in charge of interpreting the Constitution. Furthermore, they argue that constitutional interpretation is not objective but always based on the subjective values of the interpreter, for which reason the power of interpretation should not be given to outside experts but should be retained by the Members of Parliament[16].

3. Finnish constitutional culture and the European, common constitutional tradition

What constitutes the "constitutional traditions common to the Member States"? What part of Finnish constitutional culture would count as part of this European heritage? In this section, I first explain how the terms constitutional tradition or constitutional identity are not part of the Finnish constitutional vernacular, but the term constitutional culture is used instead. Next, I discuss institutional and substantive issues of Finnish constitutional

[14] J. Husa, *Nordic Constitutionalism and European Human Rights - Mixing Oil and Water?*, 55 Scandinavian Stud. L. 101 (2010), 107–108.
[15] See Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis* (2014), 199.
[16] See I. Koivisto, *Experts and Constitutional Control in Finland: A Crisis of Cognitive Authority?*, 40 Retfaerd 24 (2017).

culture. Lastly, I make some conclusions on the theme of Europeanization of Finnish constitutional culture.

3.1. Foundations

In Finland, the term "constitutional tradition" is not used in any legal texts, by courts, or in academic writing. Instead, the term *constitutional culture* is used[17]. To be precise, Finnish law does not attach any specific legal significance to "constitutional traditions". The term as such, or anything resembling it, is not mentioned in the Finnish Constitution or in normal laws. Neither has it assumed any status in the doctrine of the two supreme courts. In the legal literature, the term "constitutional tradition" is used to cover both "constitutional traditions" as per Article 6(3) TEU and "national constitutional identity" as per Article 4(2) TEU[18].

The Finnish language version Article 6(3) TEU uses the term *valtiosääntöperinne*, which is a direct translation from the English term constitutional tradition (*valtiosääntö* = constitution; *perinne* = tradition). Etymologically, I see no distinction between the Finnish term *perinne* or the English term *tradition*. A comparison with the Swedish version of the Treaty on the European Union (Swedish being also an official language in Finland) verifies this conclusion, as it uses the term *konstitutionella tradition*. The connotation between the English (*tradition*), Swedish (*tradition*) and Finnish (*perinne*) versions of the term is the same.

While the term constitutional tradition is not used in Finnish constitutional law, *customary constitutional law* (or constitutional praxis) has a big role in Finnish constitutional law, especially in the functioning of the state institutions and their relations with each other. Many central elements concerning the functioning of the Finnish Parliament (Finnish: *eduskunta*; Swedish: *riksdag*) are based on custom. These include, for example, how the Government is formed after elections, how seats in the different Committees of the Parliament are divided, and who is elected as the Chairman of the Parliament. The development of such constitutional custom is based on political praxis, although these issues are often commented on in legal literature.

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[17] See J. Salminen, *Yhä Läheisempään Liittoon?: Tutkielmia valtiosäännön integraationormin sisällöstä ja vaikutuksista* (2015); J. Salminen, *Den konstitutionella identiteten, förändringen och Finland*, 37 Retfaerd 41 (2014).

[18] E.g., see K. Tuori, *Introduction to the Theme: Constitutional identity*, 37 Retfaerd 3 (2014).

Furthermore, the term "customary law" (Finnish: *maan tapa*; Swedish: *sedvanerätt*) has specific legal relevance. For example, in case of a lacunae in the written law, customary law may be used by the judge. In the Finnish doctrine on the sources of law (the norms that can and must form the basis of a judge's decision) "national custom" is listed as one element of strongly binding sources of law right after EU law, ECHR law and national law[19]. The position of customary law dates back to the Swedish codification of 1734, mentioned above.

The Finnish legal system makes a distinction between *objectives* that the legislation pursues and *principles* that are to be taken into consideration in the application of the law. To give an example, Section 1 of the Administrative Procedure Act (434/2003) states that the objective of the Act is, inter alia, "to promote the quality and performance of administrative services". To further these objectives, Section 6 of the Act lays down the legal principles of administration: the principle of equal treatment, the principle of legality, the principle of impartiality, the principle of proportionality, and the principle of protection of legitimate interests. Finnish laws or their *travaux préparatoires* do not usually refer to any values as such, although in Finland it is perceived that generally speaking the legal system as a whole is a reflection of certain societal values. These are most often associated with issues such as the Nordic welfare state and everything that it encompasses[20].

Defining what would count in Finland as a "constitutional tradition" under Article 6(3) TEU depends on the methodology used to define such constitutional traditions. As I have understood it, this legal concept is usually invoked as a justification in situations in which national law is in breach of EU law, *Omega* being the best known example[21]. However, as according to my interpretation the way in which the substance of fundamental rights is construed in Finland is heavily influenced by Europeanization, it is difficult to

[19] See A. Aarnio, *Essays on the Doctrinal Study of Law* (2011), 150–151.
[20] See H. J. Petersen, *Nordic Model of Welfare States*, in P. Letto-Vanamo, D. Tamm & B. O. G. Mortensen (eds.), *Nordic Law in European Context* (2019).
[21] C-36/02 *Omega Spielhallen*, ECLI:EU:C:2004:614. In its judgment, the CJEU saw the protection of human dignity as a legitimate objective under EU law since it stemmed from the Member States' common constitutional traditions. Therefore, Germany was allowed to breach free movement rules on the basis of protecting human dignity.

decipher anything very Finnish in this perspective, at least in that it would allow Finland breaching EU law. It is, though, possible to distinguish central elements of Finnish constitutional culture in general, and also how these have changed due to the Europeanization of the Finnish legal order. These issues, however, pertain to the functioning of state institutions and the legal system in general, and not to rights that could be applied by a court of law. The heavy European influence on the substantive construction of fundamental rights in Finland will be explored below.

When it comes to institutional issues, I would classify the way in which the Constitutional Law Committee carries out *ex ante* review as a central element of the Finnish constitutional tradition. This issue, though, does not have any relevance for EU law in the meaning of Articles 6(3) or 4(2) TEU in my view; it is difficult to imagine a case which would involve EU law and the position of the Constitutional Law Committee as the guardian of constitutionalism in Finland. As the Committee is not a court, it cannot make preliminary references under Article 267 TFEU and thus interact with the CJEU. Here, I refer to CJEU cases such as *Simmenthal* or *Melki and Abdeli*, which affected relations between national courts and how they can make references to the CJEU[22]. As the Committee is not a court and cannot make a reference, this doctrine by the CJEU cannot affect the position of the Committee within the Finnish constitutional system.

