The European Convention on Human Rights in Sweden – Legal Practice and Legal Theory Analysed

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Abstract

The European Convention on Human Rights (ECHR) has been part of Swedish domestic law since 1995 and the Swedish government and the Supreme Courts of Sweden asserts that Swedish courts implemented it. However, the European Court of Human Rights (ECtHR) have judged Sweden 61 times for violating the ECHR, including eight judgments regarding Article 3 (prohibition of torture). Thus, Swedish courts clearly don't fully implement the ECHR indicating they adhere to some conflicting legal reasoning. The literature says little about how and why domestic courts implement or don't implement the ECHR and Swedish courts are especially neglected. The purpose of this study is to fill this gap in the literature and determine how and why the legal reasoning of Swedish courts conflict with the ECtHR. I have therefore, in relation to the eight mentioned cases, attempted to answer the following questions. (1) What legal arguments are held by Swedish courts and the Swedish government in these cases? (2) What legal arguments are held by the ECtHR in these cases? (3) In what ways do the legal reasoning of Swedish courts and the Swedish government in these cases conflict with the legal reasoning of the ECtHR and thus in extension with the ECHR? (4) How can this conflict be understood from a socio-legal perspective, especially in the light of Pound's (1910) legal theory?

I have used Bryman's (2016) description of qualitative contents analysis to determine the how and turned to existing literature and to Pound (1910) to answer the why. I have drawn on Pound's (1910) description of how *law in action* in United States (US) state courts don't follow the *law in books* defined by US federal law or the case-law of the US supreme court. A behaviour of courts that Pound (1910) argue is symptomatic for courts in general why I have applied this notion to Swedish courts and the ECHR as defined by ECtHR case-law. I have found that the strategies and reasons for such strategies described by Pound (1910) are in line with the behaviour of Swedish courts and in extension the Swedish government. Specifically, that Swedish courts reinterpret and ignore parts of ECtHR case-law when implementing the ECHR. Seemingly due to conflicting legal values making Swedish courts reluctant to seed legal control to the ECtHR regarding legal implementation of the apparent sensitive legal issue of asylum. My findings also support and are supported by previous research. For example, the findings of Helfer (2008a, pp.132-133, 137) that European domestic courts tend to ignore ECtHR case-law when implementing the ECHR and instead adhere to legal values and norms inherent to their own domestic court system.

Abbreviations

- Council of Europe: CoE
- European Convention on Human Rights: ECHR
- European Court of Human Rights: ECtHR
- European Union: EU
- Government of Sweden: GS
- Human Rights Act: HRA
- International Human Rights Law: IHRL
- United Kingdom: UK
- United Nations: UN
- United States: US

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1 Introduction

The government of Sweden (GS) has been committed since the 1950s to ensure that domestic law is harmonized with the ECHR. Swedish courts are moreover since 1995 obligated by Swedish domestic law implement the ECHR. It's thus remarkable that Sweden have been judged 61 times by the ECtHR for ECHR violation. Including eight judgments for violating Article 3, which prohibits torture, all delivered since 2010. Moreover, the ECtHR only hears accusations against Sweden after the highest legal instance in Sweden has heard the case. Which indicates that the judgments against Sweden related to judgments by Swedish courts based on legal reasoning conflicting with the ECHR. Such legal reasoning in relation to the eight mentioned cases and how and why they conflict in the way they do is what is studied in this thesis. (Case of X v. Sweden; Council of Europe, 2017, p.1; ECtHR, 2011, p.13; 2013, p.2; 2014, p.2; 2016; 2017, p.2; 2018a; 2018b, p.2; GS, n.d.a, p.3; 2015b; Supreme Court of Sweden, 2017a)

Moreover, studies regarding the legal reasoning of domestic institutions towards the ECHR accessible though standard citation indexes are of scarce supply. Especially noteworthy, such studies about domestic court are of even scarcer supply and such studies about Swedish courts are all but missing from the literature. Existing research shows divergent legal reasoning from domestic institutions such as courts towards the ECHR. For example, Helfer (2008a, pp.132-133, 137) and Hoffmeister (2006, pp.722-724) finds that domestic courts, at least indirectly, abide to the ECHR but ignore ECtHR case-law when doing so. Whilst for instance Martinico (2012, p.407) finds that domestic courts generally not only abide by the ECHR but also harmonize their legal reasoning in according to ECtHR case-law. The purpose of my study is to fill the apparent gap in the literature by determine *how* and *why* the legal reasoning of Swedish courts and the Swedish government towards the ECHR seem to conflict with the legal reasoning of the ECtHR. To answer the how I have performed qualitative contents analysis (Bryman, 2016, pp.505-506) of all ECtHR judgments against Sweden regarding Article 3 (prohibition of torture) violations. This since it's the article Sweden has received most judgments for violating since 2011 and since it's one of the articles Sweden have received most judgments for violating overall (ECtHR, 2011, p.13; 2013, p.2; 2014, p.2; 2017, p.2; 2018b; Case of X v. SWEDEN). This to extract the case related legal reasoning of Swedish courts, the Swedish government and the ECtHR described therein and compare these to determine how they conflict. To answer why they conflict I have used Pound's (1910) legal

theory, which provides possible answers regarding why courts do or don't implement written law, including case-law created by legally superior courts.

2 The Problem

Sweden have remarkably been judged 61 times by the ECtHR for violating the ECHR (ECtHR, 2018b, p.2, Case of X v. Sweden). Especially remarkable are judgments delivered since 1995 when the ECHR was made part of Swedish domestic law, thus obligating Swedish courts to implement the ECHR. This since the ECtHR only hear cases that has been taken to the highest domestic legal instance. Meaning that every ECHR judgment against Sweden relates to judgments by Swedish courts that conflicts with the ECHR. Sweden has for example been judged eight times since 2010 for violating Article 3, which defines the prohibition of torture (ECtHR, 2011, p.13; 2013, p.2; 2014, p.2; 2017, p.2; 2018b; Case of X v. SWEDEN).

Looking to these eight judgments it's difficult to grant Swedish courts the benefit of the doubt that they truly implement the ECHR. This since these cases should relate to the same legal issues. One judgment could be explained by a mistakenly wrongful interpretation of the ECHR. But the recurrence of the violations indicates a persistent conflicting legal reasoning in the face of accumulating ECtHR case-law stating such legal reasoning to be wrong. If Swedish courts did fully adhere to the ECHR they would harmonize their legal reasoning with the accumulating ECtHR case-law defining the correct interpretation. But since the judgments keep being delivered this indicate that Swedish courts don't fully adhere to the ECHR as defined by ECtHR case-law and thus also not to Swedish domestic law. Moreover, since the cases reached the ECtHR and ended in judgments of guilt rather than in acquittals or in friendly settlements this means that the Swedish government actively opposed the accusations. Meaning the Swedish government reasonably supported the judgments of Swedish courts. This in turn means that the eight ECtHR judgments relates to cases where Swedish courts and the Swedish government defended Swedish court judgments which the ECtHR judged violated Article 3.

The questions that I aim to answer in this study is consequently how and why the legal reasoning of Swedish courts and the Swedish government in these eight cases conflicted with the ECtHR. I put special focus to see how and why they internalize or don't internalize ECtHR case-law. This by examining the change or lack of change over time regarding legal

arguments and the legal reasoning within these arguments. I have thus formulated the below listed research questions. Each referring to the legal arguments of Swedish courts, the Swedish government and/or the ECtHR given in or related to the eight mentioned ECtHR judgments against Sweden. By answering these question, I have furthermore fulfilled my aim of filling the apparent gap in the literature. Meaning I will answer *how* and *why* the legal reasoning of Swedish courts and the Swedish government regarding the ECHR seem to conflict with the legal reasoning of the ECtHR and thus with the ECHR as defined by ECtHR case-law. Thus, my study will make an important contribution to the academic debate regarding how and why domestic courts do or don't abide to the ECHR. Consequently, my study will facilitate a better understanding of the relation between law as a theoretical concept and law as a legal practice, which is important from a socio-legal perspective.

2.1 Research Questions

1. What legal arguments are held by Swedish courts and the Swedish government in these cases?
2. What legal arguments are held by the ECtHR in these cases?
3. In what ways do the legal reasoning of Swedish courts and the Swedish government in these cases conflict with the legal reasoning of the ECtHR and thus in extension with the ECHR?
4. How can this conflict be understood from a socio-legal perspective, specifically in the light of Pounds legal theory?

By performing a textual analysis of the case-files, based on Bryman's (2016, pp.505-506) description of *qualitative contents analysis*, I can identify and analyse the legal reasoning accounted for in the case-files. First, given by the Swedish government as expressed by their legal representation. Second, given by Swedish courts as described indirectly by the same legal representation and by the *facts* of the case. Third given by the ECtHR described in the judgment itself. I can thus determine *how* the legal reasoning of the Swedish government and Swedish courts conflicts with the legal reasoning of the ECtHR in these legal cases. By comparing such legal reasoning found in case-files spread over time I can determine if the Swedish government and/or Swedish courts altered their legal reasoning to harmonize with the case-law formed by the previous ECtHR judgments. By determining how the legal reasonings conflicts I can also present possible answers as to why they conflict. This by looking to Pound's (1910) legal theory which deals with why *law in action* executed by jurists

and courts might differ from *law in theory* defined by statutes and case-law that courts are legally obligated to implement.

3 The Legal Text of the ECHR

Below follows a description of the articles that form the, for this study, relevant parts of the legal text of the ECHR. Which is important to know when attempting to answer the research questions. This since it would be difficult to understand legal reasoning found in legal arguments that relates to the ECHR if one is not familiar with the relevant written contents of the ECHR. For clarity I should mention that I have excluded articles and protocols that are not referred to in and therefore not relevant for this study. I have also described the articles and protocols as they are phrased after the 1998 coming of legal force of ECHR protocol 11. This since the ECtHR cases that I have analysed all date after this date. Noteworthy, protocol 11 transferred legal power from the Council of Europe (CoE) and the Council of Ministers to the ECtHR which was also consolidated as a permanent court (CoE, 1994, pp.2-8; n.d.). It also altered the wording of the human rights defined in the ECHR to constitute *obligations* to fulfil or *prohibitions* to violate but without changing the definitions of the rights per se (CoE, 1950; CoE, 1994, pp.13-14; ECtHR and CoE, 2013a).

3.1 Relevant ECHR Articles

Article 1 state that all member-states are obligated to safe-guard positive and negative human rights defined in the ECHR. The for this thesis most relevant such right is defined in Article 3 which says that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment". (ECtHR and CoE, 2013a, p.6) Article 32 states that the ECtHR have the legal authority to settle all legal disputes regarding how ECHR articles are supposed to be interpreted and/or applicated. It also states that the ECtHR has the rights to determine its own legal jurisdiction, would any member-state challenge its jurisdiction on a legal issue. Article 34 grants individuals and organisations the right to bring accusations of ECHR violations against a member-state to the ECtHR. But article 35 then states that the ECtHR only hears cases were the plaintiff/s has exhausted all domestic remedies within the last six months. Lastly, article 46 states that the final judgment of the ECtHR is legally binding for all parties and that member-state/s judged must implement the legal directives and measures attached to such judgment. (ECtHR and CoE, 2013a, pp.20-21, 25-26)

3.2 Clarifications Regarding Exhaustion of Domestic Remedies

The ECtHR and the CoE (2013b, p.3; 2014b, p.22; 2016, p.6) as well as the Council of Bars and Law Societies of Europe (2016, p.3) clarifies the following. The requirement of exhaustion of domestic remedies means that plaintiffs must take their accusations of ECHR violation to the highest domestic court before the ECtHR will hear the case in question. The Supreme Court of Sweden (2017a; 2017b) and the Supreme Administrative Court of Sweden (2017a; 2017b) also confirms this. They explicitly state that the ECtHR only hears accusation towards Sweden if the plaintiff/s has taken such accusations to the highest Swedish instance. Which they note mostly are themselves or the Swedish government, but which also may be for example the Migration Court of Appeal.

