

AUTHORITATIVE INTERPRETATION OF THE CONSTITUTION: A Comparison of Argumentation in Finland and Norway¹

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Abstract

This is a comparative study of authoritative interpretation of the Constitution in Finland and Norway, that is, of the Basic Law in these countries. An ‘authoritative interpretation’ is an interpretation that is relatively undisputed. Many countries have a constitutional court that normally provides the most authoritative interpretation of the Constitution. In countries with no constitutional court, some other institution has the role of providing the most authoritative interpretation of the Constitution. The position of authoritative interpreting body can be based - depending on the country - on written rules, on customary law or on constitutional conventions.

The Parliament’s constitutional committee (*Perustuslakivaliokunta*) is the most authoritative interpreting body of the Constitution (*Perustuslaki*) in Finland as in Norway the Supreme Court (*Høyesterett*) is the most authoritative interpreting body of the *Grunnlov*. Grammatical and historical arguments are not frequently used by the *Høyesterett*, while the *Perustuslakivaliokunta* regularly uses both grammatical and historical arguments. Systematic (including doctrinal) arguments are very important types of argument for both bodies. In the *Perustuslakivaliokunta*’s practice, the use of doctrinal arguments is perhaps even more explicit. The most characteristic type of argument in the *Høyesterett*’s argumentation is the teleological argument; the *Perustuslakivaliokunta* lays more stress on the juridical nature of the interpretation than the *Høyesterett* does.

The *Høyesterett* and the *Perustuslakivaliokunta* have the same kind of function as the most authoritative interpreting body of the Constitution in their countries. As they are, however, different types of bodies with different basic tasks, it is clear that they may find different alternatives for solving problems concerning the interpretation of the Constitution.

Introduction

This article studies the authoritative interpretation of the Constitution in Finland and Norway. The method is a survey, especially from the perspective of argumentation. The topic is an interesting one because it has close connections to the use of the powers of the state. Thus, one may ask who will determine how the Constitution is to be interpreted and with what

¹ This article is based on my doctoral thesis *Perustusla in auktoritatiivinen tulkinta* (Authoritative Interpretation of the Constitution), Helsinki 2002.

arguments. First of all, however, some rather theoretical topics concerning interpretation are discussed. This is necessary for a better understanding of the subject. Next, the theoretical starting points are applied in turn to Finland and Norway. Some concrete examples are taken from both countries to demonstrate the kind of argumentation that was used in the authoritative interpretation of their Constitution.

1. Authority and the interpretation of the Constitution

There are many kinds of authorities in everyday life. An authority could be, for example, a teacher, priest, doctor, one's parents, etc. In the field of law, there are also different kinds of authorities. Authority can present itself in different situations. One such situation is the interpretation of the Constitution. But what exactly does one mean by the authoritative interpretation of the Constitution? An 'authoritative interpretation' is an interpretation that is relatively undisputed. Authority does not arise automatically. The development of authority may take a long time and authority may in time diminish. When the legal authority makes its decisions, argumentation is observed. As, for example, Aulis Aarnio has said, if an authority cannot state arguments for its decisions (as well as interpretations), it does not *deserve* its authority.²

Many countries have a constitutional court that usually is the most authoritative interpreting body of the Constitution, as for example the *Bundesverfassungsgericht* in Germany. In Italy too there is a constitutional court, the *Corte costituzionale*. In those countries where there is no constitutional court, some other institution has the status of the most authoritative interpreting body of the Constitution. In France there is the *Conseil constitutionnel*, established in 1958 when the Constitution was reformed. The *Conseil constitutionnel* on many occasions pronounced some Bills to be in conflict with the Constitution.³ The position as an authoritative interpreter can be based - depending on the country - on a written rule, but also on customary law or constitutional conventions. For example, in the Constitution of Germany it is Article 93 where the powers of the *Bundesverfassungsgericht* are laid down and in the Constitution of Italy it is Article 134 that contains rules concerning the *Corte costituzionale*.

Often the authoritative interpretation of the Constitution concerns particularly *constitutional judicial review*. Authoritative interpretation also takes place in situations where some state body seeks to determine its own competency on the basis of the Constitution. From the perspective of the theory of interpretation, it is interesting to see whether the interpretation of the Constitution differs from the interpretation of ordinary laws, i.e. laws hierarchically below the Constitution. In general, interpretation can be defined as an action where the purpose is to limit uncertainties in texts to be interpreted. It could also be defined as giving, specifying or confirming some content of meaning from a group of possible meanings. Typical interpretation methods are the *grammatical*, *historical*, *systematic* and *teleological* methods. There is also the so-called *doctrinal* method, which is typical especially of courts and also of all other bodies that have abundant practice. There are also several types

² See Aulis Aarnio, *Laintulkinnan teoria*, Helsinki 1989, p. 183.

³ See, e.g., Neville L. Brown & John S. Bell, *French Administrative Law*, 5th edn., Oxford 1998, pp. 17-24.

of standard that can be used in the interpretation process. To choose a method therefore involves choosing an argument. There can be many different kinds of argument, and the argumentation of the interpretation as a whole can be very complex. However, it is not always easy to see which method has been used in the interpretation. Of course, it is also possible that no method at all has been used and the decision is based only on the intention of the decision-maker.

