IHMISOIKEUSKESKUS
MÄNNISKORÄTTSCENTRET
HUMAN RIGHTS CENTRE

Primacy provision of Section 106 of the Constitution and the requirement of evident conflict

– is it time for a change?

Human Rights Centre's publications 5/2021

Primacy provision of Section 106 of the Constitution and the requirement of evident conflict

– is it time for a change?

Authors: Maija Hirvi, Sanna Ahola, Sirpa Rautio
Layout: Joonas Tupala

HRC publication 5/2021:
ISSN 2670-1944
ISBN 978-952-7117-52-1

Human Rights Centre's publications 5/2021
https://www.humanrightscentre.fi/publications/

2021 Helsinki

Abstract

The purpose of this report is to discuss the need for change related to the Primacy provision of Section 106 of the Constitution in relation to the requirement of evident conflict. The report examines court rulings in which the court has legally found an evident conflict between the Constitution and the application of the provision of the law, as well as the observations arising from them. The report also discusses the views expressed in connection with the preparation of the constitutional amendment that entered into force in 2011 and the views expressed in the legal literature on the necessity and justification of the requirement for evident conflict.

In the Finnish legal system, the assessment of the constitutionality of laws relies mainly on the oversight of legality of the constitutionality by the legislator, i.e. Parliament, and in particular by its Constitutional Law Committee. The courts must respect the will of the democratically elected legislator. The constitution that entered into force in 2000 included the Section 106 on the primacy of the Constitution for the first time, according to which the court has the possibility – and also the obligation – to refrain from applying the provision of the law under certain conditions if it is in evident conflict with the Constitution.

In legal literature, the general view has been that there would be grounds for eliminating the requirement for evident conflict. On the other hand, contradictory views have been expressed. The Venice Commission of the Council of Europe has proposed the possibility of extending the primacy provision also to cases other than those in which the conflict is evident. In particular, the court's threshold for not applying a provision of the law that is in conflict with the Constitution is currently higher than the court's threshold for not applying a provision which is in conflict with an EU law or international human rights obligations due to the requirement of being evident. This should be considered in favour of removing the Primacy provision of the Constitution and the requirement for evident conflict. According to the Memorandum of the Constitution 2008 working group, it would have been appropriate to consider removing the requirement for evident conflict from Section 106 of the Constitution in connection with the amendment of the Constitution. However, the Constitutional Review Committee decided against this and the requirement for evident conflict remained in the Constitution. In recent years, there has been little debate on the possible need for amendment to Section 106 of the Constitution.

A total of ten final court rulings have involved an evident conflict between the Constitution and the application of the provision of law (by 5 November 2020). All decisions have been related to fundamental rights. Half of the decisions have been voted on, and the num-

ber of decisions is rather small. The European Convention on Human Rights and the case law of the European Court of Human Rights have played an important role in the justification of court decisions. In particular, in two decisions, the Court has justified its decision on the basis of the case law of the European Court of Human Rights and the European Convention on Human Rights. In addition, it should be pointed out that some of the decisions under Section 106 of the Constitution have underpinned a significant legislative amendment.

The decisions of the courts, in which it has found an evident conflict between the Constitution and the application of a provision of the law, are not directly related to the need to amend the primacy provision of the Constitution. However, they highlight the typical and common elements to the decisions under Section 106 of the Constitution. It is interesting, therefore, how clearly they show the argument that has emerged in the legal literature earlier and in connection with the preparation of the constitutional amendment on the need to set the threshold for assessing the conflict between the Constitution and the application of a provision of the law at the same level as in cases in which the law conflicts with EU law or international human rights obligations.

The significance of international human rights obligations in national jurisprudence has increased, and the courts refer in particular to the European Convention on Human Rights more than before. It is important that the courts in Finland are able to respond to the growing international development of fundamental and human rights obligations and the internationalisation of constitutional law and to safeguard fundamental and human rights in accordance with them. If the courts could resolve conflicts falling within the scope of Section 106 of the Constitution without the categorisation of conflict and self-limitation resulting from the requirement for evident conflict, they could follow international human rights obligations more flexibly in resolving conflicts. The abolition of the requirement for evident conflict would not mean an increase in the jurisdiction of the court in relation to the legislator, as the abstract assessment of constitutionality by the legislator and the Constitutional Law Committee would remain. In the assessment of the Court, a positive interpretation of fundamental rights would remain the primary means of resolving the conflict.

CONTENTS

Introduction

The assessment of the constitutionality of laws in the Finnish legal system relies mainly on the oversight of legality by the Parliament. As the legislator, Parliament must ensure that the laws to be laid down are constitutional. The constitutionality of the laws under preparation is primarily assessed by the Constitutional Law Committee of the Parliament.

The courts must respect the will of the democratically elected legislator. However, the constitution that entered into force in 2000 included the Section 106 on the primacy of the Constitution for the first time,[1] according to which the court has the possibility – and also the obligation – to refrain from applying the provision of the law under certain conditions if it is in evident conflict with the Constitution.

The need to amend the requirement for evident conflict contained in Section 106 of the Constitution has been discussed in the legal literature both during the preparatory stage of the constitutional amendment that entered into force in 2011, and especially after the courts had given their first decisions on Section 106 of the Constitution. However, the wording of the provision has remained the same and there has been little discussion on the need to change the section in recent years.

The purpose of this report is to review the statements expressed in the legal literature and during the preparation of the constitutional amendment on the need to amend the requirement for evident conflict contained in Section 106 of the Constitution as well as to highlight the content and justification of the decisions implementing Section 106 of the Constitution of the Courts. The purpose of the report is to provide an up-to-date overview of cases in which the Court has found an evident conflict between the application of the law provision and the Constitution. The findings that emerge from the decisions reflect the situations in which Section 106 of the Constitution is applied and the development of interpretation, and can thus act as factors to be taken into account when assessing the need for amendment in the requirement for evident conflict.

The report first examines what the primacy provision in section 106 of the Constitution and the requirement for evident conflict contained therein mean, and examines the views expressed in the legal literature and in connection with the preparation of the 2011 amendment of the Constitution on the need to amend the requirement for evident conflict. It then examines the decisions in which the courts have found, in accordance with Section 106 of the Constitution, an evident conflict between the Constitution and the application of a provision of the law, and presents observations on the decisions. Finally, we will consider what conclusions can be drawn from the observations.

1 Constitution of Finland 731/1999 (legally binding text only in Finnish and Swedish).

Section 106 of the Constitution – Primacy of the Constitution

In its proposal for a new form of government in Finland (HE 1/1998 vp), the Government proposed a primacy provision for the Constitution, which would enable ex post supervision of the constitutionality of provisions in the Act in individual cases. Ex post supervision would only be possible in limited cases, and the main focus of the monitoring of the constitutionality of the laws would remain on parliamentary oversight of legality by the Constitutional Law Committee.[2] In general, courts would not have the right to assess a law's possible conflict with the Constitution. The assessment would only apply to individual cases in such a way that the court would have to refrain from applying the provision of the law, the application of which in the case in question would be in evident conflict with the Constitution.

Section 106 on the Primacy of the Constitution reads as follows: *'If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution.'* The requirement for evident conflict means that the conflict must be clear and undisputed and therefore easy to see and not open to interpretation as a legal question.[3]

Section 106 of the Constitution:
"If, in a matter being tried by a court of law, the application of an Act would be in evident conflict with the Constitution, the court of law shall give primacy to the provision in the Constitution"

A conflict cannot be considered evident if the Constitutional Law Committee, at the time when the law is laid down, has taken a position on a case similar to the one before the court and has stated that there is no conflict. However, the opinion of the Constitutional Law Committee is given before the handling of the case and thus abstract, while the court is dealing with a specific case, in which case conflicts may arise which the Constitutional Law Committee has not taken into account in its abstract assessment. Therefore, in such a situation, the requirement for an evident conflict may also be met with regard to a law that the Committee has considered.[4] In addition, a significant proportion of laws are laid down without the help of the Constitutional Law Committee.[5]

2 Constitution of Finland 731/1999, Section 74. See also Government Proposal HE 1/1998 vp, p. 163.

3 Report of the Constitutional Law Committee PeVM 10/1998 vp, p. 31.

4 Report of the Constitutional Law Committee PeVM 10/1998 vp, p. 30–31; Government Proposal HE 1/1998 vp, p. 53–54 and 163–164.

5 Government Proposal HE 1/1998 vp, p. 163.

With regard to the assessment of an evident conflict, it should be noted that the term "with the Constitution" in Section 106 of the Constitution applies to the entire Constitution, in which case the interpretative principle in cases concerning Section 106 is also to interpret the law in a manner favourable to human and fundamental rights and based on the general principle of interpretative coordination of human and fundamental rights.[6]

The primacy provision was introduced into the Constitution to supplement the supervision of the constitutionality of the laws in cases in which oversight of legality by the Constitutional Law Committee would not be sufficient to ensure that there would be no conflict between the law and the Constitution. The reason for this was also the need for the supervision of the constitutionality of the laws caused by international human rights obligations.[7] This means that the courts are increasingly forced to compare national laws with international human rights treaties and obligations, thus also emphasising the comparison between legal and constitutional provisions.[8] The inclusion of the requirement for evident conflict in the Constitution was a sign of the caution with which a whole new primacy provision was introduced in the Constitution.[9] The purpose of this requirement was to prevent decisions that would cause the court to refrain from applying the law, even if the conflict was not clear and undisputed. The purpose was to emphasise that the court's deviation from the Act laid down by Parliament, i.e. that the provision of the Act was not applied by the court, would be exceptional.[10] However, Section 106 of the Constitution is intended to apply whenever the conditions for its application are met.[11]

The primary means of eliminating conflicts, namely the constitutional and fundamental rights interpretation, must be kept separate from the primacy provision of the Constitution. According to the Constitution of Finland and a favourable interpretation of fundamental rights, the courts must choose the option for interpreting the law which eliminates the options considered to be in conflict with the Constitution and best promotes the realisation of fundamental rights. Section 106 of the Constitution has a complementary role and is the last resort to intervene in a provision that is considered to be in conflict with the Constitution if it is not possible to overcome the conflict by interpretation.

In its report (PeVM 10/1998 vp) on government proposal HE 1/1998 vp, the Constitutional Law Committee stated that cases in which an evident conflict would be identified would probably remain very rare, as in most situations conflicts would be apparent and possible to be eliminated by interpretation. Section 106 of the Constitution refers to the law laid down in the ordinary legislative procedure, but the Constitutional Law Committee has also taken into account a situation in which the exceptional act is considered to be in evident conflict with the Constitution. In the legislative hierarchy, an exceptional act is a law comparable to regular

6 Supreme Court decision KKO 2015:14, paragraph 39, see also Pasi Pölönen's comment KKO:n ratkaisut kommentein 2015:14.

7 Government Proposal HE 1/1998 vp p. 28–29 and 52–53.

8 Government Proposal HE 1/1998 vp p. 28–29 and 52–53.

9 Perustuslain tarkistamiskomitean mietintö. Ministry of Justice, Memorandums and statements 9/2010, p. 127.

10 Government Proposal HE 1/1998 vp, p. 54.

11 Supreme Court decision KKO 2015:14, paragraph 35.

law, which is laid down in the order in which the Constitution is enacted, because its content differs from that of the Constitution.[12] It does not change the wording of the Constitution, even though it differs from the Constitution in content.[13] The order in which the Constitution is to be enacted is used to eliminate the unconstitutional nature of an (exceptional) law that is in conflict with the Constitution. However, the Constitutional Law Committee has stated that the fact that the Act has been enacted as an exceptional act does not necessarily mean that the primacy provision of the Constitution is not applied. A long period of time and substantial changes in the Constitution and a change in the interpretation practice of the Constitutional Law Committee may be reasons for assessing the matter through section 106.[14]

12 Mikael Hidén, Selvitys perustuslain toimivuudesta ja mahdollisista tarkistamistarpeista Ministry of Justice, Reports and guidelines 2019:22, p. 10.

