

Guarding the Constitutionality of Laws in the Nordic Countries: A Comparative Perspective

1. INTRODUCTION

When national systems of Constitutional Law are studied, very often it is from an international point of view, since the essence of the Constitutional Law can be seen as a part of a greater body of constitutional tradition¹ that crosses national borders. Research, including comparative aspects, has shown that surprising similarities exist between Constitutions (or more narrowly the formal Constitutional acts, i.e., Basic Laws) when general principles and structures are regarded. These similarities may be seen in matters concerning the norms of Constitutions, the structures of the formal Basic Laws and constitutional institutions.²

Despite all the similarities in systems, differences are also frequent, even though the character of basic concepts, problems and their constitutional solutions are reminiscent of each other. Regardless of the similarities in the "basic solution models," there are usually remarkable differences between systems—at least technical—even when there is a general agreement on certain fundamental matters. A general rule is that the deeper the study is carried on in individual systems, the more differences are found.³ In this article the object for judicial comparative study is one of the central constitutional institutions, that is the control mechanism of the constitution-

JAAKKO HUSA is Professor of Public Law, especially Comparative Public Law, University of Vaasa, Finland.

1. Cf. Antero Jyränki, *Valta ja Vapaus* 9-10 (2d ed. 1998) Francois Venter speaks of "sufficient common ground," *Teaching Comparative Law*. Paper presented IACL's fifth world congress in Rotterdam July 12-16, 1999.

2. See Jaakko HUSA, *Yleinen valtiosääntöoikeus* 79-208 (1997). See also Henc van Maarseveen & Ger van der Tang, *Written Constitutions* 288-89 (1978).

3. Traditionally in comparative law the area of public law (i.e., constitutional and administrative law) has been seen as especially problematic target for comparative study. See e.g., Joseph H. Kaiser, *Vergleichung im öffentlichen Recht*, 15 *ZaöRV* 1964 pp. 391-404. However, while comparing the Nordic systems these problems are a minor obstacles because the similarities of these systems. It should perhaps also be noted that there exists no special method for comparative public law since the general principles and methodological rules of comparative law in general govern also the methodology of comparative public law. Cf. Jürgen Schwarze, *European Administrative Law* 87-88 (1992).

ality of laws (and other norms).⁴ The Nordic countries (excepting Iceland) have been chosen for examination. These systems differ from each other in these respects, in opposition to what is generally believed; that the legal systems in these countries are very much alike, when considering the fundamental features of the legal culture.

1.1. *Problem and Method*

The control of the constitutionality of laws is without a doubt one of the most central problems of Constitutional Law, a problem which somehow has to be solved in different systems. The functional question (or theme of research) at this point is: *How have the Nordic countries arranged the systems of this control, the aim of which is to ensure that inferior legal norms—especially laws enacted by Parliament (Acts of Parliament)—are hierarchically in accordance with the superior legal norms (lex superior).*⁵ This kind of question can only be asked about systems based mainly on a written constitutional law, and in particular, on a written Constitution Act, i.e., formally superior Basic Law (lex superior).

In these circumstances Basic Law means a law of the hierarchically highest degree, which declares itself a Basic Law. Its legally valid enactment, amendment or repeal can take place only when done in order of procedure required for the enactment of constitutional legislation prescribed by the Basic Law itself. The functional research question posed above would hence be a totally unprofitable as a starting point for studies in, for instance, Great Britain or New Zealand. However, since codified central regulations exist (either one or several) in the category of formal Basic Law in all of the Nordic countries, the question is appropriate in this case.

How can the subject of this study be approached by using a judicial comparative method? In judicial comparison it is not enough just to descriptively picture (through registration of similarities and differences) how the examined legal function (or legal solutions connected to it) is realized by different systems. Instead there has to be the intent to explain and evaluate the causes of the similarities and differences that are found in order to generate new knowledge.⁶

4. Many times the constitutional interpretation is seen to have such a rich and complex tradition of its own that it is left out from comparative studies. Cf. Zenon Bankowski et al. (eds.), *On Method and Methodology* 11. D.N. McCormick & R.S. Summers (eds.), In *Interpreting Statutes* (eds.) 9-27 (1991) However see e.g., Edward McWhinney, *Supreme Courts and Judicial Law-Making* (1986).

5. Writer is applying a functionalist comparative approach in this article. Of this method see Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 34-35 (3d ed. 1998).

6. See Jaakko Husa, *Johdatus oikeusvertailuun* 13-14 (1998). The writer accepts as a general starting point for comparative law, that its main function is ". . . to observe and to explain similarities as well as differences" as Rudolf B. Schlesinger puts it. "The Past and Future of Comparative Law," 43 *Am. J. Comp. L.* 477-81 (1995). Of

When it is operated in constitutional jurisprudence from a comparative research schedule, the aim must be to follow the basic requirements for the methods of comparative law in general. The previously mentioned starting point creates the aim of this article which is not only to describe the control of the constitutionality of the laws in different Nordic countries, but also to describe similarities and differences in the systems. Furthermore the aim is also to give an explanation, at a general level, of the factors behind the similarities and differences found.⁷ This means that this study is also about judicial culturally orientated comparison, where law is not identified only as written rules or case-law, but it is emphasized that legal solutions have to be seen as a part of a wider context.⁸

2. CONTEXTUAL BACKGROUND FOR THE COMPARISON

In judicial comparative research a contextual frame is needed, if the intention is a methodological and disciplined approach.⁹ Before specific investigations of countries and following comparative analyses can be carried out, it is necessary to create a theoretical frame that provides general background information for the analysis and generates equal treatment and classification of the research subjects. In this study the surveyed legal function is first classified according to substance and later according to the judicial-cultural comparative context. Because this is about the frame of actual study, and not about the analysis of itself, comparative findings that are connected to the specific investigation of the Nordic countries are not discussed in this section (2). This outline prevents excessive overlap and helps separate contextual factors from the actual subject of the study. Thus this created frame is useful in later comparative investigations (4), in which similarities and differences are evaluated and explained from a comparative viewpoint.

explanative function of comparative law see for more details Michael Bogdan, *Comparative Law* 18, 68-77 (1995). As Venter puts it "In order to contribute to our knowledge of constitutional law, the comparative constitutionalist must go beyond mere description of comparable elements of different systems."

7. The intention here is not to study the historical connections and ties between the Nordic constitutional systems, although some writers insist that this kind of historical study should actually be the primary task for comparative law. See Watson, "Comparative Law and Legal Change," 60 *Camb. L.J.* 313-36, 321 (1978).

8. Cf. van Hoecke & Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law," 48 *I.C.Q.L.* 495-536, esp. 498 (1998). See also Jaakko Husa, *Law in Constitutional Comparative Law*, Juridisk Tidsskrift utgiven av Juridiska Förening i Finland (JFT) 1997 407-423.

9. Basic strategies in comparative law see for more details Husa, *supra* n. 6, at 59-74.

2.1. *Basic Solutions in Controlling the Constitutionality of Laws*

In principle, there are numerous possible methods of organizing the control of constitutionality of laws. Here the attention is paid mainly to such patterns of solutions, for which there are equivalents in present constitutional systems.¹⁰ The classification attached is still analytical in its character, or the aim is to observe such alternatives which are not necessarily genuine equivalents of the reality of living Constitutions, but which are theoretically possible equivalents.¹¹

In general, attention is paid to at least four essential factors in these circumstances. Firstly, the time for the realization of the control of constitutionality of laws is considered. Secondly, the organs, which carry out the control of the constitutionality of laws are surveyed. Thirdly, it is possible to observe where the control is directed or in what situations the norm control is deployed. At a fourth stage organizational matters are observed, such as the number of organs with the right or duty to control the constitutionality of the laws.

In accordance with the first criterion mentioned, there is a division into *preventive and afterwards control*. Preventive control refers to such control, in which a possible contradiction to the Basic Law is observed in advance, during the legislative process and before the law has come into force. This is carried out, for instance, in France by the Constitutional Council (*Conseil constitutionnel*).¹² The purpose of the preventive *a priori* control is to prevent the taking effect of laws in contradiction to the Basic Law. By successful use of the preventive control, the coherence of legal order and, in particular, the norm hierarchy is preserved, so that it has been secured already in advance, that legal contradictions to the Basic Law will not be applied by the public authorities or in the courts of justice.

The afterwards *a posteriori* or *ex post facto* control functions from the opposite principles, since the control is carried out only after the law has come into force, and a concrete application has to take place, as for example in the U.S. In this application it is of importance to

10. The writer does not seek to hold or defend any particular position concerning whether the control of constitutionality of laws is a function which should (or should not) be placed upon the courts. Of this see e.g., Kenneth C. Wheare, *Modern Constitutions* 119-20 (1980). Different plausible *pro* and *contra* arguments can be found as Eivind Smith shows in his article "The Legitimacy of Judicial Review of Legislation," in *Constitutional Justice Under Old Constitutions* 363-402 (1995).

11. Cf. Markku Suksi, *Bringing in the People* 30-37 (1993). Suksi builds his framework to analyse and to study comparatively different national constitutional models of referendum.

12. See e.g., Oliver Duhamel, *Droit constitutionnel et politique* 347-63 (1994). It should be noted that in France the courts do not have power to control the constitutionality of laws and the Constitutional Council can act only before the Act has come to force. The Council is in very important position in French constitutional law because it gives authoritative opinions of what is constitutional and what is not. John Bell, *French Constitutional Law* 77 (1992).

ensure that legal rules in contradiction to the Basic Law are not followed, instead the regulation of the Basic Law is given priority and the contradictory rules are left un-applied. (The consequences of the validity of the contradicting law might vary). The coherence of the legal order and, in particular, the norm hierarchy is hence preserved through control afterwards.¹³ The *ex post facto* control is generally justified with the claim that it is never possible to remove *a priori* all conceivable conflicting possibilities, so for this reason afterwards control in particular should be preferred.

In the second criterion the organ or the organs, which is responsible for the control of the constitutionality of the laws, is observed. The fundamental divergence is *whether the control is practiced in legal or non-legal organs*, so it is a question of separating the control by courts from other kinds of control. When control is performed by a characteristically legal organ, as a matter of practice the court of justice,¹⁴ it is evident that the control is of a legal character. As a typical example of this, the Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgericht*, BVerfG)¹⁵ can be cited. When control is carried out by organs representing legislative powers or executive powers (or some kind of combination of different organs) it is not a court control, which according to its organisatoric position can be considered non-legal, as, for instance, the French approach.¹⁶

In general, court control is justified because of its judicial independence, which is lacking in other forms of control. Since many constitutional courts operate in special compositions, and their members are chosen on different grounds from other judges, the differences might not in practice be so extensive (e.g., the Constitutional Courts in Germany and Italy) in these respects.¹⁷ Additionally, it should be mentioned that after the transition period in East Europe (1989-1990) the constitutional court -model made its breakthrough as a legal institution, when the former socialist countries renewed and re-wrote their Constitutions.¹⁸

13. See also Husa, "Lakien perustuslainmukaisuuden valvonta ja valtiosääntöuudistus," *Defensor Legis* (DL) 185-86 (1998).

14. Defining the concept of 'court' is actually not a simple task. As a sort of basic conditions, which can of course be criticized, can be seen the following: 1) independence of judge, 2) pre-existing legal rules, 3) adversary process and 4) dichotomous decision. However, because these conditions are quite rough one should perhaps speak of certain general feature of 'courtiness'. See for more details Martin Shapiro, *Courts* 1-64 (1981).

