Novel Rules in the Finnish Constitution – The Question of Applicability

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1 New Constitution Act and Novel Rules

The enactment of a wholly new Constitution Act does not happen very often. Nor is it an everyday business to write new rules into a constitution.[1] Accordingly, there have to be serious reasons and also sufficient political support for making such modifications. In Finland the constitutional reform carried out at the turn of the millennium was seen as necessary for modernizing and updating the constitutional system. There was need to codify constitutional laws and to create uniform and modern normative structures, and moreover to revise the current arrangements for the separation of powers. The reasons for the reform were not merely indigenous ones as also the expanding influence of international law was recognized to be an inescapable reason for the modernization.[2]

According to *Antero Jyränki*, in spite of its modernity, the new Finnish Constitution Act (*Suomen Perustuslaki* 731/1999) contains many old constitutional innovations that are products of original and creative thinking. Hence, the constitution has its own historical deposits that stay alive despite the fact that a new Constitution Act might be enacted. This shows the continuity of constitutional traditions. However, it must be remembered that the use of concepts and rules is dependent on the time context. For example, the concept of a constitution had different content and meaning in the 18th century than it has today.[3]

The enactment of a new Constitution Act is a moment to adopt new institutions and rules because the whole constitutional system and its functioning can be apprehended at the same time. However, the number of novelties may still be quite small. Evidently, the background of the reform affects the number of novelties. If the reform has a peaceful and well-considered background, there do not necessarily appear as many demands to adopt new rules or institutions, as could be the case when the reform is carried out in a revolutionary atmosphere.[4]

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1 Smith, Eivind, *The Constitution between Politics and Law*, in The Constitution as an Instrument of Change, Stockholm 2003, p. 23:"It is probably true that constitutions are most often perceived as instruments of stability or — to put it more negatively — of inflexibility or rigidity. But precisely in the property of a constitution to bind the legislature because more difficult to amend than ordinary legislation, lies the key to using it as instrument of political action and change…"

2 *See*, e.g., Tiitinen, Seppo, *Perustuslakiuudistus Suomessa*, Lakimies 1999. The internationalization of the Finnish legal system was remarkable during the 1990s. In 1990 Finland joined the European Convention on Human Rights and in 1995 Finland became a member of the European Union. These two occurrences had decisive importance along side the other internationalization. *See*, e.g., Nuotio, Kimmo, *Muuttuuko oikeus todella?*, in Nykyajan muuttuva oikeus, Helsinki 2001, p. 13 ff.

3 Jyränki, Antero, *Uusi perustuslakimme*, Helsinki 2000, p. 3–4.

4 For example establishment of a constitutional court has in many cases occurred within a revolutionary atmosphere. *See*, e.g., Ferejohn, John and Pasquino, Pasquale, *Constitutional Adjudication – Lessons from Europe*, Texas Law Review 2004; Vörös, Imre, *Contextuality and Universality – Constitutional Borrowings on the Global Stage – The Hungarian View*, University of Pennsylvania Journal of Constitutional Law 1999.

Several questions can be asked when reforming a constitution. For example, what kind of new innovation is *necessary* to adopt into a constitution? Accordingly, does the regulatory function possess such fundamental value and importance that it needs to be written into a constitution? Moreover, where does one draw the line between the written and unwritten norms, i.e. would the constitutional doctrine favour in some cases unwritten rules instead of trying to incorporate them into the text of a constitution?[5] Also the question concerning the origin of a rule is an interesting one. If the novelty in a constitution is a *legal transplant* adopted from a foreign constitutional system, does that cause any consequences from the perspective of application?

In this article two novel rules of the Finnish Constitution Act are analysed from the perspective of their applicability. These two rules are Article 94(3): "An international obligation shall not endanger the democratic foundations of the Constitution." And Article 106: "If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution." These rules do not have predecessors in the Finnish constitution. Actually, Article 106 is a legal transplant whose model has been taken from Sweden. The model for Article 94(3) is not mentioned in the preparatory works of the Constitution. Is it an indigenous product?

> It is not necessarily clear what is an indigenous constitutional product and what is not. As *Frederick Schauer* puts it, constitutional ideas are on the move. Accordingly, there are indigenous constitutions, imposed constitutions, transplanted constitutions and transnational constitutions. However, hardly any constitution can be classified as belonging to just one of those categories, i.e. the constitutions are mixed.[6] Then, does the origin of a rule matter and how? Obviously it does matter, although in the case of legal transplants it could be difficult to predict how a certain rule will be accommodated into a new system. Being aware of the origin of the rule helps to understand its function and may help to interpret the rule also in the new system. Nevertheless, as *Wiktor Osiatynski* points out, similarity in constitutional solutions by itself does not prove that borrowing has occurred. That is why careful analysis of constitutions can demonstrate many minute differences behind seemingly similar solutions.[7]

There is not yet much to say about the application of Articles 94(3) and 106 of the Finnish Constitution. Article 94(3) has not been applied at all since the

5 *See* e.g., Strauss, David A., *Constitutions, Written and Otherwise*, Law and Philosophy 2000, p. 464: "The written American Constitution is such a prominent part of our culture, and the framing of the Constitution is such a celebrated event, that it is easy to lose sight of the rest of the forest when concentrating on that one undeniably important tree. The rest of the forest consists of the kinds of things that have always held political societies together — practices, traditions, precedents, and institutions governed by understandings that are not always reduced to writing."

6 Schauer, Frederick, *On the Migration of Constitutional Ideas*, Connecticut Law Review 2005. *See* also Jyränki, Antero, *Lakien laki*, Helsinki 1989, p. 20.

7 Osiatynski, Wiktor, *Paradoxes of Constitutional Borrowing*, International Journal of Constitutional Law 2003, p. 244–245.

Constitution Act came into force in 2000. Article 106 has been *tested* few times in concrete cases, but only once has it been applied with the consequence that a provision of an act has been left unapplied on the basis of "evident conflict" with the Constitution. That particular decision of the Supreme Court will be discussed later in this article. Accordingly, there are many open questions concerning the application of these two rules and also concerning their legal effectiveness. Hence, to what degree they are *ornaments* of the Constitution?

Obviously, everything that is written into a constitution need not have or it just does not have any practical value. Thus, there is a possibility that an article of a constitution or part of it is an ornament by choice. Of course, this is paradoxical if it is thought that a constitution should be applied and it should be effective, i.e. why there should be non-operational parts.[8] However, one should notice that a constitution is also an *ideological* document.[9]

In the Government's Bill concerning the Constitution Act it is noticed that the constitution has its natural and approved regulatory area. This regulatory area is partly determined from the perspective of legal effectiveness, i.e. there is no ground to regulate those matters that cannot be effectively realized by legal means. On the other hand there needs to be room for the symbolic meanings and exception from the demand of efficiency may be explained by that reason.[10]

When the above-mentioned is taken into consideration, it appears that the analysis of the Finnish Constitution cannot be undertaken solely on the grounds of legal effectiveness. Nevertheless, it is difficult and even dangerous to divide the content of the Constitution from the basis of its practical use. It is important to notice that in constitutional reality it can take a long time before the application of a rule actualizes or there may elapse a long period of time before the rule is applied again. For example, it is not expected that the rule of criminal liability of the President of the Republic would actualize often, and yet few would call into question that the rule possesses legal effectiveness. Nor can, for example, a rule regulating extraordinary parliamentary elections be expected to have actuality very often, at least in a stable political system.

