

FINNISH JUDGES AND THE EUROPEAN UNION: AN AMERICAN PERSPECTIVE

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INTRODUCTION

Finland joined the European Union (EU) in 1995 and became immediately subject to the European legal system with European laws superimposed over its national system.¹ This Article will explore how Finnish judges have adapted to Finland's membership in the European Union. There has been a fair amount of scholarly attention to how being part of the EU has changed politics and government in Finland,² but there has been very little attention in the last twenty years to how joining the

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1. ALEC STONE SWEET, *THE JUDICIAL CONSTRUCTION OF EUROPE* 46 (2004).

2. See TAPIO RAUNIO & TEIJA TIILIKAINEN, *FINLAND IN THE EUROPEAN UNION* 38–39 (2003). See also DAVID KIRBY, *A CONCISE HISTORY OF FINLAND* 279–84 (2006); Jaakko Nousiainen, *The Finnish System of Government: From a Mixed Constitution to Parliamentarism*, in *THE CONSTITUTION OF FINLAND* 21–22, 37–38 (2001).

EU has affected Finland's judges and courts.³ In fact, one of the best works to examine Finland and the European Union barely mentions Finland's judiciary.⁴ This is not totally surprising, since the Finnish courts often work in almost complete obscurity. In fact, there is very little written in English about Finnish judges and law, and this article will attempt to reduce somewhat that gap in our knowledge and understanding.

This Article brings an American judicial politics analysis to the question of how Finnish judges have adapted to Finland's membership in the European Union. As I have noted in a previous work, "[t]he term *judicial politics* assumes that judges in the United States are both legal and political actors at the same time, making their decisions in part based on legal reasoning and legal analysis and in part based on ideology and other political factors."⁵ Americans and Europeans often have a very different approach to studying law and courts. As one judicial politics scholar has noted,

Whereas European legal scholars speak of law as a logically coherent set of authoritative principles and rules, American legal scholars often speak of law as a manifestation of the ongoing struggle among groups and classes for political and economic advantage, or as a manipulable set of tools for achieving better government.⁶

As part of my American perspective, I treat the courts as political (as opposed to partisan) institutions. Many socio-legal and judicial politics scholars, especially Americans, see the courts simultaneously as both legal and political institutions.⁷ As one comparative judicial politics

3. *But see* Tuomas Ojanen, *The Impact of EU Membership on Finnish Constitutional Law*, 10 EUR. PUB. L. 531, 531–64 (2004).

4. The only reference to European law and courts is a statement that "the decisions of the EU are enforceable by the European Commission and the EU court system." RAUNIO & TIILIKAINEN, *supra* note 2, at 1.

5. MARK C. MILLER, *JUDICIAL POLITICS IN THE UNITED STATES* 3 (2015).

6. Robert A. Kagan, *American Courts and the Policy Dialogue: The Role of Adversarial Legalism*, in *MAKING POLICY, MAKING LAW: AN INTERBRANCH PERSPECTIVE* 13, 32 (Mark C. Miller & Jeb Barnes eds., 2004).

7. MILLER, *supra* note 5, at 3.

scholar has argued, “[e]very judicial decision is a choice among competing values. . . . In every case some societal value is favored over another, and the essence of politics consists in authoritatively allocating values for society.”⁸

This Article will also use an institutional analysis to examine the relationship between Finnish courts and the European legal system. This new institutionalist approach to judicial politics seeks to understand how the nature of judicial institutions constrains the political choices of the judges who compose them.⁹ As one comparative judicial politics scholar has noted, “[i]nstitutions and organizations give structure to the social world. They provide logics and opportunities for action, but they also constrain it, through certifying actors, fixing roles and expectations, and authorizing certain forms of activity, while prohibiting others.”¹⁰ The new institutionalist analysis will also allow us to utilize various levels of analysis: from a single judge being the lowest level of analysis, to a specific court, to the two supreme courts in Finland, to the entire Finnish judiciary being the highest level of analysis. Since new institutionalist analysis also includes role theory, the judicial role will also be examined in the Finnish context.¹¹ Examining the courts through a new institutionalist lens will, therefore, help us better understand how Finnish courts and judges have adapted to EU membership in their role as part of the national judiciary of Finland. I was fortunate enough to live and teach in Helsinki, Finland during the 2014-15 academic year. This Article is based in part on scholarly works about Finnish courts and law available in English, as well as interviews I conducted in English with judges, academics, and practitioners in Finland and elsewhere in Europe.¹²

8. Mary L. Volcansek, *Appointing Judges The European Way*, 34 FORDHAM URB. L.J. 363, 363 (2007).

9. See, e.g., Rogers M. Smith, *Political Jurisprudence: The New Institutionalism and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 89–108 (1988); see generally SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

10. STONE SWEET, *supra* note 1, at 5.

11. Role theory is a very important part of the new institutionalist analysis of courts and judges. See MILLER, *supra* note 5, at 191–92.

12. Throughout this Article I will use quotations and paraphrases of comments made during my interviews. I promised all of my interviewees that the interviews would

I. FINLAND AND ITS EUROPEAN LEGAL CULTURE

Joining the EU in 1995 greatly strengthened Finland's ties to other Western European countries to its west and south, although it can never forget about the very long border in the east with its former ruler, the Russian Federation, which controlled Finland from 1809 until independence in 1917.¹³ Before being ruled by the Russian Empire, Finland was ruled for more than 700 years by its western neighbor, the Kingdom of Sweden.¹⁴ Finland never became a province of Russia proper, but instead existed as an autonomous Grand Duchy within the Russian Empire.¹⁵ Under Russian rule, the Finns were able to maintain most of the Swedish legal system and the previously enforced Swedish laws.¹⁶ In some important ways, the Russian Czar functioned as the constitutional monarch of the Grand Duchy,¹⁷ although at times the autocratic emperors attempted mercilessly to subjugate the determined Finns.¹⁸

For the most part, Finnish judges were able to maintain the independence of the judiciary during Russian rule, thus giving Finland a

remain anonymous, so there are no references to names or specific titles of the interviewees for this research project. I had lengthy interviews with two key judges on the Supreme Court of Finland; one key judge serving on the Supreme Administrative Court of Finland; two staff members and a judge on the ECJ in Luxembourg; three prominent law professors at the University of Helsinki; two lawyer practitioners who argued European law cases before the courts of Finland; and several Ph.D. candidates in law at the University of Helsinki, the University of Turku, and Åbo Akademi University in Turku, Finland. I thank all of them for taking so much time to talk to me and for their patience with an American trying to understand the Finnish judicial culture.

13. RICHARD D. LEWIS, FINLAND, CULTURAL LONE WOLF 28 (2005).

14. *Id.* at 25–28.

15. *Id.* at 28–29.

16. The Swedish code of 1734, the Swedish Constitution Act of 1772 and the Act of Security and Union of 1789 generally remained in effect in Finland during the period of Russian rule when Finland was an autonomous Grand Duchy in the Russian Empire. Yrjö Blomstedt, *A Historical Background of the Finnish Legal System*, in THE FINNISH LEGAL SYSTEM 8, 32 (Jaakko Uotila ed., Leena Lehto trans., 1985).

17. Markku Suksi, *Finland*, in HOW CONSTITUTIONS CHANGE: A COMPARATIVE STUDY 87, 88 (Dawn Oliver & Carlo Fusaro eds., 2011).

18. *See supra* text accompanying note 12.

separate and more Western legal and general political culture.¹⁹ Finland declared its independence from Russia during the chaos of World War I and the Russian Revolution but lost about 10% of its territory to the Soviet Union at the end of World War II.²⁰ After military losses to the Soviet Union in World War II and despite its neutral stance during the Cold War, Finland was always afraid of offending its powerful eastern neighbor.²¹

Until the collapse of the Soviet Union, Finland was often thought of as a fiercely independent and neutral buffer state between Europe to the west and Russia to the east,²² but few foreigners seemed to understand that its legal system was clearly European in style and focus. While during the Cold War the Finns had to accommodate Soviet preferences in their foreign and security policies,²³ the Finnish legal system nonetheless shared a great many similarities with its Nordic neighbors to the west.²⁴ “German legal thinking” played a key role in the development of the Finnish legal culture,²⁵ as well as did Swedish and Danish legal thinkers. Thus, the Finnish legal tradition has always been seen as part of a larger European legal culture; law professors, courts, judges, and lawyers have always looked to the west for inspiration and assistance. As one scholar has noted, “[f]or centuries continental legal thinking has influenced and

19. OUTI KORHONEN, *INTERNATIONAL LAW SITUATED: AN ANALYSIS OF THE LAWYER’S STANCE TOWARDS CULTURE, HISTORY AND COMMUNITY* 102–03 (2000).

20. *See, e.g.*, MATTI KLINGE, *A BRIEF HISTORY OF FINLAND* 119, 122 (3rd ed., 2000).

21. *See* KIRBY, *supra* note 2, at 276–78.

22. LEWIS, *supra* note 13, at 31–32. As another commentator has observed, “Finland has historically been on the frontier between Western and Eastern Europe, between the Swedish Empire and the Russian Empire, and between the Catholic and later the Protestant Western Church and the Orthodox Eastern Church. Today it is an independent, modern Nordic Welfare State.” TERTTU LENEY, *CULTURE SMART! – FINLAND* 8 (2005).

23. *See* RAUNIO & TIILIKAINEN, *supra* note 2, at 11. A common term used for this situation during the Cold War era was “Finlandization.”

24. *See, e.g.*, Jaakko Husa, *Precedent in Finland – Paradigm in Transition*, in *FINNISH LEGAL SYSTEM AND RECENT DEVELOPMENT* 7, 7–23 (Erkki J. Hollo ed., 2006).

25. *Id.* at 10.

inspired Finnish lawyers to develop a legal system suitable for North European conditions and practices.”²⁶

For geopolitical reasons, Finland probably could not have joined the European Union until after the collapse of the Soviet Union, but after the breakup of the U.S.S.R., Finland quickly sought to align itself more formally with Europe.²⁷ As a former prime minister of Finland has argued, “[b]y joining the Union Finland took her place in the new Europe emerging from Cold War division.”²⁸ For many legal professionals in Finland, having the country join the European Union seemed like a natural course of events.²⁹ However, Finnish judges, lawyers, and law professors had almost no knowledge of the European legal system and European laws before becoming part of the EU.³⁰ In my interviews for this project, almost all of my interviewees described joining the European Union as a shock to the Finnish legal culture.³¹ However, this shock has received very little scholarly analysis.

II. BECOMING FORMALLY EUROPEAN BRINGS CHANGES TO FINLAND

There is no question that Finland’s membership in the European Union has in some ways greatly transformed Finnish politics and government.³² Finland is now clearly a part of Europe, socially,

26. *Id.* at 5.

27. See RAUNIO & TIILIKAINEN, *supra* note 2, at 11.

28. Prime Minister Paavo Lipponen, *Forward to TAPPIO RAUNIO & TEIJA TIILIKAINEN, FINLAND IN THE EUROPEAN UNION ix, ix* (2003).

29. See *supra* text accompanying note 12.

30. See *supra* text accompanying note 12.

31. For example, Husa describes Finland’s membership in the EU as having a revolutionary effect on Finnish law and legal culture. Husa, *supra* note 24, at 15.

32. Some see the current era of EU membership as a defining period in Finnish history. As one commentator has noted, “[f]ollowing the Swedish period, the Russian period, and the 20th-century republic, a new era in Finnish history is beginning to take shape: that of the European Union.” KLINGE, *supra* note 20, at 171. Other scholars have written that, “[t]he significance of EU membership for Finland should not be underestimated.” RAUNIO & TIILIKAINEN, *supra* note 2, at 11. Another scholar notes that membership in the EU has been key to Finland’s “process of wholesale re-identification on the international stage.” David Arter, *Small State Influence Within the EU: The Case*

politically, and legally.³³ While still technically neutral in international affairs and refusing for the moment to become a formal member of NATO,³⁴ nevertheless, Finland's membership in the European Union has required that Finland cooperate much more with its friends in Europe; thus cementing Finland's status within Europe.³⁵ As a former Finnish prime minister has noted,

The accession of Finland to the European Union in 1995 was a logical and decisive step in Finland's long-standing policy of participation in European integration. . . . Membership in the Union has strengthened Finland's international position and it is fair to say that it is now stronger than ever before.³⁶

But Finland's membership in the EU has not come without costs and some frustration. One of the biggest changes to Finnish government and politics arising from EU membership was the fact that Finland had to reform and consolidate its constitution in part to accommodate its new position in the European family of nations.³⁷

Thus, Finland's new Constitution of 2000 came about in large part because of the need to reform political and governmental practices and structures in order to meet the demands of EU membership.³⁸ In addition, the new Constitution is also a natural consolidation and reform of the

of Finland's Northern Dimension Initiative, 38 J. OF COMMON MARKET STUD. 677, 691 (2000).

