

# **The European Convention on Human Rights and the Transformation of the Finnish Fundamental Rights System: The Model of Interpretative Harmonisation and Interaction**

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## 1 Introduction

The European Convention on Human Rights and Fundamental Freedoms (CETS 5)<sup>1</sup> is an international human rights treaty, which has been ratified by 46 Member States<sup>2</sup> of the Council of Europe and thus the human rights of 800 million people - from Iceland in the west to Vladivostok on the Pacific in the east - are guaranteed under the Convention. The European Court of Human Rights (the Court) in Strasbourg is the main supervisory organ. The Court itself speaks about “the Convention as a constitutional instrument of European public order for the protection of individual human beings” and “a multi-lateral treaty operating, subject to Article 56 of the Convention,<sup>3</sup> in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States.”<sup>4</sup>

The structure of the European Human Rights system is ultimately founded on the co-operation between national authorities and the European Court. The European system and national authorities strive towards the same goal – protection of human rights and fundamental freedoms. In light of the current case-law it is obvious that the Strasbourg Court is not anxious to broaden its scope of review and override the position and function of national authorities if this is not absolutely necessary.<sup>5</sup> There is ultimately a strong respect of the

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1 The Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 with Protocol Nos. 1, 4, 6 and 7. The text of the Convention had been amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols are replaced by Protocol No. 11 (CETS No. 155), as of the date of its entry into force on 1 November 1998. As of that date, Protocol No. 9 (CETS No. 140), which entered into force on 1 October 1994, is repealed. Protocol No. 12 (CETS No. 177) was signed 4.11.2000 and entered into force 1.4.2005. Protocol No. 13 (CETS No. 187, concerning the abolition of the death penalty in all circumstances) was signed 3.5.2002 and entered into force 1.7.2003. Finland has ratified also this Protocol, it entered into force 1.3.2005. The newest Protocol 14, amending the control system of the Convention (CETS No. 194, 13.5.2004) is under the ratification process, still 4 ratifications are needed before the Protocol enters into force. (August 2006)

2 There are at the moment 46 Contracting States (August 2006).

3 Article 56 § 1 enables a Contracting State to declare that the Convention shall extend to all or any of the territories for whose international relations that State is responsible.

4 See *Bankovic and others v. Belgium* and 16 NATO countries, (inad dec. by GC 52207/99, 12.12. 2001). para. 80 and the case of *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* (30.6.2005, GC), para. 156. See also earlier judgment in the *Loizidou* case (23.3.1995), para. 75.

5 See e.g. *Wloch v. Poland* (19.10.2000), para. 110; *Lukanov v. Bugaria* (20.3.1997), para. 41. In both cases the Court states the scope of its task “is subject to limits inherent in the logic of the European system of protection”.

established division of competence between the national system and the Strasbourg organs. In recent years a heavy caseload has required the Court to develop new types of solutions like pilot-judgments. However, the pilot-judgment procedure has been used only in a rather limited number of cases.<sup>6</sup>

The contemporary European human rights system with its different national variations has been traditionally studied through comparative studies. One of the best comparative efforts has been *Fundamental Rights in Europe, the ECHR and its Member States, 1950-2000*, edited by Robert Blackburn & Jörg Polakiewicz. Instead of repeating the same approach used in that compilation of the ECHR and its status in Member States, this article concentrates on extending the study on the specific subject of development of general doctrines of human rights law and the interaction between the European and national-level interpretation around this theme from a Finnish perspective.

## 2 The Responsibility of the Member State under the European Convention on Human Rights

The title of my doctoral thesis is *the European Court of Human Rights as a Developer of the General Doctrines of Human Rights Law*.<sup>7</sup> This reflects the view of the ideal role that the Court in Strasbourg should have in the European human rights system. The role of a developer would include not only reacting on a case-by-case basis, but also building up general doctrines, developing the Convention rules and also guiding national authorities so that they interpret the Convention in a proper way. In the *De Haan* case (26.8.1997) Judge van Dijk argued that “when the Court takes too casuistic an approach in its objective-impartiality test, basing distinctions on elements the distinctive character of which is not self-evident, it does not serve legal certainty and fails to give the necessary guidance to the national courts and legislatures.”<sup>8</sup> The opinion refers to a valid aim of giving more general advice in the judgement than just in an individual case [Do not understand the difference]. In my opinion, the active role of the Court is essential also for an effective protection of human rights at the national level.

The development of Finnish fundamental rights doctrine before joining the Council of Europe disclosed the negative effects of isolation. The Finnish system had applied fundamental rights only on the margin of law. Pekka Lämsineva has described aptly that the basic rights doctrine in Finland was concentrated on the protection of property and the possibility of using the

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6 See *Broniowski v. Poland* (28.9.2005, friendly settlement), paras. 34-37.

7 Viljanen, Jukka, *The European Court of Human Rights as a Developer of General Doctrines of Human Rights Law*. University of Tampere, Tampere University Press 2003.

8 *De Haan v. the Netherlands* (26.8.1997), Dissenting opinion of Judge van Dijk, joined by Judge Matscher.

extraordinary procedure<sup>9</sup> made the national doctrine concentrate on a formalistic approach to basic rights. Limits to the national doctrine of fundamental rights were set by the accession to the Convention. Länsineva speaks about the balancing impact of the Convention on the national basic rights doctrine.<sup>10</sup>

This shows how dangerous it was to consider contemporary legal systems in national vacuums without influence of international human rights law. In order to achieve the ideal interactive system, the Convention system should pay more attention to the domestic implementation of judgments and the responsibility of Member States. The Court has not normally considered the effects of its own decisions. However, in the aftermath of *Marckx* (13.6.1979), a new application was filed against Belgium on the same substantive question and the Court indicated more precisely what should be required of the State in order to fulfil its obligations. In the *Vermeire* case (29.11.1991) the Court emphasised that when the State has freedom to choose between different means to comply with the judgment, this does not allow national authorities, including the Courts, to suspend the application of the Convention in a period in-between and just wait for legislative reform to resolve the situation.<sup>11</sup>

Article 46 of the European Convention on Human Rights is one of the key questions related to the responsibility of Member States.

1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

An individual judgment requires various measures to be adopted at the national level. In the case of *Scozzari and Giunta v. Italy* (13.7.2000, para. 249), the Court analysed the obligations under Article 46 and referred to the division of general and individual measures.

“It follows, *inter alia*, that a judgment in which the Court finds a breach imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction, but also to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects.”