15. According to the German Basic Law (*Grundgesetze*) Art. 93 the BVerfG deals with constitutional complaints (the largest group of cases), the constitutionality of legislation and competence conflicts between the states (*Länder*) and the Federal Republic. Most of the *Länder* have also constitutional courts but these are not so prestigious as BVerfG.

16. See also Husa, *supra* n. 13, at 190-91.

17. See also Shapiro, *supra* n. 14, at 154-55.

18. See shortly e.g., Schwartz, "Constitutional Review Compared," in V. Gessner & A. Hoeland & C. Varga (eds.) *European Legal Cultures* 445-51 (1996).

Concerning the third criterion it is considered, *what the control itself is like, as to its legal character*. Abstract and concrete control appear as basic solutions. In the abstract control it is clear that when control is executed it is not a question of actual case at hand, but the control is hypothetical to its character in the sense that the norm itself is seen to contravene Basic Law (and the norm hierarchy). Abstract control is hence already executed (mostly) before possible contradictions in the courts, or among other public authorities are actualized, as for instance, in Germany (as a part of the total control, Art. 93.1) and in France. In the concrete control an actual application situation is to hand, in which a regulation that is norm hierarchically inferior to constitutional legislation is seen contradictory to Basic Law or Constitution. The control is concrete, because the solution of the problem (constitutional/non-constitutional) causes direct legal influence on the case at hand, and thereby the control benefits one of the parties involved while it is disadvantageous for the other. This is the case, e.g., in the American system. The concrete control is generally defended with the claim that such control enables a better guarantee, especially regarding fundamental rights, for citizens and other parties influenced by the regulation of Basic Law valid in the jurisdictional district of a state. When both the abstract and the concrete controls are centralized to and executed by one court, such a powerful court might become, however, a so-called negative legislator or a co-legislator.¹⁹

In the fourth criterion, attention is paid to *how the control is arranged*. A centralized and a decentralized model can be distinguished as basic solutions. In the centralized model control of the constitutionality of the law is run centrally by one organ, with the aim that all duties ordinarily connected with the control of the constitutionality of laws are executed within one organ. In the decentralized model the control duties are divided between many organs, thus it is not aimed at concentrating all control in connection with the constitutionality of laws to one organ.²⁰ An example of the centralized model is France, where matters regarding the constitutionality of laws are

19. This can be the case with specialized constitutional courts. E.g., in Italy where the Constitutional Court (*Corte costituzionale*) can control the constitutionality of laws it is the only court which can invalidate the Acts of parliament. If ordinary court raises plausible question of constitutionality of the Act of parliament it must submit this question to the Constitutional Court. The Italian model resembles very much the Austrian and also the German system. The Italian Constitutional Court's main functions are also quite typical for constitutional court: it practices judicial review of legislation and it resolves the conflicts (of legislation or competence) between federal and regional organs (Italian Basic Law Art. 134). For more detailed analysis see Giancarlo Rolla - Tania Groppi, *Between Politics and the Law: The Development of Constitutional Review in Italy*. Paper presented in IACL's Fifth World Congress in Rotterdam 12-16 July 1999.

20. Of these basic models see also Husa, *supra* n. 13, at 113-31.

concentrated in the French Constitutional Council.²¹ An example, at least in principle, of the decentralized model is offered by the U.S., where all courts have the competence to judge the constitutionality of laws in connection with the hearing of the cases.²² The centralized model is often defended by the claim that it guarantees crucial expert knowledge (lacking in ordinary courts), that is needed from a constitutional point of view, while the decentralized model is defended on the grounds of its effectivity.

In the above text attention is paid to certain basic matters, which are usually emphasized in constitutional publications including comparative elements.²³ In the study of comparative constitutional law it is worth noting *the legal basis on which the control model is based*. The basic models are in a substantive sense the ways of organizing control of the constitutionality of laws, the ways that are grounded on the interpretation of the Constitution and on the direct provision of the Basic Law. It is a matter of the kind of norm base or other kind of legal base, the control of constitutionality of laws is founded on. For example, in the U.S. there is no explicit written legal regulation, on which the control of the constitutionality of laws is built. Instead a constitutional doctrine—in court practice—is developed, on which control is based.²⁴ In most systems of Roman-German legal tradition the control of the constitutionality of laws is based on explicit provisions, either directly or at least on the interpretations of those regulations.²⁵

Regarding the above table of Problems & Solutions a significant point has to be added, since it is a matter of a collection of analytic dichotomies, despite empirical connections. The main task in this table is to offer a general theoretical and conceptual context, on which to a main extent later examinations will be based. In reality many of the previously shown models overlap with each other,²⁶ since very

21. The French Constitutional Council can also be seen as *de facto* constitutional court as Eivind Smith does in his article, "Rettslig håndheving av konstitusjonelle normer - i Europa og Norge, passim," *Tidsskrift for Rettsvitenskap (TfR)* 77-131 (1983).

22. See also Husa, *supra* n. 13, at 186-88.

23. See e.g., Mauro Cappeletti & William Cohen, *Comparative Constitutional Law* 19-20 (1979) and Danneman, "Constitutional Complaint," 43 *I.C.L.Q.* 142-53, especially 142-44 (1994). See also Allan Brewer-Carías, *Judicial Review in Comparative Law* (1989).

24. The doctrine of judicial review on the constitutionality of legislation was established in Federal Supreme Court's landmark case *Marbury v. Madison* in 1803 (5 U.S. 1 Cranch 137). From a comparative perspective it is important to note that judicial review can be understood in two ways. In this article it refers to reviewing the constitutionality of laws. However, in English Common Law judicial review refers to courts control over administrative decisions and especially the manner in which they are made. See e.g., P. Shears & G. Stephenson, *James' Introduction to English Law* 131-40 (1996).

25. See also Husa, *supra* n. 2, at 116-18.

26. Cf. Dannemann, *supra* n. 23, at 143.

TABLE 1: BASIC PROBLEMS & SOLUTIONS IN CONTROLLING THE
CONSTITUTIONALITY OF LAWS: ANALYTICAL FRAMEWORK.

Problems	Solutions
Point of Time	Preventive/ <i>Ex post facto</i>
Control organ	Judicial/Non-Judicial (court/non-court)
Nature of Control	Abstract/Concrete (object: norm/object: application of norm)
Organisation of Control	Centralised/De-centralised
Basis of Control	Doctrine-based/Written-Rule-based

rarely an existing control system is consistent with any analytic type. With the help of analytical types it is, however, possible to analyse the research subject more methodically than just by basing the specification on the criteria that emerges from actual comparative data.

2.2. *The Nordic Legal Family and Its Members*

In any research of comparative law aiming at scholarly rigour, matters connected to the general legal culture must be observed.²⁷ These are matters that form the subject for the observation of the general context of specific legal solutions to certain legal problems. In this article the legal family or the legal culture of the Nordic countries²⁸ can be kept as the general context. In the study of comparative law, the legal family or the legal culture commonly constitute the accumulation of paradigmatic characteristics on a higher abstraction level than any given formal legal order. This accumulation forms the context of the culture of legal order and society that is observed.²⁹ One cannot study legal functions effectively if one does not take into account the surroundings of specific legal solutions.

The Nordic legal family refers, here, to those general legal cultural and structural, and furthermore paradigmatic features, which can be considered characteristics for particular Nordic legal orders.³⁰ (In this article the Nordic law covers Denmark, Finland, Norway and

27. Thus, functional approach is not adequate, only, but one needs to observe also the historical, sociological, economical and political environment too. Cf. Bernhard Grossfeldt, *Strength and Weakness of Comparative Law* 44, 70 (1990).

28. See also Strömholm, "Comparative Legal Science—Risks and Possibilities," in *Law Under Exogenous Influences* 5-29 (M. Suksi, ed. 1994). See also Husa, *supra* n. 8, at 415-21.

29. Cf. Bogdan, *supra* n. 6, at 54-56.

30. Cf. Heikki E.S. Mattila, *Pohjoismainen oikeus*. In *Encyclopaedia Iuridica Fennica* VI 702-710, especially p. 702 (1998) and van Hoecke & Warrington *supra* n. 8, at 513-15. In latter there is separated six different features which are held as paradigmatic: 1) a concept of law, 2) a theory of valid legal sources, 3) a methodology of law, 4) a theory of argumentation, 5) a theory of legitimation (why rules are binding or why not) and 6) a common basic ideology. There exist, of course, differences even within systems that belong to same legal culture. Basically it is enough if these features are sufficiently similar i.e., in different systems these six points have similar basic solutions.

Sweden, Iceland is not an object for investigation.³¹) In comparative law Nordic law is mostly considered to constitute its own legal family, though it is also often seen as a part of the Continental Roman-German legal family.³² In the basic work of Zweigert and Kötz, Nordic law is presented as one legal family, which is neither seen as a member of the Roman-German nor of the Common Law, because it consists of so many original features (features of Roman-German and Common Law³³) that it constitutes an independent legal family.³⁴ What common features are there in fact between the members of this legal family?

The base for the criteria used by Finnish comparative lawyer Mattila in the description of Nordic law consists of system and concepts, the position of written law as a source of law, the characteristics of legal thinking and the mentality of the judges.³⁵ Where systems and concepts are concerned, Nordic law is reminiscent of the Roman-German, but apart from these there are no extensive codifications typical of Central-Europe in the Nordic countries, even though the frame of both legal families is written legislation. When the legal thinking is regarded, a "scientification" or theorization has never taken place in the Nordic countries as in the Central Europe, where pronounced theoretical, conceptual and constructive principles strongly influenced the legal thinking during the 19th century.³⁶

The legal thinking in the Nordic countries can be considered more pragmatic in its character than in Central Europe. In this respect it is closer to Common Law than Continental Roman-German

31. The main reason for not examining Iceland is the simple fact that the writer is not capable of utilizing original Icelandic text material or national scholarship. Because the examination of other Nordic systems relies on use of original material and national scholarship, the comparability would suffer if Iceland would also be "compared" in this study. Of the general requirements for comparative study see e.g., Bogdan, *supra* n. 6, at 42-45. However, of Iceland's system of control of constitutionality of laws see David Thór Björgvinsson, *Skranker for lovgivningsmyndigheten*. 78-92 (1998).

32. Nordic legal system(s) as a sub-member of Roman-German legal family see e.g., Husa, *supra* n. 6, at 155-57. Cf. Mattila, *supra* n. 30, at 706-07. See also Tamm, "The Nordic Tradition in European Context," in *Nordisk Identitet* (red.) P. Lettonavamo 15-31 (1998). See Bogdan, *supra* n. 6, at 88-90.

33. The expression 'Common Law' may have several meanings. Here it denotes to the totality of Anglo-American legal family (or culture) as opposed to the Roman-German legal family (or so-called 'Civil Law' legal family). Common Law countries are generally those that have historically inherited their legal culture from English Law.

34. Zweigert & Kötz, *supra* n. 5, at 277-94. "Thus while the Scandinavian legal systems have participated in the legal development of the Continental Europe they have also maintained their local characteristics, and this justifies us in allocating them to a special 'Nordic' legal group within the Civil Law." (id. at 285) One characteristic feature is e.g., the Ombudsman institution which has existed in Sweden since 1809, in Finland since 1919, in Denmark since 1954 and in Norway since 1962 (see also Zweigert & Kötz, *supra* n. 5, at 71).

