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Tensions in Finland's ex ante constitutional review: The interplay of politics, law, and media

Maija Dahlberg* and Anu Kantola**

Constitutional review has become increasingly subject to heated political debates and struggles. While the constitutionality of laws is often reviewed after the laws have entered into force (ex post), this article examines an ex ante constitutional review assessing the political tensions and struggles typical of it. We examine the Finnish experience, drawing on forty-nine semi-structured interviews among key actors involved in the work of the Constitutional Law Committee (CLC) of the Finnish Parliament, which controls the constitutionality of laws before they enter into force. We find that tensions between law and politics are an important element of the ex ante constitutional review and show how they emerge in the work of the CLC and how the key actors involved in the review seek to control and manage them. We also suggest that the political tensions surrounding the ex ante review have intensified in recent decades and find three main reasons for this development. First, as constitutional and human rights have found their way into an increasingly wide range of political matters, political tensions in constitutional assessment have been aggravated. Second, external legal experts have begun to play a more prominent and public role in the review process, adding to the public tensions relating to constitutional interpretation. Third, the media and journalists have become increasingly interested in constitutional questions, which further inflames tensions. As a result, we suggest that scholars should increasingly explore and make transparent these de facto practices in constitutional review.

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1. Introduction

In recent decades, constitutional reviews have become subject to heated political debates that often entail conflicts between law and politics.¹ Some fear that political issues are being translated into legal ones and are being decided by courts instead of politicians.² Others suggest that laws may become politicized.³ Scholarly work has also recognized that it is not only *de jure* constitutional provisions that matter in constitutional reviews, but also the *de facto* practices in interpreting the constitution.⁴ This article contributes to this body of research by exploring *de facto* practices in an *ex ante* constitutional review, which assesses the constitutionality of legislation in parliament *before* the law enters into force.

In this article, we investigate the *ex ante* constitutional review in Finland, which takes place primarily within the Parliament *before* the legislation enters into force. The *ex ante* system, a feature of several European countries, deviates from more common systems in which either constitutional or apex courts assess the constitutionality of legislation after it has entered into force. For instance, in the United States, the Supreme Court plays a central role in judicial review, which takes place after the legislation has entered into force.⁵

The non-judicial *ex ante* system reflects the tensions between law and politics that are *de facto* present in judicial *ex post* reviews.⁶ In essence, both systems seek, and often also struggle, to maintain a balance between democratic politics and constitutional law. Most legal systems provide possibilities for both *ex ante* and *ex post* constitutional reviews. The *ex ante* system is perceived as a more easily politicized system in comparison to the more concrete *ex post* review. This is because an *ex ante* review is often conducted by a non-judicial body, which assesses a proposed law before the parliament has accepted it. In addition, in an *ex ante* review, the opposition may be tempted to frame disputed political issues as constitutional questions in order to postpone the

¹ Victor Ferreres Comella, *The Rise of Specialized Constitutional Courts*, in *COMPARATIVE CONSTITUTIONAL LAW* 265 (Tom Ginsburg & Rosalind Dixon eds., 2011); Tom Ginsburg, *The Global Spread of Constitutional Review*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 81, 82–7 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008); Michael Hein, *Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoretical Approach*, 3 *STUD. IN TRANSITION STATES & SOC'YS* 3 (2011); ON LAW, POLITICS AND JUDICIALIZATION (Martin Shapiro & Alec Stone Sweet eds., 2002).

² See, e.g., Ran Hirschl, *The New Constitutionalism and the Judicialization of Pure Politics Worldwide*, 75 *FORDHAM L. REV.* 721 (2006).

³ See, e.g., COURTS, POLITICS AND CONSTITUTIONAL LAW: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF THE JUDICIARY (Martin Belov ed., 2020); Ran Hirschl, *The Judicialization of Politics*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 119 (Gregory A. Caldeira, R. Daniel Kelemen, & Keith E. Whittington eds., 2008).

⁴ See, e.g., Stefan Voigt, *Mind the Gap: Analyzing the Divergence between Constitutional Text and Constitutional Reality*, 19 *INT'L J. CONST. L.* 1778 (2021).

⁵ Tom Ginsburg & Mila Versteeg, *Why Do Countries Adopt Constitutional Review?* 30 *J. L. ECON. & ORG.* 587 (2014); MAARTJE DE VISSER, *CONSTITUTIONAL REVIEW IN EUROPE: A COMPARATIVE ANALYSIS* (2014); Maartje De Visser, *Nonjudicial Constitutional Interpretation: The Netherlands*, in *CONSTITUTIONALISM IN CONTEXT* 216 (David S. Law ed., 2022).

⁶ See, e.g., Luís Roberto Barroso, *Countermajoritarian, Representative, and Enlightened: The Roles of Constitutional Courts in Democracies*, 67 *AM. J. COMP. L.* 113 (2019); Peter M. Huber, *Constitutional Courts and Politics in the European Legal Space*, in 4 *THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW* 547 (Armin von Bogdandy, Peter M. Huber & Christoph Grabenwarter eds., 2023).

proposed legislative bill or even hinder its entry into force. Thereby, the constitutional review may become subject to a political game.⁷

Thus, it is important for constitutional studies to scrutinize the de facto practices of both *ex ante* and *ex post* constitutional reviews across various legal systems. While multiple studies have explored the de facto practices of judicial reviews,⁸ the actual practices of *ex ante* non-judicial systems have been studied less.⁹ To this end, we examine the de facto practices of the *ex ante* non-judicial constitutional review in Finland by exploring the work of the Constitutional Law Committee (CLC) of the Finnish Parliament, which is the authoritative interpreter of the Constitution and reviews laws before they enter into force. The Finnish CLC consists of Members of Parliament (MPs), who come from all parliamentary parties and assess the constitutionality of proposed laws. The MPs are aided by legal experts, whom the CLC secretaries invite to give their statements. Drawing on forty-nine semi-structured interviews with key actors involved in the work of the CLC—MPs, secretaries, and legal experts—we explore how political tensions and struggles between law and politics materialize in the *ex ante* non-judicial review and how the actors involved seek to manage them to safeguard the legitimacy of the assessment.

We find that tensions between law and politics are an important element of the *ex ante* constitutional review, and we show how these tensions emerge in the work of the CLC and how the key actors involved in the review seek to control and manage them. Our findings show that most CLC actors acknowledge the growing pressures in their work and the need to safeguard the review process from them. The de jure perspective alone does not sufficiently explain how constitutional review is undertaken in the Finnish *ex ante* system; the de facto processes of the CLC are also an important element of the system. As the system involves politicians, civil servants, and academic constitutional experts, they all play an important role in the process, which seeks to interpret the Constitution in matters which are often highly political. In their work, all these actors monitor and manage the tensions between politics and law in order to help the CLC remain neutral in completing its tasks.¹⁰

We also suggest that the political tensions surrounding the *ex ante* review have intensified over recent decades and identify three main reasons for this trend. First, as constitutional and human rights increasingly permeate a wide range of political issues, political tensions in constitutional assessments have been escalated. Second, external legal experts have begun to play a more prominent and public role in the

⁷ See, e.g., Maartje De Visser, *Constitutional Courts Securing Their Legitimacy: An Institutional-Procedural Analysis*, in 4 THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, *supra* note 6, at 223, 230–1; Christine Landfried, *Constitutional Review in the European Legal Space: A Political Science Perspective*, in THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, *supra* note 6, at 591, 604–5.

⁸ See, e.g., Voigt, *supra* note 4; Doreen Lustig & Joseph H.H. Weiler, *Judicial Review in the Contemporary World: Retrospective and Prospective*, 16 INT'L J. CONST. L. 315 (2018).

⁹ Cf. de Visser, *supra* note 5.

¹⁰ See also Conference: *Courts as an Arena for Societal Change*, Leiden Law School, July 8–9, 2022, <https://leidenlawblog.nl/articles/courts-as-an-arena-for-societal-change>; Olof Larsson, *Political and Constitutional Overrides: The Case of the European Court of Justice of the European Union*, 28 J. EUR. PUB. POL'Y 1932 (2021); Federico G. Thea, *The Role of Judges in Political Struggles* 2 QUEEN MARY L.J. 57 (2012).

review process, adding to the public tensions relating to constitutional interpretation.¹¹ Third, the media and journalists have shown growing interest in constitutional questions, further exacerbating tensions.

Our article contributes to methodological discussions by employing qualitative interview data to examine the practices of constitutional institutions.¹² By drawing on confidential interviews with key actors, we demonstrate that qualitative interviews can provide substantive insight into the de facto realities and tensions of constitutional interpretation.

The rest of this article is structured as follows. First, employing theories of constitutionalism, judicialization, and mediatization, we formulate our research questions. Second, we describe the empirical data and methods. Third, we present the results of the analysis. Fourth, we draw conclusions.