2. Argumentation and types of argument

Hannu Tapani Klami has presented several functions for argumentation. These are the informative, control, persuasive and pedagogical functions. The purpose of the *informative function* is to announce why and how the final outcome is what it is. The purpose of the *control function* is to make validity and solidity of the decision possible, which is important, for example, when one wants to get a change of decision. The meaning of the *persuasive function* is to present an argumentation that can be approved as a basis for the decision. In this case, the argumentation may only be a ‘facade’. With facade argumentation one tries to formulate arguments so that the interpretation appears justifiable without a real interpretation resulting from the arguments. The *pedagogical function* means that the decision must be argued so that it is easy to understand and adopt.⁴ These four functions make their own perspectives to argumentation. In this article, the classification of the functions is not, however, a central point. Accordingly, argumentation is conceived in its entirety. However, it is very useful to know what different dimensions argumentation can have, because these tell why argumentation is necessary.

There can be many different types of argument. For example, Robert Alexy presents a list: there can be semantic, genetic, historical, comparative, systematic and teleological arguments.⁵ Aulis Aarnio offers a different kind of list: semantic, syntactic, logical, juridical and teleological arguments, as well as value, analogy and *e contrario* arguments.⁶ If we look closely at Alexy’s and Aarnio’s lists and their contents, it can be noticed that the differences between these lists are not so remarkable. This makes an important point: argumentation can be systematised in different ways and researchers can name the same types of argument differently. To provide more examples, one may look, for example, at the book *Interpreting Statutes*. In this book - which compares the interpretation of statutes in nine countries - the list of argument types is divided into four main groups: linguistic, systematic, teleological and intentional arguments.⁷ This list is, in general, similar neither to Alexy’s nor to Aarnio’s categorisation. Nevertheless, looking more closely, one can see that this listing is also very similar to the other two.

However, the *name* of the argument type is not the most essential in this case. The

⁴ See Hannu Tapani Klami, *Finalistinen oikeusteoria*, Turku 1979, p. 127.

⁵ Robert Alexy, *A Theory of Legal Argumentation*, Oxford 1989, pp. 235-244.

⁶ Aarnio 1989, pp. 217-247.

⁷ See D. Neil MacCormick & Robert S. Summers, ‘Interpretation and Justification’, in: *Interpreting Statutes: A Comparative Study*, ed. D. Neil MacCormick & Robert S. Summers, Aldershot [etc.] 1991, pp. 512-515.

most important thing is to clarify what type of argument could be used in the argumentation process substantively. It is very clear that similar types of argument are used in different countries. My own list of argument types comprises grammatical, historical, systematic, doctrinal, comparative and teleological arguments. I will very briefly explain what I mean by these, since there is not enough space here to explain them thoroughly. With *grammatical argument* I point to an argument that is based on the text that is interpreted. *Historical arguments* are arguments that can be found from the *travaux préparatoires* of the statutory law. In this case, one should be able to find the intent of the legislator. *Systematic arguments* can be found from the logical relations of a norm to other norms of the legal order. That kind of argument is, for example, analogical argument. The use of systematic arguments requires a view of the legal order as a system, which is probably not always an easy task. *Doctrinal arguments* are systematic arguments, actually, but I think that they can be separated for the sake of a better understanding of the subject. Doctrinal arguments can be found in a different kind of practice; this may be court practice, but also the practice of some other state body which has made decisions and interpretations, for example, for many decades. *Comparative arguments* are mainly arguments from foreign law, which can be a foreign legal order or legal system. It is also possible to use international treaties as comparative arguments. *Teleological arguments* can be based on different kinds of purposes. In the interpretation process this means that the interpretation should be made such that the aim of the norm will be realised. An interpretation should, of course, be made with an objective mind. The teleological method is the best way of arriving at an authoritative interpretation of the norm.

3. Is interpretation of the Constitution something special in relation to other laws?

It is quite obvious that the Constitution is different from other laws, at least in those countries where it has *lex superior* status and amending it requires a qualified procedure. Characteristic of the Constitution is that its norms contain more principles and value statements than the norms in Acts that are hierarchically below the Constitution. This can be seen at least in the case of basic rights. Still, there is a great similarity at the level of interpretation between the norms of the Constitution and other statutes. The basic problem in both cases is that the norm content is unclear.

There have been discussions in many countries about the question whether one should interpret the Constitution differently from other statutes. For example, in the United States it is common to conceive the interpretation of the Constitution as a special case in comparison with statutes, which do not have the same status.⁸ A central question has been whether the Constitution is static or changeable. So-called *originalists* favour a static interpretation of the Constitution and so-called *non-originalists* are prepared to modify its interpretation when necessary. Typical of the originalists is their ‘original intent’ thinking, which means that interpretation is strongly rooted in the grammatical method. An example of non-originalist thinking is the ‘separate but equal’ doctrine.⁹

The same question also arose in Germany, and there too two main lines can be

⁸ Zenon Bankowski, D. Neil MacCormick, Roberts S. Summers & Jerzy Wróblewski, ‘On Method and Methodology’, in: MacCormick & Summers 1991, p. 11.

