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Iain Cameron[1]

The Influence of European Human Rights Law on National Law

Introduction

I would like to begin by thanking the organizers of the symposium for inviting me. I have had a particular respect for Finnish academic legal discourse, and a particular affection for Helsinki, since I came here for the first time in 1990, as a doctoral student, invited by Matti Pellonpää. Eivind Smith in his lecture has already sketched out many of the broader themes as regards Europeanization of public law. I wish to take up one of these themes on a more concrete level, and look at the influence the European Convention on Human Rights (ECHR) and the case law of the European Court (hereinafter the ”Court” or the ECtHR) has on national legal systems. As will become apparent, I share Eivind Smith’s cautious approach to the use of human rights law as a harmonizing tool. Human rights ”begin at home”. People do not think about their human rights until they are abused, or under threat, by the civil servants whose decisions affect them – police, social workers, teachers etc. It is the national legislature which converts international standards to concrete national norms and guidelines, and provides (or not) the financing which makes it possible for central and local government to take rights seriously. It is the national judges who hold the bureaucracy to the norms and guidelines in question. So, even if we are going to see more rights standard setting at the European level, it is the reception of the standards which is crucial.

I think that the teaching of the subject of human rights in the law curriculum should reflect this, and we certainly try to do this at the Uppsala Law

[1] This written version of my paper largely follows the oral version, delivered at the conference. I have, however, taken the liberty of developing a few points on the basis of the subsequent discussions at the conference.

Faculty. It is when the international standards are filtered into national law – criminal law, procedural law and particularly constitutional/administrative law – that they really begin to mean something. Some academic lawyers think that the international law of human rights is a self-contained discipline. Of course, the international law of human rights has now become so large a subject in its own right that we need some specialists in it. But these specialists, like experts in any area of law (perhaps especially, the subjects of jurisprudence and international law) can quickly lose touch with what ordinary practicing lawyers (advocates, judges, government officials) regard as "the life of the law". This is not to say that I am hostile to theory (then I would be out of a job) or that I consider that the proper purpose of legal research is simply to make practicing lawyers' lives easier (heaven forbid). But human rights are about peoples' everyday relationship with the state, and it is, after all, practicing lawyers who assist these people in their struggles to maintain or obtain rights, as well as the state in limiting, or denying these rights. You have to speak the language of practicing lawyers, and understand their concerns, if you want to get through to them.

näin varmaan, mikä ongelma?

To turn back to the ECHR, while all European states (with the exception of **Byelorussia???**) are bound by the ECHR, and have implemented it in national law, the actual influence it has in the legal system depends upon a number of factors. There are obviously considerable empirical problems involved in trying to go beyond the formal question of whether the ECHR is incorporated in the national legal system and if so, at what level (statutory, constitutional?) to actually "measuring" ECHR influence in the legal culture. Is there a statutory, or constitutional, obligation on the courts and administrative agencies to take the ECtHR case law into account? If so, how operative is this, or is it only on paper? What role does the ECHR really play in the national legislative process?

One can measure the simple number of mentions of ECHR in draft legislation and parliamentary debates, and how often it is referred to in the lower courts (if these are reported) or higher courts, but examining the *significance* of the reference involves analysing the parliamentary debates or cases in question.

From the perspective of government lawyers, in the Justice and Foreign Ministries, it is undoubtedly tempting to reason backwards, and look at how many complaints are made to the ECtHR and how many of these are upheld. On this test, both Finland and Sweden score very well, even if account needs to be taken of the accident of litigation, the degree of aware-

ness of the Convention amongst the legal profession etc. But on this test, the ECHR is alive and well in both the Finnish and Swedish legal orders.

Amongst the factors which I would mention as affecting the influence of the ECHR is the level of economic well-being in the state in question, and the distribution of wealth among the population, the existence, and functioning, of parallel constitutional systems for the protection of rights, the mechanisms in place for ventilating rights concerns in the legislative process and the judicial ”culture” (seeing judges as a sub-group of the national legal culture). Other factors which are relevant are how well the parties' legal counsel identify rights issues and bring them before the courts, the rules of procedural law concerning the degree to which the national courts can and should raise Convention issues of their own motion, the case load of the courts, the position given to international law in the national hierarchy of legal sources, the familiarity of judges with international and comparative law and the role judges have, and see themselves as having in regulating the state. The perceived accessibility, persuasiveness, coherence and ”user-friendliness” of ECtHR judgments are also relevant.

From the perspective of jurisprudence, the relationship between the ECHR and national law gives rise to a number of issues. One particularly interesting question is to what extent ECtHR judgments could be said to penetrate to what Kaarlo Tuori has described as the ”deep structure of the law” in his seminal multilevel approach to the legal system.[2] Academic writing in both Sweden and Finland – which has the crucial role in creating and maintaining the law's ”deep structure” – has certainly not neglected the ECHR. However, views can differ as to whether the Convention – in the relatively short time it has been a formal part of national law in Finland and Sweden – is *central* to rights protection in these countries, or still only peripheral.

From a legal-sociological perspective, a useful study would be an empirical investigation of qualitative data, most suitably interviews of a representative group of judges, prosecutors and lawyers for private parties suing the state, to determine attitudes to the ECHR.

My perspective is, however, that of the international, and public, lawyer and my intention in this lecture is modest. I simply want to sketch out *some* factors relating to the *receptivity of the judiciary* to using the case law of the ECtHR. I will mainly use examples from the Swedish experience of the incorporated ECHR.

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[2] *Kaarlo Tuori*: Critical Legal Positivism, Ashgate, 2002.