2. Political struggles and constitutional interpretation

Legal theory has maintained that constitutional interpretation should remain unaffected by politics, with judicial deliberation employing legal techniques that are “above and beyond political struggles.”¹³ As a matter of fact, constitutional review’s independence from political processes and direct political influence has been argued to be at the heart of constitutional adjudication.¹⁴ Consequently, legal research has primarily focused on the formal reasoning of the judiciary, paying less attention to the informal and external factors that might impact judicial decision-making.¹⁵

At the same time, however, constitutional interpretation often involves political tensions and struggles. A constitution is both a legal and a political document. Constitutions usually regulate politically important issues, such as the powers of the parliament, the government, and the president; the protection of fundamental rights; and the division of competences between supranational and national legal systems. In addition, constitutional interpretations often touch on politically and societally

¹¹ DAVID KENNEDY, *A WORLD OF STRUGGLE: HOW POWER, LAW, AND EXPERTISE SHAPE GLOBAL POLITICAL ECONOMY* 11–3 (2016).

¹² See, e.g., Niels Petersen, *Avoiding the Common-Wisdom Fallacy: The Role of Social Sciences in Constitutional Adjudication*, 11 INT’L J. CONST. L. 294 (2013); Niels Petersen & Konstantin Chatziathanasiou, *Empirical Research in Comparative Constitutional Law: The Cool Kid on the Block or All Smoke and Mirrors?*, 19 INT’L J. CONST. L. 1810 (2021).

¹³ See, e.g., LAWRENCE BAUM, *JUDGES AND THEIR AUDIENCES* (2006); MARTIN SHAPIRO, *LAW AND POLITICS IN SUPREME COURT: NEW APPROACHES TO POLITICAL JURISPRUDENCE* (1964); Thea, *supra* note 10.

¹⁴ Armin von Bogdandy, Christoph Grabenwarter, & Peter M. Huber, *Constitutional Adjudication in European Legal Space*, in 4 THE MAX PLANCK HANDBOOKS IN EUROPEAN PUBLIC LAW, *supra* note 6, at 651, 655; Hans Kelsen, *Wesen und Entwicklung des Staatsgerichtsbarkeit* [*Essence and Development of State Jurisdiction*], 5 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRICHTSLEHRER [PUBLICATIONS OF THE GERMAN CONSTITUTIONAL LAW PROFESSORS’ ASSOCIATION] 30, 55 (1929).

¹⁵ See, e.g., Orlando Scarcello, *On the Role of Normative Hierarchies in Constitutional Reasoning: A Survey of Some Paradigmatic Cases*, 31 *RATIO JURIS* 346 (2018); Eveline Feteris & Harm Kloosterhuis, *The Analysis and Evaluation of Legal Argumentation: Approaches from Legal Theory and Argumentation Theory*, 16 *STUD. IN LOGIC, GRAMMAR & RHETORIC* 307 (2009).

important matters, such as abortion, the fight against terrorism, migration, budgetary laws, and the constitutional balance between freedom of religion and state neutrality.¹⁶

Accordingly, politics may become judicialized and courts may become politicized. With the judicialization of politics, political questions are translated into legal ones that are decided by courts instead of politicians.¹⁷ Some even argue that democracies can turn into “juristocracies,” where political and societal struggles are transformed into judicial matters to be decided by judges.¹⁸ Alternatively, laws may become politicized,¹⁹ and judges may become policymakers.²⁰ Empirical studies have shown that judicial reviews may be influenced by political or extra-judicial factors.²¹ While most of the empirical evidence comes from the United States, some studies on European systems point to the same conclusion.²² Thus, it is not always easy to keep political questions out of constitutional interpretation.

2.1. Political struggles in *ex ante* review

This article analyzes how political tensions manifest in an *ex ante* non-judicial constitutional review, which takes place before laws enter into force. In most countries, courts conduct constitutional reviews of laws *after* they have been enacted. The arrangements differ slightly across countries. In Europe, constitutional courts generally carry out this task, while in the decentralized US model, ordinary courts conduct the reviews.

In *ex ante* reviews, political branches are usually responsible for constitutional reviews of forthcoming legislation. In some countries, the Minister of Justice (in Canada) or the Attorney General (in New Zealand and Ireland) oversees the constitutionality of upcoming legislation, while in other countries, permanent parliamentary committees (e.g., in the United Kingdom, Finland, and Sweden) are in charge of *ex ante* reviews. However, it is important to note that in most countries where *ex ante* review exists, *ex post* judicial review also exists and complements the constitutional

¹⁶ See, e.g., ALEC STONE SWEET, *GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE* (2000); MIGUEL NOGUEIRA DE BRITO & LUÍS PEREIRA COUTINHO, *THE POLITICAL DIMENSION OF CONSTITUTIONAL LAW* (2020).

¹⁷ See, e.g., Hein, *supra* note 1; Hirschl, *supra* note 2, at 721.

¹⁸ KENNEDY, *supra* note 11, at 198; RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 222–3 (2004); Oumar Ba, *The Court Is the Political Arena*, *AFR. J. INT'L CRIM. JUST.* 174 (2015).

¹⁹ See, e.g., COURTS, POLITICS AND CONSTITUTIONAL LAW: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF THE JUDICIARY, *supra* note 3; Hirschl, *supra* note 3.

²⁰ See, e.g., Anne Bloom, *The “Post-Attitudinal Moment”: Judicial Policymaking through the Lens of New Institutionalism*, 35 *LAW & SOC. REV.* 219 (2001); DAVID ROBERTSON, *THE JUDGE AS POLITICAL THEORIST: CONTEMPORARY CONSTITUTIONAL REVIEW* (2010).

²¹ See, e.g., Thea, *supra* note 10; Austin Lovegrove, *Public Opinion, Sentencing and Lenience: An Empirical Study Involving Judges Consulting the Community*, *CRIM. L. REV.* 769 (2007); Gregor Maučec & Shai Dothan, *The Effects of International Judges’ Personal Characteristics on Their Judging*, 35 *LEIDEN J. INT’L L.* 887 (2022).

²² See, e.g., Erik Voeten, *The Impartiality of International Judges: Evidence from the European Court of Human Rights*, 102 *AM. POL. SCI. REV.* 417 (2008); JOSEPHINE DE JAEGERE, *JUDICIAL REVIEW AND STRATEGIC BEHAVIOUR: AN EMPIRICAL CASE LAW ANALYSIS OF THE BELGIAN CONSTITUTIONAL COURT* (2019).

review process as a whole.²³ Overall, constitutional reviews across systems typically involve the same basic tensions between the political and legal aspects of the reviews.

In any legal system based on the rule of law, conflicts between law and politics in constitutional adjudication are almost inevitable. This becomes particularly apparent when reviewing the constitutionality of legislation.²⁴ During the *ex ante* review, these tensions manifest as the system seeks to balance constitutional requirements with the politically elected legislator's will during a strictly timed, and often politically charged, legislative process.²⁵ Political conflicts often center on the *ex ante* review, since the parliament has not yet ratified the statute when its constitutionality is assessed. A vigorous and ongoing political debate about draft legislation may complicate efforts to convince parties and the public that the outcome of the *ex ante* review is legally justified. The *ex ante* review is particularly susceptible to criticism or complaints within parliament or the media that constitutional adjudication is "politicized."²⁶ Indeed, the *ex ante* review has been described as a "quasi-legislative" action,²⁷ and the reviewing body has been called a "third chamber" of the parliament.²⁸ Due to concerns about the politicization of the *ex ante* review, it is often perceived by constitutional courts as an exception rather than the norm.²⁹

On a more positive note, proponents of the *ex ante* review argue that it enhances government accountability on constitutional issues. Parliamentary and public debates may prompt political branches to be more rights-conscious when drafting legislation and increase public awareness of rights issues. Compared to *ex post* judicial review, the *ex ante* non-judicial review may more effectively align democratic self-governance with constitutional commitments than judicial review alone.³⁰

These conflicting perspectives underscore the practical nature of constitutional reviews. In reality, constitutional reviews are social processes that involve managing both practices and political pressures. For instance, legal studies have demonstrated that most constitutional courts adopt a deferential position on complex societal and political issues such as economic crises, migration, and the fight against terrorism. Consequently, these courts often grant governments broad discretionary powers to

²³ See, e.g., De Visser, *supra* note 5; Maartje De Visser & Jaclyn L. Neo, *What Would a Pluralist Institutional Approach to Constitutional Interpretation Look Like? Some Methodological Implications*, 20 INT'L J. CONST. L. 1884 (2022); Serkan Yolcu, *East Nordic Model of Pre-Enactment Constitutional Review: Comparative Evidence from Finland and Sweden*, 26 EUR. PUB. L. 505 (2020); Thomas Bull & Ian Cameron, *Legislative Review for Human Rights Compatibility: A View from Sweden*, in PARLIAMENTS AND HUMAN RIGHTS: REDRESSING THE DEMOCRATIC DEFICIT 279 (Murray Hunt, Hayley Jane Hooper, & Paul Yowell eds., 2015).

