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2025-05-22
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Kotkas, T 2025, 'Constitutional Social Rights in Pre-enactment Constitutional Review in Finland : Interfering with Policy-Making or Constitutional Fine-Tuning?', Nordic journal of human rights , vol. 43, no. 2, pp. 168-189. https://doi.org/10.1080/18918131.2025.2503657

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Nordic Journal of Human Rights

ISSN: 1891-8131 (Print) 1891-814X (Online) Journal homepage: www.tandfonline.com/journals/rnhr20

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To cite this article: Toomas Kotkas (22 May 2025): Constitutional Social Rights in Pre-enactment Constitutional Review in Finland: Interfering with Policy-Making or Constitutional Fine-Tuning?, Nordic Journal of Human Rights, DOI: 10.1080/18918131.2025.2503657

To link to this article: https://doi.org/10.1080/18918131.2025.2503657

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Published online: 22 May 2025.

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NORDIC JOURNAL OF HUMAN RIGHTS
https://doi.org/10.1080/18918131.2025.2503657

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Constitutional Social Rights in Pre-enactment Constitutional Review in Finland: Interfering with Policy-Making or Constitutional Fine-Tuning?

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ABSTRACT

The social rights provisions of the Constitution of Finland and the Finnish system of constitutional review have recently attracted interest in international academic literature. However, there has been no systematic and comprehensive study on the significance of constitutional social rights in Finland's pre-enactment constitutional review. The article addresses this lacuna by studying to what extent, and how, constitutional social rights have been applied in the Constitutional Law Committee's praxis (1995–2024). The study relates to a broader academic literature on the pros and cons of constitutionalizing social rights, as well as research on constitutional social rights adjudication in practice. Four conclusions are drawn: 1) The constitutional social rights provisions have not remained a dead letter of the law; 2) Constitutional social rights are often also used as justification for limiting other constitutional rights; 3) The concern that constitutional social rights would excessively limit the government's/legislator's political power is unwarranted; 4) The constitutional doctrine on social rights has remained coherent regardless of the party-political composition of each respective committee, i.e., there is no evidence of politicization of the Constitutional Law Committee's work.

ARTICLE HISTORY
Received 7 December 2023
Accepted 6 May 2025

KEYWORDS
constitutional social rights; constitutionalizing social rights; constitutional review; pre-enactment constitutional review; politicization of constitutional review; juridification of politics

1. Introduction

The social rights provisions of the Constitution of Finland and the Finnish system of pre-enactment constitutional review have both attracted interest in international academic legal literature in recent years. In regard to the former, in Scotland, for instance, legal scholars have been increasingly engaged in the debate around the protection of economic, social and cultural human rights. The Finnish constitutional social rights provisions have served as one of the possible models in reports on how to introduce these rights into the Scottish legislative framework.[1] In regard to Finland's system of pre-enactment constitutional review, the trend of 'illiberal constitutionalism', i.e., the outright

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[1]Katie Boyle, Economic and Social Rights Law: Incorporation, Justiciability and Principles of Adjudication (Routledge 2020) 114–118 and 254–255; Katie Boyle, Models of Incorporation and Justiciability for Economic, Social and Cultural Rights (Scottish Human Rights Commission 2018); Manuel Cepeda, Kate O'Regan and Martin Scheinin, The Development and

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attack against or indirect taming of constitutional courts in some Eastern European countries, has led legal scholars to seek alternatives to constitutional review performed by constitutional courts. In this context, Finland has garnered interest because even though it has no constitutional court, and judicial constitutional review is weak, the country has managed to uphold the rule of law and democratic values.[2]

Despite the international interest in Finland's constitutional social rights provisions and its system of constitutional review, so far, there has been no systematic study of the significance of the constitutional social rights provisions in the pre-enactment constitutional review that is performed by the Constitutional Law Committee of the Parliament.[3] The present study aims at addressing this lacuna by analysing all the Constitutional Law Committee's statements concerning constitutional social rights in the period between 1995 and 2024. The article asks *to what extent, and how, the constitutional social rights provisions (Section 19) have been applied in the praxis of the Constitutional Law Committee*. The focus will thus be on the pre-enactment constitutional review and not the post-enactment review performed by courts. The reason for this focus is that the courts play an almost non-existent role regarding constitutional review of social security legislation in Finland, as explained below.

This study relates to a flourishing academic literature on social rights theory and practice, and on the significance of constitutionalization of social rights in particular.[4] Colm O'Cinneide argues that the emergence of 'socially engaged constitutionalism' in both the Global South and Global North in the first two decades of the twenty-first century signifies a significant departure from traditional liberal constitutional theory in which constitutional social rights were seen more as general political and moral goals than justiciable rights. The ample evidence from across countries and continents shows that constitutional social rights are today enforced through courts and that they do matter in practice. O'Cinneide traces the emergence of socially engaged constitutionalism to 'transformative constitutionalism', a legal normative project originating in the Global South.[5] Socially engaged constitutionalism later gained ground in the Global North, not least because of the 2008 global financial crisis and the subsequent austerity measures in many countries. Although the capacity of constitutional social rights to prevent and/or restrict austerity measures has proved minimal, a lot of hope has nevertheless been invested in social rights adjudication as a safeguard against the excesses of austerity.[6]

Application of the Concept of the Progressive Realisation of Human Rights: Report to the Scottish National Taskforce for Human Rights Leadership (Bonavero Report 1/2021).

[2]See Miroslaw Granat, 'Turbulent times in the constitutionalism of Central and Eastern European countries', in Miroslaw Granat (ed), *Constitutionality of Law without a Constitutional Court* (Routledge 2024) 1.

[3]There is only one study on the significance of constitutional social rights provisions in the constitutional review performed by the Constitutional Law Committee. The study covers the period between 1995 and 2012, but it is only published in Finnish. See Raija Huhtanen, 'Sosiaaliset perusoikeudet perustuslakivaliokunnan käytännössä' [Constitutional Social Rights in the Praxis of the Constitutional Law Committee], in Sakari Hänninen et al. (eds), *Muuttuva sosiaalioikeus* [Social Law in Change] (Suomalainen Lakimiesyhdistys 2013) 161.

[4]Daphne Barak-Erez and Aeyal M. Gross (eds), *Exploring Social Rights: Between Theory and Practice* (OUP 2007); Malcolm Langford (ed), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (CUP 2008); Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Hart Publishing 2010); Jeff King, *Judging Social Rights* (CUP 2011); Aoife Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (CUP 2014); Helena Alviar Garcia, Karl Klare and Lucy A. Williams (eds), *Social and Economic Rights in Theory and Practice: Critical Inquiries* (Routledge 2015); Jackie Dugard, Bruce Porter, Daniela Ikawa and Lilian Chenwi (eds), *Research Handbook on Economic, Social and Cultural Rights as Human Rights* (Edward Elgar 2020).

[5]Colm O'Cinneide, 'The constitutionalization of social and economic rights' in Alviar Garcia, Klare and Williams (n 4) 266.

[6]See e.g. Aoife Nolan (ed), *Economic and Social Rights After the Global Financial Crisis* (CUP 2014); Ulrich Becker and Anastasia Poulou (eds), *European Welfare State Constitutions after the Financial Crisis* (OUP 2020). Becker (342–344) rightly

The aim of this paper is to contribute to the academic debate on social rights constitutionalization by analysing the constitutional review of social rights in a jurisdiction in which the constitutional review system is somewhat peculiar in international comparison. The review is predominantly performed *ex ante* (i.e., pre-enactment) by a standing committee of the Parliament comprised solely of MPs, not the judiciary. Although the Constitutional Law Committee is not a court and is composed of politicians, its de facto task is the same as that of any constitutional court tasked with pre-enactment constitutional review: to decide whether a government bill is in conformity with the constitution or not.

In terms of international comparison, there are also other countries where the *ex ante* constitutional review is not vested in a court. For instance, in France the Constitutional Council is in charge of the *ex ante* constitutional review of both 'institutional acts' as well as ordinary acts referred to it. The French legislation does not set any formal competence requirements for the members of the Constitutional Council, so, as in the Finnish case, they do not necessarily have legal training.[7] The difference between the Finnish and the French systems is that in Finland the Constitutional Law Committee works from within the Parliament and reviews draft law whereas in France the Constitutional Council is independent from the Parliament and reviews acts after they have been passed in the Parliament (but not yet promulgated by the President).

