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Tort as Remedial Action Against Breaches of the ECHR

- A Study of Constitutional Rights Using the Impact of the ECHR in Swedish Constitutional and Tort Law

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Contents

Summary

The aim of this thesis is to investigate whether tort liability claims against public authorities for breaches of the ECHR can be defined as a constitutional right in Swedish law. The theoretical definition of what constitutes a constitutional right is constructed through elements of Robert Alexy's *A Theory of Constitutional Rights.* The theory is applied on the current applicable law regarding the status of the ECHR in Swedish constitutional law and the impact of article 13 ECHR in Swedish tort law. The status of the ECHR in Swedish constitutional law and the impact of article 13 ECHR in Swedish tort law is determined through traditional legal dogmatic method and vertical comparative method.

The character and historic aspects of Swedish constitutional law show that constitutional rights and rights in general have enjoyed scarce attention and significance. The preparatory works to the incorporation act of the ECHR (*Lagen (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*) furthermore explicitly stated that the ECHR was not intended to be incorporated as part of Swedish constitutional law. However, the author interprets current constitutional law as diverging from the previous legal conceptions regarding the status of the ECHR and rights in general. The guarantee stated in 2:19 § RF, the Swedish Supreme Court's established case law and the doctrinal elements show that the ECHR currently holds a quasi-constitutional status in Swedish law.

The right to an effective remedy according to article 13 of the ECHR currently states that a remedy shall be accessible, practically available to individuals, and offer a reasonable chance of success. Decisions or judgments of remedy must further be issued within a reasonable time and be possible to execute. There is however no further definition of what constitutes an effective remedy according to article 13 ECHR. Mechanisms investigating and enabling individuals to obtain tort liability and compensation for suffered non-pecuniary damages due to breaches of article 2 and 3 ECHR are however called for according to the ECtHR's case law. The Swedish Supreme Court's case law shows a greater influence of the ECHR and the precedence set by the ECtHR when assessing tort liability for public authorities because of breaches of the ECHR. Legislative amendments have been suggested in SOU 2010:87, but no changes are currently underway. The precedence of the Swedish Supreme Court regardless currently provides individuals the possibility of issuing tort liability claims against public authorities for breaches of the ECHR according to 3:2 § SkL.

The author finds that article 13 ECHR is a constitutional right by applying Alexy's theory of constitutional rights in relation to the status and impact of the ECHR and article 13 ECHR in Swedish law. Article 13 is approached and anlysed as a subjective and positive right stating entitlements for individuals.

The author finds however that there is no constitutional right to launch tort liability against public authorities for breaches of the ECHR in Swedish law. Such mechanisms are depending on breaches of article 2 and 3 of the ECHR and not necessarily part of the scope of article 13 ECHR.

Sammanfattning

Målet med denna uppsats är att undersöka huruvida det inom svensk rätt finns en konstitutionell rättighet att kräva skadestånd för offentliga myndigheters kränkningar av EKMR. För att definiera vad som utgör en konstitutionell rättighet har element ur Robert Alexy's *A Theory of Constitutional Rights* tillämpats. Teorin har tillämpats på de förhållanden som anses vara gällande rätt angående EKMR:s konstitutionella status inom svenskt rätt och genomslaget av artikel 13 EKMR inom den svenska skadeståndsrätten. EKMR:s konstitutionella status och genomslaget av artikel 13 EKMR inom den svenska skadeståndsrätten har fastställts genom traditionell rättsdogmatisk metod och vertikal komparativ metod.

Den svenska rättens konstitutionella karaktär och historia visar att konstitutionella rättigheter som begrepp ägnats liten uppmärksamhet och givits liten betydelse. Förarbetena till inkorporationslagen om EKMR (*Lagen (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*) visar dessutom att EKMR ej ämnades inkorporeras som en del i svensk grundlag. Författaren tolkar dock gällande svensk konstitutionell rätt som avvikande från denna tidigare ståndpunkt. Garantin i 2:19 § RF tillsammans med Högsta domstolens prejudikat och doktrinens tolkningar visar att EKMR har ett starkt grundlagsskydd och kvasi-konstitutionell status i svensk rätt.

Rätten till effektiva rättsmedel enligt artikel 13 EKMR innebär att rättsmedel ska vara åtkomliga, praktiskt tillgängliga för individer och erbjuda en rimlig chans för framgång. Beslut eller domar angående rättsmedel måste vidare utfärdas inom rimlig tid och vara möjliga att utföra. Det finns dock ingen klar definition av vad som utgör ett effektivt rättsmedel enligt artikel 13 EKMR. Enligt Europadomstolens praxis krävs dock mekanismer för att undersöka och erbjuda möjlighet för individer att gentemot offentliga myndigheter hävda skadeståndsansvar och begära skadestånd för ideella skador uppkomna till följd av kränkningar av artikel 2 och 3 EKMR. Högsta domstolens praxis visar att EKMR och Europadomstolens praxis är av allt större betydelse för bedömningen av offentliga myndigheters skadeståndsansvar för kränkningar av EKMR. Begäran om och förslag på klargörande lagstiftning om EKMR och skadestånd har presenterats i SOU 2010:87 men lagändringar har ännu inte skett. Högsta domstolens praxis ger dock individer möjlighet att hävda skadeståndsansvar och begära skadestånd från offentliga myndigheter för kränkningar av EKMR.

Författaren finner genom analys av status och genomslag för artikel 13 i svensk rätt enligt Alexy's teori om konstitutionella rättigheter att artikeln kan anses vara en konstitutionell rättighet. Artikel 13 EKMR analyseras som en subjektiv och positiv rättighet som konstaterar rättigheter (*entitlements*) för individer. Dock finner författaren att det inte finns en konstitutionell rättighet att hävda skadeståndsansvar och begära skadestånd för kränkningar av

EKMR inom svensk rätt. Den typen av mekanismer är beroende av kränkningar av artikel 2 och 3 EKMR för att manifesteras, vilket i sig inte nödvändigtvis är del av skyldigheten enligt artikel 13 EKMR.

Preface

I would like to take the opportunity to thank all the wonderful friends who have made my university years so enjoyable. I also want to direct my deepest gratitude to my supportive family and my wonderful girlfriend. I could not have done this without you. I would finally like to direct my special thanks to my supervisor, Karol Nowak, whose guidance and support contributed greatly to this thesis.

Malmö, January 4th 2017
David Kron

Abbreviations

Bet.	Report
Cf.	Confer
Dir.	Task given to a commission of inquiry
Ds	Ministry Publications Series
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights.
EEA	European Economic Area
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
KU	Committee on the Constitution
NJA	Nytt Juridiskt Arkiv, Avd. 1
Para.	Paragraph
Prop.	Government Bill
RF	Instrument of Government
Rskr.	Parliament Writ
RÅ	Supreme Administrative Court Yearbook
SFS	Swedish Code of Statutes
SkL	Tort Liability Act

SO	Act of Succession
SOU	Swedish Government Official Reports
SvJT	Svensk Juristtidning
SÖ	Sweden's International Agreements
TF	Freedom of the Press Act
UDHR	Universal Declaration of Human Rights
YGL	Fundamental Law on Freedom of Expression

1. INTRODUCTION

The first introductory chapter of this thesis provides the reader with a brief background to the chosen subject. The chapter further presents the purpose, research question, theoretical starting point and delimitations, which together form the framework of this thesis. This chapter also gives an account on the method applied and the material used in the writing process and the subject's current research status. Finally, the chapter provides an outline explaining the structure and approach of the thesis.

1.1 Background

This thesis discusses the constitutional rights aspects of the impact of the European Convention for the Protection of Human Rights and Fundamental Freedoms (EHCR)[1] in Swedish constitutional and tort law. Historically, the notion of rights originates from the conceptualisation of the human being as an individual in ancient Roman law, and has been influenced by every major historical paradigm since then.[2] The notion of what is currently perceived as human rights was founded by the political theories and ideologies formed in the 18th century. Rights were then perceived as entities anchored in natural law, which is law based on higher reasons commonly found and anchored within all of humanity. Such rights have come to be referred to as natural rights. The first legal document addressing the notion of natural rights, the French Declaration of Rights, contained a list of individual rights and freedoms but no enforcement measures.[3] The philosopher Jeremy Bentham called the French Declaration of Rights "*nonsense on stilts*" due to the insipid language of the declaration.[4]

The author has since his first day of law school been interested in human rights, and especially the fulfilment and enforcement of such rights. Bentham's quote captures the weakness of rights. Without mechanisms ensuring justice, rights become well-intentioned nonsense. Remedies on the other hand counteracts the nonsense ensuring and enabling human rights by providing additional tools ensuring justice. Remedies for violations of human rights have however been absent for a long time. The theoretical concept of such remedies has recently been formed but remains inconsistent in practice. National remedies, such as tort, have however been far more advanced and coherently used.[5]

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[1] Rome the 4th November 1950, SÖ 1952:35.
[2] Lysén, Göran, *Europas grundlag: Europakonventionen om mänskliga rättigheter*, 2., [rev. och utök.] uppl., Iustus, Uppsala, 1993, p. 18–30.
[3] Derlén, Mattias, Lindholm, Johan & Naarttijärvi, Markus, *Konstitutionell rätt*, 1. uppl., Wolters Kluwer Sverige, Stockholm, 2016, p. 255.
[4] Bentham (1843) http://www.ditext.com/bentham/bentham.html.
[5] Shelton, Dinah & Shelton, Dinah, *Remedies in international human rights law*, 3nd ed., Oxford University Press, Oxford, 2015, p. 1-22.

The foundation of what we today perceive as international human rights law was laid in the aftermath of the horrors of the Second World War and the holocaust. International treaties such as the UN Charter and the Universal Declaration of Human Rights (UDHR) were drafted to ensure a new peaceful world order and to guarantee the rights of individuals.[6] The notion of human rights was at the time perceived as a promoter of democracy, which led to the creation of the Council of Europe and subsequently the creation of the EHCR and the European Court of Human Rights (ECtHR).[7]

The impact of the EHCR has steadily increased, especially in Swedish law since the incorporation of the Convention[8] and the reform[9] of the Swedish Instrument of Government (RF)[10]. The interaction between Swedish law and the ECHR has sparked several discussions. Two major issues are the constitutional impact of the ECHR and tort and damages due to violations of the Convention.[11] The area of tort law the ECHR has primarily been discussed in the context of the right to an effective remedy under article 13 of the ECHR.[12] The subject of this thesis was chosen with these two areas in mind. These areas are combined and analysed as modest contributions to the discussion on the implementation of the ECHR in Swedish law with Bentham's rejection of rights as "*nonsense on stilts*" in mind.

1.2 Purpose and Research Question

The purpose of this thesis is to examine the impact and standing of the ECHR in Swedish law by examining the influence of the Convention on Swedish constitutional and tort law. Since constitutional law is supreme in the Swedish legal hierarchy, the ECHR's standing within or in relation to the Swedish constitution indicates the overall standing of rights and freedoms in Swedish law. Tort law concerns liability for breaches[13] and the reparatory and compensatory elements applicable when restoring breaches. Together the constitutional and tort liability law dimensions form a construct telling of the standing, implementation and insurance of the ECHR in Swedish law. The author has chosen the following research question to fulfil the purpose:

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[6] Lysén (1993), p. 27.
[7] Lysén (1993), p. 39-41; Alston, Philip & Goodman, Ryan, *International human rights: the successor to international human rights in context: law, politics and morals: text and materials*, Oxford University Press, Oxford, 2012, p. 891-892.
[8] See SFS *Lagen (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna*. ECHR and the Convention are used synonymously.
[9] See SFS *2010:1408 Lag om ändring i regeringsformen*; cf. 2:19 § RF.
[10] SFS (1974:152) *Regeringsformen.*
[11] See for instance Josefsson, Carl (2015) Domstolarna och demokratin – något om syftet med grundläggande rättigheter, europeiseringens konsekvenser och aktivismens baksida, *Svensk Juristtidning*, s. 40–71; Cameron, Iain (2006) Skadestånd och Europakonventionen för de mänskliga rättigheterna, *Svensk Juristtidning*, s. 553–588.
[12] See SOU 2010:87.
[13] "*Breach*" and "*Violation*" are used synonymously.

Is it a constitutional right for individuals to make tort liability claims, in accordance with article 13 ECHR, against public authorities based on breaches of the ECHR?

If there is a right stating tort liability for breaches of the ECHR and said right is a constitutional right, then such a right would be a formidable guarantee for ensuring and repairing violations of the Convention in Swedish law.[14] To answer the research question, a definition of what constitutes a constitutional right is applied. The chosen definition stems from elements of a specific theory of constitutional rights and is described and developed below.[15] The research question furthermore requires investigations of two legal conditions illustrated through the following questions[16]:

a) *What is the constitutional status of the ECHR in Swedish law?*

b) *How has the right to an effective remedy under article 13 of the ECHR influenced the liability of public authorities in Swedish tort law?*

Sub-question a) helps illustrate the relationship between current Swedish constitutional law and the ECHR. To answer a research question about constitutional rights the notion of constitutional law and the rights and freedoms constitutionally guaranteed should be considered. The question further helps highlight the standing of the ECHR in Swedish law and provides further basis for the discussion of constitutional rights in a Swedish legal context.

Sub-question b) helps clarify the current tort liability law considering the right to an effective remedy under article 13. The question provides context on the possible liability mechanisms available when breaches of the ECHR have occurred. The two questions form the bulk for the thesis outline, which is developed below.[17]

1.3 Theory

To analyse the ECHR influenced tort law from a constitutional rights perspective, the author has taken inspiration from Robert Alexy's general legal theory of constitutional rights presented in *a Theory of Constitutional*

[14] Cf. Alexy, Robert, *A theory of constitutional rights*, Oxford University Press, New York, 2010, p. 349–350.
[15] See chapter 1.3.
[16] From here on referred to as "*sub-question a)*" and "*sub-question b)*":
[17] See chapter 1.7.

Rights.[18] Elements of the theory are used to define what exactly constitutes a constitutional right. The theory has since its introduction been highly influential and hailed by several.[19] There are also other alternative theories with greater focus on substantive moral approaches.[20] The theory is applied to the current legal conditions established by answering sub-question a) and b).[21]

The theory aims at giving rationally justifiable answers to questions concerning constitutional rights.[22] This makes the theory a relevant addition and tool when answering the research question. The character of the theory is general and legal. Alexy has described the theory as the general part of constitutional rights doctrine and based on two sub-theories: the theory of principles and the theory of basic legal positions.[23] For the sake of transparency, it is worth noting that Alexy has mentioned that the theory does not aim at creating a universal model for the notion of constitutional rights. The distinguishing features of constitutions do however remain consistent between states.[24] Thus, the theory still carries merit when analysing the constitutions of other states. This thesis presupposes that the theory is applicable in relation to Swedish constitutional law.

The content and nature of the theory comprises of three main characteristics. It is a theory of constitutional rights of constitutional law; it is a legal theory, and it is a general theory.[25] Alexy has stated that the theory is a theory of constitutional rights, since it focuses on enacted constitutional rights.[26] The second characteristic of the theory consists of three dimensions: an analytical, an empirical and a normative one. The analytical dimension covers the systematic and conceptual clarification of valid law. The empirical dimension consists of the examination of enacted law and available legal argumentation. The normative dimension focuses on the explanation and critique of legal practice, which by necessity contains value judgments.[27] The theory integrates these three dimensions to justify concrete legal ought-judgments.[28] Finally, the theory is general in the sense that it concerns issues common to all constitutional rights, which distinguishes the theory from any other concerning specific problems relating to specific constitutional rights.[29]

[18] Alexy (2010). From here on is Alexy's theory of constitutional rights referred to as "*the theory"*.
[19] See Menéndez, Agustín José. & Eriksen, Erik Oddvar (red.), *Arguing fundamental rights*, Springer, Dordrecht, 2006, p. 1.
[20] Cf. Möller, Kai, *The global model of constitutional rights*, 1st ed., Oxford University Press, Oxford, United Kingdom, 2012, p. 1–2.
[21] See chapter 4.
[22] Alexy (2010), p. 3.
[23] Alexy (2010), p. 3–4.
[24] Alexy (2010), (Julian Rivers), p. xviii–xix.
[25] Alexy (2010), p. 5
[26] Alexy (2010), p. 5–6
[27] Alexy (2010), p. 6–8.
[28] Alexy (2010), p. 9.
[29] Alexy (2010), p. 10.