²⁴ See e.g., Huber, *supra* note 6, at 562.

²⁵ See e.g., Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast*, 2 INT'L J. CONST. L. 633 (2004).

²⁶ See, e.g., De Visser, *supra* note 7.

²⁷ WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE 67 (2005).

²⁸ ALEC STONE SWEET, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE 108 (1992).

²⁹ SADURSKI, *supra* note 27, at 13.

³⁰ See, e.g., Conor Casey, *The Constitution outside the Courts: The Case for Parliamentary Involvement in Constitutional Review*, 61 IRISH JURIST 36 (2019); David Kennedy & Conor Casey, *Shadow Constitutional Review: The Dark Side of Pre-Enactment Political Review in Ireland and Japan*, 18 INT'L J. CONST. L. 51 (2020).

implement policies on significant issues.³¹ Similarly, in non-judicial reviews, important constitutional questions are often addressed in highly legalistic terms and resolved behind closed doors without public debate.³²

An important aspect of the de facto tensions involved in a constitutional review is the publicity of the process. Studies have shown that, in practice, the *ex ante* review may fail to foster public moral and political deliberation over constitutional rights. Often, *ex ante* reviews are conducted in secrecy, with no public documents disclosed to the parliament or the public. Furthermore, the argumentation used in the *ex ante* review mirrors the legalistic style of court argumentation, thereby sidelining the moral and political aspects of constitutional debates. Consequently, the *ex ante* review has been called a “shadow constitutional review,” serving as a parallel and opaque counterpart to the *ex post* judicial review.³³

At the same time, some argue that publicity could harm constitutional reviews. Courts in certain legal systems have been swayed by public opinion, which has influenced their constitutional interpretations.³⁴ Indeed, the media and journalism can play a role in constitutional interpretation, highlighting the need for empirical research on public opinion’s impact on judicial decisions.³⁵ Currently, many institutions, including the judiciary, are increasingly influenced by media logic and the “mediatization” of law.³⁶ Thus, the media might play an increasingly prominent role in constitutional reviews, although this influence is often ambivalent. In Finland, constitutional reviews on political matters are handled by MPs and legal advisors, ostensibly allowing the media to play a constructive role in foregrounding the constitutional issues. However, the media might also distort these processes by sensationalizing them, adding to political tension. The media often focus on legal matters that involve political controversies, potentially turning them into courtroom dramas. Additionally, social media platforms allow various actors to discuss and influence constitutional reviews.³⁷ Studies on judicial deliberation have demonstrated that judges are not immune to public opinion, and media coverage and the presence of journalists in court may sway them,³⁸ leading to concerns about

³¹ Apostolos Vlachogiannis, *From Submission to Reaction: The Greek Courts’ Stance on the Financial Crisis*, in *NEW CHALLENGES TO CONSTITUTIONAL ADJUDICATION IN EUROPE: A COMPARATIVE PERSPECTIVE* 72, 82 (Zoltán Szente & Fruzsina Gárdos-Orosz eds., 2018).

³² Kennedy & Casey, *supra* note 30.

³³ *Id.*

³⁴ Vlachogiannis, *supra* note 31.

³⁵ Michal Bobek, *Epilogue: Past and Looming Challenges to Open Justice*, in *OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY* 277, 285–6 (Burkhard Hess & Ana Koprivica Harvey eds., 2019).

³⁶ See, e.g., Bryna Bogoch & Yifat Holzman-Gazit, *Mutual Bonds: Media Frames and the Israeli High Court of Justice*, 33 *LAW & SOC. INQUIRY* 53 (2008); Daniel Joyce, *Human Rights and the Mediatization of International Law*, 23 *LEIDEN J. INT’L L.* 507 (2010); Anat Peleg & Bryna Bogoch, *Mediatization, Legal Logic and the Coverage of Israeli Politicians on Trial*, 8 *JOURNALISM PRACTICE* 311 (2014).

³⁷ Joyce, *supra* note 36.

³⁸ Hans Mathias Kepplinger, *Der indirekte Einfluss der Medien auf Richter und Staatsanwälte [The Indirect Influence of the Media on Judges and Public Prosecutors]*, in *LITIGATION-PR: ALLES WAS RECHT IST: ZUM SYSTEMATISCHEN STAND DER STRATEGISCHEN RECHTSKOMMUNIKATION [EVERYTHING THAT IS LAWFUL: THE SYSTEMATIC STATE OF STRATEGIC LEGAL COMMUNICATION]* 219 (Lars Rademacher & Alexander Schmitt-Geiger eds., 2012); Cass R. Sunstein, *If the Public Are Outraged by the Rulings, Should Judges Care?*, 60 *STAN. L. REV.* 155 (2007).

“judicial populism,” where courts may actively adopt a populist stance if the political dimensions of cases are emphasized.³⁹

In this study, we explore the *de facto* processes of the *ex ante* non-judicial review in Finland, where the judiciary has a relatively minor role and the Parliament plays a critical and unique part, with a parliamentary committee reviewing the constitutionality of proposed laws. We examine how political tensions manifest in the *ex ante* constitutional review and how the intersections between law and politics⁴⁰ become apparent as politicians, civil servants, and academic constitutional experts assess the constitutionality of legislative proposals. We pay special attention to the management of political tensions within this process, exploring how the various stakeholders perceive these tensions and strive to navigate them to uphold the legitimacy of the process. The following sections first outline the Finnish *ex ante* system, then detail our data and methods, and finally the present the findings of our research.

2.2. The Finnish *ex ante* system

The Finnish *ex ante* system differs from *ex post* systems primarily in its choice of reviewers. In Finland, MPs, as part of the CLC, take on the responsibility of constitutional interpretation. Although the CLC is composed of politicians, constitutional reviews are supposed to be carried out based on legal principles. The CLC includes members from all political parties, encompassing both opposition and government factions, with the aim to exclude party allegiances, as its decisions are ideally based on nonpartisan legal deliberation.⁴¹

This system shares similarities with the French model, where the Conseil Constitutionnel reviews laws before they are enacted. Like the CLC, the Conseil's members are not required to have legal training, and appointments are influenced by political considerations.⁴² The Conseil's decisions are final and binding; legislation deemed unconstitutional cannot be enacted. Similarly, the CLC's final assessments on the constitutionality of draft legislation carry *de facto* binding power on the Parliament

³⁹ Burkhard Hess & Ana Koprivica Harvey, *Open Justice in Modern Societies: What Role for Courts?*, in *OPEN JUSTICE: THE ROLE OF COURTS IN A DEMOCRATIC SOCIETY* 9, 44 (Burkhard Hess & Ana Koprivica Harvey eds., 2019); Diego Werneck Arguelhes, *Speaking for the People: Judicial Populism beyond Judicial Decisions*, *VERFASSUNGSBLOG* (2017), <https://verfassungsblog.de/judges-speaking-for-the-people-judicial-populism-beyond-judicial-decisions/>.

⁴⁰ See, e.g., Ferreres Comella, *supra* note 1; Ginsburg, *supra* note 1; Hein, *supra* note 1.

⁴¹ See, e.g., Kaarlo Tuori, *Verfassungsgerichtsbarkeit in Finnland [Constitutional Review in Finland]*, in 6 *HANDBUCH IUS PUBLICUM EUROPAEUM: VERFASSUNGSGERICHTSBARKEIT IN EUROPA: INSTITUTIONEN [6 HANDBOOK OF EUROPEAN PUBLIC LAW: CONSTITUTIONAL ADJUDICATION IN EUROPE: INSTITUTIONS]* 198 (Armin von Bogdandy et al. eds., 2016); Juha Lavapuro, Tuomas Ojanen, & Martin Scheinin, *Intermediate Constitutional Review in Finland: Promising in Theory, Problematic in Practice*, in *RIGHTS-BASED CONSTITUTIONAL REVIEW: CONSTITUTIONAL COURTS IN A CHANGING LANDSCAPE* 218, 227–8 (John Bell & Marie-Luce Paris eds., 2016); Maija Dahlberg, *Openness of Constitutional Review: A Comparative Analysis of How Transparency is Ensured in Ex ante Constitutional Review*, in *EUROPEAN YEARBOOK OF CONSTITUTIONAL LAW 2021: CONSTITUTIONAL ADVICE* 155 (Jürgen de Poorter, Gerhard van der Schyff, Maarten Stremmer, & Maartje De Visser eds., 2021); JAAKKO HUSA, *THE CONSTITUTION OF FINLAND: A CONTEXTUAL ANALYSIS* (2011).