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9 Extraordinary procedure refers to a possibility under the Finnish Constitution (Section 73) to enact legislation which is in conflict with the Constitution. Normally the proposal is left in abeyance until a session following the parliamentary elections, where the proposal is adopted by a larger majority (2/3) or the majority of 5/6 decides to declare the proposal urgent and decided by a larger majority (2/3). The current doctrine is to avoid the extraordinary procedure (PeVL 1a/1998 vp. and PeVM 10/1998 vp.).

10 See Länsineva, Pekka, *Perusoikeudet ja varallisuussuhteet*, 2002, p. 54-55.

11 See *Vermeire v. Belgium* (29.11.1991), para. 26.

The Court has continued to apply the principle that national authorities are free to choose the means by which it will discharge its legal obligations. There is no dynamic interpretation in this regard. However, the Court has introduced in several cases new elements to interpretation of obligations derived from Article 46. From the national point of view the question of general measures is one of the interesting developments in the recent Strasbourg case-law.

In the case of *Broniowski v. Poland* (22.6.2004), the Court established principles relating to underlying systemic problems and solving them under Article 46. According to the Court it was inherent in the particular case “that the violation of the applicant's right guaranteed by Article 1 of Protocol No. 1 originated in a widespread problem which resulted from a malfunctioning of Polish legislation and administrative practice and which has affected and remains capable of affecting a large number of persons.” The Court speaks about a general obligation of a Contracting State to solve problems underlying the violations found. When judgments point to structural or general deficiencies in national law, the Contracting States should review and where necessary, set up effective remedies, in order to avoid repetitive cases before the Strasbourg Court.<sup>12</sup>

In the *Broniowski* case, the Court gave a detailed analysis of the Polish situation under review. According to the Court, general measures should include a scheme which offers to those affected redress for the violation identified in the *Broniowski* case. The Court's concern was to facilitate the most speedy and effective resolution of a dysfunction established in national human rights protection. The Court emphasised that once such a defect has been identified, it falls to the national authorities, under the supervision of the Committee of Ministers, to take, retroactively if appropriate, the necessary remedial measures in accordance with the subsidiary character of the Convention, so that the Court does not have to repeat its finding in a lengthy series of comparable cases.<sup>13</sup>

The Court referred later in the friendly settlement judgment of *Broniowski* case (28.9.2005, GC) that this kind of adjudicative approach by the Court to systemic or structural problems in the national legal order has been described as a “pilot-judgment procedure”.<sup>14</sup> One of the relevant factors behind choosing this approach was the growing threat to the Convention system and to the Court's ability to handle its ever increasing caseload that resulted from large numbers of repetitive cases deriving from, among other things, the same structural or systemic problem. Pilot-judgment is mentioned also in two later judgments, namely the cases of *Hutten-Czapska v. Poland* (19.6.2006, GC) and *Sejdovic v. Italy* (1.3.2006, GC).

In the *Hutten-Czapska* case, the Government argued that the case was not applicable for the pilot judgment procedure. The Grand Chamber disagreed and considered that also in this case “the Court's assessment of the situation

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12 *Broniowski v. Poland*, (22.6.2004, GC), paras. 192-193.

13 *Broniowski v. Poland*, (22.6.2004, GC), paras. 193-194.

14 *Broniowski v. Poland* (28.9.2005, friendly settlement), paras. 34-37.

complained of in a “pilot” case necessarily extends beyond the sole interests of the individual applicant and requires it to examine that case also from the perspective of the general measures that need to be taken in the interest of other potentially affected persons”. It was for Poland to secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords, including their entitlement to derive profit from their property, and the general interest of the community.<sup>15</sup>

The emphasis on government responsibility has been one of the key issues in the reform of the Convention’s control system. The pilot-judgment procedure does not provide a sufficient mechanism to reduce fundamentally the number of applications before the European Court<sup>16</sup>, although it is an important addition to measures assisting Member States to redress a systematic problem. Under Protocol 14 (CETS 194, 13.5.2004)<sup>17</sup>, there are several new features which aim at improving protection of the Convention provisions at the national level. The aim of the Protocol is to make the supervisory system more efficient. The Court has a more important role regarding the enforcement of its judgments. First among the new additions to the current system is that the Committee of Ministers can refer the question regarding interpretation of the judgment back to the Court. Secondly the Committee of Ministers can refer to the Court the question whether the Contracting Party has failed to fulfil its obligations. These decisions over referral require a majority of two-thirds of the representatives entitled to sit on the Committee of Ministers.

The explanatory report of Protocol 14 refers to the fact that rapid and adequate execution has, of course, an effect on the influx of new cases: the more rapidly general measures are taken by States Parties to execute judgments which point to a structural problem, the fewer repetitive applications there will be. The report’s basic idea is reminiscent of the principle of subsidiarity. Protection is most effective at the national level. According to the report<sup>18</sup> “[t]he responsibility of national authorities in this area must be reaffirmed and the capacity of national legal systems to prevent and redress violations must be reinforced. States have a duty to monitor the conformity of their legislation and administrative practice with the requirements of the Convention and the Court’s case-law.” The report provides a check list for every contracting state:

The national level has to concentrate on ensuring that national laws are compatible with the Convention.

The national authorities have to make findings of violations and remedy them.

15 *Hutten-Czapska v. Poland*, (19.6.2006), paras. 238-239.

16 In 2005: the Court received 41,510 applications, made 28,648 decisions, delivered 1,105 judgments (Survey of Activities 2005).

17 Protocol 14 of the Convention, amending the control system of the Convention, has not yet been ratified by all the Member States. Still Russia has to ratify the Protocol before it enters into force. (October 2006).

18 See Explanatory Report, para. 15. Internet: ["conventions.coe.int/Treaty/EN/Reports/Html/194.htm"](http://conventions.coe.int/Treaty/EN/Reports/Html/194.htm).

The national authorities have to make well-reasoned domestic judgments.

The idea is simply to remove some of the current work load at the Strasbourg level and address the problems at the national level. Enforcement of this aim requires a new more responsible approach of the national authorities to human rights obligations. The Protocol also requires that the European Court of Human Rights be prepared to determine more precisely what measures are needed to ensure compatibility with the Convention.

What has not been suggested explicitly in this new Protocol and its travaux préparatoires and what should be inherent in it, are reforms at the doctrinal level. Behind structural problems and thus behind the existing caseloads are logical difficulties to adopt a correct approach to interpretation at the national level. Instead of using a purely case-by-case method, the national authorities have to apply law in accordance with the general principles of human rights law derived from the case-law. "The capacity of national legal systems to prevent and redress violations" does not only imply strict scrutiny and a human rights friendly interpretation in courts and other authorities, it also requires effective control from the national legislator and readiness to take European case-law seriously throughout the legislative process.