The theory assumes that constitutional rights claims flow from the existence of valid constitutional rights norms.[30] The theory defines a constitutional rights norm as a wider notion than a constitutional right.[31] This in turn brings the concept of norms into question. The theory further distinguishes between norms and normative statements by defining a norm as the meaning of a normative statement.[32] Regarding constitutional rights norms more specifically, the theory defines such norms as norms expressed by constitutional rights provisions. The theory describes constitutional rights provisions as statements located in the text of constitutional law.[33] To determine more precisely whether a statement is a constitutional right provision the theory prescribes a review of the substantive, structural or formal characteristics of the statement in question. The substantive element states that the right should belong to the foundation of the state itself. The structural element states that a constitutional rights provision is a constitutional provision stating a subjective right. The formal element finally concerns the manner and form of the provision's enactment.[34]

Alexy's theory also treats norms as either rules or principles, and distinguishes rules from principles to provide constitutional justification on issues such as the limitation of rights or the conflict of rights.[35] The following criteria is implemented by Alexy for determining principles:

> "*Principles are optimization requirements, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible.*"[36]

While rules are:

> "*…norms which are always either fulfilled or not*."[37]

Upon a conflict of rules, the theory prescribes a conflict resolution either by using appropriate exceptions or by declaring one of the rules invalid.[38] The conflict of principles on the other hand is solved by establishing a conditional relation of precedence between the principles in the light of the circumstances of the case. This is referred to as the law of competing principles.[39]

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[30] Alexy (2010), p. 19.
[31] Alexy (2010), p. 19–20.
[32] Alexy (2010), p. 21–22.
[33] Alexy (2010), p. 30.
[34] Alexy (2010), p. 31–32.
[35] Alexy (2010), p. 44, 48.
[36] Alexy (2010), p. 47–48.
[37] Alexy (2010), p. 48.
[38] Alexy (2010), p. 49–50.
[39] Alexy (2010), p. 50–54.

The theory provides this thesis with a valuable classification of constitutional rights. The author applies elements of the theory regarding subjective rights in relation to analytical questions.[40] This approach is appropriate since the character of the statement expressed in the research question is analytical, since it depends of systematic and conceptual clarifications of valid law. The notion of subjective rights is treated as a system of norms and basic legal positions providing rights to something, liberties and powers. Norms refer to the normative statement expressed by the right in question and position means the relationship between the actors mentioned in the statement.[41] The relevant statement states a right to something, which is described as the following:

> *"X has a right to G as against Y"*[42]

The example above consists of a norm stating "*X has a right to G as against Y"* and the legal position consists of ("X") having a right to ("G") against ("Y"). The position exists between ("X") and ("Y"). Rights to something can further provide rights to positive state acts. The theory perceives rights to positive acts as factual or normative. A right to normative positive state acts prescribe legal norms.[43] The right to something exists in the relation between the right holder ("X"), the addressee ("Y") and the subject matter ("G").[44]

The research question is answered by applying the theory on the possible constitutional right statement relevant for this assessment. The statement in question is the normative statement of the right to an effective remedy in article 13 ECHR. Depending on whether the statement in article 13 of the ECHR is a constitutional right, the analysis continues to assess the notion of tort liability for public authorities due to breaches of the ECHR.

1.4 Delimitations

The thesis concerns the ECHR, the RF and the Tort Liability Act (SkL)[45]. The thesis focuses on certain constitutional and tort liability aspects of the ECHR in Swedish law and in relation to public authorities. The question of the liability of public authorities could also be discussed at great lengths from the perspective of the general principles and the charter of fundamental rights provided by EU law and offer for equally interesting discussions. EU law is however ignored to give room to a deeper and more focused thesis in line with the stated purpose. The focus on the ECHR is further motivated by the fact that the ECHR has enjoyed greater debate given its dubious status in

[40] Alexy (2010), p. 111, 114.
[41] Alexy (2010), p. 120.
[42] Alexy (2010), p. 120.
[43] Alexy (2010), p. 126.
[44] Alexy (2010), p. 131.
[45] SFS (1972:207) *Skadeståndslag*.

Swedish law.[46] This thesis further refrains from other international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) or International Covenant on Economic, Social and Cultural Rights (ICESCR) for the sake of precision.

The segments regarding tort are delimited to non-contractual relationships between individuals and public authorities. Only the absolute necessary tort law aspects to assess and discuss the tort liability of public authorities according to SkL are covered for comparison with the ECHR. The thesis briefly acknowledges the different kinds of damages an individual may suffer. The focus is however on non-pecuniary damages[47], since mainly concerns violations of rights stated in the ECHR. Assessments of compensation amounts due to non-pecuniary damages are also left for others to assess. This thesis only concerns if individuals should be awarded non-pecuniary damages for breaches of the ECHR. The determination of damage amounts requires a more comprehensive investigation of tort law.

The author has further refrained from addressing questions regarding the horizontal effect of the ECHR. This thesis seeks to address the notion of liability of public authorities in relation to individuals, from a vertical perspective, which renders any discussion of liability between individuals due to breaches of the ECHR obsolete. The horizontal effect of the ECHR between individuals in Swedish law has been rejected by the Swedish Supreme Court, but could still be discussed and debated.[48] The author perceives public authorities as the main guarantee and violator of rights and freedoms and therefor prefers to focus the discussion within vertical relationships.

The theoretical approach of the theory considers the positive nature of rights. The thesis avoids further discussion or investigation of positive rights under the ECHR in general. The chapters discussing the scope and application of article 13 of the ECHR are as such sufficiently investigating the positive nature of the article 13 ECHR to answer the research question.[49]

1.5 Method

The author applies traditional legal dogmatic method when answering the above-mentioned research question and sub-questions. The essence of legal dogmatism consists of the restructuring of legal systems to interpret and systematize current applicable law.[50] To engage the research questions in

[46] Nergelius, Joakim, *Förvaltningsprocess, normprövning och europarätt*, 1. uppl., Norstedts juridik, Stockholm, 2000, p. 45.
[47] See chapter 3.2.2 for more on "*pecuniary*" and "*non-pecuniary*" damages.
[48] See for instance NJA 2007 s. 747.
[49] See chapter 3.1.
[50] Jareborg, Nils (2004) Rättsdogmatik som vetenskap, *Svensk Juristtidning*, s. 1–10 (p. 4); Peczenik, Aleksander, *Juridikens teori och metod: en introduktion till allmän rättslära*, 1. uppl., Fritze, Stockholm, 1995, p. 33.

accordance with the legal dogmatic method, the author examines legislation, case law, preparatory works, and legal literature.[51] Upon examining the source material and constructing the legal argumentation, the author considers the principles stating that constitutional law, acts, other regulations, and firm custom should be granted the greatest authority.[52] Case law and preparatory works are weighted as source material that should be granted authority in the legal argumentation.[53] With case law means significant rulings, mainly from the Swedish Supreme Court and the ECtHR, setting future precedence.[54] Preparatory works are used in order to include the legislator's purpose, as well as including the different values expressed during the legislation process.[55] Other sources, such as institutional recommendations, propositions, and legal doctrine are treated as sources that may be granted authority.[56]

The author further applies a vertical comparative legal method when comparing the ECHR, Swedish constitutional law, and the Swedish tort liability act.[57] The legal systems have been restructured by using the traditional legal dogmatic method and then compared to answer the research question.

1.6 Current Research Status

The impact of the ECHR in Swedish law was at first modest. During the constitutional drafting inquiry, which was tasked with proposing a new constitution in the 1960's, the constitutional aspects of the ECHR were addressed.[58] The inquiry proposed that the ECHR should be made applicable in Swedish law, but the suggestion was rejected.[59] The issue resurfaced in connection to the Swedish ascension to the EU.[60] The Swedish government tasked a committee with investigating the effects of the EU ascension in relation to the ECHR.[61] The committee proposed that Sweden should incorporate the Convention as national law and add a protective mechanism in the constitution with the purpose of ensuring compatible legislation and application of national law.[62]

The doctrinal debate has also discussed the relationship between Swedish constitutional law and the ECHR, especially on the issue of fundamental rights and freedoms. The judge of appeal, Carl Josefsson, highlighted in a

[51] Jareborg (2004), s 1–10, (p. 8).
[52] Peczenik (1995), p. 35–36.
[53] Peczenik (1995), p. 35.
[54] Peczenik (1995), p. 37.
[55] Peczenik (1995), p. 40–41.
[56] Peczenik (1995), p. 35.
[57] Olsen, Lena (2004), Rättsvetenskapliga perspektiv, *Svensk Juristtidning*, s. 105–145, (p. 125).
[58] SOU 1972:15, p. 3, 67–74.
[59] See KU 1973:26 and prop. 1973:90.
[60] See SOU 1993:14.
[61] See SOU 1993:40, part A.
[62] SOU 1993:40, part A, p. 24–25.

recently released article the increased importance of constitutional law, primary EU law, and the ECHR in the Swedish legal discourse.[63] The previous Justice of the Swedish Supreme Court, Dag Victor, has also contributed to the ongoing discussion by presenting an overview of the Swedish courts' usage of the ECHR.[64]

The issue of the ECHR's influence on the Swedish tort law eventually became of particular interest trough time due to the Swedish Supreme Court's case law.[65] The Swedish government issued a committee directive in 2009 tasking an inquiry to analyse the legal implications of the right to an effective remedy in article 13 ECHR. The directive further requested an investigation of if article 13 ECHR entails an obligation for Sweden to award economic compensation to individuals in the event of a Convention breach.[66] The Swedish government further tasked the inquiry with suggesting legislation addressing any discrepancies between Swedish law and the right to an effective remedy under article 13 ECHR.[67] The inquiry published a report on the question of public liability according to the ECHR in 2010.[68] The inquiry proposed legislation, which would enable damages to individuals if the Swedish state or a municipality breached the ECHR.[69]

The matter of tort liability in relation to the ECHR has further been subject to doctrinal debate. Professor Iain Cameron wrote an article on the issue in 2006 when the discussion first came alive. [70] Other scholars, such as Professor Håkan Andersson[71] and Professor Bertil Bengtsson[72], and several others have given significant contributions on the subject.

1.7 Thesis Outline

This thesis focuses on elements of both national and international law. The thesis more specifically concerns the impact of international law in national law. The thesis outline aims at displaying the relevant components of the ECHR, RF and SkL forming the current legal construct relevant to the research question.

Chapter 2 examines the relationship between the Swedish constitution and the ECHR. Chapter 2.1 contains reviews of the general characteristics of

[63] See Josefsson (2015), s. 40–71.
[64] See Victor, Dag (2013) Svenska domstolars hantering av Europakonventionen, *Svensk Juristtidning*, s. 343–396.
[65] The cases NJA 2005 s. 462, NJA 2007 s. 295 and NJA 2007 s. 584 are further discussed in chapter 3.4.1 below.
[66] Dir. 2009:40, p. 5.
[67] Dir. 2009:40, p. 5-6.
[68] See SOU 2010:87.
[69] SOU 2010:87, p. 19.
[70] See Cameron (2006), p. 553–588.
[71] See Andersson, Håkan, *Ansvarsproblem i skadeståndsrätten*, Iustus, Uppsala, 2013.
[72] See Bengtsson, Bertil (2011) Skadestånd vid brott mot regeringsformen? *Svensk Juristtidning*, s. 605–629.

constitutional law with the purpose of providing an idea of constitutions in general. Chapter 2.2 covers the Swedish constitutional development through history and aims at contributing historical awareness to the discussion. Chapter 2.3 concerns the RF's fundamental rights and freedoms to provide further basis for the comparison with the ECHR. Chapter 2.4 consists of the relationship between national and international law to showcase how international law may affect national law. Chapter 2.5 concerns the impact of the ECHR in Swedish law. The chapter is finally concluded with an answer and conclusion to sub-question a) in chapter 2.6.

Chapter 3 covers the impact of the right to an effective remedy under article 13 of the ECHR in Swedish tort law. Chapter 3.1 examines the scope and limits of article 13. The section focuses on the ECtHR's case law regarding the application and interpretation of article 13. The purpose of this chapter is to provide a reference point for further comparison with Swedish law Chapter 3.2 concerns he compensatory aspects stemming from the right to just satisfaction under article 41 of the ECHR. The purpose of this section is to study the scope and application of the article 41 and to provide a reference point for further comparison with Swedish law. Chapter 3.3 contains the foundation of Swedish tort law with the purpose to provide the necessary elements regarding tort liability of public authorities. Chapter 3.4 provides a study of the Swedish Supreme Court's interpretation and application of article 13. The purpose with this chapter is to provide an overview on the practical approach developed concerning the usage of ECHR breaches as basis for tort liability. Chapter 3.5 provides a review of recent Swedish Supreme Court case law regarding tort liability of public authorities due to breaches of rights and freedoms stated in chapter 2 RF. The purpose with this chapter is to showcase the similarities in tort liability reasoning concerning breaches of the ECHR and the rights and freedoms stated in RF. Chapter 3.6 finally contains a conclusion and answer to sub-question b).

Chapter 4 contains the conclusion and answer to the research question. The aim of this chapter is to highlight the results achieved when applying the theoretical approach on the current applicable law studied in chapter 2 and 3.

2 THE CONSTITUTION AND THE ECHR

This chapter provides a schematic over the construct of Swedish constitutional law in relation to fundamental rights and freedoms in RF and the impact of the ECHR. The chapter provides the necessary material basis for answering sub-question *a) What is the constitutional status of the ECHR in Swedish law?* [73].

The chapter opens with a subchapter specifying the general characteristics of constitutional law with the purpose of providing the general role of constitutional law. The second subchapter provides a brief historical overview with the purpose of showcasing the major influences and shifts through the Swedish constitutional history. The third subchapter covers the fundamental rights and freedoms listed in chapter 2 RF. The subchapter's purpose is to illustrate the rights and freedoms dimension of RF for the later discussion regarding the ECHR. The forth subchapter covers the relationship between national and international law, with the purpose of providing the underlying context relevant to the succeeding section on the impact of the ECHR in Swedish law. The fifth subchapter covers the impact and role of the ECHR in Swedish law. The segment discusses obligations, the incorporation process, the legal status, and the norm conflicts. The purpose of the fifth subchapter is to provide the material context to assess the constitutional status of the ECHR. The sixth and final subchapter concludes the chapter.

2.1 The General Characteristics of Constitutional Law

There is no clear definition of constitutional law. Some founding aspects are however possible to deduce. Constitutional law provides the legal framework for the functioning of the state and the legal system. Which by extension makes constitutional law the closest expression of the social contract between the state and the citizen. This implies that constitutional law enjoys supremacy over other legal sources, since constitutional law defines the authority and limits of the state.[74] Additional general characteristics of constitutional law provides the conditions of public authority, the courts' control over the public authority, and the individual's fundamental rights and freedoms.[75]

The constitution is a term used for norms that directly or indirectly influence how the public authority can act. Some states, such as the United States of

[73] See chapter 1.2 above.
[74] Derlén, Lindholm, & Naarttijärvi (2016), p. 27.
[75] Derlén, Lindholm, & Naarttijärvi (2016), p. 28.

America, have gathered all such norms in one document and explicitly referrers to that collection as the constitution. Some states have no defined written constitution, such as the United Kingdom, but still use norms with constitutional character. The Swedish Constitution comprises of four documents: RF, the act of succession (SO)[76], the freedom of the press act (TF)[77] and the fundamental law of freedom of expression (YGL)[78]. The complete legal character of the constitution is however broader than the combined construct of those four documents. The notion of constitutional law is dynamic and shifting.[79] The following subchapter provides highlights of the historical influences which have featured the current Swedish constitutional law.

2.2 Historical Introduction to the Swedish Constitution

To contextualise and later analyse the dynamic character of Swedish constitutional law the origin of the Swedish constitution should be described. The history of Swedish constitutional law goes back to the 14th century and begins with King Magnus Eriksson's nation law[80]. The nation law further contained provisions providing the protection of liberty and property similar to the modern perception of fundamental rights and freedoms. The foundation to the current Swedish form of governance came with the creation of the Parliament in the 15th century. The selection of a monarch trough succession was ensured by King Gustav Vasa in the 16th century. The foundation to the current constitutional law was laid down after the death of King Karl the 12th in the 18th century. The constitution contained a counterpart to the current RF, which regulated the powers of the ruling King. The constitution further introduced the TF.[81] The RF was reformed in 1809 and provided the process for amending and legislating new additions to the constitution. The RF of 1809 also gave the King the power to form government and party provided the departmental construct seen today in the Swedish government.[82]

The notion of individual rights and freedoms gained momentum in the Swedish legal context in the mid-19th century. Individual rights and freedoms were however guaranteed by ordinary acts and not by constitutional provisions.[83] The inclusion of individual rights and freedoms came with the 16 § of 1809's RF. The main originator behind the 16 § was the Swedish lawyer and governmental official Hans Järta. He was influenced by the ideas of the European philosophers Montesquieu, Kant, and Voltaire. The inclusion of the 16 § paved way for a new constitutional tradition of including

[76] SFS (1810:0926) *Successionsordningen.*
[77] SFS (1949:105) *Tryckfrihetsförordningen*.
[78] SFS (1991:1469) *Yttrandefrihetsgrundlagen.*
[79] Derlén, Lindholm, & Naarttijärvi (2016), p. 29.
[80] Sw: *"Magnus Eriksons landslag".*
[81] Derlén, Lindholm, & Naarttijärvi (2016), p. 41–42.
[82] Derlén, Lindholm, & Naarttijärvi, (2016) p. 42–44.
[83] Prop. 1993/94:117, p. 8.

constitutional guarantees for individual rights and freedoms. The notion of individual rights and freedoms in Sweden was revitalised after the events of the 1930's and 1940's and the human rights movement that followed.[84]

2.3 Fundamental Rights and Freedoms

The RF of 1809 with 16 § remained until the 1970's. The Swedish constitution was reformed in 1974 and provided the foundation to the current constitutional construct. The preparatory works forming the basis for the reform states that the constitution should include descriptions of political rights and freedoms together with derogation mechanisms of some of those rights and freedoms through law and majority decisions. The preparatory works further states that a design with rights, freedoms, and associated exceptions would imply minimal collision between law and the constitution.[85] The guarantee of fundamental rights and freedoms was placed in chapter 2 RF after the rights and freedoms reform of 1976.[86] This placement is still current. Chapter 2 RF additionally includes provisions enabling the derogation of some of the stated rights and freedoms. Some therefore interprets and describes chapter 2 RF as a regulation for the derogation of rights and freedoms and not as a system for the protection of rights.[87]

The rights prescribed in the constitution apply vertically between the individual and the public.[88] The notion of "*the public*" includes executing and legislative bodies with the authority to issue public acts burdening individuals.[89] Private subjects acting on behalf of the public according to law also fall within the scope of this definition.[90] The constitutional guarantees apply to persons located within the Swedish territorial jurisdiction.[91] This also applies to legal persons such as companies.[92] Chapter 2 RF contains four main categories of fundamental rights and freedoms: positive freedoms of opinions, negative freedoms of opinions, physical rights and freedoms, and special guarantees for the rule of law.[93] These categories have subsequently been examined below to provide an overview of the rights and freedoms guaranteed by the Swedish constitution.