Although my topic is limited, underlying it is the broader question of the role the ECtHR *should* have in the *future of European rights protection*. There is a massive overload of the system, with a backlog of over 88,000 allocated cases.[3] The great majority of these cases will eventually be declared inadmissible, as showing no violation of the ECHR. The majority of the cases taken up by the Court are so-called ”repetitive” cases, repeats of fact-situations already found to be in violation of the ECHR. The Court, thus, is spending the great majority of its time on cases of little or no precedent value. The case overload also poses a threat to the quality of the ECtHR's judgments, which is what the value of the institution stands and falls on. Protocol 14, which would allow the Court to make procedural improvements to speed up dealing with applications, is still being blocked by one state, Russia. There are also more judgments which are not being complied with, concerning inter alia Russia. Doubts have been raised about the quality of some of the judges on the Court.

The Court is at a crossroads, and official reports on its future sketch out quite different remedies for dealing with its procedural overload, reflecting also deeper disagreement on its future role.[4] Should or must the Court be reinvented as a constitutional court for Europe, instead of, as it is now, a ”half constitutional half international” body? If so, what added value can it have to the existing constitutional systems for protection, especially bearing in mind the great divergences between European states as regards social and economic conditions (welfare), and in cultural issues? Finally, what role is there for the Court given the increased emphasis being placed on human rights in the EU, requiring, ultimately, the European Court of Jus-

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[3] Until 1 January 2008 the Court presented an overall figure for the number of applications pending before it, including applications at the pre-judicial stage. The older way of presenting statistics would have given a backlog figure of over 100 000 cases. A significant percentage of these uncompleted applications are however disposed of administratively because the applicant fails to submit the properly filled in application form and/or necessary supporting documentation within the prescribed time-limit. The Court has thus decided that the figure of pending cases should henceforth be of decisions ”allocated” to a judicial formation. In 2007, 41 700 cases were allocated, meaning that the backlog is continuing to grow with ca. 14 000 cases were year. Russia is responsible for a quarter of all the pending allocated cases.

[4] See, e.g. Steering Committee for Human Rights (CDDH), Enhancing the control system of the European convention on human rights, and Sustained action to ensure the effectiveness of the implementation of the ECHR at national and European levels, CDDH(2008)008 Add. I and II.

tice to pronounce authoritatively upon the extent of these EU human rights? In this lecture I will do no more than touch upon these larger issues, but in view of the theme of the conference, I will make a few closing comments on the ”added value” of the ECHR in the light of the proposed changes made in the Lisbon treaty to EU protection of human rights.[5]

Factors which limit the impact of the ECHR on judicial culture

Lawyers are by nature conservative creatures, and they are – naturally enough – happiest when they know exactly what the law is. Foreign legal concepts are instinctively shied away from. There is, thus, a degree of in-built passive resistance to reception. Although the incorporated ECHR is not foreign law as such, it is not really familiar either. To begin with, one has to know *when* it is relevant in a case. A comparison can be drawn here with the exercise to be performed by a court when dealing with the so called ”EC objection” – that valid national law should not be applied because it results in a restriction of the free movement of goods which cannot be justified by reference to EC law exceptions. Thomas Wilhemsson memorably described the situation a national judge, unfamiliar with EC law, was faced with when an EC objection was raised as analogous to that being confronted with a jack in the box: one never knows when the pest will next pop up.[6]

The ”ECHR objection” can also involve a feeling of uncertainty for the national judge. And this uncertainty does not end when the objection is made and determined to be not manifestly without foundation. The process of interpretation of judge-made law is rather different from that of most statutory law, where, at least in Finland and Sweden, the travaux préparatoires are easily the most important interpretative source. The travaux préparatoires to the ECHR are largely useless, and rarely referred to. The

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[5] Subsequent to delivery of the lecture, there was a ”no” vote in the June 2008 Irish referendum on ratification of the Lisbon treaty, however, this does not seem to have killed it. At the time of writing up this lecture (July 2008) it seems likely that the Lisbon treaty – with some sort of face-saving exceptions for Ireland – will still enter into force, even if this may be delayed somewhat.

[6] See, e.g. *Thomas Wilhemsson*: General Principles of European Private Law and the Theory of Legal Pluralism, in Cameron I. – Simoni A. (eds), Dealing with integration, Iustus 1996.

ECtHR collected case law (the ECtHR "acquis") consists of thousands of cases, from which can be distilled a large number of principles. Robert Alexy has referred to principles as "optimization requirements".[7] The judge must try to realize these principles by concretizing them in the particular case. The starting point at the abstract level is simple enough, but where do you go from there? The ECHR acquis does not displace the national law. Rather the national law should be applied in the light of the acquis, through the lens of the acquis, by means of the principle of treaty-conform construction. This principle is a form of purposive (or teleological) construction.[8] One then has not simply to *identify* the scope of the law, but actively to *develop* it (something which goes to the constitutional role of the judge, noted further below). As with the EC objection, the issue will come often down to the balancing of interests by means of the proportionality test. But there are two practical differences which weaken somewhat the status of the ECHR. First, ECHR law, unlike EC law, is not hierarchically superior to national law.[9] The incorporated convention has the status the national legislator determines. In both Finland and Sweden the Convention has the status of an ordinary statute. Having said this, in Sweden the legislator has chosen to emphasize that laws and other subordinate norms must not conflict with the Convention, thereby giving it a quasi-constitutional status.[10] Second, there will not usually be the same external pressure to maintain compliance with the ECHR, as compared to EC law. There will rarely be powerful companies in the background ready to defend their commercial interests, and there is no institutional watchdog for the Convention analogous to the EC Commission which can (and frequently does) threaten to bring an action against a recalcitrant state for breach of the EC treaty (Article 226).