The use of a certain rule of a constitution depends also on who the *addressee* is, i.e. what organ is responsible for — and capable of — application. When the number of addressees is high, like in the case of constitutional basic rights[11], it is more probable that a rule will be applied more often than in the case where the competence to apply a rule is restricted and there is maybe only one organ that has competence to apply the rule. In Article 106 it is stated that the courts of law shall have the power to give primacy to the provision in the Constitution in the

8 *See* Viljanen, Veli-Pekka, *Oikeusjärjestyksen valtiosääntöistyminen*, Lakimies 2003, p. 444, who notices that in Finland the Constitution did not possess much practical significance before the 1990s especially from the point of view of constitutional basic rights.

9 Jyränki, *Lakien laki*, p. 20–23; Nousiainen, Jaakko, *Pitkä tie perustuslakiuudistukseen*, Politiikka 2000, p. 5.

10 *Hallituksen esitys Eduskunnalle uudeksi Suomen Hallitusmuodoksi* (HE 1/1998), p. 6.

11 *See*, e.g., Finnish Constitution Article 22:"The public authorities shall guarantee the observance of basic rights and liberties and human rights." Accordingly, the observance of basic rights and liberties and human rights is the duty of all public authorities.

case of evident conflict between an act and the Constitution. Accordingly, the addressees of Article 106 are the courts, but not other public organs. In the case of Article 94(3), generally, it is binding for all public organs performing international co-operation[12].

If the rule is applied very seldom or it is even suspected that the norm would not be applied at all, then the rule is gathering more ornamental or symbolic meaning than practical and normative weight. And yet that is not to say that a rule could not possess remarkable normative and symbolic importance at the same time. However, it is important to make a careful observation of the kind of rule in question before much about its symbolic dimension can be said. Observation presupposes a context that makes possible to say more about the effectiveness of a rule. This context includes *political reality* because in constitutional matters it is difficult to avoid politics.[13]

Hence, drawing a borderline between law and politics is difficult in the constitutional area. This includes separation of powers, i.e. dividing competencies between the organs of state, and also the relationship between constitutional rights and the use of public power. What belongs to the area of political discretion and what is discretion from juridical viewpoint? According to *Jaakko Husa*, since a perfect balance between law and politics is just a dream, it can be asked what should be emphasized in decision-making.[14] That problem may also arise when the application of Articles 94(3) and 106 of the Constitution are at hand. That is to ask, when juridical arguments do not provide an answer, is the use of political arguments the only possibility?

In the next chapter, questions of constitutional interpretation are discussed before the question of application of Articles 94(3) and 106 comes under closer scrutiny. It is quite unavoidable to become familiar with the theory of interpretation, since it provides a base for analysing the application.

2 Interpretation of the Constitution

If a rule is formulated ambiguously, its application presupposes interpretation. From the point of view of interpretation the doctrine of the sources of law has importance. Accordingly, if a rule is ambiguous, what sources of law should and are possible to use? The Finnish doctrine of legal sources and their use emphasizes the conclusiveness of the text of the legislation. It is written in Article 2 of the Constitution that in all public activity, the law shall be strictly observed. That includes also international obligations, when those have been adopted as a part of legislation. It is recognized that besides the legislation there are those legal sources that oblige more softly — especially preparatory works of legislation or precedents — and, furthermore, those other sources that are

12 Saraviita, Ilkka, *Perustuslaki 2000*, Helsinki 2000, p. 474.

13 Smith, *The Constitution between Politics and Law*, p. 44–46.

14 Husa, Jaakko, *Non liquet?*, Helsinki 2004, p. 43–44.

allowed to be used in decision-making; including, for example, jurisprudence and comparative arguments.[15]

It may be asked whether the interpretation of a constitution is something special in relation to the interpretation of other laws, i.e. "ordinary" laws. Obviously, the *consequences* of constitutional interpretation may possess influences that have a different nature and scope than is the case when interpreting the other laws. Especially constitutional basic rights are a type of regulation that seems to have a special feature in this sense.[16] When the *interpretation methods* are under consideration, it is apparently possible to argue that a constitution cannot be interpreted the same as just any act.[17] From the perspective of its superior status, it might be possible to develop different and more sensitive constitutional interpretation methods. Nonetheless, it is not necessarily so clear how much these kinds of particular methods would after all differ from the usual methods, i.e. methods that are used in the interpretation of ordinary laws.[18] Would they offer more exhaustive arguments?

In Finland, what the interpreter is usually expected to do when interpreting is — first of all — to become familiar with the text of the regulation, the preparatory works of the regulation and the prior application practice of the regulation.[19] Of course, there can — and often does — appear problems when one tries to search and analyse the legal sources. For example, if the preparatory works of the legislation are old, should they still be attributed remarkable weight in decision-making? In case of ambiguity, interpretation of a rule may require the use of other legal sources than the formulation, preparatory works, or prior practice. As this is the situation, it becomes more important to ask what can be used as a legal source. Furthermore, what is the possibility that the decision-making is, in the end, based on the subjective intentions of the interpreter?[20]

When the formula of Articles 94(3) and 106 is observed, it appears that the grammatical interpretation is not able to offer arguments needed for justifying the decision. There are ambiguous meanings in both rules. In other words, how can "the endangering of the democratic foundation" of the Constitution and on the other hand "an evident conflict" between a provision of an act and the Constitution be noticed? It is quite open to various interpretations what is meant by *endangering*, *democratic* and *evident*. Accordingly, from the point of view of application, the formula of the rules is an abstract and vague frame. Its main function appears to be in both cases that it gives legitimacy for the action. The

15 About the Finnish doctrine of legal sources, see e.g., Tolonen, Hannu, *Oikeuslähdeoppi*, Helsinki 2003, especially p. 103 ff.; Karhu, Juha, *Perusoikeudet ja oikeuslähdeoppi*, Lakimies 2003; Nuotio, Kimmo, *Oikeuslähteet ja yleiset opit*, Lakimies 2004.

16 Goldsworthy, Jeffrey, *Introduction*, in Interpreting Constitutions – A Comparative Study, Oxford 2006, p. 1.

17 Jyränki, *Uusi perustuslakimme*, p. 44.

18 There may be found different "canons" of interpretation. *See*, e.g., Alexy, Robert, *A Theory of Legal Argumentation*, Oxford 1989, p. 234 ff. In a comparative sense see also, e.g., *Interpreting Constitutions – A Comparative Study*, Oxford 2006.