13 Government Proposal HE 1/1998 vp, p. 124.

14 Report of the Constitutional Law Committee PeVM 10/1998 vp, p. 31.

On the primacy provision of the Constitution and the requirement for evident conflict in legal literature

In legal literature, the general view has been that there would be grounds for eliminating the requirement for evident conflict and that this would be necessary[15] even though opposing views have also been expressed[16]. The Venice Commission of the Council of Europe has proposed the possibility of extending the primacy provision also to cases other than those in which the conflict is evident.[17] Lavapuro and Ojanen, among others, have stated that the court's threshold for not applying a provision of the law that is in conflict with the Constitution is higher than the court's threshold for not applying a provision which is in conflict with an EU law and international human rights obligations due to the requirement of being evident. This should be considered in favour of removing the primacy provision of the Constitution and the requirement for evident conflict.[18] Courts are obliged not to apply a national provision, irrespective of its level of regulation, if it conflicts with a legally binding provision of EU law. Similarly, priority must be given to a provision of the European Convention on Human Rights (ECHR) or other international human rights obligation binding on Finland if the national provision conflicts with such a provision.[19]

15 Martin Scheinin, Perustuslaki 2000 -ehdotus ja lakien perustuslainmukaisuuden jälkikontrolli: puoli askelta epämääräiseen suuntaan. Lakimies 1998, p. 1127–1131. p. 1128–1129; Tuomas Ojanen, Perustuslain 106 §:n etusijasäännös – toimivuuden ja muutostarpeiden arviointi. Attachment to the Memorandum Perustuslaki 2008 -työryhmän muistio. Ministry of Justice working group Reports 2008:8 p. 134–151, p. 146; Juha Lavapuro, Perustuslain 106 §:n ilmeisyysvaatimuksen vaikutuksista oikeuskäytännössä. Lakimies 4/2008, p. 582–611. p. 607–611; Hidén, 2019, p. 31. According to Hidén, the amendment of Section 106 of the Constitution should be considered, precisely in order to remove the requirement for evident conflict; not on its own, but in the context of a wider amendment or revision of the Constitution,

16 Kaarlo Tuori, Perustuslakivaliokunta ja oikeuden kehittäminen – ylin lainkäyttö valtiovallan kolmijaon rajoilla. Lakimies 1/2018, p. 103–111; Perustuslain tarkistamiskomitean mietintö. Ministry of Justice, Memorandums and statements 9/2010. See Paulina Tallroth, Kuka valvoo oikeuksiamme? Perusoikeuksien valvontaelimet Suomessa ja keskustelu valtiosääntötuomioistuimesta. Helsinki 2012, p. 44, in which, according to Tallroth, it has so far not been requested to amend the regulation, and not everyone agrees that the concept is a problem.

17 European Commission for Democracy through Law, Opinion on the Constitution of Finland. CDL-AD(2008)010, section 134.

18 Lavapuro 2008, p. 611; Ojanen 2008, p. 145; Perustuslain tarkistamiskomitea 2010, p. 127. See also KKO:n ratkaisut kommentein 2015:14 and Jussi Pajuoja — Pasi Pölönen, Supreme oversight of legality. Tietosanoma, Helsinki 2011, p. 394, in which it has been stated that 'the rights guaranteed by the Constitution have in a way been placed in a weaker position than the rights under EU law or the Convention on Human Rights' and Tallroth 2012, p. 42.

19 Statement of the Constitutional Law Committee PeVL 2/1990 vp; Government Proposal HE 1/1998 vp, p. 163.

According to Section 74 of the Constitution, the Constitutional Law Committee has the task of issuing its statement on the constitutionality of legislative proposals and other matters brought for its consideration, as well as on their relation to international human rights treaties.

According to Section 74 of the Constitution, the Constitutional Law Committee has the task of issuing its statement on the constitutionality of legislative proposals and thus, in advance, preventing provisions that conflict with the Constitution from becoming law.[20] Lavapuro has drawn attention to the fact that, although the court is subject to the requirement for evident conflict, it does not apply to the Constitutional Law Committee.[21] The Court's threshold for not applying the provision of the law in cases of conflict is therefore higher than the threshold of the Constitutional Law Committee to assess the conflict of the law proposal with the Constitution. The Court must primarily take into account the statements of the Constitutional Law Committee on the application of a particular law. Karapuu has stated that the judge and the Constitutional Law Committee have a different view. It is easier for the legislator to see whether a law is unconstitutional than for a judge who must also consider that their decision would not lead to negative consequences for anyone. The judge must have a particularly strong argument in favour of a law not being applied as unconstitutional.[22] Pajuoja and Pölönen have pointed out that the views of the court and the Constitutional Law Committee may conflict when they approach the issue at hand in different ways and from different perspectives.[23]

The legal literature has criticised – as discussed below – the strict control of norms in place, i.e. that the Court relies strictly on the opinions of the Constitutional Law Committee and the interpretation in favour of fundamental and human rights may be considered less.[24]

It has been stated in the literature that removing the requirement for evident conflict is technically relatively easy.[25] It has been assessed that removing the provision would not represent a very big change in the current situation.[26] However, when considering the meaning and content of the Constitution, it must be assumed that every word in the Constitution is significant, and that amending or removing wording in the Constitution has, or should, have an impact on the legal system.

It has been stated that the removal of the requirement for evident conflict would not require any greater amendments to the grounds

20 Hidén 2019, p. 16.

21 Lavapuro 2008, p. 592.

22 Heikki Karapuu, Perusoikeudet kansallisten normien hierarkiassa, Lakimies 6–7/1999, p. 874–877. p. 875.

23 In some cases, the Supreme Court and the Constitutional Law Committee have been said to have been on a "collision course", as stated by Pajuoja and Pölönen (2011), e.g. decisions KKO 2010:23 and the related KKO 2011:43. Pajuoja and Pölönen have pointed out that the system of supervising constitutionality is not unproblematic when it allows the Constitutional Law Committee to have a monopoly on certain issues and the courts to refrain from examining matters through constitutional or fundamental rights constraints, in which case the system may result in dead ends such as the example case (p. 411-412). The role of the Constitutional Law Committee and the justification of its decisions, as well as its relationship with the courts, is a broader topic of discussion, which, however, is not further addressed in this report.

24 Lavapuro 2008, p. 590–592.

25 Ojanen 2008, p. 146.

26 Hidén 2019, p. 31.

for the Constitution[27] as the constitutional and fundamental rights interpretation would remain the starting point for eliminating conflicts. The application of Section 106 of the Constitution would still be the last resort.[28] However, the elimination of the requirement for evident conflict is considered to grant more power to the courts, which would improve their ability to carry out the ex post supervision of the constitutionality of laws.[29] Ex post supervision by the court in individual cases would not reduce the importance of supervision by the Constitutional Law Committee, but would "implement the idea of supervision more realistically, which in any case would also be necessary".[30] On the other hand, the separation of powers between the legislator and the court as well as the primacy of the legislator vis-à-vis the court and the self-limitation of the court vis-à-vis the legislator have been emphasised in favour of maintaining the requirement for evident conflict.[31] In addition, consideration must be given to the possible effects of the relaxation of the criteria for supervision of the constitutionality of laws on legal certainty and the predictability of decisions, if the waiving of the requirement for evident conflict is decided at some stage.

In addition to the views expressed in the legal literature, the need to amend the primacy provision of Section 106 of the Constitution was discussed in connection with the preparation that led to the 2011 constitutional amendment. In order to prepare for the constitutional amendment, the Ministry of Justice appointed the Constitution 2008 working group, which in its memorandum mapped out, among other things, the need to amend the primacy provision in Section 106 of the Constitution. As part of this, Tuomas Ojanen prepared a memorandum on the functionality of the primacy provision and the need for amendment, especially as regards the requirement for evident conflict of the primacy provision.[32] According to the working group's statement, the project to revise the Constitution would have considered removing the requirement for evident conflict from Section 106 of the Constitution.[33]

However, following the preparation of the working group, the amendment of the primacy provision of the Constitution and the removal of the requirement for evident conflict were rejected in the report of the Constitutional Review Committee.[34] Despite the fact that in its report, the Constitutional Review Committee mostly raised issues that spoke in favour of removing the requirement for evident conflict, it concluded, however, that there was no need to remove the requirement for evident conflict. In its statement, the Committee referred to the fact that there were not so many cases of application of the provision at the time and that the case law was therefore only just taking shape. At that time, however, the Parliamentary Ombuds-

27 Ojanen 2008, p. 146. Hautamäki has expressed a different point of view, stating that the justifications of Section 106 of the Constitution should be amended with the removal of the requirement for evident conflict in order to maintain the current status of the Constitutional Law Committee as if we were to move towards a decentralised model. See Veli-Pekka Hautamäki, Perustuslainmukaisuuden valvonta ilmeisyyskriteerin poistamisen myötä. Lakimies 1/2009, p. 137–146. p. 141.

28 Ojanen 2008, p. 146.

29 Hidén 2019, p. 31.

30 Hidén 2019, p. 31.

31 Kaarlo Tuori, Perustuslain tuomioistuinvalvonnan ultima ratio -perustelu ja perustuslain 106 §:n ilmeisyysvaatimus. In Letto-Vanamo, Pia – Mäenpää, Olli – Ojanen, Tuomas (edit.): Juhlajulkaisu Mikael Hidén 1939–7/12–2009. Suomalainen Lakimiesyhdistys. Helsinki 2009, p. 319–335. p. 332–333. Also see Hanna Hämäläinen, Pursuing Institutional Balance: The Institutional Relationship Between the National Legislature and the National Courts in the Contemporary Constitution, 2021, p. 199–200.

32 Perustuslaki 2008 -työryhmän muistio. Ministry of Justice working group reports 2008:8.

33 Perustuslaki 2008 -työryhmän muistio. Ministry of Justice working group reports 2008:8, p. 62.

34 Perustuslain tarkistamiskomitean mietintö. Ministry of Justice, Memorandums and statements 9/2010, p. 127.

man and the Supreme Court already spoke in favour of the elimination of the requirement for evident conflict which, in their statements on the Committee's report, were in the view that the requirement for evident conflict should be removed[35] and that keeping the requirement "may prove to be problematic in the future"[36].

With regard to the Government Proposal HE 60/2010 vp which led to the amendment of the Constitution,[37] the Constitutional Law Committee consulted several experts for its report PeVM 9/2010 vp[38], some of whom found it regrettable that the change in the primacy provision of the Constitution was not included in the Government's proposal.[39] In his statement, Ojanen[40] also pointed out that it was difficult to understand why the Constitutional Review Committee had concluded that there was no reason to remove the requirement for evident conflict, even though it clearly highlighted issues that speak in favour of the removal of the requirement, such as the internal consistency of the legal system, the legal logic criteria, and the fact that the threshold of the courts not applying the provision of the law when it is in conflict with the Constitution is different to EU law and international human rights obligations.

The most recent statements on the matter have been highlighted in the foreword of the Annual Report 2020 of the Supreme Court by the President of the Supreme Court, stating that if there is a need to increase supervision of constitutionality, this should be done by strengthening the existing courts and their possibility of constitutional retrospective supervision in individual cases.[41] In a statement in the Supreme Administrative Court Annual Report 2020, the President of the Supreme Administrative Court has generally stated that the strengthening of the independence of the courts should be considered.[42]

In this context, it is a good idea to briefly refer to the discussion held in Sweden at the same time as the Government's proposal[43] on the amendment of the Constitution of Finland on the primacy provision of the Constitution, which corresponds to Section 106 of the Constitution of Finland.[44] In Sweden, the previous wording of the provision of the law included the requirement for evident conflict (*uppenbarhet*), which was removed in connection with the constitutional amendment that entered into force in 2011.[45] In Sweden, one important reason for removing the requirement for evident conflict was precisely because there is no requirement for evident conflict in situations of conflict with the regulations of EU law

35 Parliamentary Ombudsman, Opinion on the report of the Constitutional Review Committee, 8 March 2010.

36 The Supreme Court, Opinion on the report of the Constitutional Review Committee, 5 March 2010.

37 Government Proposal HE 60/2010 vp.

38 Report on the Constitutional Law Committee PeVM 9/2010 vp.

39 See expert opinions heard by the Constitutional Law Committee e.g. Janne Salminen, 17 June 2010, p. 3; Tuomas Ojanen, 18 June 2010; Matti Pellonpää, 24 June 2010, p. 3. Pellonpää referred to a lower threshold when the court assessed the conflict between EU law and ECHR and national law. Pekka Länsineva also stated that the amendment would have been beneficial to promote the interpretative development of fundamental rights, even if its unchanged nature would hardly prevent the development of fundamental rights interpretations in courts. Opposing views stating that there was no need for an amendment in the provisions at that time were expressed by Liisa Nieminen, 17 June 2010, p. 6 and Outi Suviranta, 17 June 2010, p. 3.

