

# Nordic Constitutionalism and European Human Rights – Mixing Oil and Water?

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## 1 Introduction

It has become more and more difficult to find Western jurists who would not recognise the general importance of human rights today. Especially in Europe the strengthening of human rights has been evident mainly because of the European Convention on Human Rights (ECHR).<sup>1</sup> Nordic legal systems are no exception to this. Of course, national constitutions, other human rights instruments (as e.g. those of the UN) and EU law have also played tremendously important roles. However, as an effective international law driven regional entity, the ECHR's role has been even more significant. Nevertheless, there is more to this than the mere black-letter rules of the Convention. There is something that animates the written rules. In fact, it takes no effort to grasp that the role of the European Court of Human Rights (the ECtHR or the Court) has been decisive in Europe's ambition to keep its own human rights situation in good order. However, even while the European expansion of human rights is largely regarded as accepted and very much legally desirable around Europe, the role of the ECtHR seems to be somewhat more obscure. There are different questions surrounding this important judicial organ.

Even for many of those who openly welcome human rights and the more effective ways of safeguarding them, the judicial creativity of the ECtHR is treated with much more caution and sometimes even with clear suspicion.<sup>2</sup> The dilemma of judicial activism and judicial self-restraint has been discussed for decades.<sup>3</sup> It is not exceptionally hard to conceive that the quintessential reason for this suspicion comes from the clash of different spheres of constitutionalism. In such systems that have a well functioning democracy and general respect for human rights, it seems almost natural that when decisions by the ECtHR, i.e. the international un-elected judicial elite, concern debated and even controversial matters that effect national parliaments and governments, then, the Court is perceived with an inherent suspicion. If a system adheres devotedly to democracy, then it is hardly surprising that creative judicial decision-making by judges who are not accountable is regarded with a certain distrust. In particular the *de facto* power of the ECtHR to create rule by precedents appears even questionable: the Court seems to assume a role which the national *Anshauungen* of constitutionalism is incapable of regarding as constitutionally legitimate. And, the critique according to which the Court may act in an illegitimate manner when it takes distance to the Convention's text may indicate that there really seems to be something which is different from the protection of national

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1 Convention for the Protection of Human Rights and Freedoms (1950). When in the text this Convention is referred to it also covers the Protocols of the Convention.

2 See also Alistair Mowbray, *The Creativity of the European Court of Human Rights* 5 Human Rights Law Review 2005 p. 57-79 (defending the creativity).

3 See e.g. Paul Mahoney, *Judicial Activism and Judicial Self-Restraint in the European Court of Human Rights: Two Sides of the Same Coin* 11 Human Rights Law Journal (1990) p. 57-88.

catalogues of constitutional rights.<sup>4</sup> For those who have a high regard for national, historically conditioned constitutions the fact that the ECtHR is regarded as the constitutional review court must be seen as being blasphemy with regard to national constitutional values.<sup>5</sup> The many dissenting opinions of the famous judge *Sir Gerald Fitzmaurice* are a good example even today of constitutional criticism against any activism by the Court.<sup>6</sup> And yet, even according to a less critical observer, the Court may be coined as ‘half constitutional half international body’.<sup>7</sup> In a similar vein, it has been stated that the ECtHR ‘has effectively become the Constitutional Court for greater Europe, sitting at the apex of a single, transnational, constitutional system’.<sup>8</sup> But, it is still very much unclear how this international form of human rights oriented constitutionalism fits together with much older nationally and institutionally embedded forms of constitutionalism.

This article seeks to make sense of why the ECtHR’s interpretation techniques are problematic from the point of view of Nordic legal culture and especially from the viewpoint of Nordic sovereignty of a people flavoured version of constitutionalism. However, the widely debated margin of appreciation is not dealt with here.<sup>9</sup> The dynamic and evolutive approach used in interpretation by the ECtHR is looked at in more detail, because it is likely the most controversial interpretation technique of the Court, which causes troubles with national understandings of constitutionalism. The aim of this article is to shed light on the nature of the collision between international and national versions of constitutionalism in the sphere of human/constitutional rights.<sup>10</sup> But, the point is not to generally argue that judicial review would be worse at

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- 4 See, e.g., Laurence R. Helfer, *Consensus, Coherence and the ECHR* 26 Cornell International Law Journal (1993) p. 133-166.
- 5 Court as a constitutional review court, see Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (Oxford University Press, New York, 2002) p. 155.
- 6 See, e.g., *Golder v. the United Kingdom* (21st December 1975) in which Fitzmaurice says – dissenting – that there is ‘considerable difference between the case law or “law-givers law” edicted in the exercise of sovereign power, and law based on convention, itself the outcome of a process of agreement, and limited to what has been agreed’ (para 32). For a detailed analysis and discussion, see John G. Merrills, *Judge Sir Gerald Fitzmaurice and the Discipline of International Law* (Martinus Nijhoff, Leiden, 1998).
- 7 Iain Cameron, *The Influence of European Human Rights Law on National Law*, in Erkki J. Hollo (ed.) *National Law and Europeanisation* (Suomalainen lakimiesyhdistys, Helsinki, 2009) p. 63-84, at p. 66.
- 8 Steven Greer, *What’s wrong with the European Convention on Human Rights?* 30 Human Rights Quarterly (2008) p. 680-702, at p. 701.
- 9 See, e.g., Michael R. Hutchinson, *The Margin of Appreciation in the European Court of Human Rights* 48 International and Comparative Law Quarterly (1999) p. 638-650 and James A. Sweeney, *Margin of Appreciation: Cultural Relativity and the European Court of Human Rights in the Post-Cold War Era* 54 International and Comparative Law Quarterly (2005) p. 459-474.
- 10 Cameron (2009) speaks of a legal-cultural ‘passive resistance to reception’ on European human rights law (p. 67).

protecting human rights than the political branch of public power.<sup>11</sup> But, then again, it is not argued either that the judicial branch would fulfill the protection function better than democratically chosen legislatures.<sup>12</sup>

The structure of this article is simple. Chapter 1 explains the starting point and aims. Chapter 2 deals with the Nordic legal culture in general and specifically Nordic understanding of constitutionalism. Chapter 3 explains the position of the ECHR and the ECtHR and then goes on to define the dynamic and evolutive interpretation used by the Court. Chapter 4 takes a few recent illustrative example cases and with the help of these tries to show how dynamic and evolutive interpretation actually takes shape in illustrative cases which have Nordic connections. The chapter looks specifically at cases which concern East-Nordic legal mentality i.e. Finnish and Swedish systems. Moreover, the chapter also highlights some domestic judicial reactions in order to explain the relationship between the high national judicial organs and the Court. Throughout this article the approach, as to its basic nature, is comparative and theoretical. Thus, doctrinal points of view concerning legal doctrine questions are virtually omitted. The general focus is, rather, on *constitutional cultures* than detailed human rights problems. Accordingly, this means also that questions that concern possible difference in interpretation between ordinary, international treaties and human treaties are not included.<sup>13</sup> Nevertheless, this article does introduce and evaluate some of the relevant judgements by the Court from the constitutional perspective.

## 2 National Ingredient – Nordic Legal Culture and Nordic Constitutionalism

This part of the article addresses the Nordic legal culture in general and Nordic version of constitutionalism in specific. This takes place in the light of comparative law and comparative constitutional law. The rationale for looking into Nordic legal culture is clear: it is often recognised that within the Council of Europe there are two different legal cultures which are common law and civil law. This, however, leaves many of the specifically Nordic features without due attention.

