



REASONS FOR SAYING: NO THANKS!

Analysing the Discussion about the Necessity of a Constitutional Court in Sweden and Finland

Veli-Pekka Hautamäki¹

Readers are reminded that this work is protected by copyright. While they are free to use the ideas expressed in it, they may not copy, distribute or publish the work or part of it, in any form, printed, electronic or otherwise, except for reasonable quoting, clearly indicating the source. Readers are permitted to make copies, electronically or printed, for personal and classroom use.

Table of Contents

I	Introduction	1
II	Constitutional Judicial Review	3
III	Discussing the Necessity of a Constitutional Court	5
IV	Conclusive Remarks	10

I Introduction

Mauro Cappelletti in his well-known book *The Judicial Process in Comparative Perspective* suggests that the reason behind the establishment of the constitutional court in Germany and Italy was the need for ‘a pivotal tool for protecting themselves against the return of the evil – the horrors of dictatorship and the consequent trampling on of fundamental rights by legislators subservient to oppressive regimes.’² This reason — avoiding another dictatorship — was also of great importance, for example, when democratization took hold in socialist European countries towards the end of the 1980s and a number of new constitutional courts were established to secure democracy and respect for the constitution.³

¹ D.Sc., University of Joensuu, Finland.

² M Cappelletti *The Judicial Process in Comparative Perspective* (Clarendon Press Oxford 1989) 161. The establishment of a separate (de jure) constitutional court may be indicative of the nature of the legal culture and the political atmosphere of the country. Usually, it is considered necessary to organize ‘a watch-dog’ to secure the constitutional rights of individuals and to prevent illegal dealings by the legislator and executive.

³ Cf. M Shapiro *Courts – A Comparative and Political Analysis* (University of Chicago Press Chicago and London 1981) 155: ‘... the constitutional courts ... are not expected to be “neutral” but instead to be active instruments for the promotion of the newly established democratic regimes and guardians against any backsliding into earlier antidemocratic political ways.’ See A Stone Sweet *Governing with Judges – Constitutional Politics in Europe* (Oxford University Press Oxford 2000) 137 who lists four regulatory functions

In the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) such political tumults have not taken place for a long time. Hence, after World War II the rapid growth of the economy combined with political stability of the democratic system became characteristics of the Nordic countries. This is important to note, when it is realized that a separate constitutional court has not been established in any of the Nordic countries. As the Nordic examples show, the establishment of a constitutional court is not to be seen as a popular alternative everywhere.⁴

However, this non-establishment does not suggest that the establishment of a constitutional court would not have been considered when reforming the constitution. Although in the Nordic countries attitudes towards establishment of a constitutional court have in general been negative, considerations of its usefulness have not been entirely dismissed. Accordingly, the collapse of dictatorships and massive political tumults cannot be seen, in general, as the only reasons for the adoption of a constitutional court. Although the establishment of such a court has, more often than not, been effected for precisely these reasons, it could also be argued that the adoption of a constitutional court could ‘simply’ be due to the fact that the control of constitutionality has to be organized and that the constitutional court model is seen as being an appropriate model.⁵

In this article the discussion concerning the necessity of a constitutional court in Sweden and Finland is analysed. In addition, the reasons behind the non-adoption of a constitutional court are questioned.

The second section deals with constitutional judicial review, this being the primary function of a constitutional court. In Sweden and Finland official reports have been written as products of legislative processes, where the necessity of a separate constitutional court has been taken

a constitutional court performs: 1) operating as a ‘counterweight’ to majority rule; 2) ‘pacifying’ politics; 3) legitimizing public politics; and 4) protecting human rights. See also, e.g., J Ferejohn and P Pasquino ‘Constitutional Adjudication – Lessons from Europe’ (2004) 82 *Tex. L. Rev.* 1671; VF Comella ‘The Consequences of Centralizing Constitutional Review in a Special Court – Some Thoughts on Judicial Activism’ (2004) 82 *Tex. L. Rev.* 1705, at 1728; VF Comella ‘The European Model of Constitutional Review of Legislation – Toward Decentralization?’ (2004) 2 *Int’l J. Const. L.* 461, at 461–462; GF de Andrade ‘Comparative Constitutional Law – Judicial Review’ (2001) 2 *U. Pa. J. Const. L.* 977.

⁴ In, for example, the United Kingdom a new Supreme Court is being created that is going to replace the House of Lords as the highest appellate court of the land. Strong traditions of parliamentarianism and sovereignty of Parliament prevent the thought of establishing a constitutional court being seriously entertained. See Constitutional Reform Act 2005, Part 3 (Art 24–60). In its consultation paper of July 2003 the Department for Constitutional Affairs explicitly proclaims (8, 20–21) that the aim of the reform is to create neither a supreme court similar or identical to the one in the United States nor a constitutional court. The position of Parliament is seen as supreme and not even membership of the European Union or the Human Rights Act have changed that ‘fundamental’ position. Hence, a constitutional court ‘would be a departure from the UK’s constitutional traditions.’ Cf. PJ Van Koppen ‘The Dutch Supreme Court and Parliament – Political Decision-Making versus Non-Political Appointments’ (1990) 24 *Law & Soc’y Rev.* 745, at 758–759 who argues that in the Netherlands a special constitutional court would mean a tremendous change in the Dutch legal system. See also, e.g., Ferejohn and Pasquino (n 2) 1674.

