

Legislative Competence in Matters Not Mentioned in Enumerations

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1 Introduction

According to Section 17 of the 1991 Self-Government Act for the Åland Islands Act (1144/1991; hereinafter: the SGA), the Legislative Assembly of the Åland Islands enacts acts for the Åland Islands, so-called Ålandic Acts. It is this legislative power that is referred to in Section 75(2) of the Constitution of Finland (731/1999). Section 18 of the SGA specifies the areas of law in which the Åland Islands has legislative competence. The provision contains an enumeration of competences to the extent that the Legislative Assembly has the right to exercise legislative power regarding the territory of the Åland Islands according to the legislative procedure established in the SGA and in norms of the Åland Islands. This enumeration of competence delimits Åland's legislative power on the territory of Åland in relation to the legislative power exercised by the Parliament of Finland in view of the same territory. Therefore, the corresponding provisions on the legislative competence of the Parliament with regard to the Åland Islands are included in Section 27 of the Autonomy Act in the form of a list. Within the legislative competence of the Parliament, legal norms are enacted in the manner prescribed by the Constitution.¹

The distribution of legislative powers between the Legislative Assembly and the Parliament is based on an enumeration of both legislative competences so that they are, in principle, exclusive in relation to each other. In areas where the Legislative Assembly is competent, the Parliament does not have legislative power, and in areas where the Parliament is competent, the Legislative Assembly does not have legislative power. The legislative competences are thus exclusive in relation to each other. This strict distribution of legislative competences can be described as watertight compartments between the legislative competences of the Legislative Assembly and the Parliament that

1 This article is based on Markku Suksi, 'Självstyrelselagens generalklausuler om fördelning av lagstiftningsmakt mellan Ålands lagting och riksdagen', 158:5–6 *Tidskrift utgiven av Juridiska Föreningen i Finland* (JFT) (2022) pp. 558–586.

do not allow overlaps in such a way that both legislative bodies would have legislative power simultaneously over the same matter in the territory of the Åland Islands. A matter that is the subject of legislative measures belongs, with regard to the exercise of legislative power within Åland's borders, either to the legislative competence of the Legislative Assembly or of the Parliament. This also applies to those materially uniform areas where legislative power is in part held by the Legislative Assembly and in part by the Parliament.²

The starting point for this distribution of legislative power in the Åland Islands is the two lists or enumerations of legislative powers included in Sections 18 and 27 of the SGA. Section 18 lists the powers of the Legislative Assembly and Section 27 of the Parliament, the latter supplemented by a specification in Section 29 concerning competences that the Parliament may, by ordinary law and with the consent of the Legislative Assembly, transfer in whole or in part to the Legislative Assembly. The enumerations of both legislative competences consist of detailed listings of legislative matters.³ However, at the end of the lists in both Sections, 18 and 27, there is a similarly worded provision which aims to allocate to either legislative competence those legislative matters which do not fall within the specific points of the lists. Section 18(27) of the SGA refers to 'other matters which, according to the principles of this Act, shall fall within the legislative competence of the *Legislative Assembly*', while Section 27(42) of the Act refers to 'other matters which, according to the principles of this Act, shall fall within the legislative competence of the *Parliament*'.⁴

The starting point is therefore that matters which are the subject of legislative measures and which are not mentioned among the listed legislative competences can be assigned either to the Legislative Assembly or to the Parliament on the basis of these two general clauses. Thus, additional legislative matters and perhaps also legislative areas can be added by interpretation to the explicit legislative powers listed in the two provisions. In such situations, it is either

2 However, legislative competence between the Legislative Assembly and the Parliament is never divided in the way competence is divided between the European Union and a Member State, where both can have competence over the same matter and the Member State can legislate as long as the EU has not used its competence. From the point of view of EU law, the Legislative Assembly is part of the legislative power of the Member State of Finland.

3 For the enumerations, please see the Self-Government Act for Åland in English, <finlex.fi/sv/laki/kaannokset/1991/en1991144_2020098.pdf>, visited on 18 July 2023.