### **3 Finland and the European Convention on Human Rights**

#### ***3.1 Implementation of the Convention and the Status of the Treaty***

Finland joined the European Convention on Human Rights after becoming a member of the Council of Europe in 1989. Finland ratified the treaty 10.5.1990. The Convention has been incorporated into Finnish law by an Act of Parliament with the status of ordinary law, meaning that it is part of the Finnish legal order.<sup>19</sup> The treaty provisions are in force with the status of a Parliamentary Act in respect of the parts which are of a legislative nature. This obviously requires that the treaty provisions are to be regarded in the practical application of law. However, the European Convention does not have a higher hierarchical status than normal legislation. But most importantly the Constitutional Law Committee of the Parliament emphasized in its opinion (PeVL 2/1990 vp) that in interpretative situations a human rights friendly option should be chosen.<sup>20</sup> This

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19 The current incorporation procedure described in Section 95 of the Finnish Constitution (731/1999): Bringing into force international obligations.

The provisions of treaties and other international obligations, in so far as they are of a legislative nature, are brought into force by an Act. Otherwise, international obligations are brought into force by a Decree issued by the President of the Republic.

A Government bill for bringing into force an international obligation is considered in accordance with the ordinary legislative procedure pertaining to an Act. However, if the proposal concerns the Constitution or a change to the national territory, the Parliament shall adopt it, without leaving it in abeyance, by a decision supported by at least two-thirds of the votes cast.

20 Opinion of the Constitutional Law Committee PeVL 2/1990 vp., p. 3 and similarly Report of the Constitutional Law Committee PeVM 25/ 1994 vp., p. 7. See more about the status of

phrase establishing the basic principle of human rights friendly interpretation is the foundation of the Finnish doctrine of human rights law and is therefore absolutely essential in order to understand the fundamental change of Finnish law from May 1990 onwards.

The application of this human rights friendly approach is evident not just in the legislative phase but also in Finnish case-law. The Finnish Supreme Courts – Supreme Court and Supreme Administrative Court – have taken a number of landmark decisions related to the European Convention on Human Rights and its application within the national legal system. These decisions have been essential in the transformation of Finnish legal culture. In the case of KKO 1993:19 reference was made to Article 6.3b of the Convention. The Supreme Court determined that the Convention and the CP-Covenant are part of the law of the land (“voimassa olevan oikeuden osana”) and the lower court should have ensured the defendant’s minimum rights provided for by these international treaties. Nor has the Supreme Court hesitated to use more elaborate references to the Convention and the Strasbourg case-law. These can be found e.g. in the cases of KKO 1994:26 and KKO 1995:7. In the case of KKO 1994:26 the cases of *Feldbrugge* (29.5.1986) and *Kamasinski* (19.12.1989) are mentioned. In the case of KKO 1995:7 the Supreme Court referred to the cases of *Pakelli* (25.4.1983), *Monnell and Morris* (28.3.1990), *Granger* (24.5.1991) and *Quaranta* (24.5.1991). The so-called basic (or human) rights friendly approach is also mentioned by the Supreme Administrative Court (*korkein hallinto-oikeus*). In the case of KHO 2000:63 (27.11.2000, T 3118), the Supreme Administrative Court considered that Section 22 of the Finnish Constitution<sup>21</sup> imposes an obligation for the national courts to apply law in a basic rights friendly manner. Thus within just a few years the contemporary European human rights culture had made its mark on the Finnish legal system.<sup>22</sup> The detailed analysis of the domestic jurisprudence will be examined later in this article.

The status of the Convention has developed from “a normal statute” into a more effective position in the Finnish legal order. Contrary to the normal principle of *lex posterior*, the principle of presumption has been approved by the majority of legal scholars regarding the situation where a later statute would supersede the Convention. According to the principle of presumption it would be inconsistent with the idea of a human rights friendly interpretation, if a later domestic statute were to be in conflict with the Convention and a parliament knowingly violated rights protected under the Convention. Judge Pellonpää, for example, has emphasised that a mechanistic application of the *lex posterior* principle would be in conflict with prevailing knowledge.<sup>23</sup>

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human rights treaties in Finland in Scheinin, Martin, *Finland*, in *International Human Rights Norms in the Nordic and Baltic Countries*, ed. by Martin Scheinin, 1996 pp. 257-259.

21 Section 22 of the Finnish Constitution: Protection of basic rights and liberties. The public authorities shall guarantee the observance of basic rights and liberties and human rights.

22 See more about the early Finnish case-law in Scheinin, Martin 1996, pp. 264-272.

23 Pellonpää, *Euroopan ihmisoikeussopimus*, 4 ed., 2005, pp. 60–61.



The Constitutional Law Committee has also strongly advocated the role of the Strasbourg case-law. In the recent reports related to incorporation of new ECHR Protocols, the Committee has stated that “the detailed content and scope of obligations derived from the Protocol will ultimately be determined through the practice of the European Court of Human Rights”.<sup>24</sup> In 2006 (PeVM 2/2006 vp, concerning incorporation of Protocol 14) the Committee emphasised the importance of a clear, consistent and foremost human rights friendly interpretation. The Committee also stated that the reform of the control system emphasises the responsibility of the contracting states and the primacy of national supervisory mechanisms concerning the protection of fundamental and human rights.<sup>25</sup>

### 3.2 *The Finnish Case-Law and the Strasbourg Influence*

The first Finnish judgments related to the European Convention were connected to fair trial under Article 6 of the Convention. It meant that questions were related to evidentiary rules, public hearings, pre-trial proceedings, unfairness and biased compositions of the national authorities. The spectrum of cases has widened in recent years. The question of the limits of freedom of expression has been under constant review before the Supreme Court. The complex issues of child care cases have also been often under discussion both before the national administrative courts and in Strasbourg.

The largest category of judgments against Finland relates to the excessive length of domestic proceedings.<sup>26</sup> The case of *Kangasluoma v. Finland* (20.1.2004) is one of the precedents concerning this problem. The case-law clearly refers to a need for individual and general measures. There is evidence of an attempt to solve the current incompatibility between the domestic application of law and the European Convention on Human Rights. The Finnish Supreme Court has reduced the sentencing in a couple of cases due to lengthy proceedings. In the case of *KKO:2005:73*, the Supreme Court reduced the sentence in the white-collar crime case as a result of the excessive length of the proceedings. The Supreme Court referred to the cases of *Kangasluoma*, *Pietiläinen v. Finland* (5.11.2002), *Beck v. Norway* (26.6.2001) and *Kudla v. Poland* (26.10.2000, GC).<sup>27</sup> A similar type of reduction of the punishment was also decided in the case of *KKO:2006:33*. The Supreme Court reduced the

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24 Report of the Constitutional Law Committee PeVM 4/2004 vp, p. 2.

