



THE STATUS OF THE CASE-LAW FROM THE EUROPEAN COURT OF HUMAN RIGHTS IN THE NATIONAL LEGAL PRACTICE – A QUESTION OF THE LOCAL LEGAL CULTURE? EAST-SCANDINAVIAN COMPARISONS

Laura Ervo¹

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SUMMARY

Too often it has been taken for granted that East-Scandinavian countries, Finland and Sweden share similar societies, similar culture and even legal mentality. Very often there is a shared or similar jurisprudence, sometimes even identical single legal rules in Finland and Sweden due to the historical background, deep co-operation of Nordic legislators especially before the EU-memberships and because Finland has often copied the Swedish legislation. However, the interpretations and therefore the way of legal thinking varies between Finland and Sweden, in the other words, the legal culture in the neighboring countries are not identical. Swedish legislative culture is much more dialogic compared with the Finnish one. The Finnish way to “run things” instead of to discuss and reflect is the main difference between the Finnish and Swedish cultures of realizing things.

This might be one reason to the current difference that ECHR and case law based on it, is lively discussed by academics in Finland and easily followed by courts too, whereas this common law –based way of interpretation (the contents of the convention is developed by case-law and not amending the text) is not that familiar way to make legal changes in Sweden. Formally, the convention is valid and binding in both countries and that history is much longer in Sweden since 1959 whereas - mainly thanks to political reasons – Finland could join in the convention in the beginning of 90's but the factual effects at least into the Finnish procedural law has been really enormous and very fundamental whereas in Sweden the ECHR and its article 6 are not the main factors in the procedural law.

¹ Laura Ervo, Dr., Professor of law Örebro University JPS70182 Örebro Sweden, laura.ervo@oru.se

In this article, the status of the case-law from the European court of human rights is compared with East-Scandinavian countries.

KEY WORDS

Comparative studies, critical legal positivism, East-Scandinavian countries, European Court of Human Rights, fair trial, implementation of human rights.

SWEDISH BACKGROUND

Sweden ratified the European Convention on Human Rights (ECHR) already in the very early beginning of the convention's history, in 1952. Still, the convention had no particular status in Swedish legislation until the early 1980s because according to the general view there was no need to assimilate the convention in Sweden where no violations of human rights even otherwise existed² This type of attitude seems to be typical as long as people – and not even legal experts at the national level – doesn't know the real contents of the convention. Namely, there were similar opinions among the Finnish lawyers in the early years of the convention's validity in the country. It was very common to think that only torture and that kind of problems are connected with human rights. Normally people, not even jurists, didn't perceive that for instance article 6 in ECHR covering a fair trial includes the right to be heard, to get a well-grounded decision and that type of very ancient and fundamental procedural rights and that the interpretation of these rights can be done with piety in the case-law of the European Court for Human Rights. So, the human right problems really are daily life also in such jurisdictions like Sweden and Finland where, however, normally no torture, corruption or other problems in that serious level doesn't exist. In both countries, this has been learnt through the heel.

In the beginning of 80's, however, the first violation was stated against Sweden.³This judgment (Sporrong and Lönnroth) which related to the effects of long-term expropriation permits and prohibitions on construction on the estate of the applicants as property owners, had long lasting effects and both the legislator and Swedish citizens became active. The amount of applications to the ECtHR was increasing rapidly and the legislator needed to start to consider the real effects of the ECHR to the Swedish, national legislation.⁴

The applicants Sporrong and Lönnroth complained of the length of the period during which the expropriation permits, accompanied by prohibitions on construction, affecting their properties had been in force. It amounted, in their view, to an unlawful infringement of their right to the peaceful enjoyment of their possessions, as guaranteed by Article 1 of Protocol No. 1. According to the applicants, their complaints concerning the expropriation permits affecting their properties were not, and could not have been, heard by the Swedish courts; in this respect they alleged a violation of Article 6 par. 1. The court held (10-9) that there had been a violation of Article 1 of

² Ervo – Dahlqvist 2014, p. 253 and Nergelius 2010, p.177.

³ Sporrong&Lönnroth v. Sweden, 23 September 1982.

⁴ Bull-Sterzel 2010, pp. 954 – 9, Ervo-Dahlqvist 2014, p. 253 and Nergelius 2010, p. 177.