⁵ On the other hand it must be noticed that where there are de jure constitutional courts, there also are de facto constitutional courts. That is to say, a court such as the Federal Supreme Court of the United States, without being a formal (de jure) constitutional court, is a very powerful court and in a general sense comparable to de jure constitutional courts. Some organs, without being thought of as courts at all, have been recognized as being as powerful as de jure constitutional courts. The *Conseil constitutionnel* in France possesses this kind of character. See Comella (n 2 *Tex. L. Rev.*) 1731–1733 who mentions the ‘purity’ of a constitutional court.

up for discussion when the forms of organizing the control of constitutionality have been investigated. The arguments presented in those reports are put under scrutiny in the third section. The final section of this article discusses the findings of the earlier chapters and also final conclusions are made. For example, when listing arguments rejecting the establishment of a constitutional court, it is advisable to call into question what the present usefulness of those arguments would be. This is an interesting question, especially because at present in Sweden the necessity of a constitutional court is being discussed.⁶

II Constitutional Judicial Review

The constitutional court subject invites the valid question of how the constitutional judicial review is manifested in the constitutions, or if it is indeed explicitly expressed at all. If not so, the constitution may contain implicit references to attitudes toward constitutional judicial review.⁷ In general, the significance of constitutional judicial review has not been as remarkable in the Nordic countries as it has been, for example, in the United States, Germany, or Hungary. However, even between the Nordic countries there are significant differences. In Norway especially constitutional judicial review has had much more significance than in the other Nordic countries.⁸

The historical background of constitutional judicial review differs between Sweden and Finland. In Sweden discussion concerning constitutional judicial review was not unknown even in the 19th century. In the 1850s it was seen by Parliament as unsuitable that courts could control the constitutionality of legislation. From then on, the discussion was kept alive by

⁶ See Kommittédirektiv 2004:96. The committee should finish its work at the latest in 2008. In Finland and Sweden, debates concerning the necessity of a constitutional court have centred on the moments of major constitutional reforms. Thus, in Finland the question has been more visible in those circumstances, where it has been considered as a sub-question of a total reform of the constitution; this took place at different times in the 1970s and 1990s. In Sweden, a similar process took place in the 1970s and 1990s.

⁷ H Koch 'Folkesuverænitet og domstolsprøvelse' (2000) 82 *Juristen* 281, at 286 points out that the *intensity* of constitutional judicial review cannot be concluded simply from the article where the separation of powers is written out. In Sweden and Finland, formulations of the Constitution illustrate the separation of powers doctrine. In Finland, the general content of the doctrine is presented in a single article of the Constitution Act of Finland (*Perustuslaki*). According to Article 3, legislative powers are exercised by Parliament (*Eduskunta*). The executive power is exercised by the President of the Republic (*Tasavallan Presidentti*) and the Government (*Valtioneuvosto*). Courts exercise the judicial powers. In Finland, the highest courts are the Supreme Court (*Korkein oikeus*) and the Supreme Administrative Court (*Korkein hallinto-oikeus*). In Sweden, there are four different constitutional acts with the same hierarchical status. However, the most important of these from the point of view of this article is the Instrument of Government (*Regeringsform*). According to this act, the legislative power is vested in Parliament (*Riksdag*). The executive power rests with the Government (*Regering*), according to Article 6. The Monarch is not vested with powers, but is Head of the State (Article 5). Article 8 states that the courts of law exist for the administration of justice. As in Finland, there are two supreme courts: the Supreme Court (*Högsta Domstol*) and the Supreme Administrative Court (*Regeringsrätt*). Hence, the court organization differs in this respect from Denmark, Iceland and Norway, where no separate administrative courts have been established.

⁸ See, e.g., E Smith *Høyesterett og folkestyret – prøvingsretten overfor lover* (Universitetsforlaget Oslo 1993) 24; J Nergelius 'Om grundlagstolkning, grundlagsvänlig lagtolkning och åsidosättande av grundlagsstridig lag' (1996) 81 *Svensk Juristtidning* 835, at 851; B Bengtsson 'Den svenska grundlagen och domstolarna' (1998) 33 *Jussens Venner* 56, at 62; J Husa *Nordic Reflections on Constitutional Law – A Comparative Nordic Perspective* (Peter Lang Frankfurt am Main etc 2002) 164, 172; H Zahle *Dansk forfatningsret bind 2* (Christian Ejlers' Forlag København 2003) 160.

professors of law.⁹ Constitutional judicial review was modest, or strictly speaking did not exist at all in Sweden before World War II.¹⁰ However, the first final court decision that considered a provision of a law un-constitutional and left it without adjudication on the grounds of 'evident conflict' was made by the Appeal Court in 1996.¹¹ In 2000, the Supreme Court also found that a provision of a law was unconstitutional (NJA 2000 p. 132).