Another limiting factor is that the judiciary in both Finland and Sweden is a career judiciary, in contrast to common law judges who are usually appointed after many years as practicing counsel. Swedish judges are not

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[7] See, e.g., *Robert Alexy*: A Theory of Constitutional Rights, Oxford UP, 2002.

[8] See, e.g., *Aharon Barak*: Purposive Interpretation in Law, Princeton UP, 2005.

[9] I should hasten to add, that this is only the position taken by the European Court of Justice.

[10] At the time of incorporation (in statute form) a provision was also added to the constitution (RF 2:23) which lays down that "a law or other regulation shall not be issued in conflict with Sweden's obligations under [the Convention]".

”high profile characters” in the same way that many English and, especially, American judges are. In Sweden, at least, bold interpretations of controversial rights provisions are not a sure way for junior judges to climb the bureaucratic ladder. This is not to say that Swedish judges are not independent, or objective, and certainly not to say that Swedish judges are not as ”good” as English or American judges. But junior judges at least are less openly prepared to stick out. Having said this, this argument cuts both ways: if the senior judiciary genuinely insist on compliance with the Convention, then the junior judiciary will not resist this. Thus in Sweden it is very important for the higher courts to insist upon taking the ECHR seriously, because if they do not do so, the other courts will not.[11] Of course, formal bureaucratic hierarchies, and legal supervision by the Chancellor of Justice, are probably less important than the social control which applies in the Swedish work-place. Speaking as an immigrant in Sweden, I am still struck at how strong the desire seems to be for most people not to stick out in working life. I should refrain from further amateur psychological speculation on this point, tempting though it is to identify supposedly common characteristics for an entire nation of nine million people

One can, of course, argue that the Strasbourg case law is nowadays very easily accessible online, and that, Swedish judges being familiar with English, there is no excuse for not finding the relevant case law. But this underestimates the occasional (or even frequent) lack of clarity in ECtHR case law. The Court has tended to approach the issues raised by cases in a narrow fashion. It has rarely taken the oppor-tunity to elaborate upon the meaning of a particular Convention term, but has up until relatively recently, attempted to limit explicitly its discussion to the case in hand. There is thus a distinction between the role of the Court and that of the ECJ which, through relatively abstract preliminary rulings, deliberately tries to lay down general interpretative guidelines for national courts. This caution showed by the Court is partly because the Court was not intended to act as (and does not – yet – have the legitimacy to act as) a fully-fledged constitutional court. But, more pragmatically, its composition pushes it towards caution. There is of-

[11] Neither Finland nor Sweden applies the principle that lower courts are bound by the judgments of higher courts. Even the case law of the supreme court and supreme administrative court are only persuasive authority, a ”weak obliging source” in Aarnio’s terminology. See, e.g. *Aulis Aarnio*: The rational as reasonable: a treatise on legal justification, Reidel, 1987.

ten room for legitimate disagreement amongst the judges as to whether a case falls within the scope of a right, and if so whether an interference can be justified. To reach a decision on such issues often involves compromise. One of the easiest ways to avoid prolonged discussion on an issue is to keep as closely as possible to the facts of the case at hand. This narrow approach is in one sense correct. The Court is, after all, there to do jus-tice in a particular case.

But it is often no easy business for domestic courts in one state (A) to understand that the Court's case law dealing with, e.g. motor traffic offences in state B, has implications for tax pen-alties in A. And it is clear that the obligation under ECHR Article 1 to "secure" the Convention means that national courts must have take account of ECtHR case law concerning not simply their own state, but other states too. National courts, applying the Convention as part of their domestic law, and faithfully trying to understand what it demands of them, can undoubtedly complain that they are not always being given sufficient generally applicable guidance. One can argue that a national court, faced with unclear or inconsistent ECtHR case law should wait for a judgment on the issue against its own state, or at least a Grand Chamber judgment, one of the main ideas behind the Grand Chamber being to provide coherence in the ECtHR case law. However, this is often not a practicable option. The national court can still find itself in a tight spot. If it refuses to "translate" an existing ECtHR case concerning another state to its own national context and develop the national law to take account of the Strasbourg requirements, then it risks the case going "out of its hands" to Strasbourg (something which no supreme court will want) and a violation being found at a later stage. If, on the other hand, it tries to anticipate a development in Strasbourg it may be too quick to change national law and, when the issue later arises squarely in Strasbourg, may find that it has made an unnecessary change.[12] It should be noted in this respect that the Court does not apply the common law doctrine of obiter dicta, which, at least in theory, allows a subsequent reader – judge or academic – to identify those parts of its reasoning have no precedent effect. A judgment, or even a remark made in it, may accordingly cause considerable discussion in another state, which is faithfully trying to translate that case

[12] This was the case in Norway as regards the ne bis in idem rule and tax surcharges, see, e.g. *J. E. A. Skoghøy*: Norske domstolers lovkontroll i forhold til inkorporerte menneskerettskonvensjoner, Lov og rett, 337–355, 2002.

law to its own national context.[13] I return to this issue in the next section.