35. Mattila, *supra* n. 30, at 703-06.

36. See for more details Walter Wilhelm, *Den juridiska metodlärans utveckling under 1800 -talet* (1989).

law. Considering the mentality of the judges, Mattila separates different Nordic countries from each other and sees, that especially in Finland and in Sweden the profession of judges has formed an enclosed career structure and the mentality is in general very civil-servant-minded. Whereas the professional mentality among the judges in Norway and Denmark is—according to Mattila—closer to Common Law, since the judges do not view themselves so strongly, only as mere executors of codified legal rules.³⁷

Because the Nordic countries are close to each other according to the previously mentioned grounds, it seems indisputable that they belong to the same area of legal culture. When they are comparatively examined it is with no doubt a matter of intracultural comparison. As the most central cultural areas (Africa, Asia, Islam, Europe, America and Oceania)³⁸ are distinguished, it seems clear that the research objects (here) are within the same legal culture. For this kind of study a functional approach of comparative law is suitable, since cultural ideas of law are—in their fundamental characteristics—very similar. Similarity facilitates the main features in the finding and use of the sources of law, since the culturally rooted ways of legal thinking resemble each other in fundamental solutions. Despite this, differences might appear if the study is carried out from the viewpoint of Public Law in particular.³⁹

Generally in comparative law, it is conceded that grading and classification into different legal families and even legal cultures is very relative, because they by far depend on what branch of law is examined.⁴⁰ In the case of Public Law there are a number of differences to be found between the Nordic countries. These differences are mostly cited between pairs of countries formed by Finland and Sweden vs. Norway and Denmark. In addition to the previously mentioned differences it should be noticed that in Norway and Denmark there are no special administrative courts, which are central to the Finnish and Swedish systems. However, a common feature of the Nordic countries is that the legal system is based on the separation of Public and Private Law, despite the fact that the classification is

37. See Mattila, *supra* n. 30. Differences between the civil law judge and the common law judge should not, however, be unduly stressed (cf. Shapiro, *supra* n. 14, at 147-48).

38. Van Hoecke & Warrington, *supra* n. 8, at 502-08. Also René David's famous classification appears to be leaning on the division of different cultural spheres in his famous work *Les grands systèmes de droit Contemporains* 23-33 (3rd ed. 1969). See also Leontin-Jean Constantinesco, "Die Kulturkreise als Grundlage der Rechtskreise," 22 *ZfVR* 161-78 (1981).

39. However, this does not imply that legal rules or law in general be would incomparable if the legal systems would belong to a different social system. See for more details, Bogdan 61-67.

40. Cf. David *id.* at 24 and Zweigert & Kötz 1998, *supra* n. 5 at 65-66.

more diffuse than in the tradition of Central Europe.⁴¹ Also the codification-level of norms of Public Law varies, though the substantive contents of legal solutions resemble of each other. It is notable that the norms of Public Law in especially Sweden, Finland and Denmark are connected to the harmonising influence of the EU, where Norway—at least not directly—is not touched by this influence.⁴²

3. CONTROLLING THE CONSTITUTIONALITY OF LAWS IN THE FOUR NORDIC COUNTRIES

3.1. *Advancing Country by Country*

The aspiration in country specific examinations is to proceed in the same way—from country to country—based on the same type of source material, so that the opportunity to compare the examined objects remains as valid as possible.⁴³ The condition for comparison is that the same objects in every country are examined in the same order. From this there is a goal to examining every system in the following order; first the general basis of the Constitution (norms, doctrine⁴⁴) is examined, secondly the basis of the norms is examined (on what norm basis the examined solution is constructed) and thirdly the practical execution of the control of constitutionality of laws is examined. A simultaneous viewpoint from both micro- and macroperspective is presumed by the research arrangement.⁴⁵ Because comparative law—to a large extent—is a matter of the study of foreign law, there is no aspiration here to present recommendations of interpretation, nor any normative statements about the content of the norms, which are typical to national legal dogmatics. Instead,

41. This major division is paradigmatic feature of all the Roman-German systems and legal thinking in those countries. See David, *supra* n. 38, at 87-88.

42. Discussion of harmonization of European legal systems see e.g., Basil Markesinis, *Learning From and Learning in Europe* 181-191. In *Foreign Law & Comparative Methodology* (1996) and Legrand, "European Legal Systems are not Converging," 45 *I.C.L.Q.* 52-81 (1996). See also Bogdan, *supra* n. 6, at 30-32 and Zweigert & Kötz, *supra* n. 5, at 28-31.

43. The writer has used texts and materials in original language only. The English translations for the written constitutional documents can be found e.g., Albert P. Blaustein & Gisbert H. Flanz (eds.) *Constitutions of the Countries of the World* (1971).

44. In this article the concept of 'doctrine' consists of legal writings (by professors, judges, practicioners) and prevailing court or other (constitutional) organ practice. The 'doctrine' is here therefore larger than the legal scholarship only, as it is something which is not directly a source of law but which still reveals the fundamentals of given legal system. E.g., textbooks with numerous editions sort of "carry" the basic understanding of given constitutional system. For constitutional comparison these are one of the most valuable sources of knowledge when one tries to comprehend the primary foreign legal material (e.g., statutory law, decisions of courts).

45. When the spirit, style or methods of the different legal systems are compared it is micro-comparison. In macro-comparison the comparativist is investigating specific legal institutions, rules or problems. However, when one studies the procedures one must often do both at the same time (as here). See Bogdan, *supra* n. 6, at 57-58 and Zweigert & Kötz, *supra* n. 5, at 4-5.

these factors are kept to a descriptive examination that follows the general features of national doctrine.⁴⁶

This study excludes basic and international fundamental rights, which often have connections to substantive questions of the control of the constitutionality of laws. Here attention is paid to the controlling solution in particular and to its constitutional legal basis, and not to the substantive questions, that arise when control is practiced. Also the argumentation methods, legal reasoning models and their possible similarities or differences are omitted in this examination, when they have no direct connection to the solutions of the control of the constitutionality of laws.

The previous statement also means that the author does not—regardless of author's nationality—aim for a legal dogmatic study (i.e., a normative examination that presents recommendations of interpretations), instead the aim is to treat all examined solutions equally with the same methods and depth. In the same way the analysis in practice also implies that specific sources used about a country only originate from the investigations made in that same country. Thereby a picture of the prevailing doctrine can be drawn. Besides the primary sources (statutory law and case-law) considerable importance is attached to such sources, which the author considers as possessing the idea of prevailing “constitutional *Vorverständnis*” as interpretators and claimants, which also means that the aim here is basically to observe such sources, which are not under heavy criticism within a country's national constitutional jurisprudence.⁴⁷ With the methodical solutions above it is possible to avoid, at least to a reasonable extent, outsiders valuation of foreign systems, which would also cause epistemological problems because of its foreign perspective (which comparativist always has).

3.2. Norway

General Background

In the Kingdom of Norway (*Kongeriket Norge*) there are about 4.4 million citizens, of whom nearly 90% belong to the Lutheran church. Norway is an economically prosperous and politically stable uniform state with a multiparty system. The country adheres to a constitutional system, which can be characterized by having only one formal Basic Law (*Grunnlov* 1814). The form of government is a constitutional monarchy that in practice complies with parliamentarism. The distinctive feature from other countries in the study is that Norway is not an EU member state, which means that there is more constitu-

46. Cf. Petri Mäntysaari, *Mängelhaftung beim Kauf von Gesellschaftsanteilen* 8-13 (1998). See also Husa, *supra* n. 6, at 80-82.

47. Cf. Antero Jyränki, *Läkien laki* 23 (1989). It is a question of “search for authoritative native interpretation” as Venter says, *supra* n. 1.

tional sovereignty than in the other countries under examination. The constitutional powers of the monarchy are parlamentarized, on the basis of the customary constitutional law (*konstitusjonelle sedvanerett*)—without altering the text of the Basic Law—and the central executive power is in the hands of the Prime Minister and the Government. Generally speaking the system is made up on the basis of a tripartition-doctrine of governmental power.⁴⁸

The central organ for control of the constitutionality of laws (*konstitusjonskontrollen*) is the Supreme Court (*Høyesterett*), but other courts also have power of judicial review. Thus, Norway basically belongs to the group of countries having *ex post facto*, decentralized and concrete court control. The closest system similar to the Norwegian is found in the U.S.⁴⁹

Legal Basis

Under Norwegian Basic Law there are no direct *expressis verbis* regulations on which the control of the constitutionality of the laws would be based. Instead, the Basic Law, as the higher law (*lex superior*), sets the basic rules for both the relations between the public authorities and citizens, and for the relations within the authorities. The legal control of actions of public authorities in courts was adapted at an early stage in the Norwegian system, but the control of the constitutionality of laws remained open for a long time, or at least some elements of it formed an unsolved question, whether the control authority of the courts also included laws enacted by Parliament (*Stortinget*).⁵⁰

From the 1890's to the middle of the 1930's control by the courts was practiced, but it was not taken into active use again until the middle of the 1970's. Hence, the question was in somewhat unsolved during some decades of this century and various trends sometimes pointed in different directions. Today it is uniformly agreed, both on a practical and doctrinal level, that the courts have the authority to control the constitutionality of laws.⁵¹

48. Comparative general view see Robert L. Maddex, *Constitutions of the World* 204-06 (1996). General domestic picture of Norwegian constitutional law see e.g., John Andenæs's textbook *Statsforfatning i Norge* (7th ed. 1994).

49. However, e.g., Eivind Smith holds (supra n. 21, at 118), that the USA's model is more political by its nature ("*. . . er dessuten utpekt på langt klarere <<politiske>> grunnlag enn vi er vant til i Norge*"). See also Andenæs, id. at 359.

50. The control of constitutionality of norms covers both the formal and substantive law (Andenæs, supra n. 48, at 361).

51. According to Erik Boe only Carsten Smith has raised some doubt about this. *Lovers grunnlovsmessighet* 13. Jussens Venner 1998 pp. 4-36. Interestingly, Eivind Smith has used the term 'renaissance' of judicial review in connection with the Kløfta-case. See Smith, TfR 1990 p. 114. Domstolskontroll med lovgivning i Norge efter ca. 1970 88-120.

Practical Applications

In Norway, the 1976⁵² Supreme Court decision over the *Kløfta* case became a landmark. The case was connected to §105 of the Basic Law concerning proprietary right and full compensation. In connection to the case a question of a branch of Constitutional Law was raised; had the Court the right to displace a law legislated by Parliament in the case at hand? The question was solved (paradigmatically) in favor of court control.⁵³ The solution was in practice based on a judgement made by the Court, not on written regulations in the Basic Law, nor on specific interpretations of them. The Norwegian doctrine on sources of law (*rettskildelære*) is similar to Common Law in that in the doctrine it is considered appropriate that the courts also create legal norms, not only apply them.⁵⁴ This is also shown, albeit if in a different form, in the branch of Constitutional Law where legal constitutional norms additionally are created, based on the political organ praxis (Government and Parliament).⁵⁵

The controlling power of the Supreme Court and other courts is limited in that questions regarding the relation between the higher organs of state and the division of power between them are not treated in the sphere of legal judgement, since they are not connected to individual constitutional rights, duties nor rights of property. Most such disputes are resolved on behalf of Parliament, and almost always in its favor. Furthermore it should be noted, that in Norway the courts not only possess the authority to execute control, but it is also their duty. Control as such is focused—at least basically—in formal control, but in practice, evaluation of the substantive content of the law is demanded to a certain degree as well.⁵⁶

There are reasons for separately noting, that though the judicial review is adopted in Norway, it strives to observe the considerations presented by the legislator in practical control. If it is possible to avoid conflicts through interpretation, the laws legislated by the Parliament are basically interpreted as being constitutional. When there is enough ground for suspicion (*rimelig tvil*) of unconstitutionality (and at the same time knowledge of the exact content of the norms of the Basic Law), the law is not applied, but it is, however, left formally

52. Norsk Retstidende (Rt) 1976 p. 1.

53. See Jan Helgesen, "Interpretation or reinterpretation?," in *Constitutional Justice Under Old Constitutions* 205-25 (1995). See also Andenæs, *supra* n. 48, at 347-49.