4 The Swedish-language authentic version of Section 18(27) refers to "landskapet", that is, the region or province, and Section 27(42) to "riket", that is, the realm. To avoid confusion, in this article, the Ålandic law-making powers in Section 18(27) of the SGA are referred to as those of the *Legislative Assembly* of the Åland Islands, while the national law-making powers in Section 27(42) are referred to as those of the *Parliament* of Finland.

the Legislative Assembly or the Parliament that makes the law. However, the SGA's system of *ex-post* verification of legislative competence before the entry into force of an Ålandic Act requires, as far as the Legislative Assembly is concerned, that the legislature has first made a decision on the approval of the Ålandic Act, which decision then becomes subjected to the examination of competence, ultimately at the Supreme Court (hereinafter: the SC). For the Parliament, the system is not as clear but dependent on coincidences.

What is the system of general clauses or open points of jurisdiction based on, and why have these clauses been included in the SGA in terms of legal history? How have the SC's interpretations developed in the opinions on the last item of each of the list of competences, i.e., how do the principles determine where, for example, a new area of law belongs? How has this system of general clauses worked over the last three decades? Our examination concerns the development of the system of self-government from 1920 to the present day, but the examination of practice is limited mainly to those interpretations of the general clauses given during the period when the enumerations of powers of the current SGA indicated what might be beyond the explicit legislative powers of each of the legislative bodies. The review does not cover the interpretative practice that has arisen within the Åland Delegation,⁵ nor the interpretation practices that the courts may have developed when deciding concrete cases concerning the general clauses. It is possible and even probable that such instances of interpretative practice exist, but they may be examined in some other context.

2 In the Beginning: a Different System for Distribution of Competences

Åland's legislative competence has changed during the existence of the autonomy arrangement, and the angle has shifted considerably, especially with regard to the transition from the 1920 SGA to the 1951 SGA. According to the 1920 SGA, the distribution of legislative powers was structured in such a way that Section 9 of the 1920 SGA listed the powers of the Parliament. These included

⁵ However, it is very likely that the Åland Delegation, an adjudication body with representatives of the Åland Islands and the State of Finland, has adopted positions on the general clauses and on the allocation of legislative powers on the basis of them. See, for example, Statement No 31/12 of the Åland Delegation of 29 October 2012 (equal treatment falls within the competence of both the Legislative Assembly and the and the Parliament) and Statement No 3/22 of the Åland Delegation of 28 January 2022 (domain name belongs to the jurisdiction of the Parliament).

constitutional matters, matters requiring Parliament's assent and legislation of a general nature and the issuing of decrees referred to in Section 9(2). The subject areas listed, including the subject matter governed by international treaties and subject matter 'which has not hitherto been required by law'. On the other hand, Åland's legislative competence was not listed, but the Legislative Assembly would have the right, by virtue of Section 12(1) of the SGA, to adopt Ålandic laws in matters other than those that fell within the competence of the Parliament under Section 9 of the SGA. The legislative competence of the Parliament was thus primarily of an enumerated nature, while the legislative competence of the Åland Islands was of a residual nature. Moreover, the two legislative powers were intended to be mutually exclusive in such a way that a new law which had entered into force in mainland Finland would not apply to the Åland Islands until it had been adopted by the Legislative Assembly, or else that the Legislative Assembly would be competent to adopt, in these matters, laws intended for the Åland Islands.⁶

Thus, the system of self-government was originally formulated in a way that characterizes most federations: the federal level has enumerated legislative powers, while the competences of the states are residual. This is the case, for example, in the USA and the Federal Republic of Germany. The original structure of legislative competence thus constituted the basic starting point for the development of competence: enumeration for the Parliament and residual powers for the Legislative Assembly.⁷ It would appear that this starting point gave Åland a very strong position in the legislative work and that it contained a great promise in principle with regard to the possibilities of drafting its own legislation.⁸

6 Committee report No 24/1919 to the Government from the Committee on the Drafting of Proposals for County Self-Government, Administrative Courts of Lower Instance, and re-districting of current counties and administration, p. 21.

7 See Markku Suksi, *Sub-State Governance through Territorial Autonomy* (Springer Verlag, Heidelberg, 2011) pp. 125–132.

8 Esko Hakkila, *Suomen tasavallan perustuslait sekä eräitä niihin liittyviä lakeja, asetuksia ja säännöstöjä* (Werner Söderström Osakeyhtiö, Helsinki, 1939) p. 691 *et seq.*, states that the area of Åland's legislative competence under the 1920 SGA was so extensive that the League of Nations did not consider it necessary to extend the competence. According to Rafael Erich, *Suomen valtio-oikeus, II osa* (Werner Söderström Osakeyhtiö, Helsinki, 1925) pp. 369, 376–382, Åland's legislative competence was extensive and clearly exclusive in relation to the legislative competence of the Parliament and that a national act in no case would be in a hierarchically superior position in relation to Ålandic law. According to Antero Jyräki, 'Autonomy of the Åland Islands: A Federal Element in the Constitution of a Unitary State?' in Kirsi Pohjolainen (ed.), *Constitutionalism in Finland – Reality and Perspectives* (Finnish Society of Constitutional Law, Helsinki, 1995) p. 13, however, during the 1920s and 1930s there was a lack of clarity about the relationship between national and Ålandic laws: it had been