4 Sweden's Legal Obligations to the ECHR

The government of Sweden (n.d.b; n.d.c; n.d.d; n.d.e; 2012b, p.7), the Permanent Representation of Sweden to the Council of Europe (n.d.) as well as the ECtHR and the CoE (2013b, pp.1-2, 4; ECtHR, 2016; 2018a, p.1; CoE, 2017, p.1) all notes the following. First, Sweden signed the ECHR 1950, ratified it 1953 and became legally bound by it when it came into legal force 1953. Second, the Swedish government have been responsible to ensure domestic respect for the ECHR since the 1950s. Third, ECtHR judgments against Sweden have been legally binding for Sweden since the court was established 1959. Fourth, the Swedish government is legally obligated to carry out measures attached to ECtHR judgments against Sweden, which for instance could be to harmonize domestic law with the ECHR.

The ECtHR and the CoE (2014a, pp.3-4) furthermore notes the following. First, domestic courts in nations attached to the ECHR are obligated to *apply* the ECHR. Second, failure by domestic courts to do so may result in an ECtHR judgment against the state in question. Third, ECtHR judgments creates case-law that determines how the ECHR is supposed to be interpreted. The Government of Sweden (2012c; 2015b; Ehrenkrona, 1999, p.7) as well as the Supreme Court of Sweden (2017a; 2017c) and the Supreme Administrative Court of Sweden (2017a; 2017c) on their part asserts the following. Swedish courts have been legally obligated to implement the ECHR and ECtHR case-law, at least case-law deriving from ECtHR judgments towards Sweden, since 1995 when the adoption of statute 1994:1219 wrote the ECHR into Swedish domestic law. Moreover, in an official report from the Supreme Court of Sweden (2017d), the courts former president Marianne Lundius states the following. Even if

the court in the past didn't fully adhered to the ECHR or to European Union (EU) law it does so now. Especially since 2002 when the court judged that "community law" is legally superior to Swedish domestic law.

The statute (Riksförvaltningen, 2017a) indeed wrote the ECHR into Swedish domestic law but it should be noted that the statute has been augmented several times since. Protocol 11 as well as protocol 1, 4, 6 and 7 was incorporated 1998, protocol 13 was incorporated 2003 and protocol 14 and 14a was incorporated 2010 (GS, n.d.f; 1998, p.1; 2003, p.1; 2005, p.1; 2009, p.1; 2016, p.1). The present version of the statute however doesn't include protocol 12 and 15 (Riksförvaltningen, 2017a) and protocol 12 has yet been ratified (CoE, 2018).

The Swedish government (2012c; 2015b) moreover asserts the following about the present Swedish constitution. First, it legally obligates Swedish courts to interpret all domestic statutes in a way that don't conflict with the ECHR. Second, it prohibits adoption of new domestic statutes that conflict with the ECHR. Paragraph 10 of chapter one of the present Swedish constitution do acknowledge Sweden's participation in the CoE (Riksdagsförvaltningen, 2014, p.2). Paragraph 19 of chapter two significantly also state that no law or regulation in Sweden is permitted to conflict with Sweden's commitment to the ECHR (Riksdagsförvaltningen, 2014, p.5). Both these paragraphs stem from statute 2010:1408 which came into legal force 1 January 2011 (Riksdagsförvaltningen, 2010, pp.2, 5; 2017b).

Thus, since 1995 the following can be said. First, Swedish courts and the Swedish government are obligated to implement the ECHR. Second, they both acknowledge their obligations to the ECHR and they both emphasise that Swedish courts implement the ECHR. Consequently, the legal reasoning of Swedish courts and the Swedish government should according to written law and own assertions be harmonized with the ECHR. Remaining doubts as to this could not have survived after the 2002 judgment of the Supreme Court of Sweden and certainly not after the 2011 alteration of the Swedish constitution. This is important to know when looking to the research questions and answering why such legal reasoning is not harmonized with the ECHR.

4.1 Obligations Regarding Asylum and Deportation Derived from the ECHR

The CoE, to help member-states and others to correctly implement the ECHR, makes the following clarification. First, ECtHR case-law since 1989 determines that asylum cases fall under the jurisdiction of the ECHR if the deportation of an individual risk leading to that

individual being tortured or to suffer from inhuman or degrading treatment. Second, if there is a *real risk* for an individual to be tortured or subjected to inhumane or degrading treatment or punishment in another country, article 3 of the ECHR prohibits deportation of that individual to that country. Third, this legal prohibition of deportation applies no matter who would be the perpetrator of the article 3 violation or in what context the violation would be executed or what prior actions the individual at risk might have committed. Fourth, ECtHR case-law since 1991 makes clear that it does not matter if the deportation takes the shape of extradition or expulsion, meaning all forms of deportation is forbidden if it risks leading to the deported individual to be subjected to treatment contrary to article 3. (Mole and Meredith, 2010, pp.19-21, 23, outside back cover)

Its moreover stated on the official web-page of the Swedish courts that statute 1994:1219, which wrote the ECHR into Swedish domestic law, is an important statute that is related to legal cases dealing with Aliens and citizenship (Sveriges Domstolar, 2016). The Swedish Migration board (2015; 2018) also notes the following. First, Sweden abide by international conventions it has signed and statute 1994:1219 is an example of this. Second, Sweden, since it's part of the ECHR, does not deport individuals if they risk being subjected to torture or inhuman treatment.

4.2 Sweden's Historical Commitment to International Human Rights Law

The Government of Sweden voted, without reservation, in favour of the United Nations Universal Declaration of Human Rights when it was adopted by the United Nations (UN) General Assembly in 1948 (UN, 1948a, p.933). Sweden thus committed to international human rights law (IHRL) and acknowledged that legal protection of IHRL is a human right and essential to secure everyone's access to liberty, justice and well-being and to maintain peace within and between nations (UN, 1948b, pp.1-3, 8). Since, the Swedish government has done the following. First, deepened its IHRL commitment by signing several IHRL-conventions, including the European Convention of Human Rights (GS, n.d.a; UN, n.d; 1999, pp.3-4). Second, frequently advocated for IHRL (e.g. UN, 1968, p.40; GS, 2018). Third, emphasised Sweden's IHRL commitment (e.g. GS, 2012a, pp.2-6; 2012b, pp.2-6; 2015a). Fourth, asserted that the Swedish legal system implements IHRL with special emphasis on the ECHR (e.g. GS, 2012b, p. 7). Considering the proclaimed indispensability of the ECHR regarding IHRL enforcement, I believe that it is of moral importance to study if Swedish courts in practice implement the ECHR. Thus, it's important to study how they legally

reasons towards the ECHR. Remembering that Sweden's commitments to the ECHR requires them to fully abide to the ECHR as defined by ECtHR case-law.

5 Previous Research

I have in this chapter used the general advises of Hart (2014) on how to create a high-quality literature review. Focusing on Hart's (2014, pp., 3-4, 49, 53) advises on how to find relevant article with high validity and reliability and how to deconstruct such. Also using Urinboyev's (n.d., p.20) simplified version of Hart's deconstruction model. Thus, I have used a citation-index to find relevant articles, based on described contents and listed frequency of citations in other studies. Thus, I have deconstructed these articles to determine what data and evidence was retrieved, what theories was used to understand the data/evidence and what arguments was made resulting from this. Due to limitation in space I had to exclude other methods used etc. The index, the *Web of Science*, itself asserts (Web of Science Training, 2017) to only contain peer-reviewed articles of high scientific quality collected from multiple scientific discipline. The index is noteworthy also recommended by Lund University Libraries (2017). Thus, I feel safe to trust the validity, reliability and relevance of the articles presented in the literature review presented below. Filtering articles due to citations do bring a risk of missing uncited articles with relevant contents. But citations also ensure that the articles are deemed relevant and interesting by other researchers and that they have influenced the general literature. Besides, limitations in time prevents me from reviewing uncited articles anyway.

My literature-search – although limited to the *web of Science* data-base – shows that articles about the ECHR and/or the ECtHR is of plentiful supply with many citations attached. It also shows that articles about the legal reasoning of domestic institutions towards the ECHR and/or the ECtHR is of scarce supply with relatively few citations attached. Significantly, it also shows that such articles about domestic courts are of even scarcer supply and that such related to Swedish courts are almost absent from the literature. Consequently, I had to extend my scope beyond the legal reasoning of domestic courts in member-states. Therefore, I also included articles about the legal reasoning of other domestic institutions in member-states, the ECtHR itself and other relevant domestic and international courts. All articles are however relevant in the light of my research questions. This since they all study why and/or how domestic institutions abide to or don't abide to the ECHR or other international law. All

articles focusing on legal reasoning, the present and shape, or in some cases the absent, of such.

The scarcity of mentioned articles shows that there is a gap in the literature regarding the legal reasoning of domestic, especially Swedish, courts towards the ECHR. This scarcity is troubling since even if it's important to understand such legal reasoning of the ECtHR it's more important to understand such legal reasoning of domestic courts. This since domestic courts and not the ECtHR controls domestic legal implementation of the ECHR and thus has a more direct effect on more people's lives. Thus, by answering my research questions I make an important contribution to the socio-legal debate in a relatively neglected field of academic study. A field that moreover has had a relatively small effect on the general scientific literature.

5.1 Legal Principles and Legal Norms Adhered to by Domestic Courts

Martinico (2012, p.407) finds that the legal reasoning of domestic courts and the phrasing of constitutions regarding the ECHR and EU-law can be categorized based on its relation to the legal principles of *primacy* and *direct effect*. He identifies the following approaches. First, circumventing them by interpreting domestic law in harmony with the ECHR and EU-law (Martinico, 2012, pp.404-405, 407-412, 423). Second, using them to give legal superiority to the ECHR and EU-law over domestic law (Martinico, 2012, pp.404, 412-418, 423). Third, rejecting them by defining domestic law as legally superior to the ECHR and EU-law (Martinico, 2012, pp.405, 419, 423). Martinico (2012, pp.412, 418, 422) noteworthy also finds that the Swedish constitution doesn't fully acknowledge the legal superiority of the ECHR or EU-law. But he also finds that legal implementation in Swedish courts, including the Supreme court of Sweden, grants the ECHR and EU law *indirect effect* as well as *direct effect* and *primacy* over Swedish domestic law. Swedish courts as a first choice interpreting Swedish domestic law in harmony with the ECHR and with EU-law to avoid conflict. But also, by granting EU-law and ECtHR case-law, but not necessarily the ECHR itself, legal superiority over Swedish domestic law. Importantly, Martinico (2012, pp.422-424) notes that this is the general trend in Europe.