54. Torstein Eckhoff puts it in his basic textbook *Rettskildelære* 161 (1993) followingly: "At domstolar og andre legger vekt på retspraksis i sin rettsanvendelse, innebær at domstolene (og særlig Høyesterett) ikke bare anvender retten, men også er med på å skape den."

55. See Erik Boe, *Innføring i Juss. Statsrett og forvaltningsrett* 389-90 (1993).

56. When the review is practised in conjunction with lower norms (than parliamentary Acts) the Norwegian Supreme Court can act more freely (e.g., *Transportstøttedomen* Rt. 1992 p. 182).

valid.⁵⁷ In practice, the Supreme Court follows the doctrine of interpretation, too, trying to avoid possible unconstitutionality by using the Basic Law as the interpretation-medium (*Grunnloven som tolkningsmiddel*).⁵⁸ Despite this, especially in a Nordic comparative context, it is indisputable that the major control organ of the constitutionality of the laws is the Supreme Court, not for example, the Parliament.⁵⁹

Other points

Since control of the constitutionality of laws has taken the form of *ex post facto* court control, this causes the preventive norm control, run by the Parliament to be left relatively undeveloped and with an *ad hoc* characteristic.⁶⁰ The dominant position of constitutional customary law should be regarded as a peculiar feature of the Norwegian system, which deviates from the Roman-German tradition and can be explained by the age of the Basic Law of the country. Since the Basic Law is very old (a part of the norms have undergone the *desuetudo*), it is clear that it can cover all contemporary challenges which the Constitution comes across, so the gaps that arise have to be filled by means of interpretation. In addition to the changes made through interpretation, customary law plays an exceptionally important role in this respect. This is also seen when the Court evaluates the unconstitutionality of the provision of a law, it is not just a matter of narrow textual norm in the Basic Law, but it is about a significantly wider constitutional norm (*grunnlovsregelen*).⁶¹

As a general note the Norwegian system, despite many similar features, is not even close to having judges in a dominant position as, for instance in the U.S. In Norway, weight is given to the *travaux préparatoires* in the control of the laws legislated by Parliament, and interpretation is used as a medium, which might reduce eventual conflicts of prestige. In the American system, with its more distinct

57. Boe, supra n. 55, at 497 puts it as follows: "Egentlig viker ikke loven. Den blir bare satt til side i det konkrete tilfellet."

58. See Boe, supra n. 55, at 496-97 and Andenæs, supra n. 48, at 349-53. See even Eckhoff, supra n. 54, at 188-90. Court's praxis is concentrated to questions concerning Basic Law's 97 § and 105 §. These provisions deal with retroactive legislation and problems of expropriation e.g., such as the question of so-called 'full compensation' (*fuld erstatning*) as in Kløfta -case. E.g., Case Rt. 1990 p. 284 in which Court stroke down a law as unconstitutional (on grounds of 97 §), was about retroactive rent- and tenancy legislation.

59. In Kløfta -case (Rt. 1976 p. 22) the minority of judges held that the Court should not set itself above the legislator because the legislator had already examined the constitutionality ("... lovgiveren selv å vurdere forholdet til grunnloven..."). However, the majority held that the customary constitutional law authorised the court to review the constitutionality of laws (Rt. 1976 p. 5).

60. However, according to Basic Law's 83 § the Parliament may obtain the opinion of the Supreme Court on points of law. In practice the 83 § is not significant. See Andenæs, supra n. 48, at 206-07.

61. Boe, supra n. 55, at 28 and 16.

separation of powers, the legislative organ (i.e., Congress) is not recognized as more important than other branches of the government. Nor has Norwegian membership of the European Convention of Human Rights within the Council of Europe (ECHR) caused drastic changes. In this respect, in the Norwegian constitutional thinking, the principle question (who controls?) is already solved in favor of court control. This principle question regards control, as being executed by the courts and based on the *lex superior* argument, furthermore the creation of constitutional norms formed through interpretation, particularly by the Supreme Court.

3.3. Sweden

General Background

In the Kingdom of Sweden (*Konungariket Sverige*) there are about 8.9 million citizens, of whom more than 90% belong to the Lutheran church. Sweden is an economically prosperous uniform state, with stable political conditions and a multiparty system. The country adheres to such systems of many formal Basic Laws, in which one of these (*Regeringsform*, abbr. RF 1974) is clearly more central than the others.⁶² Constitutionally it is significant that Sweden is an EU member (since 1995). EU membership partly limits its national sovereignty. The form of government is a constitutional monarchy that in practice complies with parliamentarism. The powers of the Monarch are parliamentarized in the written Constitutional Law, and the Prime Minister and the Government constitute the center of the executive power. Generally speaking the system is based on a tripartition-doctrine of governmental power.⁶³

Courts and other public authorities have a limited right to control the constitutionality of laws and other norms (*norm- och lagprövning*). Hence, Sweden belongs basically to the group of decentralized, *ex post facto* and concrete control, in which also public organs other than the courts have the right to limited judicial review.⁶⁴

62. Other formal Basic Laws are Act on Succession (*Successionordningen* 1810/1979), Freedom of Press Act (*Tryckfrihetsförordningen* 1949) and Freedom of Expression Act (*Yttrandefrihetsgrundlagen* 1991). All the formal Basic Laws and other material constitutional law can be found e.g., in Lars-Göran Malmberg (ed.) *Konstitutionell rätt* (1996).

63. Comparative general view Maddex, *supra* n. 48, at 265-68. Description of Swedish constitutional doctrine see Håkan Strömberg's basic textbook *Sveriges författning* (14th ed. 1995).

64. Background of the Swedish control system see Erik Holmberg & Nils Stjernqvist, *Vår författning* 211-18 (8th ed. 1992).

Legal Basis

Under the Swedish Constitution there is a special regulation (RF 11:14 §),⁶⁵ which control of the constitutionality of the laws is legally based on. As a general starting point, the Constitution sets the *lex superior* limits for the actions of the authorities. If a case where a hierarchically lower regulation contradicts a higher regulation, the main rule is that the lower has to step aside (*lex superior derogat legi inferiori*). The basic situation is thus, that the court or another public organ (*annat offentligt organ*) has to choose one if there are two contradicting norms.⁶⁶ The result of the choice might be that the lower norm is not applied, which however, does not effect the formal validity of the lower norm, because the passed norm—an individual provision—is invalid (*ogiltig*) only in the (concrete) case to hand.

Earlier, it was not formally admitted on the level of the written Basic Law, that the courts or other organs should have the right to evaluate the constitutionality of the laws. The earlier situation, in principle conceded this on a doctrinal level, was then confirmed in 1979 (Lag 1979:933) through changes to the written Constitution. RF 11:14 § sets especially high formal demands, for such situations of conflict when the ordinary law can be possibly by-passed on grounds of collision with Basic Law.⁶⁷

The conflict between regulations in the law and in the Basic Law (*bestämmelse i grundlag*) has to be obvious or apparent (*uppenbar*), if a law shall be left un-applied, which in practice means that it is presumed that the conflict is totally indisputable and non-questionable. The demands in conflict situations regarding the norms lower grades than the parliamentary laws are not set on such high criteria (except the regulations given by the Government within its competence), but a “simple” conflict might be grounds for not applying the provisions of a norm. An implied basic idea of the written law regarding the control of the constitutionality of Swedish Law is, that such control is not desired as being a part of the typical or normal activities of courts (or other public organs). The emphasis is put—with respect to the cen-

65. 14 § “Finner domstol eller annat offentlig organ att en föreskrift står i strid med bestämmelse i grundlag. . . får föreskriften icke tillämpas. Har riksdagen eller regeringen beslutat föreskriften, skall tillämpning dock underlätas endast om felet är uppenbart.” The requirement of ‘obviousness’ concerns only review exercised in conjunction with Parliament’s Acts or norms given by the Government. For lower norms this qualified requirement of obviousness of the collision is not in use.

66. Of norm collisions in the Swedish Law in general see Stig Strömholm, *Rätt, rättsskällor och rättstillämpning* 37-38, 215-22 (5th ed. 1996).

67. In Sweden it was already much earlier recognized in the legal scholarship and generally that the courts had the right of controlling the constitutionality of laws because of the *lex superior* -principle, however, the limits of this control were not clear. The ‘obviousness requirement’ (*uppenbarhetskrav*) is an effort to resolve this question in form of codified constitutional rule. See Erik Holmberg, *På spaning efter rättigheterna*. Svensk Juristtidning (SvJT) 1987 653-76, see especially 661-65.

tral position of the Parliament—on the technical control, which mainly means correcting “minor errors”.⁶⁸ Hence, under the Swedish system the Parliament has a larger “margin of error” than other norm giving authorities.⁶⁹

Practical Application

Under the Swedish court praxis, the control option created by RF 11:14 § is not emphasized and it has rarely been used, despite the written regulation that enables such control came into force twenty years ago.⁷⁰ In many cases connected to norm control, there have been links to proprietary right and other laws of property. It is seen that other public authorities actually have once left the provisions of a law un-applied, for the reason that it has been in conflict with the Basic Law. Instead, in the Supreme Court of Administrative Law (*Regeringsrätten*) there have been frequent applications concerning control-regulation, where the Supreme Court (*Högsta domstolen*) has again been markedly more passive and cautious.⁷¹ The attitude of the judiciary (i.e., the functionary executor of the law) and the traditions behind the sources of law have, quite obviously, influenced the prevailing situation.

In Sweden there is an aim to utilize in practice such methods of interpretation, where provisions in law are seen as harmonizing legal interpretation so that conflicting situations (law vs. Basic Law) do not appear. The demands in the Basic Law concerning the indisputable character of a norm conflict support the use of these kind of interpretation constructions, given that RF 11:14 § sets particularly high formal demands. In practice, the possibility of the courts to displace provisions of a law, contrary to the Basic Law, are quite small, unless it is a matter of *absolutely* technical control when there can be no doubtful questions regarding the relation between the substance and the regulations of the Basic Law.⁷² Nonetheless, the theoretical main principle of Swedish system is that the constitutionality control should be directed also to the substantive content of the law.⁷³

68. Strömberg, *supra* n. 66, at 140-41. See Joakim Nergelius, *Konstitutionellt rättighetsskydd* 660-70 (1996).

69. Thomas Bull, *Mötes- och demonstrationsfriheten* 255-56 (1997).

70. See *id.* at 250-51.

71. Bertil Bengtsson, *Den svenska grundlagen och domstolarna* 57. Jussens *Venner* 1998 56-65. See also Nergelius, *supra* n. 68, at 703-04 and Strömberg, *supra* n. 63, at 142-43. E.g., see the Supreme Courts case 1996:59 (*Nytt Juridisk Arkiv*, NJA 1996 p. 370), in which a provision (22§ 2 st.) of governmental decree (1987:96) was found obviously unconstitutional. The case was originally about fishing-fines which were imposed to Swedish national according to provision which delegated this competency to international joint river commission (Tornionjoen rajajokikomissio). The delegation could not, however, be accomplished by means of governmental decree, so the provision was held as obviously unconstitutional.