40 Tuomas Ojanen, expert opinion, 18 June 2010.

41 Annual Report of the Supreme Court 2020, p. 11.

42 Annual Report of the Supreme Administrative Court 2020, p. 5.

43 Government Proposal HE 60/2010 vp, 9–10.

44 Olika former av normkontroll. Grundlagsutredningens rapport VIII. SOU 2007:85, especially p. 65–70; En reformerad grundlag, Del 1. Betänkande av Grundlagsutredningen. SOU 2008:125, especially p. 364–373.

45 Regeringsformen (1974:152) 11 kap. Section 14, Amendment Act 2010:1408 concerning the section.

and the provisions of the European Convention on Human Rights.[46] In connection with the amendment of the Constitution, a reminder was added to the provision that it is up to the parliaments to represent the people and that the Constitution has priority over other legislation. Sweden's change was taking place when Finland was looking at the elimination of the requirement for evident conflict, but in Finland, unlike Sweden, it was decided to maintain the requirement in the primacy provision of Section 106 of the Constitution. The fact that the legal provisions on the primacy of the constitutions of both countries were very similar, and that in Sweden an important justification for removing the requirement was related to setting the Constitution in line with EU law and international human rights obligations in the assessment of conflict, could also have led to a different solution in Finland.

Above, the views and arguments presented in the legal literature and in connection with the preparation of the 2011 constitutional amendment have been highlighted. One of the reasons put forward by the Constitutional Review Committee was the lack of development in case law. More than ten years after the last review and a broader discussion, the development of case law should be examined.

46 En reformerad grundlag, Del 1. Betänkande av Grundlagsutredningen. SOU 2008:125, p. 371.

Court decisions in which Section 106 of the Constitution has been applied

This report discusses ten decisions that have been legally resolved by the courts, which have found, in accordance with Section 106 of the Constitution, an evident conflict between the Constitution and the application of a provision of law. They have been searched for in the Edilex database in such a way that all the Yearbook decisions of the Supreme courts issued by 5 November 2020 and the decisions that have become final for lower courts have been taken into account. It is possible that the list of cases is not exhaustive.

Tuomas Ojanen has already prepared a previous review of cases in which the primacy provision has been applied in the aforementioned memorandum in 2008.[47] At that time, by 1 June 2008, there were four court rulings in which evident conflict had been found in different courts, although one of the decisions of the Helsinki Administrative Court was annulled in the Supreme Administrative Court. In other words, at the time of the previous report, there were three final decisions that applied the primacy provision of the Constitution.[48]

Since then, there have been a total of seven final decisions from different courts in which an obvious conflict has been established.[49] All in all, there are a total of ten final decisions taken during the period that the primacy provision has been in force, where, in accordance with Section 106 of the Constitution, the court has found the application of a provision of law to be in evident conflict with the Constitution. In addition to the primacy provision of the Constitution, some decisions also concern other issues, in particular the application of the European Convention on Human Rights, or the weighing of two fundamental rights[50]. However, in all these cases, the Court has ultimately resolved the legal issue on the basis of Section 106 of the Constitution.

The first decision of the Supreme Court, in which the Court found that the provision of the applicable law was in evident conflict with the Constitution, concerned building protection.[51] Of the decisions of the Supreme Court, the fol-

47 Ojanen, 2008. See also Lavapuro 2008, who has drafted a review of the effects of the requirement for evident conflict of Section 106 of the Constitution in case law.

48 Supreme Court decision KKO 2004:26, Supreme Administrative Court decision KHO 2008:25, Insurance Court decision VakO 24.10.2006/6254:2005.

49 Supreme Court decisions KKO 2012:11, KKO 2014:13, KKO 2015:14, Supreme Administrative Court decision KHO 2018:85, Helsinki Court of Appeal decisions HelHO 23.2.2018 108226, HelHO 1.2.2018 112, Helsinki Administrative Court decision HelHAO 4.8.2015 15/0615/2.

50 Supreme Administrative Court decision KHO 2018:85.

51 Supreme Court decision KKO 2004:26.

lowing two were related to the filing of paternity law suits after the end of the appeal period.[52] The fourth ruling concerned judicial proceedings and guarantees of legal protection.[53] The decisions of the Supreme Administrative Court concerned a ban on appeals in civil service matters[54] and a taxi driver's driving licence[55]. The decision of the Insurance Court concerned the prohibition of appeals related to vocational rehabilitation in the Pensions Act.[56] The decisions of the Court of Appeal concerned refusal to participate in non-military service and the Jehovah's Witness Exemption Act[57] and the acknowledgement of paternity[58]. The decision of the Helsinki Administrative Court concerned the application of the residence period provision to foreigners in a registered partnership.[59] Further descriptions of the cases are attached.

In many cases, the Court has applied the primacy provision of the Constitution because of an absolute or unambiguous wording of the applicable law, such as in cases of prohibition on appeal[60] or the end of the period of appeal[61]. In this kind of cases, it has not been possible for the court to overcome the conflict by a favourable interpretation of fundamental rights or a constitutional interpretation.

In addition to the ten aforementioned decisions, there are at least 31 court rulings in which the primacy provision of the Constitution has emerged, but in which the Court has not found an evident conflict.[62] There are also cases in which a party may have invoked the primacy provision of the Constitution but it has not been processed by the Court.[63] In addition to these ones, there are decisions in which the evident conflict has been resolved by a favourable interpretation of fundamental rights or consti-

52 Supreme Court decisions KKO 2014:13 and KKO 2012:11.

53 Supreme Court decision KKO 2015:14.

54 Supreme Administrative Court decision KHO 2008:25.

55 Supreme Administrative Court decision KHO 2018:85.

56 Insurance Court decision VakO 24.10.2006/6254:2005.

57 Helsinki Court of Appeal decision HelHO 23.2.2018 108226.

58 Helsinki Court of Appeal decision HelHO 1.2.2018 112.

59 Helsinki Administrative Court HelHAO 48.2015 15/0615/2.

60 Supreme Administrative Court decision KHO 2008:25; Insurance Court decision VakO 24.10.2006/6254:2005.

61 Supreme Court decision KKO 2012:11; Helsinki Court of Appeal HelHO 1.2.2018 112.

62 Supreme Court decisions KKO 2018:16; KKO 2015:92; KKO 2014:14; KKO 2008:83, KKO 2006:71; KKO 2004:62; KKO 2003:107; Supreme Administrative Court decisions KHO 2019:3; KHO 2017:84; KHO 2016:180; KHO 2014:1; KHO 2014:126; KHO 2013:136; KHO 2012:75; KHO 2012:53; KHO 2011:39; KHO 2011:107; KHO 2011:41; KHO 2010:85; KHO 2010:82; KHO 2009:15; KHO 2008:66; KHO 2008:10; KHO 2007:77; KHO 2005:43; Helsinki Court of Appeal decisions HelHO 10.6.2014 1188; HelHO 16.12.2011 3703; Vaasa Court of Appeal HO 28.5.2010 645; Rovaniemi Court of Appeal HO 11.6.2001 325; Hämeenlinna Administrative Court HAO 22.4.2008 08/0255/4; Labour Court decision 2017:161.

63 For example, KKO 2020:3, in which the party had invoked Section 106 of the Constitution as the last ground for an action but the Supreme Court had already ruled on the basis of the primary grounds for action and thus did not address the primacy provision of the Constitution. In the case KHO 2010:53, the party had invoked Section 106 of the Constitution, but the Supreme Administrative Court had not investigated the claim. In the case KHO 2018:18, the complainants had also argued that the primacy of the Constitution should be taken into account.

tutional interpretation or by referring to either one.[64] However, these cases are not covered in this report.

Not all of the decisions discussed in this report are decisions of the supreme courts; there are also two significant decisions by the Court of Appeal, one decision by the Administrative Court and one decision by the Insurance Court. The primacy provision of the Constitution applies, of course, to all courts, even though only the decisions of the supreme courts are of importance in regard to preliminary ruling. On the other hand, particularly the decisions of the Court of Appeal discussed in the report, have had a major impact.

64 For example, HelHO 14.3.2014 600, in which the Court of Appeal had stated that it was possible to interpret a certain provision as reinforcing fundamental rights, differently to the decision of the District Court. Similarly, in the case KHO 2020:87, the Administrative Court had found an evident conflict, but the Supreme Administrative Court had resolved the matter through a favourable interpretation of fundamental rights. In addition, KKO 2014:89, in which the Supreme Court referred to the Constitutional Law Committee's reports on the principle of favourable interpretation of fundamental rights, taking it into account in the justification of the decision. There are also decisions which have briefly referenced the favourable interpretation of fundamental rights.

Observations on the decisions in which the court has found an evident conflict under Section 106 of the Constitution

This report focuses on ten decisions that have been found to have an evident conflict between the Constitution and the application of a provision of law in accordance with Section 106 of the Constitution. The decisions are examined on the basis of comments on court cases and observations already presented in the legal literature. The three decisions received by 1 June 2008 have been discussed comprehensively in Ojanen's aforementioned review,[65] and in particular the first decision on the primacy of the Constitution has been commented in legal literature[66].

Seven of the key comments arising from these decisions are listed in the aforementioned review. This report examines the same observations on more recent cases. The arguments that have emerged in connection with previous court rulings concerning the primacy of the Constitution are largely applicable to later cases although some new observations can also be made.

The first observation, and the assessment already made in connection with the amendment of the 2000 Constitution stating that conflicts between the Constitution and the law are presumably very rare[67], has proved to be correct. Section 106 of the Constitution has been, albeit constitutionally significant, a last-resort and relatively rare way of resolving the conflict between the Constitution and the applicable law.[68]

The second observation is that the low number of court rulings seems to mean that the oversight system carried out by the Constitutional Law Committee works quite well. If the oversight of constitutionality is sufficiently effective, the court rarely appears to be faced with individual cases in which it would be necessary not to apply a provision of the law for being unconstitutional.

65 Ojanen, 2008. See also Lavapuro 2008.

66 Tuomas Ojanen, KKO 2004:26. Rakennussuojelu. Perustuslaki. Omaisuuden suoja. Perustuslain etusija. Lakimies 2004/5 p. 911–928; Jaakko Husa, KKO:2004:26. Rakennussuojelu – Omaisuuden suoja – Perustuslain etusija – Perustuslaki. Kompastuiko korkein oikeus perustuslain 106 §:ään? Defensor Legis 3/2004 p. 532–545; Björn Sandvik, Högsta domstolen och grundlagens 106 § - några kommentarer med anledning av HD 2004:26, JFT 1/2005 p. 89–106. Of course, the publication "KKO:n ratkaisut kommentein" (KKO decisions with comments, edited by Pekka Timonen) also includes comments on the cases of the Supreme Court, such as the comment by Pasi Pölönen on the case KKO 2015:14.

67 Report of the Constitutional Law Committee PeVM 10/1998 vp, p. 30.

68 Veli-Pekka Viljanen, Perustuslain etusija ja ristiriidan ilmeisyyden vaatimus. Oikeus – kulttuuria ja teoriaa, Juhlakirja Hannu Tolonen 2005 edit. Jyrki Tala and Kauko Wikström University of Turku, Faculty of Law 2005. Published in Edilex, 2007, pp. 310-311; Ojanen 2008, p. 141.

The third observation concerns the link between court decisions and fundamental rights. In Government Proposal HE 1/1998 vp, it was estimated that cases related to the primacy of the Constitution would be linked in particular to the scope of the fundamental rights provisions of the Constitution.[69] In the decisions examined, the courts have therefore dealt with the right to protection of private life[70], the protection of property[71], the right to appeal and the right to a fair trial[72], equality[73], and freedom to conduct a business[74]. All cases have therefore been related to fundamental rights.

The fourth observation was already made in the Government Proposal HE 1/1998 vp regarding the Constitution. The primacy provision would not imply a change in the possibility for the courts to otherwise apply the regulations of the Constitution. The Court's references in particular to the fundamental rights provisions of the Constitution and the corresponding provisions of the European Convention on Human Rights seem to have increased.[75] In their case law, the Supreme Courts now apply fundamental and human rights standards quite often.[76] In the legal literature, it has been suggested that the primacy provision of the Constitution emphasises the role of favourable interpretation of fundamental rights or constitutional interpretation in courts.[77] The assessment may be correct, as since 2008 the courts have in many cases used a favourable interpretation of fundamental rights as a means of resolving any conflict between the Constitution and the applicable law.[78]

It is quite common for the courts to mention a fundamental right that is important to a particular question in their decision as a kind of legal reference, even if they do not directly base their assessment on it. In this way, the court highlights the purpose or objective of fundamental or human rights that is generally the basis for the decision.[79] Fundamental and human rights are often interpreted together in courts. The restrictions on fundamental rights must not conflict with human rights obligations,

69 Government Proposal HE 1/1998 vp, p. 163.

70 Supreme Court decisions KKO 2012:11; KKO 2014:13; Helsinki Court of Appeal HelHO 1.2.2018 112.

71 Supreme Court decision KKO 2004:26.

72 Supreme Administrative Court decision KHO 2008:25; Insurance Court decision VakO 24.10.2006/6254:2005; Supreme Court decision KKO 2015:14.