It should be noted, however, that paragraphs 12 and 13 of Section 9(2) of the 1920 SGA can be considered to have imposed severe restrictions on the Åland legislature with regard to the freedom to make use of this fundamental point of departure. Paragraph 12 referred to the Parliament's competence areas regulated by international treaties, something that in today's situation with an increasingly internationalized normative environment could have seriously threatened Åland's own legislative competence and transferred Åland's legislative power to the Parliament.⁹ Paragraph 13 included in the legislative competence of the Parliament those areas which, at the time of the creation of the 1920 SGA, had not yet been the subject of legislative measures. This, in turn, had affected large parts of such modern activities that emerged much later and would have placed the regulation of these activities automatically within the competence of the Parliament.¹⁰

In retrospect, it can be stated that Åland's legislative competence would have been severely curtailed and subjected to a continuous leakage of powers in the direction of the Parliament, if this principle of the distribution of competences had applied until today. The area of Åland's legislative competence would have been considerably narrower and the legislative competence of the Parliament much more extensive than they currently are under the 1991 SGA. In addition, the original distribution of competences was perceived as problematic, because it was not considered to have been established with the necessary clarity, and measures were proposed by the Åland Islands in this regard.¹¹

possible to consider that a national enactment would, in the event of a conflict of jurisdiction, take precedence over Ålandic law. See for example Hakkila, *supra* note 8, pp. 682, 690. However, this ambiguity has since been dispelled.

- 9 According to Arthur Tollet & John Uggla, *Lagstiftningen angående självstyrelse för Åland, jämte tillhörande författningar* (Holger Schildts förlag, Helsingfors, 1930) p. 70, paragraph 9(2)(12) of the SGA was adopted to avoid such misconception that treaties with a foreign power, when they relate to the legal provisions of national law, would require the consent of the Legislative Assembly. However, such an assent procedure was later introduced and is now part of Section 59 of the SGA, where it protects the Legislative Assembly's competence.
- 10 However, a mitigating interpretation of Section 9(2)(13) of the 1920 SGA is included in Tollet & Uggla, *supra* note 9, p. 71, where it is stated that the provision does not have such a broad meaning that any new question of law that arises or any development or extension of existing legal standards would be excluded from the competence of the Legislative Assembly. However, according to Hakkila, *supra* note 8, p. 692, the idea of 'new question of law' expresses the primary nature of national competence and the secondary nature of Ålandic jurisdiction.
- 11 See 'Committee report on the revision of the autonomy legislation for Åland 1946' (von Hellén-Committee Report), p. 252 (in *Preparatory work for the 1920 and 1951 Autonomy Acts for the Åland Islands*, Part III, Ålandica Saml.).

3 Transition to Double Enumeration

The original starting point for the distribution of competences underwent an important change in connection with the reform of the autonomy legislation initiated by Government Bill RP 38/1948 rd. Instead of enumeration for the Parliament and residual competences for the Legislative Assembly, enumerated competences were now proposed for both the Parliament and the Legislative Assembly. However, both proposed lists of competencies were concluded in the bill with a reference to a residual category of affairs. As far as the Parliament is concerned, these were matters referred to in Section 11(2) of the 1951 Self-Government Act (670/1951). Paragraph 20 referred to matters which fell within ‘areas hitherto not provided for by legislation and which, by virtue of the principles contained in this Section, fall within the legislative competence of the Parliament’. As far as Åland is concerned, these matters were defined in Section 13(1) of the 1951 SGA. Paragraph 21 refers to ‘other matters which have not been reserved to the legislation of the Parliament and which, by virtue of the principles contained in this Section, fall within the legislative competence of the Legislative Assembly’. The content of the residual category would therefore be interpreted from the point of view of some kind of principle of reciprocity, but it should be noted that the two provisions on the residual category were not entirely symmetrical.