Furthermore, the devolution of the Åland Islands is also a matter which could be classified as part of the Finnish constitutional tradition[23]. Likewise, this issue, too, seems to have no relevance for EU law, at least not for the matter that is being discussed in this study.

Statutory and constitutional interpretation in Finland has been strongly influenced by international sources. Statutory interpretation is based on the work of Aulis Aarnio[24], who

[22] C-106/77 *Simmenthal*, ECLI:EU:C:1978:49; C-188/10 and C-189/10 *Melki and Abdeli*, ECLI:EU:C:2010:363. See M. de Visser, *Constitutional Review in Europe: A Comparative Analysis* (2014), 417–427.

[23] Generally, see S. Spiliopoulou Åkermark, S. Heinikoski & P. Kleemola-Juntunen, *Demilitarisation and International Law in Context: the Åland Islands* (2018).

[24] See A. Aarnio, *Essays on the Doctrinal Study of Law*, cit. at 19; A. Aarnio, *Reason and Authority: A Treatise On the Dynamic Paradigm of Legal Dogmatics* (1997); A. Aarnio, *The Rational As Reasonable: A Treatise On Legal Justification* (1986).

collaborated with Neil MacCormick and Rober Summers[25]. Constitutional interpretation by the Constitutional Law Committee, especially the doctrine on limiting fundamental rights, is essentially derived from the German Federal Constitutional Court[26]. Of German origin is also the habit of interpreting legislation in a fundamental rights friendly manner (German: *verfassungskonformen Auslegung*)[27]. Thus, it is difficult to distinguish anything very Finnish, as per the bottom-up approach, with regard to constitutional or statutory interpretation. Finally, one could also say that the legalist tradition, mentioned in the previous section, affects the undertone that interpretation takes: according to the prevailing view, interpretation is a science not an art[28]. With regard to constitutional law, this view emphasises legal constitutionalism as opposed to political constitutionalism. The tools for such interpretation, then, stem from the case-law of the European Court of Human Rights (ECtHR).

When it comes to the principle of proportionality, the two supreme courts do not seem to have an established doctrine on proportionality[29]. Under the prevailing European doctrine, proportionality consists of three limbs: suitability, necessity and proportionality *stricto sensu*[30]. Very few cases, however, contain a proportionality analysis that would contain all three stages, at least explicitly. Proportionality before the courts is most often discussed in relation to Section 6 of the Administrative Procedure Act (434/2003), according to which "[t]he acts of an authority shall be impartial and proportionate to the objectives sought". Yet, these cases neither seem to contain an explicitly formulated

[25] See D. N. MacCormick, & R. S. Summers (eds.), *Interpreting Statutes: A Comparative Study* (1991); D. N. MacCormick & R. S. Summers (eds.), *Interpreting Precedents: A Comparative Study* (1997).
[26] See J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 198–200; I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 258–262.
[27] J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 196–198.
[28] See M. Scheinin, *The art and science of interpretation in human rights law*, in B. A. Andreassen, H.-O. Sano & S. McInerney-Lankford (eds.), *Research Methods in Human Rights* (2017). Scheinin is regarded as the leading expert in fundamental rights in Finland and he is often heard by the Constitutional Law Committee.
[29] E.g. in case KKO 2019:36 the Supreme Court first stated how notice must be had to ECtHR case-law and the Court's own precedents, and furthermore that "according to the principle of proportionality, the severity of the crime also affects the assessment". The Court did not, however, apply any specific proportionality analysis or weigh out the different interests at stake explicitly.
[30] See R. Alexy, *A Theory of Constitutional Rights* (2002), 66–69.

proportionality analysis[31]. However, as "the proportionality analysis that the ECtHR conducts in most cases does not strictly follow the three-pronged test"[32], it is perhaps not surprising that Finnish courts, which base their analysis on ECtHR case-law, are neither able to live up to the original German standards of this test.

Looking at it from the Finnish perspective, a constitutional tradition can develop in a fairly short period of time. Take, for example, the Europeanization of the Finnish legal order. It started about thirty years ago, and is nowadays *the* defining feature of Finnish constitutional culture. Conversely, what counts as constitutional tradition can emanate either from the current constitutional regime, or date back to preceding, historical regimes. Central elements of Finnish constitutional culture stem from the Swedish and Russian eras. One of these features is the existence of the Constitutional Law Committee[33]. Thus, some central elements of Finnish constitutional culture are clearly trans-regimic, while others have been established within a single constitutional regime.

Some elements of Finnish constitutional culture are broad concepts and ideas, whereas others are rather particular norms and precise rules. Similarly, if we think about, for example, the effects of Europeanization on Finnish constitutional culture, we can distinguish its effects at all three layers of law[34]. At the surface level of everyday legal practice, we can observe how ECtHR case-law is being cited often, even by district courts. At the level of legal culture, we notice how the primacy of EU law and the superior position of the ECHR viz national law has been accepted by all relevant legal actors. At the historically and culturally embedded level of the law's deep structure, we can trace the continuities emanating back to the Swedish and Russian era, while also Europeanization has sedimented certain conceptualization into it,

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[31] E.g. in case KHO 2018:85 the Supreme Administrative Court first explicitly explained what the principle of proportionality of Section 6 of the Administrative Procedure Act means, but although the judgment contains an implicit weighing of different interests, this exercise is not based on clearly expressed "limbs" or "stages" of analysis, as is often done by courts such as the ECtHR or the CJEU.

[32] Y. Arai-Takahashi, *Proportionality*, in D. Shelton (ed.), *The Oxford Handbook of International Human rights Law* (2013), 453.

[33] J. Husa, *The Constitution of Finland: A Contextual Analysis*, cit. at 4, 11–27; I. Saraviita, *Constitutional Law in Finland*, cit. at 4, 19–28.

[34] For the ontological view of the three layers of law, see K. Tuori, *Critical Legal Positivism* (2002). This understanding on the nature of law is widely accepted in Finland.

namely the openness towards European integration and the unreserved attitude towards supranational fundamental rights. We could perhaps say that Europeanization has proceeded to such an extent that it is nowadays part of the deep structure of Finnish constitutional culture.

3.2. Subject and content of constitutional traditions

When we think about elements of Finnish constitutional culture, we can discern both substantive issues and institutional arrangements. When it comes to the substantive aspect, namely fundamental rights, their content seems to coincide with the European framework. This can be established by just a cursory look at some recent judgments by the two supreme courts, in which reference has been made to fundamental or constitutional rights, or statements by the Constitutional Law Committee.