33. As two Finnish scholars have noted, "Finland has often been characterized as a 'model student' of the EU that is always willing to promote common goals and to respect common rules and obligations." RAUNIO & TIILIKAINEN, *supra* note 2, at 149.

34. Nevertheless, Finland often cooperates closely with NATO even though it is not a formal member of the organization. Christoph Hasselbach, *Finland's Cautious Relationship with NATO*, DEUTSCHE WELLE (Apr. 17, 2015), <http://www.dw.com/en/finlands-cautious-relationship-with-nato/a-18390701>.

35. See RAUNIO & TIILIKAINEN, *supra* note 2, at 150. "Finland's national European policy can be characterized as flexible and constructive, and it has sought to consolidate Finland's position in the inner core of the EU." *Id.*

36. *Id.* at ix (quoting Prime Minister Paavo Lipponen).

37. See *supra* text accompanying note 12.

38. See Nousiainen, *supra* note 2, at 21; SCANDINAVIAN LAW: DANISH LAW, FINNISH LAW, NORWEGIAN LAW, SWEDISH LAW, RIGHT OF RETURN, DISTRICT COURT, DRUG POLICY OF SWEDEN 94 (2010).

previously fragmented constitutional documents³⁹ used in Finland since its independence from Russia in 1917.⁴⁰ Contrasting the new Constitution with previous practice, Professor of Public Law Markku Suksi has observed, “[t]he Constitution of Finland . . . , in force since 1 March 2000, is now a single coherent text that is consistent and modern.”⁴¹ In some ways, the new Constitution illustrates the dramatic changes that have resulted from Finland’s joining the EU, including the weakening of the powers of the President of Finland in favor of strengthening the powers of the Prime Minister and the Government.⁴² Before the enactment of the Constitution of 2000, the President had almost total control over Finland’s foreign policy and security issues in what was called a semi-presidential governmental system, but now that responsibility mainly rests with the Prime Minister, the Minister of Foreign Affairs, and the Government.⁴³ Since 2000, the President looks more like a traditional European head of state instead of the singularly

39. As Suksi explains,

The piecemeal amendments made to the Finnish Constitution, that is, to the four constitutional documents, during independence had caused the Finnish Constitution to look like a patchwork of provisions. The text of the Constitution had lost its consistency and it was difficult for an ordinary person to extract from the Constitution the different procedures regulated therein.

Markku Suksi, *The People as the Advisor: The Referendum in Finland*, in FINNISH LEGAL SYSTEM AND RECENT DEVELOPMENT 177, 190 (Erkki J. Hollo ed., 2006).

40. See Nousiainen, *supra* note 2, at 22–23.

41. Suksi, *supra* note 17, at 88.

42. Here I am using the term “Government” in its British sense, which generally means the political party in power, which appoints the various Ministers in Government or the Council of Ministers. This is different from the American usage of the term “government,” which usually means the broader governmental system instead of the party in power. Finland generally follows British usage in this regard. In Finland, which almost never has a single majority party in parliament, the term “Government” usually means the parties that have formed a coalition agreement and the Ministers from those parties. The head of Government is of course the Prime Minister. At times the term “Government” in Finland refers to the ruling coalition parties and at times it means simply the Council of Ministers. When “Government” in Finland is capitalized, they are using the British sense of the word; when in lower case, they mean the American usage of the term. This Article will follow that convention.

43. See generally Nousiainen, *supra* note 2, at 37.

powerful foreign policy leader of the nation. The Prime Minister and the other Ministers of the Government now solely represent Finland in EU discussions among member states. The President retains the power to appoint most high officials in Finland, but now almost always follows the preferences of the Prime Minister in these appointments.⁴⁴ The President has also retained power in the Constitution as the acting supreme commander of Finland's military,⁴⁵ but all presidential decisions in this regard must now occur in cooperation with the relevant Minister.⁴⁶ Thus, Finland's membership in the European Union has resulted in the transformation of Finland from a unique semi-presidential governmental system to a full parliamentary system that "under the new Constitution[,] . . . will not be that much different from the other parliamentary republics in Europe."⁴⁷

The new Constitution of 2000 also gives the courts a limited power of post-enactment judicial review. Following the Swedish model, Finland has no separate constitutional court.⁴⁸ The practice has been for the Constitutional Law Committee of Parliament to decide questions of constitutionality before legislation is enacted.⁴⁹ Under the new Constitution of 2000, however, the courts have been given a limited right to exercise the power of judicial review (in its American sense of the term) after legislative enactment.⁵⁰ The Constitution requires that all courts give primacy to the Constitution, and all judges must utilize the Constitution as the highest source of law in the nation.⁵¹ Under prior

44. KIRBY, *supra* note 2, at 283.

45. *Id.*

46. Nousiainen, *supra* note 2, at 32.

47. *Id.* at 33.

48. Ojanen, *supra* note 3, at 532.

49. *Id.* As Ojanen notes, "[a]lthough the Committee is an organ of Parliament and, accordingly, is composed of MPs, its practice is characterized by a search for constitutionally well-founded interpretations and consistent use of precedents." *Id.*

50. *See supra* text accompanying note 12.

51. *The Judicial System of Finland*, MINISTRY OF JUSTICE, FINLAND (May 6, 2013), <http://www.oikeusministerio.fi/en/index/theministry/thejudicialsystemoffinland.html>. According to information from the Ministry of Justice,

No constitutional court exists in Finland, but the courts and other authorities are under an obligation to interpret legislation in such a way as to adhere to the Constitution and to respect human rights. According to

constitutional practice, the courts followed the British model of parliamentary supremacy, and there was no thought at all of judges using judicial review in the American sense.⁵² As one scholar has noted about the new constitutional judicial review language,

[T]he aim of the provision was not to give the courts *carte blanche* to assess or generally look into the constitutionality of legislation. The primary control of constitutionality, in the future as in the past, is the advance evaluation done by [Parliament's] Constitutional Law Committee during the progress of the bill through Parliament.⁵³

It remains to be seen whether Finnish courts will exercise their new post enactment power of judicial review. Since joining the European Union, in theory, the national courts also have the power to declare national legislation void if it is in conflict with European law.⁵⁴ Today, the courts in Finland do have a limited power of judicial review based on both the national Constitution and based on European law, but few expect that Finnish judges will use this new authority very often if at all.⁵⁵

Another dramatic change that EU membership brought about is the fact that Finland is now subject to European law, with Finnish judges needing to incorporate the decisions of the European Court of Justice (ECJ) in Luxembourg and the European Court of Human Rights in Strasbourg⁵⁶ into their decision-making processes.⁵⁷ As noted above, the

the Constitution, the courts should give preference to the Constitution when they decide a case if the application of an act would be in manifest conflict with the Constitution.

Id.

52. See *supra* text accompanying note 12.

53. Nousiainen, *supra* note 2, at 32.

54. "ECJ rulings can enhance the power of national courts in their own legal system *vis-à-vis* the executive and legislative branches by providing the opportunity for review of national legislation" to make sure it is in line with European law and ECJ decisions. RACHEL A. CICHOWSKI, THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION AND GOVERNANCE 167 (2007).

55. See Suksi, *supra* note 17, at 97.

56. Although Finland and the other Nordic countries were among the first nations to sign the European Convention on Human Rights, they did not incorporate the decisions

new Constitution requires judges to interpret legislation to promote human rights, and therefore Finnish judges must interpret the case law of both of these courts in that effort.⁵⁸ This need to interpret European law came about very rapidly in Finland, and almost all of my interviewees noted that lawyers, judges, and law professors had very little preparation or understanding of European law before Finland joined the EU in 1995.⁵⁹ As one of the judges whom I interviewed told me, the European legal system was almost fully formed when Finland entered the EU, and thus Finland was subject to European law immediately.⁶⁰ This abrupt adjustment to European practices was typical for the new member-states.⁶¹ As two scholars have noted about Finland and other fairly recent members of the EU, “[t]he newcomers had to adapt to the challenges posed by EU membership very quickly, almost overnight, unlike older member states whose adaptation has been incremental and has occurred over several decades.”⁶² This Article will focus on how Finnish judges and courts have adapted to this new European law regime, which came as a shock to the Finnish legal system.

Thus, Finland’s membership in the European Union coupled with its new Constitution has brought about great changes in Finnish politics and society. One of the biggest results for our purposes has been the fact that the courts are more important than ever in Finland. The Finnish courts

of the European Court of Human Rights into their national laws until the early 1990’s. GIUSEPPE MARTINICO & ORESTE POLLICINO, *THE INTERACTION BETWEEN EUROPE’S LEGAL SYSTEMS: JUDICIAL DIALOGUE AND THE CREATION OF SUPRANATIONAL LAWS* 44 (2012).

57. After the Lisbon Treaty took effect in 2009, the European Union became a direct signatory to the European Convention on Human Rights, making the decisions of both the ECJ in Luxembourg and the European Court of Human Rights in Strasbourg important sources of law for the national judges in the EU member states to consider. Paolo Carrozza, *Foreword* to GIUSEPPE MARTINICO & ORESTE POLLICINO, *THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU LAWS* 3, 3 (2010).

58. See *supra* pp. 497-99.

59. See *supra* text accompanying note 12.

60. Sankari further elaborates on this point when she writes, “[f]or most of the present Member States the fruits of the work of the first period [1960–1990] Court of Justice formed part of the *acquis communautaire* they accepted on entering the EU.” SUVI SANKARI, *EUROPEAN COURT LEGAL REASONING IN CONTEXT* 44 (2013).

61. See RAUNIO & TIILIKAINEN, *supra* note 2, at 3.

62. RAUNIO & TIILIKAINEN, *supra* note 2, at 3.

have applied both European law and the decisions of the European Court of Human Rights into their daily decisions, and in theory, they have the power to overturn national legislation if it conflicts with the national Constitution or with European law. This has led two scholars to conclude that the Finnish courts and Finnish judges have been empowered by European integration and attention to the European Convention on Human Rights.⁶³ As Tuomas Ojanen observed,

Thanks to the EU, even some of the fundamental tenets of the Constitution, such as the principle of sovereignty and the separation of powers between Parliament, the Government and the President, have undergone—and are undergoing—transformations. Similarly, EU membership has increased the importance of the judiciary (judicial empowerment), led to reforms of parliamentary and administrative practices, and focused attention on the relationship between EU law and the domestic system of constitutional rights.⁶⁴

III. HISTORY AND BACKGROUND OF THE LEGAL SYSTEM IN FINLAND

In order to begin to get an understanding of how courts and judges actually function in Finland, we should briefly examine the history of the nation in more detail than we did at the beginning of this Article. Recall that for about 700 years Sweden ruled the territory now known as Finland, until the Russians took over following the Russian military victory over the Kingdom of Sweden in 1809.⁶⁵ From 1809 until 1917, Finland existed as an autonomous Grand Duchy in the Russian Empire.⁶⁶ Under Swedish rule, the elites spoke Swedish (or perhaps German) while the working classes spoke Finnish.⁶⁷ This language division persisted under Russian rule, and very few people in Finland spoke Russian even during the Grand Duchy period.⁶⁸ Therefore, even under Russian rule there were Finnish speaking Finns and a Swedish speaking minority in

63. MARTINICO & POLLICINO, *supra* note 56, at 102.

64. Ojanen, *supra* note 3, at 531.

65. *See supra* pp. 490-92.

66. *See supra* pp. 490-92.

67. *See supra* text accompanying note 12.