In Finland the control of constitutionality of legislation was, from the very beginning, built on the parliamentary control more exclusively than in Sweden. During the period of autonomy (Finland was an autonomous Grand Duchy of Russia from 1809 to 1917), concentration of power in one of the permanent committees of Parliament was seen by the Finns as necessary security against the Russian Empire's imperialistic attempts to break down their autonomous position. Moreover, the courts' capability to prevent this development was not trusted, not least because judges were appointed by the Russian administrative bodies and 'Russification' of the country through court actions was feared.¹²

In both Finland and Sweden there is an article in the Constitution that allows courts to perform constitutional judicial review and to leave without adjudication a provision that is seen to be in evident conflict with the constitution.¹³ In Finland the rule in the *Perustuslaki* [the Finnish Constitution, ed.] is Article 106. Actually, the Finnish construction of 'evident conflict' was adopted from the Swedish *Regeringsform* [the Swedish Constitution, ed.] (Article 14, Chapter 11).¹⁴ The adaptation took place when the *Perustuslaki* came into force in 2000. At present, only one decision can be found where Article 106 has been applied by the Supreme Court with an outcome that left a provision of a law unapplied.¹⁵ It must be noticed that the power to control the constitutionality in Finland is still mainly concentrated in the Constitutional Law Committee of Parliament (*Perustuslakivaliokunta*). Hence, the control can

⁹ According to B Holmström 'The Judicialization of Politics in Sweden' (1994) 15 *International Political Science Review* 153, at 154: 'Public law scholars paid judicial review some attention, but at most they defended the view that the courts were authorized to ignore legislation made in flagrant contradiction to explicit rules in the Constitution.'

¹⁰ See Statens offentliga utredning (SOU) 1993:40 217–229; Holmström (n 8) 155 ff.

¹¹ Hovrätten för västra Sverige, avd 6, dom nr DB 48, i mål nr B 13/96. See, e.g., T Bull 'Om domstolarnas roll i demokratin – fågel, fisk eller mittemellan? – del II' (2000) 12 *Juridisk Tidskrift vid Stockholms Universitet* 26, at 27. However, for example in 1991 a court of first instance found a law as un-constitutional, but the appellate court overruled the decision. See Linköpings tingsrätt, dom 1991-11-13, DF33; Holmström (n 8) 160.

¹² A Jyränki *Lakien laki* (Lakimiesliiton Kustannus Helsinki 1989) 438–456; A Jyränki *Valta ja vapaus* (Talentum Helsinki 2003) 385–392. See also, eg, P Kastari 'Korkeimpien oikeuksien aseman muodostuminen ja kysymys lakien perustuslainmukaisuuden tutkimisesta' (1964) 62 *Lakimies* 909, at 914–915. C Olsson 'Om lagprövning' (1994) 130 *Tidskrift utgiven av Juridiska Föreningen i Finland* 443, at 457–478 describes — mainly academic — pieces from the Finnish judicial review discussion starting from the 1860s.

¹³ From the point of view of adopting a constitutional court, Comella (n 2 *Tex. L. Rev.*) 1732 points out that in Sweden and Finland 'It would have been pragmatically inconsistent to lay down the clear mistake rule and then erect a constitutional court.'

¹⁴ According to Bengtsson (n 7) 59, the main reason in Sweden for enacting the article was that judicial review was seen as protection against the misuse of legislative power.

¹⁵ See case KKO:2004:26. On the practical questions of applying Article 106, see J Husa 'Lakien perustuslainmukaisuuden valvonta ja valtiosääntöuudistus' (1998) 79 *Defensor Legis* 183, at 200–211.

be described to be preventive and abstract, but supplemented by Article 106 in the *Perustuslaki* that allows limited constitutional judicial review.¹⁶

In Sweden the application of the ‘evident conflict’ construction has not been fashionable either despite the fact that the provision was already amended into the *Regeringsform* in 1979.¹⁷ The system of constitutional judicial review in Sweden can be described as decentralized, *ex post facto* and concrete control.¹⁸ According to Article 14 other public organs than courts are also capable of controlling the constitutionality of legislation. That is a divergent feature in comparison to Article 106 of the *Perustuslaki* that allows only the courts to perform the control.¹⁹ In ‘evident conflict’ cases the only possible consequence both in Sweden and Finland is to leave the provision of a law unapplied on the grounds of conflict with the constitution.²⁰

III Discussing The Necessity Of A Constitutional Court

Naturally, from country to country opinions can be found for and against adopting a constitutional court and the question is never discussed without political passion. Accordingly, there are many different arguments that either try to dispute or to recognize the necessity of a constitutional court.²¹ Trying to list all of those is not the purpose of this article. Some of the arguments seem to be quite common, if not yet universal. For example, from the perspective of respect for the constitution it is seen as necessary that there is an organ capable of being the guardian of the constitution.²² Thus, within this view the idea of the constitution

¹⁶ Husa (n 7) 138–145; Jyränki (n 11 *Valta ja vapaus*) 393–447. See also Husa (n 14) 185–186, who points out the de facto constitutional court characteristics of the *Perustuslakivaliokunta*: a common statement used by the *Perustuslakivaliokunta*, and the position that the reports of the *Perustuslakivaliokunta* have reached as an argument of interpretation. According to Husa, the *Perustuslakivaliokunta* is comparable — in some functional respects — to the French *Conseil constitutionnel*.

¹⁷ See K Åhman ‘Rättighetsskyddet i praktiken – skydd på papperet eller verkligt genomslag?’ in E Smith and O Petersson (eds) *Konstitutionell demokrati* (SNS Förlag Stockholm 2004) who studies the application of Article 14 in the Swedish courts. See also, e.g., E Smith ‘Politikernas konstitution – eller folkets?’ (2004) 89 *Svensk Juristtidning* 677, at 681 who argues that the role of the Swedish supreme courts within the context of political decision-making is marginal. Only 25 percent of the articles of the *Regeringsform* have been interpreted in the supreme courts and only a few of these are related to constitutional problems. Moreover, according to Smith, the European Convention on Human Rights and the practice of the European Court of Human Rights reduce the need to interpret the individual fundamental rights articles of the *Regeringsform*. On the court decisions, see, e.g., Nergelius (n 7) 851 ff; Bengtsson (n 7) 61–65.