⁹ See Michael J. Perry, *The Constitution in the Courts: Law or Politics?*, Oxford 1994, passim.

discerned. One supports a *traditional* interpretation of the Constitution, while the other thinks that there should be *dynamics* in the interpretation. However, a *synthesis* of these two lines has been suggested, when in interpretation ‘classical’ interpretation methods (grammatical, historical) should be used, at least in principle. Different interpretation methods may be used together.¹⁰ In Sweden, at least two *travaux préparatoires* can be found, where it has been suggested that the Constitution should be interpreted along the same principles as other statutes.¹¹ That view, however, did not receive unanimous support in Sweden. Thomas Bull states that very little has been said about the interpretation of the Constitution in the Swedish constitutional debate.¹²

It is obviously possible to develop different types of method for the interpretation of the Constitution. Nonetheless, it is not always clear how much these methods differ from the ‘usual’ methods, i.e. methods that are used in the interpretation of ordinary laws. And, on the other hand, are those methods even necessary? There are, in general, many rules in the Constitution which do not need a ‘special method’ to be applied while being interpreted. Some rules do not cause any interpretation problems, because they are formulated unambiguously. An example of this kind of rule is a rule that regulates the number of representatives in Parliament. On the other hand, basic rights are a group of norms that usually need rather more interpretation than many other norms of the Constitution. This is because norms concerning basic rights are very important rules and those norms are seldom unambiguous. However, I do not wish to state that some norm of the Constitution would be less valuable than others because it does not cause any interpretation problems. However, attention is more often paid to only some norms of the Constitution.

An important question concerns the objectivity of the interpretation of the Constitution. Is its interpretation a value-neutral activity or is there room for political opinions? If interpretations are made in Parliament, it is, I believe, obvious that interpretations can also contain strong political features. If one talks about, for example, freedom of speech, it is clear that the interpreters cannot ultimately avoid value opinions. Very often the courts are also in the situation where they must say something about the values of the Constitution. Of course, there are two sides in this matter: some interpreters want to say a lot about the values of the Constitution, whereas others want to be quiet and do not want to take an explicit standpoint concerning the case at hand. In the case of courts, this is called either *judicial activism* or *judicial self-restraint*.¹³

Barry Holmström has researched the political role of the courts in Great Britain, France and Germany. He noticed that the political role of the courts varies greatly when the question is about their role as political actors and authoritative political decision-makers who

¹⁰ Winfried Brugger, ‘Legal Interpretation, Schools of Jurisprudence, and Anthropology: Some Remarks from a German Point of View’, *The American Journal of Comparative Law*, 42 (1994), 395-421.

¹¹ Statens Offentliga Utredningar (SOU) 1963: 17 p. 513 and SOU 1972: 15 p. 319.

¹² Thomas Bull, *Mötes- och demonstrationsfriheten - En statsrättslig studie av mötes- och demonstrationsfrihetens innehåll och gränser i Sverige, Tyskland och USA*, Uppsala 1997, pp. 240-250. See also Joakim Nergelius, ‘Om grundlagstolkning, grundlagsvänlig lagtolkning och åsidosättande av grundlagsstridig lag’, *Svensk Juristtidning* 10 (1996), 835-870.

¹³ See, e.g., Kenneth M. Holland (ed.), *Judicial Activism in Comparative Perspective*, Houndmills [etc.] 1991.

formulate the values of society. The importance of the courts has, according to Holmström, grown remarkably in last few decades and the activity of the courts also has connections to party politics. Holmström states that people accept the political role of the courts, because there has been ‘chronic impotence’ in the actions of parliaments to realise democracy. In Germany and France, so it became clear, political attitudes affect the choice of judges more than their competence in the field of law does, although the latter is still an important factor.¹⁴ The picture Holmström paints is quite dark from the perspective of democracy. I do not know whether the situation is the same in Finland and Norway, but it seems likely that the political aspects of the courts could have some connections with the politics of the parties.

4. Who are the authoritative interpreters of the Constitution in Finland?

In Finland, there are some persons, such as the President of the Republic (*Tasavallan presidentti*), the Speaker of Parliament (*Eduskunnan puhemies*), the Parliamentary ombudsman (*Eduskunnan oikeusasiamies*) and the Attorney General of the Government (*Valtioneuvoston oikeuskansleri*) who can be called some kind of authoritative interpreter of the Constitution. Also, the highest courts - the Supreme Court (*Korkein oikeus*) and the Supreme Administrative Court (*Korkein hallinto-oikeus*) - should be mentioned. Traditionally, courts did not have a significant role in the interpretation of the Constitution, but this position changed after the reform of basic rights in 1995 and it is also expected that the new Section 106 of the Constitution - which includes a demand for the priority of the Constitution in the courts - *may* make the role of the courts more important. Still, there are many researchers who are very critical, and doubt whether Section 106 will have an important role at all.¹⁵

However, it can be stated that the Finnish Parliament’s constitutional committee (*Perustuslakivaliokunta*) is the most authoritative interpreting body of the Constitution in Finland. This is a fact that has also been expressed both in the *travaux préparatoires* of the new Constitution (*Suomen Perustuslaki 731/1999*) as well as in Finnish legal writing. In the draft of the new *Perustuslaki* (which came into force on March 1st, 2000), there is a provision that throws light on the interpretation of the Constitution. In the text it is stated that the *Perustuslakivaliokunta* has a central and an authoritative position in terms of the interpretation of the *Perustuslaki*.¹⁶ Further, Antero Jyränki, for example, writes that the *Perustuslakivaliokunta* is the *most* authoritative interpreting body of the *Perustuslaki*. However, Jyränki states that other state bodies are also capable of making interpretations, because the *Perustuslaki* gives different kinds of opportunity, for example to the courts to

¹⁴ Barry Holmström, *Domstolar och demokrati - Den tredje statsmaktens politiska roll i England, Frankrike och Tyskland*, Uppsala 1998, pp. 73, 417, 422, 429, passim.