To be sure, the Finnish system of constitutional review has been addressed in research literature, but mostly from a theoretical and historical perspective.[8] As mentioned, there has been no comprehensive and systematic research on the role of constitutional social rights in pre-enactment constitutional review that would cover a period of time rather than focusing only on individual cases. The findings of this paper should be of interest to legal academics and any jurisdiction contemplating including social rights provisions in its constitution, broadening the scope of constitutional review to also cover social rights, or even establishing a system of constitutional review that would not be (predominantly) based on courts.[9]

The article is structured as follows. In Section 2, the social rights provisions of the Constitution of Finland will briefly be explained, before going on to describe the Finnish hybrid system of constitutional review. Section 3 highlights the five functions

notes that it is not necessarily easy to distinguish social security system reforms and amendments that were precipitated by the financial crisis from the reforms that were already under way before the crisis.

[7] *Ex post* constitutional review is performed by both the Constitutional Council (priority ruling procedure) and ordinary courts. All ex-presidents are ex-officio members of the Council if they choose. See Olivier Jouanjan, 'Constitutional Justice in France' in Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks of European Public Law: Volume III: Constitutional Adjudication: Institutions* (OUP 2020) 223.

[8] On the Finnish system of constitutional review, see Kaarlo Tuori, 'Judicial Constitutional Review as a Last Resort: The Finnish Case' in Tom Campbell, K. D. Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (OUP 2011) 377; Juha Lavapuro, Tuomas Ojanen and Martin Scheinin, 'Rights-based constitutionalism in Finland and the development of pluralist constitutional review' (2011) 9 *International Journal of Constitutional Law* 505; Kaarlo Tuori, 'Constitutional review in Finland' in Armin von Bogdandy, Peter M. Huber and Christoph Grabenwarter (eds), *The Max Planck Handbooks of European Public Law: Volume III: Constitutional Adjudication: Institutions* (OUP 2020) 183; Tuomas Ojanen, 'Finnish constitutional exceptionalism: the pluralist system of constitutional review combining *ex ante* and *ex post* functions of review' in Granat (n 3). On the historical formation of the Finnish system of constitutional review, see Jaakko Husa, 'Locking in Constitutionality Control in Finland' (2020) 16 *European Constitutional Law Review* 249.

[9] For instance, regarding the US system of constitutional review where the courts traditionally play a key role, Mark Tushnet has argued for a 'weak-form of judicial review' in which the legislative and executive branch would assume a more active role. See, Mark Tushnet, Weak Courts, Strong Rights (Princeton University Press 2008) Ch. 5.

of constitutional social rights provisions in the pre-enactment constitutional review. Finally, in Section 4, the main research question will be answered, and conclusions drawn.

2. Constitutional Social Rights Provisions and the System of Constitutional Review in Finland

2.1 Social Rights Provisions in the Constitution of Finland

The social rights provisions of the current Constitution of 2000 (731/1999) date back to 1995 when amendments were made to the Bill of Rights, i.e., Chapter II, of the then Constitution of 1919 (repealed by the current Constitution). In the reform, the wording of many existing constitutional rights provisions was amended and new second and third generation rights, such as the right to social security and the right to a healthy environment, were included in the Bill of Rights.[10] The 1995 amendments were included in the current Constitution as such. The social rights provisions of the Constitution read as follows:

Section 19: The Right to Social Security

[1] Those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care.
[2] Everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.
[3] The public authorities shall guarantee for everyone, as provided in more detail by an Act, adequate social, health and medical services and promote the health of the population. Moreover, the public authorities shall support families and others responsible for providing for children so that they have the ability to ensure the well-being and personal development of the children.
[4] The public authorities shall promote the right of everyone to housing and the opportunity to arrange their own housing.

The Constitutional Law Committee of the Parliament confirmed early on that the first subsection directly guarantees everyone a subjective right to minimum subsistence and care.[11] As Section 19(1), per se, creates a subjective right, it can be invoked in courts. In practice, however, this constitutional right is implemented through ordinary legislation such as the Act on Social Assistance (1412/1997).

The second subsection does not, directly, create subjective rights. Rather, it prescribes the legislator a positive obligation to guarantee everyone a statutory subjective right to basic subsistence in cases of any of the social risks listed in the subsection. According to the Constitutional Law Committee, 'basic subsistence' referred to in Section 19(2) is independent from the 'indispensable subsistence' referred to in Section 19(1). One of

[10]Lavapuro, Ojanen and Scheinin (n 8) 516–518.
[11]PeVM 25/1994 vp 10.

the implications of this is that the level of basic subsistence benefits must be higher than the level of indispensable subsistence benefits.[12]

The third subsection imposes on the legislator a clear obligation to guarantee everyone a statutory right to adequate social, health and medical services. Although the term 'right' is not used in Section 19(3), the nature of the provision as a constitutional right is undisputed. However, Section 19(3) does not require that the right to individual social welfare or healthcare services should be guaranteed as a subjective right. Some services may be discretionary in nature, i.e., dependent on financial resources. The 'adequacy' of services is clarified in the government bill on constitutional rights reform. According to the bill, the starting point in the evaluation of 'the adequacy of services' is such a level that 'creates opportunities for everyone to live as a full-fledged member of the society'.[13]

In terms of normativity, the fourth subsection is the weakest. Although the provision refers to a 'right to housing', it merely obliges the public authorities to 'promote' it — not to guarantee it as a subjective right as in the first and second subsections. In some acts of ordinary legislation, for instance the Child Welfare Act (417/2007), right to housing is, however, guaranteed as a subjective right. In these acts the subjective right to housing is anchored to Section 19(1), not Section 19(4), with the rationale that the right to housing secures anyone's right to 'indispensable care'.

2.2 The System of Constitutional Review in Finland

The Finnish system of constitutional review adheres to a hybrid model. It includes both *ex ante* review performed by the Parliament's Constitutional Law Committee and *ex post* review assigned to courts.[14] In practice, the pre-enactment review is far more important. According to Section 74 of the Constitution, 'the Constitutional Law Committee shall issue statements on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.' Thus, the committee cannot evaluate the constitutionality of bills on its own initiative, and it only evaluates those bills that the Parliament (mostly on the government's initiative) refers to it. Although it is not explicitly stated in the Constitution, the committee's statements are binding. If the committee holds that a bill is not in conformity with the Constitution, it must be withdrawn, revised, or passed without revision in the order of enactment required for constitutional legislation (i.e., consideration of the bill is postponed until after next elections or it is passed with a qualified majority of five sixths), but the last option hardly ever takes place in practice, and bills are usually withdrawn or revised.[15]

In regard to the constitutional review performed by the courts, it is prescribed in Section 106 of the Constitution that 'if, in a matter being tried by a court of law, the

[12]PeVM 25/1994 vp 10.
[13]HE 309/1993 vp 71.
[14]Furthermore, the Chancellor of Justice oversees the legality of the activities of the government. In this capacity, the chancellor may notify the government about possible constitutional problems in individual bills. These notifications are not legally binding, but the government abides by them.
[15]Lavapuro, Ojanen and Scheinin (n 8) 505; Tuori 2020 (n 8) 198–202.

application of an act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.' Furthermore, Section 107 of the Constitution prescribes that 'if a provision in a decree or another statute of a lower level than an act is in conflict with the Constitution or another act, it shall not be applied by a court of law or by any other public authority.' In other words, only courts may review the constitutionality of parliamentary acts, and in order to give primacy to the Constitution, there must be an 'evident conflict'. Meanwhile, the constitutionality of governmental and ministerial decrees can also be reviewed by executive authorities and giving primacy to the Constitution does not require that there is an evident conflict.[16]

Traditionally, the judicial review of the constitutionality of legislation has been weak in Finland because of the courts' strong deference to the principle of legislative supremacy. This deference shifted somewhat from the 1990s onwards in the context of Finland joining the Council of Europe in 1989 and the EU in 1995, along with constitutional rights reform in 1995. In 2000, the courts' duty to give primacy to constitutional provision over ordinary legislation was included in the new Constitution. However, courts continue to tend to defer to the views of the Constitutional Law Committee and to try to solve possible conflicts between constitutional rights and provisions of ordinary legislation by way of 'constitutional rights friendly interpretation' rather than deeming a provision of ordinary legislation 'unconstitutional' in an individual case.[17] Indeed, the primacy of constitutional rights friendly interpretation is part of the established constitutional doctrine.[18]

The Finnish model of pre-enactment constitutional review is almost unique in that the Constitutional Law Committee comprises solely MPs, i.e., elected politicians. Legal expertise is provided by three permanent committee secretaries who all have legal training and in-depth knowledge of constitutional law. Furthermore, in regard to every bill that is referred to the committee, legal experts — usually three to six law professors — are consulted by the committee. The influence of the legal expert statements on the committee's views is significant in practice even though the committee is not, of course, de jure bound by them.