¹⁸ See Bengtsson (n 7) 60–61.

¹⁹ On the Danish discussion, see PB Koch ‘Retten til domstolsprøvelse – også en ret for myndigheder?’ (2005) 138 *Ugeskrift for Retsvæsen* 1. In Denmark, the power to control constitutionality is vested only in the courts, although a written rule does not exist.

²⁰ See Husa (n 7) 150–155; Jyränki (n 11 *Valta ja vapaus*) 442; Bengtsson (n 7) 57; Åhman (n 16) 174.

²¹ See, e.g., B Bugarcic ‘Courts as Policy-Makers – Lessons from Transition’ (2001) 42 *Harv. Int’l L.J.* 247 who criticizes the strong political activity of the constitutional courts in Eastern Europe, and their role in political and economic transitions in particular.

²² Basically, constitutional courts are primarily meant to be the guardians of the constitution and, more in particular, of the constitutional rights of individuals. A constitutional court might, as TW Huang ‘Judicial Activism in the Transitional Polity – the Council of Grand Justices in Taiwan’ (2005) 19 *Temp. Int’l & Comp. L.J.* 1, at 57 puts it, understand ‘itself to be the guardian of the Constitution not only for protecting and enforcing entrenched constitutional values, but also for facilitating positive action to be taken for transforming a grossly

does not allow the legislator to be a sovereign body without limits. Unlimited power would create the possibility that certain fundamental rights of individuals might be negated. Furthermore, a separate constitutional court is often seen as a necessity because of the expertise needed in controlling the constitutionality of legislation and promoting a clear and indisputable authority in interpretation matters. At the same time it is thought that centralization of control will allow for more coherent interpretations and will prevent ‘anarchy’ caused by many different interpretations.²³

Opponents of a constitutional court have their own answers to similar questions. For example, a legislator cannot be criticized just because of some prejudices about how the constitution would be respected. Moreover, the values of democracy are worth considering; the judges of a constitutional court are not elected democratically, whereas members of parliament are. Hence, the lack of democracy can be seen as a great obstacle to establishing a powerful constitutional court. If the court holds a powerful position, the influence of political interests on its decisions might increase, thus gradually transferring de facto legislative power to the court, thereby giving birth to ‘a negative legislator’.²⁴ At the same time a serious need arises to update or even abandon the prevailing separation of powers doctrine.

When the question of establishing a constitutional court is under consideration the inevitable follow-up questions are: *who* will consider the (necessity of) establishment and *why*? Obviously, academic discussion and official decision-making of the legislator and government are two different things, although opinions and arguments picked up from the academic discussion may influence official decision-making.²⁵ From the comparative perspective it cannot be expected that the question regarding the necessity of a constitutional court would appear in exactly the same form in different countries. This is why it is difficult to start analysing the question, and some basic knowledge about the legal systems and their functioning is presupposed.

Accordingly, as already noticed, reforms of the constitution — especially total or major reforms — appear to be the most ‘suitable’ or ‘natural’ situation when considering questions

unequal society to an equal one.’ The other primary function is to solve disputes between state organs. See, e.g., S Ishiyama Smithey and J Ishiyama ‘Judicial Activism in Post-Communist Politics’ (2002) 36 *Law & Soc’y Rev.* 719, at 725–726; H Steinberger ‘Historic Influences of American Constitutionalism upon German Constitutional Development – Federalism and Judicial Review’ (1997) 36 *Colum. J. Transnat’l L.* 189, at 199–201.

²³ On the sovereignty of parliament, see e.g., DS Law ‘Generic Constitutional Law’ (2005) 89 *Minn. L. Rev.* 652, at 663–669; T Koopmans *Courts and Political Institutions – A Comparative View* (Cambridge University Press Cambridge 2003) 15–34.

²⁴ See M Rosenfeld ‘Constitutional Adjudication in Europe and the United States – Paradoxes and Contrasts’ (2004) 2 *Int’l J. Const. L.* 633, at 635–636:

The constitutional judge, therefore, must be a different kind of judge — one who, to use Kelsen’s expression, functions as a ‘negative legislator.’ The constitutional judge as negative legislator may invalidate laws only to the extent that they contravene formal constitutional requirements (e.g., the rules for parliamentary lawmaking) and, therefore, may remain largely apolitical. In contrast, since World War II constitutional judges have invalidated laws on substantive as well as formal grounds, thus coming increasingly to resemble positive legislators.

²⁵ Naturally, determining the boundaries of ‘official’ can be problematic. In the Nordic countries, however, official government documents have quite settled forms. It supports the conclusion that these documents are considered official documents. Furthermore, the names of those documents emphasize their official status. For example, the Swedish SOU means ‘State’s official adjustment’ (*Statens offentliga utredning*), and in Norway NOU means ‘Norway’s official adjustment’ (*Norges offentliga utredning*).

about the necessity of a constitutional court. Such a ‘mega-question’ would, after all, be difficult to resolve as a separate micro-question without re-thinking the whole constitutional system at the same time.²⁶ On the other hand, total reforms of the constitution have been quite rare, although Sweden and Finland evidently are countries that are often reforming the constitution through minor changes.²⁷ The small number of major constitutional reforms in itself is not a decisive reason for the non-establishment of constitutional court *de jure*, but it does show the unwillingness to change the balance of power between the high organs of state and to totally re-organize the control of constitutionality. Hence, the political stability of these countries appears to be remarkable.