72. Bengtsson, *supra* n. 71, at 61-62.

73. See Holmberg & Stjernqvist, *supra* n. 64, at 213.

Other Points

An increasing number of critics of the system have emerged in the field of constitutional jurisprudence in Sweden, since control of the constitutionality of the laws is in practice only executed very cautiously. The criticism is partly influenced by Sweden becoming a member of the EU 1995 and its earlier ratification of ECHR, since in the European idea of an effective *lex superior* -type control is strongly highlighted. In connection with this, the influence of the traditional Swedish doctrine of legal sources should be noted (*rättskällelära*). In Swedish courts, particularly *travaux* of the laws (*lagmotiv*) are traditionally studied, and the *travaux* are emphasised also in judicial judgements made by the courts.⁷⁴ Since the most emphasized part of the control of the constitutionality of laws is—at least in the written law and in the doctrine—the *ex post facto* control, the preventive and judicially orientated review of the actions of the legislators themselves is not very well developed.⁷⁵

As a general note, in practice the Swedish system only uses the control of the constitutionality of the laws very carefully. The system cannot be considered as a typical representative of a judicial and *ex post facto* review, since considerable weight is put on the legislator's own opinions as a source of law.⁷⁶ Since the Supreme Administrative Court, however, has shown certain signs of activity in control, and since the country is an EU member and also a member of ECHR, and when internal criticism is taken into account, changes in the Swedish system are perhaps to be expected. Possible changes do not necessarily have to be based on a written law, but it might be a matter of a progress in the legal mentality, which is occasionally reflected in the legal interpretation. If present developments continue in the current direction, there would seem to appear pressures to create a stronger profile for the judicial review.

3.4. Finland

General Background

In the Republic of Finland (*Suomen tasavalta*) there are about 5.2 million citizens, of whom about 85% belong to the Lutheran

74. See Bengtsson, *supra* n. 71, at 63-65. See also Supreme Court's case 1996:14 (NJA p. 110) in which potential norm collision was avoided by stressing the *travaux préparatoires* of Basic Law so that it was given more weight than the actual wording of parliament Act.

75. Bertil Bengtsson, *Om lagprövning från domstolssynpunkt* p. 674. SvJT 1989 pp. 671-682. See also Bull, *supra* n. 69, at 252-53. In Sweden the main responsibility of this belongs to the special *lagrådet* -organ which reviews Governments bills by Governments own request. In practice the prestige of this organ is not very remarkable (Nergelius, *supra* n. 68, at 35).

76. Of the position of *travaux préparatoires* in general see Strömholm's short summary *supra* n. 66, at 374.

church. Finland is an economically prosperous and a politically stable uniform state with a multiparty-system. Today the country still resembles, in the Swedish way, a system with many formal Basic Laws, and where one (*Hallitusmuoto*, abbr. HM 1919) in fact is in a more central position than the others.⁷⁷ On March 1st, 2000, a new Basic Law (*Perustuslaki*, abbr. PeL) came into force and changed the structure so that Finland will get a system with only one formal Basic Law. It is constitutionally significant that Finland is an EU member (since 1995). EU membership partly limits the national sovereignty of Finland. The form of government is a republic, which complies with presidential parliamentarism. The nucleus of the executive power is handled by both the President and the Prime Minister, but the reform of the Basic Law in 2000 reduces the President's position and strengthens the already existing parliamentary features of the system.⁷⁸ Generally speaking the system leans to a tripartition-doctrine of governmental power.⁷⁹

According to the prevailing system, courts and other public authorities have no competence to review the constitutionality of the laws, but the control of norms lower than parliamentary laws is possible. The emphasis on the control is put on the preventive and abstract norm-control executed by one special standing committee of the Parliament (*Eduskunta*), the Committee for Constitutional Law (*Perustuslakivaliokunta*, abbr. PeV). Thus, Finland basically belongs to the group of preventive, centralized and abstract form of control, where the main controlling organ is formally a non-court-like organ.

Legal Basis

According to HM 92 §, a public authority cannot apply a regulation (*Asetus*) which is against the parliamentary law or the Basic Law (the same provision is included in the new PeL). In constitutional literature an *e contrario* interpretation is made of this provision, according to which no authority has the right to observe the constitutionality of the formal law after it has been ratified. Even though there are some opinions where it is claimed, that the courts would have the right to leave a law un-applied, when the conflict situation is totally indisputable and obviously beyond doubt.⁸⁰ The control of the constitutionality of laws is concentrated to the PeV, which con-

77. The other formal Basic Laws were the important Parliament Act (*Valtiopäiväjärjestys*, abbr. VJ 1928) and constitutionally less important Act on the High Court of Impeachment (*Laki valtakunnanoikeudesta* 1922) and Ministerial Responsibility Act (*Ministerivastuulaki* 1922).

78. See for more details Jaakko Husa, *Montesquieu's Separation of Powers and the Semi-Presidential Constitution: Finland's Past and Future?* TjR 904-20.

79. For a comparative general view, see Maddex, *supra* n. 48, at 79-82.

80. Basic textbook's description of the system see Mikael Hidén & Ilkka Saraviita, *Valtiosäntöoikeuden pääpiirteet* (6th ed. 1994) especially 262-64.

trols the legislative process of new laws and gives opinions to other committees of Parliament and if necessary, on request, to the Speaker of the Parliament concerning whether legislative process are correct regarding the draft Bill. The proceedings are based on - after the total reform of fundamental rights (1995) - VJ:s 46 §, according to which the task of PeV is to give opinions about the constitutionality of draft Bills and about the bill's relation to international treaties concerning human rights.⁸¹ Before 1995 the system was mainly based on constitutional customary law.

Opinions concerning legislative process made by the PeV means in practice interpretations of substantive content of the Constitution. The opinions, outlining the existing Constitution, are legally binding in compliance with constitutional conventions and customary constitutional law. Beside the PeV, both the Speaker of the Parliament and the Chancellor of Justice and furthermore the President of the Republic (at the ratifying stage), are able to control the constitutionality of the laws (or rather the law proposals). However, the most authoritative nucleus of the control is *de facto* concentrated in the PeV.

The year 2000 total reform of the Finnish Basic Law does not change the basic features of the system, but it includes one novelty. PeL 106 § includes an *expressis verbis* provision, which enables limited review of the constitutionality of the laws in the courts; rejection to apply of the provision of a law, where the application of the provision of a law would result in a clear controversy (*ilmeinen ristiriita*) with the Constitution in general and Basic Law particularly. The court can thus give priority to the regulation of the Basic Law. The new Finnish control model is a modified transplant from the Swedish system with one significant exception, that the limited review of the constitutionality of the laws is possible only in courts, not in other public organs.⁸² The new provision complements the Finnish preventive and abstract control-model so that the emphasis of the control is still preserved in the advance control done in conjunction with legislative process of the Parliament.⁸³

As to its formal legal basis, the Finnish model is based on written provisions (the old system HM 92 and VJ 46 §; the new system PeL 74, 106 and 107 §), the constitutional customary law, and a doctrine approved by the constitutional jurisprudence, even though there are reasons for noting, that the Finnish model, differs from the Norwe-

81. See Jyränki, *supra* n. 1, at 213-14.

82. It must also be noted that the Swedish RF seems to be covering—according to the wording—only ‘provision of Basic Law’ (*bestämmelse i grundlag*), not the whole Basic Law (including e.g. the principles behind the provisions). The more open Finnish expression ‘with Basic law’ (*perustuslain kanssa*) makes it, perhaps, more effortless to take the coherence of the Constitution into account while practicing limited judicial review.

83. Husa, *supra* n. 13, at 193-200.

gian and Danish models; it is more closely based to the written regulations of the Basic Law.

Practical Application

Under the Finnish system, the control of PeV is focused to correct legislative procedure, so attention is paid mainly to the formal constitutionality when the substantive constitutionality is left as a subordinate part. The interpretations of the committee are considerably influenced—according to established convention—by the opinions of the constitutional experts (Professors of Public Law mainly), which, if they have consensual opinion, are principally followed. The PeV does not systematically give statements about all draft Bills, neither can the control subjects be independently chosen.⁸⁴ Attention is paid, only, to those draft Bills, of which the relation to the Basic Law is found somewhat undefined and the question of potential unconstitutionality cannot be answered simply by leaning on earlier PeV's praxis. In practice, interpretations made by the committee—which have been mostly linked to questions concerning constitutional protection of property—are highly respected and in legal research, the source-of-law-position of opinions of the PeV, is even considered equal to that of the constitutional court.⁸⁵

After the 1995 reform of fundamental rights (the chapter of fundamental rights in HM was totally renewed in accordance with international treaties of human rights) the PeV has gradually taken more of the role as a controller of the substantive constitutionality, too. The interpretations of the committee are transmitted as normative standpoints in connection with legislation arrangements, and if the draft Bill is considered constitutional it can be legislated in the normal order of enactment. If the draft Bill law contains contradictions to the Basic Law or Constitution in general, the PeV can propose a change so that the controversy is removed or suggest that the law should be legislated in the qualified order of enactment of the Basic Law. The

84. The difference with the French *Conseil Constitutionnel* is clear. In France all *lois organiques* (i.e. laws which affect the power structure between President, Parliament, Council itself or judiciary) must be submitted to Conseil's control. However, ordinary parliamentary laws are no subject to automatic preventive control.

85. See also Antero Jyränki, *Lakien perustuslainmukaisuus* 599-600. *Encyclopaedia Iuridica Fennica V*, 595-603 (1997). Paralleling the PeV with actual constitutional court is, perhaps, exaggeration, but it is evident that the constitutional status of this unique organ and the customary law-like traditions and interpretation-techniques relating to it are much more important that can be deduced from written legal rules only. According to the official report of the PeV (PeVM 10/1998) when courts are trying to determine the nature (obvious or not) of collision of laws provision and that of Basic Laws (106 §) they must put special weight to the fact if the PeV has already reviewed this question preventively. If the PeV has held that a provision of law is not colliding with the Basic Law the courts cannot rule otherwise, but they are obliged to follow the PeV's ruling. This same basic-assumption can be found also from the *travaux* of the Government's Bill (HE 1/1998) reasoning concerning 106 §.

PeV can also approve a draft Bill, that is suspected as being controversial, to be legislated in the normal order of enactment, but it is then presumed, that the courts and other authorities must interpret the law in conformity with the Constitution.⁸⁶ Under the doctrine of the sources of law the interpretations made by PeV are of considerable importance when the courts carry out constitutional interpretation, whereby it is possible to avoid controversy through interpretation. Also when estimating the “obviousness” of a controversy in a possible conflict situation the PeV’s opinions are given considerable importance.