Protocol No. 1, hold (12 – 7) that there has been a violation of Article 6 par. 1 (art. 6-1) of the Convention.

The conviction led to the incorporation of the convention through an act that entered into force on 1 January 1995.⁵ Also the number of following convictions against Sweden had a crucial role in the prelude of the incorporation of the convention.⁶ In 2010, the convention was again given a higher status through a new rule in the Swedish constitution according to which no Swedish legislation can be issued contrary to the European Convention.⁷

STATISTICS FROM SWEDEN

In 1959 – 2016 there were 149 judgments given by the ECtHR concerning Sweden. In 60 of them, at least one violation was found. Judgments finding no violation were 56 and friendly settlements or striking out of the list were 28 pieces. 5 pieces were other judgments like just satisfaction, revision, preliminary objections and lack of jurisdiction.⁸ To compare with, the population in Sweden is about 10 million.

What the national level is concerned, the search by the keyword “Europakonventionen”⁹ gave 87 hits in the database “Lagrummet” when the precedents given by the Supreme Court were searched. The database includes cases since 1981. The very first three cases are from the year 1991. The average amount of cases is about 1 – 6 cases per year which does not vary very much. However, in 2013 there have been 10 cases and in 1997, 8 cases. In 2013 one part of the cases were linked with the *ne bis in idem* –principle and criminal proceedings in the cases where a tax increasing already had happened as an administrative sanction. In 2007, the high amount of cases is mainly not due of any specific problem but the topics of the cases do vary quite a lot. However, there are otherwise some interesting case law in 2007. Namely, in the case NJA 2007:38, the state was found responsible to pay damages to a private person based directly to ECHR without any support in the Swedish national legislation. This shows the aim to solve problems at the national level to avoid violations at the ECtHR. In the case, NJA 2007:90, it was decided that a private person, however, cannot be responsible to pay damages based directly to the art. 8 in the ECHR.¹⁰

Concerning the precedents from the Supreme Administrative Court, the same search by the “Europakonventionen” gave 77 hits.¹¹ The first case is from the year 1995.¹² Normally, there have been some cases in each and every year, like from three until six cases. However, there are years when the amount has been much higher, like 2002 with 8 cases, 2004 with 15 cases and 2014 with 9 cases. The reason is that then there has been found a specific national problem connected with the ECHR and very many identical or very similar cases at the Supreme Administrative Court. In 2014 that problem was *ne bis in idem* –principle in tax law cases where according to

⁵ Act (1994:1219) on the European Convention for the Protection of Human Rights and Fundamental Freedoms.

⁶ Bull - Sterzel, 2010, pp. 94-95.

⁷ Regeringsform, Chapter 2 Section 19 (Act 2010:1406).

⁸ Searched in the HUDOC-database, <https://hudoc.echr.coe.int/eng>, visited 2017-10-12.

⁹ The ECHR is commonly called “Europakonventionen” in Swedish.

¹⁰ <https://www.lagrummet.se/>, visited 2017-10-12.

¹¹ <http://www.rattsinfosok.dom.se/lagrummet/index.jsp>, visited 2017-11-28.

¹² The database includes cases since 1993.

the Swedish national law and a long tradition, the administrative sanction has been the tax increase followed by a normal criminal procedure with criminal sanctions. However, this was found to be against the *ne bis in idem* –principle according to the case-law from the ECtHR and caused many national appeals.

The other top year was 2004 with 15 cases. That time the problem was the failing possibility to appeal to the court in some administrative cases. This has been a typical Swedish problem since years in very many administrative matters because traditionally there has not been any path to courts in all types of administrative cases decided by different authorities and their boards. Sweden has been obliged to change this to fix the situation according to the ECHR. The very first boom was already at 90's but some problems existed even later on. The similar problems existed also in 2002 when there were 8 cases mainly on the appeal possibility to the court in administrative matters. In some of those cases, it was considered if the board was like a court from substantive meaning and if Sweden therefore fulfilled the ECHR and in some other cases it was decided if the appeal to the court was a necessity or not, in the other words, if the issue was concerning the civil rights and obligations in the meaning of article 6 in ECHR.