In Sweden there were major reforms of the constitution in the 1970s and it can be noticed that today there is a lively discussion about the needs to reform the constitution again. It is still under question, whether that discussion will prompt actual changes in the near future. In Finland there was a serious attempt to reform the constitution in the 1970s, but it did not succeed because of political controversies. However, parts of the reform planned in those days were implemented by degrees over the decades that followed.²⁸ In 1995, the fundamental individual rights reform was carried out and the rest of the constitution was reformed a few years later.

In Finland, a special parliamentary committee was appointed in 1970 to deliberate constitutional questions. One of those questions was the necessity of a constitutional court presented as a sub-question to the problem of organizing the afterwards control of constitutionality. In the committee’s report (Komiteanmietintö 1974:27) this question was analysed explicitly. The initial problem was that the constitutionality of legislation was only examined in advance (*a priori*) by the *Perustuslakivaliokunta*. A need was felt to develop the afterwards control of constitutionality (*a posteriori*) through judicial review.

The special committee was unanimous about the need to improve afterwards control, but the form that control should take was a matter of controversy. Thus, there were those who excluded the idea of establishing a separate constitutional court and those who thought that a constitutional court would serve the idea of reforming the control of constitutionality. The majority of the members of the special committee were against a constitutional court. It must, however, be noticed that committees in Finland and Sweden are preparatory organs without final decision-making power.²⁹

²⁶ Cf. E Smith ‘Rettslig håndheving av konstitusjonelle normer – i Europa og i Norge’ (1983) 96 *Tidsskrift for Rettsvitenskap* 77, at 116 who points out that a wide constitutional reform would be needed in Norway if the system of constitutional judicial review were to be written into the text of the Constitution. Accordingly, it is not just a matter of changing a few articles.

²⁷ According to Smith (n 16) 680, the number of changes of the Constitution in Sweden is very high when compared to the other countries. Cf. BE Rasch ‘Rigidity in Constitutional Amendment Procedures’ in E Smith (ed) *The Constitution as an Instrument of Change* (SNS Förlag Stockholm 2003) 120 on the yearly amendment rates. According to Bull (n 10) 34, in the past twenty years a seemingly infinite number of minor changes was made to the Constitution.

²⁸ See A Jyränki ‘Vuosien 1970-74 valtiosääntökomitea – mitkä tavoitteet ovat toteutuneet’ (1999) 97 *Lakimies* 856.

²⁹ Komiteanmietintö 1974:27 161–162. The special committee consisted of 17 members. On the issue of the necessity of a constitutional court, the majority consisted of nine members against a minority of eight.

The argument the majority used was that a separate constitutional court did not fit the arrangements of separation of powers and that powers of Parliament would be decreased. The prevailing system of controlling constitutionality beforehand by the *Perustuslakivaliokunta* was seen as being very valuable and it was considered unproblematic that the power of control rested with a parliamentary committee. Actually, the majority thought was to develop the *Perustuslakivaliokunta* into an organ that could perform afterwards control as well. The idea of a constitutional court was also criticized by the argument that it would be difficult to find suitable persons to act as judges in the court. And it was not just the expertise that was questioned, but also the attitudes that judges of a possible constitutional court would possess. In other words, a constitutional court was seen as a political organ and as an arena of political fights.³⁰

A minority of experts deemed the plans to develop the *Perustuslakivaliokunta* as an afterwards control organ of constitutionality problematic, because the judicial system would become too centralized. According to the minority it sounded paradoxical that the *Perustuslakivaliokunta* would possess powers to control the constitutionality both beforehand and afterwards. The expertise of the *Perustuslakivaliokunta* to operate as a de facto constitutional court did not convince the minority either. An argument on behalf of establishing a constitutional court was that the fundamental rights of the individual needed a guardian. When the ordinary courts did not possess a clear and authoritative role in this matter, a special court would be the solution. The minority also rejected the idea that the arrangements of separation of powers would be questioned and the power of Parliament diminished.³¹

The plan for total constitutional reform in the 1970s did not succeed because of political controversies. Like many other questions, the question about the afterwards control of constitutionality of legislation laid dormant until the next reform of the entire constitutional system started in the 1990s. The necessity of a constitutional court was also discussed, but it did not create the same passion the 1970s evidenced. At this time it was hard to observe clear opposites in the arguments proposed. In the end, the rule to organize limited judicial review was adopted (Article 106 of the *Perustuslaki*) and was seen as being sufficient with respect to afterwards control.

Nevertheless, the arguments presented are still important despite the fact that there were no clear opposites in the arguments at the time. The main arguments presented can be mostly found in three documents: the framework report of constitutional experts; the special parliamentary committee report; and the government's bill.³² In all those documents the un-necessity of a constitutional court is used as an argument to reject the idea of establishing such an organ. Placing the court into the doctrine of separation of powers would be problematic and, moreover, it was even questioned whether there would be enough cases for the court to deal with. It was also concluded that Finnish legal culture and constitutional traditions were unfamiliar with this kind of organ and it was thought that the introduction of a constitutional court would not succeed. Nor were there any exceptional historical events that

³⁰ *ibid.* 127–130.