Although the 1951 SGA introduced a detailed enumeration of the competences of both legislatures, the assumption nonetheless was that in spite of this detail, ‘numerous difficulties of interpretation caused by the general wording of the provisions in force’ could already be foreseen. Thus, even a move towards enumerating the competences of both legislatures might ‘lead to new differences of interpretation’.¹²

This fundamentally important change gave the distribution of competences between the Parliament and the Legislative Assembly a similar structure as applies in Canada through provisions in Articles 91 and 92 respectively in Canada’s Constitution Act of 1867. Despite the fact that Canada is usually classified among federations, one can thus discern a similar exclusive idea of double enumeration as for Åland since 1951.¹³ However, it is not clear from the

¹² Statement of the Constitutional Committee of the Parliament GrUB 36/1950, p. 5.

¹³ Double enumeration also occurs in Denmark with respect to the Faroe Islands with the support of 1948 *Hjemmestyreløven* (the Home Rule Act) in combination with the determination of a minimum of the legislative power of the Danish Parliament and the right of transfer which the Faroese Legislative Assembly has by virtue of the so-called Transfer Act of 2005. See Markku Suksi, *Double Enumeration of Legislative Powers in a Sub-state Context – A Comparison between Canada, Denmark and Finland* (Springer,

legislative history of the 1951 SGA that the Canadian model was presented to the Parliament when the double enumeration solution was introduced.¹⁴

The preparatory work carried out in the 1980s with the aim of producing a new Self-Government Act for Åland was intended to extend the legislative competence of the Legislative Assembly. Although a gradual increase in Åland's legislative competence can be discerned since 1920, one of the intentions of the drafting was to further increase Åland's competence to enact Ålandic Acts. It was therefore proposed that legislative powers should be transferred as far as possible "to the Legislative Assembly in all areas which have a significant connection with autonomy and where reasons of expediency justify such regulation". New or extended powers for Åland were therefore proposed with regard to the use of the flag of Åland, rent and rent control, antiquities, social welfare, the serving of alcoholic beverages, the archives, the postal service, radio and television, and provisions of criminal law. In addition, the bill included a proposal for the flexible transfer of competence from the Parliament to the Legislative Assembly in the fields of population registration, registration of trade, associations and ships, work-related pension and other social insurance, some areas of alcohol legislation, banking and credits, employment contracts and cooperation within companies. At the same time, a transfer in the opposite

Heidelberg, 2018) pp. 13–15. In addition, double enumeration occurs in France with respect to New Caledonia. See Markku Suksi, 'Self-Determination through Autonomy or Independence? – On the Current and Future Position of New Caledonia', in 15 *Vienna Journal on International Constitutional Law* (2021) pp. 67–105.

- 14 A reference to Canada can be found in the committee report Kom.bet. 24/1919, p. 16, so it is conceivable that the Canadian double enumeration was known for the drafters at the time of the enactment of the first SGA in 1920. The preamble of Article 91 of the Canadian Constitution creates a relatively well-defined right for the Federation to legislate for "peace, order and good governance" in Canada that may apply to new areas of legislation. However, it has been used to fill gaps that have arisen between explicit federal legislative powers and, in particular, for legislation on war measures during the two World Wars. However, Canada's Supreme Court has rejected several of the attempts made by the Federation to use this provision. As far as the provinces are concerned, there is a provision in Article 92(16) which similarly confers on the provinces legislative competence in respect of "generally all matters of a purely local or private nature in the province". Thus, the Canadian version of double enumeration provides some scope for developing legislation outside the two enumerations, but the two enumerations clearly show exclusivity in relation to each other, even though the Supreme Court's interpretations have in some respects softened the edges of the jurisdictional divisions. At the same time, it should be noted that the Canadian residual categories are not formulated in a symmetrical way but show an asymmetry between the federation and the provinces. On the interpretation of these two provisions, see Suksi, *supra* note 13, pp. 81–85, 104.

direction was also proposed, as competence under employment contract legislation would be transferred to Parliament.¹⁵

The basis for the distribution of competences in the 1991 SGA remained the same as in the previous SGA, i.e., the distribution of competences is based on the enumeration of the competences of both legislative bodies and contains a general clause at the end of each of the lists of competences, allowing a certain development of competences within each competence area. The general clauses may be construed as references to implied powers of some kind accorded by legislation to both legislative bodies. The content of these powers depends on interpretation in the context of the relevant jurisdiction. The difference between the residual provisions of the 1951 SGA and the 1991 SGA is that the general clauses of the 1991 SGA are symmetrical for both legislators by using the same wording.