What marks the Finnish system with diversity when compared to other Nordic countries⁸⁷—and other systems—is undoubtedly the institution of exceptive law (*poikkeuslaki*), which enables enactment and application of laws contradictory the Basic Law, without changing the text of the Basic Law itself. The practical consequences of the exceptive law is partial displacement of the content of the Basic Law, without changing the text meanwhile. The precondition is that the decision about the exception is made in the same qualified order of enactment as change to the Basic Law would have to be enacted. Further discussions of the institution of the Finnish exceptive law are not possible here, but it can be generally stated that it is a Finnish—from a comparative point of view—constitutional speciality, of which the origins date back to the 1860’s. The basic idea of the institution of the exceptive law (which is norm hierarchically in the same position as the ordinary parliament law) is that its substantive unconstitutionality is considered acceptable, if the law, which means an exception to Constitution, is legislated in the same order of enactment as a change of the Basic Law would be treated.⁸⁸ The 2000 reform of the Basic Law does not abolish the institution of exceptive law. Instead there are substantive limits concerning what exceptive laws can be legislated (73 § *rajattu poikkeus/limited exception*). In a Nordic comparison, the Finnish institution of exceptive law is special in the sense that it enables the norm hierarchy to disintegrate between the ordinary laws and the Basic Law.

86. Jyränki, *supra* n. 1, at 217-19. PeV has put into use the principle of ‘Basic Rights Conformity Rule of Interpretation’ (*perusoikeusmyönteinen laintulkinta*) which is set forth in PeVM 25/1994 (p. 4) The idea is to choose of legally possible interpretations the one which best enhances the intention of basic right(s) and eliminates those interpretations which could be seen as colliding with the intention of basic right(s) (“*parhaiten edistää perusoikeuksien tarkoituksen toteutumista ja eliminoi. . . ristiriitaisiksi katsottavat vaihtoehdot*”).

87. E.g., in Sweden there is a constitutional principle which says that hierarchically lower norm cannot change the substance of Basic Law (Holmberg & Stjernqvist, *supra* n. 64, at 21).

88. See for more details Jyränki, *supra* n. 1, at 239-49.

Other Points

The characteristics of the Finnish system can be presented either through a historical or a comparative observation. Since there has been no aim in this article at historical observations of the other countries, it is necessary here to point out a few comparative facts. Compared to other countries the control of the constitutionality of the Finnish law is different, because it is emphasized as preventive, it has an abstract character, and it is moreover executed through the activity of the Parliament itself. This partly explains, among other things, the institution of the exceptive law and the fact, that there has been no political desire to change a proven and well functioning system.⁸⁹

In a Nordic context attention is drawn to the fact that the PeV is *de facto* a quasi-legal organ that uses legal discretion and argumentation in its own interpretation activities (the parliamentary group discipline used in other committees does not touch the PeV). In many respects the PeV comes relatively close to the French Constitutional Council even though there are significant differences (e.g., the composition and the formal nature of decisions). Compared to Norway, the *modus operandi* of the Finnish courts is notably closer to the Swedish one, which includes avoidance of judicial activism.⁹⁰ The reason for the relatively weak position of courts in the control of the constitutionality of the laws might partly be connected to the fact that there, similarly in Sweden, is no indisputable Supreme Court, since there are special supreme courts for general matters (i.e., criminal and civil cases) and matters concerning administrative law, which is not the case in Norway and Denmark.

The strong emphasis on the preventive control in the Finnish system might be somewhat weakened by the new Basic Law, in addition to which the membership of the EU and ECHR will increase the pressure for consolidation of the *ex post facto* court-control (i.e., judicial review) in the future. Instead, there has not appeared such internal criticism as in Sweden within the Finnish system. In an EU context, Finland is a rare representative of such control solution, where the control power of the constitutionality of the laws is still mainly in the hands of the democratically chosen legislator. Finland is one of the last representatives of a system, where the emphasis of the *a priori* control lies in the Parliament. This situation will be balanced in the future, so that some amount of the controlling compe-

89. In constitutional scholarship functioning of the Finnish control system is evaluated normally in positive manner. See e.g., Ilkka Saraviita, *Havaintoja perustuslakivaliokunnan toimintatavoissa ilmenneistä muutoksista* 194. In Juhlakirja Antero Jyränki 183-99 (1993).

90. See also Mikael Hidén, *Övervakning av lagarnas grundlagsenhetlighet i Finland* 73. Jussens Venner 1998 66-77.

tence is moved to the courts, in which direct argumentation using basic rights regulations of the Basic Law has, already, gradually increased after the 1995 reform of the Basic Law.⁹¹

3.5. Denmark

General Background

In the Kingdom of Denmark (*Kongeriket Danmark*) there are about 5.3 million citizens, of whom about 90% belong to the Lutheran church. Denmark is an economically prosperous uniform state, with stable political conditions and a multiparty-system. The country belongs to those systems with one formal Basic Law. The present 1953 Basic Law (*Grundloven*) is largely based on the regulations of the 1849 Basic Law. The form of government is constitutional monarchy that complies with parliamentarism. Denmark is a member of the EU (since 1972) which limits the sovereignty of the state, however, Denmark has made a few reservations to its relation with the EU e.g., to the Treaty of Maastricht.⁹² The powers of the monarchy are based on the written Basic Law that places the nucleus of the executive powers in the hands of the Prime Minister and the Government. Generally, the system leans to the basis of the tripartition of governmental power

The courts are considered to have the right to review of the constitutionality of the laws and other norms (*grundlovsprøvelse*). Denmark belongs hence basically to the group of *ex post facto*, decentralised and concrete court control, of which the closest point for comparison is the Swedish system.⁹³

Legal Basis

The right of the courts to control the constitutionality of the laws is not directly based on provisions of the Basic Law (*Grundloven*, abbr. Grl), though the judicial powers are entrusted to the courts in general in the norm of the separation of powers in 3 §. This regula-

91. Of the praxis of the Supreme Administrative Court (*Korkein Hallinto-oikeus*, KHO) after the 1995's basic rights reform see Husa, "Uudet perusoikeudet ja KHO," *DL* 1064-67 (1998).

92. The question of constitutionality of Denmark's membership in the EU has been target for constant constitutional debates. Even Supreme Court's recent so-called Maastricht-decision (*Ugeskrift for Retsvæsen*, abbr. U 1998 p. 800) has not ended the constitutional debate. Some legal scholars say that Maastricht -decision proves that the Supreme Court has now rejected the earlier doctrine of 'political question' when interfering with problems of clearly political nature. As Hjalte Rasmussen puts it "... the Supreme Court's very admission of a class action challenging the constitutionality of Denmark's ratification of the Maastricht-treaty evoked the advent of a new era in Danish constitutional and democratic history". *Denmark's Ratification of the Maastricht-treaty A Question About Constitutionality*. Paper presented at the IACL Round Table Turku May 23-24 1997.

93. Textbook description of the Danish control system see Henrik Zahle, *Dansk forfatningsret 2. Regering, forvaltning og dom* 330-46 (1992).

tion is more closely connected to the separation of powers than it is to taking direct standpoints as to the possibility of the courts to review the constitutionality of the laws legislated by the Parliament (*Folketinget*).⁹⁴ Instead Grl 63 § is interpreted as a provision that enables review of the constitutionality of regulations those hierarchically lower than the law (i.e., ordinances, decisions of Governmental departments, circular letters) in the courts. According to the provision, the courts possess the right to solve all matters regarding the limits of the executive powers.⁹⁵

When the *expressis verbis* norms concerning the control of constitutionality of laws are missing, the Danish system can be considered as being based on a doctrine, since the control power is bound to written regulations of the Basic Law, only, through legal constructions, since the power to review cannot be directly led from them. Court praxis is rare, but its standpoint is clear; even though the provisions of the laws cannot be declared contradictory to Basic Law, the control power of the courts is, however, acknowledged.⁹⁶ Despite the fact, that the system in principle represents the decentralized court control model, the most central decision-maker of matters concerning the Basic Law is in practice, the Norwegian Supreme Court (*Højesterett*). In Denmark, like in Norway (but unlike Finland and Sweden), there are no special administrative courts, but even administrative cases are tried in general courts. Characteristically the Danish arrangements, regarding the review of the constitutionality of the laws, are to its norm basis very similar as the Swedish doctrine of control before the 1979 RF's reform.

Practical Application

In Danish constitutional thinking an idea typical for all of the Nordic countries has been prevailing. The position of the Parliament must be emphasized in relation to other branches of public power. This has partly been evident because reasonable attention has been paid in Denmark, as deviating from Norway and Sweden, from a specifically judicial viewpoint, to constitutionality of the laws already being at the legislation stage (by ministries in the law-drafting machinery). Thus a part of the control of the constitutionality of the

94. 3 § “. . . Den dømmene magt er hos domstolene.” See id. at 331 and Zahle, *Er domstolenes grunlovsprøvelse en effektiv individsbeskyttelse?* 37. Jussens Venner 1998 37-55. See also Ole Krarup, “Om domstolenes grundlovsprøvelse” in *Grundlovens nutid og fremtid* 131-44 (1999).

95. 63 § stk. 1. “Domstolene er berettiget til at påkende ethvert spørgsmål om øvrighedsmyndighedens grænser. . .”. Interpretation of this provision see Bent Christensen, *Forvaltningsrett. Prøvelse* 173-78 (1994). Christensen sees courts competence to control the constitutionality of administrative regulations as a direct consequence of court's competence to control the constitutionality of hierarchically higher parliamentary laws (id. at 130).

96. Zahle, *supra* n. 93, at 334.

law has been *de facto* preventive, even though facts that directly support this conclusion cannot be easily found.⁹⁷ The central position of the Parliament is also shown, since there are aims to pass possible conflict situations through methods of interpretation used by the courts.⁹⁸ The Supreme Court has followed an interpretation policy that has got its origin in the fact that very high demands are set on cases where passing provision of an ordinary law on basis of a norm conflict with Basic Law is possible. The review of the constitutionality of the laws is not a routine in the normal judicial process.⁹⁹

On the other hand, it is recognized that the courts, in principle, have the right to review of the constitutionality of the laws, but neglect of the application of a law presumes that the content of the regulations of the Basic Law is firm (*krav om sikkerhed*) and indisputable (*utvivlsom*).¹⁰⁰ In realizing a conflict to the Basic Law it is hence presumed by the courts, that the conflict cannot be included within the "flexibility of interpretation" (*elasticitetsgrænsen*). In practice, the largest part of these cases, in which the Supreme Court has decided to maintain the regulation of a law against the Basic Law, has like in Norway, been a question of constitutional protection of property and expropriation.¹⁰¹ The Supreme Court has demonstrated its independence and activity also in judgements that have deviated from the opinions of Parliament concerning the provision (or provisions) of law that have been interpreted to lead to *de facto* expropriation.¹⁰² In Denmark the question of formal control of constitutionality is held clear, while there has been a debate about the substantive control.¹⁰³

Other Points

The Danish rarely practiced judicial review of the constitutionality. Its functioning is also influenced by the fact, that the sources of law are not arranged in a clear structure in the doctrine of any specific branch of law (*Retsskilderne*). This unlike in other Nordic countries where different sources are arranged in defined hierarchical relations to each other.¹⁰⁴ Perhaps, for this reason it is not possible to present any completely clear priority in the order of the sources of

97. However see Zhale, *supra* n. 94, at 54.

98. Zahle, *supra* n. 93, at 341. For hierarchically lower norms see *id* at 347.

99. Christensen, *supra* n. 95, at 130.

100. Birth of this legal praxis was influenced by cases from 1921 (U 1921.153 and U 1921.169), which were concerning expropriation and property rights. See also Zahle, *supra* n. 93, at 332-36, 340.