Due to the composition of the Constitutional Law Committee, the risk of the politicization of its work has been recognized in the Finnish legal literature. It has been

[16]There is no empirical research on the use of Section 107 of the Constitution by executive authorities. The general view is that the executive authorities only rarely, if ever, apply Section 107 in their decision-making. See Veli-Pekka. Hautamäki, 'Asetusehdotusten ja asetusten perustuslainmukaisuus' [The Constitutionality of Decrees and Proposals for Decrees] (4/2007) *Lakimies* 502.

[17]The Supreme Administrative Court, which is the highest instance in social law cases concerning Sections 19(1) and 19(3) of the Constitution, has — by the end of 2024, i.e., during the 24 years following the coming into force of the new Constitution — not once in its published case law found a provision of law to be in conflict with Section 19 of the Constitution. Nor has the Insurance Court (*Vakuutusoikeus*), which is the highest instance in cases concerning Section 19(2) of the Constitution.

[18]See Lavapuro, Ojanen and Scheinin (n 8) 518. The Supreme Administrative Court has directly applied Section 19(1) of the Constitution only in a handful of cases. For instance, in case KHO:2001:35, the court held that students who have lost their right to student allowance due to insufficient study credits have the right to income support. In case KHO:2019:59, the court saw that a Finnish citizen's wife and her two children should also have been taken into account in the husband's application for income support even though the residence permit applications of the wife and her children had not yet been approved. See also KHO:2001:50, which was about prioritization within dental healthcare.

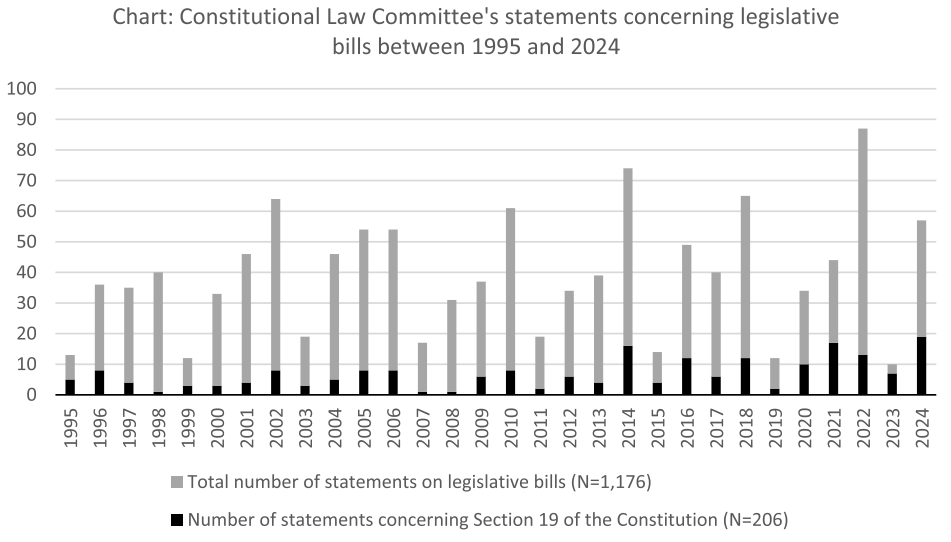
claimed that if there was a strong political consensus in the Parliament over an individual matter, this could influence the views of the committee so that it would then give precedence to political interests over constitutional doctrine and human rights law.[19] There has also been an empirical study on how the key actors in constitutional review — i.e., committee members, committee secretaries and legal experts — perceive the danger of politicization of their work, and how they try to prevent this. The study found that while committee members may let political views guide their decision-making in situations where there is no established doctrine to the constitutional question at hand, the committee secretaries and legal experts see their role as mainly judicial.[20]

3. The Application of Section 19 of the Constitution by the Constitutional Law Committee

3.1 The Empirical Data

Between the entry into force of constitutional rights reform in August 1995 and the end of 2024, the Constitutional Law Committee reviewed a total of 1,176 government bills.[21] Committee statements were selected for closer scrutiny based on the title of these bills. In other words, if the title suggested that the bill would most likely concern Section 19 of the Constitution, the committee's statement on the bill was analysed.[22] The bills chosen for analysis were 212 and mainly concerned social security, social welfare, and healthcare legislation, but also included bills on, for instance, social housing construction, alcohol and tobacco control, integration of immigrants, etc. Of the 212 statements that were selected for closer scrutiny, 206 statements did include at least one reference to one or more subsections of Section 19 of the Constitution, and only six did not.[23] It was these 206 statements that formed the empirical data of this study. This amounts to 17.5 per cent of all the Constitutional Law Committee statements on government bills from the period under examination. As the committee cannot evaluate the constitutionality of bills on its own initiative, it is possible that some bills that may have constitutional problems never reach the committee.

[19]See Lavapuro, Ojanen and Scheinin (n 8) 528.
[20]Maija Dahlberg and Anu Kantola, 'Struggles over Constitutional Interpretation: Politics, Law, and Media in the Ex Ante Constitutional Review in Finland' (2024) 22 *International Journal of Constitutional Law* 376.
[21]Here, legislative bills also include bills from the Speaker's Council on the Act on Parliament Officials, private member's bills, as well as citizen's initiatives. The total number of the Constitutional Law Committee's statements was 1,412 during the period under consideration. Thus, 236 statements concerned other matters than legislative bills, such as government reviews, reports and letters.
[22]For instance, the title, 'Government Bill on Sickness Insurance Act' (HE 50/2004 vp), suggested that the committee statement on that bill (PeVL 33/2004 vp), would most likely include a reference to Section 19 of the Constitution, which it indeed did.
[23]These four statements were, PeVL 7/2000 vp, PeVL 7a/2000 vp, PeVL 13/2000 vp, PeVL 22/2002 vp, PeVL 71/2022 vp and PeVL 10/2024 vp.



The majority of the 206 statements that were analysed also included references to other constitutional rights provisions, such as the right to equality and non-discrimination (Sec. 6 of the Constitution), the right to life, personal liberty, and integrity (Sec. 7), the right to privacy (Sec. 10), and right to protection of property (Sec. 15). However, the analysis focused solely on the ways in which Section 19 of the Constitution was applied in the argumentation of the Constitutional Law Committee. In regard to the four subsections of Section 19, the first (right to social minimum) was referred to in 45 statements (22 per cent), the second (right to social security) in 73 statements (35 per cent), the third (right to social and healthcare services) in 116 statements (55 per cent), and the fourth (right to housing) in only 20 statements (10 per cent). Section 19(3) was referred to the most frequently by far, which can partly be explained by the Covid-19 pandemic and the numerous law amendments associated with it. In 2020 and 2021 alone, a total of 17 Committee statements concerned bills on Covid-19 measures.[24] In turn, the low number of references to Section 19(4), which was referred to the least, is unsurprising given that its normative force is rather weak — it only sets an obligation to 'promote' everyone's right to housing.

The method of analysis was based on identifying different functions of constitutional social rights provisions in the constitutional review. It was assumed, for instance, that one obvious function would be that constitutional social rights set limitations to legislative proposals, which turned out to be the case; we are dealing with constitutional review, after all. However, the analysis of the 206 committee statements showed that the constitutional social rights provisions also serve other functions. All in all, five main functions were identified. These are:

1) Defining the material scope of constitutional social rights;

[24]PeVL 7/2020 vp, PeVL 14/2020 vp, PeVL 17/2020 vp, PeVL 20/2020 vp, PeVL 31/2020 vp, PeVL 44/2020 vp, PeVL 6/2021 vp, PeVL 7/2021 vp, PeVL 9/2021 vp, PeVL 10/2021 vp, PeVL 12/2021 vp, PeVL 16/2021 vp, PeVL 26/2021 vp, PeVL 28/2021 vp, PeVL 35/2021 vp, PeVL 50/2021 vp, and PeVL 51/2021 vp.