³¹ *ibid.* 130–131.

³² *Perustuslaki 2000 Työryhmän mietintö* (Oikeusministeriön lainvalmisteluosasto Helsinki 1995); *Komiteamietintö 1997:13*; and *Hallituksen esitys Eduskunnalle uudeksi Suomen Hallitusmuodoksi* (HE 1/1998 vp).

would argue in favour of the establishment of such a court. In the end, the prevailing system of *a priori* control performed by the Perustuslakivaliokunta was seen as being (the) most appropriate.³³

In Sweden the question concerning the necessity of a constitutional court was discussed in the 1970s, nearly at the same time as in Finland. A special parliamentary committee was appointed in 1973 to express a view on the realization of fundamental individual rights. In its report (SOU 1975:75) the committee also discussed the need for a constitutional court. The conclusion was that the democratic functioning of the Swedish political system would be threatened by the establishment of a constitutional court and that nominations of judges would be politicized.³⁴ The report and its conclusions were under consideration, when the government's bill (Proposition 1975/76:209) was formulated. The government agreed with the committee's view. The rejection was also based on arguments concerning the unsuitability of a constitutional court for Swedish legal culture. An institutionalized constitutional court was implied to be political, but the explicit message was that political power could not be given to the un-political organ.³⁵ Moreover, the Constitutional Law Committee of Parliament (*Konstitutionsutskott*) was against the establishment of a constitutional court, when the government's bill was under discussion as part of the legislative process.³⁶

Another special parliamentary committee was appointed in 1977 to deal with a number of issues, including the constitutional court question. Its report that was published in 1978. In general, the importance and forms of judicial review were under consideration at that time. In its report (SOU 1978:34) the committee did not see any reason to establish a constitutional court. In addition, the idea to centralize judicial review in the two supreme courts was not recommended, because it was assumed that centralized review would increase the political dimension of the courts' decision-making;³⁷ neither did the government perceive the need for a constitutional court in its bill (Proposition 1978/79:195). It declared that the improvements to the effectiveness of constitutional individual rights did not mean that political stability would be threatened by the establishment of a constitutional court. Again the argument was that an institutionalized constitutional court was un-known within the Swedish legal culture.³⁸ the *Konstitutionsutskott* discussed the bill and it concluded in its report (KU 1978/79:39) that Parliament must be seen as the best place to decide whether legal regulations were against the constitution. It rejected the idea of a constitutional court.

³³ See Perustuslaki 2000 Työryhmän mietintö (n 31) 95–96; Komiteamietintö 1997:13 109; HE 1/1998 vp 53–54. The government's bill was discussed by the *Perustuslakivaliokunta*. The committee commented on the proposal and made its own report (Perustuslakivaliokunnan mietintö hallituksen esityksestä uudeksi Suomen Hallitusmuodoksi (PeVM 10/1998 vp)) to be debated in Parliament. However, the report did not explicitly mention the necessity of a constitutional court, and even the limited judicial review of legislation was credited with a short commentary only.

³⁴ See SOU 1975:75 17. See further 102–103 where the idea to vest political power in a court is explicitly rejected. As an example of judicial decision-making with political dimensions the committee referred to abortion decision of the German *Bundesverfassungsgericht*.

³⁵ Proposition 1975/76:209 90 ff.

³⁶ KU 1975/76:56. See also, e.g., J Nordquist *Domstolar i det svenska politiska systemet – Om demokrati, juridik och politik under 1900-talet* (Stockholm Studies in Politics 76 Stockholms Universitet 2001) 179–180; E Holmberg et al *Vår författning* (Norstedts Juridik Stockholm 2003) 35–36.

³⁷ SOU 1978:34 109. See Nordquist (n 35) 181.

³⁸ Proposition 1978/79:195 41.

The debate regarding the necessity of a constitutional court did not gain any more visibility until the 1990s, when a special committee was appointed in 1992 to clarify the system of constitutional rights. In its report (SOU 1993:40) the committee rejected the establishment of a constitutional court. Reasons for the rejection were again connected with the separation of powers. It was seen as problematic to give political power to a non-political organ. According to the report, fatal tensions would appear between the political institutions and the judiciary. Moreover, the committee concluded that it would be difficult to find enough cases for a constitutional court. And furthermore, an institutionalized constitutional court was seen as unknown in the Swedish legal culture.³⁹

Today it can be noticed that the *Konstitutionsutskott* has modified its attitudes towards the possibility of establishing a constitutional court. EU membership, the effects of the European Convention on Human Rights and other internationalization developments have provided a basis, even pressure, for renewed contemplation. According to the *Konstitutionsutskott*, the government's duty is to produce a report concerning the question of organizing the afterwards control of constitutionality of the legislation.⁴⁰ Hence, in July 2004 the government announced that a new special parliamentary committee would be appointed to assess the constitutional reforms needed. One of the most important questions concerns the necessity of a constitutional court.⁴¹

IV Conclusive Remarks

Political circumstances in Sweden and Finland have been so stable over the past decades that there has been no decisive movement towards establishing a constitutional court.⁴² This is obviously one reason why in Finland, for example, the *Perustuslakivaliokunta* has been able to keep a tight hold on its position as the most authoritative interpreter of the *Perustuslaki*.⁴³

³⁹ SOU 1993:40 22, 227–228. See also Nordquist (n 35) 182–183. When the government produced its bill (Proposition 1993/94:117) on the basis of the report of the special committee, it did not at that time pay attention to the matter of the necessity of a constitutional court. The *Konstitutionsutskott* deemed a constitutional court unnecessary (KU 1993/94:24), using mainly the same arguments the special committee had presented. See also KU 1995/96:6; KU 1996/97:26; and KU 1997/98:26 where the necessity of a constitutional court is rejected by the *Konstitutionsutskott*.