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[84] Bring, Ove, Mahmoudi, Said & Wrange, Pål, *Sverige och folkrätten*, 5., [rev.] uppl., Norstedts juridik, Stockholm, 2014, p. 211–217.
[85] Prop. 1973:90, p. 192–193; Bull, Thomas & Sterzel, Fredrik, *Regeringsformen: en kommentar*, 3., [uppdaterade] uppl., Studentlitteratur, Lund, 2015, p. 59.
[86] SOU 1975:75, p. 19; cf. SOU 2008:125, p. 387-388.
[87] Bull & Sterzel (2015), p. 59.
[88] Zetterström, Stefan, *Konstitutionell rätt*, 1. uppl., Liber, Malmö, 2012, p. 26; see 2:1 § RF.
[89] Derlén, Lindholm, & Naarttijärvi (2016), p. 262; Prop. 1975/76:209, p. 86.
[90] Bull & Sterzel (2015), p. 58; Cf. 12:4 § RF.
[91] Derlén, Lindholm, & Naarttijärvi (2016), p. 268; Prop. 2009/10:80, p. 149, 249; see also SOU 2011:76, p. 186.
[92] Bull & Sterzel (2015), p. 58.
[93] Cf. SOU 2008:125, p. 390.

2.3.1 The Positive and Negative Freedoms of Opinion

The individual rights and freedoms prescribed by 2:1 § p. 1-6 RF are freedom of expression, freedom of information, freedom of assembly, freedom of association, and finally freedom of religion. These freedoms are referred to in the Swedish doctrine as the positive freedoms of opinions.[94]

The main bulk of the freedom of expression and information is expressed by the TF and YGL. Freedom of expression and information are also guaranteed under 2:1 § p. 1-2 RF. Those provisions of chapter 2 RF are secondary in relation to TF and YGL.[95] The freedom of expression stated 2:1 § 1p. RF is not limited to any certain kind of expression. Thoughts, opinions, feelings, information as well as artistic or commercial expressions are guaranteed by the freedom of expression. This differentiates 2:1 § p. 1 RF from the YGL and the TF. The TF guarantees expressions made and publicised through print.[96] Expressions of thoughts, opinions, feelings, and contributions to the public debate are guaranteed by the YGL.[97] The freedom of information stated in 2:1 § p. 2 RF is related to the freedom of expression but guarantees the access to information and applies to different media such as television, radio and the internet.[98]

The freedom of assembly stated in 2:1 § p. 3 RF acts as an additional guarantee to the freedom of expression.[99] The freedom of assembly protects assemblies arranged with the purpose of exchanging opinions, information or similar, and gatherings with artistic purposes. The freedom does not apply to assemblies with entertainment purposes, which goes under the definition of public events and is regulated by the Swedish *Law of order*.[100] It is worth mentioning that public agencies are not supposed to assess whether an assembly is of an artistic nature or not.[101] The freedom of demonstration stated in 2:1 § 4 p. RF applies in public locations and guarantees the freedom to organize or attend manifestations for the expression of opinions.[102] The freedom of association under 2:1 § p. 5 RF guarantees everyone the freedom to associate with others for public and private purposes. The freedom acts as an additional guarantee to the freedom of expression and demonstration. The freedom of association further applies to the founding of political parties, unions, and consumer associations. Private associations are also covered by the freedom of association, but such entities can be subject to regulatory

[94] Zetterström (2012), p. 30.
[95] Bull & Sterzel (2015), p. 60.
[96] TF 1:1 §.
[97] YGL 1:1 §; Bull & Sterzel (2015), p. 61.
[98] Bull & Sterzel (2015), p. 62.
[99] Derlén, Lindholm, & Naarttijärvi (2016), p. 365.
[100] Sw: *Ordningslagen (1993:1617).*
[101] Bull & Sterzel (2015), p. 64.
[102] Bull & Sterzel (2015), p. 64–65.

legislation, such as company law for. Associations are not prescribed to maintain or seek certain purposes.[103]

The freedom of religion under 2:1 § p. 6 RF guarantees individuals and communities the right to exercise religion. The freedom is more specifically exercised by the believing. Religious acts covered by the scope of any other of the other freedoms of opinion are to be assessed according to those rights and not under the freedom of religion.[104]

The freedoms listed in 2:2-3 §§ RF are referred to as the negative freedoms of opinion.[105] These freedoms are differentiated from the positive freedoms mentioned above, since they guarantee individuals the option to not act or participate. The freedoms prescribed in 2:2 § RF are the freedom of non-expression, meaning that an individual is not obliged to express their political, religious, cultural, or other similar opinion. The freedoms also include the negative freedom of association and assembly. There is further the freedom from non-consensual registration of opinions in public records in 2:3 § RF.

2.3.2 The Rights of Physical Integrity and Freedom of Movement

Rights related to physical integrity and freedom of movement are listed in 2:4-8 §§ RF and prohibits acts harming the physical well-being of persons.[106] There is an absolute prohibition of capital punishment stated in 2:4 § RF applying to all individuals. There is however no explicit right to life stated in the RF.[107] The constitution prohibits physical punishment of all individuals according to 2:5 § RF, which also applies to torture and forced medical procedures. The prohibition against forced medical procedures is however not absolute.[108] A medical procedure is considered forced if it is carried out through violence or with the threat of any other sanction.[109]

The protection from physical violation is guaranteed by 2:6 § RF. This also guarantees protection from body searches, house searches, or any other intrusion aimed at addressing other cases than those listed in 2:4-5 §§ RF.[110] The guarantee of 2:6 § RF mainly applies to acts of physical violence but also minor encroachments, such as medical examinations, fall under the protective scope.[111] The provision, according to 2:6 p. 2 § RF, protects everyone from significant invasions of their personal privacy.[112] This

[103] Bull & Sterzel (2015), p. 66–67.
[104] Bull & Sterzel (2015), p. 67.
[105] See Zetterström (2012), p. 34–35.
[106] Zetterström (2012), p. 36–38.
[107] Derlén, Lindholm, & Naarttijärvi (2016), p. 303; Bull & Sterzel (2015), p. 70.
[108] Bull & Sterzel (2015), p. 71.
[109] Derlén, Lindholm, & Naarttijärvi (2016), p. 312.
[110] Zetterström (2012), p. 36.
[111] Bull & Sterzel (2015), p. 71.
[112] See 2:6 § 2 p. RF.

applies to major intrusions by public authorities, if the actions are non-consensual, include surveillance and mapping of the individual's personal relationships.[113]

According to 2:7 § RF no citizen may be deported, refused entry or prohibited from domestic travel. The main purpose of this provision is to guarantee critics, political dissidents, or similar, protection from deportation or similar deterring measures. The guarantee does not prevent extradition, unless the person in question is unable to return to Sweden due to a life sentence.[114]

2.3.3 Special Guaranties for the Rule of Law

The protection from the deprivation of personal liberty, as stated by 2:8 § RF, covers all physical confinement.[115] The right to have a case of deprivation of personal liberty examined before a court without undue delay is stated by 2:9 § RF and is absolute.[116] There is also a prohibition against retroactively sentencing penalties or penal acts in 2:10 § RF. The right to a fair trial, public hearing and the prohibition of temporary courts are stated in 2:11 § RF and are relative.[117] Guarantees for protection from discrimination of minorities, ethnicities, sexual orientation, and gender are stated in 2:12-13 §§ RF. The rights stated in 2:14-18 §§ RF are the right to industrial action; the protection of property and the right to public access; the right to copyright; the protection of economic and professional activity; and the right to education.

2.4 The Relationship Between National and International Law

Chapter 2.1-2.3 provide the highlights necessary to comprehend the Swedish constitutional law context in relation to rights and freedoms. These features are necessary for comparing the RF to the ECHR and for further discussion on the impact and status of the ECHR in Swedish law. Chapter 2.4 addresses the relationship between national and international law to further highlight the aspects influencing the relationship between the RF, the ECHR and Swedish law in general.

States operate within two distinct dimensions: the domestic and the international. Domestic law governs the domestic dimension while international law governs the international dimension. There are two theories regarding the effect of international law in the domestic dimension: monism

[113] Bull & Sterzel (2015), p. 72.
[114] Bull & Sterzel (2015), p. 73–74.
[115] Bull & Sterzel (2015), p. 75.
[116] Zetterström (2012), p. 39.
[117] Zetterström (2012), p. 41.

and dualism.[118] A monistic state's legal order considers international law supreme in the domestic legal hierarchy and directly applicable by individuals. The ratification of an international treaty or convention by a monistic state provides individuals the possibility of invoking said treaty or convention against the ratifying state.[119] A dualistic state considers domestic law and international law to be separate legal entities consisting of separate legal subjects. Domestic law affects physical and legal persons within the jurisdiction of the particular state, while international law primarily affects the legal relationship between states.[120] From the domestic perspective, international law can only be applied by individuals or state authorities if a state has converted the provisions of an international treaty or convention into domestic law.[121]

The Swedish constitution lacks any provision stating the stance on duality or monism. However, the general perception since the 1970's depicts Sweden as a dualistic state. Thus, individuals cannot apply international treaties within the Swedish legal order.[122] The monistic or dualistic character of the Swedish legal order was for a long time a controversial issue. The issue was settled by the Swedish Supreme Court and the Supreme Administrative Court in what is now referred to as the transformation judgments.[123] The definitive statement on the issue was stated in *RÅ 1974 ref. 61 s. 121*[124], where the Supreme Administrative Court stated that ratified international agreements must be transformed in order to be applicable. This view has further been accepted and confirmed by the Swedish ministries.[125]

There are three ways, or conversion procedures, to avoid conflict between international and national law within the legal system of a dualistic state. One conversion procedure enables courts and agencies to apply domestic law in harmony with the ratified treaty or convention, which requires no further legislation.[126] A second procedure involves incorporation measures, meaning that the state legislates an act declaring the specific treaty or convention as domestic law. A third procedure involves transformation, meaning that the treaty is translated or reformed into the domestic legal context.[127] Courts may use treaty or convention provisions as sources of law or interpretative data even though the treaty or convention has not been converted into the dualistic state's national law.[128]

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[118] Cameron, Iain, *An introduction to the European Convention on Human Rights*, 7. ed., Iustus, Uppsala, 2014, p. 30.
[119] Bring et al (2014), p. 55.
[120] Bring et al (2014), p. 57.
[121] Cameron (2014), p. 31.
[122] SOU 1974:100, p. 44.
[123] NJA 1973, s. 423; RÅ 1974 ref. 61 s. 121.
[124] See RÅ 1974 ref. 61 s. 121.
[125] See Ds. 2007:25.
[126] Bring et al, p. 59–60.
[127] Cameron (2014), p. 32.
[128] Cameron (2014), p. 33.

Sweden chose to use the incorporation procedure to avoid collisions between Swedish law and the ECHR. The Swedish government suggested the incorporation of the ECHR to the parliament in 1993.[129] The Committee on the Constitution approved of the government bill and requested the Parliament to approve of the incorporation.[130] The suggested incorporation of the ECHR was approved by Parliament and the incorporated law was issued in 1994.[131] More details on the incorporation process and the impact of the ECHR in Swedish constitutional law is accounted for below in chapter 2.5.

2.5 The Impact of the ECHR

The description of the ECHR's impact starts with a review of the member states' obligations according to the Convention.

According to article 1 ECHR:

> *"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"*

Article 1 ECHR additionally obliges the member states to amend national legislation to comply with the requirements provided by the Convention. Amendments of national law must follow the interpretative authority and requirements set by the ECtHR's judgments.[132]

The rights and freedoms to the greatest effect concerning individuals' relationship with public authorities comprise of the right to life and the prohibition of torture (article 2 and 3), the prohibition of slavery and forced labour (article 4), the right to liberty and security (article 5), the right to a fair trial (article 6), no punishment without law (article 7), right to respect for private and family law (article 8), freedom of thought conscience and religion (article 9), freedom of expression (article 10), freedom of assembly and association (article 11), the right to marry (article 12), the right to an effective remedy (article 13) and the prohibition of discrimination (article 14).

A total number of fourteen additional protocols have been issued in addition to the guarantees of the ECHR. Two additional protocols have not entered into force (protocol fifteen and sixteen) yet. Sweden has signed and ratified all additional protocols except the twelfth on the general prohibition of discrimination.[133]

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[129] Prop 1993/94:117, p. 3.
[130] Bet. 1993/94:KU24, Rskr. 1993/94:246.
[131] SFS (1994:1219).
[132] *Opuz v. Turkey*, Application no. 33401/02, 9 June 2009, para 163; Cameron (2014), p. 49.
[133] SOU 2010:87, p. 121.

Chapter 2.5.1 and 2.5.2 below covers the ratification and the incorporation of the ECHR. The sections provide context on the intended role of the ECHR and the Conventions relationship to the Swedish legal system. The chapters provide necessary pretext to the subsequent chapters and discussions of this thesis. Chapter 2.5.3 addresses the constitutional ramifications of the ECHR in Swedish law. Subchapter 2.5.4 compiles the ECHR influence when applying national law and the approach during norm conflict.

2.5.1 The Ratification of the ECHR

Sweden was one of the first nations to codify a constitution. The constitutional construct aimed at ensuring political democracy and the democratic legislative process, but refrained from political and legal constitutional rights.[134] The Swedish legal philosophy has since the 1930's been heavily influenced by scholars such as Axel Hägerström, Alf Ross, Vilhelm Lundstedt and Karl Olivecrona, who together formed the academic foundation for the school of Scandinavian Legal Realism.[135] The Scandinavian legal philosophy perceived legislation as a tool for societal benefit and denied the existence of natural law and refrained from the application of general legal principals.[136] The Swedish position has however changed, largely due to the ratification of the ECHR and the ascension to the EU, and greater emphasis on the fundamental rights and freedoms is today present.[137]

Sweden ratified the ECHR in 1953.[138] The government bill passed to Parliament during the ratification process did not contain any extensive analysis of the status or impact of the Convention in Swedish law. The government bill also stated that the ECHR would be legally binding for Sweden, but not directly applicable for individuals. The ratification would further not entail any legislative changes to existing Swedish law.[139] Questions related to the status of the ECHR were however continuously brought before Swedish courts. It was confirmed that the ECHR was not directly applicable for individuals, but it was also established that Swedish law should be interpreted in conformity with the Convention.[140] Sweden had during the ratification accepted the right for individuals to issue complaints to the European Commission of Human Rights[141] but had not recognised the competence of the Commission. The competence of the Commission was recognised first in 1966.[142] The ECtHR held Sweden liable for violating the ECHR for the first time in the case of *Sporrong and Lönnroth v. Sweden* in

[134] Keller, Helen (red.), *A Europe of Rights*, Oxford University Press, Oxford, 2008, p. 170.
[135] Keller (2008), p. 171–174.
[136] Bernitz, Ulf, *Europarättens genomslag*, 1. uppl., Norstedts juridik, Stockholm, 2012, p. 51–52.
[137] Bernitz (2012), p. 53; cf. Josefsson (2015), s. 40–71.
[138] SOU 2008:3, p. 91; Prop. 1951:165.
[139] Prop. 1951:165, p. 11–12.
[140] SOU 2008:3, p. 91; Victor (2013), s. 343–396 (p. 348).
[141] Then the equivalent to the ECtHR.
[142] Victor (2013), s. 343–396 (p. 349).