⁴² See, e.g., Arthur Dyevre, *The French Constitutional Council*, in *COMPARATIVE CONSTITUTIONAL REASONING* 329–30 (András Jakab, Arthur Dyevre & Giulio Itzcovich eds., 2017).

and serve as important sources of law for the courts. This binding nature arises from a constitutional custom, rather than from a formal legal statute, guiding the Parliament to adhere to CLC's decisions on whether a bill can be passed by a simple majority as ordinary law or must undergo a qualified procedure due to constitutional conflicts.⁴³ The key procedural difference lies in the timing and influence of the reviews: the Finnish *ex ante* review encourages Parliament to consider constitutional complications while still deliberating bills, whereas the French model exercises its review after parliamentary deliberations, as the bill progresses to becoming law. Demonstrating the fine line between judicial and non-judicial reviews, the French constitutional reforms that started in the 1970s, especially the significant 2008 amendment granting the Conseil the power to conduct *ex post* reviews, have transitioned the Conseil to function similarly to a constitutional court, with the ultimate authority on constitutional matters, overriding Parliament's decisions.⁴⁴ In contrast, the Finnish CLC, which can only review draft bills and not legislation that has already been enacted, is best described as a "quasi-judicial" body.⁴⁵

In principle, Finnish courts have the authority to question the CLC's interpretations, but they rarely do so and typically adhere to the CLC's guidance. If the CLC identifies a constitutional conflict, it suggests amendments to resolve the issue. Thus, the CLC can have a considerable impact on the content of pending legislation, and its decisions may also have political ramifications.⁴⁶ As a result, the interplay between judicial and political decision-making manifests differently in the Finnish system than in countries where courts are the primary interpreters of the constitution.⁴⁷

In Finland, the CLC's secretaries, who are experienced civil servants with legal backgrounds, play an important role in the review process. They provide legal advice to the CLC and decide which constitutional law experts to consult in each case. These experts, typically professors of constitutional or public law, play a significant part in the assessment, and their opinions are generally adhered to.⁴⁸ The prominent role of these legal experts is crucial for maintaining the CLC's legitimacy; by relying on the opinions of external constitutional experts, the CLC can fend off accusations that its interpretations are politically motivated. This reliance on external legal expertise in constitutional reviews is unique internationally. In other countries, constitutional expertise typically comes from within the institution overseeing the constitutionality of

⁴³ HUSA, *supra* note 41, at 226.

⁴⁴ SOPHIE BYRON, *THE CONSTITUTION OF FRANCE: A CONTEXTUAL ANALYSIS* 141, 150 (2013); Yolcu, *supra* note 23, at 518.

⁴⁵ See, e.g., Jaakko HUSA, *Constitutional Mentality*, in *NORDIC LAW IN EUROPEAN CONTEXT* 41 (Pia Letto-Vanamo et al. eds., 2019).

⁴⁶ See e.g., Tuomas Ojanen & Janne Salminen, *Finland: European Integration and International Human Rights Treaties as Sources of Domestic Constitutional Change and Dynamism*, in *NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE: DEMOCRACY, RIGHTS, THE RULE OF LAW* 359, 360–2 (Anneli Albi & Samo Bardutzky eds., 2019); Lavapuro, Ojanen, & Scheinin, *supra* note 41, at 219.

⁴⁷ We do not contend that courts do not face political pressure. However, courts have well-established institutional and legal frameworks through which to ensure their independence, whereas the independence and impartiality of the parliamentary committee, which consists of politicians, is not guaranteed in the same way.

⁴⁸ See, e.g., Tuori, *supra* note 41; Dahlberg, *supra* note 41.

laws, and external constitutional advice is not required.⁴⁹ Crucially, where external expertise is employed, such as in the United Kingdom, the expert opinions are merely advisory and are not binding on parliamentary committees.⁵⁰

For many years, the functions of the CLC were not governed by written rules but by constitutional custom. This changed with the 1995 constitutional reform, which now outlines the CLC's powers in Section 74 of the Constitution. According to this section, the CLC is responsible for issuing statements on the constitutionality of legislative proposals and other matters under its consideration, as well as their compatibility with international human rights treaties. Formally, the CLC determines whether a bill can be passed by a simple majority as ordinary law or must undergo a qualified procedure for constitutional enactments due to a constitutional conflict. However, to avoid the use of exceptional enactments and ensure adequate protection of rights, the CLC commonly requests amendments to bills that clash with the Constitution so as to achieve their harmony with constitutional and human rights standards.⁵¹

The CLC does not have the discretion to select the cases it reviews. Instead, the government identifies constitutional issues in legislative bills being prepared, which are then referred to the CLC for review. Additionally, if constitutional questions about a bill arise during the legislative process, either the Speaker of the Parliament or the relevant parliamentary committee may refer the matter to the CLC. Thus, the threshold for sending a matter to the CLC is relatively low. For instance, in the legislative period of 2022, the CLC issued eighty-seven statements out of 328 government bills and required modifications in thirty-one statements to ensure compliance with the Constitution and/or international human rights obligations.

When a legislative proposal is submitted for review, the CLC first selects the experts to be consulted. These experts then provide written statements, which are verbally presented to the CLC. The CLC conducts its meetings behind closed doors, ensuring that deliberations and expert hearings remain confidential. However, the agenda and minutes of each meeting are published on the Parliament's website. Since 2015, the expert statements, alongside the CLC's own statements, have also been made available on the website. The CLC's decision-making process mirrors that of other parliamentary committees. Following the expert hearing, there is a preparatory discussion where CLC members guide the secretaries on drafting the statement, specifically which expert opinions to incorporate. The secretaries then prepare a draft for review. At the subsequent meeting, CLC members discuss the details of the draft and finalize the statement. Unlike other committees, the CLC strives to avoid votes and dissenting opinions, focusing instead on achieving consensus and unanimous decisions. This approach is crucial, as voting along the government/opposition lines would undermine the integrity of the Finnish *ex ante* constitutional review by revealing it as more

⁴⁹ For example, the Swedish Law Council (Lagrådet) exercises *ex ante* constitutional review and consists of current or retired judges from either the Supreme Court or the Supreme Administrative Court. See, e.g., Thomas Bull, *Judicial Preview in Sweden*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 392 (Tom Campbell, K.D. Ewing, & Adam Tomkins eds., 2011).

⁵⁰ David Feldman, *Parliamentary Scrutiny of Legislation and Human Rights*, *PUB. L.* 323 (2002).

⁵¹ See, e.g., Lavapuro, Ojanen, & Scheinin, *supra* note 41, at 226.

a political entity than a guardian of constitutionality. The unanimity of most CLC statements indicates the system's efficacy and the members' ability to set aside their political biases. However, the absence of dissenting opinions suggests a tendency within the CLC to compromise on sensitive issues to maintain consensus. This often results in constitutional argumentation that can appear incoherent and unsystematic.⁵²

While constitutional reviews are the primary responsibility of the CLC, the committee also handles another politically sensitive task: addressing alleged ministerial malfeasance (Sections 114–15 of the Constitution). The Parliament decides whether to prosecute based on the CLC's opinion regarding the unlawfulness of the minister's actions, underscoring the need for the CLC to operate on a legal rather than a political basis.

Despite safeguards to maintain the autonomy of constitutional review, the process is complex and susceptible to political influence due to several factors. First, the MPs on the CLC, being politicians and not legal professionals, may be inclined to advance their political agenda or challenge opposing views. Second, the secretaries could potentially push their political biases when advising the CLC or selecting constitutional experts for each case. Third, the external experts consulted by the CLC might also bring their personal political views into their advisories. Fourth, the media's role in the process can be significant, as it provides a platform for the expression of diverse opinions and can heighten political tensions. MPs and legal experts might use the media to promote their perspectives,⁵³ thereby influencing the reviews. Journalists, seeking news, might provoke politicians to exacerbate political tensions by soliciting their comments on ongoing issues or encouraging leaks to the media.

Next, we delve deeper into the media's influence on the CLC's constitutional reviews. We will examine the *de facto* practices in the Finnish constitutional review through the experiences of the CLC's members, secretaries, and legal experts. Our focus will be on the tensions within the review process, aiming to understand how political tensions materialize in the CLC's work, the factors driving these tensions, and how political and legal considerations are balanced in the CLC's operations.

3. Methodology and data

Our empirical data consists of forty-nine interviews conducted between autumn 2019 and autumn 2020, focusing on the key actors involved in the Finnish *ex ante* constitutional review. The participants included: (i) fourteen MPs who are or have been members of the CLC, including both substitute and regular members from the last two election periods (2015–19 and 2019–23); (ii) seven secretaries of the CLC, who are civil servants with legal backgrounds that extend beyond election cycles, many of whom have pursued postgraduate studies or completed a doctorate in law; and (iii) twenty-eight academics specializing in constitutional law. The majority of

⁵² See Dahlberg, *supra* note 41.

⁵³ See, e.g., Peleg & Bogoch, *supra* note 36.

those invited agreed to participate, resulting in a demographic spread of fourteen female and thirty-five male interviewees.