73 Helsinki Court of Appeal HelHO 23.2.2018 108226; Helsinki Administrative Court decision HAO 4.8.2015 15/0615/2.

74 Supreme Administrative Court decision KHO 2018:85.

75 Tuomas Ojanen, Eurooppa-tuomioistuimet ja suomalaiset tuomioistuimet. Lakimies 7–8/2005, p. 1210–1228. p. 1215–1220. By 5 November 2020, a search for "euroopan ihmisoikeussopimus*" ("European Convention on Human Rights") on Edilex found a total of 278 preliminary decisions by the Supreme Court, of which more than half had been issued after 2010. The same keyword found 278 Yearbook decisions by the Supreme Administrative Court, of which more than 200 happened after 2010.

76 Development of cooperation between the highest courts. Working group report. Ministry of Justice, Memorandums and statements 2020:6, p. 45.

77 Ojanen 2008, p. 142; Kaarlo Tuori, Foucault'n oikeus, Vantaa 2002, p. 269.

78 On the basis of an Edilex search carried out on 5 November 2020, search of the Yearbook decisions of the Administrative Court with a key word "euroopan ihmisoikeussopimus*" ("European Convention on Human Rights") found 16 cases by the Supreme Court and 60 cases by the Supreme Administrative Court, and the key word "perustuslainmuk*" ("constitutionality") found 12 cases by the Supreme Court and 28 by the Supreme Administrative Court. The cases may have only referenced reinforcing fundamental rights or constitutionality or the matter has been resolved through interpretation, and some of the cases in which the primacy provision of the Constitution has been applied can also be found in these search results, but the number of cases gives an indication of the number of cases reinforcing fundamental rights or constitutionality.

79 Development of cooperation between the highest courts. Working group report. Ministry of Justice, Memorandums and statements 2020:6, p. 45.

as can be seen, e.g. in the decision on the Act on the exemption of Jehovah's witnesses from military service in Helsinki Court of Appeal case HelHO 23.2.2018 108226.

The fifth observation is the proportion of decisions reached by voting in the cases in which the primacy provision of the Constitution was applied.[80] Five, i.e. half of the decisions were reached by voting.[81] As the Constitutional Law Committee has stated in its report on the Constitution, the requirement for evident conflict means that the conflict must be "clear and undisputed and therefore easily visible and not, for example, open to interpretation as a legal issue".[82] Clarity and indisputability can be easily seen in unanimous decisions. However, there is no need for unanimity in order to meet the requirement for evident conflict but differing opinions are also possible in cases related to the primacy of the Constitution.[83] In some cases, there have been divergent views as to whether Section 106 of the Constitution should have been resorted to or whether the conflict could have been resolved through a favourable interpretation of fundamental rights. As regards the first case of the application of the primacy provision of the Constitution, Viljanen stated that it did not in any way fall outside the scope of interpretation highlighted in the Government proposal; the situation was subject to interpretation.[84]

The first case in which the Section 106 of the Constitution was applied (Supreme Court case KKO 2004:26) concerned building protection. Some of the members of the court who had dissenting opinions felt that there was a conflict, but it would not have been evident in the sense referred to in the Constitution. Some, on the other hand, felt that Section 106 of the Constitution did not have to be invoked, but that the problem could have been solved with interpretation. The decision raised a great deal of criticism in legal literature.[85] The criticism concerned, among other things, the fact that the dissenting views specifically related to constitutional key issues and, in particular, to resorting to the requirement for evident conflict.[86] The comments from the Court have shown that the application of the primacy provision of the Constitution in this case was a vigorous measure, particularly since there were major differences of opinion, and questioned why there was a desire to resort to the requirement for evident conflict at all.[87] In addition, it has been discussed what kind of a precedent does the application of the Section 106 set for future cases related to the Primacy of the Constitution.[88]

Two decisions on acknowledging paternity, Supreme Court cases KKO 2012:11 and KKO 2014:13, were also voted on. In one of these, the position of the President of the Court, in particular, was dissenting with the majority in terms of the legal implications of acknowledging paternity.[89] According to the President, the restoration of the right to take legal action in

80 Ojanen 2008, p. 142. In this context, it should be noted that the 2008 review found that all decisions by the Supreme Court regarding decisions in which the primacy provision was applied, the most important decisions were reached by voting (including cases in which the Court did not find any evident conflict). The current report takes into account the number of voting decisions in the ten final decisions discussed.

81 Supreme Court decision KKO 2004:26; Supreme Administrative Court decision KHO 2008:25; Supreme Court decision KKO 2012:11; Helsinki Court of Appeal decision HelHO 23.2.2018 108226; Supreme Administrative Court decision KHO 2018:85.

82 Report of the Constitutional Law Committee PeVM 10/1998 vp, p. 31.

83 Viljanen 2005, p. 319–320.

84 Viljanen 2005, p. 319.

85 See also the comments on the court decision, Husa 2004, Ojanen 2004 and Sandvik 2005.

86 Husa 2004, p. 540, 545.

87 Husa 2004, p. 545; Ojanen 2004, p. 928.

88 Ojanen 2004, p. 928.

89 Supreme Court decision KKO 2012:11.

regards to acknowledging paternity should not lead to the implementation of the legal effects of paternity, in which case there was no evident conflict between the protection of private life as stated in the Constitution and the application of the provision of the Act on the Implementation of the Paternity Act, even though this conflict existed in regards to the right to know about one's biological origin. According to the President of the Court, Section 106 of the Constitution was suited "generally poorly as a way to resolve such fundamental rights issues which, in order to ensure equality and legal certainty, require legislative action". According to another dissenting member, the application of the Act on Implementing the Paternity Act to the case in question did not lead to such an evident conflict with the Constitution which would have required the Court to not apply the legal provisions on the period of appeal, and the problem should have been solved by the legislator.

In the voted decision on a taxi driver's driving licence (Supreme Administrative Court case KHO 2018:85), the reporting member and the disagreeing member considered that the consideration between two fundamental rights (freedom to conduct a business and security) was discretionary, and neither of these rights was clearly prioritised which did not constitute a clear and undisputed conflict, and therefore Section 106 of the Constitution would not have been applicable.

According to the judge who partially disagreed in the voted decision of the Supreme Administrative Court KHO 2008:25, the question of the transferral of the office holder's office related to the scope of the prohibition against appeal was interpreted as unclear, in which case the court should have interpreted the scope of the prohibition in a human rights favourable manner.

The decision on the exemption of Jehovah's witnesses from military service (Helsinki Court of Appeal HelHO 23.2.2018 108226) was also reached by voting. According to the members who were in the minority, it was not possible to assess the matter on the basis of Section 106 of the Constitution, as the Exemption Act had in due course been laid down in the order in which the Constitution was enacted, and when the Act was enacted, Parliament had approved the different treatment resulting from the Act. It was also not possible to deviate from the unambiguous wording of the Act by a favourable interpretation of fundamental rights, in which case, according to the members who disagreed, the basic legal issues arising from the Exemption Act should have been resolved by legislative means.

In five cases, the court ruled unanimously.[90] It is interesting that in the case of unanimous decisions on judicial proceedings[91] and the acknowledgement of paternity,[92] the court dealt extensively and thoroughly with the case law of the European Court of Human Rights (ECtHR), but nevertheless justified its decision by Section 106 of the Constitution.[93] The third unanimous decision concerned the application of the residence period provision to foreigners of the same sex who wanted to register their partnership. In this case, the possibilities to interpret the law were probably reduced by the fact that the application of the law in this case would have led to a clearly discriminatory ruling as well as the fact that the Constitutional Law Committee had not provided a statement on the relationship between the residence period provision and the Constitution.[94] The fourth unanimous decision concerned a prohibition on appeals regarding the content of vocational

90 Supreme Court decisions KKO 2015:14; KKO 2014:13; Helsinki Court of Appeal decision HelHO 1.2.2018 112; Helsinki Administrative Court decision HAO 4.8.2015 15/0615/2; Insurance Court decision VakO 24.10.2006/6254:2005.

91 Supreme Court decision KKO 2015:14.

92 Helsinki Court of Appeal decision HelHO 1.2.2018 112.

93 Supreme Court decision KKO 2015:14 section 60; Helsinki Court of Appeal HelHO 1.2.2018 112.

94 Helsinki Administrative Court decision HAO 4.8.2015 15/0615/2.

rehabilitation. First and foremost, the Insurance Court based its decision on the fact that the prohibition on appeals would inevitably have led to a result contrary to Section 21 of the Constitution, and that the Constitutional Law Committee had previously intervened in similar prohibitions on appeals in its statements.[95] In the fifth unanimous ruling on the acknowledgement of paternity, the decision was largely based on a previous ruling of the Court in a similar case.[96]

Karapuu[97] has argued that the demand for clarity and indisputability could not be taken literally because, according to him – and as the court rulings discussed in this report show – there is no obstacle to evident conflict being found, even if only some judges considered it evident. He also wonders exactly what ambiguity means, as the fundamental rights provisions are always somewhat ambiguous due to their abstract and emotive nature. According to Karapuu, the requirement for evident conflict is not met when an individual judge is forming their statement if, after having considered all the 'argument material' on the table, they are in two minds in terms of whether there is a conflict between the Constitution and the applicable law.[98]

The sixth observation concerning cases of application of the primacy provision of the Constitution is that the requirement for evident conflict, together with the position given to the statements of the Constitutional Law Committee, seems to have led the courts to give a stressed meaning to what the Constitutional Law Committee may have said at the time when the law was enacted on the constitutionality of the law. The criteria for the assessment of the court and the Constitutional Law Committee differ precisely in regard to the requirement for evident conflict, because only the court's assessment includes the requirement for evident conflict.

In connection with the statements of the Constitutional Law Committee on interpretation, Lavapuro and Ojanen consider both the distortion of the time perspective and the features of abstract control of norms to be problematic.[99] These are discussed below, as they have emerged in the first court rulings regarding the primacy of the Constitution.