Another aspect is the *time* involved in ascertaining exactly what it is that the ECHR requires in a given situation. It should be remembered that at the level of the district court or district administrative court we are speaking about mass production. Most cases will be relatively straightforward, capable of being determined by reference to the text of the law, and if need be by the travaux préparatoires and the case law of the higher courts. Courts at the lowest level can expect no reduction in their case loads merely because the case involves a convention aspect.[14] An academic lawyer may delight in complicated cases, but it is a rare Finnish or Swedish judge who will jump with joy when he/she hears that, while there is no national case law indicating that law X when applied in situation Y may breach the ECHR, there are 25 cases concerning other states on this issue and a third of these are in French. In the circumstances, I find it quite natural if junior judges adopt a publicly skeptical approach to arguments that this or that national law or practice violates the ECHR. I do not find it surprising if the lower courts say: let the Supreme Court or Supreme Administrative Court sort this out. The experience in Sweden is certainly that, in practice, application of the ECtHR case law – at least when it involves reductionist, or restrictive, interpretations of national law – is mainly left to the higher courts.[15]

Up to now I have spoken about ”passive” resistance through unfamiliarity or lack of clarity in judgments. But resistance can also be active, when

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[13] E.g. in Sweden, there have been considerable discussions of the implications of von Hannover v. Germany No 59320/00 24 June 2004 (as regards the balancing between the constitutional protection freedom of expression and the – as yet not constitutionally protected – right of integrity) and MC v. Bulgaria No. 39272/98, 4 December 2003, as regards the alleged need to legislate to so as to make lack of consent an explicit part of the crime of rape.

[14] The position of the ECHR can be constrasted with the position of the Constitution in many European states. Unlike many European states, which have the Kelsenian model of a constitutional court, Finland and Sweden apply a decentralized model of constitutional review: all courts have the power of constitutional review. However, in all states, ECHR issues arise before, and have to be determined by, the ordinary (and administrative) courts, even if in many states, the final word on the incorporated convention may be for the constitutional court.

[15] The implication is that descriptions of the national impact of the Convention which concentrate on the appellate courts can be criticized as not giving a true picture of what is the ordinary ”life of the law”. This was a well-known criticism made by the American realists of the US system of legal education in the 1920´s and 1930's. For a fascinating account of the realist movement's criticisms in this, and other respects, see *Neil Duxbury*: Patterns of American Jurisprudence, Clarendon Press, 1995.

clear Strasbourg case law is rejected because this would involve making unwelcome changes in national law. The legislator or the judges could feel that a negative ECtHR judgment is based on a misunderstanding of national law. French judges have arguably resisted ECtHR judgments requiring changes in the position of the government commissioner in administrative proceedings – something seen as central to maintaining the quality of French procedure.[16]

I certainly think it important not uncritically to accept case law from the ECtHR. Like any court, it has good judgments and bad. A bad judgment is not a problem if it leaves room – as it invariably will do – for adaptions/ameliorations when it is implemented at the national level, either by the national legislator or a national judge applying it to similar fact-situations.[17] In Sweden, in any event, there have been few holy cows which have been touched upon by judgments with the exception of the Gustafsson case,[18] which the state won. I see in any event relatively little evidence of active resistance from either the legislator or the judiciary.[19]

Another factor, already touched upon, can be described as respect for democracy and institutional competence. Democracy is the main principle for steering Western societies. In the Nordic states, it is universally accepted that it is elected politicians who should take the most important decisions in the public sphere. Respect for politicians is – relatively speaking – still reasonably high in Nordic states. Rights are inherently moral and political issues and involve the distribution of scarce societal resources. By attempting to reduce all moral or political controversies to disputes over the

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[16] See *John Bell*: 'Interpretative Resistance' Faced with the Case-law of the Strasbourg Court, 14 European Public Law, 134–142 (2008).

[17] Cf the approach of the Federal German Constitutional Court**,** order of 14 October 2004 – 2 BvR 1481/04.

[18] No. 15573/89, 25 April 1996.

[19] In the late 1980´s changes had to be made to Swedish administrative procedure as a consequence of the right of appeal/review to a court in administrative cases concerning civil rights. See *Iain Cameron*: An Introduction to the ECHR, 5th ed, Iustus, 2006, 90–95. See further, for discussion of the relevant cases, *Matti Pellonpää*: Europeiska människorättskonvention, Talentum, 2007, 364–386. The view was occasionally expressed in academic discussions that the ordinary power of administrative reopening really sufficed, and there was no need to do what the legislator actually did, namely introduce a wholly new type of administrative review. Certainly, substantively speaking it can be questioned whether these changes made more than marginal improvements in Swedish administrative decision-making.

”correct” meaning of a legal right, courts can obviously severely reduce the political room for manoeuver.[20] The pragmatic legal profession in Sweden and Finland knows that there is no ”right” answer to moral questions, and in the circumstances, most people consider that such issues should be largely left to the legislature. The judges in the ECtHR itself are themselves split – sometimes dramatically so – on issues such as abortion and adoption by homosexuals.[21] As regards institutional competence, the legislative process in Sweden is – notwithstanding some deficiencies (mentioned later) – still a good model. It is usually open, relatively long and expert opinions are usually taken properly into account. In the circumstances, judges know that the legislature is almost always in a better position to decide on the need for legal regulation, and what form it should take, compared to the type of ad hoc examinations a court, even a court with time on its hands, is capable of engaging in.[22]

But respect for democracy and institutional competence means that there will be a great temptation for the courts simply to ”buy” the national parliament’s assessment of whether a particular limit on a human right is justified. Here something should be said about judges’ conceptions of their constitutional role. At the risk of some simplification, the view of judges as primarily technicians, not denying, but downplaying their role as law-creators, has until now been strong in Sweden. The courts in both Sweden and Finland have, until recently, had a relatively limited role to play in protecting constitutional rights. The Swedish chapter on constitutional rights was added more or less as an afterthought in 1976. In both states, constitutional rights have traditionally been – and still are – protected primarily by the national legislative process. There is thus no strong judicial tradition of protection of constitutional rights to which the Convention can easily be

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[20] This is a huge subject, and I will content myself with three references: *J. H. Ely*: Democracy and Distrust: A Theory of Judicial Review (Harvard UP, 1980), *Tom Campbell*: Rights: a critical introduction, Routledge, 2006 and *Martti Koskenniemi*: The Effect of Rights on Political Culture, in Alston, P. (ed.), The EU and Human Rights, Oxford, 1999.