Interviews were conducted with MPs who have served as both regular and substitute members, and as chairs and deputy chairs of the CLC. We successfully secured interviews with representatives from all parliamentary groups, except one. The chair of the CLC, who traditionally holds a law degree and is responsible for convening and leading meetings,⁵⁴ was also among the interviewees. While some members also hold law degrees, there is no formal requirement to this effect.

Additionally, we interviewed most of the current and former CLC secretaries who have served since the early 2000s. These individuals have often gained experience in the Ministry of Justice's law drafting department or as secretaries in other parliamentary committees. The primary responsibility of the CLC secretariat is to draft statements and opinions for the CLC and to recommend which constitutional experts should be consulted on a case-by-case basis.

Finally, we interviewed twenty-eight legal experts who have actively participated in the CLC processes. Our selection was informed by an analysis of the experts consulted by the CLC during the 2015, 2016, 2017, and 2018 parliamentary sessions. Background data from legal literature identifying the most frequently consulted experts since 2003⁵⁵ helped to shape our interviewee list. This included experts in various fields of law other than constitutional law—such as criminal law and European law—who have been consulted multiple times within a single election period. We aimed for diversity in generational representation, interviewing experts whose involvement with the CLC dates back to the 1980s as well as those who began their contributions in the 2010s.

The range of consultations varied widely; the most frequently consulted experts engaged with by the CLC up to thirty times a year, while those less often consulted appeared about seven times a year.⁵⁶ All interviews were conducted by the same interviewer, totaling forty-three face to face and six remotely via the internet or phone due to the COVID-19 pandemic. The consistency of the interviews was maintained across formats, with no noticeable differences in the openness of the interviewees' responses.⁵⁷

The interviews were semi-structured thematic sessions lasting between one and three hours. They covered a range of topics, including the work practices of CLC members, secretaries, and experts, the selection of legal experts, challenges in constitutional interpretation, and the role of publicity and the media in the work of the CLC. We encouraged the interviewees to elaborate on these topics, aiming for a free-form

⁵⁴ See COMMITTEE GUIDE: PUBLICATION OF THE FINNISH PARLIAMENTARY OFFICE 29–30 (2023).

⁵⁵ ESKO RIEPULA, JUUKA KULTALAHTI, & TEUVO POHJOLAINEN, *KENELLÄ VALTA VALTIOSSA? KUNINKAIDEN JA SÄÄTYJEN VALLASTA KANSAN VALTAAN: PERUSTUSLAKIEMME PITKÄ KAARI* [WHO HAS POWER IN THE STATE? FROM THE POWER OF KINGS AND ESTATES TO THE POWER OF THE PEOPLE: THE LONG ARC OF OUR CONSTITUTIONS] 328–9 (2019); Matti Wiberg, *Perustuslakivaliokunta asiantuntija-areena* [The Constitutional Law Committee as an Expert Arena], *LAKIMIES* 967, 979–82 (2003).

⁵⁶ See *Valtiopäiväasiat ja -asiakirjat* [Parliamentary Matters and Documents], EDUSKUNTA [FIN. PARL.], www.eduskunta.fi/FI/search/Sivut/Vaskiresults.aspx (last visited Jan. 17, 2023) (containing expert statements given from 2015 onwards) (in Finnish).

⁵⁷ See, e.g., Emilia Korkea-aho & Päivi Leino-Sandberg, *Interviewing Lawyers: A Critical Self-Reflection on Expert Interviews as a Method of EU Legal Research*, 2019 *EUR. J. LEGAL STUD.* 17.

and comprehensive discussion.⁵⁸ This approach stemmed from our observation that controversies over the Constitution in Finland seemed to have escalated in the public eye, prompting us to explore their underlying causes. The interviews revealed these factors, which we will present and analyze in this article.

We chose interviews as our research method because the sensitive nature of the relationship between law and politics in the work of the CLC precluded other approaches, such as surveys. Confidential, one-to-one interviews allowed us to gather detailed insights on how the actors involved perceive the process. The anonymity provided ensured that the interviewees could discuss the realities of their work candidly.

It is important to recognize that interviews can be seen as performances and may not always reflect the interviewees in the most accurate light. Aware that interviewees might prefer not to discuss their political motives and might claim adherence to legal principles instead, we did not take their statements at face value. Rather, we understood their comments as expressions of personal views, which could sometimes be inaccurate or misleading. This article focuses on how the actors see their roles and challenges within the review process. Despite potential biases, this qualitative inquiry is valuable for understanding the intricacies of constitutional law and the tensions inherent in the review process.

All interviews were recorded and subsequently transcribed. During the initial review of the transcripts, we paid particular attention to the reasons for and descriptions of the political tensions and pressures within the CLC's operations. Notably, the sources of these tensions were evident in discussions about the CLC's work practices and processes, as well as in detailed discussions about constitutional interpretations and the influence of the media. These categories were divided into three groups: (i) statements illustrating how tensions manifest in practice and their potential increase; (ii) statements regarding the influence and roles of constitutional law experts; and (iii) statements about the media's impact. The following section outlines our findings for each of these categories.⁵⁹ From the classified interview data, we identified the prominent themes: (i) the expanding role of the constitutional review in politics; (ii) the proactive engagement of constitutional law experts; and (iii) the influential presence of the media in constitutional reviews.

To ensure confidentiality and protect privacy, we reference interviews by the group affiliation of each interviewee (secretary, member, expert) and assign random numbers to each to maintain anonymity.

4. The expanding role of the constitutional review in politics

Historically, constitutional interpretation has played an essential part in Finnish political culture, particularly since the Russian invasion in 1809. Under Russian rule

⁵⁸ See further, e.g., Lisa Webley, *Qualitative Approaches to Empirical Legal Research*, in *THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 926, 936–7 (Peter Cane & Herbert M. Kritzer eds., 2010).

⁵⁹ See further *id.*, at 940–2.

(1809–1917), the constitutional realm emerged as a key arena for defending Finland's stance against Russian policies of oppression. Legal argumentation was deployed to resist Russification efforts (i.e., coercive adoption of Russian rules and procedures in Finland), reinforcing Finnish interpretations of constitutional documents. This historical legacy has shaped Finnish politicians' approach to engaging in political battles through constitutional argumentation. In addition, there has been a reluctance within Finnish legal culture to empower courts in constitutional matters, forging a trust in politicians to oversee constitutional reviews.⁶⁰

Our interviewees, including MPs who are or have been members of the CLC, the secretaries of the CLC, and the legal experts consulted by the CLC, largely firmly support the Finnish tradition of keeping daily politics and party interests separate from the CLC's work.⁶¹ However, they also acknowledged that tensions in constitutional review processes have intensified, particularly since the 1990s, as constitutional issues gained prominence in politics across Europe.⁶² In Finland, this period saw a significant expansion in the range of issues deemed subject to constitutional review, highlighted by Finland's accession to the European Convention on Human Rights in 1990 and the European Union in 1995. These developments led to an extension of constitutional considerations into new political areas in lawmaking. Moreover, the Finnish Constitution underwent significant revisions with the enactment of the modern catalog of constitutional rights in 1995, incorporating a broad array of new economic and social rights. We suggest that the increased prominence of constitutional and human rights has contributed to the constitutionalization of political issues and politicization of constitutional reviews in Finland.

Thus, many of the interviewed politicians and experts, especially those who have witnessed these developments firsthand, acknowledged the impact of the reforms and recognized that constitutional interpretation has assumed a more prominent role in lawmaking and policymaking. Experienced constitutional law experts, who have observed the work of the CLC since the 1960s and 1970s, described the substantive changes whereby constitutional review has expanded to an increasing range of political issues. As one long-standing expert noted:

Compared to the 1960s and 1970s, when we had extensive projects, for example, the National Pension Act and the Health Insurance Act and other many important acts, then there were not many problems of this type. But now, as the role of the constitution has been emphasized, legislative proposals do not necessarily pass constitutional control, even if they are very important and necessary in themselves.

(Expert 8)

⁶⁰ See HUSA, *supra* note 41, at 16–21, 138; Hannu Tapani Klami, *A History of Finnish Legal Science*, OIKEUSTIETE-JURISPRUDENTIA 125 (1986); Jaakko Husa, *Locking in Constitutionality Control in Finland*, 16 EUR. CONST. L. REV. 249, 262–7 (2020).

⁶¹ See e.g., Tuori, *supra* note 41; Lavapuro, Ojanen, & Scheinin, *supra* note 41; Dahlberg, *supra* note 41; HUSA, *supra* note 41.

⁶² See, e.g., COURTS, POLITICS AND CONSTITUTIONAL LAW: JUDICIALIZATION OF POLITICS AND POLITICIZATION OF THE JUDICIARY, *supra* note 3; ALLAN R. BREWER-CARÍAS, *CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY* (2011).