All national case law from the Supreme Courts, which concerns European law, is collected in one place. This is an agreement between the highest courts of the Nordic countries and all countries follow the same system. That database includes decisions relating to the European Convention for the Protection of Human Rights and Fundamental Rights or the EU law. They are separately reported so that they can easily be found. The reason is that it is not rarely when such issues occur in several Nordic countries at the same time. That database includes now 42 cases between the years 2013 - 2017.¹³

SWEDISH CASE LAW

According to *Danelius and Dahlqvist*, the Swedish courts have had a tendency to give the convention a somewhat higher status than the legislator intended. Especially the highest instances have been reluctant to interpret national legislation in a way that would risk a violation in the European Court.¹⁴ If this is true, the Swedish courts seem to have understood the ECHR totally correctly. The aim is – of course – to solve the existing conflicts at the national level. As an internationally binding convention, there is not only a legal but also a political need to follow. Therefore, as soon as and as long as a ratified state is bound into the convention, the only solution is to follow and fulfil the requirements. In addition, one of the main principles in the ECHR is that the solution is given at the national level and the appeal to the ECtHR is needed only in exceptional cases where the subsidiarity has not been working.

Now I will look at the Swedish case law in the more detailed. To limit the research and because I have my expertise in a fair trial, I will now focus only cases which cover a fair trial. Search by “rättvisrättegång” = fair trial” gave six hits among the case law from the Supreme Court. However, the key word doesn't seem to cover all cases connected with article 6 of the ECHR because the new search by having article 6 of the ECHR gave 8 hits which I also will take into account. One part of the cases were included in the both searches but there were several

¹³ <http://www.hogstodomstolen.se/Avgoranden/Europarattsliga/>, visited 2017-12-01.

¹⁴ Danelius 2012, pp. 39 and Ervo – Dahlqvist 2014, p. 253 - 254.

cases connected with art. 6 which were not included into the fair trial cases. Namely, the cases NJA 2002:35, NJA 2001:7, NJA 2000:40, NJA 1999:69 and NJA 1994:118 came up only by searching with article 6 of the ECHR as a key word. I will first look at the cases classified by a fair trial and after that check the above mentioned cases which were failing.

The earliest case is NJA 2009:30. Among other things, the question was if extradition to Rwanda, taking into account the general conditions of the judiciary in Rwanda, would be contrary to the provisions of Article 6 of the European Convention on the Right to Justice.

In the second case, NJA 2013:2 the question concerned the description of the offense when it contained a statement that is not necessary for the prosecution to be approved. This problem was linked with art. 6(3) in the ECHR.

The third case NJA 2015:21, concerned one of the most basic issues in the fair trial, namely, the right to cross-examine witnesses.

The case NJA 2015:36 is again an interesting one. There the question was if the individual who has won the case against the state should get compensation based on the legal expenses. There the court referred to the ECtHR-case *Stankiewicz v. Poland* (6.4.2006) when it decided that the costs should be compensated.

The two newest cases Ö2582-17 and Ö2587-17, which are not yet published but are from 2017-09-18 concern again extraditions but this time to Bosnia-Herzegovina which was not found to be against ECHR.

Then those cases which were not classified as a fair trial cases but which still were about article 6 of the ECHR.

The case NJA 2002:35 concerned the question if the Press Subsidies Council is a court in the meaning of article 6 of the ECHR.

The case NJA 2001:7 concerned the question delays in the proceedings according to the article 6 of the ECHR.

The case NJA 2000:40 conceded the extradition and the case NJA 1999:69 the orality of court proceedings in the case of bankruptcy. The first case NJA 1994:118 covered the consideration if the case was about the civil rights and obligations in the meaning of article 6 or not.

There doesn't seem to be any clear reason not to include these cases into the fair trial cases. For instance, the case about orality is a good example of the matters which belong into the core of the fair trial concept too. The cases are more technical, like delays, civil rights and obligations as well as the board actually corresponds with the court as a decision making body or not. Still, even these more technical questions included in a fair trial and could have been classified under that key word. The allocation of cases seems therefore to be a bit arbitrary and the search can therefore be misleading and tricky if you don't double-check by using several key words.

This look at the Swedish case law shows that there have not been very many national cases concerning this, very basic topic of ECHR, namely the fair trial. Also the most of the cases do concern a very traditional way of thinking when human rights are concerned, namely if the extradition to some other country, where the judiciary doesn't correspond with the Swedish one, can be against the convention or not.