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11 Of the principled criticism against judicial review, see Jeremy Waldron, *The Core of the Case Against: Judicial Review*, 115 *Yale Law Journal* (2006) p.1346-1406 (basically arguing that there is no reason to assume that rights would be better protected by courts of law than by democratically chosen legislature).

12 This is basically what George Letsas argues in his article *The Truth about Autonomous Concepts: How to Interpret the ECHR* 15 *European Journal of International Law* (2004) p. 279-305, 303-304.

13 See Luzius Wildhaber, *The European Convention of Human Rights and International Law* 56 *International and Comparative Law Quarterly* (2007) p. 217-232.

## 2.1 Courts and Legislator - Nordic Features

Today the most widespread opinion seems to be that Nordic law constitutes a legal family of its own.<sup>14</sup> Now, perhaps one of the most fitting descriptions of the state of affairs is the one by *Ole Lando* who sees neighbourhood, nature, history, languages, religion and the special Scandinavian mentality and common legal habits as grounds from which it is possible to say that Nordic law is, indeed, a legal family in the true sense of the word.<sup>15</sup> This statement importantly asserts that there are many legal-cultural similarities between these countries. However, it is of importance to understand that the most relevant similarities do not concern formal legal rules but, rather, the legal mentality which proves that certain basic values concerning social justice, social ethics and law in general are close to each other.<sup>16</sup> Accordingly, from the point of view of comparative law we may generally speaking characterise Nordic law as a legal family that is close to continental law but separate from common law.<sup>17</sup> *Konrad Zweigert* and *Hein Kötz* say that:

Nevertheless, we are of the opinion...that it would be right to attribute the Nordic laws to Civil Law, even although, by reason of their close relationship and their common 'stylistic' hallmarks, they must undoubtedly be admitted to form a special legal family, alongside Romanistic and German legal families.<sup>18</sup>

There are many factors that comparative law writers take into account when constructing their classifications and groupings.<sup>19</sup> The key difference between civil law and Nordic law is the lack of extensive private law codifications, which is a similarity between English common law and Nordic law. In accordance, the private law legislation is as to its nature practical and concrete, not theoretical and abstract.<sup>20</sup> But, when it comes to the common law legal family one of the most decisive factors is the role of precedent. Even while the precedents play a significant practical role in Nordic legal systems, one may say, that their legal-formal and doctrinal position is relatively weak. But, when one describes

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14 See, e.g., Konrad Zweigert & Hein Kötz, *An Introduction to Comparative Law* 3 ed. (1998) p. 63-73. These writers follow quite closely the earlier classification by Pierre Arminjon, Boris Nolde, and Martin Wolff who distinguished a separate Scandinavian legal family in their *Traité de droit compare I* (1950) p. 42-53. About the concept of legal family, see Jaakko Husa, *Legal Families Today – Is It a Time for a Memorial Hymn?* 46 *Revue internationale de droit comparé* (2004) p.11-38 (in critical tone).

15 See Ole Lando, *Nordic Countries, A Legal Family? A Diagnosis and a Prognosis*, 1 *Global Jurist Advances* (2001) p. 10-11. Cf. Zweigert & Kötz (1998) p. 284-285.

16 See Jaakko Husa, Kimmo Nuotio, Heikki Pihlajamäki (eds.) *Nordic Law – Between Tradition and Dynamism* (Intersentia/METRO, Antwerp-Oxford, 2007).

17 See Ditlev Tamm, *The Nordic Legal Tradition in European Context – Roman Law and the Nordic Countries*, in (ed.) Letto-Vanamo, *Nordisk Identitet – nordisk rätt i europeisk gemenskap* (KATTI, Helsinki, 1998) p. 15-31, 16-18.

18 Zweigert & Kötz (1998) p. 277.

19 See also Michael Bogdan, *Comparative Law* (Kluwer/Norstedts/Tano, Stockholm, 1994) p. 82-91.

20 Cf. Lando (2001) p. 7.

English law the situation seems to be completely different, because precedents may be formally binding on future cases.<sup>21</sup> For a comparative lawyer it does not come as a surprise that in numerous accounts it has been repeated that one of the most obvious differences between common law and civil law is the importance of precedent.<sup>22</sup> And, when the relationship between the ECtHR's interpretation techniques and the national legal-cultural understanding of the role of the judiciary is put under scrutiny, especially the way how Nordic law normally tends to see precedents is highly informative. The Nordic attitude toward precedent is quite telling about how Nordic legal culture tends to perceive constitutionally the role of the courts and the accompanying role of the legislator. These two factors reveal something potentially important concerning the inherent suspicion toward judge-made rules. This seems to be part of what Italian comparatists *Simoni* and *Valguarnera* call 'lo spirito della tradizione Nordica'.<sup>23</sup>

In Nordic law the lack of theory concerning the formal and strongly binding precedent is evident; however, there are some differences between the countries. In the Eastern area of Nordic law, i.e. Finland and Sweden, the role of precedent has been remarkably weak in the formal and doctrinal sense. One crucial factor is the Finnish and Swedish legal-cultural attitude according to which moral questions should be left to national Parliaments, not to courts of law.<sup>24</sup> Moreover, in Sweden we may also refer to the significance of the Uppsala school which certainly has contributed – having its repercussions also in Finnish legal science – to an idea according to which one should regard rights with suspicion.<sup>25</sup> We have put our faith in politics rather than in the hands of judiciary. To understand all this, one must take into account the larger constitutional-cultural context.

## 2.2 *Mentality of Nordic Constitutional Law?*

Nordic constitutional law clearly has many features of the continental legal tradition.<sup>26</sup> These features are however not completely identical: legal systematics is – basically – continental in upholding the division between private and public law. Key constitutional documents (Constitutional Acts) in the

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21 See for more details Bogdan (1994) p. 114-119.

22 However, there are different shades in this picture i.e. black and white description (common law precedent vs. civil law no-precedent) does little justice to realities of English common law. See also Zweigert & Kötz (1998) p. 259-265.

23 Alessandro Simoni – Filippo Valguarnera, *La tradizione giuridica dei Paesi nordici* (Giappichelli, Torino 2008) p. 97.

24 Cf. Cameron (2009) p. 73.

25 As Max Lyles notes: in Hägerström's thinking such things like human rights 'reflect special interests rather than universal values', Lyles, *A Call for Scientific Purity: Axel Hägerström's Critique of Legal Science* (Olin Foundation, Stockholm, 2006) p. 368.

26 This part of the article relies on the author's book *Nordic Reflections on Constitutional Law: a Comparative Nordic Perspective* (Peter Lang, Frankfurt am Main, 2002), see especially Chapter 6. However, the text here has been updated and modified for the present purpose.

Nordic countries are written by governmental key institutions and followed by Supreme Courts, even though they are supplemented in various ways by formal amendments, constitutional conventions or other customary rules and praxis. All the Nordic systems possess a specific idea of the Constitutional Act with *lex superior* status, where all Constitutional Acts are located at the peak of the national hierarchy of legal norms. Sweden represents the only Nordic system having many formal constitutional documents all having *de jure* constitutional status. However, even in Sweden one constitutional Act is more important than the others (i.e. the Form of Government). Finland abandoned the tradition of many constitutional Acts only in 2000.