In its judgment KKO 2019:44, which dealt with the principle of legality in criminal law, the Supreme Court started its interpretation of the principle by referring to Article 49 of the Charter of Fundamental Rights of the European Union (EU Charter), Article 7 ECHR and Article 15 of the International Covenant on Civil and Political Rights (ICCPR). With this, the Supreme Court was signalling, that Paragraph 3 Section 1 of the Criminal Code (1889/39) on the principle of legality must be interpreted in light of these international norms. Next, the Court discussed how the principle is construed in the national *travaux préparatoires* and in its own previous precedents. Then, the Court discussed the CJEU's judgment in *M.A.S and M.B.* and the ECtHR's judgment in *C.R v. UK* and *Jorgic v. Germany*[35]. After having thus constructed the content of the principle of legality, the Court then moved to applying it to the case at hand.

The Supreme Administrative Court assessed an asylum seeker's, whose application had been rejected and who had been ordered to leave the country, right to basic social assistance in its judgment KHO 2019:62. In practice, the case concerned the interpretation of the national laws implementing the Reception Conditions Directive (2013/33/EU) and whether it was constitutional to grant asylum seekers, whose application had already been rejected, a lower level of basic social assistance than to

[35] See C-42/17 *M.A.S. and M.B.*, ECLI:EU:C:2017:936; *CR v. United Kingdom* (22 November 1995); *Jorgic v. Germany* (12 July 2007).

Finnish nationals. The Court came to the conclusion that denying basic social assistance in these conditions does not violate Article 3 ECHR. To this end, the Court cited *Hunde v. the Netherlands*[36].

Perhaps one of the most significant statements by the Constitutional Law Committee in recent years is the one it issued on the Government Bill concerning new surveillance powers to be given to the Finnish Security Intelligence Service[37]. Basically, the Bill aimed at giving the Intelligence Service broad surveillance powers that breached the right to privacy (Section 10 of the Finnish Constitution). The rational for such a Bill was to enable the Intelligence Service to use modern surveillance methods to counter terrorism and for other national security reasons. It was immediately clear that the proposed legislation was unconstitutional but as the will to adopt these laws was very broad, the Finnish Constitution was amended to enable the adoption of such unconstitutional laws[38].

In its extraordinary long and detailed statement, the Committee started its assessment of the issue by framing it in light of Article 8 ECHR and Article 7 EU Charter, and by discussing the case-law of both courts. There is no space here to go into detail on the Committee's argumentation. Instead, I will only list the cases cited by the Committee. From the Luxembourg court the Committee cited *Digital Rights Ireland*, *Schrems*, *Tele2 Sverige*, *Ministerio Fiscal* and *Comission v. Finland*[39]. From the Strasbourg court the Committee cited *Weber and Saravia v. Germany*, *Liberty v. the United Kingdom*, *Zakharov v. Russia*, *Szabó and Vissy v. Hungary*, *Centrum for Rättvista v. Sweden*, and *Big Brother Watch v. the United Kindgom*[40].

While these are of course just anecdotal examples, in my view the pattern is recurring throughout current praxis. Both the legislative process and the judicial practice of the two supreme

[36] *Hunde v. The Netherlands* (5 July 2016).
[37] PeVL 35/2018 vp (15 November 2018).
[38] Amendment 2018/817 and Government Bill HE198/2017 vp.
[39] C-293/12 and C-594/12 *Digital Rights Ireland*, ECLI:EU:C:2014:238; C-362/14 *Schrems*, ECLI:EU:C:2015:650; C-203/15 and C-698/15 *Tele2 Sverige*, ECLI:EU:C:2016:970; C-207/16 *Ministerio Fiscal*, ECLI:EU:C:2018:788; C-284/05 *Commission v. Finland*, ECLI:EU:C:2009:778.
[40] *Weber and Saravia v. Germany* (29 June 2006), *Liberty v. the United Kingdom* (1 October 2008), *Zakharov v. Russia* (Grand Chamber, 4 December 2015), *Szabó and Vissy v. Hungary* (12 January 2016), *Centrum for Rättvista v. Sweden* (19 June 2018), and *Big Brother Watch v. the United Kindgom* (13 September 2018).

courts takes ECtHR, and recently also CJEU, case-law as the point of departure. Leading fundamental rights experts are also consulted in cases that are being tried before lower courts, especially in case of politically motivated litigation. Good recent examples include the indigenous Sámi peoples' fishing rights[41] and exemptions from mandatory conscription[42].

The point that I am trying to make here is simple: the Europeanization of fundamental rights as such as well as fundamental rights discourse in Finland. For this reason, the formation of the content of fundamental rights in Finland has been, and continues to be, very much a top-down phenomenon – instead of the bottom-up approach that the ELI project has assumed as its hypothesis.

When it comes to institutional arrangements as part of Finnish constitutional culture, here we can distinguish something clearly Finnish. Janne Salminen has listed four issues that, according him, are central aspects of Finnish constitutional culture[43]. First, the legalistic and strongly positivistic attitude towards law and legal interpretation. This aspect was born as a reaction to the Russification attempts during the *fin de siècle*[44]. Second, we have the constant use of exceptive acts to enact normal laws that are contrary to the Constitution[45]. Third, emphasis on political constitutionalism as opposed to legal constitutionalism, which was clearly seen in how the Committee as a political organ and not the courts as judicial organs were in charge of interpreting and construing the content of fundamental rights[46]. Fourth, the presidential system[47].

These institutional features, too, have been transformed due to Europeanization. The central argument that Salminen makes in this regard is that the Finnish Constitution has become open to Europeanization and that Europeanization is now internalized into the Finnish Constitution; that Europeanization is now part of

[41] In English, see < https://yle.fi/news/3-10676003> (accessed 29 June 2022).
[42] In English, see < https://yle.fi/news/3-10089261> (accessed 29 June 2022).
[43] J. Salminen, *Yhä Läheisempään Liittoon?: Tutkielmia valtiosäännön integraationormin sisällöstä ja vaikutuksista*, cit. at 17, 171.
[44] See section 2 above.
[45] See fn. 7 above.
[46] See J. Lavapuro, T. Ojanen & M. Scheinin, *Rights-Based Constitutionalism in Finland and the Development of Pluralist Constitutional Review*, cit. at 9.
[47] See J. Nousiainen, *From Semi-presidentialism to Parliamentary Government: Political and Constitutional Developments in Finland*, 24 *Scandinavian Pol. Stud.* 95 (2001).