Only in one case the Supreme Court refers to the case law from the ECtHR even if the case law plays a central role in interpreting the convention and despite of the fact that the case-law from the ECtHR is very extensive.

To my big surprise, the same search into the case-law of the Administrative Supreme Court didn't give any hits at all.

This look at the case-law shows us that the Swedish Supreme Courts have not been extremely analytical when using ECHR 6 art. as their tool. Otherwise, there would have been more references into the case-law of ECtHR. Also, if we look at the questions where the Supreme Court has used the ECHR as its tool, it is clear that the court has not been very creative when using ECHR as their argument. The topics, where article 6 plays a role in the Swedish case-law, are rather traditional fields of human rights, like extradition or some very basic contents of art. 6 like the right to cross-examine the witness based on art. 6(3). Therefore the result of this research is, that the Supreme Court has used ECHR only in very clear situations and in a conservative way. There are no breaks with that type of a very conventional way of thinking where human rights mainly mean torture or some other very clear violations of traditional human rights. The Swedish Supreme Court has not used ECHR and the case-law from the ECtHR in a creative way by understanding that actually the concept of a fair trial includes the main core of the whole procedural law.

Additionally, in the *ne bis in idem*-discussion, Sweden had huge difficulties to accept the interpretation of the ECtHR according to which an administrative tax increase and the normal, criminal law based punishment in tax fraud cases is against the *ne bis in idem* –principle and therefore a violation of ECHR. Sweden was extremely obdurate and preferred its traditional legal way to have double proceedings and double sanctions (both administrative and criminal law based).¹⁵

FINNISH BACKGROUND

Finland ratified the Convention in 1990. To make the status of human rights stronger, the similar rights are included into the Finnish Constitution from 1995 on. There were mainly political reasons to this rather late ratification of Finland. The ECHR was seen to belong into the Western Europe and as long as the Soviet Union was existing, there were no chances to join in. However, the political situation changed quite quickly in the end of 80's.¹⁶ Even if the ECHR was not the first international convention on human rights which was ratified by Finland, its cultural significance at the national level was enormous.¹⁷ Already in advance, the academic discussion against and for the ratification from the legal point of view was extremely lively.¹⁸ The first violation against Finland came in 1994 in the case *Hokkanen v. Finland* 23.9.1994.

The contents of this discussion has been changed during the decades but the discussion has not been subsided. Quite soon the focus in these discussions was no longer the convention as such but how to interpret it correctly to avoid violations. The Finnish legislator as well as judges have been very active in that. The common aim seems to be not to take any risk but to develop the national legislation and case law to correspond with the ECHR. Therefore also the case law from the ECtHR is always analysed in detail in the government bills for the new legislation as well as

¹⁵ More about this discussion in Ervo 2013, pp. 37 – 62.

¹⁶ Lavapuro 2012, pp. 9 – 10 and Sasi 2012, p. 60.

¹⁷ Lavapuro 2012, p. 7.

¹⁸ See for instance Heinonen 1990, pp. 501.

in the court precedents. Both actors, courts and the legislator take the contents of the ECHR in serious and try to interpret carefully, sometimes even try to estimate the possible interpretation of the ECtHR in so far unclear questions to avoid the possible violation. So, the politically coloured doubts turned to legal carefulness very rapidly in the Finnish legal culture.

STATISTICS FROM FINLAND

In 1990 – 2016 there were 186 judgments of ECHR concerning Finland. In 139 of them, at least one violation was found. Judgments finding no violation were 34 and friendly settlements or striking out of the list were 9 pieces. 4 pieces were other judgments like just satisfaction, revision, preliminary objections and lack of jurisdiction.¹⁹ To compare with, the population in Finland is about 5 million. Therefore, again there seems to be much more cases concerning Finland than Sweden, also much more violations taking into account that Finland ratified the Convention much later, that is in 1990 whereas it has been valid in Sweden since 1952 and the used database includes cases from 1959.

What the current statistics are concerned, the Court dealt with 158 applications concerning Finland in 2016, of which 157 were declared inadmissible or struck out of the list. It delivered 1 judgment concerning Finland, which found at least one violation of the European Convention on Human Rights.