This insight underscores that an expanding array of societal issues such as management of the COVID-19 pandemic, economic policies, and immigration policies, including the pushback of migrants on the Russian border, are increasingly framed as constitutional questions, and the assessment in the CLC has attracted much public attention.⁶³ This attention often includes heated debates on the demarcation between law and politics.⁶⁴ Interestingly, it has been argued that *ex ante*, or political, reviews should not be limited to legal argumentation but should also incorporate political and moral perspectives on constitutional rights.⁶⁵ However, Finnish constitutional doctrine and practice starkly contrast this view: the CLC's argumentation remains legalistic and formal, relying on its prior statements, *travaux préparatoires*, expert opinions, and human rights treaties and their jurisprudence.⁶⁶

MPs who have served as CLC members reported that their political parties do not influence their votes or dictate how the constitutionality of legislative proposals should be interpreted, emphasizing the integrity and independence respected across the political spectrum. Nonetheless, politicians also noted divergent views on constitutional questions and the approaches to resolving them. MPs acknowledged that day-to-day politics have become increasingly influential in the CLC's deliberations as more political matters undergo constitutional review. Many interviewed politicians felt that tensions between legal and political deliberation frequently arise in the work of the CLC and are actively managed to ensure that partisan interests do not infiltrate the CLC's meetings. This is particularly evident in the roles of the CLC chairs and secretaries who often guide the discussions to steer them towards legal rather than political arguments.

Many CLC members openly acknowledged the challenge of setting aside partisan interests when interpreting the Constitution. The European Union Recovery Instrument of 2020, which imposed additional fees on member states to mitigate the socio-economic impacts of the coronavirus pandemic, sparked notable political tensions within the CLC. As a longstanding member pointed out, "the members who represent the Greens, the Coalition Party, and the Finns Party took stands which involved political stances" (Member 1). The same member noted, somewhat sarcastically: "If a party is very positive about European taxes, it is difficult to be very critical in the interpretation of the Constitution in this case." This comment highlights not only how political biases permeate the CLC's deliberations but also how members often claiming to be neutral accuse political adversaries of being biased.

The Finnish social and health reform (SOTE), finalized in 2022, serves as another poignant example of these political tensions.⁶⁷ The SOTE reform, aimed at reorganizing public services to enhance healthcare system efficiency, became a major political

⁶³ See, e.g., Human Rights Chief Calls on Finland to Reject Deportation Bill, YLE News, 17 June 2024, <https://yle.fi/a/74-20094590>.

⁶⁴ On social roots of the legal-political change in Finland, see THE NORDIC ECONOMIC, SOCIAL AND POLITICAL MODEL: CHALLENGES IN THE 21ST CENTURY (Anu Koivunen, Jari Ojala, & Janne Holmén eds., 2021).

⁶⁵ See, e.g., Casey, *supra* note 30.

⁶⁶ See, e.g., Lavapuro, Ojanen, & Scheinin, *supra* note 41, at 227; Husa, *supra* note 45, at 48.

⁶⁷ See, e.g., Heikki Hiilamo, *Why Did Social and Healthcare Services Reform Fail in Finland?*, 97 SOCIALMEDICINSK TIDSKRIFT 433 (2020).

controversy, affecting years of legal drafting and the CLC's work, ultimately perceived as a politically charged issue. One CLC member involved in the review recounted the intense pressures: "Political pressures were so intense that, at some point, the political passion came through emotionally in the arguments relating to constitutional interpretation, even though we try to avoid it, and usually the CLC has pretty good self-discipline" (Member 4).

Furthermore, the legal evaluation of the Minister for Foreign Affairs Pekka Haavisto (of the Green Party) in 2020 regarding his attempt to repatriate Finnish citizens from the al-Hol camp in northern Syria became a highly politicized issue. Haavisto was accused of unlawfully reassigning a foreign ministry official following disagreements over the repatriation plans. While the CLC found that Minister Haavisto had breached the Administrative Act and the Foreign Relations Act,⁶⁸ it concluded that the actions did not meet the threshold for prosecution. This case elicited concerns among CLC members about potential political motivations influencing legal assessments. "I'm a bit worried that they're starting to politicize these things too much and seek such political chases," expressed Member 1, fearing the onset of further politically motivated actions disguised as constitutional assessment. This anxiety suggests a broader apprehension that such cases could set precedents for future political manipulation within the CLC, leading some members to propose that the CLC should avoid involvement in prosecuting ministers due to the high risk of political influence.

The secretaries of the CLC have further acknowledged growing political pressures in constitutional review. As Secretary 2 explained: "Sometimes, when we have a governmental proposal that is important for the government, then there is a certain pressure to get the constitutionality review done quickly so that the government achieves its own political goals." Another longstanding secretary pointed out that it was easy to see that expert statements that deviate from CLC members' own views are not always well received: "Sometimes you can see it on members' faces that they are reading an expert statement with false content, yet, despite the objections, they do manage to swap their politician's robes for judge's robes when we start making decisions" (Secretary 3).

Furthermore, there have been debates about where to draw the line between legal review and politics. One secretary argued that the constitutional review has become overly dominant: "[T]he perspective of constitutionality has become too dominant in the society and in the legislature's activities" (Secretary 6). He posited that the Constitution excessively influences the substance of forthcoming legislation, turning too many societal issues into constitutional questions.

Similarly, the experts recognized that political pressures are an inherent part of the CLC's work, noting that these pressures have increased and present a challenge in the context of the CLC's operations. Some experts criticized the political influence, while others argued that the integration of moral-political values into constitutional

⁶⁸ Hallintolaki [HAL] [Administrative Act] 434/2003; Ulkoasiainhallintolaki [UHAL] [Foreign Relations Act] 204/2000.

interpretation is fundamental to the parliamentary-focused review system.⁶⁹ One of the regularly consulted experts explained:

Our system is built in such a way that [moral-political values] should have an effect. It is organized as part of the legislative process and is one of the parliamentary committees, which is made up of politicians. And it would be strange if politics did not in any way affect the interpretation of the constitution.

(Expert 11)

From our interviews, it is evident that the constitutionalization of the Finnish legal system has had a direct impact on the CLC's role, which has gradually expanded since the 1990s. As political struggles have become more visible due to the growing importance of constitutional and human rights, multiple constitutional considerations must be taken into account, both in preparing new legislation and in judicial and administrative decision-making. Most CLC participants acknowledged the escalating pressures in their work and the necessity to safeguard the CLC process. Overall, the interviews support the view that the broadening scope of constitutional review has heightened tensions in the CLC's practical operations, with many issues becoming increasingly politically contentious.⁷⁰

5. The increasingly active role of constitutional law experts

Constitutional law experts, while not having formally regulated powers in the CLC, play an important role in evaluating the constitutionality of proposed laws. Their influence has increasingly become a topic of debate, particularly since the 2010s, as it sometimes escalates political tensions.

Typically, the CLC invites experts from a pool of academics specializing in constitutional law or a specific area relevant to the legislative proposal under review. The selection of those experts is broadly outlined by the Parliament's Rules of Procedure,⁷¹ which allow parliamentary committees to consult experts. In addition, the Committee Guide (*Valiokuntaopas*) stipulates that committees should hear "an appropriate number of experts" and emphasizes the importance of safeguarding "the versatility and equality of information acquisition" when selecting experts.⁷² Beyond these guidelines, there are no specific regulations, and in practice, the CLC's secretaries have significant discretion in proposing which experts to consult—a practice generally respected by committee members. As one CLC member explained, "[We] basically never make any changes to the proposal made by the secretaries" (Member 5).

This flexible regulatory framework has sparked debates about the selection and role of experts. Critics argue that the CLC relies on a relatively small group of experts who

⁶⁹ See, e.g., David Dyzenhaus, *Are Legislatures Good at Morality? Or Better at It Than the Courts?* 7 INT'L J. CONST. L. 46 (2009); Casey, *supra* note 30.

⁷⁰ See, e.g., Evan Rosevear & Ran Hirschl, *Constitutional Law Meets Comparative Politics: Socio-Economic Rights and Political Realities*, in *THE LEGAL PROTECTION OF HUMAN RIGHTS: SCEPTICAL ESSAYS* 207 (Tom Campbell, K. D. Ewing, & Adam Tomkins eds., 2011).

⁷¹ Eduskunnan työjärjestys [Parliamentary Rules of Procedure] 40/2000.

⁷² COMMITTEE GUIDE: PUBLICATION OF THE FINNISH PARLIAMENTARY OFFICE, *supra* note 54, at 91.

are frequently consulted. Statistics indicate that between three and six main constitutional law experts are regularly called upon by the CLC,⁷³ positioning this small group as having considerable sway in constitutional questions. As one CLC member stated: “One can speak of a core group that can be counted on the fingers of one hand, which practically decides on the range within which we are able to interpret the constitution” (Member 3).