Finnish constitutional culture. The formal culmination of this process was the amendment of the Constitution in 2012. Now, Section 1 states that "Finland is a Member State of the European Union". Moreover, Sections 94 and 95 now specify how the "transfer of authority to the European Union" shall take place[48].

When we look at all of the abovementioned features of Finnish constitutional culture, we can see that all of them have undergone major changes starting from the end of the 20th century. The legalistic attitude towards law has changed, which is evident, for example, from the way in which national laws are now interpreted through the lens of international fundamental rights and EU law. Exceptive acts are no longer used, and in such situations the text of the Constitution itself is amended. The role of courts, both the supreme courts as well as lower level courts, in fundamental rights interpretation and application has increased. Finally, the role of the President of the Republic has been narrowed down considerably.

With regard to more specific issues, we can mention that there is a clear distinction between administrative and constitutional law in Finland. This can be seen both in the institutional setup of the legal system as a whole as well as in particular laws. The main constitutional institution is the Committee, whereas the main administrative law institutions are special administrative law courts. There are six regional administrative courts and the Supreme Administrative Court as an appellate body. Administrative actions by governmental and communal agencies are regulated by the Administrative Procedure Act (434/2003), while proceedings before administrative courts by the Administrative Judicial Procedure Act (586/1996)[49]. Administrative law and constitutional law are distinct subject matters also substantively speaking. There are specialized chairs for both topics in law schools as well as textbooks on the substance of these issues. There is of course some degree of overlap between the two, but this stems from the role of the Committee: administrative courts need to take the Committee's statements into consideration, but this applies also to all other areas of law in addition to administrative law.

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[48] Amendment 1112/2011, entry into force on 1 March 2012.

[49] See O. Mäenpää, *The Rule of Law and Administrative Implementation in Finland*, in K. Nuotio, S. Melander & M. Huomo-Kettunen (eds.), *Introduction to Finnish Law and Legal Culture* (2012).

3.3. Constitutional traditions and European influence

Finnish courts do not refer to "constitutional tradition" in the sense of Article 6(3) TEU when deciding on purely national issues. Courts may and do refer to "legal tradition", in the sense as explained above, but this is different from that which the Member States' common constitutional traditions as a concept pertains to. As most of the substantive issues of constitutional law are Europeanized (whereas the institutional issues which reflect Finnish idiosyncrasies are not the subject of court adjudication in the Finnish system as courts do not have jurisdiction on such institutional issues), therefore it is difficult to distinguish cases where national courts would rely on national constitutional tradition (or national constitutional identity) in their adjudication.

What about national engagement with European constitutional traditions? There is at least one (somewhat) recent judgment where the Supreme Court engages in a comparative constitutional discussion on common constitutional traditions. The substance of the case KKO 2014:93 concerned the *ne bis in idem* principle and whether a criminal sanction can be imposed in addition to a punitive tax increase as a result of tax evasion. One specific legal question pertained to whether states are obliged to allow for re-appeals in case the ECtHR finds the state to have breached the ECHR. In its judgment, the Supreme Court analysed ECtHR case-law on the question. Moreover, the Court also cited judgments by the Norwegian Supreme Court, the German Federal Constitutional Court, the French Constitutional Council, the Belgian Constitutional Council, the French Court of Cassation, the Irish Supreme Court, and the Supreme Court of Sweden. In my view, the Finnish Supreme Court's intention was to see whether a common European constitutional tradition has emerged with regard to the question at hand. But again, the Finnish Supreme Court's intention was to interpret the law in accordance with such a constitutional tradition; Europeanization is a top-down process, whereby the Finnish constitutional tradition is through interpretation brought in line with its European counterparts.

The Constitutional Law Committee often uses the term constitutional tradition (Finnish: *valtiosääntöperinne*), but this is most always in reference to the evolution of the Finnish

Constitution and constitutionalism[50]. When giving a statement on the European Commission's proposal for the Council Regulation on the European Union Agency for Fundamental Rights[51], the Committee stated, that since Article 3(2) of the Regulation only specifies that the duties of the Agency pertain to securing the functioning of fundamental rights as based on Article 6(2) TEU (the Member States' common constitutional tradition) and the ECHR, Article 3(2) of the Regulation should be amended to also refer to other international fundamental rights instruments[52]. Simply put, the Committee did not see the ECHR and the Member States' common constitutional traditions as encompassing enough when it comes to the landscape of fundamental rights.

Thus, it seems pertinent to conclude that the Europeanization of the Finnish legal system has progressed to the stage where Europeanization is now a central aspect of Finnish constitutional culture. In fact, Salminen has gone so far as to argue that politics that would actively strive for Finland's withdrawal from the EU would be against the Finnish Constitution now that membership is enshrined in Section 1 of the Constitution[53].

4. Examples of Europeanization… and some resistance

This section offers a glance at case-law and constitutional discourse on three specific rights in Finland. Most attention is given to the freedom of speech, while freedom of movement and judicial independence are only dealt with in a cursory manner. The first subsection further substantiates the Europeanization thesis put forth in the previous section.

4.1. Free speech

Freedom of speech is a classical liberty right that is crucial for the functioning of – if not the whole existence of – a polity. Just as

[50] For a recent example, see PeVM 4/2018 vp (21 September 2018), where the Committee explains how the enactment of the new Constitution in 2000 "did not significantly alter Finland's constitution's foundations, but the reform could be done in a manner that secures the continuation of the prevailing constitutional culture and further develops it".

[51] See COM(2005) 280 final, 30 June 2005, Proposal for a Council Regulation establishing a European Union Agency for Fundamental Rights.

[52] PeVL 57/05 vp (2 December 2005).

[53] See J. Salminen, *Yhä Läheisempään Liittoon?: Tutkielmia valtiosäännön integraationormin sisällöstä ja vaikutuksista*, cit. at 17, 135.

in Article 10 ECHR, freedom of speech is conceptualized as "freedom of expression" in the Finnish Constitution. According to Section 12 of the Constitution: "Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act."

The majority of cases on freedom of expression concern violations of personal privacy. According to Chapter 24 Section 8 of the Criminal Code (39/1889), a person who unlawfully, through the use of mass media or otherwise by making available to many persons, "disseminates information, an insinuation or an image of the private life of another person, so that the act is conducive to causing that person damage or suffering, or subjecting that person to contempt, shall be sentenced for *dissemination of information violating personal privacy* to a fine". The section then makes two reservations. First, in case of a person in politics, business, public office or public position, or in a comparable position, dissemination of private information does not constitute violating personal privacy, if it may affect the evaluation of that person's activities in the position in question and if it is necessary for purposes of dealing with a matter of importance to society. Second, the presentation of an expression in the consideration of a matter of general importance shall also not be considered dissemination of information violating personal privacy if its presentation, taking into consideration its contents, the rights of others and the other circumstances, does not clearly exceed what can be deemed acceptable.