The Nordic systems have some kind of mechanism for judicial review. And, these systems presuppose some form of separation of powers. There are different constitutional arrangements on how the judicial review is organised. Norway and Denmark do not have explicit constitutional rules that would contain judicial review. However, they both recognise judicial review as a part of their systems. Finland and Sweden have explicit written constitutional rules containing limited judicial review, but in practice judicial review is resorted to seldom and cautiously. Also it has to be taken into account, that in Finland *a priori* form of control has been greatly stressed. The real difference is, nevertheless, between the levels of judicial activism. Both Sweden and Finland accommodate some kind of judicial self-restraint. Differences in judicial review are also reflected elsewhere; Sweden and Finland do not recognise the clear principle of separation of powers, whereas Norway and Denmark are perhaps inclined more towards separation of powers, although in a parliamentary form.

Similarities, Nordic legal mentality if you like, are obvious in the ways that Supreme Courts take into account the will of the legislators. As Peczenik and Bergholz have said ‘travaux préparatoires should be taken into account because they form a part of a democratic and rationally justifiable legislative procedure.’<sup>27</sup> The word democracy is of utmost importance in this context. Nordic judicial systems have great respect for their national Parliaments as democratically chosen legislators, which is reflected in the use of travaux. Even though, the Norwegian Supreme Court has been most active it tries to avoid open power conflicts with the Norwegian Parliament. It does not seek to replace or challenge a democratically chosen legislator, although, it may set some legal limits for its legislative competence. There are also some common law type features that can be found in the Nordic systems. All Nordic systems have room for norms or doctrines that are unwritten but still have an important constitutional position. In Norway and perhaps in Denmark too, the case law of the Supreme Court is in an important position<sup>28</sup>. Those parts of the Constitutional Act that deals with the Monarch are *de facto* in a state of desuetudo. The Finnish system contains some crucial customary norms as, for

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27 Aleksander Peczenik and Gunnar Bergholz, *Statutory Interpretation in Sweden* in Neil D. McCormick and Robert S. Summers (eds.) *Interpreting Statutes* (Aldershot, Dartmouth, 1991) p. 311-358, at p. 328.

28 According to Svein Eng (at p. 214) the Norwegian Supreme Court may become closer to the ‘discursive English style’ in the future, *Precedent in Norway* in Neil D. McCormick and Robert S. Summers (eds.) *Interpreting Precedents* (Aldershot, Dartmouth, 1997) p. 189-217.

example, the *de facto* binding force of the Constitutional Committee of Parliaments' opinions and the position that constitutional specialists have in the *a priori* form of control.

Consequently, all this provides some aspects of legal thinking that is more pragmatic (lacking formalism, and the deductive and scholarly nature of *Juristenrecht*) than in civil law. However, the distinction between public and private law stemming from Roman law is obviously non common law feature, although, the distinction is not sharp in the Nordic systems as, for example, may be seen by the fact that in Denmark and Norway there are no separate administrative courts. Besides, all the Nordic systems are parliamentary. Denmark, Norway and Sweden are obviously parliamentary systems, and so is Finland after the total reform of the Constitution in 2000. In Finland the President's role was diminished so that the Parliament's and Cabinet's position was strengthened, thus, it has become much closer to other Nordic systems in this respect too. The fact that Parliaments have such a crucial role is one of the reasons for the cautiousness of Nordic forms of judicial review (with the possible exception of Norway): there is not much room for courts to quarrel with a highly legitimate national Parliament.

However, the respect for the will of the legislator does not take the same form as, for example, in France where the judicial style of the courts is much less argumentative than in the Nordic systems; Nordic forms of judicial review do not stick so closely to the written statutory text but seek a rather more general argumentative base for justification purposes. There is a certain general Nordic openness of argumentation, thus, it differs from English or French as well as German styles. And, none of the Nordic Supreme Courts have clearly such a political role as do continental Constitutional Courts. The doctrine of 'political question' is to be found in all Nordic systems; the politicisation of Courts is not applauded in Nordic systems since it is the national Parliament that has the role of legislator. None of the Supreme Courts or other controlling organs possesses the competence to formally nullify the Acts of Parliament. In this sense the Nordic systems are unique; they encompass both the idea of popular sovereignty (as a legitimate form of political democracy) and also the idea of separation of powers. This probably partially explains the seemingly low political profile of Supreme Courts – they do not willingly challenge the legitimacy of Parliamentary Acts, although, they are very much legally independent of legislators' direct affect. Courts seem to feel a great deal of *loyalty* toward the Parliament.

But, the recent slow Nordic expansion in judicial review may bring about a novel challenge to the traditional democratic theory: are the systems moving towards rule by judges instead of rule by parliamentarians? Moreover, if the ECtHR type of judicial activism expands to the traditional Nordic understanding of democracy (popular sovereignty in an important position) it may become a target for more significant and forced changes.<sup>29</sup> It has been a general

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29 It may well be that the readers are unsatisfied with the use of the concept 'constitutionalism' here. However, as Venter (p. 20) points out, it would be futile to attempt to develop a comprehensive treatise on the precise meaning of the word. The elemental components are,

comparative finding that ‘judicial activism tends to erode both the parliamentary system and majoritarian democracy’.<sup>30</sup> Nordic Supreme Courts and other constitutionality control-organs have traditionally had a stabilising and mediatory role between various branches of government. In short, ‘In Nordic countries, it is universally accepted that it is elected politicians who should take the most important decisions in the public sphere’.<sup>31</sup> So, even Supreme Courts willingly stay in the background and, thus, practice judicial self-restraint.

The Nordic experience seems to confirm that constitutional law is both ‘law’ and ‘politics’, i.e. the Constitution or a Constitutional Act does not offer defence against ‘politics’ because constitutions are themselves so deeply and profoundly of a political nature. However, this does not prevent us – the people – from entrusting them with a special status to take constitutional rules seriously. This can also be seen in the way fundamental rights are protected in Denmark, Finland and Sweden: even though there has not been an active form of judicial review, the level of protection for fundamental rights has been high even though these systems do not always meet the requirements set forth by the ECHR.

In Norway and Denmark, Constitutional Acts are held as important national symbols, not only as a collection of written rules. However, in Finland and Sweden, Constitutional Acts do not have equally strong symbolic functions, thus, interpretation of Constitution is more pragmatic. To summarise, the Nordic version of constitutionalism contains a few common macro-elements, including legal, cultural and political elements, which can be listed as follows: a parliamentary system with a mixture of separation of powers as political meta-ideology; consensual democracy (avoidance of open conflicts in politics, stable multi-party system); cautious systems of judicial review (elements of judicial self-restraint, no strong culture of rights); respect for the will of the legislator (avoidance of conflicts between Parliament and Supreme Courts; great significance of travaux as source of law); political question doctrine in use by the courts<sup>32</sup>; no separate Constitutional Courts; combination of written and unwritten rules and principles (Constitutions also contain customary material); strong elements of constitutionalism (general respect for the rules of Constitution within parliamentary frames; effective hierarchy of rules i.e. Constitution Acts are not political manifestos, doctrine of separation of powers)<sup>33</sup>; and a pragmatic and practical legal style (argumentation used in

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notwithstanding, simple: limited government, legally enforceable rights and some kind of general dominance of the rule of law, Françoise Venter, *Constitutional Comparison: Japan, Germany, Canada, and South-Africa* (Juta/Kluwer, Lansdowne, 2001).

30 Keith Holland, *Introduction* in Kenneth M. Holland (ed.) *Judicial Activism in Comparative Perspective* (Macmillan, London, 1991) p. 1-11, at p. 5.