According to Ojanen, particularly the first ruling related to the primacy provision of the Constitution has been problematic since it refers to views presented in connection with the enactment of the Act on the Protection of Buildings, and these views have become quite outdated which presents an issue from the time perspective.[100] In his comment on the court case, Ojanen has pointed out that at the time that the ruling was made, more than twenty years had elapsed since the statement of the Constitutional Law Committee had been given, and that the concept of property protection should have been considered from the perspective of views that were valid at that time, taking into account the fundamental rights reform, the new Constitution's entry into force and the European Convention on Human Rights.[101] In the ruling, the Court stated that it was clear that the Constitutional Law Committee had not taken into account damages such as those in the case in its statement at the time when the law was enacted. Sandvik, in his comments on the court case, wondered whether the statement of the Constitutional Law Committee could also have been interpreted in the opposite way, in other words that the damages

95 Insurance Court decision VakO 24.10.2006/6254:2005.

96 Supreme Court decision KKO 2014:13, in which the Court based its judgment on its previous judgment KKO 2012:11.

97 Karapuu 1999, p. 875.

98 Karapuu 1999, p. 874.

99 Ojanen 2008, p. 142–143. For norm control, see in particular Lavapuro 2008 p. 590–592.

100 Ojanen 2004, p. 923–924.

101 Ojanen 2004, p. 924.

taken into account in the statement would also include such damages.[102]

Abstract control of norms, which is also mentioned in Government Proposal 1/1998 vp, or the interpretation on evident conflict based on the control of norms (*normikontrollihakuinen ilmeisyystulkinta*) as used by Lavapuro, refers to the substantive legal tension between the Constitution and the provision of the applicable law and how it is resolved on the basis of a statement of the Constitutional Law Committee given at the time when the law was enacted. Although the court must monitor the position of the Constitutional Law Committee in the assessment of evident conflict, a strict interpretation of statements during laws when they are enacted may cause the Court to risk being forced to set themselves apart from the present case and assess the situation in a general and abstract manner in the same way as the Constitutional Law Committee does.[103] Applying the interpretation on evident conflict based on the control of norms, the Constitutional Law Committee's high position in the interpretation of the Constitution in Finland's constitutional system is emphasised, as well as the coherence of the norm control system, i.e. the fact that the Constitutional Law Committee maintains the oversight of compliance with the Constitution, and the interpretation statement of the Constitutional Law Committee during the time when the law is enacted.[104] Lavapuro has also described this phenomenon as a kind of primacy syndrome in which the attention of the court is shifted from the substantive resolution of the case to a norm control institution and constitutional aspects of the constitutionality of the law.[105]

As a result of the requirement for evident conflict, the court cannot meet halfway between the application of the provision of the law and the Constitution in assessing a conflict. It is possible for the court to decide either that there is an evident conflict between the two or that there is no conflict at all.[106] In this case, the court has to categorise conflict as a mere conflict or an evident conflict, and refrain from applying Section 106 if they have decided on a mere conflict. Of course, the Court primarily resolves conflicts by means of a constitutional interpretation. If that is not possible, and the court relies on the application of Section 106 of the Constitution, the problem may be the old-fashioned view of the legal assessment 'either or' as represented by the requirement for evident conflict of Section 106 of the Constitution.[107]

The courts have relied on the interpretation practice of the Constitutional Law Committee when it has existed and have raised in their decisions if the Constitutional Law Committee has not made a statement on the constitutionality of a particular question at the time that the law was enacted.[108] If the Constitutional Law Committee has delivered a statement on the matter, the court has relied on it or at least carefully considered it.[109] However, if the court bases its decision only on the statement of the Constitutional Law Committee, given at the time the law was enacted, on the constitutionality of the

102 Sandvik 2005, p. 99–100; Statement of the Constitutional Law Committee PeVL 6/1983 vp, p. 2–3.

103 Lavapuro 2008, p. 589–591.

104 Lavapuro 2008, p. 590–591; Report of the Constitutional Law Committee PeVM 10/1998 vp, p. 30–31.

105 Juha Lavapuro, Uusi perustuslakikontrolli. Suomalainen Lakimiesyhdistys, Helsinki 2011, p. 214–215.

106 Pajuoja – Pölönen 2011, p. 393. Especially in Lavapuro 2008, p. 592 and Lavapuro 2011, p. 214 and Martin Scheinin, KKO 2003:107 Isyys. Isyyden vahvistaminen. Perustuslaki. Perusoikeudet. Yhdenvertaisuus. Lakimies 3/2004 p. 532–543. p. 537, 542–543 authors have considered a case in which there seems to be a conflict, but which does not meet the requirement for evident conflict.

107 Lavapuro 2008, p. 592; Hämäläinen 2021, p. 240.

108 Supreme Court decisions KKO 2012:11; KKO 2014:13; KKO 2015:14; Supreme Administrative Court decision KHO 2018:85; Helsinki Administrative Court decision HAO 4.8.2015 15/0615/2.

109 Supreme Court decision KKO 2004:26; Insurance Court decision VakO 24.10.2006/6254:2005.

applicable law, and does not take into account the special features of the case at hand, the court's interpretation may be dismissed from the concrete case and become too much a case of control of norms.

However, only in two of the Court's rulings, the Constitutional Law Committee has given its opinion on the constitutionality of the Act at hand or the application of its provision in a situation similar to the one currently handled by the Court.[110] In eight of the ten rulings of the courts, the Constitutional Law Committee has not stated on the constitutionality of the law or of the provision applicable to the particular situation in question.[111]

When the position of the Constitutional Law Committee has not been available, the courts have in some cases used the case-law of the European Court of Human Rights to assist in the judicial assessment of the case.[112] In some cases, it has been question of a legally relatively clear case.[113]

The court may have also been able to find an obvious conflict between a provision of law and the Constitution in a situation in which there has been a collision between two fundamental rights. In the Supreme Administrative Court decision KHO 2018:85, the court examined whether the restriction of freedom to conduct a business was proportionate to the risk to traffic and customer safety. The court ruled that the realisation of one fundamental right, i.e. security, did not require a deviation from another fundamental right, i.e. the freedom to conduct a business. In this respect, the outcome of the court's consideration has been so obvious that the conflict between the application of the ordinary law provision and the Constitution proves to be clear and undisputed.[114] In situations in which the Constitutional Law Committee has not made a statement on the constitutionality of the applicable law, the court has also been able to try and seek assistance from relevant legislation.[115]

Supreme Administrative Court decision KHO 2018:85

According to the Supreme Administrative Court this kind of restriction on the freedom to conduct a business was not necessary for the realisation of another fundamental right, i.e. transport and customer security, so the provision had to be waived since it was in evident conflict with the Constitution. The provision of the Act on the Professional Qualifications of Taxi Drivers was unconditional, and it was not possible to interpret it in a manner favourable to fundamental rights, but the matter had to be assessed by means of Section 106 of the Constitution.

110 Supreme Court decision KKO 2004:26; Insurance Court decision VakO 24.10.2006/6254:2005.

111 Supreme Administrative Court decision KHO 2008:25; Supreme Court decisions KKO 2012:11; KKO 2014:13; KKO 2015:14; Helsinki Administrative Court decision HAO 4.8.2015 15/0615/2; Supreme Administrative Court decision KHO 2018:85; Helsinki Court of Appeal decisions HelHO 1.2.2018 112; HelHO 23.2.2018 108226.

112 Supreme Court decisions KKO 2012:11 and KKO 2014:13; KKO 2015:14 related to the same question.

113 Helsinki Administrative Court decision HAO 4.8.2015 15/0615/2.

114 Supreme Administrative Court decision KHO 2018:85.

115 See e.g. Supreme Administrative Court decision KHO 2018:85, in which there was no statement by the Constitutional Law Committee on the Act on the professional qualifications of taxi drivers. However, the Constitutional Law Committee had made a statement on the Act to include it in the reform of traffic acts (HE 161/2017 vp), but the provision (on transport services) that came into the Act was not included in the Government Proposal on which the Constitutional Law Committee issued its statement (PeVL 46/2016 vp). Therefore, in the case at hand, there was no statement from the Constitutional Law Committee on the constitutionality of such a situation.

The fact that the Constitutional Law Committee has stated that the law to be applied by the court is constitutional only in two cases indicates that, at the time that these laws were enacted, the legislator has not considered that the application of the law, or of the provision of the law that may arise in a specific concrete situation, could have unconstitutional effects. Of course, it must be taken into account that the Constitutional Law Committee has a more limited time in relation to the courts to deal with the matter, and the experts in the Committee usually rely primarily on the information that has been brought up in the Government Proposal.[116] It is not possible to map out all possible future cases of application in the Constitutional Law Committee.

The control of norms also involves the fact, as referenced in legal literature, that the requirement for evident conflict seems to emphasise the moderation and self-limitation of the courts as well as the legislator's political freedom.[117] From the point of view of the division of powers, the legislator must therefore have such freedom and power that the court does not have.[118] Moderation shows in the discussed legal cases, for example when the Court has taken a position on whether or not the Constitutional Law Committee has made a statement on the constitutionality of the matter at the time that the law was enacted.

In addition to interpretation on evident conflict based on the control of norms, the court rulings have also used interpretation of evident conflict based on legal protection. In an interpretation based on legal protection, the key content of the requirement for evident conflict is that the primacy provision of the Constitution is secondary to a constitutional interpretation or a favourable interpretation of fundamental rights. In other words, it can only be applied if it is not possible to eliminate the conflict with such an interpretation.[119] Legal protection means that, in accordance with Section 22 of the Constitution, the obligation to safeguard fundamental and human rights is intended to be implemented so that the decision is substantively constitutional.[120] In the court rulings discussed, legal protection is reflected in the fact that in most of the rulings, the courts have first assessed whether it is possible to eliminate the conflict through an interpretation of the law which is favourable to fundamental rights. The constitutionality of substantive law is also strongly reflected in the fact that the courts have referred to the European Court of Human Rights and directly to some of its decisions and in their efforts to harmonise human rights obligations with the fundamental rights provisions of the Constitution and to interpret fundamental rights with human rights obligations.[121]

A seventh observation, suggested by both Ojanen and Lavapuro[122], is that the courts do not examine the content of the fundamental rights and the general principles of interpretation applicable to them in the cases by taking into account the interpretation practice of the Constitutional Law Committee in the same way as they examine the content of the European Convention on Human Rights and EU law, taking into account the case law applicable to them. The observation also concerns the broader consideration of the Constitution and its provisions on fundamental rights, not just the primacy provision. According to court rulings, the supreme courts have hardly relied

116 Pajuoja – Pölönen 2011, p. 388.

117 Lavapuro 2008, p. 584. On moderation and self-limitation of courts, see Hanna Putkonen, Oppi pidättyväisyydestä lainsäätäjän ja tuomioistuinten valtiosääntöisten roolien jäsentäjänä. Oikeus 1/2018, p. 29–47.

118 In regard to division of powers, see Tallroth 2012, p. 43.

119 HE 1/1998 vp, p. 164. See also Lavapuro 2008, p. 592.

120 Viljanen 2005, p. 312.

121 Supreme Court decisions KKO 2015:14; KKO 2012:11; KKO 2014:13; Helsinki Court of Appeal decisions HelHO 1.2.2018 112; HelHO 23.2.2018 108226.

122 Ojanen 2008, p. 143–144; Lavapuro 2008, p. 591.

on statements of the Constitutional Law Committee other than those expressed at the time when the laws that are applicable in a situation at hand in the court were enacted.[123] However, in two decisions, as a factor affecting the decision, the courts have examined the interpretation of the Constitutional Law Committee of the content of an individual right, i.e. the statement of the Constitutional Law Committee in its various statements that the right to personal identity and access to information about one's own biological origin fall within the scope of protection of private life under Section 10 of the Constitution.[124]

In their decisions on the priority of the Constitution, the courts have addressed the general observations of the Government Proposal on the new Constitution and of the Constitutional Law Committee's report on it on the role of fundamental rights and the primacy provision. The courts have stated, for example, that human rights obligations and the fundamental rights provisions of the Constitution can be harmonised to a broad extent in terms of interpretation[125], and that the application of the primacy provision requires a clear and undisputed conflict and must not be open to interpretation[126], or that out of the possible interpretation options, the one which is the most favourable for fundamental and human rights must be chosen[127]. In addition, if the case law of the European Court of Human Rights on the content of a right in general is available, the Court has first and foremost taken it into account[128], however without considering the general principles of interpretation, if any, of the Constitutional Law Committee on the content of the right. For example, in the decision of the Helsinki Court of Appeal, HelHO 23.2.2018 108226, the Court of Appeal did discuss the content of equality by means of the Non-Discrimination provision of the Constitution and the Non-Discrimination Act, but did not particularly consider the general interpretation practice of the Constitutional Law Committee on Non-Discrimination. In its decision, it took into account, for example, the case law of the European Court of Human Rights and the practice of the United Nations Human Rights Committee, and also mentioned the Charter of Fundamental Rights of the European Union.

123 Ojanen 2008, p. 144. In the Insurance Court ruling VakO 24.10.2006/6254:2005, the Court reviewed some of the statements of the Constitutional Law Committee on the prohibition against appeal in different pension laws and their relationship with the individuals' right to appeal secured by Section 21 of the Constitution.

124 Supreme Court decision KKO 2012:11; Helsinki Court of Appeal HelHO 1.2.2018 112. In its statements PeVL 59/2002 vp, PeVL 16/2006 vp and PeVL 15/2011 vp, the Constitutional Law Committee has considered that the right to personal identity is part of the protection of private life under Section 10 of the Constitution.

125 Helsinki Court of Appeal HelHO 23.2.2018 108226.

126 Supreme Court decision KKO 2012:11.

127 Supreme Court decision KKO 2015:14.

128 Supreme Court decisions KKO 2015:14; KKO 2014:13, judgment section 29; KKO 2012:11, judgment section 24.

The importance of the ECHR and the case law of the ECtHR in assessing evident conflict

In addition to the seven comments made on the decisions related to the requirement for evident conflict presented above, the importance of the European Convention on Human Rights and the case law of the European Court of Human Rights in the assessment of evident conflict in court decisions should be emphasised. The increase in the number of references to the European Convention on Human Rights in general has already been mentioned above. The significance of international human rights obligations in national jurisprudence has increased, and the courts refer in particular to the European Convention on Human Rights more and more. It is important that the courts in Finland are able to respond to the international development of fundamental and human rights obligations and the internationalisation of constitutional law and to safeguard fundamental and human rights in accordance with them.