¹⁵ See, e.g., Jaakko Husa, ‘Lakien perustuslainmukaaisuuden valvonta ja valtio sääntöuudistus’, *Defensor Legis* 1998, 183-215; Ilkka Saraviita, *Perustuslaki 2000*, Helsinki 2000, pp. 524-530; Martin Scheinin, *Perustuslaki 2000 -ehdotus ja lakien perustuslainmukaisuuden jälkikontrolli: puoli askelta epämääräiseen suuntaan*, Lakimies 1998, pp. 1123-1131.

¹⁶ Hallituksen esitys Eduskunnalle uudeksi Suomen Hallitusmuodoksi (HE 1/1998 vp), p. 51.

apply the *Perustuslaki* and use it as an argument.¹⁷

As mentioned above, the *Perustuslakivaliokunta* is one of the committees in the Finnish Parliament (*Eduskunta*), and members of the committee are Members of Parliament. According to the working order of Parliament (*Eduskunnan työjärjestys 40/2000*), there have to be at least seventeen members on the committee and it has the authority to make decisions when at least two out of three of the members are present. The *Perustuslakivaliokunta* can issue statements (*Perustuslakivaliokunnan lausunto, PeVL*) and produce reports (*Perustuslakivaliokunnan mietintö, PeVM*). First of all, these kinds of documents are given because of Government bills. Interpretations of the *Perustuslaki* are usually given as statements, whereas the reports usually contain new doctrines. It can be said that the statements of the *Perustuslakivaliokunta* are the most authoritative material in the interpretation of the *Perustuslaki*.¹⁸ The committee is a provisional body, which means that Parliament has no obligation *de jure* to accept the committee's solutions, except where Section 42.2 of the *Perustuslaki* is concerned.¹⁹ Such a situation occurs when the Speaker of Parliament has refused to bring an issue to the vote, with the argument that it is against the Constitution or some other law. In such a case, Members of Parliament can ask for a statement from the *Perustuslakivaliokunta*, to investigate whether the Speaker acted correctly.

However, solutions (as well as interpretations) of the committee have always been accepted *de facto*. There is no specific rule in the *Perustuslaki* concerning *de facto* binding statements, although in Section 74 it is stated that the duty of the *Perustuslakivaliokunta* is to give statements about matters that concern constitutionality and relations to international human rights treaties.

It can be said that the *Perustuslakivaliokunta* is at least at some level a political body, but it still tries to be a judicial type of body. Various kinds of opinion can be found in Finnish legal writing concerning the *Perustuslakivaliokunta*'s political role.²⁰ Nevertheless, it seems to be so that almost everyone is willing to approve the authoritative role of the *Perustuslakivaliokunta* as both judicial and political. Much depends on the case, because some matters quite obviously have such strong political aspects that they cannot be bypassed in the interpretation process.

An important feature is that the *Perustuslakivaliokunta* regularly hears experts such as professors of law, civil servants, but also interest groups. Most of all, the *Perustuslakivaliokunta* hears experts on constitutional law. In practice, the *de facto* importance of these expert statements is noteworthy, and the *Perustuslakivaliokunta* usually

¹⁷ See Antero Jyränki, *Uusi perustuslakimme*, Turku 2000, pp. 43-44.

¹⁸ See, e.g., Mikael Hidén, 'Övervakningen av lagarnas grundlagsenlighet i Finland', *Jussens Venner* 1998, pp. 66-77.

¹⁹ *Perustuslaki*, Section 42.2: 'The Speaker shall not refuse to include a matter on the agenda or a motion in a vote, unless he or she considers it to be contrary to the Constitution, another Act or a prior decision of the Parliament. In this event, the Speaker shall explain the reasons for the refusal. If the Parliament does not accept the decision of the Speaker, the matter is referred to the Constitutional Law Committee, which shall without delay rule whether the action of the Speaker has been correct.' <<http://www.om.fi/constitution/3340.htm>>

²⁰ See, e.g., Veli Merikoski, *Kansa ja kansanvalta*, Helsinki 1974, p. 211; Mikael Hidén, '... antaa perusteltu lausunto siitä, onko ...' *Perustuslakivaliokunnan VJ 80 §:n mukaisesti antaman mietinnön n:o 17/80 vp herättämiä en sivaikutelmia*, Lakimies 1980, pp. 586-618; and Paa vo Nikula, *Peruso ikeudet ja la insäädä ntö*, Lakimies 1999, pp. 878-886.

accepts the interpretation that the majority of experts recommended. Typical of the *Perustuslakivaliokunta* is the direct application of the statements given by the experts. For example, Ilkka Saraviita found that in many cases the committee writes almost exactly the same sentences that are found in the expert statements.²¹ This fact has its effect in the case of argumentation: many of the arguments of the *Perustuslakivaliokunta* are, in fact, arguments of outside experts.

5. Who are the authoritative interpreters of the Constitution in Norway?

In Norway too, some state bodies have authority in matters concerning the interpretation of the Constitution (*Grunnlov*, from the year 1814). In practice it is possible that many state bodies have to interpret the *Grunnlov*. More often this occurs in the courts, Parliament (*Storting*), the Government (*Regjering*) and the Parliament's ombudsman (*Stortingets sivilombudsman*). Such a situation may also arise when a person has appealed against a court decision. Local government bodies may have to interpret the *Grunnlov*. Erik Boe mentions that a so-called *fylkesman* - local government body - can in practice make interpretations of the *Grunnlov*.²² Although there seem to be several state bodies that have made their own interpretations of the *Grunnlov*, most of them, however, do not seem to be very authoritative.