19 Jyränki, *Uusi perustuslakimme*, p. 45 ff.

20 Smith, *The Constitution between Politics and Law*, p. 35.

legal norm that the formula includes needs to be found from the supplementary legal sources.

It is also in the case of the Constitution appropriate to investigate the preparatory works. At present those are still rather fresh documents and their argumentative value — if there are to be found arguments — can be seen as noteworthy. However, the development of a society is such that in the long run every document is going to lose its normative and argumentative weight. That is also going to happen to the preparatory works of the Constitution although in the case of the Constitution Act documents are not going to face their "oldness" as quickly as many of those preparatory works concerning other legislation. Obviously, there may be "originalists" that are trying to hold on to what the framers of the Constitution have intended even if the Constitution is many decades or even centuries old.[21] *Michel Rosenfeld* interestingly concludes that textualism and originalism can be viewed as the interpretive tools of constitutional positivism.[22] Hence, the difference between making conclusions from the vague text of the Constitution and trying to catch the ancient intent of the framers is not so great.

Prior application of the articles of the Constitution could provide information about the arguments that may be used. That is why from the point of view of Articles 94(3) and 106 it would be relevant to search how these rules have been applied before, i.e. what kinds of arguments and facts are to be found from the previous practice. However, when there appears a possibility of several different interpretations, it may be asked whose interpretation should be observed more closely or even exclusively. Thus, the question is about the *authority* of the interpreter.[23]

Hence, in constitutional matters the sphere of interpreters varies. In Finland, for example, to guarantee the observance of the constitutional basic rights of individuals is the duty of all public authorities. On the other hand, for example, it is only the Constitutional Law Committee of the Parliament that is capable to interpret whether the action of the Speaker of the Parliament has been correct in a case where the Speaker has refused to include a matter on the agenda or a motion in a vote when she or he has considered it to be contrary to the Constitution, another act or a prior decision of the Parliament (Article 42(3) of the Constitution).

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21 Originalism is in its core sense an American product. *See*, e.g., Tushnet, Mark, *The United States: Eclecticism and Pragmatism*, in Interpreting Constitutions – A Comparative Study, Oxford 2006, p. 35–38.

22 Rosenfeld, Michel, *Constitutional Adjudication in Europe and the United States – Paradoxes and Contrasts*, International Journal of Constitutional Law 2004, p. 657. Rosenfeld points out (p. 661) that arguments from the framers' intent have very rarely been decisive in major American constitutional cases.

23 *See*, e.g., Goldsworthy, Jeff, *Raz on Constitutional Interpretation*, Law and Philosophy 2003, where it is found *legal* and *moral* authority. Authority is not, after all, easy to define in a satisfying way. *See* about different perspectives e.g. Raz, Joseph (ed.), *Authority*, Oxford 1990; Baurmann, Michael, *Legal Authority as a Social Fact*, Law and Philosophy 2000.

In Finnish constitutional doctrine the Constitutional Law Committee of the Parliament (*Perustuslakivaliokunta*) is recognized as the most authoritative interpreter of the Constitution.[24] That would suggest that the reports and statements of the Committee are observed. Moreover it is necessary to investigate the practice of the addressees of the rule. For example, in the case of Article 106 it is, of course, important to examine court decisions.

Jurisprudence may offer perspectives and arguments for the application. However, Article 94(3) has not been given interest in Finnish jurisprudence. In legal writings it may have a short description and possible speculation of its use. This weak interest is understandable when it is noticed that this "democratic foundations secure" rule has not been applied — not once.[25] A different situation appears with Article 106. There are signs that constitutional judicial review is going to have more interest in Finnish jurisprudence.[26] Still, from the perspective of application, it is not to be expected that jurisprudence would have a decisive role, at least explicitly. When observing the decisions of the Constitutional Law Committee or the courts, the jurisprudence is not usually explained to be an independent argument.[27]

The use of comparative arguments has not traditionally been common in Finnish legal culture, but it can be supposed that the expanding internationalization will inevitably increase the need to know more about foreign legal systems.[28] To some degree, it also depends *where* the comparative arguments are used. It is, for example, more probable that supreme courts have more resources than courts of first instance to make comparisons. Also the regulatory function of the rule has significance, i.e. in the application of certain rules it is from the beginning difficult to imagine that comparative arguments would possess relevance but, on the other hand, there are many rules that have quite universal character and from that point of view there is greater reason to

24 *See* HE 1/1998, p. 51. However, an authoritative position does not necessarily mean that there could not appear conflicts between different interpretations. *See* also, e.g., Jyränki, *Uusi perustuslakimme*, p. 43; Hautamäki, Veli-Pekka, *Authoritative Interpretation of the Constitution – A Comparison of Argumentation in Finland and Norway*, Electronic Journal of Comparative Law 2002.

25 The situation could be different in comparative context, but, however, the study of comparative constitutional law in Finland is not pursued by many persons today nor are there many foreign researchers who are capable to study Finnish law by using sources written in Finnish.

26 Viljanen, Veli-Pekka, *Perustuslain etusija ja ristiriidan ilmeisyyden vaatimus*, in Oikeus – kulttuuria ja teoriaa: Juhlakirja Hannu Tolonen, Turku 2005, p. 310–312.

27 *See* Karhu, *Perusoikeudet ja oikeuslähdeoppi*, p. 793, who points out that in Finnish legal culture the significance of jurisprudence as a legal source is usually understood from the perspective that jurisprudence systematizes other legal sources. So called "dominant opinion" (German *herrschende Meinung*) is not familiar to use as an argument in decision-making in Finland. *See* also Aarnio, Aulis, *Oikeuslähde*, in Encyclopædia Iuridica Fennica VII, Helsinki 1999, p. 783; Heinonen, Olavi, *Oikeustieteen ja tuomioistuinlaitoksen kosketuspintoja*, Lakimies 2002, p. 622–623.