1982.[143] The ECtHR found that Sweden had violated the applicant's right to a fair trial according to article 6 ECHR and had breached the protection of property under article 1 of the first additional protocol to the ECHR.[144] The ruling represented a shift and brought greater awareness and emphasis on the ECHR and the judgments passed by the ECtHR.[145] The ECtHR has since then stated through several judgments and decisions that certain areas of Swedish law have not been compatible with the Convention.[146]

The Swedish Supreme Court has also emphasised the importance of the ECHR and the precedence developed by the ECtHR.[147] The Swedish Supreme Court stated in the case of *NJA 1988 s. 572*[148] that Swedish law shall to be interpreted in conformity with the ECHR and the case law of the ECtHR.[149] The Supreme Court further stressed the importance of convention conform interpretation of Swedish law in the cases of *NJA 1992 s. 532*[150] and *NJA 2009 s. 463*[151]. The Supreme Court has even stated that Swedish preparatory works and precedence should be disregarded if prohibiting convention conform interpretation.[152]

2.5.2 The Incorporation of the ECHR

The ECHR was incorporated as national law in 1995[153], following a suggestion in 1994 by the committee on rights and freedoms.[154] The committee argued that incorporation would be appropriate due to the Swedish ascension to the EU. The committee also argued that the incorporation would clarify the status of the ECHR in national law and that individuals would be ensured a greater protection for rights and freedoms. The incorporation would further highlight the Swedish will and effort to implement and follow international agreements.[155]

The government bill to the incorporation assessed that there were no collisions or gaps between Swedish law and the ECHR. The continued harmonization between national law and the ECHR would be ensured mainly through legislative measures.[156] During the incorporation of the ECHR both the government and the committee on rights and freedoms argued for not

[143] See *Sporrong and Lönnroth v. Sweden*, Application no. 7151/75; 7152/75, 23 September 1982.
[144] *Sporrong and Lönnroth v Sweden*, Application No. 7151/75; 7152/75, 23 September 1982, para. 84–89.
[145] Bernitz (2012), p. 58.
[146] Prop 1993/94:117, p. 33.
[147] Bernitz (2012), p. 58–60.
[148] NJA 1988 s. 572.
[149] NJA 1988 s. 572 (p. 574).
[150] NJA 1992 s. 532.
[151] NJA 2009 s. 463.
[152] NJA 1992 s. 532 (p. 538); NJA 2009 s. 463 (p. 473).
[153] See SFS (1994:1219).
[154] See SOU 1993:40; see also Prop. 1993/94:117.
[155] Prop. 1993/94:117, p. 11–12.
[156] Prop. 1993/94:117, p. 36.

incorporating the Convention as part of Swedish constitutional law. While it was perceived that the protection of fundamental rights and freedoms should be constitutionally guaranteed, it was concluded that chapter 2 RF, which was already influenced by the ECHR, sufficiently guaranteed protection. The committee and the government further wished to avoid double constitutional legislation on the issue, which a constitutional incorporation would bring.[157]

2.5.3 Constitutional Ramifications of the ECHR

Prior to the incorporation of the ECHR, the convention still posed as a source of significant inspiration.[158] The rights and freedoms inquiry, which was appointed in 1973, stated in 1976 that the Swedish constitutional provisions guaranteeing rights and freedoms should not steep below the level of protection provided by the ECHR.[159]

One of the main arguments for the incorporation of the ECHR was to ensure the protection of civil and political freedoms and rights of individuals.[160] The incorporation would give individuals access to the protection in the second chapter of RF as well as the rights and freedoms prescribed by the ECHR.[161] The reason for incorporating the ECHR as an ordinary act and not into the constitution was to avoid double legislation.[162] The Swedish Supreme Court stated through a referral during the incorporation process that the ECHR possessed a special character that should grant the Convention significant weight during conflict with national law.[163] There was therefore need for interpretative guidance if norm conflicts ensued.

Following the incorporation, the RF was amended and a conflict mechanism was introduced.[164] The provision is currently stated by 2:19 § RF and provides the following:

> *"No act of law or other provision may be adopted which contravenes Sweden's undertakings under the European Convention for the Protection of Human Rights and Fundamental Freedoms."*[165]

[157] Prop. 1993/94:117, p. 36–37; Cameron (2014), p. 195.
[158] Holmberg, Erik, *Grundlagarna: regeringsformen, successionsordningen, riksdagsordningen*, 3., [rev.] uppl., Norstedts juridik, Stockholm, 2012, p. 78.
[159] SOU 1975:75, p. 99.
[160] Prop. 1993/1994:117, p. 39.
[161] Holmberg et al (2012), p. 166.
[162] Holmberg et al (2012), p. 167.
[163] Prop. 1993/94:117, p. 38.
[164] SOU 1993:40, p. 25; see also Prop. 1993/1994:117, p. 36.
[165] Translation: http://www.wipo.int/edocs/lexdocs/laws/en/se/se122en.pdf
The translation of RF from Swedish to English is taken from the World Intellectual Property Organisation's webpage and is not official. The author regardless estimates the translation as sufficient for use.

The provision addresses the legislator and was added to prevent norm conflicts between future legislation and the ECHR.[166] In the event of conflict between any national legislation adopted prior to the incorporation of the ECHR, the application should be interpreted in a Convention conform manner.[167]

2.5.4 Interpretation and Application of the ECHR During Norm Conflicts

The role and status of the ECHR in Swedish law has further come into question regarding interpretation and judicial review during norm conflict. The paragraphs below focus on the interpretative guidelines ensuring compliance when applying national law and judicial review of national law in relation to 2:19 § RF.

During the rights and freedoms committee's inquiry of the incorporation of the ECHR the issue of conflict between national law and the Convention was raised.[168] The Swedish government suggested that several interpretative principles should be applied during conflict.[169] The principle of treaty conform interpretation was emphasised as a suitable first step for solving conflict between ordinary national law and the ECHR. If the adjudicator is unable to interpret a Swedish norm in conformity with the ECHR, then Lex posterior or Lex specialis were suggested.[170] Using Lex posterior means that the adjudicator applies recent law before older law. This principle should preferably be used in the case of conflict between the ECHR and national law dating prior to the incorporation date of the 1st January 1995. Using Lex specialis means that a specially formed provision triumphs over a generally constructed one.[171] The rights and freedoms committee and the Supreme Court mentioned a third approach, where the adjudicator could grant the incorporated ECHR greater weight due to the special character of the provisions.[172] The government interpreted this approach as an extension of the treaty conform interpretation.[173]

Since the incorporation of the ECHR and the introduction of the mechanism now stated in 2:19 § RF, there have been many cases where Swedish legislation has been interpreted in conformity with the Convention. Cases where ECHR provisions have been granted precedence have also occurred,

[166] Cameron (2014), p. 195–196.
[167] Zetterström (2012), p. 27–28.
[168] SOU 1993:40, p. 123–128.
[169] Prop. 1993/94:117, p. 32–40.
[170] Prop. 1993/94:117, p. 37.
[171] Prop. 1993/94:117, p. 38; Zetterström (2012), p. 49.
[172] Holmberg et al (2012), p. 168.
[173] Prop. 1993/94:117, p. 38.

yet less frequently.[174] Cases such as *RÅ 1997 ref. 6*[175] and *RÅ 2001 ref. 56*[176] are examples when national legislation has been put aside to give way to ECHR provisions. In the case of *RÅ 1997 ref. 6* the Swedish Supreme Administrative Court gave precedence to article 14 of the ECHR in a matter regarding national registration for tax purposes. The national legislation was dated prior to the incorporation of the ECHR, and the case may be an example of the Lex posterior principle. The Swedish Administrative Supreme Court did however not explicitly state that the outcome was due to Lex posterior interpretation. In the case of *RÅ 2001 ref. 56,* which revolved around a non-appealable hunting permission. The Swedish Supreme Administrative Court found that the Swedish authorities had breached article 6 of the ECHR and gave the Convention superiority.

During the incorporation of the ECHR, the preparatory works stated that compatibility between the ECHR and national law was mainly ensured by the legislator. This notion has however been modified through the Supreme Court's case law. Courts are currently sanctioned to independently apply the ECHR. In the case of *NJA 2012 s. 211*[177] the Supreme Court stated that the general courts are responsible for applying and interpreting national law in compliance with the ECHR, with the Swedish Supreme Court as the main supervisory body.[178] The Supreme Court further stated in the case of *NJA 2012 s. 1038*[179] that Swedish courts are obliged to independently assess the scope of the Convention articles and interpret them so that they can provide individuals further rights and freedoms under Swedish law. The Supreme Court highlighted that the approach would limit the importance of the ECtHR's case law when applying the ECHR as Swedish law.[180] Some have drawn the conclusion that the Supreme Court's judgment acknowledged the ECHR as part of Swedish constitutional law.[181] The Supreme Court did however not address or clarify the relationship between the fundamental rights and freedoms of chapter 2 RF and the ECHR. The Swedish Administrative Supreme Court has previously in this context stated in the case of *RÅ 2006 ref. 87* that the Swedish Constitution is superior in relation to the ECHR.[182]

Judicial review[183] is an assessment of whether a norm complies with a norm positioned higher in the legal hierarchy. Judicial review typically revolves around the assessment of a specific legal act and the act's compatibility with the national constitution. Judicial review provides a tool for courts to ensure legislators comply with the hierarchy of norms.[184] The concept of judicial

[174] Holmberg et al (2012), p. 169.
[175] RÅ 1997 ref. 6.
[176] RÅ 2001 ref. 56.
[177] NJA 2012 s. 211.
[178] NJA 2012 s. 211, (p. 221).
[179] NJA 2012 s. 1038.
[180] NJA 2012 s. 1038, (p.1044).
[181] See Josefsson (2015), s. 40–71, (p. 55)
[182] See RÅ 2006 ref. 87.
[183] Sw: *"lagprövning* or *normprovning".*
[184] Derlén, Lindholm, & Naarttijärvi, p. 561–562.

review is to enable constitutional control over the legal system.[185] Another purpose with judicial review is to safeguard individual rights and freedoms.[186]

Swedish courts can through judicial review act against provisions breaching the Swedish ECHR obligations according to 11:14 § RF. The same goes for public bodies[187] according to 12:10 § RF.[188] Both 11:14 § RF and 12:10 § RF state that instructions in violation with constitutional or other superior provisions shall not be applied. The Swedish constitutional inquiry has stated that judicial review is of major importance to the regulating of norms and especially so in relation to the obligations according to the ECHR.[189]

The judicial review provision concerning courts in 11:14 § RF provides the following:

> *"If a court finds that a provision conflicts with a rule of fundamental law or other superior statute, the provision shall not be applied. The same applies if a procedure laid down in law has been disregarded in any important respect when the provision was made.*
>
> *In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law."*

The judicial review provision concerning public bodies in 12:10 § RF provides the following:

> *"If a public body finds that a provision conflicts with a rule of fundamental law or other superior statute, or finds that a procedure laid down in law has been disregarded in any important respect when the provision was made, the provision shall not be applied.*
>
> *In the case of review of an act of law under paragraph one, particular attention must be paid to the fact that the Riksdag is the foremost representative of the people and that fundamental law takes precedence over other law."*

[185] SOU 2007:85, p. 13; Prop. 2009/10:80, p. 142.
[186] Åhman, Karin, *Normprövning: domstols kontroll av svensk lags förenlighet med regeringsformen och europarätten 2000-2010*, 1. uppl., Norstedts Juridik, Stockholm, 2011, p. 25–26.
[187] Sw: "*offentligt organ*". From here on used synonymously with "*public authorities*".
[188] See Holmberg et al (2012), p. 577.
[189] SOU 2008:125, p. 380–381.

Prior to the constitutional reform of 2010[190] judicial review required an obvious collision between a lower and higher positioned norm. The constitutional reform brought the introduction of a reminder replacing the obvious collision requirement, currently located in the second paragraph of both 11:14 and 12:10 §§ RF, stating that Parliament is the primary representative of the Swedish people.[191]

The Swedish Supreme Court has stated in the case of conflict between Swedish law and the ECHR that courts and public authorities can only disregard Swedish law if support for non-compliance can be found in the ECtHR's case law.[192] However, if the ECHR is referred to as the incorporated Swedish act[193], there is no requirement to provide clear support in the ECtHR's case law.[194] The Swedish Supreme Court further stated that during interpretation, one should distinguish the incorporated ECHR and the original Convention.[195] The Supreme Court also stated that courts should cautiously use both the Convention and the ECtHR's case law when conducting judicial review.[196] Factors such as the importance of the right in question, the type of legislation, the legal and practical consequences, and the legislator's opportunity to adjust the Swedish law according to the standards of the Convention should influence the judicial review.[197] The doctrine interprets the removal of the obvious-requirement, the development in case law and the influence of the ECHR as evidence for a greater role and importance for judicial review in the future.[198]

2.6 Conclusion – the Constitutional Status of the ECHR

The aim of chapter 2 is to provide the material necessary to answer and discuss the following sub-question: "*a) What is the constitutional status of the ECHR in Swedish law?"*.[199]

The question might seem easy to answer at first glance. Firstly, the ECHR is at its core an international convention signed and ratified by the dualistic state of Sweden, which renders the Convention not directly applicable, and thus only relevant in the plane of inter-state affairs. Secondly, the legislator incorporated the ECHR as an ordinary act and the preparatory works highlighted that there was no political will to incorporate the ECHR as part of the Swedish constitution. Following this reasoning the issue could simply

[190] See Prop. 2009/10:80.
[191] Prop. 2009/10:80, p. 145.
[192] See NJA 2000 s. 622; NJA 2004 s. 840; NJA 2010 s. 168.
[193] See SFS (1994:1219).
[194] NJA 2013 s. 502 (p. 518).
[195] NJA 2013 s. 502. (p. 518).
[196] NJA 2013 s. 502. (p. 518); cf. Cameron (2014), p. 200.
[197] NJA 2013 s. 502. (p. 519).
[198] Derlén, Lindholm, & Naarttijärvi (2016), p. 572–573; cf. NJA 2005 s. 805.
[199] See chapter 1.2 above.

be resolved by referring to the placement[200] of the Convention and the incorporated act. However, if one allows him-or herself to assess the issue by using more than the legal placement of the relevant norms, which the word "*status*" could imply, the answer might be different. The author's line of reasoning on the issue is accounted for in the following paragraphs of this chapter below.

The author believes that the character of Swedish constitutional law has changed. This is not per se radical since the essence of constitutional law is dynamic and shifting. The influence of the ECHR is currently clear by glancing at the provisions located in chapter 2 of RF. The Swedish constitution's section on rights and freedoms is structured differently than the ECHR, but the same substance remains covered. The previously dominant conception of the constitution as only a regulatory tool for the democratic functioning of the state of Sweden has changed. During the constitutional reform of the 1970's the preparatory works stated that the reform was influenced by the ECHR. Additionally, it was stated that further legislative measures were unnecessary, since the Swedish protection of individual rights and freedoms was already aligned with the obligations of the Convection. This perception changed, partly due to the ECtHR's ruling in the case of *Sporrong and Lönnroth,* and the ECHR was later incorporated as national law. More importantly, at least in regards to the constitutional aspect of this discussion, the legislator added a constitutional provision, the current 2:19 § RF, stating that Swedish law shall not be applied in violation of the ECHR. The Swedish Supreme Court has developed this notion further in cases such as *NJA 1988 s. 572*, *NJA 1992 s. 532* and *NJA 2009 s. 463* and Swedish courts are obliged to independently apply and interpret Swedish law according to the ECHR.

To answer the question of the ECHR's status further, the discussion should consider the issue of judicial review and norm conflict. The Swedish legal system has never included the existence of a constitutional court, which would be the organ traditionally engaged in cases involving the assessment of whether norms are compliant with constitutional provisions or not. In the Swedish legal system, all courts and public authorities apply judicial review, according to 11:14 § and 12:10 § RF. The Swedish Supreme Court further simplified judicial review in relation to incorporated ECHR provisions since there is no need to provide clear support from the ECtHR's case law. You would however have to provide clear support from the ECtHR's case law if you based your judicial review on the Convention. Yet it is important to note that the Supreme Administrative Court has stated that the Swedish constitution triumphs in a conflict with the ECHR. This further emphasises the special and somewhat unclear status of the ECHR from a Swedish constitutional law perspective.

To summarize, Swedish law does not formally recognize either the incorporated ECHR or the Convention as part of constitutional law. However,

[200] By "*placement*" the author means the international status of the ECHR and the incorporated act as an ordinary act.

this is not completely deterring when assessing the ECHR's constitutional status. The author finds it clear that the ECHR enjoys a unique position in the Swedish legal hierarchy somewhere in between ordinary law and constitutional law, with the interpretation of the provisions stated in the Convention guaranteed by 2:19 § RF and the Supreme Court's case law. One could say that the ECHR holds a quasi-constitutional status. This further indicates that the current Swedish constitution is now closer to other nations' constitutions. Not by containing more rights and freedom provisions, since the number of provisions is still the same, but through a greater adherence and consideration of issues such as fundamental rights and freedoms. This change was made possible by the ratification and incorporation of the ECHR but implemented by the Swedish Supreme Court through the steady expansion of treaty conform interpretation.