25 Report of the Constitutional Law Committee PeVM 2/2006 vp, p. 2.

26 The excessive length of proceedings has been found e.g. in the Finnish cases of *Hagert* (17.1.2006); *Kajas* (7.3.2006); *Kangasluoma* (20.1.2004); *Kukkola* (15.11.2005), *Lehtinen* (No. 1) (13.9.2005) and (No. 2) (8.6.2006); *Lehtonen* (13.6.2006); *Mattila* (23.5.2006); *Pietiläinen* (5.11.2002); *Pitkänen* (9.3.2004), *Ruoho* (13.12.2005); *T. and others* (13.12.2005); *T.K. and S.E.* (31.5.2005) and *Turkiye is Bankasi* (18.6.2002).

27 See *Lehtinen v. Finland* (No. 2) (8.6.2006), para. 24, the government referred also to the same precedent made by the Supreme Court.

sentence rendered by the Court of Appeal for malfeasance and the sentences of both defendants were waived.

Article 6 has also been applied in cases not related to the length of proceedings. There are many examples of Strasbourg case-law related to the principle of equality of arms, which requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent. In the case of *M.S. v. Finland* (22.6.2005), the Court found “that respect for the right to a fair trial, guaranteed by Article 6 § 1 of the Convention, required that the applicant be informed that the Court of Appeal had received the letter of 26 November 1996 from the applicant’s ex-wife and that he be given the opportunity to comment on it”. The Court also noted that on 31 August 2004 the Finnish Supreme Court has reached a similar conclusion regarding the parties’ right to proper participation in the proceedings. The Supreme Court issued a precedent on 31 August 2004 concerning the Court of Appeal’s obligation to communicate to the parties a statement invited on the Court of Appeal’s own motion (KKO 2004:79). In this precedent, the Court stated that “the court decision is based on only such files which have been available to the parties of the legal proceedings and which they have also had the opportunity to examine.”<sup>28</sup>

The Court proceedings have also been under examination in relation to the right to private life (Art. 8). The famous judgment *Z. v. Finland* (25.2.1997) led to a re-opening of a confidentiality order before Finnish courts. The applicant’s HIV status would have become public due to publication of the court transcripts related to criminal proceedings against her former husband before the Court of Appeal. The Supreme Court quashed a judgment of a Court of Appeal (10.12.1993) and City Court’s decision (6.5.1992) that the case documents should remain confidential for a period of ten years. The Supreme Court decided (KKO 1998:33) that confidentiality of all case documents was extended to 40 years. The previous judgment was to be based on a manifestly false interpretation of law. This was the first attempt to resolve the problem related to actual violation by concrete individual measures. This exercise involved also the Finnish ombudsman system. The re-opening of the case was based on the petition to reverse the impugned judgment and this petition was made by the Deputy Chancellor of Justice. The model of *ex officio* involvement by authorities is based on the idea that it should not be merely the applicant’s responsibility to rectify mistakes that are basically caused by national authorities. There are no similar examples of the reversal of the judgments in the Finnish cases.<sup>29</sup>

The Strasbourg Organ’s decisions have led to other ways of redressing the problem. In the Committee of Ministers Report of general measures four other cases are mentioned: *Ollila*, *Kerojärvi*, *Raninen* and *Hokkanen*. The measures

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<sup>28</sup> *M.S. v. Finland* (22.6.2006), para. 22.

<sup>29</sup> The execution of judgments is collected in Committee of Ministers document: List of Individual Measures Adopted, H/Exec(2006)2. Updated April 2006. “[www.coe.int/t/e/human\\_rights/execution/H-Exec\(2006\)2\\_IM\\_960e.doc](http://www.coe.int/t/e/human_rights/execution/H-Exec(2006)2_IM_960e.doc)”.

are not concrete in every case. In the Hokkanen case the government refers to the basic principle developed by domestic jurisprudence concerning the Convention's direct effect. Two Supreme Court decisions are mentioned in this regard (KKO 1992:73; KKO 1995:95). Secondly the government has referred to the seminar on custody, right to access and protection of children where the emphasis was on avoiding situations similar to Hokkanen. The Government also noted a legislative amendment, governing the execution of decisions in cases regarding child custody and access, which entered into force in December 1996. According to the Government, the Hokkanen case had been taken into account in the elaboration of the new law so as to ensure compliance therewith.<sup>30</sup> Similar references to new legislation can be found in relation to the Ollila case,<sup>31</sup> where the case led to a new section 35a of the 1898 Guardianship Act. In the Kerojärvi case (19.7.1995) the general measures included an adoption of new rules of procedure for the Insurance Court.<sup>32</sup>

The Alien Act is one of the fields of law that most often refers to international human rights treaties. The Act should be applied in accordance with international treaty obligations (Section 1 of Aliens Act 301/2004). Several decisions were already made in the early 1990s where a reference was made to the European Convention and especially Article 8 of the Convention.<sup>33</sup> Typical of these decisions has been to keep the argumentation directed towards comprehensive examination under factors relevant to the application of the Aliens Act rather than trying to make arguments based on the Strasbourg case-law. One of the most important Strasbourg judgments is the case of *N. v. Finland* (26.7.2005). It is the first Finnish case where the violation of Article 3 was found. The execution of this judgment ultimately requires both individual and general measures. The expulsion of the applicant to the Democratic Republic of Congo would constitute a violation of Article 3. At the moment no specific measure has been taken although the Finnish government has committed itself to take both individual and general measures. However, this case clearly reveals the problematic approach of administrative procedure. The conflict between the views of national authorities and the UNHCR (United Nations High Commissioner for Refugees) reports was one of the issues relevant to the ruling. The European Court based its assessment on the expert reports by the UNHCR while the Finnish authorities did not put such an emphasis on the reports by that agency. Recent news reports seem to reveal that a similar course of action can be seen in an attempt to expel people to Somalia. Also in this instance the

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30 The law on execution of decisions related to care and access to the child (619/1996) (Laki lapsen huoltoon ja tapaamisoikeutta koskevan päätöksen täytäntöönpanosta)

31 *Ollila v. Finland*. Report by European Commission of Human Rights (30.6.1993, Appl. 18969/91). The Ollila case was not decided by the Court but according to the old system in the Committee of Ministers.

32 The execution of judgments is collected in Committee of Ministers document: List of General Measures Adopted, H/Exec(2006)1. Updated May 2006. "[www.coe.int/t/e/human\\_rights/execution/H-Exec\(2006\)1\\_GM\\_960e.doc](http://www.coe.int/t/e/human_rights/execution/H-Exec(2006)1_GM_960e.doc)".