68. *See* HENRIK MEINANDER, A HISTORY OF FINLAND 108-09 (2011).

the country. Under Swedish rule, Finland adopted the basic features of the Swedish approach to law, and in the Grand Duchy, the Russians for the most part allowed the Finns to retain the Swedish court system, Swedish laws, and the Swedish and Finnish languages.⁶⁹ Swedish remained the language of the law in Finland, even during the Russian period.⁷⁰ During Russian rule, Finland had its own legislature and its own central administration in addition to its own legal system.⁷¹

Nevertheless, the overall political position of the Grand Duchy of Finland under Russian rule was very fragile, and the Finnish bureaucracy strictly controlled almost all aspects of Finnish social and political life in order to prevent the Russians from having an excuse to curtail Finland's political autonomy.⁷² Somewhat surprisingly, the Russians gave most of the top bureaucratic positions to Finnish nobles in order to assure their loyalty to Russia.⁷³ Under Swedish rule, most Finnish nobles followed a military career, but under Russian rule it was much safer for the nobility to become members of the legal profession instead.⁷⁴ Thus, under Russian rule, most of the top bureaucrats in the country and most of the members of the Finnish Senate were lawyers educated at the only university in Finland at the time, the University of Helsinki.⁷⁵ Thus, all lawyers gained a very high status in Finland during this era because the legal profession was dominated by the nobility.

Finnish lawyers and bureaucrats adopted a highly formalistic and legalistic approach, in large part to protect the political autonomy of the Grand Duchy. As Esa Konttinen explains,

Emphasis on law was a means for top bureaucrats to secure the autonomy of the country. Attempts by Russia to reduce the internal autonomy of Finland were repelled by appealing to strict legal

69. See Blomstedt, *supra* note 16, at 26.

70. See *supra* text accompanying note 12.

71. Nousiainen, *supra* note 2, at 8.

72. Esa Konttinen, 'Finland's Route' of Professionalization and Lawyer-Officials, in *LAWYERS & VAMPIRES: CULTURAL HISTORIES OF LEGAL PROFESSIONS* 101, 103 (W. Wesley Pue & David Sugarman eds., 2003).

73. *Id.* at 106.

74. *Id.* at 106–07.

75. See *id.* at 104, 106–07, 112.

procedures. But this was possible only as long as this emphasis on lawfulness was successfully communicated to Finnish citizens as well.⁷⁶

Finland's independence in 1917 was made much easier by the fact that so many structures of the administrative state, including the courts and the legal profession, were already in place and staffed by Finns, not Russians.⁷⁷ After independence from Russia, the legal profession retained its prestige in Finland as evidenced by the fact that throughout its history most of the Presidents of the Republic have been lawyers.⁷⁸ In fact, in one of my interviews I was reminded that the first President of the Supreme Administrative Court in Finland eventually went on to become President of the Republic.⁷⁹

The Finnish legal system has therefore been greatly influenced by Sweden and its other Nordic siblings,⁸⁰ but very little by Russian practices or legal theory. One of the judges whom I interviewed stated that the Russian legal system today is so different from the one in Finland that Finnish judges have almost no knowledge of it.⁸¹ Finland is one the Nordic nations, and Finland has often shared common statutes

76. *Id.* at 109.

77. Nousiainen, *supra* note 2, at 8.

78. Konttinen, *supra* note 72, at 109.

79. *See supra* text accompanying note 12.

80. The Finns generally consider themselves to be Nordic, but not Scandinavian. *See generally* LEWIS, *supra* note 13, at 113–14. Scandinavia is considered to be Sweden, Denmark, and Norway. *See id.* at 114. The Nordic countries add Iceland and Finland to the three Scandinavian nations. *See id.* This may be due to language, since Finnish is not a Scandinavian tongue (unlike Swedish, Danish, and Norwegian). *Id.* Many foreigners use the words Nordic and Scandinavian as synonyms, but the Finns tend to make a clear distinction between these two terms. *See id.*

81. There is also a language barrier for Finnish judges. Hannele Branch, *Where Does Finnish Come From?*, THIS IS FINLAND, <http://finland.fi/public/default.aspx?contentid=160056> (last visited Jan. 5, 2015). The Finnish language is not at all related to Russian, but it is also not related to Swedish or the other Scandinavian languages even though it uses the western alphabet. *See id.* Finnish is related to Estonian and the Sami languages spoken by the indigenous peoples in Finland, and quite distantly related to Hungarian. *See id.* Despite the fact that Finland shares a border with Russia, few educated Finns speak Russian today. *See id.*

and legal approaches with its Nordic neighbors, especially Sweden.⁸² Finland formally joined the Nordic Council in 1955, at the same time that it joined the United Nations,⁸³ but informal cooperation among the Nordic nations had been going on for decades (and with Sweden specifically for centuries) before that.⁸⁴ The Nordic countries share a similar approach to law and legal culture, although there are some clear differences among these five nations and their respective semi-autonomous territories like Greenland and the Faroe Islands.⁸⁵

The Nordic legal cultures have components of both the common law and civil law families of legal systems. Some commentators consider the Nordic countries to be a separate legal tradition while others consider them a subset of the civil law tradition.⁸⁶ The Nordic countries tend to bring a pragmatic approach to law and legal issues. One of the law professors whom I interviewed observed that Nordic legal systems do not have a unified civil code, and thus Nordic judges are accustomed to consulting and using multiple sources of law like their common law colleagues.⁸⁷ This has made it easier for Finish judges to use the case law of the ECJ and of the European Court of Human Rights because they were accustomed to using multiple sources of law before Finland joined the EU. Because of the lack of a comprehensive civil code, private law in Finland by its nature is “practical and concrete, not theoretical and abstract.”⁸⁸ However, judges in the Nordic family of nations tend to approach their role in a way that is very similar to judges in civil law countries, meaning that they see law as a science,⁸⁹ making Nordic law

82. Blomstedt, *supra* note 16, at 38.

83. RAUNIO & TILIKAINEN, *supra* note 2, at 11.

84. *See supra* text accompanying note 12.

85. Husa, *supra* note 24, at 7.

86. *Id.*

87. The Constitution of 2000 is the highest source of law within Finland. *Id.* at 11. Statutes and the Constitution are the primary sources of law, and if a judge were to disregard them they would be guilty of a serious misconduct in office. *Id.* at 12. Lower judges must also follow the precedents of higher courts as another important source of law. *Id.* But customary law might also be followed in some cases. *Id.* at 14. Other less traditional sources of law in Finland include human rights based in international treaties and ECHR decisions, and EU law. *Id.*

88. *Id.* at 8.

89. MARK C. MILLER, JUDICIAL POLITICS IN THE UNITED STATES 6–7 (2015).

very close to the civil law tradition in that respect. As one of my interviewees told me, the written opinions of the supreme courts in Finland, for example, read much more like succinct civil law decisions rather than the lengthy analysis of the facts and the law that appear in the opinions written by common law judges.⁹⁰ The role of the judge is more restricted and defined in the Nordic countries unlike in the common law world, but Finnish judges do follow the concept of precedent from higher courts similar to the way it works in common law countries.⁹¹ In some ways, Nordic legal traditions are halfway between the common law world and the civil law world, although Finland is somewhat closer to the civil law world than the other Nordic countries because of its historical affinity for German legal thinking.⁹² One litigator who has worked in both the United Kingdom and in Finland told me about the differences between lawyering in the two countries, “[i]n the common law world, law is one of the tools in my toolbox. In the civil law world, the law is the rulebook.”⁹³ Given Finland’s history, it is not surprising that Finnish judges continue to look to their Swedish and other Nordic colleagues for examples of how to solve various legal questions.⁹⁴

Swedish was of course the language of the law and of administration under Swedish rule for centuries (and even under Russian rule for another century), and the transition to using Finnish as well for these purposes was quite gradual.⁹⁵ Swedish and Finnish are now the two official languages of Finland, and the Constitution and various statutes strongly protect the rights of the Swedish-speaking minority.⁹⁶ Today

90. See *supra* text accompanying note 12.

91. Husa, *supra* note 24, at 7–9.

92. *Id.* at 10.

93. See *supra* text accompanying note 12.

94. As one scholar has noted, in Finland “[t]he Nordic concept of self-government and rule of law as an ideal form[] a historical basis that continues to have an influence even today.” Nousiainen, *supra* note 2, at 7.

95. Virpi Koivu & Heikki E.S. Mattila, *Interpretation of Multilingual Texts in Finland*, in FINNISH LEGAL SYSTEM AND RECENT DEVELOPMENT 24, 26 (Erkki J. Hollo ed., 2006).

96. KIRBY, *supra* note 2, at 184–87 (2006). The Constitution also specifically protects the Sami languages spoken among Finland’s indigenous peoples, the Roma language spoken by a tiny minority in Finland, and sign language spoken by the deaf in Finland.

about 93% of Finns are Finnish speaking and about 5.5% are Swedish speaking.⁹⁷ Today the courts use both languages, and Finnish speaking lawyers and judges often become quite comfortable reading Swedish. One of the main reasons that Swedish is still important for legal professionals in Finland today is that scholars and judges continue to rely so heavily on legal interpretation materials (statutes, cases, and commentaries) from Sweden, as well as early Finnish legal sources written solely in Swedish. As two scholars further elaborate on this point, “Swedish cases have been of particular interest. Sometimes, the Supreme Court has made use of a Swedish precedent to such an extent that even the statement of reasons for the decision has been directly taken from this precedent.”⁹⁸ In addition to using legal materials from Sweden, Finnish judges on occasion will also borrow ideas and legal reasoning from their other Nordic colleagues as well.

Today Finland continues to follow the Swedish model of courts, with two supreme courts and no constitutional court. As has been mentioned earlier, the Constitutional Law Committee of the Parliament serves the function of a constitutional court present in many European countries.⁹⁹ The regular courts and the administrative courts have very different rules and procedures,¹⁰⁰ and several of my interviewees mentioned that judges on the administrative courts tend to be more academic and more cosmopolitan in their worldviews. The regular court system handles both civil and criminal cases. There are numerous local District Courts with tenured professional judges (and sometimes additional lay judges also sit in on some criminal cases), six Courts of Appeals are scattered throughout the country, and the Supreme Court of Finland sits at the top of the judicial pyramid for the regular courts.¹⁰¹ The eight regional Administrative Courts hear administrative law cases, with the Supreme Administrative Court being at the top of that system.¹⁰² The Supreme

97. LENEY, *supra* note 22, at 11.

98. Koivu & Mattila, *supra* note 95, at 28.

99. See discussion *supra*, p. 10.

100. HENRIKKA ROSTI ET AL., LEGAL AID AND LEGAL SERVICES IN FINLAND 4 (2008).

101. See Ojanen, *supra* note 3, at 557–58.

102. *Id.*

Administrative Court handles about 3500-4500 cases per year, and some estimate that about a third of these cases today involve European law issues.¹⁰³ As in Sweden, there are also specialized courts, such as the High Court of Impeachment, the Market Court, the Labor Court, the Insurance Court, and the Prison Court.¹⁰⁴ Both the Supreme Court of Finland and the Supreme Administrative Court have supervisory responsibilities over the lower courts within their jurisdictions.¹⁰⁵ The decisions of both supreme courts have the status of precedent that should be followed by lower court judges courts in their respective court systems.

All professional judges in Finland are technically appointed by the President of the Republic on the advice of the Prime Minister and the Government for tenured terms until the mandatory retirement age of sixty-five.¹⁰⁶ At some point in the future, a special nominations board may be created to handle judicial selection issues.¹⁰⁷ Thus, the Constitution requires that permanent judges have their jobs protected and even cannot be transferred to another position without their permission, because Finland highly values judicial independence.¹⁰⁸ During my interviews, however, justices on the Supreme Court told me that applicants for seats on the Supreme Court apply directly to the Court itself, and the justices themselves determine which applicant is the best qualified.¹⁰⁹ Then the President of the Supreme Court forwards the Court's choice to the President of the Republic, who then automatically appoints that person to the Supreme Court.¹¹⁰ It appears that the Prime Minister and the Government play no role in the judicial selection process, as least at the Supreme Court and the Supreme Administrative

103. *Id.*

104. Anne E. Niemi, *The Civil, Criminal and Disciplinary Liability of Judges*, in FINNISH LEGAL SYSTEM AND RECENT DEVELOPMENT 113, 113 (Erkki J. Hollo ed., 2006).

105. Mikael Hiden, *The Constitution*, in THE FINNISH LEGAL SYSTEM 39, 55 (Jaakko Uotila ed., Leena Lehto trans., 1985).

106. Nousiainen, *supra* note 2, at 39.

107. *Id.*

108. Niemi, *supra* note 104, at 114.

109. *See supra* text accompanying note 12.