Debates over the selection of experts gained momentum in the 2010s, particularly in controversial cases. These included the legislative proposal to prohibit begging and discussions on whether a traditional religious hymn (*Suvivirsi*) could be included in school activities. Tensions reached a notable peak in 2019 when the then Minister for Foreign Affairs, Jussi Niinistö, referred to experts as the “Talibans of the constitution” (*perustuslakitalibanit*), criticizing them for deeming the proposed reform of intelligence legislation constitutionally problematic.

Furthermore, our interviews revealed tensions among the experts themselves. With only a small number of experts frequently consulted, others feel excluded from the work of the CLC.⁷⁴ Many experts expressed a desire to be more involved and were critical of the current system. As one longstanding CLC member explained, “[t]here are experts who, in their own opinion, are not often enough heard by us” (Member 1).

Additionally, experts often diverge in their approach to constitutional interpretation. It appears there are two distinct approaches on the role of the constitution. Some experts believe that the Constitution should not obstruct social improvements but should serve as a framework establishing boundaries within which the legislature can operate. Others argue that the Constitution and international human rights obligations strictly bind the legislature across a wide range of political issues, including economic and social rights and the broad principle of equality. This perspective influences their assessments, for example on how budgetary resources should be allocated.

A key question is the extent and level of detail of the restrictions or obligations that constitutional rights can impose on political decision-making. The constitutional and human rights framework in the Finnish legal system was significantly expanded in the 1990s when economic, social, and cultural rights were incorporated into the Constitution and Finland acceded to the European Convention on Human Rights.⁷⁵ These developments sparked discussions on how constitutional and human rights obligations should be met in a broad array of political decisions.⁷⁶ Interviews indicate that experts often hold varying views on the matters under review.

The diverging views of experts have also become more visible and politicized, especially as experts become more active in public discussions and the media. The most frequently consulted experts are often recognized publicly and sought after for interviews

⁷³ See Wiberg, *supra* note 55, at 978–82; RIEPULA, KULTALAHTI, & POHJOLAINEN, *supra* note 55, at 326–9.

⁷⁴ See HUSA, *supra* note 41, at 223.

⁷⁵ See, e.g., Antero Jyränki, *Taking Democracy Seriously: The Problem of the Control of the Constitutionality of Legislation. The Case of Finland*, in *THE FINNISH CONSTITUTION IN TRANSITION* 6, 13 (Maija Sakslin ed., 1991).

⁷⁶ See, e.g., Kanstantsin Dzehtsiarou, *Legitimacy and Future of the European Court of Human Rights: Critical Perspectives from Academia and Practitioners*, 12 *GER. L.J.* 1707 (2011).

in newspapers and other media outlets. Conversely, there are academic experts who are not consulted as often but have become quite active in the media, including on social platforms, stirring up debates on constitutional interpretation. One often-used expert noted that experts who engage in public debates on constitutional issues do so to influence interpretations: “They are there with their opinions and that is also their intention” (Expert 14).

Public tensions rise particularly when experts who are less frequently heard by the CLC present themselves in the media as authorities on constitutional issues and express strong opinions on how these issues should be resolved. As one seasoned expert noted: “Those experts who are very active in the media are not very regularly consulted by the CLC” (Expert 9). Consequently, heated debates on the nature of constitutional expertise emerge, involving not only experts themselves but sometimes politicians and the wider public.⁷⁷

The rise of new media has further intensified these struggles. Legal experts are now able to more easily engage in public discussions and comment on constitutional interpretation through platforms like social media. In cases of disagreement on interpretative substance, experts have begun to swiftly respond to the CLC’s conclusions, using social media or blogs to critique the CLC’s constitutional reasoning.

As a result, some experts routinely express opinions via social media when an important legislative proposal is pending before the CLC. These comments can trigger heated and politicized public discussions. For instance, if a constitutional expert advocates for the rights of asylum seekers on Twitter, it can quickly escalate into heated discussions. Similarly, during the debate over reform of the intelligence legislation in 2019, mentioned earlier, two regularly consulted experts expressed critical views on Twitter, suggesting that the CLC’s statement had not been fully taken into account during the legislative process. This prompted a response from the Speaker of the Parliament, leading to a reexamination of the constitutionality of the legislative proposal by the CLC.

Additionally, an expert blog dedicated to constitutional matters, entitled *Perustuslakiblogi* (*Constitution Blog*), has become highly visible and a source of heated debates.⁷⁸ One expert, often consulted by the CLC, described the purpose behind the creation of this blog in 2013 in clear terms: “The intention, of course, was to influence the public discussion” (Expert 14).

Some experts view their public comments as an integral part of their role as academic scholars actively participating in public discourse. One of the regularly consulted experts emphasized this proactive role, stating, “It cannot be the case that we only answer when journalists ask,” but that it is an academic duty to initiate dialog: “It is the task of university professors to put questions on the agenda or in public

⁷⁷ See also Husa, *supra* note 60, at 273–4.

⁷⁸ *Perustuslakiblogi* has been published by the Finnish Association of Constitutional Law. The editors are legal academics who are frequently used as experts in the CLC. See Ida Koivisto, *Experts and Constitutionality Control in Finland: A Crisis of Cognitive Authority?*, 2017 *RETRIEVED* 24, 30.

discussion that otherwise might not have been there, if they feel that they are worthy of discussion" (Expert 11).

Many experts, both those consulted frequently and those who are not, are quite active in the media. However, during our interviews, politicians expressed a clear preference for experts who do not seek publicity but rather respect the integrity of the CLC. Experts who are prominent in the media are often viewed as potentially compromising the constitutional system. One longstanding member explained his concern about experts "who say absolutely everything if journalists call" and who are proactive in writing blogs and other texts. While acknowledging their right to voice opinions, he also warned that public debate could jeopardize the constitutional review process, which relies heavily on custom and unwritten agreements:

There's nothing wrong with that [experts debate in public], unless it's written in the wrong situation or with the wrong tone. When this is ultimately based on a legal culture and on such unspoken agreements, this constitutional control as a system or expert institution, it is precisely these kinds of practices that undermine it, to some extent.

(Member 14)

Thus, the selection of experts and their increasing visibility in public discourse have heightened political tensions, particularly since the 2010s. As interpretative authority over constitutional questions is concentrated in the hands of a relatively small group of experts, their roles have occasionally sparked politically charged debates. Moreover, constitutional experts themselves contribute to political tensions, as many have been actively raising and discussing politically sensitive issues in the media and through journalism. Additionally, some experts have been very active in new media platforms, further intensifying the political tensions associated with constitutional interpretation.

Consequently, all participants involved in the review process recognized that academic constitutional experts have taken on a more visible and politically contentious role in constitutional interpretation in Finland. The selection of the experts consulted by the CLC and their often divergent views have become topics of public discussion, focusing on their political role.

6. The escalating role of the media in exacerbating constitutional tensions

Constitutional interpretations are often politically charged, and thus draw significant interest from journalists and the media,⁷⁹ with the latter often having a direct or indirect impact on political issues and legal rulings.⁸⁰ Our interviews highlighted that in

⁷⁹ See, e.g., Doreen Spörer-Wagner & Frank Marcinkowski, *Is Talk Always Silver and Silence Golden? The Mediatisation of Political Bargaining*, 17 JAVNOST: THE PUBLIC 5 (2010); Anu Kantola & Juho Vesa, *Mediated Scandals as Social Dramas: Transforming the Moral Order in Finland*, 56 ACTA SOCIOLOGICA 295 (2013).

⁸⁰ See, e.g., Warren Francke, *The Evolving Watchdog: The Media's Role in Government Ethics*, 537 ANNALS AM. ACAD. POL. & SOC. SCI. 109 (1995); DANIEL L. FELDMAN & DAVID R. EICHENTHAL, *THE ART OF THE WATCHDOG: FIGHTING FRAUD, WASTE, ABUSE, AND CORRUPTION IN GOVERNMENT* (2014); Kepplinger, *supra* note 38; Hess & Koprivica Harvey, *supra* note 39, at 44; Arguelhes, *supra* note 39; Bobek, *supra* note 35, at 285–6.

the context of CLC's *ex ante* review, the media are active participants in public debates on constitutional interpretation.⁸¹ Most interviewees, including CLC members, secretaries, and experts, noted that journalists actively seek information and comments from the CLC by engaging directly with its members, secretaries, and associated experts.

In situations where a majority government is in place, a statement by the CLC regarding the unconstitutionality of proposed legislation becomes a critical tool—essentially the only tool—to challenge the government's legislative agenda. This potential for blocking legislative proposals makes the CLC's evaluations highly newsworthy and politically sensitive. As one member described the media's eagerness: "If there is a slightly more interesting topic, there are always journalists outside the door of the CLC who are happy to ask these experts right away: 'What did you say or what do you think about this bill?'" (Member 4). The pressure from the media can be intense. For instance, during the discussions on the SOTE reform, mentioned earlier, journalists lingered for hours, attempting to extract information from members and experts consulted by the CLC as they exited.