31 Cameron (2009) at p. 72.

32 Cf. Jens Elo Rytter, *Grundrettigheder: domstolenes fortolkning og kontrol med lovgivningsmakten* (Thomson-GadJura, København, 2000) p. 46-47.

33 See also Venter (2000, p. 47-52), he gathers together the most relevant features of constitutionalism and ‘Verfassungsstaat’; the predominance of the Constitution, constitutionally protected fundamental rights, democracy and separation of powers.

control of constitutionality although grammatical, is also teleological and intentional, and the nature of argumentation is not so "heavy" as in Germanic law, nor so cryptic as in French law, and to some extent there is a casuistic nature). We may also note that the Constitution seems to have a certain degree of flexibility: although Constitutional Acts are written, alteration takes place in various forms i.e. in formal amendment, customs, conventions and case law.<sup>34</sup>

The greatest differences appear between the Eastern and Western members of Nordic law; by extending the family metaphor one might say that Sweden and Finland are the Eastern brothers of Denmark and Norway in the West. Sweden and Finland are (or at least have been) closer to each other than the country-pair of Denmark and Norway. Denmark and Norway are NATO members whereas Finland and Sweden are militarily neutral countries, although, this neutrality must be seen in a different light than before due to membership of the EU. Norway's (limited) judicial activism in constitutional judicial review and the Finnish *a priori* form of constitutionality control are the most striking, different features of Nordic systems. Also the level of political isolationism varies from Norway's relatively high level of isolationism to (present day) Finland's relatively high level of internationalism. And, it seems fair to describe Finnish and Swedish system as being more receptive toward the ECHR's law than Denmark and Norway.<sup>35</sup> One example of the differences is a principle of clarity (*klarhetskrav*) which the Norwegian Supreme Court developed in 1994; this interpretative doctrine has not yet been fully abolished.<sup>36</sup>

Altogether, it seems that significant doctrinal, functional, political, cultural and historical similarities can be pointed out even though there are some great institutional differences. Nordic Constitutions may be characterised as socially and politically successful constitutions because they have provided a stable framework for government. Summarily, Nordic constitutions appear to be

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34 See also the conclusions drawn by Italian constitutional comparist Francesco Duranti, *Gli ordinamenti costituzionali nordici: Profili di diritto pubblico comparato* (Giappichelli, Torino, 2009) p. 243-245.

35 While saying this I rely on Laura Ervo's idea concerning the Nordic countries and the ECHR ('I Danmark och Norge tycks man ställa sig rätt kritisk till Europadomstolens inhemska betydelse, medan det i Sverige och Finland anses att det är domstolarnas uppgift att se till att man nationellt verkligen följer konventionens bokstav' at p. 411), *Förhållandet mellan Europadomstolen och nationella domstolar – finländska perspektiv* 144 Juridisk tidskrift utgiven av juridiska föreningen in Finland (2006) p. 411-422.

36 See especially case *Kvinnefengelsesaken* (Rt. 1994, p. 1244). However, this doctrine has since been modified; see case *Doppelstraff I* (Rt. 2002, p. 557). Yet, the content of ECHR law is still required to be 'reasonably clear' ('rimelig klar'), see case *KRL-fagsaken* (Rt. 2001, p. 1006). It seems that the Norwegian Supreme Court wishes to make sure that it is itself at the apex of hierarchy of norms; other Norwegian Courts should, then, not follow the ECtHR but the national Supreme Court, see case *Bøhler* (Rt.2000, p. 996) in which the Norwegian Supreme court speaks of 'values upon which our society is built on'. It has been claimed that this kind of attitude speaks of a fight over judicial power, see Hans Petter Graver, *Dømmer Høyesterett i siste instans?*<sup>37</sup> Jussens Venner (2000) p. 263-281, 280-281.

systems operating with similar foundational values although there are some differences in constitutional cultures.<sup>37</sup>

### 3 International Ingredient – ECHR

It is well known in international law that regional human rights mechanisms tend to be more advanced than global and this is precisely the case with the ECHR because it is accompanied by a judicial body. As is well known, this judicial body was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 ECHR. Of these different international judicial bodies the ECtHR is regarded as ‘by far the most advanced’ as described by *Antonio Cassese*.<sup>38</sup> It is also regarded as the most successful human rights experiment of judicially protecting human rights.<sup>39</sup> The ECtHR is seen as playing a pivotal role in Europe even though it has tremendous problems itself with a massive backlog and its slowness in deciding cases.<sup>40</sup> From the point of view of general international law the ECtHR’s importance is relevant because it may curtail various kinds of discriminatory actions by national governments.<sup>41</sup> On the other hand, national legislators and courts have a great deal of importance when it comes to the everyday job of protecting European human rights. Albeit, in recent years the role of the Court has become more relevant and this is largely because the Court has actively started to underline the need to change legislation or take other measures after a condemnatory decision.<sup>42</sup>

The starting point is clear: in Finland and Sweden the ECHR has formally the status of ordinary statute. This, nevertheless, only gives part of the picture, since the Finnish Constitution Act obliges all public authorities to ‘guarantee the observance of basic rights and liberties and human rights’ (Section 22). This constitutional rule binds the legislator, courts and public administration.<sup>43</sup> In Sweden the Form of Government (2:23) stipulates that an Act or other regulation shall not be issued in conflict with Sweden’s obligations under the ECHR.<sup>44</sup> So,

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37 And, yet we may *see* that Norway and Denmark are closer to each other than Sweden and Finland (East-Nordic).

38 Antonio Cassese, *International Law* (Oxford University Press, Oxford, 2001) at p. 366.

39 *See* Greer (2008) p. 680-681.

40 Of the case overload, *see* Greer (2008) p. 687-691.

41 Cassese (2001) p. 367.

42 *See* Matti Pellonpää, *Europeiska människorättskonventionen* (Talentum, Helsinki, 2007) p. 194-195.

43 This Section became part of positive constitutional law in 1995 when the total reform of constitutional rights entered into force. Even before this, it was regarded as having the same force and relevance ‘as Acts in general have’ as formulated by the authoritative Constitutional Committee of the Parliament (PeVL 2/1990, p. 2).

44 *See* Lag (1994) p.1468. This rule, however, does not affect Acts and other legislative measures which came into force before 1995, *see* e.g. Regeringsrätt case RÅ 1996 ref. 8 (complaint concerning the decision of the chief-doctor to take a person into psychiatric

in Finland and Sweden, European human rights have constitutional status, although in an indirect manner. From there it follows that the formal status of the ECHR is not so important; rather, in both countries the Convention's status may well be described at least as semi-constitutional. However, it is not the ECHR itself which seems to be problematic for East-Nordic constitutionalism; instead, certain ways in which the ECtHR acts may look susceptible.