3 THE RIGHT TO AN EFFECTIVE REMEDY AND SWEDISH TORT LIABILITY LAW

Chapter 2 provides an overview of the fundamental rights and freedoms of both the RF and ECHR, and the influence of the Convention on the RF and the Swedish discourse on fundamental rights and freedoms. This context is necessary for chapter 3 which focuses on tort in relation to Swedish public authorities breaching the ECHR. The purpose and research question further require an investigation into what an individual can do to seek reparation and satisfaction for a violation of fundamental rights and freedoms. Chapter 3 contains a review of the legal elements available in such a case.

Chapter 3 addresses the scope of the right to an effective remedy under article 13 ECHR and the right's impact on Swedish tort law. Chapter 3 provides the material necessary to answer sub-question *b) "How has the right to an effective remedy under article 13 of ECHR influenced the liability of public authorities in Swedish tort law?"*. Chapter 3 initially accounts for Sweden's obligations regarding remedies according to the ECHR. Secondly, the chapter concerns the ECHR's approach to just satisfaction. Thirdly, the chapter covers SkL, which is the act dedicated to questions regarding reparation and satisfaction. Fourthly, the chapter addresses the impact of the ECHR in the Swedish tort law and the possible tort liability outcomes due to violations of the ECHR. Fifthly, the chapter focuses on liability for violations of chapter 2 RF, with the purpose of determining any influence from the development of tort liability due to violations of the ECHR. The chapter is concluded with an answer to sub-question b).

The ECHR ensures national remedies trough two provisions stated in the Convention: the right to a fair trial under article 6 and the right to an effective remedy under article 13. Article 6 is reserved for the most inadequate national provisions (or complete lack of provisions) that are relevant in the context of criminal law[201] and issues of civil and political rights[202]. Article 13 on the other hand prescribes states to provide individuals effective remedies before national authorities.[203] The following subchapter provides the scope, limits, and some procedural aspects of article 13. The subchapter also includes a review of the ECtHR's case law related to article 13 and the issue of damages.

[201] Cf. *Adolf v Austria*, Application no. 8269/78, 26 March 1982, para. 30
[202] Cf. *König v Germany*, Application no. 6232/73, 28 June 1978, para. 89.
[203] Derlén, Lindholm, & Naarttijärvi (2016), p. 530.

3.1 The Right to an Effective Remedy

Article 13 ECHR states the right to an effective remedy and inflicts the following obligation on a member state:

> *"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority not withstanding that the violation has been committed by persons acting in an official capacity."*

The right to an effective remedy works in close connection with article 35 ECHR, which states that the ECtHR can only address a case once all domestic remedies have been exhausted, with the assumption that effective domestic remedies are sufficient and available at the event of a breach.[204] Article 13 ECHR stipulates the relationship between national legal systems and the Convention, giving the article vital importance to the member states' implementation of the obligations according ECHR.[205]

Article 13 is further a supplementary provision to the substantial rights and freedoms stated in article 2-12 ECHR.[206] Article 13 can however be used independently even if there has been no breach of article 2-12. A breach of article 13 occurs if a national authority has not sufficiently taken into account an individual's arguable claim that his or her rights of the ECHR have been breached.[207]

3.1.1 The Notion of "Effective" Remedy

According to the ECtHR's case law, remedies allow competent domestic authorities to deal with the substance of the relevant ECHR complaint and to also grant appropriate relief.[208] An effective remedy means that a sufficient remedy must be available and accessible to an applicant, both in law and practice. The remedy must also carry practical effect.[209] However, the ECtHR has not defined the notion of an effective remedy to require any particular form of remedy. The particular right or freedom violated may however imply

[204] *McFarlane v. Ireland*, Application no. 31333/06, 10 September 2010, para. 107.
[205] Harris, David J., O'Boyle, M. & Warbrick, Colin (red.), *Harris, O'Boyle & Warbrick: law of the European Convention on Human Rights*, 3. ed., Oxford University Press, Oxford, 2014, p. 764.
[206] Cameron (2014), p. 160.
[207] *Klass and Others v. Germany*, Application no. 5029/71, 7 September 1978; *Valsamis v Greece*, Application No. 21787/93, 18 December 1996.
[208] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 288; *Halford v. the United Kingdom*, Application no. 20605/92, 25 June 1997, para. 64.
[209] *El-Masri v. "the former Yugoslav Republic of Macedonia"*, Application no. 39630/09, 13 December 2012, para. 255; *Kudła v. Poland*, Application no. 30210/96, 26 October 2000, para. 152; *Riccardi Pizzati v. Italy*, Application no. 62361/00, 29 March 2006, para. 38.

the appropriate remedy.[210] The effectiveness of a remedy does not depend on the certainty of a favourable outcome for an applicant.[211] Article 13 requires remedial actions to allow the national authority to deal with the applicant's complaint and to grant appropriate relief. The right does not require the national authority dealing with the complaint to be a judicial one, but the powers and authorities of the authority should affect the effectiveness of the remedy.[212] The ECtHR has further stated that one must pay attention to the speediness of the remedial action. A lengthy duration of a remedial action can undermine the effectiveness of the remedy in question.[213]

The ECtHR has emphasised that member states enjoy a margin of appreciation in their fulfilment of article 13 ECHR.[214] This also applies to the selection of remedies and relief for a violation.[215] Margin of appreciation is a level of discretion which the ECtHR allows member states to use when interpreting and applying the ECHR. The ECtHR will not interfere if a member state's interpretation falls within the margin of appreciation.[216] The margin of appreciation is a doctrine granting a degree of freedom to member states when typically, but not limited to, restricting the rights stated in article 8-11 ECHR. The margin of appreciation varies depending on the objectivity and importance of the restrictions, the consensus found in national law in the area, and the nature of the right.[217]

If a single remedy as such is not sufficient to the requirements of article 13 ECHR, the combination – or aggregate of remedies – may still be so.[218] This perception was showcased in the case of *Leander v Sweden*[219], which revolved around access to personal data gathered by the Swedish security service during an employment procedure.[220] The ECtHR found that the aggregate of remedies available through Parliamentary Ombudsmen, Office of the Chancellor of Justice, parliamentary control, and the civil liability of the state in 3:2 § SkL together amounted to an effective remedy according to article 13 ECHR.[221]

[210] *Budayeva and Others v. Russia*, Application no. 15339/02 21166/02, 20058/02, 11673/02 and 15343/02, 20 March 2008, para. 190–191.
[211] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 289.
[212] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 289-291.
[213] *M.S.S. v. Belgium and Greece*, Application no. 30696/09, 21 January 2011, para. 292.
[214] *Halford v. the United Kingdom*, Application no. 20605/92, 25 June 1997, para. 64.
[215] *Kudła v. Poland*, Application no. 30210/96, 26 October 2000, para. 154.
[216] Cameron (2014), p. 76.
[217] Cameron (2014), p. 117-120; see also *Sunday Times v. The United Kingdom (No. 1)*, Application no. 6538/74, 26 April 1979, para. 59.
[218] *Chahal v the United Kingdom*, Application no. 22414/93, 15 November 1996, para. 145.
[219] *Leander v. Sweden*, Application no. 9248/81, 26 March 1987.
[220] *Leander v. Sweden*, Application no. 9248/81, 26 March 1987, para. 1–17.
[221] *Leander v. Sweden*, Application no. 9248/81, 26 March 1987, para. 81–84; SOU 2010:87, p. 156.

3.1.2 The Notion of "Arguable Claim"

Article 13 is applicable if the claim of a violation is an arguable one. The requirement is a qualifier disencumbering national courts or other authorities from reviewing every claim.[222] The ECtHR has stated that one must consider the facts and the nature of the legal matter in question to see if there are any indications of a violation and if the claim of a violation is arguable.[223] A complaint falling outside the scope of the rights and freedoms guaranteed by the ECHR is not an arguable claim.[224]

Article 13 further prescribes that there must be a remedy available when a violation has been carried out by persons acting in an official capacity. Remedies should also be made available against violations committed by the highest offices of public authorities, but not against national legislation. There is however, no obligation for a state party to provide remedies for the adjudication of alleged ECHR violations between individuals.[225]

3.1.3 The Limits of the Right to an Effective Remedy

Article 13 ECHR does not give national public authorities the obligation to directly carry out any judicial review of whether the ECHR has been violated. This would in turn result in the direct applicability of the ECHR in the national legal order in question. The member state is of course obligated to fulfil the requirements of the ECHR according to article 1, but is free to choose the method to do so.[226] The ECtHR stated in the case of *A and Others v. the United Kingdom*[227] that the right to an effective remedy:

> "…*does not guarantee a remedy allowing the challenge of primary legislation before a national authority on the ground of being contrary to the Convention...*".[228]

The reasoning expressed in *A and Others v. the United Kingdom* also applies to other norms, depending on their position in the domestic legal hierarchy.[229]

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[222] Cameron (2014), p. 163.
[223] See *Boyle and Rice v. The United Kingdom,* Application no. 9659/82, 9648/82, 27 April 1988, para. 55.
[224] *Boyle and Rice v. The United Kingdom,* Application no. 9659/82, 9648/82, 27 April 1988, para. 77.
[225] SOU 2010:87, p. 160.
[226] SOU 2010:87, p. 158.
[227] *A. And Others v. the United Kingdom,* Application no. 3455/05, 19 February 2009.
[228] *A. And Others v. the United Kingdom*, Application no. 3455/05, 19 February 2009, para. 135.
[229] SOU 2010:87, p. 158–159; cf. *Boyle and Rice v. The United Kingdom,* Application no. 9659/82, 9648/82, 27 April 1988, para. 87.

3.1.4 The Principle of Subsidiarity

Article 13 applies between an individual and a national authority of a member state. Such a national authority can comprise of a judicial authority or an authority with powers and guarantees relevant in determining whether the remedy before it is effective.[230] This reasoning proceeds from the presumption that any transgression of the ECHR should be dealt with within the national legal order by the member state. This is known as the principle of subsidiarity.[231] This principle applies to the all the provisions of the ECHR and not just to article 13. The principle is also expressed in article 1 and 35 ECHR.

The principle of subsidiarity further implies that the ECtHR does not review national law as such. The ECHR was not created to harmonize the national law of the member states or to create a court of appeal from national courts. The ECtHR only examines the compatibility of national law and practice with the standard ensured by the provisions of the ECHR. The ECtHR provides individuals a reasoned opinion on the restriction of his or her rights and freedoms.[232]

3.1.5 The Procedural Aspects of the Right to an Effective Remedy

Article 13 and the admissibility criteria in article 35 ECHR are interconnected since they both express the principle of subsidiarity. The articles also interact in the sense that the right to an effective remedy and the demand for the exhaustion of remedies in article 35 connect. Article 13 is relevant to the individual's access to effective remedies in the case of a ECHR violation. Article 35 meanwhile provides member states the chance of preventing and relieving ECHR violations before the issue is brought before the ECtHR.[233] The ECtHR has further stated that the requirement for exhausted remedies in article 35 are only those that are available and sufficient, certain in practice, capable of providing redress in respect of the applicant's complaints and with reasonable prospects of success.[234] The literature has argued that the exhausted remedies referred to in article 35 consist of the effective remedies stated in article 13.[235] Of further importance is the fact that manifestly ill-founded claims are not admissible according to article 35 and do also not meet the requirements for an arguable claim according to article 13.[236]

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[230] *Kudła v. Poland*, Application no. 30210/96, 26 October 2000, para. 157.
[231] SOU 2010:87, p 154.
[232] Cameron (2014), p. 74–76.
[233] SOU 2010:87, p. 160–161; see also *Selmouni v France*, Application no. 25803/94, 28 July 1999, para. 74.
[234] *Selmouni v France*, Application no. 25803/94, 28 July 1999, para. 75–76.
[235] Dijk, Pieter van (red.), *Theory and practice of the European Convention on Human Rights*, 4. ed., Intersentia, Antwerpen, 2006, p. 1009–1010.
[236] *Powell and Rayner v. The United Kingdom*, Application no. 9310/81, 21 February 1990, para. 33.

Another aspect of article 13 is the notion of victim status referred to in article 34 ECHR, which is a requirement individuals must fulfil to launch a claim of violation of the ECHR. The interpretation of the victim status has indirectly affected the issue whether an individual has had access to an effective remedy according to article 13.[237] The ECtHR has stated that the ability to launch a claim is lost if the domestic authorities can provide redress that can be considered appropriate and sufficient.[238]

3.1.6 The Right to an Effective Remedy and Damages in the ECtHR's Case Law

The member states are, as previously stated, free to choose remedial actions to fulfil their obligations according to article 13 ECHR.[239] Damages can be considered an effective remedy, but there are no clear scenarios that demand such actions according to article 13. The ECtHR has, however, stated that damages should be part of the effective remedies available to all individuals suffering economic and non-pecuniary[240] damages if the matters concern breaches of article 2[241] or 3[242] ECHR.[243] The most notable ECtHR case law establishing the practice concerning remedies and damages are emphasised in the paragraphs below.

The issue of effective remedy and damages in relation to article 2 was developed in the case of *Keenan v the United Kingdom*[244]. The circumstances of the case revolved around the authorities' treatment of a mentally ill patient. The patient committed suicide while being confined in a prison cell.[245] The ECtHR highlighted the major importance of article 2 ECHR and stated that article 13 would require payment compensation considering this.[246] The ECtHR further stated in the case of *Keenan v the United Kingdom* that compensation for non-pecuniary damages stemming from breaches of article 2 or 3 ECHR should be made available as a possible remedy.[247]

The importance of available liability mechanisms and the area of use for damages were developed and reiterated in the case of *Z and Others v the United Kingdom*[248]. The circumstances of the case revolved around the social

[237] SOU 2010:87, p. 162.
[238] *Scordino v. Italy (No. 1),* Application no. 36813/97, 29 March 2009, para 193.
[239] *Keenan v the United Kingdom*, Application no. 27229/95, 3 April 2001, para. 123.
[240] Sw: *"ideell skada".*
[241] The Right to Life.
[242] The Prohibition of Torture.
[243] SOU 2010:87, p. 167.
[244] *Keenan v the United Kingdom*, Application no. 27229/95, 3 April 2001.
[245] *Keenan v the United Kingdom*, Application no. 27229/95, 3 April 2001, para. 8–49.
[246] *Keenan v the United Kingdom*, Application no. 27229/95, 3 April 2001, para. 123.
[247] *Keenan v the United Kingdom*, Application no. 27229/95, 3 April 2001, para. 130.
[248] *Z and Others v the United Kingdom,* Application no. 29392/95, 10 May 2001.

authorities' failure to relocate four children suffering from family abuse.[249] The ECtHR stated that:

> "…*Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure*…"[250]

The ECtHR also specified that even though article 13 ECHR may not always require authorities to investigate allegations of failure to protect persons from the acts of others, there should always be available mechanisms for establishing any liability for state officials or bodies for acts or omissions involving violations of the rights stated in the ECHR. The liability mechanisms should be made available to both the victims or the families of victims. The ECtHR further reiterated that compensation should in principle be part of available remedies for non-pecuniary damages stemming from breaches of article 2 and 3 ECHR. In the case of *Z and Others v. the United Kingdom,* the victims did not have available means to their disposal to appropriately obtain or determine their allegations of the social authorities' failure to protect the children from degrading and inhuman treatment (article 3 ECHR).[251]

More on the issue of available means for claiming and obtaining compensation for damages was addressed by the ECtHR in the case of *T.P. and K.M. v the United Kingdom*[252]. The circumstances of the case revolved around the social authorities' unjustified removal of a young girl from her mother. The applicant complained that she had not been afforded any remedy for the damage she had suffered from the interference.[253] The government argued that access to redress through pecuniary compensation was not necessary since redress through the end of the separation between the daughter and her mother was enough.[254] The ECtHR stated that victims of a breach should be able to access mechanisms for establishing any liability of state officials for breaches of the ECHR. The Court reiterated that compensation for both pecuniary and non-pecuniary damages stemming from breaches should in principle be available as part of the redress.[255] The ECtHR

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[249] *Z and Others v the United Kingdom*, Application no. 29392/95, 10 May 2001, para. 9–49.
[250] *Z and Others v the United Kingdom*, Application no. 29392/95, 10 May 2001, para. 109.
[251] *Z and Others v the United Kingdom*, Application no. 29392/95, 10 May 2001, para. 109–110.
[252] *T.P. and K.M. v. the United Kingdom*, Application no. 28945/95, 10 May 2001.
[253] *T.P. and K.M. v. the United Kingdom*, Application no. 28945/95, 10 May 2001, para. 104.
[254] *T.P. and K.M. v. the United Kingdom*, Application no. 28945/95, 10 May 2001, para. 108.
[255] *T.P. and K.M. v. the United Kingdom*, Application no. 28945/95, 10 May 2001, para. 107.