⁴⁰ KU 2000/01:11. See Holmberg et al (n 35) 212–217.

⁴¹ See <http://www.regeringen.se/sb/d/4152/a/26984>; see also, e.g., Smith (n 16) 703 ff; C Taube 'System för lagstiftningskontroll' in E Smith and O Petersson (eds) *Konstitutionell demokrati* (SNS Förlag Stockholm 2004) 227–230. Members of the committee were finally appointed by the government on 29 October 2004. See <http://www.sou.gov.se/grundlag/pdf/041206%20Pressmed.pdf>

⁴² See JB Board 'Judicial Activism in Sweden' in KM Holland (ed) *Judicial Activism in Comparative Perspective* (Macmillan Houndmills and London 1991) 181 who describes the situation in Sweden:

It is obvious that any attempt to introduce an active conception of judicial review through the medium of courts, which do not rest on popular election and which are elitist, non-representative, and non-democratic, would face an impossible uphill struggle in the face of these constitutionally expressed precepts of Swedish political culture.

⁴³ Although the *Perustuslakivaliokunta* seems to bear some functional similarities to the French *Conseil constitutionnel*, the *Perustuslakivaliokunta* cannot be claimed to be a de facto constitutional court. There are signs that courts in particular are challenging the position of the *Perustuslakivaliokunta* as the most authoritative interpreter of the Constitution. There are also several other interpreters, such as the Parliamentary Ombudsman, whose significance in constitutional interpretation matters is noteworthy. Constitutional interpretation would appear to be more incoherent in Finland than it is in France. Moreover, while the *Conseil constitutionnel* can review laws passed by the parliamentary body prior to the laws entering into force, the *Perustuslakivaliokunta* is not allowed to do that. The *Conseil constitutionnel* also ensures proper conduct of and reviews all disputed

Up to the present day Finnish courts have been restrained, and even Article 106 of the *Perustuslaki* that allows limited control of constitutionality has not caused dramatic change. No flow of ‘activist’ court decisions has appeared. However, the situation is different in, for example, Central European countries where the socialist regimes collapsed after decades of totalitarian government. In these countries it is not surprising that a strong need is felt to establish a separate and powerful court to secure the fundamental rights of individuals as well as solve disputes between organs of the state.

In Sweden and Finland, the discussion concerning the necessity of a constitutional court has been linked with the larger reforms of the constitution. When constitutional judicial review has traditionally been modest in Sweden and Finland, it is rather obvious that the question of strengthening the afterwards control of constitutionality comes up when the constitution is under reform. Up to the present, a constitutional court has been seen as too powerful an organ that would cause serious problems to the balance of power. As a matter of fact, a few quite common or even ‘traditional’ arguments can be found that have been presented against the establishment of a constitutional court. In summary – they have been presented in this article – there are six general reasons for rejecting the establishment of a constitutional court, for saying ‘no thanks’.

Firstly, the establishment of a constitutional court would cause problems within the separation of powers and would weaken the power of Parliament. Secondly, a constitutional court would use political power. Thirdly, the prevailing system of controlling the constitutionality of legislation is satisfactory, and it would, therefore, be unnecessary to establish a constitutional court. Fourthly, a constitutional court would be unsuitable for (unfamiliar to) certain legal cultures. Fifthly, a constitutional court would threaten democracy when the members of the court are not elected democratically. Sixthly, there would not be enough cases for a constitutional court; such an institution would possess un-actuality in the prevailing system.

When this kind of list is presented, it is not claimed that there would not be overlaps. For example, a constitutional court’s capability to use political power is also a matter concerning the separation of powers. Neither would that list be exhaustive. However, when the arguments against the establishment of a constitutional court are analysed, it seems that Finland and Sweden are almost *identical twins*. The similarity of these lists may be explained by the fact that both countries are continuously interested in observing what their neighbour is doing. On the other hand, at least partly, the same arguments are repeated time after time. But these two explanations are not totally satisfactory for a fuller understanding of the situation.

When the constitutional systems of the world have the same functions, these functions are seen as being universal. It is possible to find the arguments presented in this article outside Sweden and Finland. Problems regarding the separation of powers and threats to democracy especially can be noticed as universal arguments against the establishment of a constitutional court. Accordingly, these reasons do not possess anything that is specific to Sweden and Finland. Obviously more variation is to be found when it is asked whether there would be enough cases for a constitutional court or whether a constitutional court would be alien to the prevailing legal culture. After all, the arguments listed above are quite abstractly formed without focusing on those possible differences that appear, when the arguments are supplemented with details from the basis of a particular legal system.

elections, while the *Perustuslakivaliokunta* does not have this kind of function, even though it is typical of constitutional courts.

Likewise, only one side of the coin is examined, if the arguments on behalf of the establishment of a constitutional court are not searched for. The problem may, however, be that the arguments on behalf of the establishment just have not been written into the official reports. Arguments for and against can be gleaned from the committee reports, but are not found in the government's bill. From that point of view the coin has only one side: it is the majority's view that has the last word.