Helfer (2008a, pp.132-13 3, 137) similarly to Martinico finds that domestic courts in general do implement the ECHR. But Helfer, in contrast to Martinico, also finds that domestic courts generally interpret the ECHR it in line with domestic legal norms and values rather than in line with such defined by ECtHR case-law. It should however be mentioned that Martinico (2012, pp.423-424) in domestic court practices observes a growing hostility towards the

ECHR and to EU-law which the concludes must be a reaction to the ECtHR gaining in legal power.

The above research can be compared to Young (2005, pp.1143-1144) who draws parallels between the relation between domestic courts and the ECtHR and the relation between US state courts and international courts. He finds that US state courts evade influence from international courts by referring to the legal principle *procedural default*. Specifically, that they argue that international courts have no authority to judge on a US cases not yet judged on by the US Supreme Court. Young then finds that that international courts in response to this use the legal principle *complimentary* to create an institutional settlement that US state courts can accept. A tactic which Young finds similar to the ECtHR's use of the *margin of appreciation*. Young significantly argues the following regarding the institutional settlement he observed between US state courts and international courts. First, that its characteristic for the relation between domestic courts and international courts. Second, that it's the optimal approach since domestic courts finds it less invasive and international courts thus can increase their legal influence over time. Third, supports *Hart and Sacks theory of institutional settlements*. A theory that says that if an institution has superior expertise on an issue it's also the best suited to make decisions related to this issue and thus should make decisions on the behalf of other institutions working with the same issue.

Helfer (2008a, pp.125-126) moreover, in the same way as Greer (2008, p.791) observes that the ECtHR is incapable of handling the large number of cases submitted, why its falling behind in resolving these. Helfer (2008a, pp.125-128) and Greer (2008, pp.680, 701-702) both conclude that the ECtHR can't handle the present caseload. They therefore argue that the only solution is to transform the ECtHR into a constitutional court. Helfer arguing that this is only possible if the ECtHR abandons the legal principles *margin of appreciation* and *subsidiary*. Greer also arguing that such transformation together with a transformation of the ECHR into a *European constitution* would push domestic courts to harmonize their legal implementation with the ECHR and ECtHR case-law. They both moreover argue that such transformation together with writing the ECHR into member-states constitutions will ensure that domestic courts will implement the ECHR. To justify his argument Helfer (2008a, p.132) refer to *Harold Koh's transnational legal process theory*. A theory claiming that the best way to initiate an interaction between governmental and non-governmental organisations regarding human rights is to write human rights into domestic law. This since international legal norms then will be embedded into the domestic legal, social and political systems.

5.2 Writing the ECHR Into Domestic Law - Effects on Domestic Legal Reasoning

Bahadur (2001, pp.785-789), Hiebert (2006, p.1-3), Bellamy (2011, p.86) and Woogara (2001, p.234) by analysing the Human Rights Act (HRA) finds that it gives courts in the United Kingdom (UK) the right and obligation to implement the ECHR. Bahadur moreover finds that the HRA obligates UK courts to implement ECtHR case-law. Hiebert also finds that the HRA give UK courts the legal right to urge UK lawmakers to harmonize domestic law and government conduct with the ECHR. Hiebert and Bellamy further finds that the HRA obligates the UK parliament to ensure that domestic law and government conduct is harmonized with the ECHR. Bellamy besides also notes that the HRA gives the UK parliament the legal right to enforce specific interpretations of the HRA in domestic courts. Hiebert interestingly also finds that the UK parliament was reluctant to adopt the HRA due to animosity to transfer power from the parliament to the courts. This can then be compared to Richardson (2005, p.127-128) which finds that it was only after the adoption of the HRA that UK courts started to implement the ECHR and the UK parliament started to harmonise UK law with the ECHR. But Woogara however finds that the legal rights the HRA brings are in practice curbed due to lack of knowledge about HRA obligations in domestic institutions.

Bahadur (2001, pp.785-789) makes two predictions. First, that UK domestic law and implementation in domestic courts will harmonize with the ECHR since the HRA requires it. Second, individuals will use the ECHR when demanding rights from UK institutions since the HRA grants this right. Hiebert (2006, pp.1-2) conclude that the HRA do transfer power from the UK parliament to the domestic courts but that it also grants significant power over ECHR implementation in domestic courts to the UK parliament. This, Hiebert concludes, supports the *parliamentary rights model* which predicts that parliaments will take a greater role in human rights protection. Hiebert further argues that this is of value since parliaments can prevent human rights abuse whilst courts can only compensate such. Bellamy (2011, p.86) concludes that if domestic courts in the UK implement the HRA properly domestic legal cases will not be taken to the ECtHR. This since ECHR related cases then will be resolved domestically. Bellamy consequently argues that that the HRA makes the UK independent from rather than dependent to the ECtHR. Bellamy moreover, comes to the same conclusion as Hiebert, namely that the UK parliament due to the HRA will keep significant control over ECHR implementation in UK courts. Richardson (2005, p.127-128) conclude that the adoption of the HRA caused the domestic courts in the UK to implement the ECHR and caused the UK parliament to harmonize domestic laws with the ECHR. This, Richardson

argues, is positive since it will lead to individuals having their rights secured to a higher degree than before in the UK. Woogara (2001, p.234) simply conclude that education about HRA obligations in UK institutions is the only way to ensure practical access the legal rights defined in the HRA.

5.3 The Effect of ECtHR Case-law on Domestic Legal Reasoning

Haydon and Scraton (2000, pp.416, 436, 440-441), studying a UK legal process, finds that the legal reasoning of UK courts conflicted with that of the ECtHR. The ECtHR judging that the UK court judgments in question violated the ECHR. They find that the conflict resulted from opposing legal opinions regarding political interference in court matters, acceptable court proceedings and appropriate legal punishments for children. They significantly find that the domestic laws and government conducts was harmonized with the ECHR shortly after the ECtHR judgment was delivered. Haydon and Scraton (2000, pp.416, 440-441) thus conclude that ECtHR case-law created by judgments against the UK has a direct effect on the conduct of the UK government and an indirect effect on UK courts since they implement domestic law created by the parliament. This can be compared to Helfer and Voeten (2014, p.77) who performs a broader study and finds that ECtHR judgments defining LGBT-rights generally are followed by new domestic policies supporting rights defined in these judgments. They moreover find that such support increases if the government in question is supportive of LGBT-rights or if domestic courts considers ECHR case-law to be legally superior to domestic law. Helfer and Voeten thus conclude that these ECtHR judgments are causing these new policies and not vice versa.

However, Guiraudon (2000, pp.1114-1115), Hoffmeister (2006, pp.722-724) and Çalı (2010, p.334) acquires contrary findings. Guiraudon (2000, pp.1114-1115) finding that the ECtHR started to create case-law regarding migrant rights after 1974 when domestic laws first started to grant such rights. Guiraudon thus conclude that the ECtHR when imposing legal norms on the domestic level also ensures not to enforce legal norms that domestic courts are not ready to implement. Hoffmeister, studying the legal process of a German father claiming family related ECHR rights, finds the following. The fathers legal claim was initially rejected by German courts but was later granted by the ECtHR which judged that this rejection was ECHR violation. Following this German courts did grant this right based on this ECtHR case-law. However, this was then overruled, and his claims rejected by a German appeal court that judged that German courts have no legal obligation to implement ECtHR case-law. Hoffmeister thus conclude that ECtHR case-law in practice don’t have legal superiority in

German domestic courts. Çalı, studying ECtHR judgments against Turkey, finds that the Turkish government acknowledge the facts of the ECHR violation described in the judgments and also implements the measures therein stated. But she also finds that the Turkish government rejects guilt based on the assertion that the plaintiff/s are terrorists. Çalı (2010, pp.311, 331-334) find that these measures have advanced the Turkish human rights regime but that the Turkish government has used its rejection of guilt to actively exclude anyone they consider to be terrorists from this regime. Çalı thus conclude that the *technical bureaucratic approach* adopted by the ECtHR to pressure Turkey to cease its illegal practice of state violence has been unsuccessful. This since it allows partial and selective compliance to ECtHR case-law. She further concludes that this shows that there are limitations to what the ECtHR can do to force governments to respect human rights. At least when they are engaged in domestic military conflict with people they view as terrorists.

Also noteworthy is Cichowski (2006, pp.50-51, 69, 70) findings that the publics in Europe increasingly are taking accusations of ECHR violations to domestic courts and that the ECtHR via its case-law are giving legally supports to such behaviour. This by strengthening the ECHR defined right to a fair trial. Cichowski (2006, pp.50-51, 69, 70) argues that the increased use of the ECHR by the public show the following. Namely, that the public have internalized the norms of the ECHR, especially the expanded right to a fair trial defined by ECtHR case-law. This has then resulted in a general belief that it's a right to demand ECHR rights in court. Cichowski moreover argues that increased involvement by the public in the legal system benefits the democratic system since the public gets democratically involved beyond the ballot vote.

The above findings can also be compared to the finding of Cleveland (2010, pp.225-226, 229-230) although the refer to the US rather than to Europe. He finds that US state courts started to refer to the legal principle of *jurisdiction* and *effective control* regarding the US governments obligations to the US constitution. Even for actions committed outside the US boarders. Cleveland argues this adoption of these legal principles by US state-courts prove that these principles in practice have been *embedded* in US constitutional law via US Supreme Court case-law.

5.4 Willingness or Unwillingness of Domestic Institutions to Implement the ECHR

Krisch (2008, pp.186-187) finds that domestic courts in nations with strong domestic human rights regimes generally refers to the ECHR less and that courts in nations with weak such regimes refer to the ECHR more. This is also similar to the findings of Guiraudon (2000,

pp.1114-1115), Çalı, Koch and Bruch (2013, p.982) and Moravcsik (2000, pp.219-220). Guiraudon (2000, pp.1114-1115) finding that Germany has a strong system of human rights protections for migrants and few migrant related cases at the ECtHR whilst France has a weak such system and many such cases. Çalı, Koch and Bruch finding that elites in nations with weak domestic human rights regimes generally supports the ECHR more than elites in nations with strong such. Moravcsik finding that government of young democracies was more supportive of and more eager to join the ECHR and that governments of old democracies was less supportive of and less eager to join the ECHR.

Their conclusions and arguments as to these findings are also similar. Guiraudon (2000, pp.1114-1115) concluding that the difference regarding domestic courts use of the ECHR and the number of cases reaching the ECtHR must be due to the following fact. Namely, that the ECHR and the ECtHR are superfluous for jurists in nations with strong domestic human rights law but useful for jurists in nations with weak such. Krisch (2008, 186-187) concluding that the correlation between a strong or weak human rights regime and the use of the ECHR in domestic courts must be due to the practical benefit of abiding to the ECHR in the first case and the lack of such in the second case. Çalı, Koch and Bruch (2013, pp.956, 981-982) arguing that elites differ in support of the ECHR since elites in weak human rights regimes have more to gain from supporting the ECHR. This since it provides a human rights tool that is missing domestically and that elites in strong such has less to gain since such tool exist domestically. Moravcsik (2000, pp.218, 220, 228-230) arguing that the data supports *liberal republican theory*. A theory stating that young democracies supports IHRL more than old democracies since they are more vulnerable to domestic political threats. New democracies have a higher self-interest to transfer political power to an international court such as the ECtHR since it safeguards the long-term survival of their liberal democracies.