further held that the applicant did not have available to them the appropriate means for obtaining a determination of their allegations that the local authority had breached their right to respect for family life under article 8 ECHR, nor the possibility of obtaining compensation for the damage suffered. The ECtHR found that the applicant was therefore not afforded an effective remedy and had her rights under article 13 ECHR violated.[256]

More on the issue of determining authorities' failure in relation to article 13 ECHR was addressed by the ECtHR in the case of *Paul and Audrey Edwards v. The United Kingdom*[257] The circumstances of the case revolved around an aggravated assault with lethal outcome at a state prison. The applicants' imprisoned son had been killed by another inmate while locked in his cell. The prison guards had been unable to prevent the assault due to a defect alarm system.[258] The ECtHR held that the United Kingdom had breached article 13 ECHR since the remedies available to the applicants did not provide them with the appropriate means for obtaining or determining their allegations of the authority's failure. The ECtHR argued that the redress available to the applicants were not of practical use. This since it was unclear whether the damages from a civil action in negligence would have been recoverable or if legal aid could have been obtained for the applicants. [259]

The issue of actual possibility for realising liability measures of state officials or bodies was assessed by the ECtHR in the case of *Stockholms Försäkrings-och Skadeståndsjuridik AB v. Sweden*[260]. The circumstances of the case revolved around the fact that the applicant had had to pay for bankruptcy costs, despite that the district court's bankruptcy petition was quashed by the Swedish Supreme Court.[261] The applicant asserted that a claim for damages against the state could not have provided a remedy and could therefore not be considered effective under article 13 ECHR. The applicant based this argument on the Supreme Court's ruling in *NJA 1994 p. 654*[262].[263] According to the ruling of *NJA 1994 p. 654,* liability for public authorities' through wrongful acts or omissions cannot be based on a court's assessment of legal or evidentiary issues. Only manifestly erroneous assessments can be considered culpable.[264] Based on the Swedish Supreme Court's ruling in *NJA*

[256] *T.P. and K.M. v. the United Kingdom*, Application no. 28945/95, 10 May 2001, para. 109-110.
[257] *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, 14 March 2002.
[258] *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, 14 March 2002, para. 9–36.
[259] *Paul and Audrey Edwards v. the United Kingdom*, Application no. 46477/99, 14 March 2002, para. 99–101.
[260] *Stockholms Försäkrings-och Skadeståndsjuridik AB v. Sweden*, Application no. 38993/97, 16 September 2003.
[261] *Stockholms Försäkrings-och Skadeståndsjuridik AB v. Sweden*, Application no. 38993/97, 16 September 2003, para. 9–22.
[262] NJA 1994 s. 654.
[263] *Stockholms Försäkrings-och Skadeståndsjuridik AB v. Sweden*, Application no. 38993/97, 16 September 2003, para. 66.
[264] *Stockholms Försäkrings-och Skadeståndsjuridik AB v. Sweden*, Application no. 38993/97, 16 September 2003, para. 36; see also NJA 1994, p. 654.

1994 p. 654 the ECtHR found that there were no available remedies that could provide compensation for the applicant's grievances. The Swedish court involved had not committed any wrongful acts or omissions of manifestly erroneous character, which rendered 3:2 § SkL inapplicable and not capable of providing relief. The ECtHR considered this and found that the applicant's right to an effective remedy under article 13 ECHR had been violated.[265]

The notion of which persons should be granted access to effective remedies under article 13 ECHR was clarified in the case of *Bubbins v. the United Kingdom*[266]. The circumstances of the case revolved around a lethal shooting of a man during a police operation.[267] The applicant (brother to the man shot by the police) held that the investigation of the police conduct during the shooting had not been independent and had therefore not met the requirements under article 13 ECHR. Of further importance was also the fact that since the applicant's brother had passed immediately and without leaving any dependent persons, there had been no way of pursuing actions for damages against the public authorities.[268] The ECtHR reiterated that breaches of article 2 and 3 ECHR should in principle be able to access compensation for non-pecuniary damages as a redress.[269] The ECtHR further held that the domestic law, which abolished the possibility of obtaining compensation since the applicant was not a dependent relative to the deceased, breached article 13 ECHR, since it excluded the access to obtaining non-pecuniary compensation.[270]

This review of the ECtHR's case law regarding the scope of article 13 ECHR and the right to an effective remedy concludes chapter 3.1. The above-mentioned judgments address the notion of damages in relation to the application of article 13 ECHR. Another aspect of the ECtHR's approach to damages is the right to just satisfaction in article 41 ECHR. This issue is expanded in chapter 3.2.

3.2 The Right to Just Satisfaction

The right to just satisfaction under article 41 ECHR states the following:

> *"If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation*

[265] *Stockholms Försäkrings-och Skadeståndsjuridik AB v. Sweden*, Application no. 38993/97, 16 September 2003, para. 71.
[266] *Bubbins v. the United Kingdom*, Application no. 50196/99, 17 March 2005.
[267] *Bubbins v. the United Kingdom*, Application no. 50196/99, 17 March 2005, para. 9–63.
[268] *Bubbins v. the United Kingdom*, Application no. 50196/99, 17 March 2005, para. 167.
[269] *Bubbins v. the United Kingdom*, Application no. 50196/99, 17 March 2005, para. 171.
[270] *Bubbins v. the United Kingdom*, Application no. 50196/99, 17 March 2005, para. 172–173.

to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

The wording of the article gives the ECtHR the ability to award an applicant just satisfaction, if the breaching member state only to a certain degree can grant satisfaction. The term "*just satisfaction*" comprises of monetary compensation with the purpose of providing reparation for the damages suffered.[271] This includes pecuniary losses, non-pecuniary losses, and costs and expenses.[272] Any other measures fall within the scope of article 46[273] ECHR.

3.2.1 The General Principles of Just Satisfaction

The following principles regarding just satisfaction for violations of the ECHR are worth highlighting.[274] The applicant must present a precise claim for remuneration, according to Rule 60 of the Rules of the Court.[275] The applicant has no automatic right to just satisfaction. Compensation is only awarded if the ECtHR believes it to be absolutely necessary, according to article 41 ECHR. Compensation can further only be awarded in cases where it is satisfied that the loss or damage complained of was actually caused by the violation of the ECHR.[276] Compensation can cover both pecuniary and non-pecuniary damages.[277] Both physical and legal persons can be awarded damages as compensation. The assessment of awarding non-pecuniary damages to legal persons is based on the circumstances of the case.[278] The applicant should as far as possible be placed in a similar situation as prior to the violation in question.[279] The mere establishment of violation of the ECHR as such may in some cases, when non-pecuniary damages are concerned, be sufficient as just satisfaction.[280] Finally, certain compensation for interest may be actualised to prevent the satisfaction from being lowered in an oppressive way.[281]

[271] *Scordino v. Italy (No. 1),* Application no. 36813/97, 29 March 2009, para. 228–240; Harris, O'Boyle & Warbrick (2014), p. 157.
[272] Shelton (2015), p. 321.
[273] Binding Force and Execution of Judgments.
[274] Cf. SOU 2010:87, p. 186–187.
[275] Harris, O'Boyle & Warbrick (2014), p. 158.
[276] Dijk (2006), p. 246; *Kingsley v the United Kingdom*, Application no. 35605/97, 28 May 2002, para. 40.
[277] Harris, O'Boyle & Warbrick (2014), p. 157.
[278] Harris, O'Boyle & Warbrick (2014), p. 161.
[279] Dijk (2006), p. 257.
[280] Dijk (2006), p. 264–265.
[281] SOU 2010:87, p. 187.

3.2.2 More on Pecuniary and Non-pecuniary Compensation

Areas that may be compensated under article 41 ECHR are costs and expenses, pecuniary losses, and non-pecuniary damages.[282] Compensation for pecuniary losses covers injuries and losses of real or personal property and profits, fines and costs due to domestic proceedings linked to the violation, loss of past and future earnings, loss of business opportunities and medical costs.[283] An applicant must further prove that there is a causal link between the violation and the pecuniary loss in question.[284] The ECtHR has typically compensated pecuniary losses by awarding a lump sum of money with little further detail.[285]

Compensation for non-pecuniary damages considers factors such as pain and suffering, anguish and distress, inconvenience, and loss of opportunity.[286] Moral damages from procedural violations have become more and more relevant in the ECtHR's case law.[287] Clear principles still, however, have yet to emerge.[288] The reason for this may be that the ECtHR has no official precedence doctrine and that the ECHR is applicable in relation to legal orders with different tradition on determining damages.[289]

3.2.3 The European Minimum Standard

The Swedish law of tort liability and the ECHR based equivalent are different but not entirely distinct according to the doctrine.[290] The ECtHR possesses a more constitutional role in the sense that the Court ensures a minimum standard for human rights in Europe. Issues such as damages and compensation have therefore not been granted particular attention.[291] The ECtHR has further recognised and admitted this in the case of *Guiso-Gallisey v. Italy*[292]. The ECtHR called for greater effort and strive for greater consistency and proportionality in determining compensation.[293]

The ECtHR's case law has shown that the Court is more selective when awarding pecuniary damages than non-pecuniary damages due to a high

[282] Harris, O'Boyle & Warbrick (2014), p. 158–162.
[283] Shelton (2015), p. 324.
[284] Harris, O'Boyle & Warbrick (2014), p. 159.
[285] Shelton (2015), p. 325.
[286] Harris, O'Boyle & Warbrick (2014), p. 160.
[287] See *Casciaroli v Italy,* Application no. 11973/86, 27 February 1992 and *Tusa v Italy,* Application no. 13299/87, 27 February 1992.
[288] Shelton (2015), p. 309.
[289] Cameron (2006), s. 553–588 (p. 561–562).
[290] See Andersson (2013) p. 561.
[291] Cameron, (2006), s. 553–588 (p. 561).
[292] *Guiso-Gallisey v. Italy,* Application no. 58858/00, 22 December 2009.
[293] Shelton (2015), p. 326; *Guiso-Gallisey v. Italy,* Application no. 58858/00, 22 December 2009, para. 85.

burden of proof and high requirements for causation.[294] There have however been instances where the ECtHR has presumed pecuniary and non-pecuniary injury based on the character of the violation and the particular right in question.[295]

3.3 The Foundations of Swedish Tort Liability Law

The previous chapters provide the foundation of article 13 ECHR and the article 41 ECHR. This chapter contains a review over the foundation of current Swedish tort law. The chapter provides an overview of the legal concepts in concerning tort for later discussion and comparison with the ECHR equivalent. Chapter 3.3 includes sections on the theoretical approach and scope of the SkL, the liability assessment in general and tort liability for public authorities.

3.3.1 The Legal Character of Swedish Tort Law

One of the main purposes of the Swedish tort law is the function of remuneration, or reparation, when someone has suffered damages.[296] The notion of "*damage*" consists of damage to a person, which demands remuneration for expenses due to medical costs or loss of income, or damage to property, which justifies reparation for the victim of the property to the same level as prior to the damage occurrence.[297] A second aspect of importance in the construct of tort liability is the notion of liability insurance. The holding of a liability insurance that can be activated and used to repair any damage and so relieve a liable person or entity's loss, while guaranteeing any injured party available funds for remuneration.[298] A third important issue of the law of tort is the prevention of damage inducing behaviour.[299] A person found liable for inducing damage upon a victim may in the future refrain from such behaviour, while society in general should be deterred from acts resulting in liability.[300]

The character of the provisions stated in SkL are general and require interpretation. The application of the provisions further requires considerations of general principles, such as the principle of proximate

[294] Shelton (2015), p. 323–325; cf. *Neumester v Austria*, Application no. 1936/63, 7 May 1974, para 40–44.
[295] Shelton (2015), p. 325-326; See *König v Germany*, Application no. 6232/73, 28 June 1978.
[296] SOU 1950:16. p. 68.
[297] Hellner, Jan & Radetzki, Marcus, *Skadeståndsrätt*, 9., [rev.] uppl., Norstedts Juridik, Stockholm, 2014. p. 36.
[298] Hellner & Radetzki (2014), p. 37–38.
[299] SOU 1950:16, p. 71.
[300] Hellner & Radetzki (2014), p. 38.

cause[301], and additional guidance provided by the Swedish Supreme Court's case law.[302] The scope of SkL is mainly non-contractual and subsidiary to any special legislation, regardless of any contractual or non-contractual relationship.[303] Chapter 3.3.2 and 3.3.3 provide the basis for the liability assessment.

3.3.2 The Objective Basis for Liability

The objective basis pf liability revolves around the conditions that are independent of the individual or personal circumstances of the party inflicting damage or injury. This applies to the assessment of whether damage or injury has occurred. A basic assumption in Swedish tort law for liability is that damage has occurred and that the damage has occurred on property not belonging to the party inflicting damage.[304] The duty to not cause any other party damage or injury is one of the main rules of the Swedish tort law. Any party carrying out actions is obliged to consider the risk of causing damage or injury to others.[305]

Passivity can result in liability if there is a duty to act according to law or other statutes.[306] Regarding the issue of who has a duty to act, the Swedish current tort law puts the responsibility on several parties at the same time. Some parties do however carry a primary responsibility. The primarily responsible party may for instance be designated to act through law, contractual arrangements or through professional assignments. This approach guarantees a beneficial situation for the party suffering damage or injury.[307]

The damage or injury suffering party is mainly the one with the burden of proof regarding the causality between the act and the damage or injury suffered.[308] The level required for proving causality depends on the situation and may be lowered if the circumstances are particularly difficult.[309] The notion of causality will be developed below.

3.3.3 Subjective Basis for Liability: Intention and Negligence

According to the rule stated in 2:1 § SkL, anyone who through intention or negligence[310] causes injury or damage shall compensate such injury or

[301] Sw: "*Adekvat kausalitet"*.
[302] SOU 2010:87, p. 65.
[303] SOU 2010:87, p. 66; see also 1:1 § SkL.
[304] Hellner & Radetzki (2014), p. 101.
[305] Hellner & Radetzki (2014), p. 104.
[306] Hellner & Radetzki (2014), p. 104–107.
[307] Hellner & Radetzki (2014), p. 108–111.
[308] Hellner & Radetzki (2014), p. 141.
[309] SOU 2010:87, p. 69.
[310] Sw: "*vårdslöshet*" or "*culpa*".

damage. The assessment of intentions lacks importance, since the prerequisites of 2:1 § SkL require intention or negligence. The notion of negligence is therefore reviewed below. An important aspect to note is that SkL and the associated Swedish tort law proceed from assessments focusing on the conditions of the responsible and inflicting party. The assessment of alleged breaches of the ECHR on the other hand focus on the conditions of the injured party.[311]

The fundamental question upon assessing the issue of negligence is if the allegedly negligent party should have acted differently.[312] The act in question is compared with a standard of care, consisting of statutes or other instructions by agencies, precedence, and custom.[313] If there are no sources suitable for the case at hand the court is free to assess the act in question.[314] The standard of care supposedly considered is then constructed by compiling the risk for damage or injury, the probable size of the damage or injury, the probability of avoiding the damage or injury, and the acting party's ability to realise the risk of the damage or injury. These factors are then combined to form the basis for an assessment of whether another act could have been demanded.[315] Apart from the standard of care, other circumstances add to the negligence assessment. The circumstances often considered are the damage inflictor's individual situation or abilities. Facts such as whether similar damages or injuries have been induced by the same party add to the severity of the negligence assessment.[316]

The assessment of the standard of care is also influenced by the number of persons involved in the situation where damage or injury occurres. If all the participating individual parties are equals, then the responsibilities are the same. However, a primarily responsible party with the duty to act has a greater standard of care to follow. A manager of a workplace has for instance a greater responsibility than an individual worker.[317]

The general principle of proximate cause must additionally be considered to establish liability for damages. This means that there must be a causational relationship between the act and the damage, and that the act causing the damage did not do so in an all too unpredictable, unique or remote way.[318] The assessment of the proximate cause is not entirely established, but the notion of predictability is central to the assessment.[319] There is, however, an exception to the obligation to compensate caused damage or injury. If an act causing damage or injury falls outside the scope of the protective purpose for a tort law norm, then there is no obligation to compensate.[320] The protective

[311] Bengtsson (2011), s. 605–629, (p. 608).
[312] Hellner & Radetzki (2014), p. 122.
[313] Hellner & Radetzki (2014), p. 122–127.
[314] Hellner & Radetzki (2014), p. 127.
[315] NJA 2011 s. 454; Hellner & Radetzki (2014), p. 128
[316] Hellner & Radetzki (2014), p. 130–135.
[317] Hellner & Radetzki (2014), p. 135–136.
[318] SOU 2010:87, p. 67; see NJA 1983 s. 3 (p. 79) and NJA 1993 s. 41 I, II.
[319] Hellner & Radetzki (2014), p. 195–196.
[320] SOU 2010:87, p. 68; Hellner & Radetzki (2014), p. 200–202.

purpose as ground for exception to the obligation to compensate has been confirmed by the Supreme Court's case law.[321]

3.3.4 Compensable Damages and Injuries

Two compensable damages commonly actualised outside of a contractual obligation are injuries and damages. The term "*injury*" comprises of both physical and mental damages inflicted on the human body. The term "*damages*" covers physical damages on real estate and personal property.[322] There are two more imperative categories of compensable damages. The details of pecuniary losses and non-pecuniary damages resulting from an act committed by public authorities will be investigated below.