According to the legislative history of the 1991 SGA, the enumerations in Sections 18 and 27 are intended to specify which matters fall within the competence of the Legislative Assembly, on the one hand, and which ones fall within the competence of the Parliament, on the other. In addition, however, it is stated that 'not all areas of law have been indicated, nor can they be listed'. This is a recognition that enumerations of this kind cannot be made completely comprehensive for all conceivable situations. Therefore, the bill goes on to state that 'the proposal also contains general clauses, which are decisive for legislative competence, inter alia, for new areas of law'.¹⁶

According to the proposal for the 1991 SGA, areas of law not specifically mentioned in Sections 18 and 27 must be assessed in terms of competence on the basis of the principles followed in the Act as a whole, which means that it is not only the basic principles set out in the two enumerations that should be taken into account in the interpretation, but the whole of the SGA. This general framework based on the SGA could therefore be attributed, for example, to the provisions on the right of domicile in Sections 6 to 8, the right of trade in Section 11 and possibly also land acquisition on the basis of Section 10 of the SGA.¹⁷

In the preparation of new autonomy legislation to replace the 1991 SGA, certain characteristics of the general clauses of the current SGA have been put forward. According to the Åland Committee's 2013 final report, new areas of law,

15 Government Bill on the SGA, RP 73/1990 rd, p. 6.

16 RP 73/1990 rd., *supra* note 17, pp. 42, 63, 69, 73, 78. As stated on p. 41, one reason for the renewal of the distribution of competences was the uncertainty about the extent of jurisdiction caused by divided areas of law.

17 RP 73/1990 rd., *supra* note 17, p. 79.

when they arise, belong to either the Legislative Assembly's or the Parliament's area of competence. The basic principle of the 1991 SGA would thus be followed regarding how a new area is to be assessed in terms of competence is that it is to be attributed to the area to which it has the strongest links. None of the lists in Section 18 of the current Act on the competence of the Legislative Assembly and Section 27 on the competence of Parliament have more weight than the other in the assessment. This is a principal statement on the general clauses which is in many ways corroborated by the more detailed review of the various relevant opinions below.¹⁸

4 Interpretations of the Current General Clauses

Although the general clause is worded symmetrically for both legislators, the procedure for interpreting the content of the two provisions is asymmetrical. The general clause linked to the legislative competence of the Legislative Assembly is interpreted by the SC, while it is in principle the Constitutional Law Committee of the Parliament that could give an opinion on the interpretation of the general clause linked to the legislative competence of the Parliament with regard to the Åland Islands' area. The Constitutional Law Committee sometimes expresses an opinion on the relationship between national legislation and Åland's legislative competence, but it is not systematically examining the legislative competence of the Parliament under the SGA. An assessment of the legislative competence of the Parliament is usually given in relation to the explicit legislative competences.

It is not known to the author that the Constitutional Law Committee would have tested the Parliament's legislative power to any great extent in relation to the general clauses in Section 18(27) of the SGA in relation to the legislative competence of the Legislative Assembly, or Section 27(42), which concerns the legislative competence of the Parliament. An educated guess in this context is that such assessments are fairly rare, but at least one case, the Lotteries Act, exists. On the other hand, there are some interpretations concerning the legislative competence of the Legislative Assembly under Section 18(27) of the SGA and the legislative competence of the Parliament under Section 27(42) given by the SC in the context of the review of jurisdiction concerning Ålandic laws.

18 Ålands självstyrelse i utveckling – Ålandskommitténs 2013 slutbetänkande. Justitieministeriet, Betänkanden och utlåtanden 14/2018 (Justitieministeriet, Helsingfors, 2018) p. 153.

The SC's interpretations regarding Åland's general clause contain the referendum on EU accession (Opinion of 9 September 1994), the creation of indirect public administration (Opinion of 19 December 1996), emissions excess charge (Opinion of 29 June 2005), independent auditing office under the Legislative Assembly (Opinion of 15 February 2013), application of national statutes on data protection to Åland (Opinion of 1 August 2019), application of national non-discrimination legislation in the Åland Islands, with some modifications (Opinion of 16 September 2020), and legislation on the openness of official activities in the Åland Islands (Opinion of 1 June 2021).