The courts have the obligation to waive a provision of national law regardless of the regulatory level if it is in conflict with a legally binding statute of EU law. Primacy has to be given also to the European Convention on Human Rights (ECHR) or any other provision of an international human rights obligation binding Finland, if the national provision is in conflict with them. The threshold of the courts to waive a provision which is in conflict with the Constitution is, due to the requirement of evident conflict, higher compared to the above-mentioned.

The courts have a higher threshold for prioritising the Constitution than EU law or obligations of international human rights conventions in conflicts.[129] Although there is no requirement for evident conflict in international law and EU law, the courts usually rely specifically on the case law of the European Court of Human Rights and the Court of Justice of the European Union, and do not go on to interpret, for example, the provisions of the European Convention on Human Rights. A different threshold in relation to the Constitution is problematic in terms of the effective implementation of fundamental rights. The purpose of the national fundamental rights system is to be the primary system for safeguarding rights while international human rights obligations set the minimum level and supplement national protection.[130] The difference in the threshold for courts to prioritise the Constitution or the international human rights obligation is also problematic due to the internal coherence of the judicial system. This lack of consistency has been seen as a significant justification for eliminating the requirement for evident conflict.[131] How can the requirement

129 Ojanen 2008, p. 145–146. Lavapuro 2008, p. 611; Perustuslain tarkistamiskomitean mietintö 2010, p. 127; KKO:n ratkaisut kommentein 2015:14; Pajuoja – Pölönen, 2011, p. 394; Tallroth 2012, p. 42.

130 Ojanen 2008, p. 146.

131 Ojanen 2008, p. 145. Perustuslain tarkistamiskomitean mietintö 2010, p. 127. However, the Constitutional Review Committee has argued that there was no need for eliminating the requirement for evident conflict in 2010.

for evident conflict be justified in relation to the Constitution if a conflict is identified between the applicable law and the case law of the European Court of Human Rights, and the matter should be resolved through harmonising fundamental rights with human rights obligations while choosing the option that is the most favourable to human rights?

The justification for the court rulings shows that the Court's decision has been strongly based on the case law of the European Court of Human Rights, especially in two cases. In the decision to exhume a grave for a legal genetic investigation for the purpose of acknowledging paternity (Helsinki Court of Appeal HelHO 1.2.2018 112), the Court used the case of the ECtHR Jäggi v. Switzerland as the basis for its decision and stated that it interpreted Article 10 of the Constitution on the protection of private life in accordance with Article 8 of the European Convention on Human Rights.

Supreme Court decision KKO 2015:14:
The court relied on the ECtHR case Neziraj v. Germany, stating that leaving the complaint as it was, was in particular contrary to Article 6 of the Convention on the right to a fair trial. With this decision, the Supreme Court made it clear that the conflict with the human rights obligation arising from the application of the law could also be an evident conflict with the Constitution.

In the Supreme Court case KKO 2015:14, the Court relied on the ECtHR case Neziraj v. Germany, stating that in the case in question, leaving the complaint as it was, was in particular contrary to Article 6 of the Convention on the right to a fair trial. Of course, the national provision also has a similar content, but the Court referred first and foremost to the European Convention on Human Rights. With this decision, the Supreme Court made it clear that the conflict with the human rights obligation arising from the application of the law could also be an evident conflict with the Constitution.[132] This is the case, at least when there is appropriate case law of the ECtHR at hand for the court to be applied. The use of the rights contained in the European Convention on Human Rights as a basis for decisions and their coordination with fundamental rights and the constitution as a whole is increasingly common in national case law. The Supreme Court has therefore considered that conflicts between national law and human rights obligations can no longer be regarded as exceptional individual cases.[133]

132 See KKO:n ratkaisut kommentein 2015:14, in which Pölönen has also used the term "semi-abstract ex post control", meaning that, while formally the assessment of Section 106 of the Constitution is limited to individual cases and it is not a question of abstract control of norms in the work of the court, but the ruling of the Supreme Court in question 'clarifies this type of legal effect considerably clearly' and, in this case, the court explicitly required the amendment of the application procedure of the law (see ruling section 46).

133 Supreme Court decision KKO 2015:14, Sections 33–36; KKO:n ratkaisut kommentein 2015:14.

In two other decisions that revolved around acknowledging paternity[134], the Court also comprehensively considered the case law of the European Court of Human Rights and the content of the article on the protection of private life of the European Convention on Human Rights[135], and it considered the provisions of the Convention on the Rights of the Child[136]. Referring to the ECtHR case Jäggi v. Switzerland, the Court stated that the elapsed time does not reduce the person's interest in establishing their biological origin.[137]

In 2018, the Supreme Administrative Court stated that "in rare situations in which Section 106 of the Constitution has been applied in case law, the existence of such a conflict has often been established either directly on the basis of the wording of an individual fundamental rights provision or on the basis of the application of human and fundamental rights, in particular the decisions of the European Court of Human Rights".[138]

---

134 Supreme Court decisions KKO 2012:11; KKO 2014:13.

135 Supreme Court decision KKO 2012:11.

136 Convention on the Rights of the Child, SopS 59/1991.

137 Supreme Court decision KKO 2014:13.

138 Supreme Administrative Court decision KHO 2018:85.

Court rulings behind legislative changes

The decisions given by the courts pursuant to Section 106 of the Constitution concern individual cases and do not affect legislation in general. However, some of the decisions have been in the background of influencing legislative amendments.[139] Lavapuro and Hämäläinen have stated that the requirement for evident conflict may take the court's assessment further from an individual assessment towards an abstract legal assessment that is part of the legislative procedure.[140] The more evident the conflict, the more clearly it affects the law itself and not its application in an individual decision.[141] This leads to the impact of a decision regarding the primacy of the Constitution to perhaps be more significant than it would be if the question was only of an individual case. The following cases highlight this idea in more concrete terms.

In its statements regarding the enactment of the Paternity Act and the annulment of the Jehovah's Witness Exemption Act[142], the Constitutional Law Committee has discussed court rulings which have assessed the conflict of these laws with the Constitution.[143]

In 2014, a Government Proposal for a Paternity Act (HE 91/2014 vp) was pending in Parliament[144], according to which the legal effects related to taking legal action to acknowledge paternity should be examined when assessing the transitional provision of the Act on Implementing the Paternity Act. The Government Proposal presented that the acknowledgement of paternity through an action brought by a child born outside the marriage before 1 October 1976 would not grant the right to inheritance after such a deceased person who had passed before the initiation of the action leading to the acknowledgement of paternity.

However, in its opinion PeVL 46/2014 vp, issued on a Government Proposal, the Constitutional Law Committee had discussed the right to inheritance and stated that there is no acceptable justification for putting children in a different position. In the opinion of the Constitutional Law Committee, it was not acceptable to place those born outside marriage before 1 October 1976 in a different position even when the deceased had died before the Act had entered into force. The Constitutional Law Committee based its position on the ruling of the Supreme Court KKO 2012:11, in particular as regards "after it has been known that a child born before 1 October 1976 outside the marriage may, at least in some cases, be entitled to

139 Government Proposal HE 1/1998 vp, p. 163.

140 Lavapuro 2008, p. 585; Lavapuro 2010, p. 185; Hämäläinen 2021, p. 213–214.

141 Hämäläinen, 2021. p. 213–214; Lavapuro 2010, p. 185.

142 Statements of the Constitutional Law Committee PeVL 46/2014 vp; PeVL 59/2018 vp.

143 Supreme Court decision KKO 2012:11; Helsinki Court of Appeal HelHO 23.2.2018 108226.

144 Government Proposal HE 91/2014 vp, p. 21–22.

a right of inheritance as a result of the acknowledgement of paternity", which means that the time when this decision was given became an absolute limit to the reduction of the limitation rule planned by the Legal Affairs Committee. The Constitutional Law Committee stated that if the Legal Affairs Committee decided to shorten the limitation period before the entry into force of the Act, it could also be appropriate to assess the possibility of reducing the absolute limitation period due to the individual circumstances of each case.[145]

Section 67 of the current Paternity Act is in line with the statement of the Constitutional Law Committee. In principle, a child born outside the marriage before 1 October 1976 does not have the right to inheritance from their father's side if the deceased has died before the above-mentioned Supreme Court decision KKO 2012:11. However, it is possible to deviate from the main principle in cases in which, for example, the loss of the right to inheritance must be considered unreasonable in terms of equal treatment of siblings born outside of the marriage. The courts have discussed the matter in the Supreme Court decision KKO 2020:3 and Turku Court of Appeal decision Turun HO 28.2.2017 195, among others.

The Government Proposal HE 139/2018 vp to repeal the Exemption Act was based on the decision of the Helsinki Court of Appeal HelHO 23.2.2018 108226, in which the person had refused to participate in non-military service on the grounds of conscience.[146] The Exemption Act[147] was originally enacted in the constitutional procedure. In other words, it was an exceptional act, and the reasons for which it came into force, were mainly practical rather than legal, according to the government proposal on the repeal of the law.[148] In its ruling, the Court of Appeal had discussed the relationship between Section 106 of the Constitution and the Exemption Act, and on the basis of the report by the Constitutional Law Committee PeVM 10/1998 vp, stated that the fact that a law had been enacted as an exceptional act "does not necessarily lead to not applying the primacy provision of the Constitution". The Exemption Act was enacted in 1985 when Finland was not yet a party to the European Convention on Human Rights.

An exceptional act cannot eliminate any conflict between national law and human rights obligations. Government Proposal HE 309/1993 vp states[149] that some of the exceptional laws laid down before the commitment to human rights treaties would currently be contrary to international human rights commitments to the extent that they "differ from the human rights provisions that are similar in content to the fundamental rights provisions".

Supreme Court decision KKO 2012:11:
In the opinion of the Constitutional Law Committee, it was not acceptable to place those born outside marriage before 1 October 1976 in a different position even when the deceased had died before the Act had entered into force. The Constitutional Law Committee stated that after the decision KKO 2012:11 it has been known that a child born before 1 October 1976 outside the marriage may, at least in some cases, be entitled to a right of inheritance as a result of the acknowledgement of paternity.

145 Statement of the Constitutional Law Committee PeVL 46/2014 vp, p. 10.

146 Government Proposal HE 139/2018 vp, especially p. 11. See also p. 5, 10 and 19.

147 Act Exempting Jehovah's Witnesses from Performing Mandatory Military Service in Certain Cases 645/1985.

148 Government Proposal HE 139/2018 vp, p. 5. See also Government Proposal HE 7/1985 vp, p. 2.

149 Government Proposal HE 309/1993 vp, p. 9.

The Court of Appeal had ruled that the Jehovah's Witness Exemption Act was in evident conflict with the provisions on equality and the prohibition of discrimination in the Constitution. This decision of the Court of Appeal was used as a background in the Government proposal to repeal the Act. The Constitutional Law Committee also considered the same decision of the Court of Appeal[150] in its statement. Parliament repealed the Exemption Act and Jehovah's Witness' special status was removed.[151]

These two examples show that, although the application of Section 106 of the Constitution does not have an impact outside individual cases, the cases may be behind legislative amendments by the legislator. Recognising an evident conflict can clearly and concretely bring to light something that may also have an impact in future cases. The Supreme Court has also directly stated in the case KKO 2015:14 that it would be necessary to take legislative action to remedy the situation caused by evident conflict.[152] Of course, under Section 99, subsection 2 of the Constitution, the Supreme Courts may also propose to the Government to take legislative action if they have observed juridical shortcomings in their jurisdictional activities.[153]

The passing of time and changes in society as well as the emphasis on human and fundamental rights have influenced changes in interpretations and laws. According to the Constitutional Law Committee's report on the Constitution[154], it is possible to take into account the time elapsed from the enactment of the Exemption Act in the application of Section 106 of the Constitution. The Supreme Court case KKO 2012:11 and Helsinki Court of Appeal case HelHO 23.2.2018 108226, which have contributed to subsequent legislative amendments, show that the impact of human rights has become stronger. In connection with decision HelHO 23.2.2018 108226, the Court of Appeal had also mentioned the Supreme Court's decision KKO 2015:14, in which the Supreme Court had stated that human rights obligations and the fundamental rights provisions of the Constitution can be interpreted to a broad extent in terms of harmonisation, referring to the line adopted as a result of the fundamental rights reform. The decision of the Court of Appeal had comprehensively examined international human rights obligations. However, it would be prudent not to draw too far-reaching conclusions on the impact of court rulings on legislative changes. In this context, it can also be considered whether the decisions would have had an equal impact on legislative changes if the court's assessment did not have a requirement for evident conflict, or whether the requirement for evident conflict makes the decisions particularly imposing.