In Norway, the Supreme Court (*Høyesterett*) is the most authoritative interpreting body of the *Grunnlov*.²³ The central position of the *Høyesterett* as regards matters concerning the interpretation of the *Grunnlov* is based primarily on constitutional customary law.²⁴ Thus, the *Grunnlov* does not state that the *Høyesterett* is the most authoritative interpreting body of the Constitution. Interpretations are made in concrete court decisions. As constitutional judicial review is an important form of interpretation of the *Grunnlov*, so in Norway the control is concrete and takes place afterwards.

Members of the *Høyesterett* are professional judges who are chosen by the Ministry of Justice.²⁵ There is no fixed number of judges on the *Høyesterett*, but usually their number

²¹ See Ilkka Saraviita, 'Perustuslakivaliokunnan rooli perusoikeusjärjestelmän kehittämisesssä', in: *Perusoikeudet Suomessa*, ed. Liisa Nieminen, Helsinki 1999, pp. 29-71.

²² Erik Boe, *Innføring i juss*, bind 2, Oslo 1993, p. 888. See also Erik Boe, 'Lovers grunnlovsmessighet', *Jussens Venner* 1998, pp. 4-36.

²³ See, e.g., Eivind Smith, *Høyesterett og folkestyret*, Oslo 1993, p. 20. Smith states that the *Høyesterett* is the highest institution in the constitutional area. This also concerns the interpretation of the Constitution.

²⁴ Johs. Andenæs, *Statsforfatningen i Norge*, 8. utgave, Oslo 1998, pp. 21, 288-289 and Boe 1998, p. 13. In Norway, many fundamental norms that are taken account of in legal practice are unwritten; this is called constitutional customary law.

²⁵ See Smith 1993, p. 332, who states that in Norway the nominations of *Høyesterett* judges are not such a political issue as, e.g., in the United States and in many European countries. See also Jan Skåre, 'Betydningen av Høyesteretts sammensetning', *Lov og Rett* 1999, 67-77, who researched the career backgrounds of the *Høyesterett* judges.

does not exceed twenty.²⁶ Cases to the *Høyesterett* come from the lower courts and these may concern different kinds of affairs, for example criminal cases or compensation cases. It should be noticed that, in fact, very few cases concern constitutional matters.²⁷ When the *Høyesterett* makes a decision (a judgment), it includes the opinions of every judge. The decision is legally binding when it is made in the *plenum*, but the *Høyesterett* can change its interpretation doctrines whenever it deems it necessary.²⁸

There has been a debate on the question whether the *Høyesterett* can be labelled a political body.²⁹ Many Norwegian researchers have the opinion that the *Høyesterett* also has a political function, because both law and politics belong to the role which the *Høyesterett* has as a ‘creator of law’ or as a ‘negative legislator’. Thus, the *Høyesterett* actually has two separate roles: on the one hand it is self-restraining and on the other it is active.³⁰ Nevertheless, the active side of the *Høyesterett* is so strong that in Norway it is thought that the *Høyesterett* is also some kind of political institution, a ‘third state power’. In other words, the *Høyesterett* is not simply a court because it has constitutional functions that are not available in other courts.³¹

6. Some examples of the argumentation of the *Perustuslakivaliokunta* and the *Høyesterett*

My aim is not to analyse the whole practice of the *Høyesterett* and the *Perustuslakivaliokunta* that would somehow link matters of interpretation of the Constitution. That would be a huge task! Both the *Høyesterett* and the *Perustuslakivaliokunta* have an abundant practice, so there is a wealth of material that can be used as examples. The cases are to be explained from the perspective of argumentation. In this way, one may obtain a list of argument types that are in use in the *Høyesterett* and in the *Perustuslakivaliokunta*. My aim is also to present the features that are typical for the *Høyesterett* and the *Perustuslakivaliokunta* when interpreting the Constitution.

As I mentioned above, different kinds of argument type exist, such as grammatical, historical, systematic, doctrinal, comparative and teleological arguments. The grammatical

²⁶ See Svein Eng, ‘Precedent in Norway’, in: *Interpreting Precedents: A Comparative Study*, ed. D. Neil MacCormick & Robert S. Summers, Aldershot [etc.] 1997, pp. 189-217 and Eivind Smith, ‘Domstolskontroll med lovgivning i Norge efter ca. 1970’, *Tidsskrift for Rettsvitenskap* 1990, 88-120.

²⁷ See Smith 1993, pp. 204-206.

²⁸ See Eng 1997, pp. 198-200 and Torstein Eckhoff, *Rettskildelære*, 3. utgave, Oslo 1993, pp.151-154. See, on the other hand, Anne Robberstad, ‘Er Høyesteretts dommer bindende?’, *Tidsskrift for Rettsvitenskap* 2000, 504-524, who criticizes the bindingness of the *Høyesterett*’s judgments in general because this could have serious effects also in those cases where the judgment is ‘wrong’.

²⁹ About the debate, see, e.g., Per Helset & Bjørn Stordrange, *Norsk statsforfatningsrett*, Oslo 1998, p. 28.

³⁰ See, e.g., Johs. Andenæs, ‘Høyesterett som politisk organ’, *Lov og Rett* 1965, pp. 22-43; Eckhoff 1993, p. 161; Smith 1993, pp. 258-259; Carl August Fleischer, *Rettskilder*, Oslo 1995, pp. 58, 152; Carsten Smith, *Loven og livet*, Oslo 1996, pp. 42-44 and Rune Slagstad, ‘Rettsens ironi, åpningsforedrag ved Det 35. nordiske juristmøte’, Oslo 18.8.1999, p. 8.