28 Husa, Jaakko, *Johdatus oikeusvertailuun*, Helsinki 1998, p. 1–3; Niemivuo, Matti, *Kansallinen lainvalmistelu*, Helsinki 2002, p. 88–95.

make a comparison. For example the constitutional basic rights seem to have that kind of character.[29]

> The use of comparative arguments is not unproblematic. In the field of constitutional law difficulties are also more pronounced. In the words of *Francois Venter*: "For the constitutional comparatist, it is unavoidable to deal with the *law of the constitution* of the systems being studied. At first blush, this is not a difficult exercise, because it involves a simple juxtaposition of actual provisions dealing with similar subject-matter. However, constitutional texts require interpretation, and constitutional interpretation is system-specific: the comparatist can easily misjudge the actual meaning of a foreign text if such a text is not interpreted in the national hermeneutic context. It can thus be said that inchoate textual comparison will very frequently represent the first layer of comparison, almost inevitably followed by a search for authoritative native interpretation."[30]

Finally, if teleological argument concerning the "objective" aim of the rule is constructed, the border between legal interpretation and *political decision-making* becomes rather unclear. Of course, defining what actually is "political" may be difficult, but in one sense it is in this respect an action that means the creating of law. That is to say, when for example a court uses teleological argument, it may at the same time actually perform judicial law-making. After all, it is not easy to pinpoint that the teleological argument used is purely "objective" and without any subjective opinion of the interpreter. Nevertheless, the use of teleological argument is quite unavoidable to approve in a situation where other legal sources do not give satisfactory arguments for the justification of the decision. According to the doctrine, teleological argument should be used as a last resort and argumentation should not be based merely on teleological argument.[31]

In the following, the *model* of Articles 94(3) and 106 is discussed. Also the *necessity* of those rules is worth considering because it is linked with their applicability. When the *interpretation* of these rules comes under scrutiny, Articles 94(3) and 106 are analysed on the basis of different legal sources mentioned previously.

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29 Markesinis, Basil and Fedtke, Jörg, *The Judge as Comparatist*, Tulane Law Review 2005, p. 26–50, have compared the use of comparative arguments in courts in Canada, England, France, Germany, Italy and South Africa. Country by country the use of comparative arguments may vary significantly.

30 Venter, Francois, *Constitutional Comparison*, Dordrecht 2000, p. 42–43. *See* also, e.g., Husa, Jaakko, *Nordic Reflections on Constitutional Law*, Frankfurt am Main 2002, p. 43–47.

31 *See* Aarnio, *Oikeuslähde*, p. 785–786; Alexy, *A Theory of Legal Argumentation*, p. 247; Hautamäki, Veli-Pekka, *Teleologisk tolkiningsinställning och judiciell aktivism*, Tidskrift utgiven av Juridiska Föreningen i Finland 2004, p. 138.

3 "Democratic Foundations Secure" Rule

The preparatory works of the Constitution do not say anything about the origin of Article 94(3). It is just stated that the rule is new in the Constitution.[32] It remains unclear whether foreign models have been used. On the other hand, why could the rule not be purely an indigenous product? From a comparative perspective it is not extraordinary that the principle of democracy is secured by enacting a prohibition rule. Many times, however, the securing of democracy may be formulated implicitly, i.e. the rule is not necessarily formulated as an explicit prohibition as is the case with Article 94(3).

> For example, in the French Constitution it is stated in Article 1 that France *shall* be an indivisible, secular, democratic and social Republic ("*La France est une république indivisible, laïque, démocratique et sociale*."). Obviously, this also creates an indirect prohibition not to endanger democracy.
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> If explicit prohibitions are searched for, then for example, according to Article 79(3) of the German Federal Basic Law an amendment of the Basic Law affecting the division of the Federation into Länder, the participation in principle of the Länder in legislation, or the basic principles laid down in Articles 1 and 20, is inadmissible. In Article 20(1) it is stated that the Federal Republic of Germany is a democratic and social Federal state.
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> In Article 178 of the Algerian Constitution it is stated that: "Any constitutional revision cannot infringe on: 1. the republican nature of the State; 2. the democratic order based on multi-party system; 3. Islam as the religion of the State; 4. Arabic as the national and official language; 5. fundamental liberties, and citizen's rights; 6. integrity of the national territory."

Thus, the formulation used in Finnish Article 94(3) is not unique from the point of view of securing democracy although the exact same formulation is obviously difficult to find elsewhere. However, what should further be noticed is that Article 94(3) focuses on the issues actualizing when accepting international obligations. From a comparative perspective this makes it more challenging to find foreign counterparts.[33]

International relations are regulated in the 8th Chapter of the Constitution Act. According to Article 93 Finnish foreign policy is directed by the President of the Republic in co-operation with the Government. However, if international obligations contain provisions of a legislative nature, are otherwise significant, or if otherwise required, the acceptance of the Parliament is required (see Article 94(1)). Also in the case of denouncing such an international obligation the

32 HE 1/1998, p. 150.

33 When the Government's Bill concerning the Constitution Act is examined it can be perceived that many European countries have been under study when preparing the constitutional reform. In the Government's Bill this study is however presented quite abstractly. Apparently, the stability of the democratic system is emphasized when the foreign examples are scrutinized. That is why Sweden, the Netherlands and Switzerland, for example, seem to have been given special attention. *See* HE 1/1998, p. 15–21. In this article it is not possible to make comprehensive comparison hypotheses concerning the possible foreign origin of Article 94(3).

acceptance of the Parliament is required. To bring into force international obligations of a legislative nature presupposes that an act is enacted by the Parliament (Article 95).[34] Evidently, the role of the Parliament is decisive when accepting international obligations of a legislative nature. This is a distinctive feature of the Finnish dualistic system.[35]

From the perspective of the other articles of the Constitution that regulate enforcement or denouncement of international obligations, the function of Article 94(3) obviously appears to be *an appendage*. Hence, it could be supposed that even without Article 94(3) the democratic foundations of the Constitution are secured by the Parliament. In this respect it can be argued that Article 94(3) is an ornament of the Constitution. On the other hand, it cannot exclusively be proclaimed that there could not appear any circumstances where Article 94(3) is applied and where it could be an instrument for solving a legal problem.

There are several preparatory works concerning the Constitution. Finnish doctrine assumes that the significance of a preparatory work is dependent on how close it is prepared in relation to the enactment of the legislation. For example, the reports and statements given by different law committees of the Parliament are seen as more significant from the perspective of application and argumentation than the Government's Bills. That is understandable because a law committee may want to make modifications to the Government's Bill and usually those modifications have effects when the legislation is being enacted.

In the case of the Constitution there are also preparatory works previous to the Government's Bill. Accordingly, the list of the most noteworthy preparatory works of the Constitution includes the report given by the Constitutional Law Committee[36]; the Government's Bill concerning the Constitution (HE 1/1998); the report of the special parliamentary committee[37]; and the report of constitutional experts[38].

It appears that Article 94(3) has not received much attention in the report given by the Constitutional Law Committee or in the Government's Bill. In short, the Constitutional Law Committee states that the rule could have significance in order to restrict the powers of the organs that formulate foreign policy in single matters. The rule is linked to Article 1(3) of the Constitution that deals with international co-operation[39]. The Constitutional Law Committee points to the statement given by the Committee of Foreign Affairs (*Ulkoasiainvaliokunta*) of the Parliament that is more detailed. According to that statement the new rule is important from the viewpoint of principle, but its

34 *See* in more detail, e.g., Jyränki, *Uusi perustuslakimme*, p. 199 ff.

35 Nieminen, Liisa, *Eurooppalaistuva valtiosääntöoikeus – valtiosääntöistyvä Eurooppa*, Helsinki 2004, p. 239 ff.

36 *Perustuslakivaliokunnan mietintö hallituksen esityksestä uudeksi Suomen Hallitusmuodoksi* (PeVM 10/1998).