150 Statement of the Constitutional Law Committee PeVL 59/2018 vp.

151 However, this does not in itself eliminate the general problem of a penalty for refusing military service for reasons of conscience. See section 118 of the Conscription Act (1438/2007).

152 Supreme Court decision KKO 2015:14, section 48. See also Government Proposal on amendments to the Code of Judicial Procedure HE 200/2017 vp, which mentioned among other things the Supreme Court decision KKO 2015:14, in which the Supreme Court had directly stated that urgent legislative measures would be necessary to remedy the situation.

153 Government Proposal HE 1/1998 vp, p. 157.

154 Statement of the Constitutional Law Committee PeVM 10/1998 vp, p. 31.

Conclusions

The cases in which the court has discussed the primacy provision of the Constitution and has found an evident conflict with the application of the provision of the law and the Constitution are very diverse. Every decision is an isolated case, but there are also common elements related to the priority of the Constitution. Although the primacy provision of the Constitution is the last resort to resolve a conflict between the Constitution and the applicable provision of law, it has had a constitutional effect and has contributed to the decision-making of the Court. The decisions have had an impact on the individual's legal protection and, in some cases, on the development of legislation.

The remarks that emerge from the cases are not all directly related to the requirement for evident conflict but may also become actualised in other court decisions. For example, the fact that there are voted decisions among the cases related to the primacy of the Constitution does not, in itself, relate to the requirement for evident conflict, and the number of such decisions cannot yet provide much information in regards to the requirement for evident conflict. Voting decisions may happen in court decisions in different situations and for different reasons. The fact that the favourable interpretation of fundamental rights has become more important is also not only a matter of the priority of the Constitution, although the primacy provision highlights the impact of the interpretation of the fundamental rights provisions.

Instead, the fact that the cases in which the Court has found an evident conflict between the application of the provision of the law and the Constitution are so rare is due to the requirement for evident conflict.

As a justification for keeping the requirement for evident conflict, the Constitutional Law Committee invoked the fact that the case law on Section 106 of the Constitution was only in the process of being formulated and that there had been only a small number of cases before in the courts. There is now more case law, but by only observing the legal praxis, there are hardly any new arguments for eliminating the requirement for evident conflict.

However, this report confirms the idea that the arguments presented in the legal literature and in the preparation of the amendment of the Constitution are still mostly correct.

The most important of these arguments is that the court's threshold for assessing conflict between the Constitution and the application of the provision of the law should be at the same level as in a conflict between the law and EU law or international human rights obligations.

The newer case law does not justify a different assessment, but rather emphasises the accuracy of this argument.

As the Supreme Administrative Court stated in 2018 in regards to clarity and indisputability, "in rare situations in which Section 106 of the Constitution has been applied in case law, the existence of such a conflict has often been established either directly on the basis of the wording of an individual fundamental rights provision or on the basis of the application of human and fundamental rights, in particular the decisions of the European Court of Human Rights".[155]

International human rights obligations were one of the reasons for the incorporation of Section 106 into the Constitution. Their importance and significance in national jurisprudence has become stronger, and constitutional regulation has become more international. In particular, court rulings based on the case-law of the European Court of Human Rights indicate that the assessment of the constitutionality of the application of the provision of the law is based especially on respect for human rights obligations and fundamental rights. The decisions show the increased importance of international human rights obligations and the increase in transnational constitutional developments.

It is important that the courts in Finland is able to respond to the international development of fundamental and human rights obligations and the internationalisation of constitutional law and to safeguard fundamental and human rights in accordance with them. The Court should be able to resolve a conflict falling within the scope of Section 106 of the Constitution without the categorisation of the conflict resulting from the requirement for evident conflict and, in this respect, without significant self-restriction of the court itself. While respecting fundamental and human rights and respecting international obligations, the Court should have the opportunity to identify a mere conflict between the Constitution and the application of a provision of the law.

The division of powers between state bodies is an integral part of the democratic rule of law. The division of powers between the Court and the legislator must therefore be respected, and the role of the court is to remain moderate in relation to the legislator. From the perspective of the division of powers, the abolition of the requirement for evident conflict would not mean an increase in the jurisdiction of the court in relation to the legislator, as the abstract assessment of constitutionality by the legislator and the Constitutional Committee would remain. In the assessment of the Court, a positive interpretation of fundamental rights would remain the primary means of resolving the conflict.

The role of the courts in the ex post supervision of the Constitution and fundamental and human rights can be strengthened by eliminating the requirement for evident conflict without any significant change in the Finnish oversight of legality and the main role played by the Constitutional Law Committee.

155 Supreme Administrative Court decision KHO 2018:85.

ANNEX
Cases

Supreme Court case KKO 2004:26

In the first case of application of the primacy provision, the matter concerned building protection and an evident conflict with the protection of property as laid down in Section 15 of the Constitution. Under Section 9 of the Act on the Protection of Buildings, a temporary prohibition of measures on the company's assets had been imposed and was subsequently overturned. The company demanded compensation from the state, claiming that the ban interrupted the use of property that produced income. The question was whether the protection of property guaranteed by the Constitution also required the application of the principles of compensation set out in Section 11 of the Act on the Protection of Buildings to the damage at hand. The Supreme Court stated in its report that the clear and deliberately chosen wording of the Act prevented the interpretation of the provision of the Act on the Protection of Buildings from also extending to temporary prohibitions of measures, which was the case in this case. In this case, the question was whether the absence of a provision on compensation for damage caused by a prohibition of measures would lead to an evident conflict with the provision of the Constitution on the protection of property under Section 106 of the Constitution of Finland.

In this case, the Supreme Court considered the statements issued by the Constitutional Law Committee given at the time that the Act on the Protection of Buildings was enacted (PeVL 16/1982 vp, PeVL 6/1983 vp). According to the statements of the Constitutional Law Committee on interpretation, a temporary prohibition of measures would not result in the type of damage on which the claim for compensation in this case was based, i.e. the interruption of a regular revenue flow from assets. The preliminary work of the Act revealed that such damages had not been taken into account when the provisions on compensation in the Act on the Protection of Buildings and the order in which the Act was to be enacted were laid down. In the case at hand, the Supreme Court considered that the temporary prohibition of measures had caused such damage that the failure to compensate for it due to the absence of relevant provisions would infringe the protection of property guaranteed by Section 15 of the Constitution. The Supreme Court considered the conflict to be evident, referring to the statements of the Constitutional Law Committee on interpretation. The decision was reached by voting in which disagreeing opinions pointed out, for example, that the failure to compensate for the damage caused by the absence of a compensation provision was not significant enough to lead to an evident conflict with the Constitution, in which case the lower court judgment should have been left permanent. According to the opinion of the other disagreeing member, the ruling of the lower court should be overturned in accordance with the view of the majority, but it should have been decided through a constitutional interpretation.

Insurance Court case VakO 24.10.2006/6254:2005

The decision of the Insurance Court concerned a prohibition against appeal regarding the content of vocational rehabilitation. The State Pensions Board had not investigated A's demand to obtain an education in cosmetology as vocational rehabilitation as the State Treasury's decision on the content of the rehabilitation was not subject to an appeal under the provisions of the State Pensions Act. The Insurance Court addressed this question on the basis of statements issued by the Constitutional Law Committee in connection with both the enactment of the Municipal Pension Act (PeVL 55/2002 vp) and the provisions of the Employees Pensions Act (PeVL 30/2005 vp). In its statement on the enactment of the Municipal Pension Act, the Constitutional Law Committee had stated that lifting the prohibition against appeal would be a matter for serious consideration for reasons arising from the Constitution. In its statement on the Employees Pensions Act, the Constitutional Law Committee had also stated that the prohibition against appeal concerning the content of vocational rehabilitation should be lifted – which did get lifted – and a later government proposal on the State Pensions Act (HE 173/2006 vp) also proposed that the prohibition against appeal be removed from the State Pensions Act. The Insurance Court stated that the prohibition against appeal in the State Pensions Act was clearly worded and unambiguously justified in the Government proposal, so the restriction of the right to appeal could not be removed by a favourable interpretation of fundamental rights, but rather the evident nature of the conflict had to be examined on the basis of Section 106 of the Constitution. The application of the prohibition against appeal concerning the content of vocational rehabilitation would have meant that a person could not have exercised the right of appeal secured by the Constitution to bring the matter to an independent judicial body. The Insurance Court stated, taking into account in particular the statement of the Constitutional Law Committee PeVL 30/2005 vp, that the application of the prohibition against appeal provision was in evident conflict with Section 21 of the Constitution, and therefore the prohibition of appeal rule in the State Pensions Act could not be applied.

Supreme Administrative Court case KHO 2008:25

The case KHO 2008:25 concerned the transfer of a position to another department and the right of the holder of the office to appeal against that transfer. The post of the official was transferred to another department of the office. The decision was made without the official's consent as referred to in Section 5, Subsection 1 of the State Civil Servants Act. Under Section 58 of the State Civil Servants Act, a civil servant could not appeal on the transfer of a post in their name to another department. In its assessment, the Supreme Administrative Court stated that the prohibition of appeal in the State Civil Servants Act was an explicit prohibition and that there was no possibility for a favourable interpretation of fundamental rights. The issue therefore had to be examined through Section 106 of the Constitution. The official's consent to the transfer was specifically provided for in the Act for the protection of officials. However, the transfer was unlawful without the official's consent. The transfer was also based on problems in cooperation between the transferred official and another person. An additional appeal on the basis of which an administrative decision can be overturned under certain conditions laid down in the Administrative Judicial Procedure Act was not a sufficiently effective remedy in the circumstances of the case. The application of the prohibition against appeal provision of the State Civil Servants Act would have been in evident conflict with the regular right of appeal guaranteed by Section 21 of the Constitution as referred to in Section 106 of the Constitution. In this case, the prohibition against appeal had to be waived. The decision was reached by voting in which, according to a disagreeing member of the Court, the issue of the prohibition against appeal was unclear to interpret legally and should therefore have been interpreted in a favourable manner to fundamental rights, rather than resorting to Section 106 of the Constitution.

Supreme Court case KKO 2012:11

The case KKO 2012:11 concerned legal action to acknowledge paternity, which was thoroughly discussed by the Supreme Court. Before the entry into force (1 October 1976) of the Paternity Act, A had been informed of the name of their father only after the five-year period of appeal laid down in Section 7 Subsection 2 of the Act on the Implementation of the Paternity Act had expired. When the paternity had not been acknowledged, A had brought an action to do so. The complainant had no real opportunity to bring an action before the court within the time limit, as the alleged father had not agreed to acknowledge his paternity. The Supreme Court considered that the application of the period of appeals provision in this case was in conflict with the protection of private life guaranteed by Section 10 of the Constitution and Section 8 of the European Convention on Human Rights. The provision on the period of appeal was not applied under Section 106 of the Constitution and paternity was acknowledged. In this case, the Court drew attention to the importance of the fact that the deadline for bringing an action had already expired before the entry into force of the ECHR, which could not be given relevance according to Section 8 of the ECHR and Section 7 of the Convention on the Rights of the Child. In its ruling, the Court presented and discussed the ECtHR case law on acknowledging paternity, which also included a couple of cases concerning Finland. Only trust in the situation created under the law in force could not be considered a significant argument against the acknowledgement of paternity which kind of arguments the defendant should have presented. In its ruling, the Supreme Court also pointed out as an important general fact that the restrictions on fundamental rights could not be in conflict with human rights obligations, as the Constitutional Law Committee had already stated in its report and statement in connection with the reform of the fundamental rights provisions (PeVM 25/1994 vp) and in connection with the Government Proposal on the implementation of the Convention on Human Rights (PeVL 2/1990 vp).