Interpretations of the SC and the Constitutional Law Committee regarding the general clause of the Parliament include fewer examples, namely genetically modified organisms (Opinion of 21 March 1996; hereinafter GMO), lottery legislation (Constitutional Law Committee, Statement GrUU 22/2001 rd, and Statement of the SC in HD 2001:79) and criminal provisions on drunkenness at sea (Opinion of 25 February 2003).

Based on the SC's Statement HD 2001:79 regarding the Lotteries Act, it is possible to ask what a new area of legislation is, what is meant by the object of regulation and classification of objects in the regulation and what constitutes a whole of cases with regard to something falling within either the competence of the Legislative Assembly or the Parliament. A first step in the application of the general clause is a review of the subject matter of the proposed legislation against the existing competences in either list of competences. If no basis is found in either list of competences by which the subject matter of the legislation can be linked to a substantive basis of competence, a second step consists of an examination of whether the proposed legislation could be classified as belonging to the competence of the Legislative Assembly or the Parliament in view of the subject matter of the regulation. If the classification of objects suggests a connection to one of the areas of competence, the third step is a reasoned finding that the subject matter of the legislation belongs to one of the two areas of competence, that of the Legislative Assembly or the Parliament.

Since, roughly speaking, the material competences of the Legislative Assembly largely concern areas of public law, while the substantive competences of the Parliament are to a greater extent of a private law nature, it is generally conceivable that the regulation of vertical legal relationships, i.e. those concerning the relationship between authority and private individuals, may fall within the competence of the Legislative Assembly, whereas the regulation of horizontal legal relations, i.e. those relating to the relationship between two individuals, may fall within the competence of the Parliament. Competence in criminal matters can also be considered to follow from this division, since the

Legislative Assembly's competence in the area of criminal law depends on the public law nature of the other competences of the Legislative Assembly. The general competence of the Parliament in the area of criminal law, on the other hand, is not as clearly linked to this division.¹⁹

In the field of GMO regulation, the creation of units of indirect public administration and the establishment of the auditing office as an independent authority, a new area of legislation has been discovered. Admittedly, this is not entirely obvious for the auditing office, as the auditing previously operated under the Government of the Åland Islands. Thereafter, a classification of objects has been carried out and, on the basis of this, a determination of the matter as a matter that falls within the legislative competence of either the Legislative Assembly or the Parliament has been made. The interpretations of these Ålandic acts appear to follow the interpretative instruction developed by the SC in HD 2001:79 on the Lotteries Act for mainland Finland, because the SC has examined the provisions in terms of content to determine the entity to which the provisions are to be assigned and decided according to this classification of objects of the regulation whether the provision or regulation in question falls within the competence of the Legislative Assembly or the Parliament. With regard to the auditing office and to units of indirect public administration, the SC came to the conclusion on the basis of the general clauses that competence belongs to the Legislative Assembly, which can be considered to be in harmony with the idea that the regulation of public law issues, especially vertical legal relations, falls within the competence of the Legislative Assembly. The SC referred GMO to the competence of the Parliament, which means that the opinion is in harmony with the principles of the legislative competence of the Parliament, since the Gene Technology Act primarily concerns the regulation of the market, products and the position of the operator, although the authority organization is also involved in this legislation.

On the basis of the SC Statement HD 2001:79 on the Lotteries Act for mainland Finland, it appears that the jurisdictional interpretations, where a category of competence has been found in the lists and strengthened by reference to the general clause, are those where a classification of objects has been taken as a starting point and a matter has been found to which the Ålandic Act

19 Markku Suksi, *Ålands konstitution* (Åbo Akademi, Åbo, 2005) pp. 191–192. In addition to the general clause of the Parliament, there is in fact a 'general private law clause' in Section 27(41) of the SGA, which gives the Parliament legislative competence in other private law matters than those specifically referred to in this Section, unless they relate directly to a field of law which, according to the SGA, falls within the legislative competence of the Legislative Assembly. This general private law clause strengthens the private law character of national competences.

can be attributed. Then the interpretation has been consolidated by a check against the general clause. It is not necessarily a very established procedure as the interpretations are fairly fresh, but it seems to be a possible approach in the light of the SC's description of the interpretative steps. In these situations, the general clause for allocating legislative competence between the two legislatures has not really been applied, but what has been applied is the existing material competence in the actual enumerations.