Two recent judgments by the Supreme Court addressed freedom of expression and violation of privacy. The case KKO 2018:51 concerned the following events. B had been found guilty of aggravated sexual abuse of a child. After B's conviction, his name and personal information had been publicized in various newspapers, as is customary in Finland. Four months later A had linked a newspaper article about B's conviction to a Facebook group dedicated to "exposing paedophiles" and also attached along a picture of B, which he had taken from B's public Facebook profile. A was charged of breaching B's privacy by making the Facebook post.

In applying the relevant legislation to the facts of the case, the Court's reasoning proceeded through the following three stages.

Has posting the picture caused damage and suffering to B? Has A acted unlawfully, or were his actions justifiable due to the general public's interest in the issue? Has A's act gone beyond what can be deemed acceptable? This is the normal pattern of reasoning followed by courts in such cases. The last step (whether the actions were "acceptable") constitutes essentially a proportionality analysis. The Supreme Court does not, however, use the term proportionality (Finnish: *suhteellisuus*) but instead talks about balancing (Finnish: *punninta*). Terminologically, this conveys well what the third limb of proportionality – proportionality *stricto sensu* – is really about.

Before initiating this analysis, the Court stated that in applying the relevant Section of the Criminal Code, "a court needs to balance out the violation of privacy with freedom of speech and has to strike a just balance between the two". The guidelines for this balancing, according to the Court, come from ECtHR case-law on freedom of speech. The Court then explained the ratio of *von Hannover v. Germany*[54] and also referred shortly to the CJEU judgment in *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*[55], apparently because the latter case later ended up before the ECtHR[56].

In its analysis, the Court first concluded, that the posting of B's picture to the Facebook group caused him damage and suffering. This was because sexual offenders are faced with "strong judgment and despise" and B's picture belonged to the "core of his privacy". Next, the Court concluded that even though the linked news article and B's picture were both publicly available on the internet, this did not mean that A had the legal right to post them on the Facebook group in the aforementioned manner.

Lastly, the Court came to the most difficult part of the judgment: whether A's actions *had gone beyond what is acceptable*, that is, whether they were proportionate. A's stated aim with the Facebook group had been to create public discussion on sexual crimes and to alert the public about sexual offenders. According to the Court, the public interest aspect could have been reached without posting B's picture online. In contrast, the Court also

[54] *von Hannover v. Germany* (No. 2) (Grand Chamber, 7 February 2012).
[55] C-73/07 *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECLI:EU:C:2008:727.
[56] See *Satakunnan markkinapörssi Oy and Satamedia Oy v. Finland* (Grand Chamber, 27 June 2017).

recognized that the right to privacy does not protect convicted criminals from the public reactions that severe crimes (such as the one in this case) understandably might raise. However, in this case, A's actions were primarily targeted towards B as a person and not towards the phenomenon of paedophilia generally, A's post lacked any editorial content, and instead the post just generated a heated debate within the Facebook group which also contained threats towards B. On this basis, the Court concluded that A had "clearly breached" that what can be deemed as acceptable and is thus guilty of violating B's privacy.

The case KKO 2018:81 concerned a situation in which A, with the assistance of B, had posted on YouTube a video about the police coming to take custody of his two underaged children. Although in parts of the video the children's faces were blurred, relatives and neighbours of the family could easily recognize the children from the video. The question was, whether posting the video violated the children's right to privacy, or whether there was a public interest concern that made posting the video legal. I will skip straight to the third stage of the Court's analysis.

The Court came to the conclusion that the video concerned an issue of public interest (how children are taken into custody and on what grounds). When it came to the acceptability of posting the video, the Court considered the following matters. Revealing the children's identity was not relevant for raising public discussion on the issue. The video revealed the identity of the children and the fact that they were taken into custody, furthermore the video conveyed the children's emotions as they tried to refuse being taken to custody; both of which are very private matters. The video had tens of thousands of views and despite being removed from YouTube, it can still resurface on the internet later. The Court concluded that, although posting the video served a legitimate public interest concern, in these specific circumstances A's and B's actions went beyond what is acceptable. Both were found guilty of violating the children's privacy.

A case also worth mentioning shortly is one that concerned the blog posts of Jussi Halla-aho, a Member of the European Parliament (2014–2019), the Finnish Parliament (2011–2014 and 2019–), and the former chairman of the Finns Party (2017–2021), formerly known in English as the True Finns. Halla-aho had published a blog post in June 2008 in which he criticized immigration and Islam, and wanted to participate to the discussion

on freedom of speech and limitations to it in the name of hate speech. He had been a candidate already in the national parliamentary elections in 2007, but the first time he was elected into a public office was in the communal elections in October 2008.

The post in which Halla-aho made the statements was titled "A few baits to Mika Illman"[57]. Illman was then a prosecutor at the Office of the Prosecutor General. He had in 2005 defended his PhD on hate crimes[58], and had also participated in the public discussion on hate speech. Halla-aho's intention was to participate in the public discussion on hate speech and limitations to freedom of speech with this blog post. Judging by the title of his post and the manner in which it was written, it was rather apparent that he wanted to see if charges would be brought against him and whether they would stand before a court.

Halla-aho had made the following statements in his blog post: "Prophet Muhammad was a paedophile, and Islam is a religion that sanctifies paedophilia, that is a paedophilic religion. Paedophilia is Allah's will"[59]. "Robbing passers-by and living on welfare like a parasite is a national, perhaps even a genetic, characteristic of the Somali people"[60]. Halla-aho based his first statement on the understanding according to which Prophet Muhammad had a bride, Aisha, who was 6 years old. The second statement was based on Finnish statistics on crime and social welfare benefits. Halla-aho argued that if these are facts, then his statements cannot be blasphemy or ethnic agitation as they are logical deductions from the aforementioned facts.

The public prosecutor brought two charges against Halla-aho. The first statement resulted in a charge for breach of the sanctity of religion (Chapter 17 Section 10 of the Criminal Code), which essentially constitutes blasphemy. The second statement resulted in a charge for ethnic agitation (Chapter 11 Section 10).