The term pecuniary losses contain both pure financial losses and financial losses due to damages or injuries. Pure financial losses are according to 1:2 § SkL considered financial losses suffered without the effect of damage or injury. The notion of non-pecuniary damages is the opposite of economic losses. Non-pecuniary damages are not defined by law but the term is used for the pain and suffering that cannot be valued in financial means.[323] The main rule of Swedish tort law states that only liability for economic losses prescribes compensation.[324] Non-pecuniary damages are principally only compensated when so is prescribed by law.[325] Breaches of the ECHR resulting in non-pecuniary damages are however compensated without the support by law, which is further developed below.[326]

3.3.5 The Tort Liability of Public Authorities

The older construct of the Swedish tort liability law limited the liability for public authorities greatly.[327] The lack of provisions inflicting liability for public authorities was motivated by the fact that such instruments would limit the state's sovereignty.[328] The current tort law prescribes a similar liability between private entities and public authorities.[329] According to the current 3:2 § SkL the state or municipalities shall compensate damage or injury inflicted though negligent exercise of public authority[330]. Liability can however only be materialised if damage or injury occurred due to non-compliance with the protective purpose of the current norms for the exercise of public authority.[331]

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[321] NJA 1976 s. 458.
[322] Hellner & Radetzki (2014), p. 95, 99.
[323] SOU 2010:87, p. 99.
[324] SOU 1992:84, p. 31.
[325] Prop 2000/01:68, p. 17.
[326] SOU 2010:87, p. 99, 126-136.
[327] Prop. 1989/90:42, p. 1–5.
[328] SOU 2010:87, p. 76.
[329] SOU 1993:55, p. 15–20.
[330] *Sw: "myndighetsutövning"*.
[331] Hellner & Radetzki (2014), p. 416.

The key notion in 3:2 § SkL is the term "*exercise of public authority*". This term has been described as all decisions or actions that independently constitutes the exercise of public authority or stands in close connection to the exercise of public authority.[332] This includes all decisions or actions that showcases the powers of public authorities.[333] In the context of tort liability, the term includes decisions or actions that affect the individual and is an expression for society's right to exercise authority over its citizens.[334] Some counselling or information services do, however, not fall within the scope of the exercise of authority.

The negligence assessment in relation 3:2 § SkL is largely the same as for private subjects. Some aspects are however approached differently.[335] Since the exercise of public authority expresses the public's authority and the individual's dependence, it may be necessary to demand a particular level of care and judgment of the public authority. Meanwhile one must consider that it is impossible to demand constantly flawless operations from a public authority. The particular situation at hand may therefore require a stricter or softer proximate cause assessment.[336] The burden of proof falls on the party claiming injury or damage. It should be sufficient for an individual to prove wrongdoing caused by negligent exercise of public authority.[337]

According to 3:2 § p. 2 SkL, the state or municipality should also compensate non-pecuniary damages in accordance with 2:3 § SkL caused through wrongful acts or omissions. According to 2:3 § in connection with 3:2 § SkL, the state and municipalities should compensate individuals for severe violations through crime of that individual's person, liberty, peace or honour due to acts or omissions during the exercise of public authority.[338]

3.4 The Impact of the Right to an Effective Remedy in Swedish Tort Law

Chapter 3.3 provides the necessary Swedish tort law foundations. Chapter 3.4 provides an overview of the impact of article 13 ECHR in the context of Swedish tort law. In accordance with the delimitations of this thesis, the following paragraphs concern the liability of public authorities. The paragraphs below contain a review of the Swedish Supreme Court's interpretation and application of article 13 and the associated ECHR material. This chapter also includes sections on doctrinal elements and the suggested legislative measures provided by t the inquiry on the public liability according to the ECHR.[339]

[332] Prop. 1989/90:42, p. 10; Prop. 1972:5, p. 502.
[333] Prop 1972:5, p. 312; see also NJA 1985 s. 360 (p. 362–363).
[334] SOU 2010:87, p. 77; Prop. 1972:5, p. 311–312.
[335] Hellner & Radetzki (2014), p. 418.
[336] SOU 2010:87, p. 83.
[337] SOU 2010:87, p. 84.
[338] See Hellner & Radetzki (2014), p. 412.
[339] See SOU 2010:87.

3.4.1 Swedish Case Law Concerning Tort and the ECHR

The nature of the impact and application of article 13 ECHR has been interpreted and clarified by the Swedish Supreme Court in several judgments in the last decade. The relevant judgments are developed and contextualised in the following paragraphs. The judgments were selected based on relevance and impact and are presented chronologically below.

The Swedish Supreme Court introduced the ECHR as a parallel and independent basis for liability in the case of *NJA 2005 s. 462*[340]. The circumstances of the case concerned a financial manager who had been prosecuted for several economic crimes. The applicant argued that the allegations against him had not been tried by court within a reasonable time.[341] The applicant claimed compensation for non-pecuniary damages due to the lengthy proceedings and argued that the actions of the prosecutor had breached article 13 ECHR.[342] The Supreme Court referred to previous case law, where the Supreme Court had held that the Swedish State could be liable for damages inflicted upon individuals due to breaches of the EES-agreement.[343] The Supreme Court used the same approach and came to the same conclusion in relation to the ECHR. The Supreme Court observed and heeded the interpretative guidelines provided by the ECtHR's case law when assessing the applicant's claims.[344] The Supreme Court finally held that the applicant had been denied the access to an effective remedy according to article 13 ECHR. The Supreme Court further stated, with regard to the ECtHR's case law[345], that breaches of the ECHR should result in the compensation of non-pecuniary damages.[346]

The precedence set by the Swedish Supreme Court in *NJA 2005 s. 462* was reiterated and clarified in the case of *NJA 2007 s. 295*[347].[348] The issue brought before the Swedish Supreme Court in the case of *NJA 2007 s. 295* concerned article 5 and 13 ECHR and whether Swedish courts could award damages directly based on the ECHR, if domestic tort law or *the act of compensation during imprisonment and other coercive measures*[349] would not be able to award compensation according to the principles of the Convention.[350] The Swedish Supreme Court stated that article 5 and article 13 ECHR both express

[340] NJA 2005 s. 462.
[341] NJA 2005 s. 462 (p. 462–463).
[342] NJA 2005 s. 462 (p. 464).
[343] NJA 2005 s. 462 (p. 487); cf. with NJA 2004 s. 662.
[344] NJA 2005 s. 462 (p. 487–488).
[345] See *Kudła v. Poland*, Application no. 30210/96, 26 October 2000.
[346] NJA 2005 s. 462 (p. 497–498).
[347] NJA 2007 s. 295.
[348] Andersson (2013) s. 599.
[349] *Sw: "Lagen (1998:714) om ersättning vid frihetsberövanden och andra tvångsåtgärder".*
[350] NJA 2007 s. 295 (p. 301).

obligations for the member state, and that failing to ensure the right to damages in the context of the case would breach the ECHR. The Supreme Court also stated that the applicant's right to damage should primarily be tried according to Swedish tort law. The Swedish tort law should, to the extent relevant to the context of the ECHR, be interpreted in conformity with the Convention. The Supreme Court further stated that if Swedish tort law cannot meet the obligations set by article 5 of the ECHR, then the obligations should be met by awarding damages without support by law. However, the provisions do not themselves grant individuals a conclusive right to damages.[351]

The notion of compensation for non-pecuniary damages due to breaches of the ECHR was expanded in the case of *NJA 2007 s. 584*[352]. The circumstances of the case concerned the police's unauthorized and unlawful medical examination of a group of children. The legal issue addressed by the Supreme Court was whether the examined children's family could be awarded damages for suffered non-pecuniary damages inflicted by the medical examination based on SkL or the ECHR.[353] The Supreme Court found that there were no immediate grounds for compensating non-pecuniary damages stated in SkL.[354] The Supreme Court did however state that the medical examination breached the right to privacy under article 8 ECHR and awarded the applicant non-pecuniary damages in accordance with article 13 and article 41 ECHR.[355] The Supreme Court reiterated that article 13 ECHR gives the member state some liberty in determining appropriate remedy and that the establishing of violations as such may qualify as just satisfaction according to article 41 ECHR. The Supreme Court further highlighted the ECtHR's judgment in the case of *T.P. and K.M. v. The United Kingdom*, where it was stated that there in principle should be provided a possibility of obtaining compensation for inflicted pecuniary and non-pecuniary damages due to breaches of the ECHR.[356] When the Supreme Court determined the non-pecuniary damage amount, the court emphasised the medical examination's impact on the children as well as the parents. This showcased a line of reasoning connected to the right to private life under article 8 ECHR.[357]

The question of the horizontal or vertical application of the ECHR in Swedish law was addressed by the Swedish Supreme Court in the case of *NJA 2007 s. 747*[358]. The legal issue concerned whether individuals could be obliged to compensate damages to other individuals through the direct application of article 8 and 13 ECHR. The circumstances of the case revolved around an applicant who had been monitored by her insurance provider.[359] The applicant

[351] NJA 2007 s. 295 (p. 302).
[352] NJA 2007 s. 584.
[353] NJA 2007 s. 584 (p. 593).
[354] NJA 2007 s. 584 (p. 595).
[355] NJA 2007 s. 584 (p. p. 595–598).
[356] NJA 2007 s. 584 (p. 596); see also *T.P. and K.M. v. the United Kingdom*, Application no. 28945/95, 10 May 2001, para 107-110.
[357] NJA 2007 s. 584 (p. 597–598); see also Andersson (2013), p. 671–677.
[358] NJA 2007 s. 747.
[359] NJA 2007 s. 747 (p. 747–748).

claimed that the insurance provider had violated her rights according to article 8 ECHR, and was therefore liable for the suffered damage according to article 13 ECHR.[360] The Supreme Court rejected the applicant's claim and stated that an individual is not liable to pay damages to another individual on the basis of the ECHR.[361] The Supreme Court reasoned that liability on the basis of the ECHR from a horizontal perspective is different and that a significant weight should be given to the notion of predictability. The dynamic interpretation of the ECHR by the ECtHR was further highlighted by the Supreme Court as a factor increasing the difficulty for individuals to predict the scope and application of the ECHR.[362] The Supreme Court rejected the applicant's claim and limited the ECHR to apply vertically between the state and the individual in Swedish law.[363]

The scope of liable subjects for breaches of the ECHR was expanded by the Swedish Supreme Court in the case of *NJA 2009 s. 463*[364]. The judgment concerned whether a municipality, without support by law, could be held liable for breaching the ECHR. The applicant claimed that a Swedish municipality had violated article 5 ECHR trough unlawful imprisonment and official misconduct.[365] The Supreme Court granted the applicant's claims and held that municipalities can, without the explicit support by law, be liable for breaches of the ECHR to fulfil the ECHR.[366] The Supreme Court based the judgment on the similarities between the general character of the state's exercise of public authority and the activities carried out by municipalities and argued that it was relevant for municipalities to also be liable for breaches of the ECHR.[367]

The remedies in Swedish law were considered and assessed by the ECtHR in the case of *Eriksson v. Sweden*[368]. The circumstances in the case of *Eriksson v. Sweden* revolved around a rejected request for life annuity and the rejected appeals for said life annuity.[369] The applicant had during the Swedish court proceedings been denied an oral hearing before the Swedish Supreme Administrative Court and claimed before the ECtHR that the denied hearing constituted a breach of article 6.1 of the ECHR. The applicant further stressed that the proceedings for life annuity would have been in his favour if he had been granted an oral hearing.[370] The ECtHR held that the state of Sweden had not violated the applicant's rights according to article 6.1 of the ECHR when not granting him an oral proceeding. The ECtHR emphasised the Swedish Supreme Court's case law and the practices of the Chancellor of Justice and stated that they clearly showcased that Sweden had adopted possibilities for

[360] NJA 2007 s. 747 (p. 750).
[361] NJA 2007 s. 747 (p. 752).
[362] NJA 2007 s. 747 (p. 751).
[363] NJA 2007 s. 747 (p. 752).
[364] NJA 2009 s. 463.
[365] NJA 2009 s. 463 (p. 464).
[366] NJA 2009 s. 463 (p. 474).
[367] NJA 2009 s. 463 (p. 473–474).
[368] *Eriksson v Sweden*, Application no. 60437/08, 12 April 2012.
[369] *Eriksson v Sweden*, Application no. 60437/08, 12 April 2012, para. 1–17.
[370] *Eriksson v Sweden*, Application no. 60437/08, 12 April 2012, para. 37, 55–57.

individuals to obtain compensation for violations of the ECHR.[371] The ECtHR highlighted that the Swedish Supreme Court had held in previous case law that compensation for breaches of the ECHR can be based directly on the ECHR without support in Swedish law.[372] The ECtHR further stated that the Swedish case law together with the Chancellor of Justice's practice proved that there exists accessible and effective Swedish remedies in place capable of granting redress for alleged breaches of the ECHR.[373]

3.4.2 The Priority of Sources

The Supreme Court's case law on the scope and application of the ECHR in tort liability law has according to the doctrine resulted in the three following possibilities.[374] Firstly, any breach of the ECHR committed by the Swedish state or a municipality should amount to a wrongful act or omission and trigger compensation for injury of persons, damages of property and pecuniary damages according to 3:2 § SkL.[375] Secondly, Swedish law, including 3:2 § SkL and other related tort liability law provisions, should be interpreted in conformity with the obligations stated in the ECHR.[376] Thirdly, any breaches of the ECHR provides independent grounds for liability and possibility to obtain non-pecuniary damages according to article 13 ECHR, regardless of the applicability or Convention conform interpretation of 3:2 § SkL.[377]

3.4.3 Suggested Amendments of Law

An appointed inquiry was in 2009 tasked with investigating the liability of public authorities according to the ECHR. The inquiry presented their conclusions on the matter in 2010.[378] The inquiry concluded that the Swedish legal system handled non-pecuniary damages differently from the ECtHR when assessing cases in the context of article 13 ECHR.[379] The Swedish SkL was built on a notion of restrictively awarding non-pecuniary damages to individuals who had had their rights or interests violated.[380] The inquiry further concluded that the right to an effective remedy under article 13 ECHR and the principles developed by ECtHR in relevant case law did not prescribe the awarding of generous amounts as the primary method of repairing

[371] *Eriksson v Sweden*, Application no. 60437/08, 12 April 2012, para. 29–34.
[372] *Eriksson v Sweden*, Application no. 60437/08, 12 April 2012, para. 50; see also NJA 2009 N 70.
[373] *Eriksson v Sweden*, Application no. 60437/08, 12 April 2012, para. 52.
[374] Andersson (2013), p. 557–559.
[375] Andersson (2013), p. 557.
[376] Andersson (2013), p. 558.
[377] Andersson (2013), p. 559; NJA 2009 N 70; NJA 2007 s. 295; NJA 2007 s. 584.
[378] See SOU 2010:87.
[379] SOU 2010:87, p. 276–277.
[380] SOU 2010:87, p. 277–279; see also NJA 2005 s. 462.

violations of human rights.[381] The inquiry further found that the SkL could and should be adapted to be in line with the ECHR.[382]

The inquiry stated that there was a need for clarifying legislation regarding reparative remedies. However, any legislative tort liability measures should be approached as one of many appropriate remedies. Any breaches of the ECHR should primarily be remedied or satisfied within the relevant process assessing the breach as such.[383] The inquiry mentioned several reasons for adding clarifying legislation to the SkL. The first reason was to clarify the case law established principles on tort liability for public authorities regarding non-pecuniary damages.[384] Another relating reason was to clarify and provide guidance on the current legal position on tort liability issues interacting with the ECHR. This would further help the adjudicator applying current law and ensure greater predictability and consistency in future case law.[385] The third reason provided was that Sweden as a member state primarily fulfils the ECHR trough legislative measures.[386] The fourth reason for legislative measures was to anchor the case law developed principle of awarding non-pecuniary damages as compensation for breaches of the ECHR in legislation. The Swedish tort liability law has previously demanded support by law to award non-pecuniary damages.[387]

The inquiry also suggested that the legislator should introduce legislation enabling trials in Swedish courts concerning breaches of the ECHR.[388] The inquiry furthermore concluded that the legislator should introduce a provision enabling individuals the possibility to obtain damages due to breaches of the ECHR committed by public authorities. The inquiry suggested that this provision should be located right after 3:2 § SkL.[389] No legislative measures on the issue of tort liability and the ECHR are currently undergoing.