What the national law in Finland is concerned the search in the database Finlex with the key word “Euroopan ihmisoikeussopimus” (=ECHR) gave 63 hits from the Supreme Court’s precedents²⁰ and 146 hits from the Administrative Supreme Court’s precedents.²¹ The very first case from the Supreme Court came in 1990 and concerns the extradition to the Soviet Union (KKO 1990:93). The frequency of human rights precedents from the Supreme Court has been quite uniform during the years by being about 1 – 4 cases per year. In 2011, there were 5 cases, in 2012 6 cases and in 2014 also 6 cases. However, again in 2015 only 2 cases, in 2016 4 cases and so far no cases in 2017. The reason to the high amount of cases in 2014 was the *ne bis in idem* –problem in tax fraud cases, the similar to the earlier described Swedish situation where the national tradition to give tax increase in the administrative procedure based on the tax fraud situations has not been enough but after that also a criminal proceedings with the normal criminal law punishments are followed which has nowadays seen to be double punishment and therefore against *ne bis in idem* –prohibition. In 2014, in three of the mentioned 6 cases there was this type of *ne bis in idem* –problem in the issue. Three other cases in 2014 were based on paternity procedure problem, which was found to be against the ECHR and this solution increased the number of paternity cases in Finland that time.

In 2012, there also were 6 cases but the questions in those cases do vary a lot. Therefore there is no specific reason to this increase in 2012. Still, some single cases concern *ne bis in idem* already in 2012, however not in the tax law situation and there is one paternity case too. In 2011,

¹⁹ Searched in the HUDOC-database, <https://hudoc.echr.coe.int/eng>, visited 2017-10-12.

²⁰ <http://www.finlex.fi/fi/oikeus/kko/kko/haku/?search%5Btype%5D=pika&search%5Bpika%5D=Euroopan+ihmisoikeussopimus&submit=Hae+%E2%80%BA>, visited 2017-12-02.

²¹ <http://www.finlex.fi/fi/oikeus/kho/haku/?search%5Btype%5D=pika&search%5Bpika%5D=Euroopan+ihmisoikeussopimus&submit=Hae+%E2%80%BA>, visited 2017-12-02.

there were 5 cases but the questions are varying in all of them. So, there is no specific reason to this increase in 2011.

What the precedents from the Administrative Supreme Court are concerned, the very first case is from the year 1992 and just recently the number of cases has been strongly increasing by being 10 cases in 2011, 6 cases in 2012, 8 cases in 2013, 16 cases in both 2014 and 2015. In 2016, there were 28 cases and so far in 2017 16 cases. Before that, the number of cases has been between 0 – 7 cases per year when 2 cases per year seems to be quite a typical amount at the 90's and in the beginning of 2000. The reason to top years, especially in 2016 and this year 2017 has been the high amount of migration cases which is due to the global change in the amount of asylum cases and the high amount of refugees. There has been also some *ne bis in idem* –problems and other varying issues among those top rates but that is not the reason to the high increase of cases. Therefore the increase is not about the high awareness of the Finnish Administrative Supreme Court about the ECHR in general, but it is in the global situation of a high movement of people, in which also human right issues do exist in a high amount as a matter of fact.

Unfortunately, Finland doesn't follow the Nordic decision to collect all Supreme Court - case law based on EU-law or European human rights law to the one place any longer. This database was working in Finland between the years 2009 – 2015 but it will not be updated any more. However, between the named years, there were totally 44 such cases in Finland whereas the amount in Sweden was 42 cases between the years 2013 - 2017.²² Taking into account the big difference in population (Sweden about 10 million and Finland about 5 million), there seem to be much more such case law which are connected with the EU-law or European human rights law, from the Finnish Supreme Court compared with the Swedish one.

THE FINNISH CASE LAW

Now I will look at the Finnish case law in the more detailed way. Again, I will focus only cases which cover a fair trial. Search by “*oikeudenmukainen oikeudenkäynti*” = fair trial gave 18 hits among the case law from the Supreme Court²³ and 9 hits from the Administrative Supreme Court.²⁴

The first case (KKO 1993:9153) from the Supreme Court came in 1993 and covers the linguistic rights of the Swedish speaking minority in Finland in a civil procedure, where the party had used Finnish at the district court but used Swedish when appealing to the Court of Appeal. Even otherwise, the issues in the named 9 cases vary from the impartiality of the judge to the delays in proceedings and everything in between. Still, the core concept of a fair trial as a key word is in this case tricky. If I search by using article 6 of the ECHR, the result is 43 cases including very important ones. Therefore, the allocating system does not correspondence very well with the real contents of the case and the real contents of the ECHR. A fair trial is, namely,

²² <http://www.hogstادمstolen.se/Avgoranden/Europarattsliga/>, visited 2017-12-01.