Krisch (2008, pp.206, 215) moreover significantly finds that domestic courts generally acknowledge the legal status of the ECHR and ECtHR case-law but generally reject such regarding sensitive legal issues. Krisch (2008, pp.206, 215) in relation to this finds that the ECtHR generally grants the *margin of appreciation* to grant domestic independence regarding such sensitive issues. This, Krisch (2008, p.185) argues supports *pluralist theory*, which views the relation between courts as political as not only juridical.

5.5 Willingness or Unwillingness of the ECtHR to Deliver Judgements

Voeten (2007, pp.0, 9, 19) finds the following regarding the behaviour of ECtHR judges. First, that they generally are lenient towards their own government. Second, that they

generally are lenient towards the governments of the UK, Germany and France. Third, that their behaviour is not significantly influenced by any other variables besides these. Fourth, that they tend to be either restrictive or generous to grant the *margin of appreciation,* meaning they are more likely or less likely to support a guilty verdict. Westeson (2013, pp.175-176) finds that the ECtHR judged that Poland and Ireland prevented access to abortion but that only Poland was found guilty of ECHR violation. This since abortion is considered a *health service* in Polish health practice but not in Irish. Shany (2005, p. pp.909-910, 939) similarly finds that the ECtHR frequently and increasingly is using the *margin of appreciation* to balance its scrutiny of governments and domestic courts with its objective to grant adequate self-determination regarding sensitive domestic legal issues.

Voeten (2007, pp.0, 4, 9, 19) conclude the following regarding his four findings about the legal behaviour of ECtHR judges. The first is due to career ambitions which could be hampered by angering their home government. The second is due to fear that the governments of the UK, Germany and France if angered will use their political influence to undermine the legal authority of the ECtHR. The third show independence. The forth show consistency. He then argues that the first two finding supports *Agent theory* which claims that judges of international courts are influenced by the government they represent and of the governments of powerful states. However, he then argues that the third finding supports *trustee theory* which says that judges of international courts are independent from the government they represent. He finally argues that the fourth finding support *theory of dissent* which says that behaviours of judges of international courts are based on their individual understanding of where to *draw the line* for a, in the case of the ECtHR, an ECHR violation. Westeson (2013, pp.175-176) then conclude that the ECtHR clearly lets domestic health practices determine if abortion is to be considered a health service or not. This, she argues, must be a result of the ECtHR fearing to antagonize governments government for which abortion is a sensitive legal question. Noting that the ECtHR by defining abortion as a health service would create ECtHR case-law obligating governments to provide access to abortion since it then would be an ECHR right. Shany (2005, pp.907-909, 939) argues that since domestic courts isn't ready to make concessions on certain legal issues the ECtHR's use of the *margin of appreciation* is necessary to maintain its legal authority. Shany (2005, 918-920) also argues that the ECtHR's use of the *margin of appreciation* will lead to more and long-lasting support of the ECHR from governments and domestic courts. This since it supports national sovereignty. Thus, it will also lead to more domestic scrutiny regarding ECHR harmonization of domestic

legislations. Thus, it will also lead to more domestic laws that are harmonized with the ECHR.

The above findings can be compared with the findings of Cleveland (2010, pp.225-226, 229-230, 261-264) and Van Schaack (2008, pp.119-120) who finds the ECtHR to be more proactive in its judgments and that it even is expanding its own legal authority. Cleveland finds the following. First, that the ECtHR and the US Supreme Court use the legal principles *jurisdiction* and *effective control* to hold their subordinate government/s accountable under the ECHR and the US constitution respectively. This for actions they commit on foreign soil which they in practice have control over. The ECtHR noteworthy by referring to the word "jurisdiction" inscribed in the ECHR. Cleveland (2010, pp.261-264) consequently argue that the US Supreme Court and the ECtHR has embedded these two legal principles into their own case-law and thus both expanded their legal authority. Van Schaack finds that the ECtHR and other international courts usually don't adhere to the legal doctrine stating that there is *no crime or punishment without law*. Rather she finds that they let their judgments create retroactively applying case-law that retroactively define the *crime* committed and the *punishment* to be administered. But Van Schaack also finds that the ECtHR differs from other international courts by referring to the judgments of domestic court to gain legal precedent. Van Schaack then puts forwards the following arguments. First, international courts neglect of the *no crime or punishment without law* doctrine has been necessary to develop IHRL. This since IHRL in the past has been largely undefined. Second, that the doctrine now should be adhered to by international courts. This since their case-law now has defined IHRL and that not adhering to it undermines the legal authority of international courts and prevents suspects to access their human rights. Third, that the ECtHR by referring to domestic court judgments and the case-law of international courts in its judgments adequately do adhere to the doctrine and that other international courts should do the same.

5.6 The ECtHR Imposing its Case-law on Domestic Courts

Lupu and Voeten (2012, pp.413, 438) finds that the ECtHR often cites its own case-law and do so based on legal issue rather than on nation judged. They also find that the ECtHR do so more often if it wants to force domestic courts to implement the case-law in question and thus *change their mind* regarding the legal issue dealt with in the judgment. Lupu and Voeten (2012, pp.438-439) thus argues that this use of case-law citation prove that domestic courts are the primary recipients of ECtHR case-law. Meaning that the reason for citing case-law instead of citing the ECHR directly is to strengthen the ECtHR's legal authority towards

domestic courts. By doing so convince them that all ECtHR case-law, not only such related to the own nation, is legally binding for domestic courts. This can be compared to Spielmann (2014, pp.55, 61-62) that finds that the ECtHR use the *margin of appreciation* to base its judgments on the forestalled domestic court judgment. He significantly finds that it does so more often if the domestic courts in question strived to adhere to ECtHR case-law in these domestic court proceedings. Thus, in a way, rewarding domestic courts for adhering to ECtHR case-law. Spielmann (2014, pp.49, 65) conclude that the ECtHR created, uses and will continue to use the *margin of appreciation* since it allows for it to take a pluralistic approach when engaging with domestic courts. It can thus empower and push domestic courts to adhere to the legal principle of *subsidiary*. Meaning that domestic courts independently can and should judge domestic institutions if they commit ECHR violations.

5.7 The ECtHR Failing to Impose its Case-law on the Domestic Level

The seemingly successful ways of making domestic courts abide to ECtHR case-law, described in the previous section, can be compared to the failure of doing so, which will be described below.

Brems and Lavrysen (2013, pp.199-200) finds that the ECtHR consider domestic courts use of procedural justice criteria when giving judgments but that it doesn't define legal requirements for domestic courts to fulfil such. Instead they find that the ECtHR only judges how reasonable the explanation provided by the accused government is regarding why they didn't fulfil such criteria. Brems and Lavrysen thus argues that the ECtHR forgo the opportunity to use its case-law to make domestic courts implement such criteria. They argue that the ECtHR to do this must do the following. First, create case-law that defines failure to adhere to such criteria in domestic court proceeding to be an ECHR violation. Second, to only grant the *margin of appreciation* if such criteria are fulfilled by domestic courts.

Helfer (2008b, p.5-7) finds that the ECtHR defines Intellectual property rights as an ECHR right equal to other ECHR-rights. He identifies three subcategories of arguments and legal reasonings by the ECtHR in relation to this. First, that governments and courts have a negative obligation to not violate individuals intellectual property rights (Helfer, 2008b, pp.6-7, 37-38, 40). Second, that governments have a positive obligation to provide domestic law and legal institutions that protects intellectual property rights (Helfer, 2008b, p.40). Third, that the value of upholding intellectual property rights must be weighed against the severity of ECHR violations of other articles that follows such upholding (Helfer, 2008b, pp.5-7, 46-47). Helfer (2008b, pp.1, 4-5, 46, 51) then argues that the way that the ECtHR has granted ECHR

protection to intellectual property rights is inconsistent, ineffective and hurtful for the legal authority of the ECtHR. The parallel ways of legal reasoning, Helfer argues, makes it difficult to predict ECtHR judgments related to intellectual property. Moreover, except for the first approach which Helfer argues should be the only approach, corporations rather than individuals are benefitted from these ECtHR judgments. This in turn is hurtful for the upholding of real human rights and hurtful for people's trust in the ECtHR.

6 Legal Theory of Roscoe Pound

6.1 In short

The core of Pound's (1910) theory is the claim that what creates *law in action* is not the law that is written in books but rather what in practice is executed by people entrusted to execute this *law in books*. Most influence over law in action are jurists' and judges' since they control the courts which are the institutions that more than any other another control what law is executed in practice. These peoples' actions determine if the law in books will be translated to law in action or if the law in books will be ignored or reinterpreted. Moreover, what determine these peoples' actions is how they reasons towards the law in books, which in turn is determined by their personal normative and legal values and opinions. Thus, Pound's theory should reasonably be helpful in answering my research questions.

6.2 Included and Excluded Parts of the Theory

I have focused on the parts of Pound's (1910) theory that are relevant for my study. Namely, as Pound puts it, the difference between the *law in practice* that is found in courts and the *law in theory* that is found in books. I have excluded the parts referring to the historical development of the common law systems in England and the US, courts practice of nullifying statutes and the conduct and reasoning of law enforcers, juries and the public. This due to lack of space and since such matters are not analysed in and thus has no relevance for my study. Noting that even if the ECtHR portray some common law features by utilizing case-law, Swedish courts are part of a civil-law system meaning they cannot create case-law or nullify statutes.

6.3 The Legal Reasoning of Jurists

Pound explain that jurist often feels that law in books are immoral or detached from the facts of reality. Meaning they believe that such law is unpractical or impossible to execute in court

or that the public would consider courts to be immoral if they did so and thus stop adhering to courts. Thus, jurists will do their utmost to find legal loopholes to reinterpret what they believe to be flawed statutes. This to make such fit with their perception of morality and/or the facts of reality and if they fail to do so they might simply reject the legal status of the statute or ignore its existence. Pound also explain that jurists may reinterpret a statute to compensate for the lack of a statute that they believe should exist. But Pound also claim that courts always will ensure to uphold the appearance of legality when in their legal practice evading the interpretation of statutes as intended by lawmakers. This to uphold their legal authority. This legal reasoning of jurists and courts is according to Pound what creates the difference between law in action executed in courts and legal theory written in books. (Pound, 1910, pp. 12-15, 21-22)

6.4 Relation Between Courts

Significantly, Pound (1910, pp.15-16, 27-29) claims that empirical studies show that US state court regularly evade from abiding to the US constitution or to the legal judgments of the Supreme Court. Pound describes several strategies used by state courts to adhere exclusively to US state law. First, ignoring the US constitution and US Supreme Court case-law. Second, arguing that state-law is legally superior. Third, referring to legal doctrines or legal principles that they argue has legal superiority over the US constitution. Such tactics can be applied in general or regarding some specific legal issues that courts are unwilling to seed to the federal level. This even, as Pound explains, the US constitution in theory has the highest legal status in the US. Meaning US state courts are obligated to abide to it. Also noting that the US constitution clearly states that the US Supreme Court has the highest legal authority regarding legal interpretation of its legal text. Meaning US state courts are legally obligated to abide to US Supreme Court case-law as well.

Pound (1910, p.20) also point to the problem of judges' making individual interpretations of statutes that differs from what lawmakers intended. Explaining that this not only lead to a divide between the law in action and the law in books but also regarding the law in action between different courts. Pound claims that the normative values of individual judges' play a significant role regarding their legal reasoning and thus their legal actions and thus the legal judgment of courts. Consequently, judgments in one court can be inconsistent or even conflicting with judgments delivered by other courts, even at the same legal instance.