While CLC members are theoretically restricted from discussing pending cases in the media, leaks of confidential information do occur, often motivated by a desire to influence public opinion and, by extension, the decision-making process. Leakers can utilize source protection to remain anonymous while shaping public discourse in a way that they believe will advance their party's goals.⁸² Member 2 recalled how the CLC had to close the electronic workspace that contained all its documents in order to prevent leaks. Simply put, too many people, including assistants, had access to the documents and drafts, and it was feared that some of them might leak information by simply sending it to media sources. However, such measures are not leak-proof. As the same member bluntly noted, source anonymity "is also a way of doing politics, [aimed at] leak[ing] draft statements." As leaks are becoming a standard way of doing politics and advancing agendas, they are employed in the work of the CLC, as well.

Some of the secretaries also suggested that public debates might influence the CLC's constitutional interpretations. For example, public support for expanded intelligence powers in the wake of terrorism threats led to an interpretation that not only expanded these powers but also curtailed individual privacy rights. Conversely, other legal experts argued that international human rights court practices and EU law, rather than public opinion, exert the most significant pressure on national constitutional interpretation.⁸³

Interestingly, the constitutional literature supports active media and public engagement in *ex ante* constitutional reviews, proposing that the media can provide a forum

⁸¹ See, e.g., Timo Harjuniemi, Maija Dahlberg, & Anu Kantola, *Sanattomien sopimusten puolustajat: eduskunnan perustuslakivaliokunnan suhde mediajulkisuuteen* [Defending Unspoken Rules: The Relationship between the Media and the Constitutional Law Committee of the Finnish Parliament], 45 MEDIA & VIESTINTÄ 1 (2022).

⁸² See, e.g., Zvi Reich, *The Anatomy of Leaks: Tracing the Path of Unauthorized Disclosure in the Israeli Press*, 9 JOURNALISM 555 (2008).

⁸³ See, e.g., Ojanen & Salminen, *supra* note 46.

for critically discussing the political and moral tensions surrounding constitutional rights.⁸⁴ However, in practice, as our interviews show, actors involved in the review process in Finland try to keep their diverging views and political and moral tensions away from the media spotlight to avoid politicized discussions and to maintain the legal integrity of the reviews.

Nevertheless, media and journalism have played a conspicuous and active role in several high-profile CLC cases. Journalists actively seek comments from CLC members and experts, while draft statements have been leaked to the press. The high level of media attention intensifies political struggles with respect to constitutional interpretations. Many interviewees expressed concerns about the impact of media visibility on the work of the CLC, suggesting that it could sometimes influence the outcome of constitutional reviews.

7. Conclusion

Constitutional questions are gaining importance across various societies, but addressing these questions in practice proves challenging due their politically charged nature. This article has illustrated the pressures inherent in an *ex ante* system where constitutional reviews are managed by a parliamentary committee. Drawing from interviews with key actors in the Finnish *ex ante* review system, our findings reveal the apparent tensions between politics and law within parliamentary constitutional review. These tensions manifest in the day-to-day operations of the committee, involving politicians, civil servants, and academic experts.

Our analysis identifies three developments that have intensified these tensions: the rising significance of constitutional and human rights; the influence exerted by a select group of experts; and the increasing media focus coupled with the rise of social media. These factors contribute to the politicization of constitutional interpretation, complicating the CLC's work.

First, the broadening of the constitutional review increases tensions in the CLC's practical work, as many issues seem increasingly politically contentious. Most CLC actors acknowledge the growing pressures that exist in their work and the need to safeguard the CLC process from them. Consequently, politicians who are members of the CLC strive to maintain a legalistic approach and exercise judicious reasoning. The chair of the CLC often intervenes to mitigate political tensions by reinforcing the committee's constitutional role and established practices, such as keeping party-political interests out of CLC meetings. In addition, politicians perceive the media as a tempting and potentially destabilizing arena for public profiling, even though, in general, the members of the CLC have a cautious attitude to the media when it comes to CLC matters. Second, the interpretative power vested in a relatively small group of experts intensifies political tensions. The selection of experts to be consulted by the CLC, coupled with their increasingly divergent views, have sparked public discussions

⁸⁴ See, e.g., Kennedy & Casey, *supra* note 30.

on their contribution to intensifying the political tensions surrounding constitutional review. Third, the media and journalists have played an active and visible role in many high-profile CLC cases, exacerbating the political debates over constitutional interpretations.

What, then, should be done about these tensions? We argue not that they should be eliminated, but rather that it is necessary to acknowledge that politics is a factor. Constitutional interpretation typically includes, and often requires, political contest, even though legal theories and doctrines are meant to set aside any non-legal considerations. The struggles over the interpretation of the Constitution are complex in nature; therefore, there is no clear means of resolving them. They typically involve several actors, including the media, political parties, civil society, business community, academic experts, and state authorities.

Constitutional judicial review, in contrast to jurisprudence, is delimited by politics. Court rulings are strictly regulated by the law and the courts' own rules of procedure; courts also decide cases in a limited and structured way, turning political issues into legal questions. In contrast, *ex ante* review allows for, and even encourages, public officials and political actors to challenge the constitutionality of proposed legislation.⁸⁵ For instance, in Spain, between 1980 and 1985, *ex ante* review existed alongside *ex post* review, but political opposition began to use the *ex ante* review to hinder legislative reforms, and was consequently abolished.⁸⁶ Compared to judicial *ex ante* reviews, political motives are arguably even more present in *ex ante* non-judicial reviews, when the interpreters of the constitutionality of laws are politicians. At best, these tensions may lead to more open, in-depth constitutional debate enhancing the legitimacy of constitutional reasoning. Interpreting rights almost always involves making moral and political choices, and the constitutional decision-maker should openly state and justify these choices.

Thus, instead of denying the political aspects of constitutional interpretation, it would be more fruitful to analyze the way in which these struggles manifest and are resolved in constitutional interpretation. Rather than trying to eliminate all political tension, the aim should be to articulate it and understand its sources in the practice of constitutional review. The increasing presence of politics in constitutional interpretation undermines the legitimacy of the CLC and, by extension, the legitimacy of the unique constitutional arrangement of the Finnish *ex ante* review. We argue that political tensions are always present in constitutional interpretations, irrespective of whether the interpreter is a court or a non-judicial body. Consequently, it would be interesting to analyze, in further comparative constitutional law studies, the tensions relating to constitutional adjudication in different cases where the authoritative interpreter of the constitution is a non-judicial body consisting of politicians or civil servants as opposed to constitutional or supreme courts where judges are in charge.

⁸⁵ Hirschl, *supra* note 3, at 132.

⁸⁶ See, e.g., Wojciech Sadurski, *Constitutional Review in Europe and in the United States: Influences, Paradoxes, and Convergence* (Sydney L. Sch. Rsch. Paper, Paper No. 11/15, Feb. 2011), <https://ssrn.com/abstract=1754209>.

While the legitimacy of a constitutional review traditionally rests on the assumption that the review is independent from political processes and direct political influence, further research should focus on developing this notion of legitimacy, taking into account that political tensions are an inevitable part of constitutional interpretation.

Above all, comparative analysis could be applied to studying political dynamics across a variety of constitutional systems, combining approaches from legal science, political science, and media studies. Constitutional interpretation often takes place in a highly politicized environment, and tensions are unlikely to diminish in the future. Political struggles relating to human rights are likely to intensify, given the growing polarization of political views across many countries and the rise of authoritarian populism in various contexts. As part of these developments, the mounting criticism and skepticism toward supranational institutions has already had an impact on court rulings, as some national courts have begun to avoid references to international human rights treaties.⁸⁷

Our findings further illuminate the role of the media and public opinion in constitutional interpretation which deserves further critical attention. Legal issues are not only politicized but also mediatized, leading to increasingly heated public debates. The rise of social media has provided opportunities for people to express their views and mobilize political and public support. At the same time, journalism has to compete for audiences. The impact of media on constitutional reviews may be mixed, on the one hand providing opportunities for increased public deliberation, while on the other hand serving as a platform for sharing political views that challenge, and may even jeopardize, the functioning of a constitutional system. It is therefore important to carry out empirical groundwork to trace and examine these developments and their impact on constitutional systems. The media may distract and influence judicial reviews, but, as in politics, it may also play a vital role:⁸⁸ above all, media reporting makes politically charged issues transparent, encouraging constructive public debate. Thus, rather than merely criticizing the involvement of the media, it is crucial to understand its role in the context of constitutional law.

⁸⁷ See, e.g., Neil Walker, *Populism and Constitutional Tension*, 17 INT'L J. CONST. L. 515 (2019); Tamar Hostovsky Brandes, *International Law in Domestic Courts in an Era of Populism*, 17 INT'L J. CONST. L. 576 (2019).

⁸⁸ See, e.g., Joyce, *supra* note 36.