²³ <http://www.finlex.fi/fi/oikeus/kko/kko/haku/?search%5Btype%5D=pika&search%5Bpika%5D=Oikeudenmukainen+oikeudenk%C3%A4ynti&submit=Hae+%E2%80%BA>, visited 2017-12-02.

²⁴ <http://www.finlex.fi/fi/oikeus/kho/haku/?search%5Btype%5D=pika&search%5Bpika%5D=Oikeudenmukainen+oikeudenk%C3%A4ynti&submit=Hae+%E2%80%BA>, visited 2017-12-02.

there the main concept which covers the whole article 6 and all other rights mentioned in the article are just examples on the fairness.²⁵

That's why, we need to look at those 43 cases. These cases cover questions from the impartiality of a judge to the right not to incriminate him- /herself. The impartiality of a judge is the most frequent topic among these cases. The reason for that is the Finnish norm on impartiality. The list of the reasons to disqualify the judge is left open and therefore the case law from the ECtHR plays a significant role in this interpretation. There are again *ne bis in idem* –cases too as well as cases concerning the law of evidence. The right to an attorney and access to court are also represented among these precedents.

What is typical to the Finnish cases, is that they often are quite analytical and ECHR and the case law of ECtHR is used to solve the national problem, where the legislation is not updated enough or there are space to different interpretations or any other these type of hard cases in a correct and fair way. The Finnish Supreme Court really uses the ECHR and ECtHR case law as a tool to solve legal problems in the field of procedural law. Some examples are precedents KKO 2016:76 and KKO 2016:96 where the question was the right to an attorney at the police investigation level and the consequences in the situations where there has been no attorney during the questioning of the suspect. Based on the case law from the ECtHR, the Supreme Court decided that those pieces of evidence were inadmissible. Therefore, the questioning without an attorney at the present will not produce any informative material for the court trial. In the previous case, KKO 2016:76, the suspect had got the information on his right to the attorney but he had said that he doesn't need one. However, he had not refused to use an attorney in the way and under the conditions which would have been a valid disposition of the named right. In the conditions of the case, the disposition was not valid and that part of the evidence was inadmissible.

The case KKO 2016:1 concerned *ne bis in idem* –problem in the situation of disciplinary punishment in the prison because of the illegal possession of drugs. Afterwards even the criminal proceedings was started. However, this was against *ne bis in idem* –principle and the disciplinary punishment would have been enough as a sanction in this case. Also this case is a good example on how the Supreme Court analyses the case law from the ECtHR and uses that as an argument. This is very typical to the Finnish Supreme Court that the cases connected with the fair trial and article 6 of the ECHR are analyzed carefully in the light of case law too and different solutions are weighed from the many perspectives.

The first two cases from the Administrative Supreme Court (KHO 2007:67 and KHO 2007:68) concern the increase of tax and therefore *ne bis in idem* –problems again.

Other questions in the Administrative Supreme Court's precedents concern often the oral hearing and the right to be heard which has been one of the typical Finnish problems from the human rights law perspective. In too many cases, the court has not organized any oral hearing to hear the party in person which has been found against the ECHR. There are also several cases concerning the impartiality of a court and more specifically situations where a judge might be challengeable.

After 2014 there seem to be no precedents with this key word "fair trial" from the Administrative Supreme Court; the latest case is KHO 2014:57). However, the common problem in the classification of precedents by key words seem to cover also the Finnish Administrative

²⁵ Ervo 2005, p. 9.

Supreme Court because the search by the article 6 of the ECHR gives 108 cases of which the latest three ones are from October 2017.²⁶

THREE LEVELS OF LAW

Law doesn't consist only of a legal order as *Kaarlo Tuori* has written in his famous book „*Critical legal positivism*“. A legal order is only the visible and discursively formulated surface of law. I would say, it is the most trivial level of law. Below a legal order there are still two more stable levels, namely the legal culture and the deep structure of law.²⁷ So, we get:

(1) The visible law; in the other words the legal order.