[21] See, e.g. Tysiac v. Poland No. 5410/03, 20 March 2007 (abortion) and E.B. v. France, No. 43546/02, 22 January 2008 (homosexual adoption).

[22] The willingness of the British judges to use the incorporated ECHR to hold in check the British parliament’s (over) reaction to terrorist threats has been the subject of academic discussion. See e.g. *Jeffrey Jowell*: Judicial Deference: servility, civility or institutional capacity? (2003) PL 592 and *Conor Gearty*: Principles of Human Rights Adjudication, Oxford, 2004.

”fitted in”. Again with the risk of simplification, this approach has meant in Sweden that constitutional interpretation has been ”bottom-up” interpretation: an administrative authority’s regulations are usually deemed to be in accordance with the government ordinance which is almost invariably deemed to be in accordance with the statute which is hardly ever not deemed to be in accordance with the constitution. This approach may be mainly a result of a pragmatic method of judicial interpretation (concrete specific norms being preferred whenever possible over abstract general norms) itself a product of mass production of cases, but respect for the democratic principle, and institutional competence, certainly buttresses it.

It is difficult to argue that this approach is wrong. As Alf Ross demonstrated, it is not logically necessary to have a court with the power of constitutional review to protect the constitution.[23] And ultimately, if the political process cannot ensure compliance with the constitution, then no court mechanisms will be able to stand long against pressures to limit constitutional rights. But it is easy to take this truth one step further and argue that, if the national legislative process is functioning well, then what is the need for constitutional review at all?

I think, for reasons I will develop more further on, that there can be a need for *some* degree of constitutional review in Sweden and Finland in general, and concerning the incorporated ECHR in particular. The ”respect for the democratic will” argument is definitely valid, but easily be overstated. The will of the majority in any well-functioning system of government is, and should be, subject to all sorts of restraints, legal and political.[24] In fact, bearing in mind the crucial role government departments play in drafting legislation in both Finland and Sweden, one can argue that the power shift – if there is one at all – will be minor, and in practice more from one group of public employees (civil servants) to another (judges).

Having said this, all rights – civil, political, economic, social and cultural – cost money. Rights are thus ultimately decisions on the allocation of scarce public resources. This allocation should be largely – but not exclusively – a matter for the politicians. I therefore accept the *potential* for misuse of the case law of the ECtHR, to short-circuit the necessary political discussions

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[23] See, e.g. *Alf Ross*: Why democracy? Harvard UP, 1952.

[24] Again, this is a huge subject. For a critical treatment, arguing that, historically, well-functioning republican systems have always had the ”counter-vailing” forces balancing the power of the legislature, see *Scott Gordon*: Controlling the State, Harvard UP 2002.

which each state must have on the right substantive (content of right) and procedural (which organ of the state should have the last word) ”balance” to be taken in the issue.[25] But I do not think the Swedish courts' use of the ECHR has in fact constituted an impermissible encroachment of politicians' freedom of action.[26]

Factors which operate to increase the judicial impact of the ECHR

What are the factors which serve to increase the judicial impact of the ECHR in Sweden (and Finland)? The first of these is that it is no longer *possible* to leave the protection of Convention rights *wholly* to the parliament. The ECtHR case-law is extensive. It is easy to miss a case, especially a case concerning another state which nonetheless has implications for one's own state. As already mentioned, both Sweden and Finland – rightly in my view – place the bulk of safeguards at the preventive level. The open nature of the legislative process, and the scope it leaves for expert views, is important. There are also mechanisms designed to identify possible conflicts with the constitution. In Finland, these are the Chancellor of Justice, the Ombudsman, and the constitutional committee, in Sweden these are the Law Council and the committee on the constitution. This is not a protection simply on paper: the ECHR is relevantly frequently mentioned in commission of inquiry reports, in the bills and parliamentary debates.[27]

In the circumstances, this argument that preventive scrutiny is not enough may seem strange. However, a number of points should be made in reply. The first is that the pace of legislation continues to increase. This is partially as a result of the complexities of modern life and partially as a result of EU membership. Moreover, legislation is more fragmented: the time of the great codification projects seems over (at least at the national level). What

[25] For critical views of common law judges' willingness to quote comparative human rights law, see *Christopher McCrudden*: Judicial Comparativism and Human Rights – http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1028703&rec=1&srcabs=963754

[26] I develop this further in EKMR och normprövning, SvJT, 851–861 (2007).

[27] All of this is in line with Committee of Ministers Recommendation (2004) 5 on the verification of the compatibility of draft laws, existing laws and administrative practice with the standards laid down in the European Convention on Human Rights.

is left is tinkering with the details. Another development, related to the first two is that the quality of preparation seems to be decreasing. In Sweden, more laws are being produced on the basis of departmental reports rather than parliamentary/academic commissions of inquiry, or even on summary, and unpublished, departmental studies. The resources the government departments have to devote to investigation, and drafting, of legislation are less: more departmental man-hours have to be devoted nowadays to international negotiations, primarily at EU level.