6.5 Closing the Gap Between Law in Action and Law in Books

Pound (1910, p.23) argues that it is desirable to close the gap between law in action and law in books since this will produce predictable verdicts that, if the law in books is fair, will produce consistently fair judgments. However, Pound (1910, p.21) also claims that jurists are correct in their assessments that statutes often are flawed. He explains that the reason for this is that many lawmakers lack the competence and/or motivation to create statutes that fit with the facts of reality. Pound (1910, p.34) underscores that law in action inescapably is a product of the legal reasoning of jurists and that nothing will prevent jurists from reinterpret or ignore statutes they believe are flawed. Thus, the only way to harmonize law in action with law in books is for lawmakers to ensure that statutes are formulated as generally legal principles that allows jurists and judges some degree of interpretive freedom. However, Pound (1910, pp.35-36) also explains that jurists may be incompetent or have maleficence and/or criminal intent that motivates them to not resolve or to distort the legal outcome of a case. In such cases, he explains, there is no possibility to close the gap between law in action and law in books.

6.6 Connecting Pound to this Study

One should remember that even if Pound (1910) claims that his theory applies to law and courts in general, his theory is clearly focused on the US common-law system of 1910. However, I believe that many of Pounds insight still translates well to the legal context studied in this thesis. The most significant general insights are the following. First, jurists control the courts and thus control law in action. Second, mostly courts at the lower levels execute law in action. Third, the actions of jurists depend on their legal reasoning which depends on their legal and normative values. Fourth, if the legal and/or normative values of jurists differ from what is required by law in books then there will appear a gap between the law in action and the law in books. Translating these insights to my study would summarize in the following way. First, Swedish courts are in control of the everyday implementation of the ECHR in Sweden, or in Pound's vocabulary the *law in action*. Second, the seeming conflicting legal reasoning of Swedish courts might be a result of inherent legal and/or normative values that conflict with the ECHR, or as Pound's would say with *law in theory*.

Pound's (1910) description regarding how and why US state courts might evade implementing the US constitution and US Supreme Court case-law translate especially well to my research questions. Namely, how and why Swedish courts might evade implementing the ECHR and ECtHR case-law. Since Swedish courts belong to a civil-law system, some of the evading strategies described by Pound (1910) are out of reach or might never occur to

Swedish jurists'. However, the following evading strategies and the motivation behind such could be used Swedish jurists when relating to the ECHR and ECtHR case-law.

6.6.1 Strategies for Evading ECtHR influence

Swedish courts may present one or several of the following legal arguments to undermine the legal status of the entire or parts of the ECHR and ECtHR case-law. First, that such law doesn't have legal status in Sweden, Second, that such law is legally inferior to Swedish domestic law. Third, that such law is legally inferior to some legal doctrine or legal principle. Swedish courts might also simply ignore the existence or consistently reinterpret the meaning of such law. They might use any of these strategies to uphold an appearance of legality at the same time as evading influence from the ECHR and/or ECtHR case-law. Significantly, they can do so even in conflict with accumulated ECtHR case-law judging such behaviour to be unlawful. This since they are in control of law in action. However, these evading strategies might also differ from court to court and/or be absent. But some form of evading strategy should reasonably have been used by Swedish courts in the cases described in the ECtHR judgments. Remembering that the ECtHR in its judgments reasonably should deem these domestic judgments to conflict with the ECHR. Pound (1910) provide plausible explanations regarding what evading strategies might be used by Swedish courts. Thus, helping me to answer my research question regarding how the legal reasoning of Swedish courts conflict with the ECHR.

6.6.2 Reasons for Evading ECtHR Influence

Pound (1910) as mentioned also gives plausible explanations as to why such strategies might be used by courts. Reasons that could explain why Swedish courts seemingly are unwilling to implement the entire or parts of the ECHR, at least as defined by ECtHR case-law. Meaning Swedish courts might hold on to normative and/or legal values that conflicts with such of the ECtHR and thus with the ECHR. Which in turn could Swedish courts to using some of the above mentioned evading strategies for one or several of the following reasons. First, they might be unwilling to seed juridical control over any domestic law or at least of such regarding domestically sensitive legal issues. Second, they might believe that that the ECHR, as is or as defined by ECtHR case-law, is flawed or doesn't give enough room for interpretation. Third, they might be fearful that implementing the ECHR, as is or as defined by ECtHR case-law, would make them lose authority over the Swedish public. If the second is correct, this could be due to Swedish courts believing that it would be unethical, impractical and/or impossible to implement this law. If the third is correct, this could be due to Swedish

courts believing that the Swedish public would consider such implementation to be immoral. The notion that Swedish courts would lack motivation to implement such law due to incompetence or criminal intent to me seem unlikely, but its' still a possibility. Thus, Pound's (1910) theory provides possible answers as to why Swedish courts seemingly are unwilling to implement the entire or parts of the ECHR including ECtHR case-law.

Thus, Pound's (1910) theory provides possible answers to my research questions. Both regarding how the legal reasoning of Swedish courts conflict with the ECHR but, perhaps more importantly, also why it conflicts in such a way. Thus, from a socio-legal perspective answering how and why the legal actions of Swedish courts are not in line with the legal theory defined by the ECHR.

7 Methodology

7.1 Introduction

In the following section I will describe how I selected which ECtHR judgments to analyse and how I collected the case-files describing these cases. I will also describe why the reliability and validity of the case-files can be trusted and what limitations for conclusions that my selection inevitably brings. I will moreover describe how I have used qualitative contents analysis to identify and analyse the different legal reasonings described in the case-files and how they conflict. Significantly, I will also describe how I have used Pound's (1910) legal theory to facilitate the analysis regarding how and why these legal reasonings conflict.

7.2 Selecting and Collecting the Data

I have chosen to analyse all eight existing ECtHR judgments against Sweden regarding article 3 violations. More precisely the eight ECtHR case-files accounting for these judgments. This for several reasons. First, since the ECHR enjoys extraordinary strong legal protection in Sweden since 2011. Second, since article 3 is the article that Sweden has received most ECtHR judgments of violations since 2011. Third, since article 3 is one of the articles that Sweden has received most ECtHR judgments of violation overall, with such judgments delivered in 2010, 2012, 2013, 2016 and 2018. (ECtHR, 2011, p.13; 2013, p.2; 2014, p.2; 2017, p.2; 2018b; Case of X v. SWEDEN)

I downloaded the case-files from HUDOC, the official case-file database of the ECtHR. Thus, ensuring that the data are primary data published by the ECtHR itself rather than being from a

secondary source. (ECtHR and CoE, 2017, p.5) The eight cases, in chronological order based on date of judgment, are listed below.

7.2.1 The Studied ECtHR Judgments/Case-files

1. Case of R.C v. SWEDEN (2010)
2. Case of N. v. SWEDEN (2010)
3. Case of S.F. AND OTHERS v. SWEDEN (2012)
4. Case of F.N. AND OTHERS v. SWEDEN (2012)
5. Case of I v. SWEDEN (2013)
6. Case of F.G. v. SWEDEN (2016)
7. Case of J.K. AND OTHERS v. SWEDEN (2016)
8. Case of X v. SWEDEN (2018)

7.3 Assessing the Data

7.3.1 Preliminary analysis – Possibility to Draw Conclusions?

The case-files indeed contain the data needed to make conclusions that are relevant for my study. They, as is to be expected, include detailed descriptions of the legal reasoning of the ECtHR as well as of the Swedish government. But they also contain detailed descriptions of the legal reasoning of Swedish courts in relation to the mentioned forestalled Swedish courts judgments. The fact that there are eight cases also means that the case-files together supplies a sufficiently large data-material to allow an analysis to be made and conclusions to be drawn. Its thus possible to identify the legal reasoning of Swedish courts, the Swedish government and the ECtHR and to determine how and why such seem to conflict between the first two and the third. At least in the context of article 3. Such legal reasoning about ECtHR case-law can be derived by studying references to pre-existing case-law found in the case-files. But since the cases are spread over several years it's also possible to draw conclusions regarding legal reasoning towards the ECtHR case-law defined by these eight judgments themselves. The possibility to determine such regarding the Swedish government is good since it delivers its legal arguments in 2010, 2012, 2013, 2016 and 2018 respectively. Thus, allowing a study of alteration or lack thereof regarding such on a case to case basis. It's more difficult to draw conclusions regarding the legal reasoning of Swedish courts towards ECtHR case-law. This since only the last three ECtHR judgments relate to forestalled court judgments delivered at a time when case-law from any of the other eight ECtHR judgments existed.

Thus, legal reasoning of Swedish courts towards the case-law defined by the ECtHR judgments studied in this thesis can only be derived by studied the last three ECtHR cases. There are also limited possibilities to derive such from the case of X v. SWEDEN (2018). This since the ECtHR in this case notes that Swedish courts was withheld information crucial to the ECHR violation. Meaning they to a large degree was deprived of the possibility to take relevant case-law into consideration. Moreover, such can only be compared to case-law created by the ECtHR judgments in case of R.C v. SWEDEN (2010) and the case of N. v. SWEDEN (2010). The legal reasoning of Swedish courts towards the ECHR in general (or lack thereof) is of course possible to derive from all eight case-files, with reservations for the last case.

It can moreover be noted the following. First, all except the first two ECtHR judgments was delivered in a context where the ECHR was part of Swedish constitutional law. Second, only forestalled judgments by Swedish courts related to the last three ECtHR judgments was delivered in this context. Third, all ECtHR judgments and all forestalled judgments was delivered in a context where the ECHR was part of Swedish domestic law. Thus, in all eight cases both the Swedish government and Swedish courts was obligated not only by the ECHR but also by Swedish domestic law to abide to the ECHR including ECtHR case-law.

7.4 Assessing Validity and Reliability of the Data

Bryman (2016, pp.489, 509) notes requirements for textual documents to have adequate validity. First, that they contain information sought for in the study. Second, that they are representative for the document-category they belong to thus allowing general conclusions to be made. Third, they are authored by someone that have authority to write on the matter described in them. The following can be said of the case-files studied in this thesis. First, they by necessity include descriptions of the legal reasoning of Swedish courts, the Swedish government and the ECtHR which is what I aimed to study. Second, they by necessity, since they are legal documents, are highly representative for the type of document-category they belong to. Third, they are authored by the ECtHR, which clearly has the highest legal authority to write on the matter.

Bryman (2016, pp.489, 509) also notes specific reliability concerns for textual documents. First, that they are written in a standardized and straight forward manner making it easy to extract the data without distorting it due to misunderstanding. Second, that they are representative for the category of documents that they belong to (which also is a validity concern). That they are primary data which guarantees that they are authentic. The case-files

since they are legal documents clearly fulfil the first two reliability requirements and since they are downloaded from the HUDOC they clearly fulfil the third requirement as well. Moreover, since the case-files are downloaded from the HUDOC and thus are primary data authored and published by the ECtHR I would say that they clearly fulfil Bryman's (2016, p.489) requirements for data quality. Namely that it's safe to trust the data's authenticity, credibility, representativeness and meaningfulness. Since the author, the ECtHR, is what per definition creates the judgment which I aim to study I can also discard another validity/reliability concern presented by Bryman (2016, p.497). Namely that the author of a text might have let personal opinions distort the information described in the document.