37 *Perustuslaki 2000 –komitea*, Helsinki 1997 (KM 1997:13).

38 *Perustuslaki 2000 –työryhmän mietintö*, Helsinki 1996.

39 Article 1(3): "Finland participates in international co-operation for the protection of peace and human rights and for the development of society."

meaning is dependent on how "the democratic foundations of the Constitution" should be interpreted. The Committee of Foreign Affairs emphasizes that the rule cannot be used for dissociating international agreements because that would be against international law. An exception to this is a situation where an international agreement is in conflict with other international obligations. According to the Committee, the rule has general conclusiveness in all action where the purpose is to make international agreements. The power of the Parliament to approve obligations in conflict with Article 94(3) is also limited.[40]

In the Government's Bill concerning the Constitution it is mentioned that such international obligations that are usual in international co-operation and which have only small effects on the sovereignty of the state are not in themselves in conflict with the sovereignty rule of the Constitution.[41] Accordingly, the application of Article 94(3) would demand an exceptional kind of international obligation. That is likely a factor that has significance even in considering the use of the rule. But all in all, the Bill does not include more information for the interpretation of the rule as it contents itself to proclaim that there are some limits when adopting international obligations.[42]

Accordingly, what is the significance of the report of the special parliamentary committee and the report of constitutional experts when it appears that neither the Government's Bill nor the report given by the Constitutional Law Committee (nor especially the statement given by the Foreign Affairs Committee) provide much guidance for the interpretation? From the point of view of interpreting the rules of the Constitution, the report made by constitutional experts does not offer answers because the report is very preliminary and usually offers only questions. Neither does the report of the special parliamentary committee give any further or more precise information. After all, the preparatory works of the Constitution are just not able to provide arguments when interpreting the rule.

When one observes the practice of the Constitutional Law Committee after the enactment of the new Constitution, it appears that Article 94(3) has not been mentioned at all. It is Article 94(1) that is mentioned when the question concerns the acceptance of the Parliament.[43]

In jurisprudence, *Jyränki* sees that the outer limits of international co-operation are expressed in Article 94(3). The rule is maybe the first rule in the Finnish Constitution that sets an absolute prohibition.[44] According to Jyränki the reason why the rule was enacted (*occasio legis*) lies in the democracy problems of the European Union. Also, for example, possible membership in NATO could cause problems from the same perspective. Thence, the application of Article

40 PeVM 10/1998 appendix 2 UaVL 6/1998, p. 66.

41 HE 1/1998, p. 73.

42 *See* HE 1/1998, p. 150.

43 Many cases exist. *See*, e.g., PeVL 14/2005; PeVL 6/2005; PeVL 48/2004; PeVL 45/2004.

44 *See* however Article 1(2):"The constitution of Finland is established in this constitutional act. The constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual and promote justice in society." Accordingly, there appears to be a prohibition against infringing human dignity.

94(3) is in a great respect dependent on how the EU will develop.[45] In a situation where it is considered that an international obligation shall be accepted despite its conflict with Article 94(3), Jyränki sees a textual modification of the Constitution as primarily the most advisable solution.[46] *Ilkka Saraviita* points out that the rule written in Article 94(3) is unconditional. Also Saraviita assumes that the federalist development in the European Union is behind the need for this kind of rule.[47]

In the case of comparative arguments there is a well-founded reason to ask whether a rule like Article 94(3) would be reasonable to apply by using foreign examples. The function of Article 94(3) is actually so political that legal instruments like comparative law seem not to have much relevance. That is maybe the case also with teleological arguments, although they can be used to give a legal façade to a plain political decision. Finally, is it in practice just a bluff that Article 94(3) would be interpreted on the basis of legal grounds? Of course, Article 94(3) gives farthest legitimacy for the action, but the action itself (i.e. interpretation of the rule) cannot defend itself by exact legal reasoning.

4 "Evident Conflict" Rule

Roots of controlling the constitutionality of laws — or preferably law proposals — in Finland reach into the period of Autonomy.[48] Beginning from the 1860s, a Law Committee *(Lakivaliokunta)* of the *Säätyvaltiopäivät* (predecessor of the Parliament) became a place where constitutionality was controlled *a priori* and abstractly. However, any written rule concerning that control power was not enacted and therefore the control was based on custom. At the same times when the parliamentary control strengthened it was rejected that courts would have competence to control the constitutionality of laws Still courts' competence to perform judicial review remained as a topic of discussion and some of the well-known scholars did recommend that the courts should have the power to perform judicial review.[49]

The reform of Parliament was carried out in 1906 and the Perustuslakivaliokunta (Constitutional Law Committee) was to become an organ where the control of constitutionality was concentrated. When Finland gained independence in 1917, there were many questions open, for example, if the power to control constitutionality should be given to a Supreme Court. However, this kind of proposal did not succeed and the control remained an *a priori* and abstract control performed by the committees of the Parliament and especially by the Perustuslakivaliokunta.[50]

45 Jyränki, *Uusi perustuslakimme*, p. 217–218.

46 Jyränki, Antero, *Valta ja vapaus*, Helsinki 2003, p. 331.

47 Saraviita, *Perustuslaki 2000*, p. 475.

48 Finland was an autonomous Grand Duchy in the Russian Empire between 1809-1917.

49 *See* Jyränki, *Lakien laki*, p. 438 ff.

50 *See* Kastari, Paavo, *Korkeimpien oikeuksiemme aseman muodostuminen ja kysymys lakien perustuslainmukaisuuden tutkimisesta*, Lakimies 1964, p. 915; Riepula, Esko, *Eduskunnan*

Accordingly, a historical background of the Finnish control of constitutionality indicates that judicial review was recognized as a possible alternative when organizing the control, but for several reasons it was rejected. This explains why it has been so difficult to enact a rule that allows judicial review. And now, when judicial review is finally allowed in the Constitution, many reservations have appeared concerning its use. Obviously, the purpose of those reservations is to maintain the leading control position of the Perustuslakivaliokunta.[51]

In the preparatory works of the Constitution it is clearly expressed that the model for Article 106 is Article 14 in the 11th Chapter of the Swedish Instrument of Government (*Regeringsform*). According to the Swedish rule: "If a court or other public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision may not be applied. If the provision has been approved by the Parliament or by the Government, however, it shall be waived only if the error is manifest." Although the basic idea is the same, both formulation and material content differ between Swedish Article 14 and Finnish Article 106. The most significant divergence is that in Sweden also other public bodies than courts are allowed to control the constitutionality of laws.[52]

The Finnish system of controlling constitutionality is strongly based on *a priori* and abstract control performed by the Constitutional Law Committee. However, the need for *a posteriori* and concrete control was recognized long before Article 106 came into force. A growing number of international obligations and overall internationalization were in the domestic debate among the important reasons for allowing limited judicial review. Especially the European Convention on Human Rights and the decisions given by the European Court of Human Rights were considered important from that perspective. Although the control performed by the Constitutional Law Committee was not criticized it was finally admitted that all problems cannot necessarily be detected and solved in *a priori* and abstract control.[53]

When the preparatory works of the Constitution are observed, it appears that Article 106 is discussed more thoroughly in comparison to Article 94(3). That is quite natural when one considers the function of the rule. Controlling the constitutionality of laws via judicial review is, after all, a more concrete matter than trying to determine an international obligation that would endanger the democratic foundations of the Constitution.