### 3.1 *Thorns in the Side: Controversial forms of Interpretation?*

Clearly, the Articles of the Convention are mostly expressed in vague language and in a somewhat broad and open manner which in itself suggests using some kind of interpretation while trying to make sense of the precise human rights obligations. To claim otherwise would be but naive. Simply, these rules need to be interpreted if they are going to be applied in real life case-resolving. The standard view seems to be that the ECHR is an instrument of international law and, thus, the general principles laid down in the Vienna Convention are applied also when interpreting the ECHR.<sup>45</sup> These general considerations, as relevant as they may be, are not focused on here. Rather, it is of importance to look at such interpretation techniques that appear to go beyond the standard-interpretation techniques which are largely accepted. So, it is of specific importance to see what the Court does when it entertains judicial creativity and when it 'would not follow the decisions and the reasoning' of its earlier case.<sup>46</sup>

Let us take an example of how the dynamic and evolutive interpretation is actually used in the Court's judgements. A telling example is the Grand Chamber judgment in the case of *Demir* decided in late 2008.<sup>47</sup> The case concerned the failure by the Turkish Court of Cassation in 1995 to recognise the applicants' right, as municipal civil servants, to form trade unions, and the annulment of a collective agreement between their union and the employing authority. In a key-part of the judgement the Court says the following:

In the light of these developments, the Court considers that its case law to the effect that the right to bargain collectively and to enter into collective agreements does not constitute an inherent element of Article 11 ... should be reconsidered, so as to take account of the perceptible evolution in such matters, in both international law and domestic legal systems. While it is in the interests of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents established in previous cases, a

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treatment by an involuntary commitment) in which the Swedish Supreme Administrative Court interpreted national law in the light of the ECHR.

45 Vienna Convention on the Law of Treaties (1969). See also Mowbray (2005) p. 58-60.

46 See e.g. *Öcalan v. Turkey* (12th May 2005, application no. 46221/99) para 118 (although saying also that the judgement has a basically 'declaratory character'. See also Mowbray (2005) p. 64-65.

47 Grand Chamber judgments are final (Article 44 of the ECHR). Case *Demir and Baykara v. Turkey* (12th November 2008, application no. 34503/97).

failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.<sup>48</sup>

From the point of view of the Court itself the evolutive and dynamic approach seems to be based on rational thinking; improving the standard of human rights cannot be truly based on comparisons concerning the conditions in other states. This means of course that while adopting this approach the Court cannot rely on a consensual approach. And, on the other hand, this means that the ECtHR moves further away from the normal *modus operandi* of the international court. In doing so, however, there is the problem which is revealed when the Court's case law meets different legal and constitutional cultures. How the systems will react is based not only on the obvious willingness to respect human rights, but on other factors also: national constitutional structures, doctrines and deeply embedded legal-cultural conceptions. In short, convergence does not follow automatically.

Even while the use of a dynamic and evolutive approach is used sparingly its judicial base goes back to the first interstate case resolved by the ECtHR. In case *Ireland v. UK* the ECtHR conceived its role in a manner which can today be understood as the first serious sign from the Court that it was not going to settle for the role of an ordinary international court.<sup>49</sup> In the key-part of its decision the Court declared that:

The Court's judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties.<sup>50</sup>

If one looks at these words from the point of view of the Nordic popular-sovereignty style of parliamentarism and combines it with the small role, which especially the East-Nordic systems have granted to the courts of law, these ideas are sure to arouse interest, to say the least. Importantly, the doctrine of dynamic and evolutive interpretation has developed from the case law emanating from the Court i.e. there is no explicit base to this in the ECHR. This may raise questions concerning the constitutional legitimacy of the Court's *modus operandi*: the Convention is clearly 'a living instrument'. But exactly how lively can it be from a normative point of view?<sup>51</sup>

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48 Para 153. About the Turkish legal system and the role of the Court of Cassation (Yargıtay), see Tuğrul Ansay and Don Wallace (eds.) *Introduction to Turkish Law* (Kluwer, The Hague, 2005) p. 13-16.

49 Case of *Ireland v. the United Kingdom* (18th January 1978).

50 Para 154.

51 Convention as a living instrument, see e.g. case of *Sigurd A. Sigurdjonsson v. Iceland* (30th June 1993, application no. no. 16130/90) para 35 ('must be interpreted in the light of present day conditions').

## 4 Variations on a Theme – Some Case Law Illustrations

To begin with, we may note that there is a certain uneasy tension when we deal with the East-Nordic legal mentality and constitutional culture, and the ECHR. This may sound surprising, at first that is, however the tension is a peculiar one: on the one hand both Finland and Sweden are most likely commonly perceived as leading countries when it comes to human rights practices.<sup>52</sup> Moreover, both of these countries are known to encourage other states to observe human rights when Finland and Sweden engage in development cooperation and in international political dialogues. On the other hand, there are certain human rights problems in both of these countries. Now, the point here is not to claim that these countries would be specifically problematic when it comes to human rights. This is clearly not the case. However, the case law by the ECtHR seems to prove that there is still much to do in the area of human rights protection. After the first condemnatory cases against Sweden in the 1980s and Finland in the 1990s many others have followed since.<sup>53</sup> In addition, both of these countries have had small but striking problems in trying to integrate the Nordic fashion of protecting children by transfer of guardianship and Article 8 of the Convention.<sup>54</sup> And yet, we may claim that there is no active visible resistance toward the ECHR or the case law of the ECtHR.<sup>55</sup> In fact, in both countries the doctrine of convention-conform-interpretation is well known and also used by the courts of law.<sup>56</sup>

### 4.1 The ECtHR's Case Law – Some Illustrations

In case of *Mustafa* there was an application against Sweden lodged with the Court under Article 34 of the ECHR by two Swedish nationals Mr Adnan Khurshid Mustafa and Mrs Weldan Tarzibachi, on 12 June 2006.<sup>57</sup> This case concerned a satellite television dish and eviction from an apartment. The

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52 In a list in which Western European states are ranked according to the annual average of violation rates, Finland is in tenth place and Sweden in sixteenth place. Greer (2008) p. 692.

53 The first Swedish case was *Sporrong and Lönnroth v. Sweden* (23th September 1982) and the first Finnish case was *Hokkanen v. Finland* (23th September 1994).

54 See, e.g., *Olsson v. Sweden* (27th November 1992, application no. 00013441/87) and *L v. Finland* (27th April 2000, application no. 00025651/94).

55 Cf. Cameron (2009) p. 72.

56 See, e.g., in Sweden NJA p. 462 and NJA 2007 p. 747 (in both cases the Penal Code was interpreted in the light of the case law by the ECtHR) and in Finland KHO 2004, p. 68 (the legal effect of marriage to a Finnish citizen). Interestingly, the Finnish Supreme Court has been somewhat more reluctant than the Finnish Supreme Administrative Court, see e.g. KKO 2008 p.10 in which this court actually refused to use convention-conform-interpretation (this was, nevertheless, precisely what dissenting judges would have wanted to do). In Norway the situation is basically the same, see Supreme Court's case *Forsikringsdirektivsakten* (Rt. 2000, p. 1811) 'meget stor vekt ved fortolkningen av norske rettsregler' (p. 1829).

57 *Khursid Mustafa and Tarzibachi v. Sweden* (16th December 2008, application number 23883/06).

applicants alleged that their eviction from their flat due to a refusal to remove a satellite dish involved violations of Articles 8 and 10 of the ECHR. The reasoning of the Court was not openly based on dynamic interpretation, however the conclusion it entered concerning the admissibility appears somewhat activist:

Admittedly, the Court is not in theory required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national court's interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice appears unreasonable, arbitrary, discriminatory or, more broadly, inconsistent with the principles underlying the Convention.<sup>58</sup>

After deciding that the case was, indeed, admissible (thus the Court 'cannot remain passive') the Court went on to evaluate whether the interference with the applicant's human rights was actually necessary in a democratic society. The ECtHR stated that:

Having regard to the above, the Court concludes that, even if a certain margin of appreciation is afforded the national authorities, the interference with the applicants' right to freedom of information was not "necessary in a democratic society" and that the respondent State failed in their positive obligation to protect that right. There has accordingly been a violation of Article 10 of the Convention.<sup>59</sup>

The rationale behind this conclusion is that the Swedish national Constitutional Act on Freedom of Expression and the Form of Government applies only to the relationship between individuals and public bodies. These constitutional Acts do not apply to relationships between individuals.<sup>60</sup> So, the basis of the outcome about the alleged violation contained a comparison between the level or protection of national constitutional law and European human rights guaranteed in the ECHR and, importantly, interpreted in the light of national law remaining passive and being, thus, 'inconsistent with the principles underlying the Convention'. It was deemed as especially important for the applicants to have the right to receive television transmission because of their origin: 'at issue was therefore of particular importance to the applicants'.<sup>61</sup> The Swedish government's argument according to which 'the dispute in the case had been limited to the question of the actual placing of the satellite dish, having regard to, primarily, contractual obligations' was not given credit.<sup>62</sup> So, the Court rejected the national view based on the private law framework and used instead its human rights view.