The Supreme Court ruled on the issue in case KKO 2012:58. The Court framed the issue in light of freedom of religion (Section

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[57] "Muutama täky Illmanin Mikalle", 3 June 2018, https://www.halla-aho.com/scripta/muutama_taky_illmanin_mikalle.html (accessed 29 June 2022). The below discussed parts of the post have since been removed from the post, but they are discussed in the Supreme Court's judgment.

[58] See M. Illman, *Hets mot folkgrupp* (2005).

[59] Finnish: "*Profeetta Muhammad oli pedofiili, ja islam on pedofilian pyhittävä uskonto, siis pedofiiliuskonto. Pedofilia on Allahin tahto.*"

[60] Finnish: "*Ohikulkijoiden ryöstely ja verovaroilla loisiminen on somalien kansallinen, ehkä suorastaan geneettinen erityispiirre.*"

11 of the Constitution and Article 9 ECHR) and freedom of speech (Section 12 of the Constitution and Article 10 ECHR). According to the Court, Halla-aho's actions need to be considered in light of his political activism, which means that the scope of accepted speech is broader than in non-political situations.

With regard to both charges, the Court first went through ECtHR case-law on the issue. When it came to blasphemy, the conclusion was that freedom of speech in such cases is broad, but not unlimited. The Court saw Halla-aho's statements on Prophet Muhammad and Islam as blasphemy because they were direct attacks on the religion as such. It would have been possible to participate in the public discussion on limitations to freedom of speech also with an otherwise worded blog post. In fact, according to the Court, such statements do not contribute to the discussion on religion and freedom of speech but just agitate hate against Muslims. The Court saw that Halla-aho had a specific intention to offend Muslims, which could be seen already from the way he had worded his blog post, especially the title.

When it came to ethnic agitation, the Court's conclusion from analysing ECtHR case-law was that criticism of immigration is not forbidden, but hate speech and ethnic agitation is. Again, Halla-aho could have participated in the public discussion on the topic in a manner that would not have required such ethnic agitation (insults towards and slander about the Somali people). According to the Court, Halla-aho's statements are to be classified as "hate speech" (Finnish: *vihapuhe*). Note, however, that the Finnish Criminal Code does not contain such a term. What the Court means is that since Halla-aho's statements classify as hate speech, therefore they do not enjoy the protection of freedom of speech.

The Supreme Court found Halla-aho guilty on both charges. Halla-aho did not appeal to the ECtHR.

The ECtHR's assessment of the acceptability of limitations to freedom of speech (freedom of expression) under Article 10 ECHR proceeds through the following steps: i) is the limitation prescribed by law, ii) is the limitation necessary in a democratic society, and iii) does the limitation aim to protect one of the enumerated public policy concerns. This second criterion is somewhat of a proportionality test, however, it is important to note that "[e]ven though classic elements of proportionality review (suitability, necessity, and a reasonable balance between the interests concerned) might be read into the formula, they are not explicitly

mentioned"[61]. Perhaps for this reason, the Finnish Supreme Court's proportionality analysis is not always the most explicit, as was already discussed in the previous section and as these example cases also demonstrate.

Overall, Finnish law, legal practice and legal culture on free speech seem to be convergent with the ECtHR's doctrine on the issue.

The following still needs to be stated shortly on more specific isues. There is no *lèse-majesté* or similar criminalization in the Finnish Criminal Code. Burning the national flag is not criminalized. Holocaust denial, or apology of a crime as such is neither criminalized in Finland. Commercial speech is covered by the right to freedom of speech, but it is not at the core of that right. The use of religious symbols is not legislated separately, neither is there any legislation on Islamic head scarfs or such.

Freedom of association is a separate constitutional right (Section 13 of the Constitution), but associations cannot misuse that right and thereby breach other constitutional rights. There was recently a case in which an association was deemed illegal due to it having a fascist and racist policy and was thus ordered to be dissolved[62]. The Supreme Court came to the same conclusion in in its judgment KKO 2020:68.

In Finland, there is in place a system of mandatory conscription for all men (6 to 12 months). Conscientious objectors have to participate to an equally long civil service. If they refuse, they are given a prison sentence of 173 days. This issue might change due to a recent decision by the Helsinki Court of Appeal, according to which the exception made for Jehovah's Witnesses is discriminatory in relation to other conscientious objectors[63].

4.2. Freedom of movement

Freedom of movement – whether it be that of goods, services, capital or people – is not that much debated in Finnish legal academia or politics in general. When looking at the issue in relation to non-EU countries, it seems not have been discussed in the legal literature; legal literature on international trade focuses on

[61] J. Gerards, *How to improve the necessity test of the European Court of Human Rights*, 11 International Journal of Constitutional Law 466 (2013), 467–468, footnotes omitted.
[62] In English, see < https://yle.fi/news/3-10712210> (accessed 29 June 2022).
[63] See fn. 42 above.

contract law issues such as the application of the United Nations Convention on the International Sale of Goods (CISG)[64] or the INCOTERMS clauses[65]. Most case-law by the two supreme courts seems to stem from intra-EU situations. This is despite the fact that about 40% of Finland's international trade is with non-EU countries[66].

When looking at the Finnish case-law on freedom of movement within the EU's internal market, two policy areas immediately stick out: importation of used cars and alcohol. As taxation of cars and alcohol is high in Finland in comparison to other Member States, after Finland's accession to the European Union people have started to import used cars and alcohol from cheaper Member States. Cars are mainly imported from Germany and Sweden, whereas alcohol from Estonia.

The CJEU has rule on several preliminary references from Finland concerning alcohol[67] and taxation of cars[68]. Moreover, the issue of car taxation has also been the object of many infringement proceedings against Finland[69].

Concerning taxation of imported used cars, the Finnish Government has faced several problems on the compatibility of the applied taxation practices with the prohibition of tax discrimination of Article 110 TFEU. Finland has had difficulties in adapting its national taxation with the ban on tax discrimination in such cases. It seems that even today, Finnish tax laws are based on the Government's fiscal interest as opposed to what is mandated by Article 110 TFEU. The Supreme Court has even ruled in KKO 2013:58 that the Finnish Government must compensate for the

[64] See B. Sandvik & L. Sisula-Tulokas, *Kansainvälinen kauppalaki* (2013).
[65] See L. Railas, *Incoterms® 2010: Käyttäjän käsikirja. 2, uudistettu painos* (2016).
[66] See < https://tulli.fi/en/statistics/key-figures-and-graphics> (accessed 29 June 2022).
[67] See C-394/97 *Heinonen*, ECLI:EU:C:1999:308; C-455/98 *Salumets*, ECLI:EU:C:2000:352; C-434/04 *Ahokainen and Leppik*, ECLI:EU:C:2006:609; C-75/15 *Visnapuu* ECLI:EU:C:2015:751; C-75/15 *Viiniverla* ECLI:EU:C:2016:35.
[68] See C-101/00 *Siilin*, ECLI:EU:C:2002:505; C-365/02 *Marie Lindfors*, ECLI:EU:C:2004:130.
[69] See C-232/*03 Commission v. Finland*, ECLI:EU:C:2006:128; C-10/08 *Commission v. Finland*, ECLI:EU:C:2009:171; C-144/08 *Commission v. Finland*, ECLI:EU:C:2009:348.

damage caused by the excessive taxation that has been in clear breach of the legal framework of the internal market[70].