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perustuslakivaliokunta perustuslakien tulkitsijana, Helsinki 1973, p. 335–340; Jyränki, *Valta ja vapaus*, p. 388–391.

51 Saraviita, *Perustuslaki 2000*, p. 518.

52 *See* HE 1/1998, p. 54; KM 1997:13, p. 110. As such, an interesting question is whether the "evident conflict" construction is an indigenous Swedish product or whether it is a transplant.

53 Jyränki, *Valta ja vapaus*, p. 431–434; Saraviita, *Perustuslaki 2000*, p. 517–518; Karapuu, Heikki, *Perusoikeudet kansallisten normien hierarkiassa*, Lakimies 1999, p. 869.

In the report made by the Constitutional Law Committee it has been emphasized that the application of Article 106 would be exceptional. Several preconditions or requirements for the application of the rule are settled. Their aim is to prevent the unnecessary use of the rule. By an evident conflict between a provision of an act and the Constitution is meant that the conflict is "clear" and "undisputed" and therefore easy to find. Moreover, the legal problem shall not be open to interpretations. Whenever it is possible, an attempt should be made to solve the conflict by an interpretation technique that favours the most constitutional-friendly result.[54] The conflict cannot be evident if the Constitutional Law Committee has already controlled the constitutionality of the act. However, if the Committee has not assessed the act in a way that it appears in the court, the conflict is possible on the basis of evidence. In general, the praxis of the Constitutional Law Committee should be recognized when considering the possibility of an evident conflict. The extraordinary system of so called exceptive laws (*poikkeuslaki*) also has influence, as these kinds of laws remain out of the application sphere of Article 106 unless those laws are not so old that they should be assessed on the basis of the evident conflict.[55]

The supremacy of European Union law should also be recognized. In other words, when the provision of an act is in conflict with an EU law and at the same time also with the Finnish Constitution, Article 106 cannot be applied because of the supremacy of the EU law. Obviously, this kind of situation would be very unusual.

The Government's Bill concerning the Constitution offers some details for the application of Article 106, but when it is noticed that in Parliament modifications were made to the proposal's content, one should be careful when reading the Bill from the perspective that it would give hints for interpretation of Article 106. The same applies to the report of the special parliamentary committee (KM 1997:13). As the report of constitutional experts faces the same problem, its value for interpretation is also poor. In the end it appears that the report of the Constitutional Law Committee gives the most reliable guidelines for interpretation when the most noteworthy preparatory works of the Constitution are observed.

The Constitutional Law Committee has not stated much about Article 106 after the Constitution came into force in 2000. Obviously, so far, the most important statement from the perspective of the application of Article 106 was made in 2002. The statement concerned the Government's Bill for municipal expenditure classification. This kind of classification has been used when deciding salaries in private and public sectors, old-age pensions and some social security benefits. The principle of equality — that is written into Article 6 of the Constitution — needs to be taken into consideration when deciding this kind of classification. According to the Constitutional Law Committee it was doubtful whether the use of the expenditure classification was still acceptable and whether the use of the system could be supported from the perspective of Article

54 *See*, e.g., Husa, *Nordic Reflections on Constitutional Law*, p. 142–143; Viljanen, *Perustuslain etusija ja ristiriidan ilmeisyyden vaatimus*, p. 310.

55 PeVM 10/1998, p. 30–31. *See* also e.g. Jyränki, *Valta ja vapaus*, p. 436–441.

6 of the Constitution. Also from the perspective of Article 19(2) of the Constitution — that guarantees a basic subsistence for everyone — the proposal was seen as problematic. Because of these problems of constitutionality, the Constitutional Law Committee recommended that the expenditure classification system should have been removed. That recommendation was also based on the conclusion that the possible conflict between Articles 6 and 19(2) of the Constitution and a provision regulating the expenditure classification could actualize the use of Article 106 of the Constitution. Accordingly, the Constitutional Law Committee tried to guard against the evident conflict arising and being solved in courts.[56]

The same question concerning the expenditure classification system came forward again in the Constitutional Law Committee in 2005. The Committee censured the Government quite severely because the Government had overlooked the constitutional remarks that the Committee had already presented in its previous statement in 2002. Evidently, the Constitutional Law Committee again worried that the application of Article 106 might arise.[57]

However, also the Legal Affairs Committee (*Lakivaliokunta*) of the Parliament has remarked on the application of Article 106 in one of its statements in 2002. The statement was given to the Administration Committee (*Hallintovaliokunta*) of the Parliament and it concerned the Government's Bill for a law that would improve the safety of individuals in public places. The Legal Affairs Committee found problematic from the perspective of Article 106 the proposal's prohibition concerning the use of intoxicating agents — usually alcohol — in public places. If there does not appear any disorder when — as such lawful — intoxicating agents are used, the application of Article 106 might arise. The Legal Affairs Committee expressed its concern about this possibility by stating that the Administration Committee should ensure that conditions are not created that would result in the application of Article 106.[58]

Although there do not exist many examples, it is remarkable how worried the Parliament seems to be concerning the possibilities that Article 106 of the Constitution would be applied. Of course, this worry is understandable from the perspective that the application of Article 106 could reveal — evident — failures in legislative action. On the other hand, expansion of judicial power should also be restrained.[59]

First and so far also the only case where Article 106 has been applied was the decision made by the Supreme Court (*Korkein oikeus*) in Spring 2004. Hence, in its decision (KKO 2004:26) the Supreme Court found evident conflict between a provision of an act and the Constitution. This decision is very interesting because of its thorough argumentation and dissenting opinions. Accordingly, from the perspective of the application of Article 106 it gives guidelines and does show how in a concrete case a court would apply the evident conflict rule.

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56 PeVL 73/2002.

57 PeVL 38/2005.

58 LaVL 22/2002.

59 Viljanen, *Perustuslain etusija ja ristiriidan ilmeisyyden vaatimus*, p. 315.

Article 9 of the Building Preserve Act (*Rakennussuojelulaki* 60/1985) prohibits making changes to a cultural-historical valuable building before the final decision concerning the preservation of the building is made. In the above-mentioned case, a temporary prohibition against making changes to the building was set by a state authority. A pharmacy had been operated in the building for a very long time and it was questionable whether the furnishings of the old pharmacy should have been preserved. The house-owning company made a claim against the state arguing that the temporary prohibition had caused disadvantage and loss because the company had not been able to rent the flat. According to Article 11 of the Building Preserve Act, the owner of a building has the right to compensation unless disadvantage and loss is not small.