3.5 Tort in Relation to Breaches of Fundamental Rights and Freedoms

A topic made relevant by the ECHR influenced tort discussion is tort liability due to breaches of the fundamental rights and freedoms stated in chapter 2 RF. Some doctrinal elements have suggested amendments of law to provide additional regulation to the current case law based approach developed in relation to the ECHR.[390]

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[381] SOU 2010:87, p. 279–280.
[382] SOU 2010:87, p. 280.
[383] SOU 2010:87, p. 281.
[384] SOU 2010:87, p. 281; cf. chapter 3.4.2, NJA 2009 N 70, NJA 2007 s. 295 and NJA 2007 s. 584.
[385] SOU 2010:87, p, 282.
[386] SOU 2010:87, p. 283; cf. SOU 2008:3, p. 323 and Prop. 1993/94:117, p. 36-37.
[387] SOU 2010:87, p. 283.
[388] SOU 2010:87, p. 294.
[389] SOU 2010:87, p. 306.
[390] Bengtsson (2011), s. 605–629, (p. 625–629).

The rights and freedoms features of the RF and the ECHR share similarities but are also different. There is no equivalent in the RF to the right to respect for private and family life under article 8 ECHR or the right to marry under article 12 ECHR. Another notable difference is the absence of a right to an effective remedy under article 13 ECHR in the RF.[391] The protection of the rights and freedoms stated in chapter 2 RF apply to the exercise of public authority, which includes the legislator, courts and governmental agencies.[392] This would entail liability to legislation and adjudication breaching the provisions of the RF.[393] The overall construct, despite possible differences, would benefit from legislation similar to the current 3:2 § SkL explicitly providing tort liability for breaches of both chapter 2 RF and the ECHR.[394] The issue of tort liability due to breaches of the RF's fundamental rights and freedoms have been addressed by the Swedish Supreme Court. The reasoning found in those cases are accounted for below. The judgments show that the Swedish Supreme Court might have expanded the approach developed in ECHR related cases to issues concerning chapter 2 RF.

3.5.1 Non-pecuniary Damages

The legal issue of case *NJA 2014 s. 323*[395] was whether the Swedish state could be found liable and obligated to compensate the non-pecuniary damages for violating the applicant's right to Swedish citizenship, as stated by 2:7 p. 2 § RF.[396] The applicant was born abroad and had acquired a Swedish citizenship from the Swedish man who then was presumed to be his father. It was however later revealed that the Swedish man had not been his biological father and the applicant lost his Swedish citizenship. The applicant's citizenship was restored by the Swedish Supreme Administrative Court and the Court stated that the applicant's Swedish citizenship had been revoked incorrectly. The applicant had however stood without his Swedish citizenship for four years and therefore sued the Swedish State for the non-pecuniary damages suffered during the time without citizenship.[397]

The Swedish Supreme Court emphasised that the right to citizenship under 2:7 § RF is absolute and stated that citizenship is a crucial condition for participating in elections, and by extension the individual's possibility of influencing the public authority and governance. The Supreme Court furthermore highlighted that citizenship establishes the legal relationship between the state and the individual. By breaching the right stated in 2:7 § RF, the state had deprived the individual the rights and freedoms activated through the citizenship. Such a breach carried a harmful effect of such a

[391] Bengtsson (2011), s. 605-629. (p. 607)
[392] Holmberg et al (2012), p. 81; Bengtsson (2011), s. 605–629, (p. 607).
[393] Bengtsson (2011), s. 605–629, (p. 613–614).
[394] Bengtsson (2011), s. 605–629, (p. 610, 626).
[395] NJA 2014 s. 323.
[396] NJA 2014 s. 323, (p. 324–325).
[397] NJA 2014 s. 323, (p. 329–330).

significance that it deviated from the constitutional foundations of Sweden. Such a breach should provide an individual with grounds to invoke tort liability for the state. The Supreme Court also stated that such a severe breach could be awarded with non-pecuniary damages, despite the lack of support by law. The Supreme Court found the applicant to be entitled non-pecuniary damages as compensation for the breach.[398] A dissenting Judge of the Supreme Court requested further legislation to clarify the issue.[399]

The judgment did not provide clear principles or extensive details on how to assess future tort liability issues related to chapter 2 RF. The Supreme Court did however state that it is possible to award inflicted non-pecuniary damages law due to breaches of the RF without support by law. The Supreme Court further bypassed the notion of negligence as in other recent cases concerning breaches of the ECHR.[400] The Supreme Court deviated from a liability assessment based on whether there had been an act or omission according to 3:2 § SkL.[401] Some have compared the judgment of *NJA 2014 s. 323* to *NJA 2005 s. 462*, which started the ECHR's entry into the Swedish tort law. The development illustrated in *NJA 2014 s. 323* has been perceived by some as the next logical step in the development of fundamental rights and freedoms in Swedish law.[402]

3.5.2 Pecuniary Damages

The case of *NJA 2014 p. 332*[403] concerned a group of fishermen's claim for compensation for pecuniary damages suffered due to a fishing prohibition. The applicants argued that the fishing prohibition had corresponded to a breach of 2:15 p. 1 § RF, which should entail the right to compensation according to 2:15 p. 2 § RF.[404]

The Swedish Supreme Court highlighted that the ECtHR in similar cases had emphasised the legitimate expectations of the individual concerned. The Supreme Court further emphasised the ECtHR's use of the principle of proportionality and stated that the principle also played an important part in Swedish law concerning infringement of property. The Supreme Court stated that the principle prescribes a balancing between the interests of the public and the individual. If no compensation were to be awarded, then much would suggest that the measure breaching 2:15 § RF would be un-proportionate.[405] The Swedish Supreme Court finally stated that the breach was so severe that

[398] NJA 2014 s. 323, (p. 331).
[399] NJA 2014 s. 323, (p. 332).
[400] Bengtsson, Bertil (2014) Högsta domstolen fortsätter omvandlingen av skadeståndsrätten, *Svensk Juristtidning*, s. 431–439, (p. 437).
[401] Mörk, Martin & Hermansson, Magnus (2014), En enhetlig skadeståndsordning vid överträdelser av grundläggande rättigheter? *Svensk Juristtidning*, s. 507–519, (p. 508–509).
[402] Mörk & Hermansson (2014), s. 507–519, (p. 510–512).
[403] NJA 2014 s. 332.
[404] NJA 2014 s. 332, (p. 337).
[405] NJA 2014 s. 332, (p. 356); cf. with *Alatulkkila and Others v. Finland*, Application No. 33538/96, 28 July 2005.

it should provide compensation despite there being no additional support provided by law.[406]

3.6 Conclusion – the Impact of the Right to an Effective Remedy in Swedish Tort Law

The aim of chapter 3 is to account for the material necessary to answer sub-question *b) "How has the right to an effective remedy under article 13 of ECHR influenced the liability of public authorities in Swedish tort law?"*[407]

The right to an effective remedy stated in article 13 ECHR addresses the relationship between individuals and national authorities. The article states no obligation between individuals. According to the principle of subsidiarity, expressed in article 1 and 35 ECHR, issues revolving remedies and compliance with the Convention shall be addressed by the member states.

A remedy is effective if it is accessible, practically available to individuals, and offers a reasonable chance of success. The decision or judgment of remedy must be possible to carry out and have been issued within a reasonable time. Article 13 ECHR sets the standard that member states must follow. The right to an effective remedy does not prescribe national public authorities of member states the obligation to judicially review the compliance of national law with the Convention. The member states are free to choose appropriate methods to fulfil the obligations set by the ECHR.

There are no specific measures stated in article 13 ECHR as appropriate remedies. The ECtHR stated in the case *Z and Others v. the United Kingdom* that damages awarded to individuals suffering economic and non-pecuniary damages should be considered effective remedies. If an issue involves breaches of article 2 or 3 ECHR, then the ECtHR has stated that damages for economic and non-pecuniary losses are called for. The ECtHR's case law has further developed the scope of article 13 ECHR. The right to an effective remedy obliges the member states to provide mechanisms to assess and investigate the liability of public authorities, especially in scenarios where article 2 or 3 ECHR have been breached.

The Swedish Supreme Court first concluded in the case of *NJA 2005 s. 462* that the ECHR can provide an independent basis for liability of public authorities. This was later confirmed in *NJA 2007 s. 295*, with an added statement clarifying that article 13 ECHR does not entail a conclusive right to damages. A clarification of liable public authorities was concluded in *NJA 2009 s. 463*. The Supreme Court stated that municipalities can be liable for breaches of the ECHR.

[406] NJA 2014 s. 332 (p. 357).
[407] See chapter 1.2 above.

The ECtHR has further concluded in the case of *Eriksson v. Sweden* that Swedish law fulfils article 13 ECHR and provides individuals the right to an effective remedy. The ECtHR examined Swedish case law and highlighted the Swedish Supreme Court's approval of ECHR breaches as valid grounds for liability of public authorities as an indicator that Sweden complies with article 13.

The doctrine states that the ECHR has come to influence the Swedish tort liability of public authorities in three ways. Firstly, a public authority that breaches the ECHR, has committed a wrongful act or omission according to 3:2 § SkL and is therefore liable for compensation. Secondly, Swedish tort law should be interpreted in conformity with the ECHR. Thirdly, a breach of the ECHR can independently cause liability for public authorities.

Of interest are also the recent judgments of *NJA 2014 s. 323* and *NJA 2014 s. 332*. The cases are not of major importance to the issue of tort liability and article 13. But they still showcase the impact of the considerations of rights and freedoms in tort law reasoning, albeit from provisions stated in Chapter 2 RF instead of the ECHR.

To summarise, the right to an effective remedy under article 13 ECHR has had a significant influence on the liability of public authorities in Swedish tort liability law. The impact was recognised in 2010 by the inquiry tasked with investigating the question of public authorities' liability according to the EHCR. Despite the inquiry's recommendation on amending the Swedish SkL to clarify the role of the ECHR in the liability assessment, no legislative measures have been issued or are underway. The impact is however obviously recognised in the Supreme Court's case law and the legal doctrine.

4 CONCLUSION

The two summarising sub-questions *a)* "*What is the constitutional status of the ECHR in Swedish law?"* and *b)* "*How has the right to an effective remedy under article 13 of ECHR influenced the liability of public authorities in Swedish tort law?"* are answered above to provide the basis necessary to answer the research question: "*Is it a constitutional right for individuals to make tort liability claims, in accordance with article 13 ECHR, against public authorities based on breaches of the ECHR?"*.

The constitutional status of the ECHR is more elaborately analysed and discussed above.[408] The provision of 2:19 § RF states no formal constitutional status for the ECHR. The EHCR has however after the incorporation been given more and more consideration. The Swedish Supreme Court's case law together with the interpretative guarantee in 2:19 § RF provides the ECHR a quasi-constitutional status.

The provision located in 2:19 § RF further applies to the entirety of the ECHR, including the right to an effective remedy under article 13 ECHR. As is concluded above, the right to an effective remedy greatly influences tort liability of public authorities in Swedish tort law.[409] The influence is manifested through principles established through the Swedish Supreme Court's case law and legal doctrine. Clarifying legislation has been requested to showcase the development. It stands clear that individuals currently have the possibility of basing tort liability claims against public authorities for breaching the ECHR and the opportunity of obtaining compensation for the related non-pecuniary damages. The doctrine and case law provides three possible approaches for individuals. Firstly, a public authority that has breached the ECHR has committed a wrongful act or omission according to 3:2 § SkL and is therefore liable to compensate non-pecuniary damages. Secondly, Swedish tort liability law should be interpreted in conformity with the ECHR. Thirdly, a breach of the ECHR can independently cause tort liability and obligations to compensate non-pecuniary damages for public authorities.

Do the answers in a) and b) combined provide an answer to the research question? By applying the theory's definition of constitutional rights can the research question be answered. The application of the definition on current law is accounted for below.

The initial step is to analyse and establish whether the right to an effective remedy under article 13 of the ECHR is a constitutional right according to the definition provided by said theory. Establishing a constitutional right requires an assessment of the particular right's norm and legal position. The norm is the meaning of the normative statement. The normative statement expressed

[408] See chapter 2.6 above.
[409] See chapter 3.6 above.

in article 13 of the ECHR provides everyone the right to an effective remedy before a national authority. The legal position of the right consists of the relationship between the actors mentioned in the normative statement. The statement constitutes a subjective right stating a positive state act. The statement more precisely provides individuals the right to something. As stated by Alexy in the theory, a right to something typically contains the following construct: *"X has a right to G as against Y"*. In the case of article 13 "*X*" corresponds to "*Everyone*", "*G*" corresponds to "*effective remedy*", and "*Y*" corresponds to "*national authority*". The relationship of the actors consists of "*everyone*" in relation to "*national authority*" concerning "*effective remedy*". The statement in article 13 ECHR stipulates an entitlement, or more specifically, everyone's entitlement to an effective remedy. The entitlement is also normative, since it prescribes member states to create legal norms ensuring effective remedy.

Can the norm and right stated in article 13 be considered a constitutional rights norm? It is necessary to reiterate the defined constitutional status of the ECHR since constitutional rights norms flow from constitutional rights provisions. The ECHR holds a quasi-constitutional status, which means that article 13 ECHR also holds a quasi-constitutional status. To further analyse and define article 13 ECHR as a possible constitutional rights provision, the issue is compared to the substantive, structural and formal elements of constitutional rights provisions according to the theory.

The substantive element states that the right should belong to the foundation of the state itself, the individual liberties. Article 13 ECHR has above been defined as a right to something and not an individual liberty per se. The structural element states that a constitutional rights provision is a constitutional provision stating a subjective right. Article 13 ECHR is a subjective right but not stated through a constitutional provision. Article 13 ECHR is a quasi-constitutional provision and could be defined as a quasi-constitutional rights provision according to the structural element of constitutional rights provisions. The formal element requires assessment of the manner and form of the provision's enactment. Article 13 ECHR in relation to this element could more plausibly be considered a constitutional rights provision. The guarantee stated in 2:19 § RF, the status given the ECHR through case law and during judicial review shows a manner and form that should imply that article 13 ECHR is a constitutional rights provision. The article is therefore most likely a constitutional rights norm, which also makes the article a constitutional right. The conclusion proceeds with this as a presumption.

According to the theory, the constitutional rights norm stated in article 13 ECHR is a principle. The requirements stated in article 13 ECHR can be satisfied to varying degrees and in various ways depending on the factual possibilities and what is legally possible. Article 13 ECHR is an optimization requirement and member states are to a degree free to choose how the right to an effective remedy is implemented. There is no clear definition of what constitutes an effective remedy, but an effective remedy is accessible,

practically available to individuals, and offers a reasonable chance of success. The decision or judgment of remedy must also be possible to carry out and issued within a reasonable time. The character of the effective remedy is further affected by the particular violation of the ECHR. If article 2 or 3 are violated, then remedial actions such as damages for economic and non-pecuniary losses are called for. Furthermore, article 13 is not a rule. A rule is either fulfilled or not. The character of article 13 is too differentiated to be either fulfilled or not.

The theory provides input on how to resolve conflict between two principles. According to the law of competing principles, one of the principles must be outweighed. Article 13 should then be placed in relation to the other principle. The research questions of this particular thesis does not concern conflict between principles and pays therefore this issue no further attention.

The fact that article 13 of the ECHR can be perceived as a constitutional right does however not automatically entail the same for tort liability claims against public authorities breaching the ECHR. Member states are free to choose which effective remedy to provide according to article 13. To provide tort liability as a remedy is not inherently an obligation under article 13, unless there has been a breach of article 2 or 3 of the ECHR. The notion of tort liability is not formally required by article 13 of the ECHR. The author therefore finds the classifying of tort liability under article 13 of the ECHR as constitutional law as too dependent on whether article 2 or 3 have been breached. The manner and form of the possible right becomes too specific and depending on unspoken circumstances. The author therefore concludes that there is no constitutional right for individuals to make tort liability claims against public authorities based on breaches of the ECHR.

Should tort liability due to breaches of the ECHR by public authorities against individuals be considered a constitutional right? The author believes that such an approach would further entrench the remedy of human rights violations and by extension the protection of human rights. The establishment of a provision as constitutional right further holds a certain magnitude and symbolic value. Furthermore, the author requests a greater awareness of rights and more specifically constitutional rights in the Swedish legal discourse. Such an effort would therefore be appropriate. The contemporary legal development shows that the legal doctrine is gravitating towards human rights assessments made through unwritten principles in court. A greater debate and discussion on the issue would contribute and eventually materialise to an explicit stance on how human, constitutional and fundamental rights are to be perceived in Swedish law. This is, at least from the point of the author, beneficial since it puts the spotlight on how we approach rights in general, which is of major importance and should interest everyone.

Beyond the constitutional aspects of this discussion, the author agrees with the doctrine's and Swedish government's requests for legislation clarifying the possibility of obtaining tort as remedial action for breaches of the ECHR. A clarification through law would be a suitable way forward ensuring both

clarity and predictability for individuals on the matter. More clarity and debate would additionally be healthy for the Swedish rights climate in general. The author further argues for an amendment of RF, capturing and conveying the status of the ECHR established by the Swedish Supreme Court. Yet another bundle of constitutional amendments similar to the reform of 2010 would perhaps be enough to concretize the direction which the Swedish Supreme Court has taken.

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