Moreover, the very fact that there are *several* preventive mechanisms can create a problem. It is a fact of human nature that when you give several people the same job to do, at the same time as giving them a *lot* to do, then everyone will – often or at least sometimes – assume that everyone else is doing it properly, and take their duties more lightly. In Sweden, the committee on the constitution and the Law Council have very limited resources to engage in own investigations. The Law Council occasionally has judges with human rights expertise on it, but more often not. It has no continuity of expertise. Nonetheless, the – on occasion – very summary investigations it makes of the constitutionality of draft legislation (abstract constitutional review) can in practice provide a full protection against subsequent challenge in court proceedings (concrete constitutional review). The judges can easily take the view that if the provision really is unconstitutional, then surely the Law Council would have identified this.[28] As regards the parliamentary preventive mechanisms (the committee on the constitution), this can indeed work well, but where there is political consensus in the committee about the desirability of a particular limitation on human rights, then this will be adopted, even if doubts may be raised by lawyers as to its constitutionality.[29] Moreover, and this is very important, the production of *new*, important cases from the ECtHR is constant. However exhaustive and well-made the analysis made by the government departments, and the preventive mechanisms, these cannot guard against the law, or more likely particular applications of it in concrete situations, being in breach of the ECHR because of later ECtHR cases.

Another reason for the courts not being able totally to rely upon the legislature, or the administration, is the pressures nowadays being placed upon

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[28] This was a factor in the ”Pastor Green” case, NJA 2005, s. 805.

[29] See the Opinion on the Constitution of Finland adopted by the Venice Commission at its 74th plenary session (Venice, 14–15 March 2008), para. 119.

the whole public sector to economize. Finland and Sweden are rich countries. One should not forget the crucial importance of a sound economic base for rights protection. I say to my idealistic students that if they are interested in human rights, they should also be interested in tax law, because the former is dependent upon the latter. Of course this dependency does not mean that only rich countries are able to respect human rights, and certainly not that poor countries should not even try to do so. But it is undoubtedly *easier* for rich countries to respect human rights.

Human rights are not "natural rights". In the hard-headed North, we know that, while the *demand* for human rights may indeed be universal, and timeless, in that voices demanding respect for human rights have been heard in all societies and during all periods of history, the potential to *supply* them depends on special social, economic and political conditions. A system which respects human rights is not the "natural order" of things, but a vulnerable human creation, which will start malfunctioning, or even fail, if we do not continually take it seriously.

Human rights can be seen, in Ronald Dworkin's terminology, as "trumps".[30] But rights to a state of being, or a state of affairs, as Neil MacCormick defines human rights, are complexes of different claims on the state and on other people.[31] As such, they always have to be interpreted. The question of balancing of interests still comes in, at the very least at the level of the applicability (or not) of the right in the concrete situation. Resources are thus not irrelevant in rights discussions, simply that the discussion on allocation of resources is channeled in a different way.

Anyway, for good or ill, all public servants are nowadays under the watchful supervision of economists, who want value for money. Even though they (hopefully) accept that you cannot measure effectiveness of administrative or judicial decision-making in terms only of speed, vague factors – such as justice, privacy, freedom of conscience – are difficult to measure, and inevitably risk being downplayed.

I think that there are few immediate economic threats to ECHR rights in Finland and Sweden. However, we should not be complacent. The underfinancing of the public sector, in particular pressures to economize on local authorities, the main service providers in both countries, mean that economic and social benefits can be, and will be, cut. This can raise issues

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[30] *Ronald Dworkin*: Taking Rights Seriously, Duckworth, 1977.

[31] Cf. *Neil McCormick*: Institutions of Law, Oxford UP, 2007, p. 132.

under Article 8. It is also reasonable to assume that the Article 6 guarantees of access to court to challenge such administrative decisions – when these are decisive for civil rights – will increasingly come into play.[32] Overloading of the administrative courts for this, and other reasons, means that the Article 6 requirements of trial within a reasonable time come under threat.

Another point is that the national courts, even if they might want to do so, *cannot avoid* the job of developing national law in accordance with ECtHR practice. As noted already, ECtHR judgments are often casuistic in nature, keeping closely to the facts of the given case. This is partly for procedural reasons (making it easier to obtain agreement on a majority judgment) but partly built into the Court's function as a half-international, half-constitutional court. This is why the Court deliberately gives a "margin of appreciation" to states.[33] But the margin of appreciation, given out of respect for national sovereignty, paradoxically can make it more difficult for a national court, in a subsequent case, to determine exactly what it must do to avoid breaching the Convention. As already mentioned, there will be situations where a national court will have relatively little guidance as to whether the "Convention objection" forbids, or permits, or obliges, an exception being made to a given law or practice. At the same time, the national court is supposed to (and will want to) decide the case and solve the problem, without having to let it go to Strasbourg.

Just as the Court is increasingly feeling obliged to give certain national legislatures more guidance as to what sort of law reform is necessary,[34]

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[32] Another matter which can be mentioned here is the risk that the minimum standard of the ECHR can be used offensively, to justify cutbacks. The minimum can become the maximum, if the position is taken that the "ECHR places no obstacles to doing this". One Finnish commentator already sees this problem. See *Laura Ervo*: Förhållandet mellan Europadomstolen och nationella domstolar – finländska perspektiv, JFT 2006/4 s. 411. Certainly, at the EU level, the experience so far of Framework Decisions shows the ECHR can easily become the only agreed standard when the EU legislates in criminal law.

[33] A huge subject again. For recent treatments of the issue see *Jukka Viljanen*: The European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law, Acta Universitatis Tamperenis 965, 2003 and *Jonas Christoffersen*: Fair Balance: A study of proportionality, subsidiarity and primarity in the ECHR, academic dissertation, Copenhagen, 2008.