The Supreme Court found that a temporary prohibition on the basis of Article 11 of the Building Preserve Act was not — as such — a reason to pay compensation to the house-owner company. However, it was questioned whether the compensation rule was in harmony with Article 15 of the Constitution that regulates the protection of property. And from that point of view Article 106 of the Constitution also came under consideration. The majority of justices argued that the wording of the compensation rule was unambiguous and prevented the payment of compensation in cases of temporary prohibition. However, the preparatory works of the Building Preserve Act was seen as defective since they made no mention about the loss caused by a temporary prohibition. Finally, the majority found the compensation rule of the Building Preserve Act to be in evident conflict with Article 15 of the Constitution. Therefore, from the point of view of Articles 15 and 106 of the Constitution the Supreme Court decided that despite the wording of Article 11 of the Building Preserve Act, full compensation can be paid also in the case of a temporary prohibition unless the disadvantage and loss is not small.

In the dissenting opinions the application of Article 106 is deemed unnecessary. Accordingly, the problem would have been solved by using an extensive interpretation of the compensation rule. Moreover, the former practice of the Constitutional Law Committee mentioned the use of reasonableness while considering the possibility for compensation. In other words, unreasonable disadvantage and loss should always lead to compensation despite the lacunae in the wording of legislation.

Soon after the above-mentioned decision, the Supreme Court rendered a decision in KKO 2004:62. In the latter case, the Court considered the constitutionality of Chapter 10, Article 1(2) of the Distraint Act (*Ulosottolaki* 37/1895), which governs a right to appeal, in relation to Article 21(1) of the Constitution, which governs a right to have a decision pertaining to one's rights or obligations reviewed by a court of law or other independent organ for the administration of justice. The referendary of the court found an evident conflict between the mentioned Articles and recommended Article 106 to be applied in a way that Chapter 10, Article 1(2) of the Distraint Act would have been left unapplied and been subordinated to Article 21(1) of the Constitution. The majority of justices did not find an evident conflict. One of the justices did however present a dissenting opinion and agreed the referendary's view about the evident conflict.

In 2003 the Supreme Court decided in KKO 2003:107 that there was no evident conflict between a provision concerning the confirmation of paternity and Article 6(2) of the Constitution that prohibits the different treatment of the individuals. Actually, the court does not explicitly mention Article 106 of the Constitution in its decision but the evident conflict was deemed to exist by the referendary of the court who found an evident conflict between a provision concerning the confirmation of paternity and Article 6(2) of the Constitution.

The substance of the case was that claimant A demanded a court to make a decision, where person B would have been confirmed to be her lawful father. However, B had died before A presented her claim and the claim was also overdue. According to the law, in this case the claim should have been made five years before the "transition time" had passed from the enforcement of the Paternity Act (*Isyyslaki* 700/1975). According to the same provision of law[60], a claim for confirmation of paternity is barred if the man has died. Thence, the Paternity Act came into force on 1 October 1976. According to that Act, the claim for confirmation of paternity does not need to be made by any designated time and the claim can be made even if the man has died.

According to the Supreme Court the provision concerning the designation of time was unambiguous. Claimant A had made her claim in the year 2000; it was almost nineteen years overdue. No conflict was found either between the provision of national law and the provisions of the international human rights treaties. On these grounds the Supreme Court concluded that applying the time limit of five years was not in conflict with Article 6(2) of the Constitution.

Accordingly, the referendary of the court came to a different conclusion and found an evident conflict between a provision of an act and the Constitution. She found that when applying Article 7(2) of the Act Regulating the Enforcement of Paternity Act, persons could be treated separately because of their time of birth and their age. Obviously, the aim of the regulation was not to put children of different ages in an unequal position. Moreover, confirmation of paternity had become easier through the development of science and therefore that a man had died could no longer be seen as a reason to apply Article 7(2). These were reasons why A should have been justified in making a claim concerning the confirmation of paternity.

Interestingly, at this case the justices applied law by using strict grammatical interpretation while the referendary formulated her arguments by using teleology (the aim of the regulation) and the development of science, i.e. a factual argument.

In the Supreme Administrative Court (*Korkein hallinto-oikeus*) the application of Article 106 was in 2001 rejected in a decision (KHO 3065/1/00) where a policeman was denied permission to work as a guard on a boat when he was off-duty. According to the Court the work of the guard is rather similar to the work of a policeman. Since police can use public power she or he could become disqualified to act as a guard. That is why Article 18(3) of the Civil Servant Act (*Valtion virkamieslaki* 750/1994), which governs the competence of an authority to forbid its civil servants from having a secondary occupation, is

60 Article 7(2) of an Act Regulating the Enforcement of Paternity Act (*Laki isyyslain voimaanpanosta* 701/1975).

not in conflict with Article 6(1) of the Constitution, which governs equality before the law.[61]

It is not only the supreme courts that have taken a standpoint on the application of Article 106. In 2001 an Appeal Court of Rovaniemi found (RovHO 11.6.2001 T 325) that a provision concerning the fishery on *Tenojoki*–river was not in evident conflict with the Constitution.[62] Obviously, Article 106 of the Constitution is recognized and tested in courts although only once has the consequence been that a provision of an act has been left unapplied because of an evident conflict with the Constitution. However, the number of cases is small and from them it is difficult or even impossible to understand the overall picture for applying Article 106. That is to say, more cases are required before "critical mass" is reached.

Because of its principal importance and unclear normative content, the possible application of Article 106 aroused interest in several jurisprudential writings *before* the Constitution came into force. Generally speaking, the writings are quite sceptical in the sense that they predict the use of the evident conflict rule to be very unusual. *Husa*, for example, opined that the application of the evident conflict rule would not have significance due to the fact that there already is an interpretation doctrine that emphasizes the avoidance of evident conflicts and therefore the application of that rule would be "extremely hypothetical and rare."[63]

Even *after* the Constitution came into force it is usually concluded that Article 106 is not going to be applied very often and even if it is, then almost only in the decisions of the supreme courts.[64] When the Supreme Court for the first time left unapplied a provision of an act, the decision promptly became the subject of comment. Application of the evident conflict rule was criticized, because it was recognized as an overreaction and as too intrusive an instrument to use for that situation. Hence, the conflict could have been avoided via

61 *See* also decision KHO 2005:43 where Article 106 is mentioned, but the court did not find an evident conflict. The question was about the relationship between Article 26(1) of the Patents Acts (*Patenttilaki* 550/1967) and Article 21(1) of the Constitution in a matter where the claimant demanded a right to make an appeal concerning a patent decision.