110. *See supra* text accompanying note 12.

Court level. It seems that the justices are in fact choosing their own new colleagues.

A country's legal culture certainly reflects its general political culture.¹¹¹ Like many of their Nordic neighbors, Finland has a strong rule abiding culture based on honesty, trust, consensus, and self-rule. As one scholar noted, "Finland has a very strong legalist tradition."¹¹² For judges and for the general public in Finland, law is "*strongly binding* and unconditional or obligatory."¹¹³ Even today Finns pride themselves on being a very law-abiding and legalistic society where honesty is a prized value. Almost all of my interviewees mentioned this fact. Recall that some of this comes from the Russian era, when legalism served as the main defense against Russian domination.¹¹⁴ This law-abiding and rule following culture also prizes honesty and trustworthiness. As one commentator has explained, "Finland has been ranked for many years, in international comparisons, as the least corrupt country in the world."¹¹⁵ The so-called Protestant work ethic is also deeply ingrained in Finland.¹¹⁶ Thus, Finland is almost always at the top of the world's Corruption Free Index.¹¹⁷ As almost all of my interviewees explained, Finland is a society that assumes that everyone is doing the right thing and that honesty is highly valued.¹¹⁸ This "trust society" concept is deeply rooted in the Finnish psyche. After World War II, Finland paid off its enormous war reparations to the Soviet Union in record time.¹¹⁹ Finns pay their debts very quickly, and Finland is one of the fastest payers in the EU.¹²⁰ This rule following and law-abiding nation has very little patience for

111. Sabine Frerichs, *Constitutional Ideal Types in the Global Age: A Sociological Review*, in *THE MANY CONSTITUTIONS OF EUROPE* 70 (Kaarlo Tuori & Suvi Sankari eds., 2010).

112. Liisa Nieminen, *The Emergence of a European Constitutional Law*, in *FINNISH LEGAL SYSTEM AND RECENT DEVELOPMENTS* 128, 128 (2006).

113. Husa, *supra* note 24, at 11.

114. Suksi, *supra* note 17, at 90.

115. LENEY, *supra* note 22, at 64.

116. *Id.* at 92.

117. LEWIS, *supra* note 13, at 3.

118. As one commentator has written, "Finnish honesty is of the blue-eyed, uncompromising, law-abiding variety, where truth is truth." *Id.* at 60.

119. KIRBY, *supra* note 2, at 240.

120. LEWIS, *supra* note 13, at 3.

individuals or even countries that do not follow the rules.¹²¹ In fact, Finland is so law abiding that it still follows the Swedish tradition and mostly allows questions of constitutionality of legislation to be determined by the Parliament itself, because it is assumed that the Members of Parliament will always approach their decisions in an honest and non-partisan fashion!¹²² Although trust, honesty and legalism are very important to Finns, Finnish judges also bring a strong sense of pragmatism to their work.¹²³ Some commentators even argue that the hallmarks of the Finnish governmental system are pragmatism and adaptability.¹²⁴ Finnish culture clearly values pragmatism over ideology,¹²⁵ and this is true in the legal system as well.

Although Finnish legal culture clearly values pragmatism, which gives Finnish judges some flexibility in specific cases, this does not mean that the judges see their work as political in any way.¹²⁶ Finnish judges separate respect for the rule of law on the one hand, and politics (partisanship) on the other, in part because of Finnish history. During Russian rule, Finnish judges were often imprisoned when Russian citizens living in Finland, and Russian corporations doing business in Finland, disapproved of their rulings.¹²⁷ This occurred with some frequency in the 1909-1917 period.¹²⁸ The Finnish judges used a more

121. For example, Finland has been highly critical of how Greece has handled its financial crisis. According to one news report, “[i]n the five years since Greece’s financial woes were revealed to the world, it has been sleepy Finland which has emerged as the most trenchant critic of EU largesse to the indebted Mediterranean.” Mehreen Khan, *How sleepy Finland could tear apart the euro project*, THE TELEGRAPH, (Apr. 18, 2015), available at <http://www.telegraph.co.uk/finance/economics/11541657/How-sleepy-Finland-could-tear-apart-the-euro-project.html>.

122. Ojanen, *supra* note 3, at 531–32.

123. *Id.* at 561.

124. RAUNIO & TILIKAINEN, *supra* note 2, at 149.

125. LEWIS, *supra* note 13, at 32.

126. For Americans, judges can be political without being partisan, but it takes some explanation for Finns to understand the distinction in English between these two terms because the Finnish language does not use separate words for “political” and “partisan” as several of my interviewees explained to me. *See supra* text accompanying note 12.

127. *See* KORHONEN, *supra* note 19, at 105.

128. *Id.*

Western notion of legal rules as important and inviolable, while the Russians wanted relaxed procedures to make their business dealings easier.¹²⁹ Thus, the Russians wanted the judges to be political, but the Finns felt that political and partisan decision-making would destroy the rule of law. Thus, in Finnish political discourse, “the preferred party is seen as one upholding the rule of law which has been corrupted by politics on the other side.”¹³⁰ Finnish judges today do not participate in political debates in Finnish society, and by tradition Finnish judges almost never make any public statements, as my interviewees told me. Finnish society is less rigidly bureaucratic than in some other European nations. Therefore, the pragmatic judges apply legal rules honestly and fairly without letting the rules qua rules be the only point of consideration in judicial decision-making.

The historical notion of the separation of law and politics in Finland was further reinforced by the country’s experiences during and immediately following its Civil War in 1918. After declaring its independence, Finnish society quickly split into leftist, working class and pro-Russian “Reds” and conservative, middle class and pro-independence “Whites.”¹³¹ The two sides fought a Civil War in 1918, supported in part by Russian military assistance on the Red side and German soldiers on the White side.¹³² The Whites quickly won a military victory under the leadership of General Carl Gustav Mannerheim, who is a national hero in Finland.¹³³ The Whites argued in their propaganda that they represented the law-abiding segment of Finnish society, while the Reds were outlaws and revolutionaries.¹³⁴ As one scholar explains, “[t]he White Government did not recognize the Reds as a competing regime, a belligerent party or as insurgents, but treated them merely as criminals and traitors.”¹³⁵ When the Whites won the Civil War, they brought swift

129. *Id.* at 106.

130. *Id.*

131. MATTI KLINGE, *A BRIEF HISTORY OF FINLAND* 119 (3d ed. 2000).

132. *Id.*

133. LEWIS, *supra* note 13, at 33–34.

134. Lauri Hannikainen, *The Finnish Civil War 1918 and Its Aftermath*, in *IMPLEMENTING HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS: THE CASE OF FINLAND* 8, 13 (Lauri Hannikainen, Raija Hanski, & Allan Rosas eds., 1992).

135. *Id.*

punishment against the Reds. This scholar continues, “[t]he Whites had the deep conviction that their government was the legitimate government of Finland: that they had the law on their side and, as a result, the right to punish the rebels.”¹³⁶ The reality, however, was not so clear-cut about which side was the most law-abiding. There was a great deal of extra-legal retribution during and after the Civil War on both sides, including by the Whites who had argued that only they could uphold the rule of law in Finland.¹³⁷ After the Civil War ended, the victorious leaders of the Whites decided to put all Red prisoners on trial for treason, and the judges merely rubberstamped the sentences dictated to them by the White military commanders.¹³⁸ Several of my interviewees noted with shame how Finnish judges violated the rule of law with their harsh sentences for the defeated Reds.¹³⁹ Nevertheless, the narrative of the victorious Whites was that they won the Civil War because they followed the rules and protected Finland’s law-abiding political culture. Thus, even today being seen as law-abiding is critical to Finland’s political identity.

IV. THE EUROPEAN COURT OF JUSTICE AND THE NATIONAL COURTS

The ECJ has helped create a new system of European law, which Cichowski says is based on the “treaty provisions, secondary legislation, ECJ precedent and the procedures that govern rulemaking” in the EU.¹⁴⁰ The ECJ, sitting in Luxembourg City, is the top court in the European Union’s legal system.¹⁴¹ The ECJ currently has twenty eight judges, one

136. *Id.* at 18.

137. Immi Tallgren, *The Finnish War-Responsibility Trial in 1945-46: The Limits of Ad Hoc Justice?*, in *THE HIDDEN HISTORIES OF WAR CRIMES TRIALS* 430, 443 (Kevin Jon Heller & Gerry Simpson eds., 2013).

138. Hannikainen, *supra* note 134, at 24.

139. *See supra* text accompanying note 12.

140. CICHOWSKI, *supra* note 54, at 4.

141. After the Lisbon Treaty went into force in 2009, the Court of Justice of the European Union became the official name of the European Union system of courts, made up of three separate courts: the ECJ, the General Court (formerly known as the Court of First Instance), and the specialized Civil Service Tribunal. *See SANKARI, supra* note 60, at

from each of the member states of the EU, and nine Advocates General.¹⁴² One of the judges on the ECJ told me that having a judge from each of the member states on the Court greatly facilitates the judges' understanding of the unique judicial culture in each nation. It also encourages the dialogues between the national judges and the judges on the ECJ. Although the European Union includes both common law and civil law societies, the traditional practice of the ECJ has been to follow the French (civil law) model in the style of its written opinions,¹⁴³ meaning that its opinions are often terse and highly abstract.¹⁴⁴

Over the years, decision-making on the ECJ has received a great deal of scholarly attention, both from those who conceptualize the EU primarily as an international organization similar to the United Nations¹⁴⁵ and from those who instead conceptualize the EU more as a federalist supranational quasi-polity.¹⁴⁶ What is clear to both camps is that the ECJ has taken the lead in promoting both the legal and the political integration of the European Union. The Court has done this by

3. The term "ECJ" is still generally used to refer to the top court in this European court system, and that convention will be followed throughout this Article.

142. Based on the French system, the Advocates General of the ECJ review each of the cases before the Court and write preliminary opinions for the judges of the ECJ before the case is decided. See JOHN MCCORMICK, *THE EUROPEAN UNION: POLITICS AND POLICIES* 186–87 (4th ed. 2008). The judges are not obligated to follow the preliminary opinions of the advocate general in a case, but these opinions are often quite influential. *Id.*

143. SANKARI, *supra* note 60, at 5.

144. DANIEL TERRIS, CESARE P.R. ROMANO, & LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES* 78 (2007).

145. See, e.g., Bruno de Witte, *The European Union as an International Legal Experiment*, in *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 19, 19–56 (Gráinne de Búrca & J.H.H. Weiler eds., 2012).

146. See generally, e.g., STONE SWEET, *supra* note 1. Writing before the enactment of the Lisbon Treaty, Cichowski refers to the EU as a "quasi-constitutional polity" that exhibits "supranational governance." RACHEL CICHOWSKI, *THE EUROPEAN COURT AND CIVIL SOCIETY: LITIGATION, MOBILIZATION, AND GOVERNANCE* 1 (2007). She defines supranational governance as "characterized by a set of binding rules and procedures governing actors and organizations in a supranational policy arena." *Id.* For a summary of much of this scholarship on both sides, see generally KAREN ALTER, *THE EUROPEAN COURT'S POLITICAL POWER: SELECTED ESSAYS* (2010).

establishing a system of European law that the member-states have agreed to follow. As one scholar argues,

Without a body of law that can be uniformly interpreted and applied throughout the EU, the Union would have no authority, and its decisions and policies would be arbitrary and [inconsistent.] By working to build such a body of law, the Court of Justice—perhaps the most purely supranational of the major EU institutions—has been a key player in promoting integration.¹⁴⁷

In the process, the ECJ has certainly increased its own standing and prestige. As one scholar has thus proclaimed, “[t]he European Court of Justice . . . is the most powerful and influential supranational court in world history.”¹⁴⁸

The increase in the prestige and power of the ECJ is of course part of the global trend of the increasing importance of courts in their respective systems of government.¹⁴⁹ According to one scholar, “[International] court constitutional review jurisdiction mirrors the growth of judicial review powers across domestic political systems” after WWII.¹⁵⁰ Courts are becoming more active, and critical issues in many societies are now handled by the judiciary today. Alter reminds us that the world is changing around us. She states,

The growing role of judges, both domestic and international, is self-evident. In the United States and Europe courts review most major policy initiatives, and judicial rulings are front-page news. . . . International courts are part of this global trend and a powerful symbol that law and legalism have become part of foreign affairs and international politics.¹⁵¹

147. McCORMICK, *supra* note 142, at 157.

148. STONE SWEET, *supra* note 1, at 153.

149. *See generally, e.g.*, THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjörn Vallinder eds., 1995).

150. KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, AND RIGHTS 285 (2014).

151. *Id.* at xv.

When Finland entered the European Union in 1995, most of the key tools that the ECJ uses to promote European integration were already well established¹⁵²: the direct effect doctrine and the doctrine of the supremacy or primacy of European law.¹⁵³ The direct effects doctrine states that European law is directly and uniformly applicable in all member states,¹⁵⁴ meaning that European law has a “direct effect” in domestic law, thus becoming part of the national law of each member-state without any further independent action.¹⁵⁵ The ECJ pronounced this doctrine in the 1963 *Van Gen den Loos* case.¹⁵⁶ The concept of the supremacy of European law means European law is superior to national laws and perhaps even national constitutions in areas of the law where the EU has responsibility,¹⁵⁷ and conflicting national laws must therefore yield to European law in those instances. The ECJ first established this doctrine in 1964 in the *Flaminio Costa v. ENEL* case.¹⁵⁸

Both of these doctrines are implemented by the national courts, and the national courts are expected to send preliminary reference cases to the European courts when questions arise about how European law should be interpreted.¹⁵⁹ In a preliminary reference case, the ECJ will interpret EU law, but not decide the outcome of the specific case before

152. SANKARI, *supra* note 60, at 44.

153. Note that some scholars use the term “supremacy” to refer to the position of European law vis a vis national law, while others use the term “primacy” in this context. For example, Alter uses the term “supremacy.” ALTER, *supra* note 146, at 6. On the other hand, de Witte prefers the term “primacy.” De Witte, *supra* note 145, at 42–52. As discussed in more detail below, this debate stems in part from whether a scholar sees the decisions of the ECJ as being superior to national law and national constitutions or whether they are seen as parallel to national legal doctrines. Somewhat oddly, Jackson seems to use the terms almost interchangeably. VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* 91–95 (2010).

154. MCCORMICK, *supra* note 142, at 179.

155. Martin Shapiro, *The European Court of Justice*, in *EURO-POLITICS: INSTITUTIONS AND POLICYMAKING IN THE “NEW” EUROPEAN COMMUNITY* 123, 126 (Alberta M. Sbragia ed., 1992).

156. Case 26/62, *Van Gen den Loos v. Nederlandse Administratie Belastingen*, 1963 E.C.R. 5.2.

157. MCCORMICK, *supra* note 142, at 179.

158. Case 6/64, *Flaminio Costa v. ENEL*, 1964 E.C.R. 15.7.

159. MCCORMICK, *supra* note 142, at 192.

it.¹⁶⁰ That result is left to the national courts to implement after the ECJ provides its interpretation of what European law requires.¹⁶¹ As one scholar has explained, “[w]hereas in other actions the Court of Justice—or more generally the [Court of Justice of the European Union]—decides the case by applying EU law, the Court’s preliminary rulings provide (legally binding) assistance to the national court that posed the question and that will apply the answer in deciding a case before it.”¹⁶² Weiler has argued that giving the national judges the ability to implement European law has given them more power, i.e. a form of judicial review, which has enhanced their own standing, thus making them loyal to the ECJ.¹⁶³ Burley and Mattli look at specific rhetorical devices in ECJ opinions that appear calculated to appeal to the national judges, thus increasing the bargaining position of the national judges.¹⁶⁴ Nyikos found that in preliminary references national judges often signal to the ECJ the answer they hope to obtain (38% of the time) and this practice has increased over time and among heavy users of the reference cases.¹⁶⁵ In a majority of cases where the national judges have signaled their preferred results, the ECJ has provided it.¹⁶⁶

In addition to the preliminary reference cases brought to the ECJ by national judges, individuals, corporations, a member state, or an EU institution can also bring a case directly to the European court system under certain circumstances.¹⁶⁷ Cichowski among others argues that the doctrines of direct effect and supremacy coupled with the practice of preliminary reference cases have greatly increased the power of national

160. SANKARI, *supra* note 60, at 23.

161. *Id.*

162. *Id.*

163. J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403, 2426 (1991).

164. Anne-Marie Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41, 63–64 (1993).

165. STONE SWEET, *supra* note 1, at 101; *see also* Stacy Nyikos, *The European Court of Justice and National Courts: Opportunities and Agenda-Setting within the Preliminary Reference Process* (unpublished Ph.D. dissertation, University of Virginia) (on file with author).

166. STONE SWEET, *supra* note 1, at 101; *see also* Nyikos, *supra* note 165.

167. MCCORMICK, *supra* note 142, at 193.

judges and of individual litigants including interest groups as well.¹⁶⁸ Goldstein points out that judicial empowerment means more in the European context than in the American context because almost all national judges in Europe are civil service employees without any real power or hope of career advancement.¹⁶⁹

The ECJ has often been called an extremely activist court.¹⁷⁰ Its activism was most evident in the early period, from about 1960-1990, when its decisions had the effect of consolidating European integration.¹⁷¹ Some have even argued that during the early period various influential judges on the ECJ used “an intentional strategy to promote integration through law.”¹⁷² In the second period, after about 1990, the ECJ has focused less on “questions fundamental to the legal order” and thus is somewhat less activist.¹⁷³ Most of the criticism of the ECJ has been based on its activism in the early period. Some worry that the ECJ was making law, instead of just interpreting law. According to one scholar, “[t]his criticism against judge-made law, of courts *playing politics instead of practi[c]ing law*, is familiar to all. In EU law, such action has most often been discussed as (negative) judicial activism.”¹⁷⁴ Others have applauded the judicial activism of the ECJ, because it led to the political and legal integration of Europe.¹⁷⁵ According to one scholar,

168. CICHOWSKI, *supra* note 54, at 26–28.

169. LESLIE FRIEDMAN GOLDSTEIN, *CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT* 52–53 (2001).

170. Mark C. Miller, *A Comparison of Two Evolving Courts: The Canadian Supreme Court and the European Court of Justice*, 5 U.C. DAVIS J. INT’L L. & POL’Y 27, 34 (1999).

171. SANKARI, *supra* note 60, at 39.

172. ALTER, *supra* note 146, at 35.

173. SANKARI, *supra* note 60, at 39.

174. Suvi Sankari, *Could the Court of Justice Have Done Differently?*, in *THE MANY CONSTITUTIONS OF EUROPE* 195, 196 (Kaarlo Tuori & Suvi Sankari eds., 2010) (emphasis added).

175. See, e.g., ALTER, *supra* note 146, at 35–37; J.H.H. Weiler, *A Quiet Revolution: The European Court of Justice and Its Interlocutors*, 26 COMP. POL. STUD. 510, 510–34 (1994); Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AM. J. OF INT’L L. 1, 1–27; HJALTE RASMUSSEN, *ON LAW AND POLICY IN THE EUROPEAN COURT OF JUSTICE: A COMPARATIVE STUDY IN JUDICIAL POLICYMAKING* 510–12 (1986).

“[t]he European Court of Justice . . . today is one of the main motors of governance in Europe. It has turned a relatively young body of law into a dynamic and coherent legal system governing and protecting public interests and civil society.”¹⁷⁶

One of the key elements in this judicial activism is the fact that that the ECJ has constitutionalized the various treaties that form the foundation of the European Union and European law. As Martin Shapiro argued in 1992,

The *Marbury v. Madison* of the European Court is not the establishment of review, but the movement of the review of member-state acts from the sphere of international law to that of constitutional law. The Court has declared that through their treaties the member states have surrendered some of the sovereignty to the Community. The treaties, therefore, are not simply agreements under international law but create a constitutional regime.¹⁷⁷

During this constitutionalization process, the ECJ looked to the treaties and other sources of law to find the general principles of European law, but it has also looked to constitutional principles in the “shared heritage” of the national legal systems of the EU.¹⁷⁸ In this way, the Court created an integrated system of European law, increased its own power, and also increased the power of the national judiciaries.

Although still controversial among some European scholars,¹⁷⁹ some commentators argue that the ECJ today is looking more and more like the U.S. Supreme Court sitting atop a federalist legal system. For example, Kelemen observes that both the structure of the EU’s institutions and the control these institutions exert over member states closely resemble the American federal system, with its separation of powers, large number of veto points, and highly detailed, judicially

176. CICHOWSKI, *supra* note 54, at 242.

177. Shapiro, *supra* note 155, at 126.

178. ALICIA HINAREJOS, JUDICIAL CONTROL IN THE EUROPEAN UNION: REFORMING JURISDICTION IN THE INTERGOVERNMENTAL PILLAR 183 (2009).

179. *See e.g.*, de Witte, *supra* note 145, at 19–56.

enforceable legislation.¹⁸⁰ Both Joseph Weiler¹⁸¹ and Jo Shaw have argued that the relationship between European law and national law “demonstrates the hallmarks of a federal system.”¹⁸² The ECJ has used an incrementalist approach to making policy, often using the precedent of its own decisions to justify policy change.¹⁸³ This approach is also similar to the American experience.¹⁸⁴ Hinarejos goes so far as to describe the EU legal system specifically as a federalist system, and refers to the ECJ as “federal constitutional court of sorts,” with the power to declare legislation unconstitutional.¹⁸⁵ This scholar also observes that, “constitutional courts tend to empower the central level of government while federal systems are still young.”¹⁸⁶

Certainly one could argue that the ECJ’s decisions usually uphold EU interests and not the interests of member-states.¹⁸⁷ The ECJ often constitutionalized European law without the consent of the Governments of the member-states, but with the assistance of the national judiciaries.¹⁸⁸ As Cichowski explains,

180. R. DANIEL KELEMEN, *THE RULES OF FEDERALISM: INSTITUTIONS AND REGULATORY POLITICS IN THE EU AND BEYOND* 15–19 (2004).

181. Weiler, *supra* note 163, at 2403–84.

182. JO SHAW, *LAW OF THE EUROPEAN UNION* 76 (2d ed. 1996).

183. CICHOWSKI, *supra* note 54, at 257.

184. As one scholar argues, “[t]he ECJ often justified its rulings in light of its past case law, a pattern observed readily in the American experience, but one that is generally new but very much on the rise even in civil law systems.” *Id.*

185. HINAREJOS, *supra* note 178, at 4.

186. *Id.* at 6; see also KELEMEN, *supra* note 180, at 13–14; Daniel Halberstam, *COMPARATIVE FEDERALISM AND THE ROLE OF THE JUDICIARY*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 151 (Keith E. Whittington et al. eds., 2010).

187. According to Cichowski, for example, ECJ decision-making in gender equality and environmental cases was better predicted by the position of the European Commission rather than by the positions taken by governments of the member-states in their “observations” (amicus briefs in American usage). CICHOWSKI, *supra* note 54, at 134. The large number of member-state “observations” indicates that member-states take seriously the policy making effects of ECJ decisions. *Id.*

188. Alec Stone Sweet, *European Integration and the Legal System*, in *THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY* 18, 22 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003).

[T]he ECJ functions to provide greater clarity to EU law and in doing so often expands EU competence while diminishing member state control over EU policy outcomes. . . . [T]he policy positions of member state governments do not systematically shape ECJ decision-making. Time and time again, the ECJ is clearly informed of the preferences of powerful member state governments, and the ECJ does not hesitate to act in opposition to these interests.¹⁸⁹

There seems to be little that the Governments of the member states can do to reverse this process.¹⁹⁰ As several authors have explained, “national courts now apply the decisions of the ECJ even when national politicians and administrators object.”¹⁹¹ Even critics of the activism on the EJC now acknowledge that the Court has become a constitutional court of European law. As one critic of the Court has written, even if somewhat reluctantly, “[t]he Court of Justice is the constitutional court of the legal order and its methods of interpretation generally follow those universally shared by courts and, in particular, those that constitutional courts regularly employ.”¹⁹²

Because individual litigants can bring cases directly to the ECJ, or indirectly through the national courts and their preliminary reference procedures, this process has greatly increased the ability of individual litigants and interest groups to influence European law.¹⁹³ Interest groups often use litigation as a strategy for bringing about political change.¹⁹⁴ Cichowski argues that interest groups were instrumental in helping bring about European integration because, “[t]he emergence and evolution of

189. CICHOWSKI, *supra* note 54, at 246.

190. *Id.* at 255.