Bryman (2016, p.489) moreover notes that data produced before a study began and for other reasons than to facilitate that study are preferable. This since it then is safe to trust that potential researcher biases have not altered the raw-data. Regarding this I can mention that all except the last case-file was published on HUDOC well before my study began and none of them where created to facilitate my study. They are textual document which raw-data I couldn't possibly have distorted because of personal biases etc. Considering the above I conclude that it's safe to trust that the case-files has sufficient validity and reliability for an adequate analysis to be made and for relevant conclusions to be drawn.

7.5 Limitation of Data

I have only included case-files regarding ECtHR judgments of ECHR violation towards Sweden and not included such that ended in friendly settlements or acquittals. This since my study is dependent on legal cases where the ECtHR is of the legal opinion that Sweden violated the ECHR. Meaning the related forestalled judgments in Swedish courts conflicted with the ECHR. It would however have been interesting to expand the scope of the study to include all case-files regarding all ECtHR judgments of ECHR violations towards Sweden since 1995. This would make it possible to identify possible similarities or differences regarding how Swedish courts relate to different ECHR articles and the ECtHR case-law attached to such. This would increase the likelihood of determining how Swedish court relate to the ECHR in general. To include case-files dated before and after 1995 would also make it possible to determine if the mentioned legal reasoning of Swedish courts altered due to the ECHR becoming part of Swedish domestic law. This is however not the aim of my study. My study focus on the behaviour of Swedish courts after the ECHR was granted status as domestic law which makes case-files before 1995 irrelevant for my study.

I have not studied the domestic case-files that gives a first-hand account of the forestalled judgements of Swedish courts related to the ECtHR cases studied. But I believe that it's safe to trust the account of this given by the ECtHR. It would however have been interesting to include Swedish domestic courts cases that did not reach the ECtHR. Cases that did or should have mentioned article 3 of the ECHR. An analysis of such cases would increase the likelihood of forming a deeper understanding of the mindset of Swedish courts and Swedish jurist regarding the ECHR and/or ECtHR case-law. At least regarding the article 3. I could also have chosen to study how the Swedish government as well as Swedish courts handled the legal implications in the eight cases. Implications stemming from measures etc. attached to the ECtHR judgments. But the focus of this study is on the legal reasoning of Swedish courts towards the ECHR and particularly if such if effected by new ECtHR case-law. Making such matters less relevant for my study even if such are of interest per se. However, regardless of anything ells, limitations in time, resources and allowed scope in and for this thesis prevents me from including additional data besides the eight case-files studied.

It's important to acknowledge that my data exclusion do bring the risk of loss of relevant data. Significantly, the fact that legal reasoning of Swedish courts and/or the ECtHR might differ depending on which ECHR article is dealt with. Or that Swedish courts might legally reason differently when they don't have the eyes of the ECtHR directly on them. But I still believe that the case-files I analysed warrants interesting conclusions regarding the legal reasoning of Swedish courts towards the ECHR and to ECtHR case-law. I also believe that the data included are more relevant than the data excluded. Remembering the following. First, cases at the ECtHR are forestalled by domestic court proceedings that at the time did not have the attention of the ECtHR. Second, the legal opinion of the ECtHR regarding Swedish court judgments can only with certainty be determined in cases judged on by the ECtHR. Third, only ECtHR judgments against Sweden with certainty includes legal reasoning of Swedish courts that conflict with the legal reasoning of the ECtHR. Fourth, the plural form of the case-files analysed in this study allows for conclusions regarding alteration of the legal reasoning of Swedish courts due to new ECtHR case-law. Which case-files regarding single violations can't provide. Fifth, case-files from before 1995 might not be fully translatable to the Swedish domestic legal context after 1995.

7.6 Analysing the Data

What I in the end aim to extract from the case-files is the description given by the ECtHR regarding the following. First, the legal reasoning of Swedish court behind their forestalled

judgment. Second, the legal reasoning of the Swedish government behind their approval of this forestalled judgment. Third, the legal reasoning of the ECtHR behind its judgment against Sweden. The jurists that represent the Swedish government in these cases by necessity pleads for the Swedish governments claim that no violation had occurred. This also by necessity corresponds with the forestalled judgment of Swedish courts. Thus, studying the legal reasoning of these jurists, described in the case-files, makes it possible to determine the legal reasoning of the Swedish government. It's also makes it possible to some degree determine the legal reasoning of Swedish courts, which is more relevant for my study. This however did not allow me to with certainty determine the legal reasoning of Swedish courts. But ECtHR case-files by necessity contains detailed descriptions of the *facts* that surrounds the case, including forestalled domestic courts proceedings and judgments. Thus, by studying these facts I could more precisely determine the nature of the legal reasoning of Swedish courts. The legal reasoning of the ECtHR is also clearly described in the case-files. This is also to be expected since the main purpose of the case-files is to communicate the judgment and the justification for the judgment given by the ECtHR. The analysed data thus gave me the possibility to draw conclusions regarding how the legal reasoning of Swedish courts towards the ECHR and ECtHR case-law conflicted with the legal reasoning of the ECtHR. At least in relation to article 3.

Since the data analysed are ECtHR case-files, that is textual documents, the only feasible method to extract meaningful information is, as Bryman (2016, pp.505-508) explains, to use textual analysis. *Qualitative contents analysis* described and promoted by Bryman (2016, pp.505-508) is in my opinion a for my study optimal form of such. The method has been of great help to identify, schematize and analyse different types of legal reasonings described in the case-files. It has thus allowed me to draw relevant conclusions as to how the legal reasoning of Swedish courts towards the ECHR and/or ECtHR case-law conflicts with that of the ECtHR.

When executing the *qualitative contents analysis*, I have however altered the method slightly from the one prescribed by Bryman (2016, pp.505-506). This to make the method fit with the limited numbers of textual documents at hand. Meaning I did not start by performing a pre-analysis of a dozen documents and I did not gradually increase the number of documents analysed and re-analysed. Rather I analysed all eight case-files at once. First, I read and analysed the eight case-files a first time to identify different types of legal reasonings on the part of the ECtHR, the Swedish government and of Swedish courts. The first derived from the

legal argument given by the ECtHR to justify the judgment itself. The second derived from the legal argument presented by the legal representation of the Swedish government. The third derived indirectly from the legal arguments of this same legal representation and directly from the factual descriptions of the forestalled judgments and court proceedings of Swedish courts. I categorized identified legal reasonings and fitted them into a preliminary schema of sub-categories. I then re-analysed these eight case-files several times. Updating and sharpening my schema each time by including additional sub-categories of legal reasonings that I had previously overlooked. When I had a schema containing all different types of legal reasonings described in the eight case-files I used this finalized schema to analyse the eight case-files one last time. The categorization made possible by qualitative contents analysis made it possible to determine how the different legal reasonings differed in and between cases. Since all the case-files I analysed regarded article 3 and since they were spread over time I could also determine if identified legal reasonings towards article 3 changed over time. Noting if some types of legal reasoning are recurring in the different case-files. Especially if some legal reasonings of Swedish courts and the Swedish government are recurrent even case-law from previous ECtHR judgments determine such to conflict with the ECHR. Or if such legal reasoning seemingly harmonizes with such case-law. Besides, I have attempted to discard any biases or preconceived notions that I might have and strived to be as objective as possible when analysing the case-files.

After determining *how*, I could theorise about *why* the legal reasonings of, mainly, Swedish courts conflicted in such a way. For this I used the theoretical explanations provided by Pound (1910) and translated them to Swedish courts and their relation to the ECHR and the ECtHR. Namely, that Swedish courts might be unwilling to implement the entire or parts of the ECHR, including or excluding ECtHR case-law, due to some of the following reasons. First, they might believe that doing so would be incompatible with in Swedish courts established normative and/or legal norms. Second, they might believe that doing so would be incompatible with the in Swedish courts established legal agenda. Third, they might believe that doing so would be immoral or illogical. Fourth, they might believe that doing so would be viewed by the Swedish public as being immoral which would undermine their legal authority "at home". Fifth, they might believe that doing so would be impractical in terms of the facts of the certain case or of the general facts of the "Swedish reality". Seventh, they might believe that doing so would lead to a by Swedish courts unwanted seeding of legal power from Swedish courts to the ECtHR. Eighth, they might believe that doing so would

lead to a by them unwanted weakening of the legal status of Swedish domestic law in favour of the ECHR including or excluding ECtHR case-law.

7.7 Research Ethics

It's always important to consider ethical questions to determine if special consideration needs to be taken when collecting data and presenting research finding. Since my data consist of textual documents I haven't interacted directly with anyone and thus haven't had to consider questions about research ethics regarding personal interaction with research subjects. However, the plaintiff/s mentioned in the case-files have per definition had their human rights violated and might also be at risk of having their human rights violated in the future. Thus, it is warranted to make a case to case consideration regarding anonymising plaintiff/s names. Even such would make it slightly more difficult for someone per-reviewing this thesis to find the original data. Even such may seem futile since such information can be found in the original case-files. However, the ECtHR has in the eight cases already made this consideration and has anonymised all plaintiff/s names and replaced them with initials. Meaning I didn't have to make this case to case consideration myself.

8 Result and Analysis

8.1 Introduction

I will in this section describe and analyse the for my study relevant legal arguments given by Swedish courts, the Swedish government and the ECtHR identified in the eight studied cases. I will describe in which cases these arguments are found, who gave them, to what legal issues or legal concepts they relate, which overlap and which conflict. I will thus illuminate how the different parties interpret the legal text and what legal status they give to it. My purpose is here to figure out how and why Swedish courts and the Swedish government reach conflicting legal conclusions from the ECtHR and why they seem to not harmonize their legal reasoning with the accumulating ECtHR case-law. Based on these results I will execute an analysis, based on Pound's (1910) legal theory and on the previous research presented in the literature review. Thus, allowing me to answer my research questions regarding how and why the legal reasoning of Swedish courts and the Swedish government conflicts with the legal reasoning of the ECtHR. My final conclusions regarding the answers of my research questions will then be presented in the next chapter.

8.1.1 Terminology Clarification

For clarification I have below given the definition of some words and phrases frequently used in the following chapters.

- *Ill-treatment* refers to torture or inhuman or degrading treatment or punishment or execution.
- *Applicant* refers to the person who Swedish courts decided should be deported but who took the case to the ECtHR and argued that the deportation would constitute an ECHR violation. In other words, the *plaintiff* referred to earlier in the thesis.
- *Real risk* refers to the real risk of the applicant/s to be subjected to ill-treatment if deported to the country in question.
- *Local authorities* refer to the authorities in the country designated for deportation.
- *Targeted group* refers to a group that in the country of deportation is targeted and consequently ill-treated by the local authorities and/or by a third part.

8.2 The Eight Cases in Short

In the following table I will summarize the relevant factors and main arguments in the eight cases. In the first column of the table the name of the cases is displayed. In the second column the acts committed by Swedish courts later judged to constitute an ECHR violation are displayed. Noting that the Swedish government supported this act at the ECtHR.

The third column display the legal arguments given by Swedish courts to justify this act. Again, noting that the Swedish government supported and restated these legal arguments at the ECtHR. The last column then displays the legal arguments given by the ECtHR to justify its judgments that the act committed constituted an ECHR violation.

The cases are however not described in detail, leaving out several legal arguments needed for a proper analysis. This since the purpose of the table isn't primarily to facilitate an analysis but rather to give an overview of the cases. More detailed description together with an analysis of these details will be given in the following sections. A reader of these sections will benefit from revisiting the table to recall the overall details of the case or cases at hand.