³¹ Andenæs 1998, p. 170.

method and the use of grammatical arguments are not usual in the *Høyesterett* practice. In Norway - according to Per Helset and Bjørn Stordrange - the interpretation of the *Grunnlov* is less of a juridical nature than the interpretation of ordinary statutes; there are more political elements in the interpretation of the *Grunnlov*. This is due to the fact that in the case of the *Grunnlov* the wording and the *travaux préparatoires* do not have a central position as is the case with ordinary statutes.³² On the other hand, Carl August Fleischer remarked that there are several starting points for the interpretation of the *Grunnlov*. First of all, there is the age of the *Grunnlov*. The *Grunnlov* was adopted in the year 1814, and it is the oldest Constitution in Europe and the second oldest in the world after the Constitution of the United States. From this it may be clear that the *travaux préparatoires* of the *Grunnlov* no longer have relevance for its interpretation. Of course, amendments have been made after the year 1814; for example, Articles 110b and 110c came into force in the 1990s. However, these amendments are, after all, not so significant that they would affect in any notable way features of interpretation of the *Grunnlov* as a whole. Secondly, the language of the *Grunnlov* is not modern and it is also full of vague expressions (there is more than one way of interpreting a sentence) so that the use of the grammatical method would be difficult. Fleischer mentions other matters that may affect interpretation such as the *lex superior*, quality, political aims and qualified amendment procedure of the *Grunnlov*. Nonetheless, Fleischer does not think that the interpretation of the *Grunnlov* is fundamentally different from the interpretation of ordinary statutes.³³

An example of using the *travaux préparatoires* argument can be found in *Høyesterett* case *Rt. 1980 s. 52*, which concerns the interpretation of Article 88 of the *Grunnlov*. In this case, the question was whether the *Høyesterett* was *siste instans* (the highest appeal court) in matters concerning labour disagreements. Amendments had been made to the *Grunnlov* in 1862, when Parliament decided that the *Høyesterett* was not necessarily the *siste instans*. However, in 1911 the Parliament's constitutional committee issued a statement whereby the amendment from the year 1862 was found unnecessary. The *Høyesterett* used this as an argument when it decided that the *Høyesterett* would be the *siste instans* also in matters concerning labour disagreements. As can be noticed, the *Høyesterett* used rather old *travaux préparatoires* as an argument. Accordingly, this proves that the age of documents is not always an obstacle, at least not in constitutional law.

In Finland, the *Perustuslakivaliokunta* used both grammatical and historical arguments. It is very likely that these types of argument are used also in situations where the *Perustuslaki* is new. As an example of the use of grammatical arguments, mention can be made of the *Perustuslakivaliokunta*'s statement concerning Finland's membership of the European Union (*PeVL 14/1994 vp*). This was before the new *Perustuslaki* was adopted. Finland had negotiated an agreement with the EU, but that agreement needed a law from the Finnish Parliament to be put into effect. Thus, the question was in what order that law of enforcement had to be approved. There were two main alternatives. The first was an order based on Section 69 of the 1928 *Valtiopäiväjärjestys*, according to which the law could be

³² Helset & Stordrange 1998, pp. 68-70.

³³ See Carl August Fleischer, 'Prinsipper for grunnlovsfortolkning', *Lov og Rett* 1969, 433-452.

enacted in a fast schedule, but still would need two out of three of the votes in Parliament.³⁴ The second alternative was an order based on Article 67 of the *Valtiopäiväjärjestys*. According to this Section, the law should have been enacted following the Constitution, meaning that elections should be held before the law could be enacted. The *Perustuslakivaliokunta* argued that the order of Section 69 of the *Valtiopäiväjärjestys* was proper to enact the law because the grammatical form of Section 69 was in harmony with the EU. The *Perustuslakivaliokunta* also used other arguments, for example, the *travaux préparatoires* of the *Valtiopäiväjärjestys* and the practice of Parliament in the case of agreements.

However, both alternatives (Sections 67 and 69 of the *Valtiopäiväjärjestys*) would have been acceptable. This can be seen, for example, from the dissenting opinions which some of the members of the *Perustuslakivaliokunta* signed, and also from expert statements. In the end, it seems that it was simply the will of the major political parties to obtain membership of the EU as quickly as possible. Still, it would be rather bold to argue that the argumentation of the *Perustuslakivaliokunta*'s statement was just facade argumentation, because the case was solved with juridical arguments.

A more recent example of the use of historical arguments in the *Perustuslakivaliokunta*'s practice concerns a statement concerning the penalisation of membership of a criminal organisation (*PeVL 10/2000 vp*). The issue was whether the Government's proposal for penalisation was against Sections 8 (the principle of legality in criminal cases) and 13 (freedom of assembly and freedom of association) of the *Perustuslaki*. The *Perustuslakivaliokunta* used as its central argument the Government's basic rights reform (*Hallituksen esitys 309/1993 vp*).³⁵ However, other kinds of arguments were also used so that it would be a mistake to say that the *Perustuslakivaliokunta*'s interpretation was based mainly on historical arguments. It is common that both the *Høyesterett* and the *Perustuslakivaliokunta* use several types of argument as the basis of their interpretation.

Systematic arguments are very important argument types for both institutions. This becomes particularly clear from their abundant practice. This practice means that some kind of systematic construction can very probably be found concerning the ideas of interpreting the Constitution. In other words, different types of doctrine can be found besides those used in interpretation. Moreover, I would rather use the term 'doctrinal argument' in connection with this type of systematic argument.