When it comes to regulating the selling and importation of alcohol, it seems that the arguments that the Finnish Government uses to justify its restrictive measures against imports (a matter dealt with under Articles 34 and 36 TFEU) are somewhat contradictory in relation to its overall alcohol policy. On the one hand, Finland wants to restrict importation of alcohol due to public health reasons, while on the other hand, Finland maintains exceptions to the Government's monopoly on alcohol production and selling that seem to go against the public health concerns and, instead, seem to favour national production at the expense of imports from the internal market[71].

Does the fact that most freedom of movement cases are about cars and alcohol say something about the Finnish culture? Perhaps so, or at least to me as a Finn it would seem to be so. But I would not draw any conclusions from this with regard to Finnish law in general or Finnish constitutional culture in particular. High taxation of cars and alcohol is one feature of the Nordic welfare state, which naturally leads to people wanting to import these goods from those parts of the internal market where prices are lower. Perhaps some indices can be made from the stubbornness with which the Finnish Government has battled EU's free movement rules and sought to protect the national alcohol monopoly and system of taxation. But this is mainly a policy issue and no legal doctrine can be deduced from the Finnish courts' case-law.

A brief glance also needs to be accorded to the CJEU's decision in *Viking Line*[72]. In this heavily criticized judgment, which originated from Finland, the CJEU first concluded that the right to strike is a "fundamental right", which forms an "integral part of the general principles of Community law", and the observance of which the CJEU must ensure. However, the CJEU then came to the conclusion that the exercise of the right to strike may none the less

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[70] P. Määttä, *Suomen autoverojärjestelmän eurooppaoikeudelliset haasteet – Verosyrjintäkielto ja käytettyjen tuontiautojen verotus*. LL.M. thesis at the University of Lapland, 2016.

[71] E. Haataja, *Tuonnin määrällisten rajoitusten kielto ja Suomen alkoholin vähittäismyyntiä koskevan lainsäädännön sopivuus sisämarkkinoille*. LL.M. thesis at the University of Lapland, 2019.

[72] C-438/05 *Viking Line*, ECLI:EU:C:2007:772.

be subject to certain restrictions. The outcome of the case was, that the collective action taken by a Finnish trade union against the shipping company Viking Line was disproportionate and thus breached the free movement right of freedom of establishment (Article 49 TFEU).

After the CJEU had answered the preliminary reference, the case was settled between the parties, so we do not know how a Finnish court would have ruled on the issue[73]. There are, however, examples of situations in which EU law has affected the functioning of the Finnish collective labour market agreement system. Clauses in Finnish collective labour market agreements, which restrict the free movement of services contrary to EU law, may be deemed void. For example, in case TT:2009:90 the Labour Court came to the conclusion that a collective labour market agreement could not restrict the Finnish airline company Finnair's right to "wet lease" an aircraft and crew from a Spanish airline company. Such "wet leasing" is a service, and the free movement of services from one Member State to another cannot be restricted with such national measures[74].

The strong criticism that *Viking Line* has faced in the literature[75] is understandable from the Finnish perspective (although not everyone in Finland ascribes to this criticism), as the judgment concerned the Finnish system of collective labour market agreements and challenged the very essence of this system. But as was exemplified above, EU free movement rights do have primacy over Finnish labour law in practice. If one compares the first discussed issue of taxation of cars and alcohol with the issue of labour market regulation and especially collective agreements, it seems that in the former the clashes between the Finnish system and the EU system stem primarily from actions by the Finnish Government, whereas in the latter the Finnish system has been more receptive towards the EU system despite the heavy academic criticism. However, one should not draw any conclusions on the

[73] N. Bruun & A. von Koskull, Anders, *Työoikeuden perusteet* (2012), 164. To be precise, the preliminary reference was not sent from a Finnish court but from the Court of Appeal of England and Wales (Civil Division), although the parties to the proceedings were Finnish and the substance of the case concerned the Finnish labour market system.

[74] N. Bruun & A. von Koskull, Anders, *Työoikeuden perusteet*, cit. at 73, 164–165.

[75] For a list of critical commentary on the judgment, see D. Kukovec, *Law and the Periphery*, 21 Eur. L. J. 406 (2015), 412 fn. 29.

importance or policy preference between these two issue within the Finnish legal system based on this simple comparison.

Overall, Finnish legal practice on freedom of movement within the EU's internal market seems to be convergent with the prevailing doctrine of the CJEU. However, national policy choices are not always aligned with EU law, which causes some turmoil in the interaction between Finnish law and EU law, and how the specific rights granted by EU law are effectuated in Finland.

4.3. Judicial independence

The issue of judicial independence has come to the fore within the EU due to the democratic backsliding of Poland and Hungary; these two Member States do not seem to respect the rule of law principle any more. In Finland, judicial independence has not been discussed in the same meaning.

The impartiality of the judge viz the case at hand is regulated by the Code of Judicial Procedure (4/1734) and the issue has been addressed by the Supreme Court several times[76]. These cases concern the alleged bias of the judge towards the individual case. Chapter 13 Section 7 of the Code of Judicial Procedure lists several reasons that lead to the judge being disqualified from hearing the case. The reasons are rather similar to those that are generally followed in administrative procedures as well: no one shall be a judge in their own case or in a case concerning an issue on which they are known to have a strong public opinion.

According to surveys, 82% of the Finnish population see the judiciary as independent and trustworthy[77]. Independence refers here specifically to non-corruption and freedom from political interference. The independence of the judiciary has a strong basis in the Constitution. The separation of powers is prescribed in Section 3, according to which "judicial powers are exercised by independent courts of law". Linked to this is also Section 21, which contains a due process ("Protection under the law") requirement. Finally, Section 103 stipulates the right of judges to remain in office.