101. The cases have been, mostly, about the Basic Law's 73 § which concerns the expropriation and compensation which are disputes that can be brought to court according to the Basic Law (73 § stk. 3: "*Enhvert spørgsmål om ekspropriationsaktens lovlighed og erstatninges størrelse kan indbringes for domstolene.*")

102. Krarup, *supra* n. 94, at 131-34.

103. Zahle, *supra* n. 93, at 336-37.

104. See Peter Blume, *Tanskan oikeus* 825 in *Encyclopaedia Iuridica Fennica* VI 823-33 (1998).

law.¹⁰⁵ In the control of the constitutionality of the laws the highest source of law is naturally the Basic Law, but in practice, the Supreme Court has avoided the review of the constitutionality of the laws, especially when the character of the actual case is seen to be of a political nature. In its own praxis the Supreme Court has operated with such provisions of the Basic Law, of which the application has not appeared to present any risk of the Court becoming politically involved.¹⁰⁶ There might have become possible changes to the Court's cautious basic line though, as a result of the *Tvind* case in the beginning of 1999.¹⁰⁷

The *Tvind*-case was a matter of influence of a law, legislated by Parliament; (nr. 506 12. June, 1996) of the position of Danish (private) free schools, which was altered, so that some of them (those, which were connected to *Tvind* school association) were left without economic support due to the decision made by the Ministry of Education based on the above mentioned law. *Friskolen i Veddinge Bakker*, a member of the *Tvind* school association, appealed against the judgement and the last instance was against the law's provisions- the Supreme Court. The decision of the Ministry of Education was based up on a law legislated by Parliament, a law of which 7 § the Supreme Court declared contradictory to 3 stk of 3 § in the Basic Law, because the previously mentioned regulation of Grl was considered as setting certain limits (*visse grænser*) of how far the actions of legislative powers can interfere with the legal status of citizens (and of the separation of judicial and executive powers).¹⁰⁸

It is still partly unclear if the decision of the *Tvind* case results in a change of the constitutional-policy in the Danish model of the control of the constitutionality of the laws, or if it is just a matter of an individual case. When both EU membership and ECHR, and the their influences on Danish jurisprudence are taken into account,¹⁰⁹ a change in the legal direction towards a more active judicial review of the constitutionality of the laws in the courts could turn out to be a continuous development trend. Regarding these changes, external factors that affect the trends in this development, with respect to the similarity of the national doctrines are much the same as in Sweden.

105. W.E. von Eyben, *Juridisk Grundbog (Retsskilderne)* 20-21 (1991). See also Zahle, *supra* n. 93, at 331.

106. However, the discussion around the ratification of the Maastricht-treaty is, perhaps, an evidence that points to other direction.

107. Krarup, *supra* n. 94 at 133-34.

108. *Udskrift af Højesteretts Dombog*. Dom I 295/1998 p. 6 and 8. The lower court (*Østre landsret*) referred in its ruling (13th May 1998) to the hesitant position of constitutional scholarship about the question whether the 3 § could set these type of legal limits to the legislator (p. 14). The lower court judged differently than Supreme Court i.e., the provision of law was not held as unconstitutional (mainly on the grounds of *travaux* p. 15).

109. See Blume, *supra* n. 104, at 831-32.

4. COMPARISON—DIFFERENCIES AND SIMILARITIES

On the comparative information found in the country-specific studies it is possible to assemble the following compressed table, which is based on the theoretical frame from section 2.1. The table is general in character, or it includes a rough extract of the result of the comparison, which is then analyzed and evaluated in detail in the following text. The aim is reaching a deeper comparative understanding (than the extract initially presented here) which is, by its very nature, a comparative synthesis.¹¹⁰ In the latter observation it is enhanced also by the contextual frame presented in section 2.2. concerning the general legal culture in the Nordic countries.

TABLE 2: BASIC SOLUTIONS IN CONTROLLING THE CONSTITUTIONALITY OF LAWS IN FOUR NORDIC COUNTRIES: INITIAL COMPARATIVE FRAMEWORK.

Problem	National Solutions			
	Norway	Sweden	Finland	Denmark
Point of Time	R	R	P+R	R
Control organ	C	C+NC	NC+C	C
Nature of Control	K	K	A+L	K
Organisation of Control	H	H	S(+H)	H
Basis of Control	A+D	N	N+D	D

Symbols: R=Ex post facto, P=Preventive, C=Court, NC=Non-Court (other public organ), K=Concrete, L=Abstract, H=De-centralized, S=Centralized, D=Doctrine, N=Norm (codified rule) and A=Courtpractice.

Point of Time for the Control

In all other Nordic countries, except Finland, the control (or the priority-principle of the Basic Law) has been emphasized by the *ex post facto* control. The Finnish model has earlier been based on emphatically preventive control, but 106 § in the new Basic Law, similar to the Swedish model, includes the possibility, mostly technical, of a subsequent control in the courts so that, it is aimed that the focus of control to be still kept within the preventive control of the Parliament. The general cautiousness unites Finland, Sweden and Denmark in a common constitutional basic idea, though the solutions in connection to the arrangements of control are technically different from each other.¹¹¹

110. The aim here is to do what Zweigert & Kötz, *supra* n. 5, at 44 present in following way: “.when the process of comparison begins, each of the solutions must be freed from the context of its own system and, before evaluation can take place, set in the context of all solutions from the other jurisdictions under investigation.”

111. However, it should be noted that ECHR harmonizes even the Nordic systems of basic rights, although the technical-legal solutions may differ. Especially important position has the praxis of European Court of Human Rights, which gives concrete legal content to the loose expressions of the Articles in the Convention. See for more

The model of the control of the constitutionality of Norwegian Law represents the most active model (judicial activism) in Nordic comparison, but when compared to the U.S., there are typical Nordic features, which can largely be explained by the parliamentary focus in the Norwegian system. Another explaining factor for the Norwegian Supreme Court not being as strong as the American Federal Supreme Court, is that Norway is a uniform state, and thus it is not natural part of the duties of the Supreme Court in Norway to resolve collision situations in relations between the organs or the legislations between states and the Federal state.

Despite the differences, a unifying factor of the Nordic countries seems to be that the position of Parliament is constitutionally seen as central, which means that there has been no desire from the courts to truly challenge a legislative organ that is elected in democratic elections. In all systems studied, except perhaps Norway, there is a strong presumption of conformity concerning the constitutionality of the laws legislated by Parliament.

Because of this, political legitimation theory that is, unpronounced, connected to Constitutional Law seems in these parts to be of a similar nature.¹¹² When it comes to the constitutional mentality of the judges, there seem to be Common Law-like elements in Norway which emphasize the independent position of the courts, when in the other Nordic countries studied (especially in Finland and Sweden) the courts are more passive in this respect (judicial self-restraint). Denmark is situated somewhere in between. The reason for the Norwegian diversity can be found in one central factor, which is the age of the Basic Law and the problems related to it. All branches of the government try to solve these problems caused by the antiquated Basic Law by creating their own praxis that complements the Basic Law, so the control must proceed from a mere formal control towards a clearly substantive one.

The Nordic countries seem to be divided into two country pairs, which are Finland/Sweden and Denmark/Norway. The systems in these pairs are closer to each other, though the differences between the pairs are not very pronounced. Regarding Finland and Sweden, it is a matter of a codified priority norm (in collision the lower norm must step aside *in casu*), while the judicial-review-type control in Denmark and Norway is based on an un-codified norm, which is strengthened especially by the Supreme Courts praxis.

details e.g., P. van Dijk & G.J.H. van Hoof, *Theory and Practice of the European Convention of Human Rights* (1990).

112. Also Robert S. Summers and Michelle Taruffo are using the political theory as an aid while explaining the differences and similarities in statutory interpretation. *Interpretation and Comparative Analysis* 463. In *Interpreting Statutes*, at 496-508.

Controlling Organ

In all Nordic countries except Finland the control of the constitutionality of the laws is in principle accentuated in the courts, even though the control function in Sweden and Denmark is very cautiously used and carried out in way that respects Parliament. In Finland control is concentrated to the PeV, which as its virtual character, is very close to a quasi-constitutional court, as it functions in a judicially emphasized way (freedom from parliamentary group discipline, stable courses of action and particularly the conventionally strong position of the constitutional experts). The Finnish Parliamentary Constitutional Committee could functionally be paralleled with the French Constitutional Council rather than with the Swedish equivalent, which cannot be considered a functional equivalent to the Finnish PeV.¹¹³ If note is taken of the desire of the courts in other Nordic countries, to stress the opinions of the Parliament and the *travaux* of the legislation in interpretation questions, it is seen that the differences are not very extensive, despite different technical methods of arranging control of the constitutionality of the laws.

The Nordic countries lack the American Supreme Court system's or the BverfG's extremely powerful and deeply respected "super courts," although the Supreme Courts in the Nordic countries also receive considerable respect in their own countries. This might be partly linked to the fact, that in the studied systems there does not seem to appear any strong desire from the courts to challenge the legislator's own interpretations (when they are explicit) of the constitutionality of the laws. In these parts the method concerning the application of laws shows similar features in matters linked to the constitutionality of laws, which means avoidance of conflicts and a strong aim to reach harmony (i.e., constitutional conformity). If the Nordic countries are compared to other systems, the function of the control organs is in all observed countries closer to such solutions, where the courts do not willingly operate with so-called political questions, but try to keep politics and law apart. In this respect the Nordic countries are closer to the U.S. than the solution model based on the German BverfG or other Continental constitutional courts.¹¹⁴

Nature of Control

Regarding the type of control it is, in principle, possible to carry out a concrete *ex post facto* control in all studied countries, but in Finland the abstract and preventive control is emphasized. Not one system in the Nordic countries includes such abstract and preventive

113. However, the French Constitutional Council has no established procedure as the PeV does. See L. Neville Brown & John S. Bell, *French Administrative Law* 14-24 (1998).

114. See also Bull, *supra* n. 69, at 71-72 and 81-83.

control that is executed by the constitutional courts in Continental Europe (e.g., Germany, Italy and Austria). 106 § in the new Finnish Basic Law will relieve the principal abstract features of the Finnish system, that allowed the courts (and other authorities) to profit from opinions of the PeV. This is an effort to perform a constitutional interpretation of ordinary parliamentary laws and lower regulations. The same effort is also seen in other Nordic countries.¹¹⁵ In practice this means that the *de facto* normative recommendations in the interpretations of the Committee for Constitutional Law will be utilized by the courts when actual cases are being judged, so that the difference between the abstract and concrete control is, mainly, in principle significant. Also in Denmark they seem to pay systematic attention, from a judicial point of view, to the constitutionality of the laws as a part of the law-drafting process.

The functioning of the Swedish Parliamentary Committee of the Constitution after 1979 tends to point in the direction that, when the system concedes on the level of written law, the courts have the right to subsequent control of the constitutionality of the laws, there might follow changes in the preventive control, which for its part can mean weakening of judicially orientated preventive control. Conclusions cannot be directly drawn in this respect about Sweden in relation to Finland, because the Parliamentary Committee of the Constitution in Sweden has never had the same position as the one in Finland has had for a long time.¹¹⁶ In all studied countries, except in Finland, a decentralized control model is being used, but in the new Basic Law, a subsequent control option has also been adopted similar to Sweden, so in the future the centralized and preventive nature of the Finnish system might become weaker. In fact, the illuminating factor of the Finnish system, or the special institution of exceptive law in the comparative viewpoint, widely explains the causes of the Finnish model, and it can also in the future protect the centralized and preventive nature of the control.