2) Legitimizing legislative reforms and amendments;
3) Setting conditions for legislative reforms and amendments;
4) Blocking legislative reforms and amendments altogether;
5) Prompting exhortations, recommendations, and monitoring obligations.

Each function will be discussed separately below.

3.2 Defining the Material Scope of Constitutional Social Rights

It is not possible to formulate constitutional social rights provisions in such a manner that there would not arise a need to subsequently specify their material scope. It is in the nature of constitutional rights provisions in general that they are framed in a rather abstract way in order to stand the test of time and to remain utilizable in changing circumstances. Consequently, the Constitutional Law Committee must deal with bills that have raised the question whether a particular social security benefit falls within the material scope of Section 19 of the Finnish Constitution in the first place.

The empirical data of this study included a total of eight statements in which the committee considered the material scope of the constitutional social rights provisions. In most of these cases, the committee found that the benefit in question did not fall under the material scope of Section 19. In a statement from 2000, the committee confirmed the view expressed already in the bill that an unemployment benefit called 'labour market subsidy' (*työmarkkinatuki*) that was paid in the form of a temporary travel allowance to an unemployed person who had accepted a work offer outside their travel-to-work area did not fall within the material scope of Section 19(2).[25] Such a travel allowance could not be considered an unemployment benefit because any person receiving it would be working and so would no longer be unemployed. In a statement from 2002, the committee held that the discretionary 'social credit benefit' (*sosiaalinen luotto*) granted by municipalities did not fall within the scope of social rights guaranteed in Section 19 of the Constitution.[26] Furthermore, the committee has considered that the abolition of a supplementary employee pension scheme 'did not affect the right to basic subsistence in a constitutionally significant way',[27] and that the abolition of MPs' adaptation pension scheme 'was not problematic in regard to Section 19(2) of the Constitution' because there existed statutory social security benefits for the possible social risks related to the termination of MPs' representative terms.[28] According to the established doctrine, neither does Section 19(2) of the Constitution provide protection against cuts that are aimed at earnings-related components of statutory basic subsistence benefits.[29] Finally, Section 19(3) of the Constitution does not demand that health inspections related to issuing or renewal of a driving licence should be provided by the public healthcare system.[30]

[25]PeVL 32/2000 vp 2.
[26]PeVL 43/2002 vp 2.
[27]PeVL 41/2013 vp 4.
[28]PeVL 63/2018 vp 2.
[29]PeVL 8/2024 vp 3 and PeVL 42/2024 vp 2.
[30]PeVL 63/2024 vp.

In addition to these rather typical cases, the data also included a statement in which the Constitutional Law Committee had to determine the constitutional significance of a situation where the responsibility to provide a particular welfare service had been assigned to another administrative branch. The case concerned reassigning children's day care service from social welfare administration to education administration and renaming the service 'Early Childhood Education'. In its statement, the committee iterated its view that the reassignment 'does not mean that the legislation concerning early childhood education would no longer primarily be considered as a social welfare service whose adequacy in the meaning of Section 19(3) of the Constitution could not be evaluated.'[31] The committee continued that the terminology used in the Constitution was 'autonomous in relation to classifications of ordinary legislation.'[32] This view was repeated in three later statements.[33]

When there is a need to determine whether a particular benefit falls under the material scope of the constitutional social rights provisions, the constitutional social rights provisions are the obvious legal source. In order to perform this function, constitutional social rights provisions need to be formulated broadly. Jeff King has argued that:

> A general right or interest should be stated in the abstract, together with any further specification that might assist to highlight a jurisdiction's important institutional mechanisms or hard commitments, or to delimit the scope of the interest and thus limit the range of cases that could be brought under it. This approach will afford interpretative flexibility, which […] is crucial.[34]

3.3 Legitimizing Legislative Reforms and Amendments

One of the important functions of constitutional social rights is that they offer legitimation for legislative reforms and amendments. After all, international treaties on social human rights are built on the idea of 'progressive realization' of all rights enshrined in those treaties. The UN International Covenant on Economic, Social and Cultural Rights speaks about 'full realization' (Art. 2(1)) and the Council of Europe's revised European Social Charter refers to 'further realisation' of rights (Preamble).[35] On a national level, the human rights treaties, as well as constitutional social rights provisions, can be used to legitimate improvements in national social security and healthcare systems. For instance, it is prescribed in Section 22 of the Finnish Constitution that 'the public authorities shall guarantee the observance of constitutional rights and liberties and human rights.' This also obliges the Parliament when passing or amending social security legislation.

The empirical data included 120 statements that concerned bills whose purpose was, inter alia, to improve the existing social security system in one way or another or that were otherwise neutral to their effects, such as administrative amendments. For instance, in a statement concerning a bill on the introduction of a payment ceiling for client charges in social welfare and healthcare services, the Constitutional Law Committee

[31]PeVL 12/2015 vp 3.
[32]ibid.
[33]PeVL 21/2016 vp 2, PeVL 17/2018 vp 2, and PeVL 41/2021 vp 2.
[34]King (n 4) 100.
[35]See Ben Saul, David Kinley and Jacqueline Mowbray, The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials (OUP 2014) 133–172.

concluded that 'the introduction of the payment ceiling is justified from the point of view of [Section 19(3)] of the Constitution because one of the significant aspects of guaranteeing adequate social, health and medical services for everyone is that too high client charges will not make the services inaccessible for those who need them.'[36] A similar line of argumentation was used when the committee issued its statements on bills concerning, for instance, broadening the right to free dental care to new age groups,[37] introducing maximum waiting times for admission to medical treatment,[38] increasing the amount of paternity allowance,[39] and introducing the subjective right to personal assistance services for disabled persons.[40] Even though these bills were not problematic in regard to Section 19 of the Constitution, they were referred to the committee because the government anticipated that they might have been constitutionally problematic in other respects. For instance, anytime the legislator proposes a broadening of the well-being services counties' responsibility to provide social welfare or healthcare services, the constitutional doctrine demands that the counties de facto have the financial resources to carry out the expansion of their tasks.

The above examples in which Section 19 of the Constitution offered legitimation to a legislative amendment did not involve any balancing between constitutional social rights and other constitutional rights. However, the data also included numerous statements in which the committee had to engage in this kind of balancing. In these statements the constitutional social rights were balanced, among others, against the right to life, personal liberty, and integrity (Sec. 7 of the Constitution), the right to privacy (Sec. 10), right to protection of property (Sec. 15), and the freedom of occupation (Sec. 18). The question most often concerned whether Section 19 offered sufficient grounds for limiting another constitutional right.

Indeed, Finnish constitutional doctrine, formulated by the Constitutional Law Committee, requires that seven conditions must be met if constitutional rights are to be curtailed. These are: 1) curtailment must be justified; 2) curtailments must be prescribed in legislation; 3) such legislation must be clear and precise; 4) curtailment must be proportionate; 5) curtailment cannot extend to the core of the constitutional right; 6) there shall be adequate legal safeguards in place; and 7) curtailment cannot contradict Finland's human rights obligations.[41] In regard to the first condition, the constitutional right to social security often offers a justification for curtailing other constitutional rights. For instance, when the bill on the current Occupational Health Care Act (1383/2011) was under review, the committee stated that the constitutional obligation to promote the health of the population (Sec. 19(3)) offered an acceptable justification for compulsory health inspections on employees. However, the committee wrote that the proposed provision should be amended so that it would satisfy the proportionality test, as well as the textual clarity condition.[42] The right to adequate social welfare and healthcare services and the obligation to promote the health of the population were also used as a justification for legislation allowing inspections of private homes to make sure that renovation,

[36]PeVL 8/1999 vp 2.
[37]PeVL 37/2000 vp 2.
[38]PeVL 20/2004 vp 2.
[39]PeVL 38/2006 vp 3.
[40]PeVL 30/2008 vp 2.
[41]PeVM 25/1994 vp 5.
[42]PeVL 39/2001 vp 2.

energy, and health hazard subsidies are used accordingly;[43] transferring the discounts in wholesale prices of medicines to pharmacy customers;[44] requiring separate smoking sections in restaurants;[45] curtailing the right to industrial action by allowing healthcare workers to be ordered to work during strikes,[46] enabling the use of organs of deceased persons for organ transplantations based on their presumptive consent;[47] and professional regulation of social welfare workers.[48] Furthermore, all Covid-19 measures were justified with reference to Section 19(3) of the Constitution.[49]