The case also took a position on the legal effects of accepting an action for the acknowledgement of paternity, i.e. in more detail on matters of inheritance. However, in the case at hand, such legal effects under other legislation could not be addressed and had to be resolved separately when necessary. The majority of the Supreme Court stated, with reference to the objectives of the Paternity Act, that there were no grounds for imposing restrictions on the grounds of the legal equality of children and Section 6 of the Constitution. One disagreeing member stated the application of the Act on Implementing the Paternity Act to the case in question did not lead to such an evident conflict with the Constitution which would have required the Court not to apply the legal provisions on the period of appeal, and the problem should have been solved by the legislator. The President of the Court disagreed as well, stating that the restoration of the right to take legal action in regards to acknowledging paternity should not lead to the implementation of the legal effects of paternity, in which case there was no evident conflict between the protection of private life as stated in the Constitution and the application of the provision of the Act on the Implementation of the Paternity Act, even though this conflict existed in regards to the right to know about one's biological origin. According to the President, Section 106 of the Constitution is suited "generally poorly as a way to resolve such fundamental rights issues which, in order to ensure equality and legal certainty, require legislative action". The President also stated that "it is difficult to see that the application of Section 7, Subsection 2 of the Paternity Act to the discriminatory effects of inheritance law would be in such evident conflict with Section 6 of the Constitution as referred to by Section106 of the Constitution that it would result in the court having the right and obligation to supersede the period of appeal for actions to secure a legal remedy in order to acknowledge paternity with all its effects." However, in accordance with the majority's opinion, the decision was based on the finding of an evident conflict and, consequently, on the failure to apply the provision on the period of appeal.

Supreme Court case KKO 2014:13

In the case KKO 2014:13, the matter was related to filing an action for paternity, and the starting point for the court's consideration on the right of action was based on the aforementioned case KKO 2012:11 and the cases of the European Court of Human Rights mentioned in the decision in question, which also include a few decisions against Finland. In the court decision in question, the person in question did not have a real opportunity, due to their age, to find out their father's identity or to bring an action for paternity within the time limit. The action had not been brought until 27 years after the person had been informed of their father's identity. In accordance with the ECtHR case-law, the Supreme Court stated that the elapsed time does not reduce the interest of the person in establishing their biological origin. Likewise, the death of the father should not be regarded as an "independent and unconditional" obstacle to bringing an action, even in cases in which the child was born before 1 October 1976; such a restriction was not applicable to children born after 1 October 1976. According to the Supreme Court, the rejection of the action on acknowledging paternity on the basis of Section 7 Subsection 2 of the Paternity Act, because the action had been brought too late, would be in evident conflict with Section 10 of the Constitution on the protection of the private life, so the provision of the Act on the Implementation of Fundamental Rights had to not be applied in the case.

Supreme Court case KKO 2015:14

The case KKO 2015:14 concerned judicial proceedings. The appellant had been invited to appear in person before the Court of Appeal in order to investigate the matter, at the risk that the appeal would not be processed if the appellant did not appear. The appellant did not arrive at the court, but their assistant was present. In its ruling, the Supreme Court referred to its own previous case law and the case law of the ECtHR with regard to the judicial procedure. In relation to such situations, the ECtHR had required that the requirement for the defendant to be present should be resolved by a means other than not processing the case. The Supreme Court strongly based its ruling on the judgment of the ECtHR of 2012 in Neziraj v. Germany, stating that partially leaving the appeal as it was, was against the right to a fair trial guaranteed by Section 6, Subsection 3c of the Convention on Human Rights and the right to defend oneself through an agent. These substantive rights also constitute the content of a fair trial under Section 21 of the Constitution. The Supreme Court stated that, at the time when the Code of Judicial Procedure was enacted, the Legal Affairs Committee had submitted a report, but the Constitutional Law Committee had not discussed the constitutionality of the provision or its relationship with human rights obligations; therefore, the Constitutional Law Committee had not adopted a position that would have been relevant in assessing the requirement for evident conflict. The Supreme Court considered that by leaving the appeal as it was under Chapter 12, Section 29 and Chapter 26, Section 20, Subsection 1 of the Code of Judicial Procedure was in evident conflict with Section 6, Subsection 3c of the European Convention on Human Rights and Section 21 of the Constitution, in which case the provisions should not be applied in the ruling. The Supreme Court also considered that urgent legislative measures would be necessary to take account of situations in which the personal absence of a party leads to situations in which, according to a new interpretation, proceedings should be resumed through an agent.

Helsinki Administrative Court case Helsingin HAO 4.8.2015 15/0615/2

In the case of the Helsinki Administrative Court 4.8.2015 15/0615/2, the matter concerned the application of the provision on the period of residence to foreigners of the same sex who wanted to register their partnership and the conflict of this provision with the Constitution. In this case, Vietnamese citizens had applied for an investigation of impediments to a registered partnership, but only one had lived in Finland for the two years required to register a partnership under the Act on Registered Partnerships. Based on the preliminary work carried out in the Act on Registered Partnerships, there were no grounds for establishing a two-year residence requirement for non-Finnish citizens. There was also no such requirement for marriage. The Administrative Court noted that the Constitutional Law Committee had not discussed the residence requirement or its constitutionality in its statement on the Government Proposal for an Act on Registered Partnerships. According to the Administrative Court, a person was placed in a different position without an acceptable justification on the basis of their sexual orientation. The Administrative Court found that the provision of the Law on Partnerships was in evident conflict with Section 6 of the Constitution, which meant that it could not be applied in the case.

Supreme Administrative Court case KHO 2018:85

In the decision of the Supreme Administrative Court, KHO 2018:85, the matter concerned a taxi driver's licence. The taxi driver had mistakenly driven a vehicle registered as a light lorry for about five kilometres, even though the driver's driving licence only entitled them to drive a passenger car and a van. The taxi driver was guilty of driving the vehicle unlawfully, and according to the Act on the Professional Qualifications of Taxi Drivers, an unconditional obstacle to obtaining a driving licence was created because the driving without a right had taken place in the five years preceding the application for a driving licence. According to the Supreme Administrative Court, such a restriction of the freedom to conduct a business, i.e. the restriction of the right guaranteed by Section 18 of the Constitution, was not necessary to guarantee another fundamental right, i.e. to achieve traffic and customer safety, so the provision could not be applied as it was in evident conflict with the Constitution. The Supreme Administrative Court stated that since the provision of the Act on the Professional Qualifications of Taxi Drivers was unconditional, it was not possible to interpret it in a manner favourable to fundamental rights but the matter had to be assessed by means of the primacy provision of the Constitution.

The Supreme Administrative Court noted that the Constitutional Law Committee had not considered the constitutionality of the regulation in question, as no statement from the Constitutional Law Committee had been requested on the Government Proposal on the professional qualifications of taxi drivers (HE 39/2009 vp). The Constitutional Law Committee had made a statement on the Government Proposal for the reform of the transportation act (HE 161/2016 vp) which led to the enactment of the Act on Transport Services (320/2017). However, the Government Proposal on which the Constitutional Law Committee had issued its statement (PeVL 46/2016 vp) did not contain an absolute obstacle to obtaining a driving licence. In this case, therefore, there was no statement from the Constitutional Law Committee on the constitutionality of the regulation of the case in question. The Supreme Administrative Court also stated that there was no relevant previous case law on the situation between two fundamental rights in this particular case (in particular the ECtHR case law, which has often made it possible to establish the existence of an evident conflict). In its ruling, the Supreme Administrative Court stated that the rejection of the application for a taxi driver's licence was not necessary in order to ensure the safety of customers or other road users, and the restriction of the taxi driver's freedom to conduct a business could not be considered necessary in order to achieve an acceptable purpose when the licence application had been made two years and seven months after the taxi driver had been found guilty of unlawfully driving under special circumstances. The provision of the Act on the Professional Qualifications of Taxi Drivers was in evident conflict with the Constitution. The decision was reached by voting in which, according to a disagreeing member, it was a legally interpretable situation in which the court cannot rely on the application of Section 106 of the Constitution.

Helsinki Court of Appeal case Helsingin HO 1.2.2018 112

In the case of the Helsinki Court of Appeal on 1.2.2018 112, the matter concerned exhuming a grave to conduct a forensic genetic examination for the purpose of acknowledging paternity. The appellant had been born out of wedlock in 1966 and in 2016 brought an action to acknowledge paternity because the alleged father had not acknowledged his paternity. In 2016, the father had been buried for 33 years. The court assessed whether exhuming the grave and taking a DNA sample of the buried person was necessary in order to determine paternity. This assessment had to take into account the fundamental and human rights of the person investigating their identity. The wording of the Act on Forensic Genetic Paternity Tests (378/2005) was unconditional and unambiguous: according to the Act, it was not possible to take a sample of a buried person but the investigation had to be conducted with a sample taken earlier which was not available in this case. The absolute and unambiguous wording of the law left no room for a favourable interpretation of fundamental rights, so the Court had to assess the question on the basis of Section 106 of the Constitution.

In its ruling, the Court of Appeal discussed the conflict between the human rights obligations and the law, and in a situation in which the matter cannot be resolved by means of interpretation, it must first of all be assessed whether the violation of the human rights obligation also constitutes a violation of the Constitution and, secondly, whether the violation of the Constitution is evident. The Court of Appeal found that the European Convention on Human Rights obliges at national level to secure the possibility of investigating and legal implementation of biological origin. The Court of Appeal raised a few cases of the European Court of Human Rights and based its arguments on the ECtHR case, Jäggi v. Switzerland, and Section 8 of the European Convention on Human Rights on the right to respect for private life. The Court of Appeal stated that it interpreted Section 10 on the protection of private life of the Constitution in accordance with Section 8 of the ECHR, in which case there was a conflict with the provision of the Law on forensic genetic investigation of paternity and the Constitution. As regards the protection of private life, the Court of Appeal referred to statements made by the Constitutional Law Committee in connection with artificial fertilisation and adoption legislation, according to which a person's right to information about their own origin is necessary (PeVL 59/2002 vp, PeVL 16/2006 and PeVL 15/2011 vp). However, the Constitutional Law Committee had not delivered its statement on the Act on Forensic Genetic Paternity Tests. For reasons beyond their control, the person did not have the opportunity to exercise their right under the protection of private life to have their biological origin established by law. The Court found that, in accordance with Section 106 of the Constitution, the provision of the Act on Forensic Genetic Paternity Tests was in evident conflict with the Constitution and therefore the prohibition on exhuming a grave for the purpose of taking a sample could not be applied in this case.

Helsinki Court of Appeal case Helsingin HO 23.2.2018 108226

The decision of the Helsinki Court of Appeal 23.22018 108226 was about exempting a person from military and non-military service. The application of the so-called Exemption Act (645/1985) on the exemption of Jehovah's witnesses from military service in certain cases and the question of its conflict with the Constitution was discussed. The person had refused non-military service on the grounds of conscience. The person had been proposed to be sentenced to prison for refusal, as they were not a Jehovah's witness, only to whom the exemption concerned. The Constitutional Law Committee had not expressly delivered a statement on how the penal provision for refusing military or non-military service should be applied if a person claims that they cannot be put in a different position with Jehovah's witnesses on the basis of their own convictions. The Constitutional Law Committee had also not made a statement on the acceptability of the Exemption Act in relation to Finland's binding human rights commitments. The Court of Appeal thoroughly examined national regulations on equality and the prohibition of discrimination. The Court of Appeal also addressed human rights obligations and the case law of the European Court of Human Rights and other bodies in a comprehensive manner, especially with regard to freedom of thought, conscience and religion and the prohibition of discrimination. The Court of Appeal considered that condemning a person to a sentence would constitute discriminatory treatment prohibited by the Constitution in relation to Jehovah's witnesses, and thus was in conflict with the principle of equality laid down in Section 6 of the Constitution and the prohibition of discrimination referred to in Subsection 2 when these provisions were interpreted in conjunction with human rights obligations binding on Finland. The conflict was evident within the meaning of Section 106 of the Constitution. This assessment was not influenced by the fact that the law on the exemption of Jehovah's witnesses in certain cases was enacted in the constitutional procedure. The decision was reached by voting in a strengthened composition in which, in the opinion of the minority, the criteria adopted by the Constitutional Law Committee did not allow the court to despite procedures on exceptional acts, assess the matter on the basis of Section 106 of the Constitution. The minority justified its position by the fact that the Exemption Act had in due course been enacted in the constitutional order, and when the Act was enacted, Parliament had approved the different treatment resulting from the Act.

IHMISOIKEUSKESKUS
MÄNNISKORÄTTSCENTRET
HUMAN RIGHTS CENTRE

00102 Eduskunta, Helsinki
www.ihmisoikeuskeskus.fi

00102 Eduskunta, Helsinki, Finland
www.humanrightscentre.fi