33 See e.g. KHO:1992-A-63, KHO:1993-A-29 and KHO:1995-A-33.

authorities for alien affairs have overlooked the results of UNHCR reports over the unsafe situation in Somalia.<sup>34</sup>

An example of the improvement of Finnish case-law is the recent decision by the Supreme Administrative Court KHO 2006:50. The Supreme Administrative Court decided in favour of Iranian-Kurdish applicants and revoked the decision to turn them back and gave them a residence permit based on their need for protection. In its comprehensive review, the Supreme Administrative Court took into account all relevant circumstances and the human rights situation in the country of origin. The applicants' situation was such that it was not inconceivable that they would face inhuman treatment in Iran. However, unfortunately, as is typical of the Supreme Administrative Court, there is no detailed analysis of the Strasbourg case-law.

In recent years the Supreme Court has several times developed its own interpretation of the national legal system with a close linking with international sources. In certain areas there have been apparent difficulties integrating the Strasbourg case-law fully into the national case-law. The problematic examples are related to interpretation of the freedom of expression and other rights protected under the Convention. The Finnish Supreme Court and lower courts have struggled to balance in their judgments the freedom of expression and conflicting rights e.g. the right to private life. In the Strasbourg case-law there are as many as five cases in which the Finnish court decisions are considered to be incompatible with Article 10 of the Convention: Nikula (21.3.2002), Selistö (16.11.2004), Karhuvaara and Iltalehti (16.11.2004), Goussev and Marenk (17.1.2006) and Soini and others (17.1.2006). There are several reasons behind this worrying development. Some of the breaches have been related to the unforeseeability of the law rather than erroneous interpretation of the law by national courts.<sup>35</sup>

In the case of Karhuvaara and Iltalehti, the problem was connected to a rigid interpretation of the legislation giving a special protection to members of parliament. The national courts interpreted legislation in such a manner that no real test was performed of the necessity of restriction. In the Selistö case, the newspaper articles were not recognised as a part of public debate over the health care system and the safety of patients. Thus, the public debate link, which should

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34 The European Court of Human Rights decided that deportation of the applicant to Somalia in the case of *Ahmed v. Austria*, 17.12.1996 would breach Article 3 of the Convention. The Court has declared admissible an application against Sweden regarding a similar issue, expulsion to either Somalia or Kenya: *Mohammed Ibrahim Ahmed v. Sweden*, 9886/05, dec. admissibility 16.5.2006. See also *KHO 2005:35* where the Supreme Administrative Court considered the situation in Somalia to be insecure and that the applicant could face inhuman treatment if returned to Somalia.

35 The problem with cases of *Goussev and Marenk v. Finland* (17.1.2006) and *Soini and others v. Finland* (17.1.2006) were related to whether the restriction was prescribed by law. The Court considered that it was not clear as to the circumstances in which the police could seize material which was potentially defamatory during a search which was being carried out for the purposes of finding evidence of another suspected crime and in that regard the legal situation did not provide the foreseeability required by Article 10.

have automatically caused the scale to tip towards the freedom of expression in the balancing process, did not influence the equation. The domestic courts followed the wrong path by analysing the journalistic styles used by the applicant. However, the clear message from the Strasbourg case-law is that “methods of objective and balanced reporting may vary considerably, depending among other things on the medium in question; it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted by journalists.”<sup>36</sup>

Three recent Supreme Court judgments give a comprehensive picture of the current case-law. The Supreme Court has based its examination on the Strasbourg case-law in all three cases. The judgment KKO 2005:82 concerned a newspaper article revealing that a presidential campaign advisor was having an extra-marital affair with a television journalist’s former spouse. The Supreme Court considered that this article had breached the right to private life of the campaign advisor. The Supreme Court referred mainly to cases *Pedersen and Baadsgaard v. Denmark* (17.12.2004) and *Von Hannover v. Germany* (24.6.2004) in its argumentation. According to the Supreme Court, the disclosure of the advisor’s extra-marital affair in the media was not justifiable from the standpoint of people’s rights to receive information or important public debate. The judgment KKO 2005:136 concerned publication of the name of a person who was convicted of assault. The Supreme Court used several cases e.g. *Sidabras and Dziautas v. Lithuania* (27.7.2004) contributing to the general doctrine on issues related to publication of sentenced persons’ personal information. The Supreme Court noted that it was to be expected in a case of serious offences that a convicted person’s name is published. Thus the complainant had to be prepared that his name would become public in one way or another. According to the Supreme Court, the complainant did not have the right to receive compensation for the disclosure of his name. Finally, the judgment KKO 2006:20 develops the doctrine by referring to the *Selistö* case (16.11.2004) and the basic argument is once again related to the question of the relation to public debate. According to the newspaper article, the wife of a leading district prosecutor was suspected of an excise tax offence. The story’s news value was based on the status of the complainant as a district prosecutor and therefore there existed an important public interest to publish the news. There was no violation of the complainant’s right to private life.

Other interesting freedom of expression cases have been related to the protection of journalistic sources. The Finnish Supreme Court (KKO:2004:30) used in an exemplary manner the Strasbourg case-law to create relevant general principles on issues concerning the protection of journalistic sources. The publisher was ordered by lower courts to reveal the author of a book describing events in a Finnish mobile operator, Sonera. However, the Supreme Court overturned this decision and the publisher was allowed to refuse to disclose his sources. The Court referred to the cases of *Goodwin v. the United Kingdom* (27.3.1996) and *Roemen and Schmit v. Luxembourg* (25.2.2003) and the Court’s

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36 See *Bergens Tidende and others v. Norway* (2.5.2000), para. 57.

interpretation of the importance protecting sources in relation to the freedom of expression. The Supreme Court also referred to interpretation in the Müller case (24.5.1988) that expression is protected regardless of the medium or form of expression.