191. Elena A. Iankova & Peter J. Katzenstein, *European Enlargement and Institutional Hypocrisy*, in *THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY* 269, 277 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003). *See also* Karen Alter, *Explaining National Court Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, in *THE EUROPEAN COURT AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* 277–78 (Anne-Marie Slaughter, Alec Stone Sweet, & J.H.H. Weiler eds., 1998).

192. SANKARI, *supra* note 60, at 26.

193. ALTER, *supra* note 150, at 285–86.

194. MARTIN SHAPIRO & ALEC STONE SWEET, *ON LAW, POLITICS, & JUDICIALIZATION* 48 (2002).

supranational governance in Europe can be characterized by a complex relationship between social actors, organizations, and institutions.”¹⁹⁵ Interest groups also played a key role in the integration of Europe, in part because “market integration and the construction of the legal system have been mutually reinforcing processes.”¹⁹⁶ Maduro argues that the ECJ was successful because it sought out and found support among various national actors, including interest groups, other litigants, and the national courts, in large part because of these actors’ domestic political needs.¹⁹⁷

Judges on the national courts have played a key role in the ECJ’s efforts at legal integration, and there has been a great deal of scholarly attention to the institutional dialogues¹⁹⁸ between the justices of the ECJ and the judges sitting on the national courts.¹⁹⁹ Stone Sweet observes that the legal system of the EU was not preordained in the treaties, but evolved due to the needs of litigants, national judges, and the institutions of the EU.²⁰⁰ According to this scholar,

The Member States did not design the legal system that ultimately emerged. Legal elites (lawyers activated by their clients, and judges activated by lawyers) had to figure out how to use European law, to make it work in their interests. . . . Hardly passive, national judiciaries

195. CICHOWSKI, *supra* note 54, at 2.

196. STONE SWEET, *supra* note 1, at 61.

197. Miguel Poiares Maduro, *Sovereignty in Europe: The European Court of Justice and the Creation of a European Political Community*, in *COURTS CROSSING BORDERS: BLURRING THE LINES OF SOVEREIGNTY* 49–53 (Mary L. Volcansek & John F. Stack, Jr. eds., 2005).

198. For an explanation of the governance as dialogue movement in the U.S. and Canadian contexts, see Mark C. Miller, *Constitutional Interpretation and Policy-Making: The Governance as Dialogue Movement*, 40 OHIO N.U.L. REV. 337, 337–57 (2014).

199. See, e.g., Iankova and Katzenstein, who have written, “[t]he construction of a rule of law Community has been a participatory process, a set of constitutional dialogues between supra-national and national judges.” Elena A. Iankova & Peter J. Katzenstein, *European Enlargement and Institutional Hypocrisy*, in 6 THE STATE OF THE EUROPEAN UNION: LAW, POLITICS, AND SOCIETY 269, 277 (Tanja A. Börzel & Rachel A. Cichowski eds., 2003).

200. STONE SWEET, *supra* note 1, at 53–54.

negotiated their relationship to the European Court of Justice within a set of multidimensional, intrajudicial, “constitutional dialogues.”²⁰¹

V. CONSTITUTIONAL PLURALISM IN EUROPE

It is well settled that national statutes must conform to European law, but the position of national constitutions within the hierarchy of European law is less clear.²⁰² In 2003, a new Constitutional Treaty was proposed for the European Union, which would have given the EU a single constitutional document and a single legal identity, rather than being the collection of a variety of legal communities with multiple identities.²⁰³ The proposed Constitution Act (sometimes called the Constitutional Treaty) included a clear statement that European law would be supreme throughout the European Union, similar to the Supremacy Clause in the U.S. Constitution. The proposal failed when voters in France and the Netherlands rejected the new treaty in national referenda in 2005.²⁰⁴ The defeat was a blow to many European federalists. But others saw many positives for the EJC in this event. Some have even argued that the failure of the Constitution Treaty has increased the bargaining power of the ECJ in their dialogues with the

201. STONE SWEET, *supra* note 1, at 53–54. Further explaining this governance as dialogue metaphor in this context, Weiler and Slaughter have written,

The construction of the community legal order is a tale in which national courts (as well as other national and transnational actors) have played as important a role as the European Court of Justice itself; that constitutionalization is above all “conversation” with a uniquely interesting grammar and syntax; that this conversation has taken place over time at differing levels of intensity and outcome; that this on-going conversation occurs in a context broader than a narrow discourse of legal rules; and finally, that this relational and process-oriented perspective has both doctrinal and extra-doctrinal manifestations.

Joseph H.H. Weiler & Anne-Marie Slaughter, *Prologue-The European Courts of Justice, in THE EUROPEAN COURTS AND NATIONAL COURTS: DOCTRINE AND JURISPRUDENCE* v, v (Joseph H.H. Weiler & Anne-Marie Slaughter eds., 1997).

202. JACKSON, *supra* note 153, at 91.

203. Alberta Sbragia, *Introduction* to 39 PS, *POLITICAL SCI. AND POLITICS* 237, 237–40 (Apr. 2006).

204. MCCORMICK, *supra* note 142, at 84.

national judiciaries.²⁰⁵ As two scholars explain, “[t]he absence of a supremacy clause . . . has permitted the ECJ over the years to devise and reshape the content of the primacy principle, giving it an incredible flexibility.”²⁰⁶

After the defeat of the Constitution Treaty, a new proposal known as the Lisbon Treaty was written in 2007, and it came into force throughout Europe in 2009. Most of the provisions of the Lisbon Treaty (about 90%) are the same as the Constitutional Treaty that did not go into effect,²⁰⁷ but the new Lisbon Treaty does make some changes. For example, although the ECJ continues to have one judge per member state serving renewable six year terms, under the Lisbon Treaty the appointees must now be approved by a new seven person committee composed of former EJC judges, members of national supreme courts, and lawyers of recognized competence.²⁰⁸ After the enactment of the Lisbon Treaty, criminal law became European law and was constitutionalized at the supranational level.²⁰⁹ Probably EU criminal law will be limited to financial crimes and to cross-border crimes, although the provisions of the Lisbon Treaty will also make it easier for accused criminals to be extradited from one country to another even for crimes defined purely under national laws.²¹⁰ After passage of the Lisbon Treaty, the EU’s Charter of Fundamental Rights also becomes legally binding.²¹¹ The Lisbon Treaty also states that the European Convention on Human Rights becomes legally binding in the EU, meaning that national judges must consider the decisions of the European Court of Human Rights that sits in Strasbourg if they were not already doing so.²¹² Finally, the Lisbon Treaty also dropped the statement from the proposed Constitutional Treaty that EU law would be supreme. Instead, the Lisbon Treaty has a vague statement noting that under settled case law of the ECJ, the Treaties and European Law have primacy over

205. MARTINICO & POLLICINO, *supra* note 56, at 8.

206. *Id.*

207. PAUL CRAIG, THE LISBON TREATY: LAW, POLITICS, AND REFORM 123 (2010).

208. *Id.*

209. ESTER HERLIN-KARNELL, THE CONSTITUTIONAL DIMENSION OF EUROPEAN CRIMINAL LAW 1 (2012).

210. *Id.* at 237.

211. CRAIG, *supra* note 207, at 193.

212. HERLIN-KARNELL, *supra* note 209, at 231.

national laws.²¹³ This complicated constitutional law situation has led two scholars to note, “EU law, national law, and the ECHR are conceived as the three sources of European constitutional pluralism.”²¹⁴ Whether national constitutions must yield to European law, as the ECJ has stated in various opinions, or whether they are a parallel source of law, remains an open question.²¹⁵

Although the ECJ has taken the position that European law is supreme²¹⁶ and that both national law and national constitutions must yield to European law when there is a conflict,²¹⁷ the constitutional courts of some of the member states have pushed back against this doctrine. The German Constitutional Court in a series of decisions has been an especially strong voice in this debate, stating that European law must protect fundamental rights as least as well as the German constitution does; if it does not then European law must yield to German national constitutional law, and that the national constitution remains the supreme law in Germany.²¹⁸ The Italian Constitutional Court,²¹⁹ the constitutional courts of Spain, Denmark, Poland,²²⁰ Hungary, and the courts of several of the Baltic States (Latvia and Lithuania especially)²²¹ have taken

213. CRAIG, *supra* note 207, at 146–47.

214. MARTINICO & POLLICINO, *supra* note 56, at 7.

215. CRAIG, *supra* note 207, at 148.

216. As Craig has argued, “[t]he ECJ elaborated its far-reaching vision, which embodied the idea that all EU law was supreme over all national law, including national constitutional precepts.” *Id.* at 151. Stone Sweet further elaborates on this point when he states,

[the ECJ’s s]upremacy doctrine was *constitutional* in that it sought to organize the juridical relationship between otherwise distinct legal orders: the national and the supranational. The reception of supremacy, by national judges, was *political*, in that it entailed choices that would necessarily impinge upon the activities of executives, legislators, administrators, and private actors.

STONE SWEET, *supra* note 1, at 81.

217. *See, e.g.*, TIM KOOPMANS, COURTS AND POLITICAL INSTITUTIONS: A COMPARATIVE VIEW 85–87 (2003).

218. JACKSON, *supra* note 153, at 92–93.

219. MARTINICO & POLLICINO, *supra* note 56, at 88.

220. JACKSON, *supra* note 153, at 91.

221. Giuseppe Martinico, *National Judges and Supranational Laws: Goals and Structure of the Research*, in THE NATIONAL JUDICIAL TREATMENT OF THE ECHR AND EU

similar positions on the supremacy of national constitutions. On the other hand, the courts of Belgium, Luxembourg, the Netherlands, and Estonia have stated that their national constitutions are inferior to European law.²²² The English High Court has also acknowledged the primacy of EU law,²²³ and the House of Lords, when it was the supreme court in the U.K., acknowledged that English judges had the power to declare legislation to be in conflict with European law.²²⁴ The French high courts have come down on both sides of the debate, with the French constitutional court supporting the primacy of European law, while the Conseil d'Etat and the Cour de Cassation have argued in favor of the supremacy of the national constitution.²²⁵

It is important to note that although various national constitutional courts have asserted the supremacy of their national constitutions over EU law, to date no national courts have directly defied a ruling of the ECJ. In fact, even the German Constitutional Court among others has made it very difficult for litigants to challenge European laws in the national courts.²²⁶ Thus, the national courts are protecting the uniformity of European law at the same time that they are asserting that their national constitutions are not inferior to it. As Jackson explains, “[n]ational courts have taken stances at once sympathetic to the development of a uniform and coherent body of EU law and maintaining distance—or the possibility of distance—between EU law and national constitutional law.”²²⁷ Some scholars therefore argue that while the national courts are protecting their power to interpret their national constitutions, they may also be forcing the judges on the ECJ to communicate more with them about the interpretation of European

LAWS 7, 16 (2010). However, these authors also go on to say that “[t]he Baltic States represent the most evident example of the gap between the formal wording of the Constitution . . . and the reality of the law in action.” MARTINICO & POLLICINO, *supra* note 56, at 16, 59.

222. MARTINICO & POLLICINO, *supra* note 56, at 134.

223. *Id.* at 12.

224. *Id.* at 119.

225. *Id.* at 74.

226. CRAIG, *supra* note 207, at 154.

227. JACKSON, *supra* note 153, at 91.

law.²²⁸ Even after the enactment of the Lisbon Treaty, the controversy continued. In 2009, the German Constitutional Court in a case interpreting the Lisbon Treaty again stated its belief that it decides whether EU law is superior to the German Constitution.²²⁹ It is unclear whether other national courts will follow the latest German example.²³⁰

Thus, the question arises, is European law hierarchical with the ECJ serving as the highest court in Europe, or is European constitutional law parallel to the national legal systems? Supporters of the former position tend to be labeled as European federalists, while the latter position has given rise to the concept popular in many European academic circles today known as “constitutional pluralism.” There are many definitions of constitutional pluralism. Providing one definition of constitutional pluralism, one pair of scholars has written, “[t]he language of constitutional pluralism is increasingly being used both to describe the existence of and the relationship between the many different kinds of normative authority—functional, regional, territorial and global—in the transnational context. It has particular traction, however, in relation to the European Union.”²³¹ Probably the first definition of this concept comes from Neil MacCormick, who wrote, “[w]here there is a plurality of institutional normative orders, each with a functioning constitution . . . it is possible that each acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges constitutional superiority over another.”²³² In other words, MacCormick is noting that European constitutional law and national constitutional law are parallel and overlapping legal systems, not one single hierarchical one. Maduro uses a slightly different definition of constitutional pluralism:

228. As these scholars so colorfully explain their point, these counter-limit decisions, as they call them, “[a]re like a ‘gun on the table’ which induces the jurisdictional actors to interact and compare their visions.” MARTINICO & POLLICINO, *supra* note 56, at 133.