In many statements, Section 19(1) on the right to receive indispensable care was used as a justificatory argument for a proposed amendment. For instance, when the provisions of the Child Welfare Act (417/2007) on the use of restrictive measures in institutional substitute care were amended, the committee saw that even though the use of restrictive measures curtailed several constitutional rights of the children and their guardians,

> the goals of the proposed new regulation were justified from the point of view of the constitutional rights system. In the last resort, it is a question of a child's right to life and personal security. The child welfare legislation implements everyone's right to receive indispensable subsistence and care guaranteed in Section 19(1) of the Constitution.[50]

In two statements, the committee found that Section 19(3) of the Constitution did not offer a sufficient justification for the proposed amendment. Regarding the first one, the government had proposed that the Act on the Measures to Decrease Smoking (698/2010, no longer in force) should be amended by adding a ban on smoking in private vehicles if children were among the passengers. The committee found, however, that the ban and the powers to conduct inspections that it would enable were disproportionate in relation to the goal of the regulation. Furthermore, the committee held that the ban's relation to the authorities' obligation to promote public health prescribed in Section 19(3) of the Constitution 'remained so distant' that the section could not be used as a justification for conducting inspections on vehicles that were used for living, such as caravans.[51] The proposal for the ban was consequently withdrawn by the Social Affairs and Health Committee of the Parliament.[52] The second statement concerned the bill on Amending of the Tobacco Act (549/2016). The Constitutional Law Committee saw that Section 19(3) of the Constitution did not offer sufficient justification for the amendment that would have prohibited showing tobacco brands in sales catalogues in shops. The Committee held that the amendment excessively curtailed the constitutional right to free speech.[53]

[43]PeVL 39/2005 vp 2. The committee also referred to Section 19(4), i.e., public authorities' obligation to promote the right of everyone to housing, as a justificatory argument for the proposed amendment. See also PeVL 30/2014 vp 2.
[44]PeVL 56/2005 vp 2. See also 69/2014 vp 2 and PeVL 31/2018 vp 2–3.
[45]PeVL 19/2006 vp 2. In a similar way, the French Constitutional Council has given precedence to the right to health over the right to property and freedom of enterprise. See Laurent Pech, 'France: Rethinking "Droit-Créances"' in Langford (n 4) 271.
[46]PeVL 15/2007 vp 2 and PeVL 41/2022 vp 6.
[47]PeVL 24/2010 vp 3. See also PeVL 10/2012 vp 2, PeVL 48/2014 vp 3, and PeVL 23/2020 vp 8 and 11.
[48]PeVL 65/2014 vp 2.
[49]See n 24 above.
[50]PeVL 5/2006 vp 2. See also PeVL 58/2006 vp 2.
[51]PeVL 21/2010 vp 5.
[52]StVM 14/2010 vp 5.
[53]PeVL 7/2022 vp 4.

3.4 Setting Conditions for Legislative Reforms and Amendments

We have seen above how the constitutional social rights provisions often function as justification for individual legislative amendments, but the opposite also holds true. Indeed, the committee has argued in several statements that in order to secure conformity with Section 19 of the Constitution, changes to the bill under consideration have been necessary. Here, we are dealing with the central feature of constitutionality review. Although the Constitution does not explicitly prescribe that the Constitutional Law Committee statements are de jure binding, it is indisputable that the Parliament must follow the committee's views.

In one instance, the bill on the Act on Rehabilitation Services and Rehabilitation Allowance (566/2005) initially included a provision according to which rehabilitation allowance 'could' be paid for the interval between the administrative decision and the actual rehabilitation service. The committee held that in order to prevent people from falling through the net, the discretionary nature of the allowance had to be abandoned. Instead, a person 'should' always have the right to receive the allowance during the interval period if their livelihood was not secured through other social security benefits or work. This was the committee's condition for passing of the bill in the order of enactment of ordinary laws.[54] The Parliament passed the law with the wording demanded by the committee. The data included 25 statements in total in which the committee demanded changes in the bill, and every time these demands were met by the Parliament.[55]

The data also included one case in which the committee stated that a bill could not be passed in the order of enactment of ordinary laws unless the government provided additional arguments for the proposal.[56] The bill included a provision according to which a person arriving in Finland solely for the purpose of studying full-time was not to be considered residing in Finland permanently and would thus not be eligible for social security benefits. As a result, the Social Affairs and Health Committee explained in its final report to the Parliament that the proposed provision was in accordance with the EU social security coordination law and so could be passed following the ordinary course of enactment of law,[57] which indeed it was.

3.5 Blocking Legislative Reforms and Amendments

The data also included two cases in which a bill encountered constitutional problems of such a magnitude that it had to be withdrawn entirely. In 2016, the government proposed that the Unemployment Security Act (1290/2002) and the Act on the Promotion of Integration (1386/2010, no longer in force) would be temporarily amended so that labour market subsidy would be 10 per cent lower for unemployed immigrants residing lawfully in Finland compared to unemployed citizens. After having heard from eight professors of law and the Deputy Ombudsman of the Parliament, the Constitutional Law Committee

[54]PeVL 13/2005 vp. See also PeVL 39/2024 vp.
[55]PeVL 15/1995 vp, PeVL 17/1995 vp, PeVL 39/1996 vp, PeVL 31/1997 vp, PeVL 20/1998 vp, PeVL 8/1999 vp, PeVL 18/2001 vp, PeVL 45/2002 vp, PeVL 46/2002 vp, PeVL 5/2003 vp, PeVL 20/2004 vp, PeVL 33/2004 vp, PeVL 13/2005 vp, PeVL 6/2009 vp, PeVL 10/2009 vp, PeVL 36/2012 vp, PeVL30/2013 vp, PeVL 17/2018 vp, PeVL 15/2020 vp, PeVL 17/2021 vp, PeVL 44/2021 vp, PeVL 79/2022 vp, PeVL 100/2022 vp, PeVL 11/2023 vp, PeVL 25/2024 vp, and 44/2024 vp.
[56]PeVL 22/2004 vp.
[57]StVM 17/2004 vp 3–4.

stated that the bill could not be passed in the order of enactment of ordinary law because it violated Section 6(2) of the Constitution (prohibition of discrimination).[58] As a consequence, the government withdrew the bill. At stake was not only the unemployed immigrants' right to be treated equally with Finnish nationals, but also their right to basic subsistence (Sec. 19(1) of the Constitution).

The second case concerned the Health and Social Services Reform (*sote-uudistus*) that was finally implemented in 2023 after various bills were rejected. With the reform, the responsibility to organize healthcare and social welfare services was transferred from almost 300 municipalities to 21 larger regional administrative bodies, known as the Well-being Services Counties (*hyvinvointialueet*). The reform had already been initiated more than ten years earlier. The first bill from 2014 (the so-called 'Five Municipal Federations Model') was overturned by the Constitutional Law Committee. The problems were not so much related to the constitutional social rights provisions because the committee held, in line with the bill, that a reform was required in order to guarantee everyone's right to adequate social, health and medical services (Section 19(3) of the Constitution). Instead, the committee found the proposed regional administrative model problematic from the point of view of regional and municipal democracy and autonomy.[59] The second bill from 2017 (the so-called '18 Counties Model') was also rejected by the committee, on the basis that it was problematic, this time, also from the viewpoint of Section 19(3) of the Constitution. The problem was that according to the bill the counties would not have had the right to directly produce basic healthcare services and certain basic social welfare services themselves but only through establishing publicly owned companies. The government's goal was to open basic healthcare services for competition. However, the committee held that in cases of market failure, this model would not necessarily guarantee everyone's constitutional right to adequate social, health and medical services.[60] The government amended the bill, but the amended version did not pass constitutional scrutiny either and was dropped.[61] It must be noted that in addition to concerns about Section 19(3) of the Constitution, the committee found the proposals for the Health and Social Services Reform constitutionally problematic in many other respects as well. It was thus not issues in relation to Section 19(3) alone that led to the lapse of the government bills.