(2) The middle mediating level of the law which consists of principles that guide interpretation of the law and which may - at times - invalidate or limit some of the legal activity at the surface (they are more enduring than the specific statute or individual case).

Finally, the most stable level of law is:

(3) The deep structure of law where both the most basic principles (e.g. human rights) and the habits of mind or forms of rationality by which we think and argue about the law are rooted.²⁸

This seems to be very true based on empirical comparative studies. The same legal phenomenon like the consequences of the implementation of international conventions do vary from one legal order to the other. This is true even in very similar legal cultures where the deep structure of law is more or less identical, the visible law in the case of common international conventions too but due to the varying legal culture and the second level of the law the real, current situation in applying the common international instrument can be rather different.

CULTURAL COMPARISONS BETWEEN SWEDEN AND FINLAND

Too often it has been taken for granted that Finland and Sweden share similar societies, similar culture and even legal mentality. Very often there is a shared or similar jurisprudence, sometimes even identical single legal rules in Finland and Sweden due to the historical background, deep co-operation of Nordic legislators especially before the EU-memberships and because Finland has often copied the Swedish legislation in the case something has been working well in Sweden. Still, the way of thinking and therefore also interpretations may vary more than we think owing to those differences that exist at micro level in the two cultures' ways of thinking.

Nordic legal culture has been said to be democratic, transparent, human, flexible, pragmatic and reformistic.²⁹ Still, some other key differences between the Finnish and Swedish legal cultures do exist, especially the difference in courts' power to create justice. Swedish legislative

²⁶<http://www.finlex.fi/fi/oikeus/kho/haku/?search%5Btype%5D=pika&search%5Bpika%5D=Euroopan+ihmisoikeussopimus+6+artikla&submit=Hae+%E2%80%BA>, visited 2017-12-02.

²⁷ Tuori 2002, p. 147.

²⁸ Mohr 2003, p. 141 – 142.

²⁹ Hirschfeldt 2011, pp. 5 - 6 and Wilhelmsson 2003. 85.

culture is much more dialogic compared with the Finnish one. The Finnish way to “run things” instead of to discuss and reflect is the main difference between the Finnish and Swedish cultures of realizing things. This is something which can be seen very prominently in the legal culture.

The Finnish legal culture can be characterized by quick solutions and rapid reforms, which can be realized whenever needed through new interpretations in the case law if the legislator has not reacted to relevant new and current needs in the society. This makes flexibility. Creative solutions and common sense are trademarks of the Finnish legal culture.³⁰ This type of legal culture gives lot of space and fertility to adapt foreign models and international instruments too. There are no big obstacles in the culture to go to the new. This might be one reason to this difference that ECHR and case law based on it, is lively discussed by academics in Finland and easily followed by courts too, whereas this common law –based way of interpretation (the contents of the convention is developed by case-law and not amending the text) is not that familiar way to make legal changes in Sweden. This could be one clarifying actor in this – quite a deep - difference between Finland and Sweden. When used to the discursive legislative procedure to change interpretations, Swedes don’t feel at home with this European instrument to make changes without common discussions first.

The other East-Scandinavian differences stay in mentalities. It has been written that many Swedish colleagues have the missionary zeal and they seem truly concerned that the blessings of their national legal system are brought to the knowledge of the international forum.³¹ Swedes seem mostly happy and well-satisfied with their legal system. It should perhaps also lead to critical thinking about what should be imported or whether something should or can be imported at all. Contrastively, in Finland it is typical to underrate local solutions and focus on what could be imported to make the own legal system better - sometimes even in situations where local solutions could be seen as “blessings”. This difference is also one clarifying factor in the analysis why there are some differences between Finland and Sweden in factual adaptation of the ECHR. Formally, the convention is valid and binding in both countries and that history is much longer in Sweden since 1959 whereas - mainly thanks to political reasons – Finland could join in the convention in the beginning of 90’s but the factual effects at least into the Finnish procedural law - which I know best - has been really enormous and very fundamental whereas in Sweden the ECHR and its article 6 are not the main factors in the procedural law at all. The academic discussion on that topic is not lively, it could even be described as mainly failing except of some colleagues who have adopted the human rights perspective in their research. The domestic “climate”, or, in other words, this type of general systemic mentality evidently has an effect on legal decision making, and especially on interpretation and application.