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58 Para 33. In here the Court referred to the case of *Pla and Puncernau v. Andorra* (13th July 2004, application no. 69498/01).

59 Para 50.

60 Para 24.

61 Para 44.

62 Para 26.

Let us take another case law illustration. In the recent case of *Mendel* the applicant took part in a programme organised by the State for the long-term unemployed. Relying on Article 6(1) and Article 13 the applicant complained that she had not been able to make an appeal against a decision which had withdrawn permission for her to participate in the programme. But, the ECtHR held unanimously that there had been a violation of Article 6(1) and that there was no need to examine the complaint under Article 13.<sup>63</sup> This is yet another case that adds a precedent to the long standing case law expanding the scope of Article 6 in the Convention. It seems that the long-standing obstacle in the Swedish system is to provide individuals access to courts for a review of administrative decisions by State authorities. In accordance, the Court stated that the ‘applicant did not have a practical, effective right of access to court. There has accordingly been a breach of Article 6 § 1 of the Convention’.<sup>64</sup>

This case hardly came as a surprise to anyone informed, because the obvious lack of access to courts to appeal administrative decisions has been a problem for Sweden’s obligations under the ECHR since the 1980s. And, because of this, Sweden has been found on numerous occasions to breach Article 6 of the ECHR: even in *Mendel* no right to appeal to a court was provided for. A new Act was, nevertheless, introduced already in 1988, which expanded a right of access to court. This renewed legislation was later incorporated in the Administrative Procedure Act. Also the Act of 2006, concerning judicial review of certain government decisions, meant an improvement in this matter.<sup>65</sup> And yet, the case of *Mendel* demonstrates that there was still an obstacle which prohibited access to courts in the manner demanded by the ECHR. In that particular case the ECtHR did not evaluate Swedish law in a brusque and thoughtless manner, but instead looked at the question of how effectively the right protected in Article 6 was taken care of:

As concerns the present case, the Court considers that, at the relevant time, a right to appeal against decisions by national authorities that concerned a person's “civil rights and obligations” according to Article 6 § 1 of the Convention, irrespective of any prohibitions against appeals in law or ordinance, could be found in the case law of the Supreme Court and the Supreme Administrative Court.<sup>66</sup>

The ECtHR went on by saying that:

However, the Court will consider whether this right to appeal could, in the instant case, be considered as an effective access to a court.<sup>67</sup>

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63 *Mendel v. Sweden* (7th April 2009, application no. 28426/06).

64 Para 81.

65 Lag (2006, p. 304) om rättsprövning av vissa regeringsbeslut.

66 Para 75.

67 Para 76.

This is also a case which seems to hint that although Sweden's human rights protection is on a high general level there is something that seems to prevent the national legal culture from taking seriously the demands of the ECHR and especially the kinds of demands that can be derived from the case law of the Court. Perhaps this problem has now been solved by the introduction of the new section of § 3 Administrative Procedure Act and the accompanying case law of the Swedish Supreme Courts. Albeit, even this national way of solving the problem may still be regarded as problematic from the point of view of Article 6 and the accompanying ECtHR's case law: - whether or not the latest national solution *fully* complies, is an open question. Clearly, this seems to be evidence, which at least hints of some kind of resistance against full reception of the ECtHR's case law. However, the explanation to this may not be simply that Sweden is just reluctant toward reception of European human rights; rather, it might tell that there are deeper legal-cultural elements that lie under the surface of legislation and case law.

Let us now turn to the Finnish scene. In the highly noteworthy case of *Eskelinen* the most intriguing question did not concern so much the actual human rights question at hand but, rather, how the ECtHR used creative interpretation and explicitly decided to reject its own earlier precedent when making a new one.<sup>68</sup> The case is a prime example of dynamic and evolutive interpretation. The earlier precedent which was overruled by the Grand Chamber was the famous *Pellegrin* case in which the Court created so-called 'functional criterion' concerning the interpretation of Article 6(1) of the Convention (what actually means a 'civil nature').<sup>69</sup> However, in the case of *Eskelinen* the functional criterion was abandoned and a new doctrine created. Interestingly, the Court stepped away somewhat completely from the written rule even though it should, according to the Vienna Convention's principles at least interpret the rules 'in accordance with the ordinary meaning to be given to the terms of the treaty'.<sup>70</sup> In the key-part of the ECtHR's judgement it is stated that:

...the Court finds that the functional criterion adopted in the case of *Pellegrin* must be further developed. While it is in the interest of legal certainty, foreseeability and equality before the law that the Court should not depart, without good reason, from precedents laid down in previous cases, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.<sup>71</sup>

68 *Vilho Eskelinen and Others v. Finland* (19th April 2007, application n. 63235/00).

69 *Pellegrin v. France* (8th December 1999, application no. 28541/95). See also Clara Ovey and Robin White, *The European Convention on Human Rights* (Oxford University Press, Oxford, 2002) p. 149-150.

70 Vienna Convention Article 31(1).

71 Para 56. In a similar vein see *Stafford v. the United Kingdom* (application no. 46295/99) decided 28th May 2002, in which the Court holds that the: 'Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases [...] It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive

The following problem for national systems is clear: Should they now change their own systems and accompanying legal systematics so that national legal systems would fit better together with the ECtHR's understanding of what the ECHR demands? This seems a perfectly rational way to understand this. Notwithstanding, anybody who knows something about how deeply embedded such a thing as the structure of the legal system is (e.g. separation between private law and public law) immediately grasps that to follow closely what the Court seems to demand would mean also changing national understanding of the structure of the legal system. This may or may not be viable, but what is clear is that some sort of collision between different ways of conceiving the law and legal system and the accompanying constitutional national structures is more than likely. But how should these legal-cultural and constitutional percussions be dealt with and what do they tell about the ECtHR? Should we regard this kind of case law as pure judicial activism and what should be done if so? And, how should we regard the fact that the Court is readier now 'than ever before to upset member states with decisions that stretch the language of the Convention'.<sup>72</sup> Clearly, there seems to be more questions than clear cut answers.

In concluding this section, what has been sought in this chapter is not to claim that there would be judicial or legal problems in the cases discussed above. However, the main point was rather to highlight how there is a clear preference for human rights over constitutional structures: activist human rights decision-making appears particularly blind to national constitutional and legal-cultural structures.<sup>73</sup> The manner in which the ECtHR functions may sometimes undervalue judicial protection of such constitutional rules and principles that allocate decision-making and use of supreme public power like the separation of powers. If one reads through the activist case law of the ECtHR it is clearly noted that structural, constitutional arguments are missing; separation of powers or democracy (if understood as a structural institutional design) are simply omitted or at least they remain in the shadows as indeterminate and hopelessly weak arguments.<sup>74</sup> Rights are taken seriously, as they should of course, but it seems that other constitutional arguments are not taken very seriously. And yet, the ECtHR is in fact regarded as the *de facto* constitutional court. If it is a constitutional court, it is a remarkably narrow-minded court, because it does not seem to take properly into account the constitutional context of a country. Or, to be more precise, the ECtHR does take into account one such factor which is, however, traditionally part of international law: the margin of appreciation is

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approach would risk rendering it a bar to reform or improvement' (para 68). This formulation may be regarded as the basic doctrine of the evolutive and dynamic approach.