The way the control is arranged in Sweden is different from other Nordic countries in one peculiar point. In Sweden the most decentralized model of the control of the constitutionality of the laws is used. As the only Nordic country, it gives the power to execute a, to its characteristics, a limited judicial review of the constitutionality of

115. Constitutional-conform interpretation (*Verfassungskonforme Auslegung*) does not necessarily include judicial review of legislation. It can work also as a guiding principle of interpretation which does not include competency to strike down or invalidate an unconstitutional provision of law. This principle can also be utilized when filling up the gaps in necessary process of interpretation. So one can find different degrees of this doctrine: e.g., Finnish system represents the weaker version and e.g., German system represents the stronger version.

116. Neither the Swedish *lagrådet's* position can be compared to Finnish PeV (e.g. the differences concerning members and process), although *lagrådet* fulfills, to some extent, similar functions. See Nergelius, *supra* n. 68, at 34-36, 714-18.

laws also to all other public organs, not just courts. In this respect the solution model transplanted to Finland is different, since in Finland it enables a subsequent review of the constitutionality of the laws only in courts. In practice, Swedish control is concentrated in the Supreme Administrative Court and the Swedish Supreme Court, of which the latter has so far been unwilling in its praxis to initiate a more active review of the constitutionality of laws.

Organization of Control

In Norway and Denmark the control power is *de facto* concentrated in the Supreme Courts. Both Norway and Denmark lack special administrative courts, which seems to support the idea that when the control power is centralized to one judicial organ, it is easier for this particular organ to take stand against the legislator if it is a question of a clear (especially substantive) disagreement concerning the constitutionality of the laws (the *Kløfta* and *Tvind* cases). In addition, it is worth noticing, that Norway and Denmark lack accurate and codified legal qualifications for the option to executing control. (In accordance with the regulation in Finland and Sweden, displacement of the law demands an *expressis verbis* provision, an obvious conflict. Denmark doctrine and praxis have required the same). When the judicial power is decentralized between two competing Supreme Courts, as in Finland and Sweden, it is probably more difficult for the courts to challenge the constitutionality of laws in a parliamentary system that is only partly based on the principle of separation of powers.¹¹⁷

Despite certain differences, they do not seem to be very extensive when the fundamental questions of centralization/decentralization are considered. On basis of the country specific observations this seems to be connected to the fact that the control of the constitutionality of the laws and the putting aside of a law, legislated by Parliament are in these systems experienced as an uncommon (or unparadigmatic) function in a unusual situation, of which the routine hearing in whichever court seems to conflict with the parliamentary concentration of the Nordic systems (note: it is still a question of uniform states in all cases, so there is no need to solve conflicts between the Federation and the states¹¹⁸). In Norway, that represents the

117. In the Nordic systems the separation of powers is based on codified constitutional rules (i.e., provision(s) of Basic Law), not only on legal tradition as in the Common Law tradition (except in USA). See also Shapiro, *supra* n. 14, at 32.

118. E.g., the case of Belgium shows, that the need which arises of different legislative bodies (in Belgium Parliament and Communities and Regions) acting separately, can be resolved effectively by some form of judicial review. Although, after 1948 the Council of State's one section (*Section de Législation*) had exercised a type of preventive control a new Constitutional Court was established (*Cour d'Arbitrage*). The court was formed in 1984 and it exercises abstract, concrete, preventive and *ex post facto*

most active court control in this comparison, the respect for the Parliament is still seen in the restraints (in the decision of the *Kløfta* case), which are connected to the court control of the constitutionality of the laws (questions regarding relations between different organs of the government and the distribution of powers are not judged, but the precondition for the control is that there are connections to violations of individual rights).

Basis of Control

The control of the constitutionality of the laws is based on a doctrine in both Norway and Denmark. However there is a difference: the doctrine in Norway is supported by a firm judicial praxis, especially by the 1976 *Kløfta*-judgement. In Denmark, the control is rarely and cautiously executed, and the whole idea of the control is for the most part based on doctrines accepted in constitutional literature, which has supported a court praxis where the provisions of the laws have not been passed on the basis of colliding with the Basic Law, even though the existence of the review power is in principle accepted at a doctrinal level. The *Tvind*-case, decided in the beginning of 1999, could in fact, be an indication for Denmark moving from a model, like Sweden, to a more active control as in Norway.

When the written Constitution, and especially formal Basic Law, lacks an explicit norm ground (provision of law), it seems that the courts, and especially the Supreme Courts (which indivisibly use highest judicial power), can make their own interpretations and constitutional policy, which form a framework, within which legal activism or judicial self-restraint can be chosen. The loose text in the Basic Law increases the flexibility of the courts in these respects, which is obvious in the Norwegian case. In contrast, in Finland and Sweden, where the court control is based on written regulations, there seems to be less space for legal activism, especially when the courts function within the frames of a parliamentary and modern written constitutional system. Additionally, both Finland and Sweden have the highest judicial power, which is divided between the general and the administrative courts,¹¹⁹ and that there seems to be a more civil service mentality prevailing among the judges in Finland and Sweden,

form of judicial review. See André Alen (ed.), *Treatise on Belgian Constitutional Law* 108-15 (1992).

119. In Finland and Sweden the Supreme Administrative Courts (KHO and *Regeringsrätten*) or lower administrative courts cannot be seen as continuation of the machinery of public administration. These courts are basically like any other court; they are independent while using judicial power. The main exception, to my mind, is that they are specialised in dealing with cases of administrative nature. In this respect the French Supreme Administrative Court (*Conseil d'Etat*) is different. See Brown & Bell, *supra* n. 113, at 62-82.

than in Norway and Denmark, a breakthrough of legal activism seems improbable in the present situation in these countries.

Other Points

As a result of the comparison, at least two extra unifying features have appeared. The first is connected to the contexts and types of cases which cause questions about the constitutionality of the laws to arise. In all observed Nordic countries the control seems to be actualized in situations connected especially to proprietary right and general property rights (in particular to redemption and question of so called full compensation). This probably cannot be explained only through matters linked to the Nordic countries, since it is a question of a wider context, which has also appeared in other systems and legal cultures, for instance, U.S.¹²⁰ Instead such discussions and main themes, which have been prevailing in American constitutional jurisprudence, have not been emphasized in connection with the constitutionality of the laws in the Nordic countries.¹²¹

A second extra unifying feature is connected to the question, what happens to those laws containing norm(-s) which are interpreted as being in collision with Basic Law? All the Nordic countries the same results: The law (or more precisely a provision in the law) is still *de jure* valid law. None of the review organs possesses competency to invalidate laws enacted by Parliament. The possible outcome of this limited review is invalidation of law's provision only *in casu*, i.e., leave the colliding law unapplied only in the case at hand. This seems to be, again, a feature which is tightly connected to the parliamentary character of the Nordic systems.

5. DISCUSSION AND CONCLUDING REMARKS

Despite the differences in the systems of the control of the constitutionality of the laws, a specific "Nordic cautiousness" unites the Nordic countries, and it is evident particularly in Finland, Sweden and Denmark. Norway seems to have the strongest court based *ex post facto* control (judicial review), while the other extreme is represented by Finland. When common general features of the countries studied are observed it is, in fact, not hard to understand why there are so many similar features—despite certain technical differences—in practice and in the ideas concerning the central function of controlling the constitutionality of the laws. The previously mentioned gen-

120. E.g., famous (and still debated in scholarship) Supreme Court's landmark case in 1905 *Lochner v. the State of New York* 198 U.S. 45.

121. E.g., in USA the basic frontlines stand between so-called 'originalists' and 'non-originalists'. The major difference concerns the position of the text (i.e., the wording of the rules) of the Constitution; how much it restricts the contemporary interpretation. See for more e.g., Erwin Chemerinsky, *Interpreting the Constitution* (1987).

eral features include: Lutheran Protestantism as a general ethical and moral reference frame for the legal system, the advanced economic development, multiparty system, political stability, geographical proximity and the particular unifying feature of all systems, which is the central position of Parliament. Discussing the Nordic legal family or legal culture is meaningful in this article for the observed parts and also from a constitutional point of view.

In the doctrine of the sources of law, the most central observation seems to be that the *travaux* of the legislation is important in matters concerning the constitutionality of the laws. Independent of the age of the Basic Law or formal form of government, the legislator's own opinions are considered paradigmatically central in all Nordic countries.¹²² In the constitutional basic idea there does not seem to be remarkable differences, though the Finnish exceptive law is a peculiarity for the Finnish system with its historical reasons.¹²³ Norway and Finland seem to be furthest from each other, though the practical differences in substantive legal questions (e.g., constitutional protection of property rights) are not that extensive. In prosperous, politically and democratically stable parliamentary conditions, the main uniting factor has on the basis of this investigation been the "Nordic constitutional principle of cautiousness," which is supported through interpretation and other methods, so conflicts between laws and the Basic Law can be avoided rather than underlined.¹²⁴ Even though similar characteristics are found in other countries (i.e. in Italy, France, U.S., and Germany), the cautiousness in the control of the constitutionality of laws seems to be the paradigmatic and typical feature of the systems in the Nordic Countries.¹²⁵

Since there are both external and internal pressure towards new ideas in all member states of the EU (Sweden: internal criticism, Finland: new Basic Law, Denmark: the *Tvind*-case), it is difficult to predict in which direction the Nordic "cautiousness principle" will develop in the future. The Norwegian connection to the "cautiousness principle" is quite weak anyway, so the systems of control of the constitutionality of the laws in all observed countries could develop to-

122. This might be understood something which Zweigert & Kötz, *supra* n. 5, at 69-71) are referring as 'a distinctive mode of legal thinking' in the area of constitutional law.

123. For detailed analysis see Jyränki, *supra* n. 47, at 403-71.

124. This feature is not typical only for the Nordic countries. Similar features can be found also from e.g., Canada and Japan. See Beatty, "Protecting Rights in Japan and Canada," 42 *Am. J. Comp. L.* 535-50 (1994). The so-called "political question-theory" is also known in countries where the courts are applying more actively constitutional judicial review as in e.g., USA.

125. See *Interpreting Statutes* 101, 195, 249, 443 and 451. In the UK the constitutional interpretation is effected by Community Law and European Convention of Human Rights (as in all ECHR countries) (*id.* at 398).

wards stronger juridification (*ex post facto* and concrete control) and more judicial activism by the courts in the future.¹²⁶

The development is, however, not solely dependent on national factors, because particularly the constitutional development in an integrated Europe (including both Community Law and ECHR) is in a central position in this respect. The importance of the development of the EU leads directly to the conclusion, that in all member states of the EU a part of the control of the constitutionality of the laws is *de facto* a growing matter of control between national and Community Law, which is executed by the European Court of Justice in relation to the "Constitution" of the EU. It is quite problematic to apply the interpretation methods used in the EC-court and its doctrines in general to the Roman-German legal family and especially to the parliamentary flavored Nordic Countries.¹²⁷

126. However as David, *supra* n. 38, at 22 says changing deeply the legal system is always difficult because the systems are rooted in culture and culturally characteristic ways of thinking.

127. ECJ's role as judicial law-maker is especially problematic from the Nordic point of view. See Jaakko Husa, *Constitutional Foundation of the Legal System and Community Law* 125-49 (1999).