229. CRAIG, *supra* note 207, at 151–54.

230. *Id.*

231. GRÁINNE DE BÚRCA & J.H.H. WEILER, *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* 3 (2012).

232. NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY: LAW, STATE AND NATIONS IN THE EUROPEAN COMMONWEALTH* 104 (1999).

Constitutional pluralism identifies the phenomenon of a plurality of constitutional sources and claims of final authority which create a context for potential constitutional conflicts that are not hierarchically regulated. More broadly, it refers to the expansion of relevant legal sources, the multiplication of competing legal sites and jurisdictional orders, and the existence of competing claims of final authority.²³³

Jackson prefers to use the term “cooperative constitutionalism,” which she defines as “a notion of a pluralistic set of legal orders, conceived not hierarchically but in overlapping relationships.”²³⁴

With so many scholars now proclaiming constitutional pluralism as their main academic approach to the study of European constitutional law, it should come as no surprise that the term is “underspecified” and implies a “multiplicity of meanings without offending any received understanding.”²³⁵ Constitutional pluralists within academia, however, all clearly seem to question the supremacy of EU law over national constitutions, leading some to use the term “primacy” instead of “supremacy” to refer to the ECJ doctrine. By some accounts, constitutional pluralism is so dominant among legal academics in Europe today that almost all scholars claim to be part of this intellectual movement.²³⁶ What do judges on the ECJ think about this academic debate?

When I was in Luxembourg City, I asked staff members for the ECJ what the judges thought of this academic and judicial resistance to the supremacy of ECJ decisions. One staff member quickly explained the ECJ functions as a constitutional court for the European Union, and the Court must protect the fundamental rights of the European people.²³⁷ The implementation of ECJ decisions, however, is often left to judges on the

233. Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, in CONSTITUTIONAL PLURALISM IN THE EUROPEAN UNION AND BEYOND 67, 69–70 (Matej Avbelj & Jan Komárek eds., 2012).

234. JACKSON, *supra* note 153, at 92.

235. DE BÚRCA & WEILER, *supra* note 231, at 9.

236. *Id.* at 8. As Weiler has so colorfully described the situation, “Constitutional Pluralism is today the only party membership card which will guarantee a seat at the high tables of the public law professoriate.” *Id.*

237. *See supra* text accompanying note 12.

national courts. The staff member then exclaimed that European law is supreme, and any national laws or national constitutions in conflict with European law must yield. The staff member continued that the academic theories of constitutional pluralism had not entered into ECJ case law, and that the academic debate was not relevant to the work of the judges on the ECJ. The ECJ works under an assumption of the supremacy of European law over national law and national constitutions, and this issue has been settled for many years by previous ECJ rulings. This staff member concluded by noting that no national or constitutional court has ever refused to implement a decision of the ECJ, and even Germany changed its constitution when the ECJ ruled that a provision of the national constitution conflicted with European law. Thus, all the national judges have accepted the practical implementation of the supremacy of EU law. The staff member made it very clear that the judges on the ECJ work in the world of the practical and not in the area of theoretical academic debates.

That brings us to the question, where is Finland in this academic debate? Finnish academics seem to be clearly supporters of the constitutional pluralism movement,²³⁸ but the position of Finnish judges is far less clear. In general, it seems that Finnish judges have tended to avoid the controversy as much as possible and have refused to take sides in the judicial debate. On the other hand, Ojanen states that the Constitutional Law Committee of Parliament takes a constitutional pluralism approach similar to the one espoused by the German Constitutional Court,²³⁹ but he agrees that Finnish judges do everything possible to avoid conflicts between domestic law and European law.²⁴⁰ As one Finnish academic has noted, “[i]n Finland the idea of new European constitutionalism is a little-discussed issue. In general, the attitude to this phenomenon is more practical than theoretical.”²⁴¹ When I asked Finnish judges and law professors about where Finland falls on the question of the supremacy of EU law, I got very vague answers in response. One judge did tell me that European law is considered part of

238. See e.g., SANKARI, *supra* note 60, at 44–46.

239. Ojanen, *supra* note 3, at 541.

240. *Id.* at 560.

241. Nieminen, *supra* note 112, at 128.

domestic law, with the same procedural safeguards for both.²⁴² The judge went on to say that when Finland entered the EU in 1995, the principle of the supremacy of European law was already well established. But when asked what happens if the Finnish Constitution or other Finnish laws are in conflict with European law, the judge answered that that has not happened yet. The courts will do everything possible to interpret Finnish law so that it is not in conflict with European law, thus avoiding the controversies that other national courts have created regarding the supremacy of European law. As one judge explained to me, “Finnish courts have pushed an interpretative approach that attempts to always reconcile Finnish and European law, and avoid conflicts between the two.”²⁴³ Another judge told me that the Finnish courts will look at the practicalities of their decisions, avoiding conflicts with other courts including the ECJ and the European Court of Human Rights whenever possible. As one Finnish law professor explained to me, “[u]nlike in Germany or in many of the newly independent states of Eastern Europe, given Finland’s history and tradition there is no need for confrontation with the ECJ in our courts.”²⁴⁴

Professor Tuomas Ojanen agrees with this assessment. Ojanen has written that, in Finland, “[i]n practically all cases, it has been possible to implement EU law without having to limit the reasonable observance of constitutional rights.”²⁴⁵ He thus observes, “[t]here is no evidence of any reluctance on the part of the Finnish courts to embrace such fundamental qualities of EU law as its direct effect, indirect effect and primacy.”²⁴⁶ Finally, it is worth noting that,

A hard case that genuinely invites a Finnish court to ponder its acceptance of the primacy of EU law has yet to emerge. ... The overall approach of the Finnish courts towards the application of EU law is characterized by pragmatism. Each case is dealt with individually, without expressing any general views about the status of EU law. One looks in vain, therefore, for the kind of bold and sweeping observations

242. See *supra* text accompanying note 12.

243. See *supra* text accompanying note 12.

244. See *supra* text accompanying note 12.

245. Ojanen, *supra* note 3, at 544.

246. *Id.* at 559.

on the relationship between EU law and national law that have been issued by certain English or German courts.²⁴⁷

While Finnish judges do everything they can to avoid conflicts with EU law, they also do not send many preliminary reference cases to the ECJ. Sankari found that both Sweden and Finland were well below the average number of preliminary reference cases per country for the 1995-2002 period.²⁴⁸ She theorizes that the long waiting periods for the national courts to receive an answer from the ECJ in preliminary references cases caused the Nordic courts to refuse to send preliminary reference cases to the ECJ.²⁴⁹ Stone Sweet's research found similar low numbers of preliminary reference cases from Finland,²⁵⁰ and Ojanen notes that even today "the number of preliminary references is very modest."²⁵¹ When Finnish judges do send preliminary references cases to the ECJ, it is to get an interpretation of an EU law provision and not to make sure national legislation or constitutional law are in conformance with European law.²⁵² Both litigators and judges have told me that the rate of reference cases is still very low in Finland. The judges on the Finnish supreme courts provided a different reason for this practice.²⁵³ They uniformly said that the ECJ judges prefer that national judges refrain from sending them unnecessary preliminary reference cases because the workloads of judges on the ECJ are already too high. Thus, Finnish judges were being kind to their colleagues on the ECJ by refusing to send them too many preliminary reference cases. Several litigators I interviewed saw the situation quite differently. They said that many lower judges in Finland do not have a good understanding of European law, in part because many of the lower court judges do not have good foreign language skills. The judges on the Supreme

247. *Id.* at 561.

248. Suvi Sankari, *EU Law in Finland and Sweden: A Survey of the Preliminary References, National Jurisprudence and Legal Integration*, 3 *EUROPÄRTSLIG TIDSKRIFT*, 508-510 (2003).

249. *Id.* at 511.

250. *See, e.g.*, STONE SWEET, *supra* note 1, at 102-03.

251. Ojanen, *supra* note 3, at 561.

252. MARTINICO & POLLICINO, *supra* note 56, at 102.

253. *See supra* text accompanying note 12.

Administrative Court and the Supreme Court refuted this notion, stating that when in doubt it is the duty of lower court judges to send the cases to their respective supreme courts, and the high courts should decide when to send a preliminary reference case to the ECJ. But judges on the Finnish supreme courts very rarely do so, preferring to find a pragmatic answer on their own without resorting to the preliminary reference procedures.

VI. ARE FINNISH JUDGES PART OF A EUROPEAN NETWORK OF JUDGES?

I wanted to know more about Finnish judicial culture and the self-identity of judges in Finland. This inquiry is part of the American judicial politics and institutional analysis I bring to this project. Bell argues that one must study the culture of the judiciary from three perspectives:

The personal perspective looks at the way individuals perceive their role and career. The institutional perspective looks at the judiciary as a collective and examines the way in which the structures of the career and organi[z]ation of judges, as well legal process, affect the judiciary as a social institutional. The external perspective looks at the judiciary from the perspective of its impact on the wider world.²⁵⁴

I wanted to gain more insights on all three perspectives. Part of a judicial politics analysis looks at role theory to see how it can help us understand judicial culture. In its most simple form, role theory asks whether the same individual would make different decisions if they were a legislator instead of a judge.²⁵⁵ Bell notes that, “[t]he law is something more than simply a system of rules or legal standards. Those rules operate in a context of institutions, professions and values that form together ‘a legal culture.’”²⁵⁶ In other words, how do Finnish judges understand their judicial roles and their judicial identities?

254. JOHN BELL, *JUDICIARIES WITHIN EUROPE: A COMPARATIVE REVIEW* 2 (2006).

255. MILLER, *supra* note 5, at 191–92.

256. BELL, *supra* note 254, at 6.

For a long time, Finnish judges have been accustomed to using multiple sources of law in their work and to following the precedents of the two supreme courts of Finland. After Finland became subject to European law in 1995, ECJ decisions became a more important source of law in Finland.²⁵⁷ At about the same time, Finland incorporated the decisions of the European Court of Human Rights into its national law. As Ojanen notes, “EU membership has—together with the European Convention on Human Rights—contributed to the evolving significance of case law as a source of law in Finland.”²⁵⁸ Finland also works under the concept that “the judges know the law,” as many of my interviewees explained, so even if the lawyers in a case do not raise the appropriate questions of precedent or of European law, the judges are supposed to consider the relevant case law on their own.²⁵⁹ Thus, it should not have been too difficult for Finnish judges to add the decisions of the ECJ and the European Court of Human Rights to their judicial decision-making process. But are Finnish judges aware of this new case law?

One of the questions that I asked most of my interviewees involved how judges in Finland get an understanding of European law. Although Finnish judges have long been accustomed in their work to consulting multiple sources of law, how familiar are they with the decisions of the ECJ and the European Court of Human Rights? How do Finnish judges use these cases? How much training do Finnish judges get in European law and especially European case law? As Cichowski notes, “[t]raining in EU law varies substantially amongst member state countries, and thus we might expect this factor to influence not only the availability of lawyers to assist claimants but also how knowledgeable and thus favorable national judges are to these claims.”²⁶⁰ I wanted to know where Finnish judges fall on this measure.