72 Mark Janis, Richard Kay, Anthony Bradley, *European Human Rights Law* (Oxford University Press, New York 2000) at p. 71.

73 Yet, there is something peculiar about this because originally it was thought that one of the functions of the ECHR was to protect the democratic identities of member states. See Greer (2008) p. 682.

74 Cf. Robert F. Nagel, *Constitutional Cultures: The Mentality and Consequences of Judicial Review* (University of California Press, Berkeley, 1993) p. 62-65.

clearly a device which enables the Court to take into account national sovereignty.<sup>75</sup> But is this enough?

#### 4.2 *Some National Reactions*

According to the prophesy of *Lando*, Nordic law as a distinct family of legal groups is vanishing. He sees that there is a genuine possibility of European laws becoming one great legal family in the future and says that '[o]ne day the Nordic law will then merge with other European systems.'<sup>76</sup> Even though *Lando's* prognosis seems to be in accord with the Finnish experience, especially concerning the changing role of precedent, it would appear too early to claim that the traditional East-Nordic doctrine of sources of law would be ready to become extinct. This sort of transformation seems to require the understanding that democracy will change and that seems, if not impossible, at least quite a slow process even though Finnish law has kept up to speed in this regard also; Finland seems to be more detached from the sovereignty of people rooted constitutionalism than Sweden, although the differences are not that remarkable. Moreover, as the role of the human rights precedent by the ECtHR is growing, there is also going to be a growing number of those who will see Nordic law closer to common law than was the case before: the role of precedents is growing and the role of travaux is diminishing. In turn, this seems to open more space for the ECtHR's activism and the East-Nordic reception of that activism.

The classical Nordic doctrine on sources of law is in legal cultural transformation, but to say where it finally ends is not in the scope of this paper. Finland, though, seems to be taking distance from the traditional Nordic doctrine; and the same seems to apply to Sweden. All the same, there is something very true in what *Iain Cameron* says about this:

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 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.<sup>77</sup>

And, it is in these kinds of situations when the invisible rejection of the ECtHR's case law most likely takes place: legal-cultural inertia prevents the case law of the Court from having a deep impact on national law in such cases as described by *Cameron* above. One way to react against the deeper acceptance of the ECHR is to make excessive demands on the case law of the Court. The case resolved by the Swedish Supreme Court in 2005 seems to indicate this passive rejection rather well: the Swedish court demanded a clear case law from the ECtHR in order for this case law to be taken into account in the Swedish case at hand:

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75 This interpretative technique allows some flexibility for the ECtHR, which can make certain variations concerning the interpretation of limitation provisions of the ECHR in order to take into account nationally varying circumstances and values.

76 *Lando* (2001) at p. 12.

77 *Cameron* (2009) at p. 71.

Begreppet anklagad för brott i artikel 6 Europakonventionen har en autonom betydelse. Enligt Europadomstolens praxis har den relevanta tidpunkten inträtt när behörig myndighet underrättat någon om anklagelsen om brott eller när myndigheterna vidtagit en åtgärd som gör att en persons situation väsentligt har påverkats av att det finns en misstanke mot honom eller henne (se bl.a. Europadomstolens dom den 20 oktober 1997 i målet *Serves mot Frankrike* § 42).

Några avgöranden från Europadomstolen som behandlar andra än den anklagades rätt att förhålla sig passiv finns inte.<sup>78</sup>

The argumentation used by the Supreme Court is curious: first it states the content of the ECHR's Article 6 in the light of the ECtHR's praxis. But, when the Supreme Court itself enters into an area in which it could use the interpretational tools provided by the ECtHR it refuses to do so and stops by claiming simply that 'There are no such judgements from ECtHR'. Instead of trying to read carefully and interpret the ECtHR's case law the Swedish court just refuses to go further. Against the background of national constitutional mentality this is of course very much understandable.<sup>79</sup> However, this way of reasoning is much closer to the national respect-of-the-Parliament-mentality than it is to the will to protect human rights. Besides, this case is but one example of a legal-cultural attitude which seems to threaten European human rights; if national courts always use the minimum approach then the level of human rights protection does not seem to gain its potential position and judicial significance. It is not argued here that this is planned active resistance but rather it is argued that this inertia is best explained as a kind of collision of two kinds of constitutionalism: a national structurally oriented one and an international rights oriented one.<sup>80</sup> The subtle attitude shown in this Swedish case proves that national courts are more loyal to national law than to the ECHR law in such

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78 NJA p. 407. It makes no sense to go into the details of this case. However, we may note that actually the Supreme Court says that the ECHR does not apply to this case and this is the reason why the court applies national law. But, this seems curious because the court bases its interpretation on the *plain text* of Article 6 in the ECHR; should the Swedish court have relied more heavily on the ECtHR *case law* it might have come to a different conclusion concerning the applicability of the ECHR.

79 For the sake of comparison, we may note that East-Nordic passive resistance towards the case law of the ECtHR has been clearly much softer than in Germany where the *Bundesverfassungsgericht* has been far more sceptical in its attitude. However, even in Germany the situation seems to be changing these days, see Heiko Sauer, *Die neue Schlagkraft der gemeineuropäischen Grundrechtsjudikatur*'65 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (2005) p. 35-69.

80 I have left out the older case *Gustafsson v. Sweden* (18/1995/524/610) from 1996 in which the main question concerned the applicant's disagreement with the collective-bargaining system in Sweden. Gustafsson objected to becoming bound by a collective agreement mainly on grounds of political and philosophical conviction he wished to retain the personal character of the relationship between himself as employer and his employees'. The Court held that because no 'legal protection existed in Swedish law, the facts giving rise to the applicant's complaints constituted a violation of his rights under Article 11 of the Convention' (para 46). For anyone who knows how immensely important the political role of trade unions is in Sweden will not be surprised that this specific case was met with sharp criticism.

cases in which national law and human rights law stand in possible conflict to each other: it is easy to say ‘no relevant case law’ and then go on and rely on national law. And, by doing it like this it certainly *appears* that the ECtHR’s case law has due relevance.

Finland, on the other hand, has perhaps been a bit more open in acknowledging the importance of the ECHR and the accompanying case law of the ECtHR. Just by looking at some of the recent case law of the Finnish Supreme Courts, it is easy to see that the case law of the ECtHR sometimes plays a central and high profile role in judgements delivered by them.<sup>81</sup> Yet, in some questions, the Finnish resistance appears to be rather unfounded, even stubborn, to the seemingly clear cut case law of the ECtHR. Especially the length of the court proceedings has been a constant stumbling block for Finnish law. An example of this is *Jaanti* in which the ECtHR concluded that:

the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the “reasonable time” requirement.<sup>82</sup>

In fact, there is a long list of cases judged against Finland on the basis of a violation of Article 6(1) of the ECHR due to the length of proceedings. It took many such cases until Finland finally in the spring of 2009 took the necessary legislative means to do something in regards to this human rights problem. One may only wonder why it took so long for Finland to do something about the situation, as the cases judged against Finland were piling up in a highly predictable fashion.<sup>83</sup> Furthermore, no one can claim that the Court had imposed an undue burden on Finland concerning this matter.