However, the previous problems to interpret the freedom of expression and its relation to other rights and freedoms protected by the Convention are apparent in recent decisions by the Deputy Ombudsman. In his decisions (EOAK 2296/2005, 31.5.2006 and 3851/2005, 29.5.2006), the Deputy Ombudsman took an unexpected view that it would be against the freedom of religion to send religious material to those who are not members of the same religion. This view seems to be based on the interpretation that religious expression does not enjoy a protection similar to that which applies under Article 10 regarding other forms of expression. The Deputy Ombudsman does not balance the freedom of expression and the rights of others in compliance with the Strasbourg case-law. The European Court has approved certain limitations on religious advertisement in the case *Murphy v. Ireland* (10.7.2003). However, this authorized prohibition was only on broadcasting and the Court specifically notes the limited scope and also noted that such a limitation did not extend to print media and it was also related to the country-specific environment of Ireland. The Court mentioned that “there is no uniform European conception of the requirements of “the protection of the rights of others” in relation to attacks on their religious convictions”. It was also expressed that Article 10 does not, as such, envisage that an individual is to be protected from exposure to a religious view simply because it is not his or her own. The question before the Court was “therefore whether a prohibition of a certain type (advertising) of expression (religious) through a particular means (the broadcast media) can be justifiably prohibited in the particular circumstances of the case.”<sup>37</sup> The Court’s interpretation ultimately requires that national authorities must take into consideration all relevant circumstances and balance the protected right against the public interest.

In the field of public care of children, the Strasbourg Court has rendered several important decisions regarding Finland. These cases show how difficult it is to influence the specific legal cultures and transform the applied doctrine towards the European one. Especially the case of *K. and T. v. Finland* (12.7.2001, GC) indicated problems in the Finnish public care system. The Court maintained that “the taking of a new-born baby into public care at the moment of its birth is an extremely harsh measure”, it also put the stress on the degree of the measure. There are severe measures and more lenient measures and as the degree of a measure becomes more serious it naturally also means that the reasons given for it must be more persuasive. The Court required “extraordinarily compelling reasons”.

The Court introduces a proportionality test which was stricter than normal in the field of public care. The Court made clear that more lenient measures (“less intrusive interference”) could have been used or at least this should have been

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<sup>37</sup> *Murphy v. Ireland* (10.7.2003), paras. 67 and 72.

examined by the competent authorities. The Court pointed out that the Government had not suggested that other possible ways of protecting the newborn baby J. from the risk of physical harm from the mother were even considered. The issuing of the emergency care order and the method of implementing this order were disproportionate (although the Court accepts that some precautionary measures to protect the child could have been considered to be necessary) and the actual interference with the applicants' right to respect for family life was not necessary in a democratic society.<sup>38</sup> The Court also found a violation of Article 8 of the Convention as a result of the authorities' failure to take sufficient steps directed towards a possible reunification of the applicants' family regardless of any evidence of a positive improvement in the applicants' situation. The Court found striking the exceptionally firm negative attitude of the authorities. According to the Grand Chamber, "[t]he minimum to be expected of the authorities was to examine the situation anew from time to time to see whether there has been any improvement in the family's situation."<sup>39</sup>

The subsequent case-law indicates that in the Finnish public care system there are still practices which are not in accordance with the Convention. The Court has found violations in cases of K.A. (14.1.2003) and R. (30.5.2006). The problems seem to focus on the nature of the public care and whether it is a temporary or permanent measure. In the recent case of R. v. Finland, the Court reiterated the guiding principle whereby a care order should be regarded as a temporary measure, to be discontinued as soon as circumstances permit, and that any measures implementing temporary care should be consistent with the ultimate aim of reuniting the natural parent and the child. The Court also referred to the positive duty to take measures to facilitate family reunification as soon as reasonably feasible will begin to weigh on the competent authorities with progressively increasing force as from the commencement of the period of care, subject always to its being balanced against the duty to consider the best interests of the child.<sup>40</sup> The Court considered that authorities had failed to take sufficient steps towards possible reunification. Once again the Court referred to the negative attitude among the authorities and their ultimate failure to follow the above-mentioned general principles established by the Court in its previous case-law.

"The picture transpiring from the facts of the case is one of determination on the part of the local social welfare authority not to consider the reunification of the applicant and his son as a serious option, instead firmly proceeding from a presumption that the boy would be in need of long term public care by substitute carers".<sup>41</sup>

The case-law seems to point to the doctrinal problem at the national level. It is about failing to apply "the guiding principle" established already in the Olsson

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38 See *K. and T. v. Finland* (12.7.2001), para. 168.

39 See *K. and T. v. Finland* (12.7.2001), para. 179.

40 See *R. v. Finland* (30.5.2006), para. 89.

41 See *R. v. Finland* (30.5.2006), para. 93.

(No 1) case (24.3.1988) which emphasises the temporary nature of a care order and that the reunification of natural parents and child should be an ultimate aim.<sup>42</sup> There has been some development in relation to the public care doctrine in light of the case of KHO 2004:121. The Supreme Administrative Court considered that social welfare authorities had failed to take more lenient measures than the care order. The decision was quashed and the case was sent back to the social welfare authorities for review of the case. However, a conflict between the temporary nature of a care order, required by the Convention and also recognised by the Child Welfare Act Section 20, and a long term placement which forms the administrative practice of the social welfare authorities, seems to exist. The basic principle derived from the Strasbourg case-law is that despite the formulation of the Child Welfare Act which refers to the principle of the best interest of a child, the decision to issue a care order entails a difficult balancing process and not an automatic presumption towards long duration public care by substitute carers.<sup>43</sup>

In his theory, Kaarlo Tuori has emphasised the slow transformation of legal culture. That observation is also relevant to the topic related to the European Convention on Human Rights. When Tuori, for example, examines the role of a national judge applying European Community Law, he refers to doubts whether a national judge is able to assimilate with the legal culture specific to EC Law. If a national legal culture differs from EC legal culture, the judge cannot simply temporarily switch off his own national legal culture and replace it with a legal culture specific to EC Law.<sup>44</sup> In the field of the Convention the national courts can not switch off their own legal culture but rather apply it in light of international human rights law.

The described practice of the Supreme Court and Supreme Administrative Court can be considered to form a relatively accurate picture of the Finnish application of the Convention rules and case-law before national courts. The early cases provided an introduction to international case-law. Some of the recent cases, like KKO 2006:20, present already a more complete model where the case-law is used in developing national doctrine. But at the same time there are vivid examples, like the Deputy Ombudsman's decisions concerning religious freedom of expression, of erroneous interpretation giving the impression that Finnish authorities have not fully adopted Strasbourg doctrines, like finding a balance between the rights of the individual and general interests

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42 *See Olsson v. Sweden* (No. 1) (24.3.1988), para. 81.

43 Care in accordance with Section 16 of the Child Welfare Act terminates when the child attains the age of 18 or marries. Public care may be terminated earlier where the preconditions for the termination of care exist. According to Section 20 of the Child Welfare Act, the Social Welfare Board must discharge a child from care when there is no longer any need for the care or substitute placement referred to in Section 16, unless such discharge is clearly contrary to the best interests of the child.