Also the procedure for selecting judges to ordinary courts aims to increase the independence of the judiciary. Appointments are made by the President of Finland, on the basis of a proposal by the Judicial Appointments Board (Courts Act (673/2016), Chapters

[76] Recent judgments include KKO 2017:97 and KKO 2015:39.
[77] Government Bill HE 136/2018 vp, 21.

11 and 20), which is an independent body. Members to the two supreme courts, however, are appointed by the President of Finland on the basis of a reasoned proposal from the supreme court in question (Chapter 11 Section 7). The procedure of appointing supreme court justices has been criticised for not being open, but it has not been argued that it would affect the independence of the two supreme courts.

The Venice Commission has presented slight criticism against Section 102 of the Finnish Constitution, which regulates the selection of judges only very briefly and superficially: "Tenured judges are appointed by the President of the Republic in accordance with the procedure laid down by an Act. Provisions on the appointment of other judges are laid down by an Act." The more specific rules are found in the above mentioned Courts Act from 2016.

According to the Venice Commission's opinion from 2008, special care has to be taken that appointment by the executive is always based on a nomination procedure in the hands of an independent and apolitical body. The Venice Commission raises the point, that if the Parliament would pass dubious legislation, which has also passed the *ex ante* review of the Committee, there should still be a genuine possibility of a court finding it unconstitutional when applying it in a concrete case, and thus utilising the *ex post* review power granted to courts under Section 106 of the Constitution. If judges are not independent enough, then they might be hesitant to use the power granted to them by Section 106, especially if their decision to set aside a normal law would run counter to the assessment made by the Committee during the adoption of the act in question[78].

The opinion of the Venice Commission was delivered with view to the forthcoming process of amending the Constitution of Finland. This was to be the first major amendment to the Constitution since its adoption in in 1999. The Constitution was eventually amended in 2011[79], but Section 102 on the appointment of judges was not made any more specific. The Venice

[78] Venice Commission, Opinion on the Constitution of Finland, Venice, 14–15 March 2008, CDL-AD(2008)010, para. 112 and 118.
[79] Amendment 1112/2011, entry into force on 1 March 2012.

Commission's opinion was not even mentioned in the *travaux préparatoires* of the new Court Act, adopted in 2016[80].

The independence of the judiciary as such has only very recently been discussed. This was in relation to the establishment of a new central agency in charge of courts (Finnish: *Tuomioistuinvirasto*)[81]. The Constitutional Law Committee assessed the Government Bill on establishing the new agency and stated that the independence of the judiciary would be increased if the administrative duties now taken care of by the Ministry of Justice would be moved to a new, independent agency. According to the Committee, no one shall give political guidance to the agency, but the agency itself should also not interfere with the independence of courts[82]. These discussions have mainly related to the functions and internal organization of the new agency. These discussions are rather formal and as such have no relevance in relation to the rule of law crisis of Poland and Hungary, or anything similar to that.

Lastly, a word on the Committee and judicial independence. As was explained in Section 2, due to the way in which constitutional review is split between the Committee and all courts, courts have not faced strong criticism of judicial activism or politicization, but the Committee has. The topic of judicial independence as such does not concern the Committee, as its members are elected politicians. However, the possibility of the ruling parties organizing a *coup d'état* of the Committee has been brought up in the constitutional commentary concerning democratic backsliding and populism. The fact that all parties get their share of seats in the Committee is just an established practice; the ruling parties that together have a simple majority in the Parliament and thus form a government could elect only their own representatives to the Committee. This would allow for them to deem all laws proposed by the Government as constitutional, and they would thus be acceptable by simple majority. All this would

[80] Government Bill HE 7/2016 vp. However, the Commission's report on Independence of the Judicial System (CDL-AD(2010)004) was briefly discussed with view to the position of judges in the reorganization of the judicial system. HE 7/2016 vp, 28.

[81] Government Bill HE 136/2018 vp, which resulted in the addition of Chapter 19a to the Courts Act (673/2016).

[82] PeVL 49/2018 vp (5 December 2018).

take place according to the letter of the Constitution[83]. This issue has not yet been discussed in the academic literature.

Overall, the procedures prescribed in the Court Act and how the new central agency participates to them seem to guarantee the independence of the judiciary in a way that fulfils the criteria set by the Venice Commission.

5. Concluding remarks

I have tried to argue that, when it comes to the common constitutional traditions of Europe, Finland is not among the states that contribute to it, but rather that the Finnish legal order has adapted to the content of this common tradition. I have done this by way of showing how ECtHR case-law affects the legislative process (the assessment of the Constitutional Law Committee) and the argumentation of the two supreme courts. While the thesis I have presented in relation to the common constitutional traditions might be novel, I believe, however, that it is based on a reading of the Finnish law and constitutional culture that is universally accepted in Finland. My analysis was based on general features of Finnish constitutional culture and three specific rights. A similar argument has been presented in relation to the development of the Economic and Monetary Union and the events following the Eurozone financial and debt crisis: that primarily "the Finnish constitution has been at the receiving end" of the process of constitutional mutation that occurred then[84].

Several reasons might explain why the top-down approach perhaps describes the Finnish experience better than the bottom-up approach that this ELI project has adopted as a working hypothesis. These reasons might include, for example, the size and relative political and economic influence of Finland, the way in which the Finnish Constitution channels politics within Finland and viz the European Union, or Finnish constitutional culture and academic sentiments more generally (how both are very European and pro-

[83] See two blog posts by J. Lavapuro, in Finnish: https://perustuslakiblogi.wordpress.com/2018/09/11/juha-lavapuro-ruotsidemokraattien-vaalimenestys-ja-oikeusvaltion-puolustus/; https://perustuslakiblogi.wordpress.com/2016/10/19/juha-lavapuro-ihmisoikeudet-suomi-ja-populismin-vaarat/ (accessed 29 June 2022).

[84] See Kaarlo Tuori & Klaus Tuori, *The Eurozone Crisis: A Constitutional Analysis*, cit. at 15, 199.

integration). These issues are beyond the scope of this study, though.

Future research is still needed on the topic of common constitutional traditions and national constitutional identities. However, I firmly believe that their content should be crafted primarily by the democratic legislator, and in the second place by courts (and other institutions with constitutional review functions, for example the Committee). Academics can try to excavate the content of such fuzzy concepts from constitutional praxis, but as long as there is very little material to work which – especially material that would engage specifically and directly with such concepts – scholars should not draw too far-reaching conclusions on this issue.