Also, there are two interpretations where it can be said that the interpreter of the general clause is mistaken about the premises for the use of either general clause.

In the light of the SC Statement HD 2001:79 on the Lotteries Act, the Constitutional Law Committee's interpretation with regard to the Lotteries Act seems to consist of a misunderstanding of how the division of competence between the Legislative Assembly and the Parliament is structured and of how the general clause can be used. The Committee advocated an interpretation of the legislative competence of the Parliament that would have allowed the then Åland Provincial Administrative Board, which is a state body in the Åland Islands, to exercise administrative competence in Åland in a field where legislative competence and thus also administrative competence belongs to the Legislative Assembly. There were no other matters relating to the Lotteries Act which would have fallen outside the substantive definitions of the Legislative Assembly's competence and which would thus have created a need to remove a normative ambiguity by interpreting the general clause relating to the legislative competence of the Parliament.

Regarding the EU referendum, the wording of a core material provision of the enactment should have caused the SC to treat the issue as a binding referendum which does not fall within the scope of any substantive competence in Section 18 of the Autonomy Act, nor does it fall within the scope of the application of the general clause as a new area of legislation. However, it actually gives rise to an amendment to the SGA. It is possible that counterarguments can be presented in this regard, such as that the intention was always to arrange a consultative referendum, which is also reflected in the name of the law, but the wording of the content of the law is nevertheless binding on the Legislative Assembly. There is clearly a new area of legislation here, but the subject of the regulation, the creation of a binding referendum procedure according, falls outside the framework of the SGA. The matter should, actually have led to a formal amendment of the SGA. Perhaps a sense of expediency overshadowed the referendum issue, for it was natural to imagine that a referendum would be held in Åland on Åland's entry into the European Union together with the rest of Finland.

Attempts to renew the autonomy legislation and to change its structure by passing a new autonomy act to replace the 1991 SGA have been going on for 15 years. Without going into the content of these plans, however, it can be stated that even in a system with the possibility to transfer national competences to the Legislative Assembly through decisions of the Legislative Assembly, it is envisaged that a system of two enumerations will continue and thus also the need for two general clauses.²⁰

5 Conclusions

The system of general clauses or open points of competence at the end of the lists of competences of the Legislative Assembly and the Parliament is a consequence of the fact that it has been considered impossible to determine, once and for all, which matters belong to which legislator. The system is based on the original division of competences in the 1920 SGA, which in principle placed a residual part of the competences with the Legislative Assembly, but opened the way for the exercise of legislative power by the Parliament in new legislative areas that arose in a way that automatically attributed them to the competence of the Parliament. It is possible to imagine that the original situation for Åland was similar to a federal distribution of legislative power, where it is typical that the state loses legislative competence to the federation through the application of a federal principle of precedence.

In order to stop the leakage of competence of this kind, the 1951 SGA created a system of double enumeration, i.e., two lists of competences for the exercise of legislative power for the Åland Islands. One list of competences gave legislative power to the Legislative Assembly and another list of competences to the Parliament. Even with double enumeration, new areas of law could not find their place in the explicit substantive competences, which prompted the need to formulate a residual category, a general clause, at the end of both lists of competences. This system was in principle transferred to the current SGA, but the general clauses were made symmetrical so that, on the basis of a similar wording, they can bring about a symmetrical distribution of new legislative matter to either legislature without any of them benefiting from the system. The idea is that this system would also apply in a prospective new autonomy act, which would admittedly be somewhat different in nature due to the planned possibility for the Legislative Assembly to decide through its

20 Draft of 2 July 2021 for the Government's proposal for a new Self-Government Act, <api.hankeikkuna.fi/asiakirjat/43e0520d-248e-4fc6-98f6-77c74e3be669/5f76b164-bfa7-4464-87fd-e056123bdc44/LAUSUNTOPYYNTO_20210706122322.PDF>, visited on 2 June 2022.

own decisions on the transfer of legislative powers from the Parliament to the Legislative Assembly.

It is relatively rare that the general clauses have been used as a basis for the examination of competence. This can be understood to mean that the rather detailed explicit substantive lists of competences work relatively well even in situations where legislative competence is not entirely obvious and given. In the last 30 years, only relatively few legislative matters have arisen which have not been possible to place in the existing substantive matters. The best example here is probably GMO regulation, which undeniably represents a new area of legislation. Most of the opinions on Ålandic laws issued by the sc have therefore been based on the substantive points in the lists of competences, which can be seen as meaning that the explicit enumerations have worked well, perhaps better than anticipated when the current SGA was passed.