3.6 Prompting Exhortations, Recommendations and Monitoring Obligations

The Constitutional Law Committee does not always require in its statement that a bill that it finds constitutionally problematic must be amended in order to be passed following the order of enactment of ordinary laws. Sometimes, the committee contents itself with giving exhortations or recommendations. The difference between an exhortation and a recommendation lies simply in how they are worded. An exhortation can be formulated in the following way: 'For reasons relating to the constitutional rights protection,

[58]PeVL 55/2016 vp. For a more detailed account of the statement, see Toomas Kotkas, 'Legal Strategies and the Question of the Social Minimum: A Systems-Theoretical Approach' in Toomas Kotkas, Ingrid Leijten and Frans Pennings (eds), *Specifying and Securing a Social Minimum in the Battle Against Poverty* (Hart 2019) 201.
[59]PeVL 67/2014 vp and 75/2024 vp.
[60]PeVL 26/2017 vp.
[61]PeVL 15/2018 vp and PeVL 65/2018 vp.

the committee holds that it is necessary to formulate the condition [for imposing sanctions] more clearly.'[62] Recommendations, in turn, are formulated less strictly: 'The provisions should be framed clearer.'[63] It is not entirely obvious on what grounds the committee makes the decision between setting absolute conditions for the passing of a bill and only giving exhortations or recommendations. However, it seems that the committee uses exhortations and recommendations (without raising the issue of the correct order of enactment) mostly in situations where it is mainly a question of a provision in a bill that has been framed too vaguely.[64]

The committee has given other types of exhortations and recommendations as well. For instance, the committee has required that the grounds for receiving urgent medical care should be prescribed in an act of Parliament, and not in a decree of the Ministry of Social Affairs and Health;[65] that the Social Affairs and Health Committee should consider whether there was a need to increase the level of child pension even more than proposed;[66] that the Environment Committee of the Parliament should investigate whether it was possible to add a transition provision to give housing allowance recipients more time to prepare for the decrease in the allowance;[67] and that the general fee for court proceedings should not be imposed on appeals concerning decisions on reimbursement of cross-border healthcare services within the EU.[68] In all these cases the bills were ultimately passed with the amendments recommended by the Constitutional Law Committee.

However, the committee's exhortations and recommendations are not always followed by the Parliament. The data included six cases in which the Parliament had not observed the committee's suggestions. For instance, in its statement on a bill amending the Unemployment Security Act (1290/2002) the committee exhorted that a provision on the abolition of an erroneous unemployment benefit decision should be clarified so that the provision would explicitly prescribe that the paying of the benefit could be continued if the recipient's livelihood was in jeopardy.[69] However, the Social Affairs and Health Committee of the Parliament did not find this necessary since the wording of the provision already allowed taking into consideration the recipient's economic situation.[70] In another statement, the Constitutional Law Committee recommended that a time limit within which a person willing to change their home municipality must notify the new home municipality that they will accept the welfare services offered them should be extended.[71] The Administration Committee did not find this necessary.[72] Furthermore, in a statement from 2016, the Constitutional Law Committee recommended that a transition provision should be included in a bill so that students who were to receive general housing allowance instead of student housing supplement would have

[62]PeVL 25/1997 vp 4.
[63]PeVL 15/1997 vp 2.
[64]PeVL 15/1997 vp, PeVL 25/1997 vp, PeVL 32/1997 vp, PeVL 50/2005 vp, PeVL 27/2009 vp, PeVL 11/2010 vp, PeVL 10/2011 vp, PeVL 36/2014 vp, PeVL 33/2018 vp, and PeVL 64/2018 vp.
[65]PeVL 41/2010 vp 6.
[66]PeVL 48/2006 vp 3.
[67]PeVL 17/2014 vp 3 and PeVL 51/2017 vp 3.
[68]PeVL 60/2022 vp 3.
[69]PeVL 34/2006 vp 3. See also PeVL 39/2024 vp 4.
[70]StVM 33/2006 vp 3.
[71]PeVL 39/2010 vp 5.
[72]HaVM 27/2010 vp 3.

time to prepare for the possible decrease in benefits.[73] The Education and Culture Committee did not agree.[74] Regarding a bill on amending the Unemployment Security Act, the Constitutional Law Committee found it constitutionally problematic that the unemployment benefit of an unemployed person could be reduced if they were unable to fulfil obligations of activity even if there were no activation services available. The committee thus recommended that the proposed provision should be amended so that the reduction was not possible if the unemployed person could not fulfil their obligations due to reasons beyond their control.[75] The Social Affairs and Health Committee did not find this necessary because unemployed persons could fulfil their obligation in other ways.[76] Finally, a statement from 2021 concerned a bill on amending the Child Protection Act setting a maximum number of clients a social worker could simultaneously have. The committee exhorted that the bill should be amended so that it would allow temporary deviations from the norm in order to make sure that a social worker was assigned to every client.[77] The Social Affairs and Health Committee argued, however, that such a derogation provision could justify permanent exceeding of the norm which would work against the very purpose of the bill.[78]

It is also not uncommon that the Constitutional Law Committee has obliged in its statements the Ministry of Social Affairs and Health or the government to *monitor* the impact of individual reforms on children, deprived families, other vulnerable population groups, or gender equality.[79] In particular, with respect to temporary Covid-19 legislation, the committee often set an obligation on the government to monitor the necessity of the temporary legislative measures and the possible problems in their application.[80] The legal status of these monitoring obligations is unclear because there is no requirement to report to the committee on how the monitoring has been carried out. However, the committee may also recommend that the committee that is in charge of bringing the final bill to the Parliament should suggest in its final report that the Parliament accepts a 'formal statement' (*lausuma*) about a monitoring obligation.[81] If this is the case, then the government must explain in its annual report to the Parliament how the monitoring obligation has been implemented and what kind of practical impact the law reform or amendment has had.

In some of its statements the committee has also given *instructions* to the authorities that are responsible for applying the proposed legislation. For instance, in its statement concerning an amendment to the Unemployment Security Act, the committee held that the proposed provision according to which an unemployed person was allowed to travel abroad for a short period of time without losing their right to unemployment benefit should be applied so that representatives of different professions and trades were

[73]PeVL 58/2016 vp 4.
[74]SiVM 17/2016 vp 4.
[75]PeVL 45/2017 vp 5.
[76]StVM 22/2017 vp 5.
[77]PeVL 45/2021 vp, para 7.
[78]StVM 34/2021 vp 5.
[79]PeVL 11/2015 vp 4, PeVL 12/2015 vp 5, PeVL 21/2016 vp 3, PeVL 30/2016 vp 6, PeVL 47/2017 vp 4, PeVL 40/2018 vp 3, and PeVL 45/2021 vp, para 19.
[80]See PeVL 7/2020 vp 5, PeVL 15/2020 vp 7, PeVL 9/2021 vp, para 11, PeVL 26/2021 vp, para 9, PeVL 28/2021 vp, para 12 and PeVL 51/2021 vp, para 10.
[81]See e.g. PeVL 45/2021 vp, para 19.

treated equally.[82] In another statement the committee instructed that the Unemployment Security Act should be applied in conformity with the constitutional rights (Section 19(2)) to prevent unemployed persons from slipping through the social security safety net altogether, i.e., being eligible to no social security benefit at all.[83] Furthermore, in a statement from 2018 the committee emphasized that the authorities applying the proposed legislation must take into consideration the requirements set by EU law, as well as human rights treaties.[84]

4. Conclusions: Fine-Tuning of Constitutional Doctrine Rather than Interfering with Policy-Making

It is time to draw conclusions from the analysis of the empirical material. At least four main conclusions concerning the significance of constitutional social rights in pre-enactment constitutional review in Finland can be drawn. First, the analysis of the data shows *that the constitutional social rights provisions have not remained a dead letter of the law* but have, rather, been actively applied in the pre-enactment constitutional review performed by the Constitutional Law Committee. The high proportion of committee statements in which Section 19 of the Constitution was referred to (17.5 per cent of all statements) itself suggests that constitutional social rights do matter. More importantly, the references to Section 19 are not merely declaratory or cosmetic, rather the analysis shows that the constitutional social rights provisions have had a real significance in restricting and setting conditions for legislative bills, legitimizing the curtailment of other constitutional rights, and even blocking government bills entirely.