In the *Høyesterett* cases, the *Høyesterett* normally follows the ideas concerning the interpretation of the *Grunnlov* that it had in previous cases. Many cases can be mentioned, for example the famous *Kløfta* case (*Rt. 1976 s. 1*), where the final outcome was argued by using many earlier cases. In the *Perustuslakivaliokunta*'s practice, the use of doctrinal arguments is perhaps even more emphasised than in the *Høyesterett*. The *Perustuslakivaliokunta* very often uses doctrinal arguments, see, for example, the case mentioned above (*PeVL 10/2000 vp*). Still, it is not always clear whether the doctrinal argument is used as a *ratio decidendi*

³⁴ Before the new *Perustuslaki* (731/1999), there were four constitutional Acts which together formed the Constitution: *Suomen Hallitusmuoto* (94/1919), *Valtiopäiväjärjestys* (7/1928), *Laki eduskunnan oikeudesta tarkastaa valtioneuvoston jäsenten ja oikeuskanslerin sekä eduskunnan oikeusasiamiehen virkatointen lainmukaisuutta* (274/1922) and *Laki valtakunnan oikeudesta* (273/1922).

³⁵ The Basic Rights Reform Act entered into force in 1995. The content of the Act was incorporated into the new *Perustuslaki*.

argument or more like an *obiter dicta* argument. Of course, this question is justifiable with every argument. It is, after all, not easy to assess which interpretation method is the most important in the case at hand.

Although comparative arguments are not as often used in the *Høyesterett*'s and the *Perustuslakivaliokunta*'s practice as doctrinal arguments, these kinds of case are not rare. Obviously, much depends on the attitude that the interpreter has towards foreign law, but also on the question whether comparative arguments are needed at all.

In Norway, the *Høyesterett* used comparative arguments, for example, in cases *Rt. 1997 s. 580* and *Rt. 1997 s. 1821*. Actually, comparative arguments play a rather important role in these cases. In the latter case - the so-called *Kjuus-saken* - the question concerned the freedom of speech (Article 100 of the *Grunnlov*). There had been elections, in which the accused had revealed racist opinions. The *Høyesterett* mentioned the European Convention on Human Rights and the United Nation's Covenant on Civil and Political Rights in its argumentation. The *Høyesterett* also mentioned the practice of the European Commission of Human Rights and the European Court of Human Rights, and the judgments that those had given in matters concerning freedom of speech. So, in this case the *Høyesterett* considered it inevitable to comply with international treaties.

In the other case (*Rt. 1997 s. 580*), the *Høyesterett* was not, however, so accommodating as regards international law as in the *Kjuus-saken*. In this case it was questioned whether conciliation was justifiable by force. There had been a strike on the oil rigs and when no agreement could be made between the Government and the strikers, the Government ended the strike by forcing conciliation. The strikers appealed, arguing that the Government's actions were against Article 110c of the *Grunnlov*.³⁶ The *Høyesterett* noted that Norway had committed itself to several international treaties containing provisions on the right to strike. One of these treaties was the ILO agreement. However, the *Høyesterett* argued that the ILO agreement was not a restrictive factor when the question concerned the interests of society. The United Nation's Covenant on Economic, Social and Cultural Rights was not, according to the *Høyesterett*, a restrictive factor either, because Norway had negotiated certain options, nor was the European Social Charter the kind of treaty that would have affected the case in hand. So, the *Høyesterett* used important national interests as an argument against the international treaties. What is perhaps a surprise is that the *Høyesterett* does not mention the *travaux préparatoires* of the *Grunnlov* Article 110c at all, although that had recently come into force.

From the *Perustuslakivaliokunta*'s practice, the statement *PeVL 10/2000 vp* can be mentioned again. The *Perustuslakivaliokunta* used the European Convention on Human Rights as a comparative argument when it noted that the *Perustuslaki* was in harmony with the agreement. On the other hand, the *Perustuslakivaliokunta* also mentioned the 1966 United Nations International Convention on the Elimination of All Forms of Racial Discrimination. A different matter is whether these arguments can be classified as *ratio decidendi* or *obiter dicta* arguments.

It can be said that both in Finland and in Norway international treaties have effect. Nevertheless, in general, the attitudes towards international law are somewhat different in the *Høyesterett* and the *Perustuslakivaliokunta*. In Norway, there is a principle of priority of

³⁶ *Grunnlov*, Art. 110c: 'It is the responsibility of the authorities of the State to respect and ensure human rights. Specific provisions for the implementation of treaties hereof shall be determined by law.'
<[http://www.uni-wuerzburg.de/law/no00000 .htm](http://www.uni-wuerzburg.de/law/no00000.htm)>

national law, whereas in Finland such a principle is not in use. So, attitudes in Norway favour some kind of isolation in those matters that seem to be important in respect of national interests. This can be seen from *Høyesterett* case *Rt. 1997 s. 580*, where national interests considerations had much more influence than international treaties.³⁷ In the past decade, there has been a strong tendency towards internationalism in Finland. This kind of politics does not allow isolationism and for that reason too international treaties must be taken into consideration more carefully.