It is a fact that an institutionalized constitutional court inevitably mixes the separation of powers, especially when it is suspected that a constitutional court would take powers away from the legislator. That is why this argument seems to be rather useful in the context of today as well as the argument that a constitutional court uses political power. The most sensible argument to reject the establishment of a constitutional court is simply that the prevailing system of controlling constitutionality works well and there are, therefore, no practical reasons in establishing a constitutional court. Another question, of course, is whether or not this argument has been formulated from the basis that it primarily favours the existing form of controlling constitutionality.

On the contrary, the argument that a constitutional court would be unsuitable for the prevailing legal culture must be noted as having a slightly anachronistic taste. Modern legal cultures have had to accommodate themselves to many different kinds of irritants and therefore many kinds of legal transplants have taken place. Although a constitutional court would be recognized as being a very special adaptation, it must on the other hand call into question whether or not some legal cultures are so 'traditionally' rigid that the institutional arrangements in place cannot be changed.

The argument that a constitutional court is a threat to democracy is maybe the most abstract one on the list. It is, however, linked to the separation of powers as it describes the situation where the legislative power is taken away from a parliament elected by the people. At this point it should be noted that the judges of constitutional courts are usually nominated by the democratically elected organs, thus often at least partly by the legislator itself.⁴⁴ Moreover, the judges' period of office is limited. Furthermore, the argument of un-actuality (a constitutional court would not have enough cases) is irrelevant today, because the significance of constitutional rights and international human rights has increased remarkably. If and when a constitutional court is considered from the point of view that it is a guardian of the constitutional rights of individuals, then the economical argument of it possibly not having a full case-load cannot be used as a decisive reason for its rejection.

When the list of used arguments to reject a constitutional court is prepared, it is interesting to call into question what the present usefulness of these arguments is. If rejection of a constitutional court is the aim, it is obviously useful to choose the three first arguments mentioned above, that the establishment of a constitutional court would cause problems with the separation of powers, that a constitutional court would use political power, and that the prevailing system of controlling constitutionality is satisfactory. Those arguments have weight and they are still simple. The three latter arguments, however, are not equally convincing because of their anachronism (unsuitability to the prevailing legal culture),

⁴⁴ Cf. Comella (n 2 Int'l J. Const. L.) 467: 'Judicial review of legislation may give rise to a "democratic objection", inasmuch as the legislation in question is the product of a democratic legislature. This objection may be minimized if the members of the court are selected in ways that are relatively democratic.'

abstractness (undemocratic character of a constitutional court) and delusiveness (not enough cases for a constitutional court).

It seems very unlikely that a separate constitutional court *de jure* will be established in any of the Nordic countries in the near future. Prevailing forms of organizing the control of constitutionality are deemed satisfactory, plus those voting in favour of establishing a constitutional court will probably also be in the minority in the near future.⁴⁵ There is plenty of room for suspicion when a constitutional court is mentioned and suggested. However, as the world is continuously changing, the need to reconsider once again all the alternatives will assert itself.

International developments could evoke or even necessitate fundamental changes to the legal system. The growing importance of international human rights control in particular (at the European level especially the control performed by the European Court of Human Rights and European Court of Justice) demands that the national courts evaluate national legislation — including the Constitution — from stricter perspectives than before, when these kinds of control mechanisms did not exist.⁴⁶ In these circumstances the words and meanings produced by the national legislative power could bring about conflict with the arguments presented by the international organs of human rights control. This makes it increasingly questionable whether there should be a special organ with a high level of expertise to draw up coherent doctrines that would be organized and empowered as a constitutional court.

Finally, it is rather interesting to wait and see what the parliamentary committee appointed in Sweden 2004 is going to say about the necessity of establishing a constitutional court. When the committee publishes its report it will be no surprise if the arguments mentioned above — reasons for saying no thanks — are repeated.

Cite as: Veli-Pekka Hautamäki, *Reasons for Saying: No Thanks! Analysing the Discussion about the Necessity of a Constitutional Court in Sweden and Finland*, vol. 10.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (June 2006), <<http://www.ejcl.org/101/article101-1.pdf>>.

⁴⁵ Nevertheless, appreciation of constitutional control systems can always be done on a *de facto* constitutional court basis. If judicial activism were to increase in relation to judicial cautiousness in Finland and Sweden, perhaps also the *de facto* constitutional court features would be strengthened. See PB Koch *Forfatningskontrol* (Jurist- og Økonomforbundets Forlag København 2002) 210–262 who outlines four different future scenarios for the Danish system of constitutional judicial review. One of these scenarios is the establishment of a constitutional court.

⁴⁶ See, e.g., HP Graver 'Dømmer Høyesterett i siste instans?' (2002) 37 *Jussens Venner* 263 who analyses the Norwegian context. According to Graver (273 ff), attitudes of the Norwegian courts in relation to the supranational European courts have clearly changed, and today international human rights are taken into consideration more carefully. Nevertheless, the tendency in Norway would appear to remain that the national courts have a selective approach to obligations of international law. Cf. A Robberstad 'Norske dommers plikt til å veilede om EØS-retten' (2002) 41 *Lov og Rett* 195 and JEA Skoghøy 'Norske domstolers lovkontroll i forhold til inkorporerte menneskerettskonvensjoner' (2002) 41 *Lov og Rett* 337. From the Danish angle of view see, e.g., T Jensen *Højesteret og retsplejen* (GadJura København 1999) 263–290.