Many of my interviewees commented on the generational differences in the familiarity of Finnish judges and lawyers with European law perspectives. Older judges and lawyers in Finland (and their law professors) did not study European law at university if they attended law

257. See *supra* text accompanying note 12.

258. Ojanen, *supra* note 3, at 559.

259. See *supra* text accompanying note 12.

260. CICHOWSKI, *supra* note 54, at 33.

school before 1995. The younger generation, of course, has been required to study European law in law school since Finland joined the EU, and one of the law professors I interviewed told me, at the nation's premier law school at the University of Helsinki, today over 40% of law students now study abroad, often taking European law courses in other European countries.²⁶¹ Another of the Finnish law professors I interviewed confirmed this phenomenon, stating that in her classes on European law, the students are mostly foreign nationals who spend a semester or a year studying in Finland because Finnish students do the same thing in reverse.²⁶² Thus, younger lawyers, judges, and law professors in Finland have strong training in European case law and are quite willing to apply EU and ECHR law to their cases. Older legal professionals are less familiar with European law. The older generation, however, is approaching retirement age, so the generational training gap will eventually disappear. Yle News, the national news organization in Finland, reports that around one-third of the current judges in Finland will reach mandatory retirement age by 2020.²⁶³ These retirements will bring about the largest generational change on the bench in Finnish history.²⁶⁴ But the older generation remains somewhat unfamiliar with European law and especially European case law.

In order to educate their colleagues on European law, several justices on the Supreme Court of Finland have created a monthly newsletter that summarizes in Finnish the most important decisions of the ECJ and of the European Court of Human Rights in Strasbourg. The newsletter started in late 2007 or early 2008, according to one of the judges whom I interviewed.²⁶⁵ With the strong support of the President of the Supreme Court, this electronic newsletter is sent to all the judges on the regular courts in Finland. As my interviewees told me, in this way all the judges in Finland should be familiar with the main European law cases. The

261. *See supra* text accompanying note 12.

262. *See supra* text accompanying note 12.

263. *TS: Record Numbers of Retiring Judges in Next Few Years*, YLE (Apr. 4, 2015), http://yle.fi/uutiset/ts_record_numbers_of_retiring_judges_in_next_few_years/7910198.

264. *Id.*

265. *See supra* text accompanying note 12.

judges in the administrative law system have a similar process. Recall that many estimate that around one-third of the cases before the Supreme Administrative Court involve European law issues.²⁶⁶

I also wanted to try to understand more about Finnish judicial culture, and whether Finnish judges think of themselves as purely Finnish or as part of a larger global or at least European community of jurists. The evolution of the European Union has created a new European identity and a new concept of European citizenship, in addition to the pre-existing national identities and national citizenship.²⁶⁷ Does this European identity carry over to the judges on the national courts? Slaughter refers to the European Union as a “community of courts” and by definition a community of judges.²⁶⁸ Bell also argues that a notion of “judicial community” is essential for institutional analysis of the judiciary.²⁶⁹ He also stresses the importance of judicial socialization. He writes, “[i]n studying the institution of the judiciary, it is necessary to look first within the judicial community. That community sets standards for judicial activity and inducts new judges into their role. It is the most immediate influence in defining what it is to be a judge.”²⁷⁰ I wanted to know if Finnish judges were part of this pan-European cultural phenomenon.

The responses from my interviewees were quite interesting. Some said that lower court judges, especially on the regular courts, understood their identity as purely Finnish, while judges on the two supreme courts often took a more global and European perspective.²⁷¹ Some said that the judges in the administrative courts system tended to be more academically oriented than judges in the regular courts, thus giving them a more cosmopolitan judicial identity. They travel more than the judges on the lower regular courts; more of them have Ph.D.’s in law, and they speak more foreign languages than their colleagues on the lower regular courts. As one of the judges whom I interviewed told me, some of the

266. See *supra* p. 503

267. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 148 (2000).

268. ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 84 (2004).

269. BELL, *supra* note 254, at 13.

270. *Id.*

271. See *supra* text accompanying note 12.

judges on the regular courts choose that profession because they prefer a quiet life where they rarely have to leave their offices. They do not want to travel or interact with judges from other European nations. One litigator told me that he thought that judges in the Finnish regular courts prefer to remain isolated from what is going on elsewhere in Europe.

On the other hand, the members of the supreme courts of Finland are much more ambitious and worldly in their views. Some judges in my interviews commented on the interactions they have with judges on the European courts, especially the Finnish judge on the ECJ who meets with members of the two supreme courts on a regular basis.²⁷² They also meet with the Finnish judge on the European Court of Human Rights. Others pointed to generational differences discussed above. All of my interviewees agreed that Finland's membership in the EU has empowered Finnish national judges in sometimes unexpected ways. One judge did tell me that, "European and Finnish judges see themselves today as part of a larger family of judges."²⁷³ Thus, some judges in Finland have a more European identity, but others remain solely Finnish in their outlook.

Formal and informal networks of judges can be very important in developing a broader judicial identity. These judicial networks are a relatively recent phenomenon, but a very important one. Judges naturally seek out the decisions of their colleagues on other similar courts because almost all judges share a common understanding of the judicial role. As two scholars have noted, "[j]udges create links between legal orders even in the absence of expressed norms of connections."²⁷⁴ Baudenbacher has argued that there is an increasing dialogue among judges worldwide and among judges who must deal with similar legal issues. He notes,

It is argued that in times of globalization, a global dialogue among supreme courts and international courts is necessary due to the homogenization of legal problems around the globe, the fact that human rights are by their very nature international, advances in

272. *See supra* text accompanying note 12.

273. *See supra* text accompanying note 12.

274. MARTINICO & POLLICINO, *supra* note 56, at 6.

technology that make dialogue possible, and increased personal contact between the judges.²⁷⁵

Some scholars have noted that the evolution of networks and linkages among judges was inevitable as more and more courts make their decisions available in widely spoken languages like English, and judges have the technology to access those rulings. As Slaughter has commented, “[j]udges around the world are talking to one another: exchanging opinions, meeting face to face in seminars and judicial organizations, and even negotiating with one another over the outcome of specific cases.”²⁷⁶ De Visser and Claes have done a fair amount of research on judicial networks in Europe. These scholars have thus observed that in transnational judicial communities, “judges are said to share common beliefs, values, and a self-perception and understanding of their role in the legal system and in society.”²⁷⁷

The ECJ has been quite intentional in creating judicial networks among judges from all the EU member states. One of my interviewees noted that the ECJ has established networks for the presidents of all national supreme courts in Europe, as well networks based on subject matter for lower court judges like the one on environmental law.²⁷⁸ There is a newly established network for appeals judges from throughout Europe, as well as new networks for law clerks on the various national courts. Goldstein points out that the ECJ has invited many national judges to Luxembourg for social and educational events that increase knowledge and probable support for the ECJ, as well as creating new professorships financed by the EU in European law at various universities throughout Europe.²⁷⁹ My interviewees told me that Finnish

275. Carl Baudenbacher, *The Definition of the Precautionary Principle in European Law: A Product of Judicial Dialogue*, in EUROPEAN INTEGRATION THROUGH INTERACTION OF LEGAL REGIMES 1, 2–3 (Carl Baudenbacher & Henrik Bull eds., 2007).

276. SLAUGHTER, *supra* note 268, at 65.

277. Maartje de Visser & Monica Claes, *Courts United? On European Judicial Networks*, in LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD 75, 76 (Antoine Vauchez & Bruno de Witte eds. 2013).

278. *See supra* text accompanying note 12.

279. LESLIE F. GOLDSTEIN, CONSTITUTING FEDERAL SOVEREIGNTY: THE EUROPEAN UNION IN COMPARATIVE CONTEXT 53 (2001).

judges are involved in a large variety of formal and informal judicial networks.²⁸⁰ Judges on the Nordic supreme courts met on a regular basis long before Sweden and Finland joined the EU. Judges from the various supreme courts in the Nordic countries still meet on a regular basis, and Finnish judges also participate in broader European meetings of judges each year. Finnish judges often attend seminars abroad, and foreign judges are often invited to Finland. The European Court of Human Rights in Strasbourg also hosts a variety of conferences and seminars for national judges. In this way, Finnish judges learn more about how other judges in Europe do their jobs, and they gain a greater appreciation for European law at the same time. These cross-border judicial interactions are strongly encouraged by most members of the supreme courts of Finland, including the two presidents of the courts. Some Finnish judges remain reluctant to reach out to their colleagues across Europe, but this sense of isolation is changing as the older generation retires from office.

Another key to increasing the support for and understanding of the ECJ and other European courts is the fact that judges on the ECJ have relatively short terms. Although they may be reappointed to their seats on the bench, they often serve for only a few years and then return to their native countries. For example, a former Finnish judge on the ECJ returned to his position on the Supreme Administrative Court of Finland after finishing his term in Luxembourg.²⁸¹ As Goldstein argues,

The role of fixed terms has had an additional important [payoff] in fostering member-state acceptance of European jurisprudence. Both the judges of the ECJ and its Advocates General . . . at the end of their tenure return, newly socialized by service on the European Court, to their home countries where . . . they hold important governmental posts, or teach in prestigious law schools, spreading the pro-European law message.²⁸²

280. See *supra* text accompanying note 12.

281. See *supra* text accompanying note 12.

282. Leslie F. Goldstein, *State Resistance to Authority in Federal Unions: The Early United States (1790-1860) and the European Community (1958-1994)*, 11 *STUDIES IN AMERICAN POLITICAL DEVELOPMENT* 149, 176–77 (1997).

Several of my interviewees commented on how much they learn from talking to Finnish judges who have served on various European courts. Several of the current judges on the two supreme courts in Finland have worked in Luxembourg City or in Strasbourg as staff members for the European courts.²⁸³ They continue to share their experiences with their Finnish colleagues, thus spreading the pro-European message.

CONCLUSION

Judges in Finland continue to adapt to Finland's membership in the European Union. On the one hand, being faced with learning European law came as a shock to Finnish judges and lawyers. On the other hand, the Finnish pragmatism has not been changed by requiring judges to consult case law from new sources such as the ECJ and the European Court of Human Rights. The new Constitution of Finland does require that judges protect human rights as one of their highest priorities, and European law is one avenue for doing so. Being a part of the EU has increased the power of the judges in both the regular courts and administrative court systems, and the new Constitution of Finland has given the courts a limited power of post-enactment judicial review. But the Finnish judges are reluctant to use their new power, and they certainly do not want to challenge the Parliament or the established political order in Finland.

Finnish judges are becoming more and more familiar with European law, and this situation will continue to improve as the older generation of judges retires from the bench. The supreme courts are doing many things to increase the understanding of European law among their colleagues, including writing newsletters summarizing the most important recent cases and encouraging their colleagues to interact with other European colleagues through both formal and informal judicial networks. Finnish law students, at least at the top law school in the country at the University of Helsinki, demonstrate their interest in European law and a European identity because they study abroad in such large numbers. Certainly some judges in Finland remain reluctant to interact with their

283. See *supra* text accompanying note 12.

European colleagues, to read case law from other countries, and in general to learn more about European law, but the number of judges in this category seems to be decreasing as time passes.

Finnish judges do participate in many dialogues with their colleagues on the ECJ and on the European Court of Human Rights. It is very important that Finnish judges who serve on any of the supranational courts usually return to Finland and rejoin their previous colleagues on the national bench. Yet for a variety of reasons, Finnish judges send very few preliminary references cases to the ECJ. Finnish judges also do not want to participate in the judicial and academic debate over constitutional pluralism, partly because Finnish judges approach their role by pragmatically deciding only the narrow case before them and by avoiding grand judicial pronouncements. Finnish judges, like the rest of Finnish culture, have a very strong independent streak, but the judiciary in Finland also seems to like working in obscurity. Judges want to do their jobs without calling attention to themselves or to the courts as a whole. The Finnish legalist culture seems to demand that they act in this way.

It is clear, however, that the changes brought about by Finland's membership in the European Union can never be reversed. Finland has always had a western-looking, European style judiciary modeled on the processes and procedures used most often by its Nordic and perhaps Germanic neighbors. Now since Finland is part of Europe, politically, socially, and legally, many judges are developing a new sense of a European judicial identity. This evolving new judicial culture also means that eventually Finnish judges may be forced to make political decisions including overturning acts of Parliament because they do not sufficiently protect human rights or because they violate European law. Despite the long-standing tradition in Finland of the clear separation of law and politics, this dichotomy seems to be breaking down. As one scholar has written, in Finland, "[i]n general, European integration and European human rights with the supreme judicial organs have changed the relationship between law and politics so that these two cannot be clearly separated anymore, not even in doctrine."²⁸⁴ Thus, Finnish judges

284. Husa, *supra* note 24, at 14.

probably will eventually combine law and politics, but probably not in the way their American colleagues have done so.