8.2.1 Table

Case of	**Act Constituting ECHR Violation.**	**Sweden's Legal Justification for the Act.**	**The ECtHR's Legal Justification for its Judgment.**
	Swedish authorities ordered the applicant to be deported from Sweden to …	*The applicant/s failed to substantiate a real risk. This since …*	*A real risk was substantiated. This since …*
R.C v. SWEDEN (2010)	Iran.	his showed scars indicated but didn't substantiated past torture.	the applicant's showed scars substantiated past torture.
N. v. SWEDEN (2010)	Afghanistan.	she failed to substantiate affiliation with the targeted group (ostracised women).	the applicant's account and actions in Sweden substantiated affiliation with the group.
S.F. AND OTHERS v. SWEDEN (2012)	Iran.	their substantiated affiliation with the targeted group (political party) is unknown to Iranian authorities.	the applicant's account substantiated affiliation with the group.
F.N. AND OTHERS v. SWEDEN (2012)	Uzbekistan.	they failed to substantiate affiliation with the targeted group (political party).	the applicants account substantiated affiliation with the group.
I v. SWEDEN (2013)	Russia.	even his showed scars substantiate past torture his account failed to substantiate a real risk.	the applicant's showed scars substantiated past torture.
F.G. v. SWEDEN (2016)	Iran.	his affiliation with the targeted group (converts), substantiated or not, is unknown to Iranian authorities.	the applicant account and actions in Sweden substantiated affiliation with the group.
J.K. AND OTHERS v. SWEDEN (2016)	Iraq.	even they substantiated past affiliation to the targeted group ("America Collaborators") as well as subsequent ill-treatment they failed to substantiate present/recent such.	the applicants substantiated past and thus present affiliation with the group as well as subsequent past ill-treatment.
X v. SWEDEN (2018)	Morocco.	the Swedish Security Agency had and would assure the Moroccan authorities that he didn't belong to the target group ("terrorist suspects"), even he did.	the Swedish Security Agency had and would make Moroccan authorities aware of the applicant's affiliation to the group.

8.3 Common Traits of Court Proceedings and Arguments

The eight cases are remarkably homogeneous, beyond the fact that they all refer to ECtHR judgments of article 3 violations against Sweden. All but one of the case-files describes the court proceedings of applicants that did the following. First, applied for asylum at the Swedish Migration Board, which denied their request and ordered their deportation. Second, appealed to the Migration Court, which dismissed their claim by upholding the decision of the Swedish Migration Board and consequently reaffirmed the deportation order. Third, appealed to the Migration Court of Appeal which rejected the appeal and thus gave legal force to the judgment of the Migration Court and thus to the deportation order. Fourth, took the case to the ECtHR which judged that Swedish authorities and the Swedish government had failed to fulfil their obligations to the ECHR by ordering/approving the deportation. The ECtHR consequently judging that implementing the deportation would constitute an ECHR violation.

The remaining case of X v. SWEDEN (2018) is identical except for one detail. Namely that the Swedish Migration Board ordered the deportation on request by the Swedish Security Agency. Meaning the following. First, the applicant's appeal was not given to the Migration Court but rather directly to the Migration Court of Appeal. Second, the Migration Court of Appeal recommended the Swedish government to uphold the deportation order. Third, the Swedish government judged to uphold the deportation order. The argumentation by the different parties also follows the same structure in the eight cases. First, the applicants arguing that they would be in real risk of ill-treatment if deported. Second, Swedish courts and the Swedish government arguing that such risk had not been substantiated. Third, the ECtHR arguing that such risk had been substantiated and that the deportation order thus violated the ECHR. Thus, the substance of the eight cases are remarkably similar regarding legal context and legal arguments. This makes them especially suitable for analysis, which also becomes clear in the following sections.

8.4 Shared Arguments

The Swedish government and the ECtHR in all cases argues that the Swedish government and Swedish authorities, including Swedish courts, are legally obligated to abide by the ECHR. They also agree that this, among other things, means that Swedish institutions are obligated to *not* deport someone if there is a *substantiated real risk* that the person in question will be subjected to *ill-treatment* in the country of deportation. The ECtHR in the case of X v. SWEDEN (2018) underscores that article 3 *"prohibits in absolute terms torture and inhuman or degrading treatment or punishment"* and that it *"makes no provision for exceptions".*

Clearly stating the inescapable obligation of Swedish institutions to abide to the article regardless of circumstances. Swedish courts in all cases base their judgments on the Swedish domestic statute *the Aliens Act* and in the case of X v. SWEDEN (2018) also on the domestic statute *the Special Control of Aliens Act.* Noteworthy, Swedish courts in these court proceedings only refers to this or these domestic laws and never to the ECHR directly. The Swedish government and the ECtHR however in all cases argues that the *Aliens Act*, and in the case of X v. SWEDEN (2018) also the *Special Control of Aliens Act*, puts the exact same legal prohibitions for deportation as do the ECHR. The Swedish government moreover in all cases argues that it and Swedish authorities, including Swedish courts, fulfil their obligations to the ECHR. Swedish courts also in all cases state the exact same reasons for prohibition of deportation as defined by the ECHR. Meaning that Swedish courts, the Swedish government and the ECtHR all agree on the basic premises regarding the legal obligations to *not* deport individuals under certain circumstances.

8.5 Analysis of Common Traits and Shared Arguments

Based on my findings above I can assume the following regarding the expressed legal opinions of the Swedish government and the ECtHR. First, they both agree that the relevant Swedish domestic law is fully harmonized with the ECHR. Second, they both agree that if Swedish courts interpret and implement this domestic law in line with the ECHR, defined by ECtHR case-law, they fulfil their obligation to the ECHR. This is also what the Swedish government (2012c; 2015b), the Supreme Court of Sweden (2017a; 2017c) and the Supreme Administrative Court of Sweden (2017a; 2017c) asserts that Swedish courts do since 1995. This, as they explain, due to the adoption of the Swedish domestic statute 1994:1219 which wrote the ECHR into Swedish domestic law in 1995.

8.5.1 Swedish Courts Abiding to the ECHR?

If the above assertions represent reality it would, together with the fact that Swedish courts refer exclusively to domestic law, be in line what was found in several previous studies reviewed in this thesis. First, Martinico's (2012, pp.412, 418, 422) findings that Swedish courts prefer to refer exclusively to domestic law but do so in harmony with the ECHR and moreover gives legal supremacy to ECtHR case-law. Second, that domestic law the reasoning of governments and domestic courts harmonize with the ECHR as soon as the ECHR is written into domestic law, as noted by Richardson (2005, p.127-128) and predicted by Bahadur (2001, pp.785-789). Third, that domestic institutions, for example courts, in nations with advanced human rights regimes are less inclined to refer to the ECHR. This since they

believe that domestic law adequately protects human rights, which was what Guiraudon (2000, pp.1114-1115), Moravcsik (2000, pp.219-220), Krisch (2008, pp.186-187) and Çalı, Koch and Bruch (2013, p.982) found.

These findings are also in line with my findings so far regarding Swedish courts. However, drawing from the previous research mentioned above and from the mentioned Swedish assertions one would assume that Swedish courts when implementing the domestic law in question do so in harmony with the ECHR as defined by ECtHR case-law. One would particularly assume so when drawing of the findings of Martinico (2012, pp.412, 418, 422) regarding Swedish courts giving legal supremacy to ECtHR case-law.

Assuming then that Swedish courts do not in theory and/or in practice reject the legal status of the ECHR or its attached case-law one may explain an ECtHR judgment against Sweden in the following way. Namely, that Swedish courts strived to adhere but made a conflicting interpretation of this, to use Pound's (1910) words, *law in books* compared with the interpretation made by the ECtHR. If true, Swedish courts would reasonably internalize the case-law derived from an ECtHR judgment towards Sweden and abandon lines of legal reasonings judged by the ECtHR to conflict with the ECHR. In other words, they would reasonably *embed* the legal reasoning of the superior court in a way similar to what is described by for example Helfer (2008a, p.132) and Cleveland (2010, pp.225-226, 229-230, 261-264). Thus, Swedish courts should harmonize their legal reasoning with the ECtHR case-law created by ECtHR judgment against Sweden. Such case-law harmonization is moreover observed in relation to other countries, described by for example Haydon and Scraton (2000, pp.416, 436, 440-441), Cleveland (2010, pp.225-226, 229-230, 261-264) and Helfer and Voeten (2014, p.77). Thus, there are sound reasons to believe that Swedish courts would abandon lines of legal reasoning once they were made aware that the ECtHR considers such to conflict with the ECHR.

8.5.2 Swedish Courts Not Abiding to the ECHR?

However, the fact that the ECtHR in the eight studied cases did judge Sweden for ECHR violation contradicts that Swedish courts fully abide to the ECHR as defined by ECtHR case-law. Especially considering that all cases refers to similar legal issues indicating that the case-law formed by each judgment is relevant for the next case. Remembering that Swedish courts in each case per definition presented legal reasoning that conflicted with the ECHR. This fact contradicts Martinico's (2012, pp.412, 418, 422) claim that Swedish courts give legal supremacy to ECtHR case-law. This fact instead indicates that Swedish courts don't fully

internalize and harmonize their legal reasoning with what is defined in the case-law created by the ECtHR judgments studied in this thesis. Such non-harmonization would moreover contradict parts of the mentioned earlier research claiming that domestic courts generally internalize case-law from ECtHR judgment, at least when delivered against the own country. Rather, it supports other previous research (Helfer, 2008a, p.132; Çalı, 2010, p.334; Hoffmeister, 2006, pp.722-724 and Krisch, 2008, pp.206, 215) suggesting that governments and domestic courts implement the ECHR but for different reasons don't implement some or any parts of ECtHR case-law.

The fact that all eight cases are related to asylum could be interpreted as asylum being a sensitive legal issue for Swedish courts and possibly also for the Swedish government. Such interpretation is in line with the findings of Shany (2005, p. pp.909-910, 939), Krisch (2008, pp.206, 215) and Westeson (2013, pp.175-176) that domestic courts even they generally implement the ECHR don't do so when it comes to legally sensitive issues. This notion is also supported by Pound's (1910) claim that courts in general are inclined to not execute the *law in books* when it comes to for them legally sensitive issues. Further drawing on Pound's (1910) reasoning this would mean that Swedish courts would be reluctant to cede control over this specific legal issue to the ECtHR.

Thus, it seems as is Swedish courts are bent on the following. First, to only implement Swedish domestic law and thus giving the ECHR an indirect legal status in Sweden. Remembering that Swedish domestic law in theory is harmonized with the ECHR. Second, that Swedish courts don't fully adhere to article 3 of the ECHR when implementing this domestic law. At least not as defined by ECtHR case-law and/or at least not when it comes to asylum. This can be compared to Pound's (1910) description of how and why US state courts evade from abiding to federal law including the case-law of the US Supreme Court. Namely, by *reinterpreting*, *ignoring* or *rejecting* part or all of such *law in books*. This in order to only adhere to state-law rather than to federal law and/or to not lose control over an especially sensitive legal issue. Notions that in this study is translatable to Swedish domestic courts, the ECHR and ECtHR case-law. Meaning Swedish courts might use one or more of the strategies of *reinterpreting*, *ignoring* or *rejecting* to only adhere to Swedish domestic law rather than to the ECHR and/or to not lose control over a legal issue they consider to be of especially sensitive nature.