The sc has thus had to rely on arguments about the principles of the general clauses in relatively few situations. This has taken place in approximately the same number of situations for both the Legislative Assembly's and the Parliament's competences. On the basis of the general clause of the Legislative Assembly legislative competence has been given with regard to the creation of units within indirect public administration and the establishment of the auditing office as a separate authority under the Legislative Assembly, while Parliament has been given legislative competence based on "its" general clause for GMO. It is possible to argue that the two competences which have been considered to belong to the Legislative Assembly by virtue of "its" general clause are clearer, whereas the question of GMO was genuinely new and created a less clear situation in view of the placement of GMO in either of the two areas of competence. It seems to me that the issue of GMO regulation has been the best example so far of how the assessment and interpretation of jurisdiction should be carried out on the basis of the general clauses. In situations where the general clauses have been used to distribute legislative power between the Legislative Assembly and the Parliament, the sc has maintained the clear dividing line between the powers of the two legislators established by the SGA: the general clauses do not lead to overlap of legislative powers, but legislative powers are distributed to either the Legislative Assembly or the Parliament and remain exclusive to both legislators. In a manner similar to the situation in Canada, the general clauses of the SGA do not introduce a principle of precedence for the national legislature as would be common in federations. This shows that the distribution of competences can be successfully created on a basis other than the traditional federal division of competences.

The sc may sometimes use the general clauses to support placing a subject area among the substantive areas of law mentioned in the lists of competences. This seems to have been the case for the Legislative Assembly in

the case of the fees for exceeding emission rights, while the general clause's support for national competence may have been put forward for drunkenness at sea. It has happened that the SC, without explicit reference to the general clause, has argued along the lines of the tenets of the clauses in such a way that appears to reinforce the placement of a particular subject area within a substantive competence. This is a fairly recent development in the area of data protection and of discrimination. Interestingly, even the Constitutional Law Committee of the Parliament at least once felt compelled to rely on the general clause of the Parliament, but on that occasion, regarding the Lotteries Act, the SC had to step in and explain that the general clause cannot be used in the way that the Constitutional Law Committee intended. At the same time, in one case, the EU referendum in Åland, the SC has probably erred in deciding to apply the Legislative Assembly's general clause when the issue had actually required an amendment of the SGA so that referendums that bind the Legislative Assembly's decision-making power become possible.

Based on the application of the general clauses, it can be concluded at this stage in the life cycle of the current SGA that so far, there are relatively few situations of interpretation and that such issues have not really arisen during the last decade, following the assessment of the legislation on the auditing office. Thus, no completely settled practice can be deduced from the opinions of the SC issued so far, except that the Court stated in its Statement HD 2001:79 concerning the Lotteries Act in a fairly clear way how the classification and interpretation of the objects and matters should take place. In this context, an important interpretation was created which can be regarded as protecting the distribution of competences of the current autonomy arrangement.

Since private law issues do not arise to any great extent within the scope of the Legislative Assembly's competence, it is conceivable that the general clause at the end of the Legislative Assembly's list of competences is very rarely activated with regard to private-law oriented enactments of the Legislative Assembly. As far as the Parliament is concerned, the application of the general clause of the Parliament may be relevant in the field of public law, except in the case of certain typical areas of public law which fall within the legislative competence of the Legislative Assembly, but in particular, private law is an area of competence for the Parliament, so also general criminal law. An outside observer might get the impression that the distribution of competence between the Legislative Assembly and the Parliament does not show a good balance. However, in the light of the above analysis, it is submitted that there is a good balance in the distribution of legislative power through the general clauses: in the key areas of public law (education, social and health care, environment, etc.) where the Legislative Assembly has extensive competences, the

general clause in Section 18(27) of the SGA works in favour of the Legislative Assembly, while the general clause in Section 27(42) of the SGA works in the area of private law in favour of the Parliament, in both cases on the basis of the principles of the SGA. It is also apparent that the nature of the general clauses at the end of each list of competences is such that, in comparison with the subject-specific points of competence, they not only invite more in-depth and general considerations, including the use of a step-by-step procedure for assessing competence, but lead to a more general interpretation of the normative environment of the provisions.