44 *See Tuori, Kaarlo, Critical Legal Positivism*. Ashgate 2002, p. 208. Tuori maintains that the internalisation of the legal culture plays an essential role in the formation of the lawyer's habitus.



and testing the necessity of a restriction, which are essential to the Convention. This means that the European Convention's influence has started to penetrate or (as Tuori describes) sediment into the deeper levels of law. However, this development has not been accomplished but still requires guidance from Strasbourg, several precedents from Supreme Courts and also criticism from legal scholars.

One of the legal scholars, Tuomas Ojanen, has pointed out the same problem as is mentioned in relation to Supreme Administrative Court decision KHO:2006:50; the Supreme Administrative Court in most cases refers in general terms to the case-law of the European Court of Human Rights without specific references to actual cases.<sup>45</sup> Sometimes it also refers only to the fundamental rights chapter and not to the equivalent provision of the Convention.<sup>46</sup> This practice is surprising because otherwise the Supreme Administrative Court has been keen on taking fundamental and human rights to be an active part of its interpretation. I think the references to specific cases should be required from national courts in general and especially from the Supreme Courts. The basis for this requirement can be found in Section 22 of the Constitution: "The public authorities shall guarantee the observance of basic rights and liberties and human rights." The Constitution talks about guaranteeing observance from both sources. The idea that human rights treaties only provide minimum requirements compared to national fundamental rights cannot be considered to be a valid explanation to override international case-law. The hierarchical picture of systems is too simplified and does not adequately correspond to the reality of a parallel operation of national and international systems. In the area of fair trial, for example, the link between Section 21 of the Finnish Constitution and Article 6 of the Convention is essential.

Another problem, according to Ojanen an even more serious one, relates to application of case-law in a negative rather than a positive manner. This negative dimension reduces the role of human rights law in the national application of law to questions where the courts can avoid conflicts between national and international norms. Ojanen claims that in Finnish courts there is no positive undertaking to achieve solutions that promote in the best possible manner the protection of human rights. Ojanen supports a more active role and a positive dimension to the application of the Convention. He maintains that in the normal application of law there are several possible options which are not necessarily commensurable from a human rights perspective. Therefore there is a need for a positive dimension and not just trying to avoid potential situations where the Strasbourg Court finds a violation.<sup>47</sup>

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45 See e.g. KHO 2005:35 on a Somali applicant's situation under Article 3. The judgment lacks the obvious reference to case-law of the European Court of Human Rights e.g. *Vilvarajah and others v. the United Kingdom* (30.10.1991) and *Ahmed v. Austria* (17.12.1996).

46 Ojanen, Tuomas, *Eurooppa-tuomioistuimet ja suomalaiset tuomioistuimet*, in Lakimies 7-8/2005, pp.1217-1219.

47 Ojanen, Tuomas, *Eurooppa-tuomioistuimet ja suomalaiset tuomioistuimet*, in Lakimies 7-8/2005, p. 1218.

The argument presented by Ojanen is legitimate, but there is no patent answer to it. Demanding the incorporation of a positive dimension of human rights into the practice of national courts brings the discussion back to the development of law and Tuori's theory about law and its different levels. It is easy to achieve changes at the surface level, but development is naturally slower in the deeper structures of law. Traditionally the Finnish legal system has been dominated by the legislative phase and the role of the courts has been limited. The independent role of courts, in most countries considered to be an essential part of democratic the state, was somehow turned into a threat in the Finnish discourse.<sup>48</sup> Inevitably it takes a few more years to change the cautious attitude towards the role of the judiciary and overturn it to be active and positive and thereby nearer to an average European model of protecting human rights.

### **3.3 *The European Convention on Human Rights and the Constitutional Law Committee of the Parliament***

The Constitutional Law Committee of the Parliament has an important task of supervising the constitutionality of laws in the Finnish legal system. The Finnish system is based on the control of the constitutionality of Government bills during the legislative phase.<sup>49</sup> In addition to supervising whether the bills are in accordance with domestic fundamental rights, the Committee also examines whether the bills are in accordance with international human rights obligations (Section 74 of the Constitution). The interpretative decisions taken by the Constitutional Law Committee are considered to be binding during the Parliamentary process.

The Constitutional Law Committee comprises 17 Members of the Parliament representing all political groups equal to their share of seats in the Parliament.<sup>50</sup> The Committee does not follow in its supervision a division between government and opposition MPs. Normally the Committee is unanimous in its opinions and therefore its opinions are above daily party politics. The independence from the Government is also reflected in the possibility to have independent experts in its proceedings. The Committee conducts closed hearings where not just Government officials but also independent academic experts and also representatives from non-governmental organisations represent their viewpoints before the Committee.

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48 The discourse is analysed e.g. by Tuori, Kaarlo, *Tuomarivaltio – uhka vai myytti?* in *Lakimies* 6/2003, pp. 915-943.

49 Legislative decisions in Parliament are based on committee work. Committees must study and report on all bills and other items on which Parliament will finally decide. Each bill or item is sent to one reporting committee for study. It is also possible that a bill will be sent to another or several committees for their opinion, which is then given to the reporting committee.

50 Composition of the Committee: Finnish Centre Party 5, Social Democrats 4, National Coalition Party 3, Left Alliance 2, Green Party 1, Swedish Peoples Party 2 (One of which is the Åland Island's representative). Chair *Kimmo Sasi* (National Coalition Party), Vice Chair *Arja Alho* (Social Democrats) 2003-2006 Parliamentary Sessions. Three civil servants work as a Counsel for the Committee: *Kalevi Laaksonen*, *Sami Manninen* and *Petri Helander*.

The improved position of the European Convention on Human Rights and the case-law of the European Court of Human Rights within the national constitutional system are reflected in the practice of the Constitutional Law Committee. During the sixteen years period, from 1990 onwards, the Constitutional Law Committee has witnessed major developments in relation to the application of the Convention and the case-law. In the 1980s there were still references to fundamental rights and human rights as separate systems. The main question remains whether the Committee's work has developed towards an integrated model or whether there are still two separate systems safeguarding rights of individuals. The Constitutional Law Committee's reports and statements imply that the prevailing system is based on an integrated model of basic rights and international human rights protection.