Mentality is one crucial factor in judicial activism in its opposite, i.e. judicial self-restraint. These concepts refer to judges’ activity in creating new interpretations and, in difficult cases, even new solutions to problems. Judges can be like passive civil servants who just apply the law more or less technically, or they may closely resemble political actors where they actively create law and up-date interpretations. Mattila wrote in 1998 that judges in Finland and Sweden see themselves as executors of the legislator. Husa shares the same opinion in 2010, but adds that activism in the Nordic countries is increasing. As concerns judicial self-restraint, the question of the level of restraint arises. It might still be true today that courts are self-restrained in both

³⁰ See also Sallila 2011, p. 466.

³¹ Hondius 2007, p. 147.

countries to some degree, but despite this fact there are deep differences in the Finnish and Swedish mentality in this respect. This is at the same time connected to the sources of law. According to a specific research project where 11 countries were studied for this aspect, Sweden was one of the most self-restrained countries together with the Soviet Union, whereas the United States was the most active one. Finland was unfortunately not among the countries included in the research.³² Unfortunately that empirical study is also very old now and cannot tell us much about the current situation. However, because the legal culture changes slowly, there might still today be something true in this study. At least, the factual adoption of the ECHR in practice do vary between the neighboring countries due to the cultural and mental differences. The legal frames to apply and interpret the ECHR are namely identical.

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SANTRAUKA

EUROPOS ŽMOGAUS TEISIŲ TEISMO PRAKTIKOS STATUSAS NACIONALINĖJE TEISINĖJE PRAKTIKOJE – KLAUSIMAS APIE VIETINĘ TEISINĘ KULTŪRĄ? RYTŲ-SKANDINAVIJOS Palyginimai

Pernelyg dažnai savaime suprantamu dalyku buvo laikoma, kad Rytų ir Skandinavijos šalys, Suomija ir Švedija turi panašią visuomenę, panašią kultūrą ir netgi teisinę mentalitetą. Suomijoje ir Švedijoje labai dažnai egzistuoja bendra ar panaši jurisprudencija, kartais net vienodos teisinės taisyklės, atsiradusios dėl istorinio pagrindo, glaudaus Šiaurės šalių teisės aktų leidėjų bendradarbiavimo, ypač prieš narystę ES; jos bendros dar ir todėl, kad Suomija dažnai kopijavo Švedijos teisės aktus. Tačiau skiriasi interpretacijos ir teisinio mąstymo būdai, kitaip tariant, teisinės kultūros kaimyninėse šalyse nėra vienodos. Švedijos teisės kultūra yra labiau dialogiška nei Suomijos. Suomijos būdas tvarkyti reikalus, o ne aptarti ir atspindėti yra pagrindinis skirtumas tarp Suomijos ir Švedijos dalykų realizavimo kultūrų. Tai gali būti viena iš priežasčių, dėl kurių šiuo metu esama skirtumo tarp EŽTT ir jo grindžiamos teismų praktikos; tai aktyviai aptariama Suomijos akademikų ir lengvai vykdoma teismų, kadangi šis bendrais įstatymais grindžiamas aiškinimo būdas (konvencijos turinys parengiamas remiantis teismų praktika ir nekeičiant teksto) nėra toks įprastas būdas atlikti teisinius pakeitimus Švedijoje. Formaliai konvencija galioja ir yra privaloma abiejose šalyse, nors Švedijoje istorija yra daug ilgesnė (įsigaliojo nuo 1959 m.), o – Suomija (daugiausia dėl politinių priežasčių) galėjo prisijungti prie konvencijos tik dešimtojo dešimtmečio pradžioje, bet faktiniai padariniai, bent jau Suomijos procesinėje teisėje, buvo didžiuliai ir labai svarbūs, tačiau Švedijoje EŽTT ir jo 6 straipsnis nėra pagrindiniai proceso teisės elementai.

Šiame straipsnyje teismų praktikos statusas iš Europos Žmogaus Teisių Teismo lyginamas su Rytų ir Skandinavijos šalimis.

REIKŠMINIAI ŽODŽIAI

Lyginamieji tyrimai, kritinis teisinis požiūris, Rytų-Skandinavijos šalys, Europos Žmogaus Teisių Teismas, sąžiningas teismas, žmogaus teisių įgyvendinimas.