62 *See* also the Vice Chancellor of Justice's decision (AOK 29/21/00) from the year 2002 where the application of Article 106 is discussed on the basis of the argumentation. In the decision it is emphasized that there has to appear an exceptional situation before Article 106 may be applied and in those cases the argumentation of the decision must be thought through very carefully.

63 Husa, Jaakko, *Lakien perustuslainmukaisuuden valvonta ja valtiosääntöuudistus*, Defensor Legis 1998, p. 211 ff. *See* also, e.g., Saraviita, Ilkka, *Perustuslakivaliokunnan rooli perusoikeusjärjestelmän kehittämisessä*, in Perusoikeudet Suomessa, Helsinki 1999, p. 38; Karapuu, *Perusoikeudet kansallisten normien hierarkiassa*, p. 874 ff.; Scheinin, Martin, *Perustuslaki 2000 –ehdotus ja lakien perustuslainmukaisuuden jälkikontrolli*, Lakimies 1998, p. 1128.

64 *See* e.g. Jyränki, *Valta ja vapaus*, p. 434; Tuori, Kaarlo, *Oikeuslaitos ja yhteiskunta*, Lakimies 2000, p. 1055–1056.

interpretation. Also the motives of the Supreme Court were questioned, i.e. was there actually a need to demonstrate the possibility for applying Article 106?[65]

As previously noted, the model for Article 106 is to be found in Sweden. Would there from the Swedish practice concerning "evident conflict" be found something of importance when applying Article 106? At least in theory that is possible. According to *Aulis Aarnio*, if a legal rule is similar in two countries, argumentation constructed in a foreign country could be used as a principle that has significance in the application of the rule. This is the case, for example, when preparatory works of legislation do not provide answers. Moreover, when the legislature has adopted a legal transplant, it can be assumed that the same kinds of aims of the regulation are adopted. On the same basis, foreign court decisions can be used to guide interpretation.[66]

Accordingly, it may appear relevant to seek arguments for the application of Article 106 from Swedish practice when it is recognized that the domestic application is scanty. However, although the evident conflict rule was enacted as early as 1979 into the Instrument of Government, the application of the rule has been rare. The first final court decision where a provision of an act was seen as unconstitutional and left without adjudication on the basis of the "evident conflict" was rendered by the Court of Appeal in 1996.[67] In 2000 also the Supreme Court found a provision of an act to be unconstitutional in its decision and the provision was invalidated. The substance of that case concerned the retroactivity of taxation.[68]

How realistic is it to expect that Swedish or some other foreign court practice is used when formulating arguments? The use of comparative arguments presupposes prior knowledge of the foreign system and still there are many dangers in using foreign law. The problem might be quite similar, but the context in which the solution is sought may be quite different.[69] For example, are the Swedish and Finnish taxation systems so equivalent that there is reason to compare the court decisions? Hence, what can be embraced is nearly on the level of a general principle.

Article 106 is obviously a rule that offers a wide margin of discretion despite the fact that many restrictions have been stated for its application by the Constitutional Law Committee. In that sense the teleological interpretation has relevance. Teleological arguments might be used to dress the decision in a legal form if it is not possible by using merely the other interpretation methods that ought to be used before the teleological interpretation. When the teleological

65 Husa, Jaakko, case note about KKO:2004:26, Defensor Legis 2004, p. 540–545; Ojanen, Tuomas, case note about KKO:2004:26, Lakimies 2004, p. 919–928.

66 Aarnio, *Oikeuslähde*, p. 782.

67 Hovrätten för västra Sverige B13-96 (RH 1997:47). *See*, e.g., Bull, Thomas, *Om domstolarnas roll i demokratin (del II)*, Juridisk Tidskrift vid Stockholms Universitet 2000-01, p. 27; see also Holmström, Barry, *The Judicialization of Politics in Sweden*, International Political Science Review 1994, p. 160.

68 *See* NJA 2000 p. 132. *See* also Husa, *Nordic Reflections on Constitutional Law*, p. 152–153.

69 Markesinis and Fedtke, *The Judge as Comparatist*, p. 109 ff. It can be asked how much time is possible to spend when studying foreign law.

argument appears to be the key to finalizing the decision, at the same time the borderline between law and politics becomes more unclear. Case by case, the use of teleological interpretation can be put under scrutiny and it can be asked which part of the decision is actually based on legal facts and which part is based on political discretion.

5 Conclusions

Obviously, *Article 94(3) can be described as an ornament of the Finnish Constitution*. This conclusion is not made merely on the basis that the rule has not been applied yet. Because the normative content of Article 94(3) is quite exceptional, it cannot be expected that the first application — if there ever is one — would appear immediately after the rule has came into force. Although the formulation of the article is quite impressive, in the constitutional doctrine the normative value remains in the shadow of Article 94(1). Accordingly, *Article 94(3) can also be described as an appendage and evidently a result of political wrist-wrestling*. This is referring to the fact that the background of the article is poorly documented in the preparatory works of the Constitution. However, from the *ideological* point of view Article 94(3) strengthens the democratic character of the Finnish constitution and from that point of view the necessity may be explained.

Despite its obvious necessity from the point of view of controlling constitutionality, *Article 106 of the Constitution has a character of a semi-ornament of the Constitution.* The provision of an act has been left unapplied only once after the "evident conflict" rule came into force. It is not possible to predict when the next application with the same result will be made because a lot depends on the attitudes of the courts towards applying the rule. On the basis of one single court decision where the rule has been applied it cannot be proclaimed that a new era in constitutional judicial review has begun. There are many checks laid in the preparatory works of the rule and it seems that courts are — at least so far — respecting those. Accordingly, an attempt has been made to render the possibilities of the courts to perform judicial review as exceptional as possible and the Parliament is trying as much as possible to prevent those situations where the application might actualize. In other words, an attempt has been made to make the significance of Article 106 as hollow as possible.

Although Article 106 is a legal transplant from Sweden that fact does not seem that important from the point of view of legal reality. What can be noticed is that in Sweden the "evident conflict" rule has been applied only in a couple cases. Maybe it is just this rare use that has made it attractive for adoption as a rule of the Finnish Constitution.

Articles 94(3) and 106 of the Finnish Constitution have quite different functions in the Finnish constitutional system. However, both of them seem to reflect a situation where uncertainty has appeared when making a rule. On the other hand, despite this uncertainty, it has been seen as necessary to write those rules into the Constitution. That describes the common feature of Finnish legal culture that favours written form and tries to avoid unwritten form.

Application of both of these rules is expected to be exceptional. When Article 94(3) ought to be applied the argumentation is inevitably more political than legal. In the case of Article 106 the basic character of the rule is not so political, however, the application may have political features as has been the case in many countries where judicial review is performed and where significant judicial activism therefore exists.

In general, when a new rule is adopted into a constitution it is always worth considering what is the origin of the rule, is it necessary to adopt into a constitution, and whether its function would be more ideological or ornamental than practical. When these kinds of factors are investigated, the possibility to argue about the applicability of the rule becomes more reasoned.