[34] See Res (2004) 3 "on judgments revealing an underlying systemic problem"; which encourages the Court to exercise a more forward-looking "quasi-legislative" competence where it has identified a structural problem. See inter alia Broniowski v. Poland, No. 31443/96, 22 June 2004, Lukenda v. Slovakia, No. 23032/02, 6 October 2005.

there are also indications that the Court is attempt-ing to lay down clearer, uniform standards of interpretation of the Con-vention for domestic courts, even where this involves explicitly departing from previous case law[35] But while I think this is a welcome development, there are still going to be many, many more concrete legal interpretative issues which arise in a national legal system compared to the Strasbourg system.

What should the national court do? As already noted, if it goes beyond what the ECtHR requires, it risks making an unnecessary change. If it does not go far enough, it will be embarrassed in the future. National courts, in any event, should not give their legislature a margin of appreciation, as this risks a ”double” margin of appreciation.[36] The Supreme Court in Sweden has taken different approaches to this issue. On one occasion, it has demanded clear Strasbourg case law indicating that a criminal law arguably requiring self-incrimination breached the Convention.[37] On another, it has considered that the logical consequences of more general Strasbourg case on freedom of expression in religious contexts meant that a conviction for incitement to hatred could not be upheld.[38]

By way of conclusion on this section, it can be said that when it comes to the judicial reception of the ECHR as far as Sweden is concerned, meas-

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[35] For a recent example of an attempt by the Court to give better general guidance (in this case, regarding which disputes involving public employees fall outside of Article 6) see Vilho Eskelinen and Others v. Finland, No. 63235/00, 19 April 2007. This case is an explicit overruling of Pellegrin v. France No. 28541/95, 8 December 1999, which itself was an explicit departure from previous case law. Another factor altering the relationship between the national courts and the ECtHR is the gradual development of a quasi-obligation to re-open national proceedings following a negative judgment in Strasbourg. This is, formally, only at the level of a Committee of Ministers recommendation, Rec (2004) 6 on the improvement of domestic remedies, but the existence of such a remedy can have implications for the damages awarded by the ECtHR in ”just satisfaction”. See, however, the German constitutional court judgment cited above.

[36] See e.g. *Martin Scheinin*: ”one clearly should not take a case decided by the European Court through the application of the [margin of appreciation] doctrine as an authoritative statement that the ECHR does not give grounds for a claim that would extend further. As long as the European Court rests on a margin of appreciation, domestic courts should conduct an independent scrutiny in order to prove themselves worthy of the discretion left to them”. See ”International Human Rights in National Law” in Hanski R. – Suksi M. (eds), An Introduction to the International Protection of Human Rights, 2nd ed, 1999, p. 422.

[37] NJA 2005, s. 407.

[38] NJA 2005, s. 805. The Supreme Court later clarified that the religious context is crucial, upholding convictions for incitement to hatred on the basis of sexual orientation where the religious context was absent (NJA 2005 s. 467).

ured in terms of how often the ECHR is mentioned by the higher courts, the ECHR is more important in Sweden than the rights chapter, chapter 2, of the Instrument of Government.[39] Chapter 2 cannot really be described as a living part of the Swedish judicial culture, and the present commission of inquiry into the Constitution (whose report is due at the end of the year) is expected to make proposals for changes in this regard to ”boost” its profile. Having said this, the published Swedish case law shows that ECHR is ”living” mainly as regards the right to fair trial, Article 6. It is this article which is perceived by the Swedish courts as being most ”operative”, as filling a gap in Swedish rights protection.

Concluding remarks – a continued value for the ECtHR?

In states where the judiciary is, relatively speaking, strong, such as the United States and the United Kingdom, we see a continuous debate on the permissible limits of judicial power, often reflecting a view of politics/law as a ”zero sum game”. For example, in the UK, judges relying upon, and developing, Strasbourg case law on detention of terrorist suspects have been attacked for putting public safety at risk.[40] In the US, the Supreme Court naturally interprets US law, but there has been strong disagreement between judges and academic lawyers on the permissibility of even *looking* at comparative case law (including that of the ECtHR) for guidance in interpreting constitutional rights.[41] Of course, it is easy to exaggerate the political importance of the judiciary (and particularly easy for a lawyer to do so). Even in the United States, it should be remembered that it is not the Supreme Court but Congress and the President which decide the *great*

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[39] *Karin Åhman:* Kartläggning av i vilka fall svenska domstolar tillämpat bestämmelserna i 2 kap. regeringsformen och i Europakonventionen, Uppsala universitet, juridiska institutionen, 2003.

[40] See, e.g. A and others v Secretary of State for the Home Department [2004] UKHL 56, MB v. Secretary of State for the Home Department [2006] EWCA Civ 1140.

[41] Compare Judge Scalia’s dissenting opinion in Lawrence v. Texas 539 U.S. 558 (2003) with *Aharon Barak*: Comparative Law, Originalism and the Role of a Judge in a Democracy: A Reply to Justice Scalia http://www.fulbright.org.il/fileadmin/fulbright/editor/images/news/-documents_for_news/Barak_50th_symposium_speech.doc. This can be seen as yet another battle in the war (referred to by Professor van Caenegem in his lecture) between ”intentionalists” and ”evolutionists”.

majority of the issues regarded as being politically important by the populace.[42]

In Sweden, the ”politics/law” debate is largely absent. Admittedly, the position of the Social Democrats in Sweden is still to keep the courts from encroaching upon what they regard as properly within the political sphere. But there is little *controversy* involved in this. Few Swedish politicians of any political complexion, and for that matter few judges, would disagree with this starting point.