Undoubtedly, the most characteristic type of argument in the *Høyesterett's* argumentation is the teleological argument (see, for example, Frede Castberg). In the case of constitutional law, the main reason for this is undeniably the way in which texts of the *Grunnlov* are formulated. In other words, grammatical interpretation of the *Grunnlov* is not possible in all cases, implying that the meaning of the norm should be obtained in a different way, and the teleological method is that kind of way.³⁸ Many cases can be found where teleological arguments have been used, for example case *Rt. 1970 s. 67*, where the question was about the right to use property. There was a small island on which the owner wanted to build a cottage. There was a temporary prohibition on building in that area. The owner of the island demanded compensation because of the prohibition and argued that compensation should be paid on the basis of Article 105 of the *Grunnlov*, which contains a rule about the right to property. The *Høyesterett* decided that there was no ground for compensation, because the common values of society were more valuable than the rights of an individual. Thus, the *Høyesterett* interpreted Article 105 of the *Grunnlov* using a teleological argument and formulated such kinds of purposes that it regarded necessary for the normative content of Article 105.

Another example concerning teleological argumentation can be found in *Høyesterett* case *Rt. 1997 s. 1821* (the *Kjuus-saken* mentioned previously). The *Høyesterett* used a teleological argument when it stated that Article 100 of the *Grunnlov* is an old provision and that that is why it should be interpreted from the perspective of social development. So, the *Høyesterett* took on the role of legislator when it found Article 100 to be out of date and that the Article should be interpreted in the spirit of the times.

In the *Perustuslakivaliokunta's* practice, teleological arguments do not take such a prominent position as in the *Høyesterett*. The *Perustuslakivaliokunta* also uses this kind of argument, but on the whole it rather stresses the juridical nature of its interpretation than does the *Høyesterett*. An example is statement *PeVL 32/1992 vp*, which concerns the interpretation of Section 6.2 of the *Suomen Hallitusmuoto*. In that Section, there were provisions concerning the responsibility of the state to arrange jobs for people when there were no statutes in force regulating the matter. Finland was at that moment in a period of serious economic recession. The Government produced a Bill containing no provisions which would oblige the municipalities to organise training jobs for people under twenty. The *Perustuslakivaliokunta* interpreted Section 6.2 in a way that its purpose became more of a political rule than a

³⁷ See Helset & Stordrange 1998, pp. 167-168. They mention that the *Høyesterett* has some dualistic tendency towards international law. See also Smith 1993, p. 234, who states that in Norway it was traditionally thought that national law must be in harmony with international customary law, though not necessarily with international treaties.

³⁸ Frede Castberg, *Norges statsforfatning I*, Oslo 1964, pp. 57-61. See also Fleischer 1969, p. 447, who mentions that teleological arguments have had a preponderant role in the interpretation of the *Grunnlov*.

juridically binding rule. With this interpretation the *Perustuslakivaliokunta* actually changed - with a teleological argument - its own doctrine that was previously in favour of a binding responsibility.

7. Conclusions

It is, first of all, remarkable that both the *Perustuslakivaliokunta* and the *Høyesterett* use different types of argument, often in a way that there is more than just one argument type in the argumentation. Thus, of neither of them can it be said, that, for example, so-called 'original intent' thinking is in favour. Nevertheless, it seems to be that in the argumentation of the *Høyesterett* teleological arguments are used more than in the *Perustuslakivaliokunta*, which emphasises more doctrinal and juridical types of argument. It is obvious that the *Høyesterett* can be called a more political interpreter of the Constitution than the *Perustuslakivaliokunta*.

Thus, perhaps in some respects surprisingly, the argumentation of a parliamentary committee more often seems to be of a juridical nature than that of a court, although the members of the committee are politicians and members of the court professional judges who had a legal education and long experience. This can be explained better by the different positions of these bodies in society. The *Høyesterett* is a 'third state power', while the *Perustuslakivaliokunta* does not have that kind of special status as it is one of the parliamentary committees. The other explanation concerns the consultation of experts in the *Perustuslakivaliokunta*. The *Perustuslakivaliokunta* is highly dependent on constitutional experts. The probability for juridical arguments is higher, because most of the leading experts are experts on constitutional law, who favour juridical arguments. It should also be mentioned that the *Perustuslakivaliokunta* makes interpretations *in abstracto* while the *Høyesterett* makes them *in concreto*.

The second important finding is, obviously, that the *Høyesterett* and the *Perustuslakivaliokunta* have the *same kind of function as authoritative interpreting body* of the Constitution. Actually, both are the most authoritative interpreters of the Constitution in their own countries. This is an interesting finding at the theoretical level, but also in the respect that Finland and Norway are both part of the same legal family.³⁹ The same function in different kinds of institutions whose basic tasks are different shows clearly that there is more than one alternative for solving, for example, the problems that are involved in questions of interpreting the Constitution.

However, it would be wrong to say that the interpretation positions mentioned in Finland and Norway are unchangeable. There are many kinds of factor that may affect the position of the authoritative interpreter of the Constitution. One of them is, of course, the *level of argumentation*. It may always be questioned whether the argumentation is sufficient to justify the interpretation. In other words - just as Aulis Aarnio has said - one must earn one's authority as an interpreter. On the other hand, to be pessimistic and cynical, on the battlefield of politics it is never sure who is going to be the most authoritative interpreter of the Constitution for the next ten or a hundred years. For example, in the case of Finland the (federal) development of the EU could lead to a situation where one has to question who

³⁹ See, e.g., Konrad Zweigert & Heinz Kötz, *An Introduction to Comparative Law*, 2nd rev. edn., Oxford 1992, pp. 286-295.

ultimately becomes the most authoritative interpreter of the Constitution.