The main influence of the Convention has taken place by means of integration into the general doctrines of fundamental rights. The 1995 Fundamental rights reform was based on the harmonisation between the Finnish fundamental right system and international human rights systems. The starting point of the harmonisation was the formulation of the Fundamental Rights Chapter of the Constitution according to international treaties. The rights are formulated in a manner that is more defined and there are strict limitation clauses describing conditions on e.g. limitations of the secrecy of communications (Section 10.3). Secondly, the Constitutional Law Committee introduced seven requirements on the limitation of rights. These are requirements of (a) parliamentary legislation, (b) precision and definition, (c) legitimacy, (d) proportionality, (e) non-violation of the core of a basic right, (f) due protection under the law, and (g) compliance with human rights obligations. The Constitutional Law Committee applies these seven requirements regularly in its decisions whether a bill is in harmony with the Constitution or if there is a discrepancy between the Constitution and the bill.<sup>51</sup>

The limitation clauses under the European Convention on Human Rights and the related case-law provide a basis for several of these requirements. This co-operation and interaction between the European and national level general doctrines can be observed in light of the practice of the Constitutional Law Committee. The lawfulness and necessity requirements are essentially the same under both the Finnish and the European general doctrines. Even the formulations of the doctrines refer to the same terminology, e.g. pursuing a pressing social need. The Committee has used an integrated approach, for example, in legislation related to telephone tapping and other types of secret surveillance methods.<sup>52</sup> There are obviously concepts which do not transfer from the European limitation doctrine to national doctrine. One of the problematic concepts is the margin of appreciation doctrine used frequently by the European Court in its necessity test. It should not be applied at the national context.

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51 Detailed analysis of the general doctrine in Viljanen, Veli-Pekka, *Perusoikeuksien rajoitusedellytykset*, 2001.

52 See e.g. Opinions of the Constitutional Law Committee PeVL 36/2002 vp and PeVL 11/2005 vp.

There are also elements in the Finnish doctrine which provide a better level of protection compared to the European one. The typical condition in that regard is the requirement of parliamentary legislation. Under the European system the concept of law is inevitably more flexible. Also the requirement of legitimacy has been interpreted more strictly within the Finnish system. It has a more significant role to play as a national test compared to the European one.<sup>53</sup> Under the Strasbourg case-law the legitimate aim requirement does not have a similar independent status. It is only a factor within the necessity test. The use of legitimacy as an independent requirement provides evidence of the alternative way to consider also the role of the legitimate aim requirement in the European limitation clause equation.<sup>54</sup>

The opinions and reports by the Constitutional Law Committee establish a precise national limitation test with a close interpretative relationship to the Strasbourg system. However, the same deficiency as was mentioned in relation to the Supreme Administrative Court can be found. There are few systematic references to the European case-law in the statements. The influences of the Strasbourg case-law are often inherent. The European doctrine is integrated into the domestic formulations of the national general doctrine. This method may raise concerns related to the evolutive and dynamic nature of the Strasbourg case-law. It might lead to an unfortunate situation where the Committee does not sufficiently follow the development of interpretation at the European level. This practice might cause negative effects on the legitimacy of the Committee's praxis.

The Constitutional Law Committee has two main approaches in applying the European Convention and its case-law. There is the basic approach where the Strasbourg case-law is used from the point of the general doctrines. There exists also a less frequently applied category of the Committee statements. In these decisions, the Committee uses the Court's particular judgments in order to find support for the interpretation of the substance of the protected right.<sup>55</sup> This model emphasises the interaction between national and international levels and is closer to the idea of interpretative harmonisation laid down by the Committee in 1995.

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53 See e.g. Opinion of the Constitutional Law Committee 5/2000 vp. Protecting rights of others and especially protecting the environmental right written in the Constitution (Section 20) was an important factor in testing the legitimacy of the new Land Use Act.

54 Legitimate aim has not been challenged in the Strasbourg case-law. A contrary example relates to the discrimination case of *Thlimmenos v. Greece* (6.4.2000). Also in the case of *Sidiropoulos v. Greece* (10.7.1998) para. 38, the Court was not persuaded that all the aims mentioned by the Government constituted a legitimate aim. The Court's doubt over a legitimate aim can be seen in many cases, e.g. *Ivanov and others v. Bulgaria* (24.11.2005), para. 63.

55 See e.g. Opinion of the Constitutional Law Committee PeVL 4/2004 vp. The Committee constructed its interpretation from the established requirements, but also has specific references to the Strasbourg case-law.

## 4 Conclusions

The interpretative harmonisation of human rights and national fundamental rights is a dynamic process. Interpretative harmonisation can be achieved at the doctrinal level by applying domestic doctrines in light of the European case-law. In the advanced human rights system the role of national authorities is not passive, but rather actively giving feedback to the Strasbourg level. This feedback from the national sources helps to develop and improve the Strasbourg doctrine in a dynamic manner i.e., “in light of present-day conditions”. The contemporary European human rights system does not operate in a vacuum, but rather works in close co-operation between different levels of supervision in Member States and other European actors and also links itself to the international context (international trends).

Therefore the future of harmonisation is also in the hands of Strasbourg judges and how they develop, for example, the doctrine of obligations of national authorities. The Court has continued to apply restrained judicial policy and the margin of appreciation doctrine. Despite elements towards increasing the role of general and guiding principles the case-law is mainly casuistic. In order to assist the national courts and legislature, the Court’s reasoning should go beyond the boundaries of existing circumstances especially in cases related to systematic or structural problems. The pilot-judgment procedure is one of the inventions to resolve the caseload resulting from these problems, but other analogous measures are needed to conduct “the most speedy and effective resolution of a dysfunction established in national human rights protection”.

The interaction between national and international levels does not endanger the special features of the national system. The margin of appreciation doctrine does not have a scope of application at the national level. Elements of national doctrine providing better protection than the international system are unaffected by the harmonisation process. Part of the national limitation test, for example, requirements of parliamentary legislation and legitimacy provide stricter protection than the Strasbourg case-law. In light of national case-law there are significant variations regarding the ability of national authorities to adopt the general principles derived from the Strasbourg case-law. There are successful attempts to prevent recurring findings of violations in lengthy proceedings cases (reduction of punishment). However, future breaches, for example, in public care cases are more difficult to prevent although the Strasbourg case-law and its guiding principle considering care order as a temporary measure are on paper in accordance with national statutes. The contradiction is in the practice of the social welfare authorities aiming often at a permanent placement of a child for substitute care.

International case-law provides a beneficial standard to confirm whether the human rights obligations are observed. It also provides a practical technique of keeping the national basic rights system up to date and it is therefore in conformity with the principle of integrated human rights supervision. Thus it is difficult to find valid reasons to avoid open references to the authoritative interpretation by the European Court of Human Rights. The idea of primacy at the national level of supervision does not imply that the European case-law would have harmful effects for the status of domestic fundamental rights.

Referring to a hierarchical structure between international and domestic protection does not provide an accurate picture of the human rights framework from a Finnish perspective. The national and international protection systems are parallel and without proper references to original sources the interpretation by national courts and other supervisory organs can present itself as ambiguous and, as a result, the legitimacy of human rights interpretation could be questioned.