Second, the data included numerous committee statements in which *constitutional social rights provisions were used as a justification for limiting other constitutional rights*. This aspect is only rarely, if ever, discussed in the literature on fundamental social rights. As said, social rights are most often portrayed as needing protection from the excesses of legislative or executive decision-making. In other words, social rights are usually set against financial policies. However, the data of this study shows that not only are constitutional social rights often balanced against civil rights, but that social rights are also used as arguments for curtailing civil rights. For instance, constitutional social rights were used as arguments for enabling compulsory health inspections on employees (curtailing the right to personal liberty), allowing inspections of private homes to make sure that renovation, energy, and health hazard subsidies are used accordingly (curtailing the right to privacy), requiring separate smoking sections in restaurants (curtailing the right to protection of property), allowing some healthcare workers to be ordered to work during strikes (curtailing the right to industrial action), enabling professional regulation of social welfare workers (curtailing the right to work), etc.[85] Unlike the doctrine of France's Constitutional Council, according to which constitutional social rights cannot 'substantially' limit other constitutional rights,[86] the Finnish doctrine does not include such an a priori rule.

[82]PeVL 15/1997 vp 2.
[83]PeVL 35/2012 vp 3. See also PeVL 59/2016 vp 4.
[84]PeVL 39/2018 vp 2.
[85]See section 'Legitimizing Legislative Reforms and Amendments'.
[86]Pech (n 45) 271.

Third, in light of the data, *the concern that constitutional social rights would excessively limit the political power of the government or the legislator and would lead to juridification of politics is unwarranted*. This 'democratic objection' or 'de-politicization critique' is one of the standard arguments against constitutionalizing social rights and active social rights adjudication.[87] In this connection, it is feared that courts would impose on governments and legislators binding orders to broaden the scope of social security schemes or to raise the level of benefits in a way that would not be economically viable. The democratic objection also applies to situations in which constitutional social rights would prevent governments or the legislator from retrenching benefit levels during economic downturns or a full-scale recession.[88]

The Constitutional Law Committee has been very cautious about rejecting proposed cuts to benefit levels. According to the established doctrine, cuts to the existing amounts of social security benefits cannot entail a 'significant reduction'. The analysis found only one case in which the committee considered that a proposed cut would have been disproportionate and therefore unconstitutional.[89] In all other cases, the committee deemed the proposed cuts to be within constitutionally acceptable boundaries. Furthermore, the empirical data included only two statements in which the Constitutional Law Committee found a bill so manifestly in conflict with constitutional social rights that the government had to withdraw it altogether, and neither of these cases concerned retrenchment of benefits.[90] The committee has, of course, in a number of cases demanded smaller revisions in order for a bill to be passed in the Parliament in the order of enactment of ordinary laws.[91] Constitutional social rights have thus mostly prompted case-by-case fine-tuning of the government bills on social security cuts.

The fourth conclusion is a more general one and relates to the nature and status of the Constitutional Law Committee. As mentioned above, due to the composition of the committee, there has always been a general awareness of the danger of politicization of the committee's work, i.e., that general political or even party-political considerations would trump legitimate constitutional concerns. It is generally held, however, that so far there has not been any indication of this type of politicization. The committee's argumentation has been characterized as 'legalistic and formal' because it has relied on its own prior statements, *travaux préparatoires* and expert opinions, along with human rights treaties and their jurisprudence.[92] This study's analysis lends support to this general view. The 206 statements that were analysed did not include 'doctrinal anomalies' that would suggest that (party-)political considerations were playing a significant role in decision-making. Instead, the data indicates that *the doctrine on constitutional social rights developed by the committee has so far remained more or less consistent and coherent* regardless of the composition of the committee or the government in power. It has been

[87]See e.g. Gearty in Gearty and Mantouvalou (n 4).
[88]Michelman has rightly pointed out that the limitation of the legislator's powers by constitutional rights can be as detrimental to democracy as activist courts demanding and ordering comprehensive social security reforms. See Frank I. Michelman, 'The Constitution, Social Rights and Liberal Political Justification' in Barak-Erez and Gross (n 4) 34.
[89]PeVL 46/2002 vp. It was suggested in the government bill that the labour market subsidy of a person still living in their parents' home would be 40 per cent lower than the normal labour market subsidy. On the question of social minimum in the context of Section 19 of the Finnish Constitution, see Kotkas (n 58) 201.
[90]See section 'Blocking Legislative Reforms and Amendments'.
[91]See section 'Setting Conditions for Legislative Reforms and Amendments'.
[92]Tuori 2011 (n 8) 380; Lavapuro, Ojanen and Scheinin (n 8) 512.

claimed that as long as the Constitutional Law Committee retains independence from party-political influence, possesses sufficient expertise and resources, and is respected by the MPs, judiciary and general public, there is no cause for changing or abandoning the Finnish system pre-enactment constitutional review.[93]

Rather than politicization of the committee's work, Kaarlo Tuori argues that the greater risk in the Finnish system is a 'juridification of legislative politics' because of the committee's quasi-judicial nature within the legislature and the prominent role of legal experts in the review process.[94] This argument comes close to the democratic objection usually presented in connection with judicial constitutional review. As said, the analysis of the data does not lend support to claims of juridification of legislative politics in Finland because the committee has only twice blocked a government bill altogether due to serious problems in regard to constitutional social rights.

Even if the data suggests that the Constitutional Law Committee has so far managed to maintain its integrity and independence regarding the constitutional review of bills on social security (which as we have noted are seen to be particularly vulnerable to politicization), it does not mean that the Finnish system would not be vulnerable to political influence in the future.[95] It has been argued that the Finnish system is, at least in principle, perhaps even more open to politicization than constitutional court-based systems. After all, it is the Parliament that decides whether to refer a bill to the Constitutional Law Committee or not, and in most cases the initiative for this comes from the government.[96] As such, if there were political consensus in the Parliament on the necessity of a constitutionally questionable legislative amendment, the Parliament could simply decide not to refer the bill to the committee. Even if it would be referred to the committee, with a majority of MPs from ruling parties it could ignore constitutional problems raised by the committee and pass the bill regardless.[97]

In fact, it has recently been suggested in the media by constitutional law scholars that since the autumn of 2023 the Constitutional Law Committee's views have been influenced by political considerations, and not only in relation to bills on social security.[98] Regarding constitutional review of bills concerning social security legislation, four committee statements in particular gave cause for concern.[99] These statements concerned, respectively, four bills that the newly appointed right-wing government had

[93]Tuori 2020 (n 8) 221.
[94]Tuori 2011 (n 8) 382; Tuori 2020 (n 8) 213–214.
[95]For a good overview and analysis of the pros and cons of different models of pre-enactment political constitutional review, see David Kenny and Conor Casey, 'Shadow constitutional review: The dark side of pre-enactment political review in Ireland and Japan' (2020) 18 *International Journal of Constitutional Law* 51.
[96]Tuori 2020 (n 8) 197–198.
[97]Lavapuro, Ojanen and Scheinin 2011 (n 8) 528; Matti Pellonpää, 'Perustuslakikontrollista neljässä Euroopan maassa ja Suomessa' [Constitutional Review in Four European Countries and in Finland] (6/2021) *Lakimies* 938.
[98]Petri Sajari, 'Oikeustieteilijöiltä poikkeuksellista arvostelua perustuslakivaliokunnalle: "Ei ole täyttänyt tehtäväänsä"' [Legal scholars express exceptional criticism towards the Constitutional Law Committee: "It has not performed its duties"], *Helsingin Sanomat*, 18 November 2023. See also, Petri Sajari, 'Oikeusvaltio on vaarantunut Suomessa ennennäkemättömällä tavalla, sanoo professori Kaarlo Tuori' [The rule of law has been jeopardized in Finland in an unprecedented manner, claims Professor Kaarlo Tuori], *Helsingin Sanomat*, 29 June 2024.
[99]PeVL 11/2023 vp, PeVL 14/2023 vp, PeVL 15/2023 vp and PeVL 16/2023. Apart from these four statements on social security bills, the most significant controversy among the legal experts was generated by the committee's statement (PeVL 26/2024 vp) on the so-called 'pushback bill' (allowing authorities to turn away migrants attempting to enter Finland at its border with Russia without first allowing them to apply for asylum) and the subsequent act. See e.g., Milka Sormunen, 'Politicizing Constitutional Review: The Case of the Finnish Pushback Law' (*Verfassungsblog* 16 December 2024) < https://verfassungsblog.de/politicizing-constitutional-review/> accessed 20 April 2025.