## 5 Conclusion – Inside or Outside View of Constitutionalism?

If we concentrate on the core of the critical argument, it is almost too easy to launch an attack against the ECtHR: human rights judges, as all judges, are not guided merely by their legal ideas, but also by their political and ideological preferences.<sup>84</sup> Take a case such as *Şahin* or others of a similar vein and it

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81 See, e.g., KHO 2009: 15 (changing identity number after a sex-change operation, but in the circumstances where the spouse refuses to give consent), KHO 2008: 91 (deportation to Somalia’s Puntland of a person who committed several crimes whilst in Finland), and KKO 2008: 24 (reversal of a final judgement on the basis of the ECtHR’s judgement). In general, see Pellonpää (2007) p. 60-74.

82 *Jaanti v. Finland* (24th February 2009, application no. 39105/05) para 20.

83 For the sake of comparison we may note the case *Synnelius and Edsbergs Taxi AB v. Sweden* (Judgment 30th June 2009, application no. 44298/02), which was deleted from the ECtHR’s list due to the parties reaching a friendly settlement.

84 The ECtHR’s judges may be regarded as politically motivated actors having policy preferences, see Erik Voeten, *The Impartiality of International Judges: Evidence from the*

becomes clear that sometimes also the political and ideological ideas of the judges play an important role.<sup>85</sup> To claim otherwise would mean believing in the myth of judicial impartiality. From the point of view of Nordic constitutionalism this is problematic, because it seems to prove that international human rights judges are also trying to gain a more powerful position in their relation to national legislators; universalising and objectifying their ideological interests into a cloth of legal arguments is something that fits extremely poorly with the traditional Nordic way of conceiving relations between judiciary and a democratically chosen legislator.<sup>86</sup> The actual problem is not the substance of the case-law-emerging human rights themselves but, rather, the specific manner in which these human rights norms are created: instead of national democratically elected Parliaments – which are so highly regarded in Nordic legal culture – these norms are created by unelected international judicial elite, which is accountable to no one.<sup>87</sup>

In Nordic constitutionalism, and especially the way how constitutionalism is understood in Finland (to a slightly lesser extent though) and Sweden, the role of the principle of constitutional democracy concerns the role of the judiciary as being able to apply legal norms which are created through a democratic process by democratically chosen legislators.<sup>88</sup> So, when the ECtHR steps away from the text of the Convention, it seems to penetrate into areas which the principles of Nordic constitutional law normally reserve for their Parliaments. To summarise, when the ECtHR argues that ‘it would be artificial and formalistic’ to rely on the national view, then, the national system may feel that the ECtHR steps into an area which is perceived as being the constitutional domain of a national democratically chosen legislator.<sup>89</sup> This is a genuinely demanding problem that concerns the difficulty of translating in-between national and international forms of constitutionalism. *Neil Walker* has wondered if it is at all legitimate to translate ‘the language and normative concerns of constitutionalism from the

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*European Court of Human Rights* 102 *American Political Science Review* (2008) p. 417-433 (provides empirical evidence of ECtHR judges acting as ‘policy seekers’).

85 Grand Chamber Judgement *Leyla Şahin v. Turkey* (17th November 2005, application no. 44774/98).

86 The argument which states that rights protect against the so-called tyranny of the majority is omitted here for one simple reason: the ECtHR (and other courts) also tend to make precedents by majority voting. See also Waldron (2006) p. 1396-1398.

87 Obviously, this has to do with the broader Finnish and Swedish legal mentality, which prefers to leave the protection of rights to national legislators as a part of the constitutionally regulated legislative process in which the will of the people is transformed into legislation. See also Cameron (2009) p. 73.

88 This, at least partially, explains why national courts may be reluctant to apply the Convention to their own motions; they would rather wait for the national legislator to act first and choose to follow the Nordic path of judicial self-restraint.

89 Quote from case *Gustafsson* (1996) para 43. See also Ervo (2006) p. 412.

state to the non-state domain'.<sup>90</sup> This question is as important as it is difficult to answer: possibly there is no compelling argument for either.

Emerging international human rights oriented constitutionalism (*ius commune* of human rights even) vs. old national constitutionalism is a tremendous problem, it is not just pro or contra human rights or judicial activism vs. judicial self-restraint.<sup>91</sup> It is hardly believable that those who criticise the ECtHR do it because they oppose human rights. This is by no means the case. So, we should be very cautious not to make such claims. But, what are we then dealing with? We may look briefly at constitutional theory at this point. As we know from Jürgen Habermas' theory about the democratic *Rechtsstaat*, two dimensions are important: the part which deals with institutions and separation of powers as well as those parts which deal with rights. As a matter of fact, it is the combination, which creates democratic *Rechtsstaat*.<sup>92</sup> This is an important notion for the discussion, which concerns the role of the ECtHR and national constitutional democracies. The possible solution to the conflict does not come from focusing on only one of the basic dimensions; but, rather, by trying to reconcile the demands which arise from the creative international human rights case law of the ECtHR and from national understandings of constitutionalism and democracy. Possible objections to reconciliation are probably not insurmountable: we are dealing with different sides of the same coin, namely, the coin of constitutionalism.

It has not been sought in this article to resolve the tension between Nordic and especially East-Nordic constitutionalism and the ECtHR. However, it is not said either that this tension is impossible to resolve. Instead, I have tried to illustrate why certain activism by the ECtHR and the way constitutionalism is conceived especially in Finland and Sweden, are difficult to combine. More importantly, it is crucial to understand that those who defend separation of powers or parliamentarism do not simply wish to undermine human rights. Instead, many of the arguments that may be presented against the active role of the ECtHR are deeply embedded in a certain constitutional culture, the understanding of democracy and constitutionalism. These, in turn, are reflected in the way the role of courts, doctrine on sources of law, and the constitutional-symbolic significance of national democratically elected legislator are conceived. In accordance, it is important to try to understand what the main ingredients are of human-rights-oriented transnational constitutionalism and

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90 Neil Walker, *Postnational Constitutionalism and the Problem of Translation*, in J.H.H. Weiler and Marlene Wend (eds.) *European Constitutionalism Beyond the State* (Cambridge University Press, Cambridge 2003) p. 27-54, at p. 27.

91 About *ius commune* of human rights, see Christopher McCrudden, *Judicial Comparativism and Human Rights*, in, Esin Örtücü, David Nelken (eds.) *Comparative Law: a Handbook* (Hart, Oxford 2007) p. 371-398.

92 For detailed discussion see Jürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, Frankfurt am Main 1992). However, the quintessential connection between constitutional rights (*Grundrechte*) and separation of powers (*Gewaltenteilung*) originally comes from the constitutional theory of Carl Schmitt, *Verfassungslehre* (Duncker & Humblot, Berlin 1928) p. 442.

national parliamentary oriented constitutionalism. Rational balancing and weighing between these two can take place only if both are taken seriously: integration rather than assimilation is the likeliest way toward genuine reconciliation. Then, hopefully, we would have a true possibility to mix oil and water. Paradoxically, this might mean that the ECtHR would abandon its function as a court working mainly with individual applicants and would move toward an abstract constitutional model as has already been suggested.<sup>93</sup>

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93 *See Greer (2008) for a more detailed discussion.*