In Sweden (and, I believe, Finland) there is no question of the correctness of the largely subordinate role which is played, and should in the future be played, by the courts in constitutional matters, including the content of rights. Having said this, there has been a discussion in Sweden recently of the power of the ECJ. This has been linked to a traditional Swedish holy cow, the right of the parties in the labour market (employers' associations and trade unions) to determine conditions of work and pay through collective agreement, and without interference from others (the legislature or the courts). The ECJ has come under a lot of attack from certain Social Democrats, sparked off by the preliminary ruling in the ”Vaxholm” case.[43]

I will conclude this lecture with a few remarks on the role the ECtHR can and should play in a future when human rights are a binding part of the constitutive EU treaties and the ECJ is given an explicit role in human rights protection. I would begin with the obvious point that EU legislation is not the same as national legislation, and the texts of directives should not be treated in the same way as national laws. The EU has what political scientists describe as ”output legitimacy”.[44] It is not the legitimacy of the input, the decision-making process, by which the EU should be judged but the end results it achieves. The political compromises in the final legislative product, the regulation, directive or decision, mean that it is usually much vaguer than an equivalent national law, allowing much greater scope for interpretation. The power given to the final interpretative body – the ECJ – is, and must of necessity be, correspondingly greater. This is built into the

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[42] *Frederick Schauer:* Foreword: The Courts Agenda – and the Nation's, 120 Harv. L.R. 5 (2007).

[43] C 341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, 18 December 2007. The legislative change required to implement the judgment is minor, meaning that the criticism directed at the ECJ is more emotional than rational.

[44] *Fritz Scharpfe:* Governing in Europe: Effective and Democratic, Oxford UP, 1999.

system. However, the ECJ is hardly insensitive to its own power. On the contrary. In its preliminary rulings the ECJ nowadays tends deliberately to keep itself on a relatively vague level, allowing the national court considerable freedom of interpretation when the case returns for decision. It does not determine the case in a preliminary ruling (even though, in the past, the specificity of its ruling meant that it occasionally come very close to doing so).

The relationship between the ECJ and national courts on the one hand, and between the ECtHR and the ECJ on the other is complicated, and too large to be dealt with in this short lecture. I will content myself to noting three points, all concerning the power of the ECJ and all following on from the fact that the post-Lisbon Charter on Fundamental Freedoms will obtain a legally binding status. This legal status means that it can (and must) be applied by the ECJ and national courts (when interpreting national law within the scope of EU law).

First, the Charter is supposed to be complementary to national constitutional protection, and is – explicitly – not designed to provide in itself for competence to legislate in the area of human rights.[45] But the history of the EU is one of expansion of legislative competence. We now have an EU Fundamental Rights Agency which is designed to investigate member states' laws to identify gaps in human rights protection. It is a reasonable assumption that FRA reports will lead to pressure to legislate in some areas at least. Some human rights issues now determined at the national level will in the future be determined at the EU level. The ECJ will have the final word on interpretation of these areas. Scharpfe's formulation of the criterion of legitimate EU legislative activity – to keep away from what ordinary people would discuss over the 'kitchen table' – is thereby definitely abandoned. Second, where the issue concerns direct administration (i.e. by an EU institution, such as the Commission, in anti-trust cases, or EUROPOL), the ECJ will not simply give a ruling on how the law should be interpreted, but *determine* the case. Third, following on from the above two points, the judges on the ECJ have – with a few notable exceptions such as the Finnish

[45] Article 6 of the EU treaty would provide that: "1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. 2. The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties."

judge, Allan Rosas – no competence in the area of human rights. This in itself may not be seen as too serious, bearing in mind the extensive expertise they can call on from their assistants, the advocates-general, and the research department of the Court. Admittedly, I can think of at least one case from the Court of First Instance (CFI) where the judges, who I am sure have adequate expertise in the area of competition law, produced a result which would be a disgrace for EU protection of human rights.[46] But, hopefully the case, now pending before the ECJ, will be corrected on appeal. And while there is a lively debate on whether the ECJ really "takes rights seriously"[47] it certainly cannot be accused of deliberately ignoring relevant ECtHR case law.[48] Nonetheless, there is one aspect of the process of decision-making in the ECJ – namely the lack of dissenting opinions – which becomes very much less acceptable when it is applied outside of the field of competition law and in the – essentially contested moral/political areas – of human rights. What seven judges (the standard composition of chambers in complicated cases being thirteen judges) say on any area of EU law will be the *only correct* answer. This is absurd in the area of human rights.

The conclusion from these three points alone is that there is still a need for the ECtHR as a court of appeal from the ECJ. Fortunately, the reform treaty provides for EU ratification of the ECHR.[49] And the Council of Europe and the EU will find some procedural solution to grant the ECtHR jurisdiction.[50] This is not a strange result, putting the ECtHR "above" the ECJ. It is no more "above" the ECJ than it is "above" a national constitutional court.[51]

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[46] Case C-402/05, Yassin Abdullah Kadi vs. Council and Commission (Case T-315/01). Judgment 21 September 2005.

[47] See, e.g. C-112/00, Schmidberger Internationale Transporte und Planzüge, 12 juni 2003

[48] See, e.g. C-94/00, Roquette Frères, REG 2002, I-9100.

[49] Article 6 of the EU treaty would provide that "2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties. 3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law."

[50] Protocol 14 envisages this ratification, but more work needs to be done on the practical arrangements. Protocol 14 is, as already mentioned, being blocked by Russia.

[51] *Matti Pellonpää*: The European Court of Human Rights and the European Union, in Caflisch L., Callewaert J., Liddell R., Mahoney P. and Villiger M. (eds), Liber amicorum Luzius Wildhaber: human rights – Strasbourg views / Droits de l'homme – regards de Strasbourg, N.P. Engel 2007.