referred to the committee at the end of 2023. Considerable cuts to several social security benefits were proposed in these bills, including reducing the amount of income support for families whose housing costs would top the pre-set norm,[100] restricting the right to housing allowance and reducing its amount,[101] freezing index increments to several basic subsistence benefits for four years,[102] and abolishing the child increment of basic unemployment benefits.[103]

One of the main arguments of the legal experts whom the Constitutional Law Committee consulted was that contrary to the established constitutional doctrine and international social human rights treatises, the government had not provided a sufficient assessment of the overall economic impact of the individual cuts on various benefit recipient groups. Second, the experts claimed that the government had disregarded the concerns of the CESCR included in its Concluding observations on the seventh periodic report of Finland according to which 'cuts in benefits and the freeze on the National Pensions Index during the 2015–2019 parliamentary term rendered these benefits inadequate and disproportionately affected groups that had already been disadvantaged (art. 9).'[104] Moreover, the ECSR has repeatedly found Finland to be in violation of Articles 12(1) and 13(1) of the European Social Charter due to the deemed inadequacy of both social assistance and social security benefits.[105] Notwithstanding the criticisms put forward by the legal experts, the proposed cuts were greenlighted by the Constitutional Law Committee. However, in two of the statements four dissenting opinions were written by six committee members, all of whom were MPs from opposition parties.[106] The views of the dissenting opinions largely aligned with the views presented in the opinions of the legal experts.

Although the four statements — and the fact that in two of them there were dissenting opinions — give reason for critique, I would not too quickly jump to the conclusion that the committee's work has been politicized. It is certainly true that the government provided a report on the overall impact of the proposed individual cuts only when the bills had already been presented to the Parliament and that the report did not include a proper evaluation of the impact of the cuts to different groups of income support recipients. However, similar kinds of problems in the past have not resulted in the rejection of government bills either. The committee (with different political composition) has been content to state that governments must make sure that the overall impact of individual social security cuts does not become unreasonable.[107]

Second, while it is undeniable that the CESCR and ECSR have found Finland to be in breach of its treaty-based obligation to provide adequate social security and social assistance benefits, the way that the adequacy of benefit levels is defined by these bodies (particularly the ECSR) is rather mechanistic.[108] In my opinion, it is a bit too

[100]HE 58/2023 vp.
[101]HE 74/2023 vp.
[102]HE 75/2023 vp.
[103]HE 73/2023 vp.
[104]UN Committee on Economic, Social and Cultural Rights, 30 Mar 2021, E/C.12/FIN/CO/7 para 27.
[105]See Finnish Society of Social Rights v. Finland (Complaint No. 172/2018), 22 March 2023; Finnish Society of Social Rights v. Finland (Complaint No. 108/2014), 8 December 2016; and Finnish Society of Social Rights v. Finland (Complaint No. 88/2012), 9 September 2014.
[106]PeVL 15/2023 vp and PeVL 16/2023 vp.
[107]See e.g. PeVL 40/2018 vp 3, PeVL 11/2015 vp.
[108]The method the European Committee of Social Rights uses to evaluate the adequacy of social assistance and social security benefits by certain percentage values of the equivalent median income is problematic in at least three respects.

simplistic to claim that Finland — or any other country, for that matter — does not respect its international commitments simply because its social security benefit levels fail the adequacy test based on a rigid mathematical formula. Especially when there is political consensus on the need to balance the public economy, the legislator should have quite a wide margin of political discretion on how to target any necessary retrenchments. The majority of the Constitutional Law Committee contented itself with stating that that it 'takes very seriously the observations raised by the European Social Rights Committee' and that the government should start a thorough review of the issue promptly.[109] However, the committee (with different political composition) had already expressed similar concerns in 2017 and 2018 without deeming the proposed cuts under consideration to be unconstitutional.[110] In this regard, Finland is not a rarity in European comparison; as state parties are under no formal legal obligation to give effect to the determinations of the ESRC, national governments rarely do so.[111]

Third, although dissenting opinions in the Constitutional Law Committee's statements are rare,[112] there is one historical precedent for the events of autumn 2023. Due to deep economic recession in the early 1990s, significant cuts to many social security benefits were made in Finland throughout the decade. In 1995, the Constitutional Law Committee dealt with a bill that included cuts to the sickness allowance.[113] The committee demanded some changes in the bill so that certain population groups would not be excluded from the allowance, but it did not see the cuts themselves as violating citizens' right to basic subsistence. However, four committee members — all belonging to an opposition party — gave a dissenting opinion claiming that due to the cuts, the amount of sickness allowance would be too low to secure the constitutional right to basic subsistence guaranteed by the Constitution.[114] Furthermore, in another bill the government proposed that the mandatory waiting period for labour market subsidy be extended from three to five months.[115] The majority of the Constitutional Law Committee did not find this constitutionally problematic whereas five committee members — four of whom were opposition party MPs — gave a dissenting opinion

First, it does not take into account supplementary benefits if the basic social security benefit falls below a certain level (40 percent). In Finland the majority of labour market subsidy recipients also receive significant housing allowance and one third receives social assistance as well. Second, there is no solid scientific grounds for the percentage values. And, third, focusing on median income indicators ignores the significance of low-cost access to social welfare and healthcare services that can fundamentally improve the standard of living of benefits recipients. See, J. Tervola, I. Ilmakunnas and P. Moisio, 'Why is the adequacy of Finnish basic social security under special scrutiny by the Council of Europe? A critical review', 12 *Finnish Journal of Social Research* (2019), p. 67.

[109]PeVL 15/2023 vp para 18 and PeVL 16/2023 vp para 20.

[110]See PeVL 47/2017 vp 5 and PeVL 40/2018 vp 4. As a rule, in its statements the Constitutional Law Committee does not refer to the articles of international treaties on economic, social and cultural rights nor to the general comments, concluding observations on country reports, or 'case law' of the monitoring bodies of those treaties. Instead, the committee contents itself with referring to its own 'jurisprudence' and the national constitutional social rights doctrine. It is difficult to say whether this practice has been intentional or not. It could be argued that the unwillingness to engage in more profound reflection on the significance of international treaties to the national constitutional doctrine is a way of making sure that constitutional review does not become too juridified and that Parliament continues to have room for political considerations.

[111]Colm O'Cinneide, 'The European system' (2020) in Dugard et al. (n 4) 53 and 63–65.

[112]Of the 206 committee statements that were analysed in this study, in only 12 were one or more dissenting opinions given.

[113]HE 124/1995 vp.

[114]PeVL 15/1995 vp.

[115]HE 172/1995 vp.

arguing that the proposed amendment violated the constitutional right to basic subsistence.[116]

Given all this, I would not conclude, from the 2023 and 2024 statements concerning constitutional social rights, that the work of the Constitutional Law Committee has been politicized and its central function compromised. One thing is nevertheless certain: constitutional review performed by the committee has increasingly become a subject of political debate in the media. Maija Dahlberg and Anu Kantola suggest that this is due to three factors: the intensified constitutional and human rights argumentation in politics in general, the more visible and vocal role of constitutional law scholars in the media, and the growing interest of media in the work of the committee.[117]

Time will tell whether the Constitutional Law Committee manages to maintain the delicate balance between politics and constitutional law in the future. If not, alternative mechanisms of constitutional review may have to be sought. One solution could be a constitutional court made up of judges with legal education and extensive powers of pre-enactment constitutional review. This model would not signify too radical a break from the current system of *ex ante* review. Another alternative would be strengthening the *ex post* constitutional review by the judiciary. Indeed, it has been suggested that Section 106 of the Constitution should be amended so that the courts' duty to give primacy to a provision in the Constitution over a provision in a parliamentary act would no longer require that the latter is 'in evident conflict' with the Constitution. Instead, courts should have the same duty if the ordinary law was only 'in conflict' with the Constitution. This amendment would not be too radical, but it would likely shift the emphasis from *ex ante* constitutional review to *ex post* review performed by the (supreme) courts.[118]

Acknowledgement

I thank the anonymous reviewers for their useful comments on the manuscript of this article. Since 2014, I have regularly been consulted by the Constitutional Law Committee of the Parliament whose statements form the empirical data of this study. My role as a legal expert is to give an opinion on the constitutionality of bills.

Disclosure Statement

No potential conflict of interest was reported by the author.

[116]PeVL 17/1995 vp.
[117]Dahlberg and Kantola (n 20).
[118]Pellonpää (n 97) 941–942.