First, the strategy of *ignoring* such laws are in line with my findings that Swedish courts don't mention the ECHR in the related domestic court proceedings. However, the use of this

strategy would contradict the assertion, made by the Swedish government and of the two Supreme Courts of Sweden, that Swedish courts do abide to the ECHR as defined by ECtHR case-law. Second, the strategy of *reinterpreting* such laws could explain how Swedish courts and the Swedish government seem to adhere to the same legal principles and legal concepts as the ECtHR but still reach legal conclusions that conflict with the ECtHR. The use of both these strategies could in general terms explain how the legal reasoning of Swedish courts conflicts with the ECtHR. Thus, giving a general answer to my research questions regarding the how. Both strategies could explain how the legal reasoning and thus the legal practice of Swedish courts conflict with the legal theory defined by ECtHR case-law. Thus, highlighting the gap between the law in action and the law in books described by Pound (1910). Or more precisely, how this gap is shaped in the case of Swedish courts practices, representing the *law in practice,* and the ECHR as defined by ECtHR case-law, representing the *law in books*. However, only the strategy of *reinterpreting* would allow Swedish courts to abide to the ECHR as defined by ECtHR case-law *in theory* at the same time as evading the substance of their legal meaning *in practice*.

Considering the above and drawing on Pound's (1910) claim that courts are disposed to uphold the *appearance of legitimacy* even when in practice evading from the law in books I can make some assumptions. First, that it's unlikely that Swedish courts, and in extension the Swedish government, openly would reject the legal status of the ECHR or ECtHR case-law. This would be especially unlikely since the two Supreme Courts of Sweden and Swedish government, as mentioned, acknowledge the legal superiority of the ECHR and of ECtHR case-law. The supreme courts specifically noting that ECtHR case-law determines how Swedish courts are supposed to interpret and thus implement the ECHR. I in line with this have also not found any rejections of the ECHR or ECtHR case-law in the legal arguments put forward by Swedish courts or the Swedish government. However, by using the strategy of *reinterpreting,* Swedish courts and the Swedish government may adhere to the legal concepts defined in ECtHR case-law but redefine the legal meaning of all or some of these legal concepts. Thus, giving the *appearance* of fully adhering to the ECHR including ECtHR case-law but at the same time in practice evading from fully doing so in relation to all or some parts of this, in theory, superior law.

Pound's (1910) claim that that courts, or rather the jurists operating these courts, prefer to execute the law in books in line with their own legal and moral values rather than with what is intended by lawmakers or defined by the case-law of superior courts. Pound (1910)

significantly also claim that courts are more inclined to evade from legally superior such laws when it comes to for them sensitive legal issues. These claims are in line with the mentioned findings of Helfer (2008a, pp.132-133, 137) that domestic courts, when implementing the ECHR, interprets is based on their own legal values rather than on ECtHR case-law. They are also in line with mentioned findings of Shany (2005, pp.909-910, 939) and Krisch (2008, pp.206, 215), that domestic courts generally evade implementing ECtHR case-law when implementing the ECHR. These claims and findings are moreover in line with my findings this far. This indicates the following. Swedish courts reinterpret certain legal concepts in order to make the ECHR fit with their own legal norms and values rather than with ECtHR case-law. Norms and values which likely are connected to the presumably legally sensitive issue of asylum. This since all eight cases relate to asylum. Possibly based on a belief, described by Pound (1910) that courts often believe that they and not lawmakers or superior courts are aware of the fact of reality. Meaning that they and not the lawmakers or the superior court are the best suited to decide how to execute the law in practice. The lawmaker in this study being the CoE that created the ECHR and the supreme courts being the ECtHR. A notion that moreover corresponds with *Hart and Sacks theory of institutional settlements* described by Young (2005, pp.1143-1144). My findings described in the following sections regarding partly and fully conflicting legal arguments also supports that Swedish courts in fact don't fully adhere to ECtHR case-law.

8.6 Assessment of Real Risk of Ill-treatment in Case of Deportation

Swedish courts, the Swedish government and the ECtHR in all cases present the following argument. That unless the security situation in the country of deportation at present time is so dangerous as to automatically substantiate a *real risk* an individual assessment must be done to determine such risk. They also in all eight cases agree that this is not the case meaning an individual assessment had to be done. The Swedish government moreover in all cases argues that Swedish courts dealing with Swedish asylum cases are experts in their field and are the best suited to assess Swedish asylum cases. Based on this the Swedish government then consistently in all cases states the following. First, that it trusts the judgment of the forestalled judgment of Swedish courts and second that the ECtHR should do so as well. The ECtHR in all cases likewise argues that Swedish authorities *generally* are the best suited to assess Swedish asylum cases and in all, except in the case of X v. SEDEN (2018), commends the forestalled Swedish court proceeding for being of good legal standard. The ECtHR generally arguing that Swedish courts simply reached the wrong conclusion due to a wrongful

interpretation of certain legal concepts and/or underrating the extent of their legal obligation to the ECHR to assess real risks. The ECtHR thus indirectly argues that it and not Swedish authorities has superior expertise regarding the legal issue of asylum and that Swedish courts must adopt its legal reasoning to advance their otherwise sound legal practices. However, in the mentioned case of X v. SWEDEN (2018) the ECtHR rescinds its praise over Swedish court practices and argues that such practices seem to lack both *rigour* and *reliability*. This since the Swedish Security Agency in this case had withheld from Swedish courts that they, unwittingly or purposefully, had informed Moroccan authorities that they considered the applicant to be a *national security risk.* Thus, putting him in danger of ill-treatment by Moroccan authorities that frequently tortures people considered to be national security risks by other nations.

The partially agreeing and partially conflicting arguments regarding which institution is best suited to assess Swedish asylum cases also supports the mentioned *theory of institutional settlements*, described by Young (2005, pp.1143-1144). This since, as this theory claims, there clearly exists a dialogue between Swedish courts, the Swedish government and the ECtHR regarding who is the most qualified to assess asylum cases and thus who should have the authority to do so. A dialogue ending in a *settlement* where the parties agree in general terms but disagrees regarding the facts in the cases studied. The argument by the Swedish government that Swedish courts are the best suited to assess Swedish asylum cases since they can take into consideration the special circumstances of the case can be compared to Pound's (1910) theory. Specifically, Pound's (1910) claim that lower level courts generally believe that they are the only institution able to take into consideration the special circumstances of the certain case. Meaning they are naturally inclined to use the strategies of *ignoring* or *reinterpreting* the law in books to alter its legal meaning to be in line with their own understanding of the *facts of reality*. Significantly, Pound (1910) underscores that if such understanding conflicts with the understanding of a superior court entrusted to define the correct interpretation of a superior law there will appeared a gap between law in theory and law in practice. Translated to this study meaning that Swedish courts would ignore or reinterpret some parts of ECtHR case-law since they consider such to be incompatible with the facts surrounding Swedish asylum cases. Consequently, creating a gap between the law in practice executed in Swedish domestic courts and the law in books in the form the ECHR as defined by ECtHR case-law.

The criticism given by the ECtHR against Sweden in the case of X v. SWEDEN (2018), is hurtful for the argument that Swedish courts are the most competent to assess Swedish asylum cases. The actions of the Swedish Security Agency in this case can be compared to Pound's (1910) reservations regarding harmonizing the law in action with the law in books. Namely, that incompetence and/or criminal intent amongst jurists or other people entrusted to execute the law in action puts limitation on the possibility of such harmonization. Comparing with the actions of the Swedish Security Agency one sees that the withholding of information, regardless of the reason for such, prevented the law in action in Swedish courts to be in harmony with the law in books as defined by the ECHR. However, since this criticism has only been given once it could be a one-off mistake, caused by the incompetence of a single agent. But it could also be an indication that Agents at the Swedish Security Agency in general consider anti-terrorism to be a sensitive legal issue. Meaning that they are unwilling to fully abide to the ECHR or to domestic law in relation to this legal issue. If true this would be similar to the findings of Çalı (2010, pp.311, 331-334), that there are limitations regarding the influence of ECtHR case-law to make local government and authorities respect human rights of people they believe to have terrorist affiliations.

8.7 Responsibility to Substantiate a Real Risk of Ill-treatment

The ECtHR already in the first case of R.C. v. SWEDEN (2010) argues that *"the applicant has to adduce evidence capable of proving that there are substantial grounds for believing that, if the measure complained of were to be implemented, he would be exposed to a real risk of being subjected to treatment contrary to Article 3"*. An argument which the ECtHR restates in all cases and which clearly puts a *burden of proof* on applicants to substantiate a real risk. Swedish courts and the Swedish government is clearly aware of this case-law since they already in the same case relates to and/or use the legal concept *of substantiation.* This awareness becomes clear when one considers the following. First, the fact that the Swedish Migration Board arguing that *"the applicant had not substantiated his story" […] "and that he had thus failed to show that he had been, or would be, of interest to the Iranian authorities"*. The Swedish Migration Board moreover arguing that the applicant had failed to *"prove that he had been tortured"* why "*there was no reason to believe that the applicant would be subjected to ill-treatment or torture upon return"*. Second, the fact that Swedish courts *"rejected the appeal"* by the applicant largely based on the Swedish Migration Board's conclusion. For example, noting that the applicant *"failed to show that he had been tortured"*. Third, the fact that the Swedish government in the same case arguing that *"substantial*

grounds had to be shown to establish that the applicant would face a real, personal and concrete risk of being subjected to treatment contrary to Article 3 if return". Moreover, in relation to this also arguing that the assessment of the Swedish Migration Board and Swedish courts had showed that no such grounds existed.

The ECtHR and the Swedish government use the word *substantiate* in all cases arguing for and against the existence of a substantiated real risk. Swedish courts frequently use the word for the exact same reason but noteworthy alternate the word with words and phrases such as *made probable* or *proven*. However, when reading the substance of the arguments given by Swedish courts in relation to these different words and phrases it becomes clear that they all refer to the same legal concept and to have the same legal meaning as the word *substantiate.* This becomes clear in, for example, the case of I v. SWEDEN (2013) in where Swedish courts argue that it *"did not consider that the first applicant had made probable why he had been subjected to abuse and by whom"*. Significantly, referring to the Swedish Migration Board's argument that the applicant's shown *"injuries were sufficient to substantiate his motive for asylum"*. Thus, overruling the dissenting court judge's argument that the applicants "*could not substantiate their story more than they already had"*.

Thus, Swedish courts and the Swedish government clearly agree with the ECtHR that applicants are responsible to *substantiate* a real risk, preferably by submitting evidence supporting their account. Consequently, it's also clear that the Swedish government and Swedish courts are aware of the ECtHR case-law defining the legal concept of *substantiation* and that they use it actively. This awareness is also supported by the fact that the Swedish government in all cases uses the substance of the arguments given by Swedish courts to argue why a real risk isn't substantiated. This regardless of if Swedish courts use the word *substantiation* or for example *proven*. It seems that Swedish courts and the Swedish government don't reject, ignore or reinterpret this legal concept. Thus, prompting an assumption that no conflicting legal reasoning exist on this matter. This could then be interpreted as Pound's (1910) notions of courts different reasons and strategies for and of evading the influence of superior law are not translatable to Swedish courts and ECtHR case-law. Instead it supports the previous research that domestic courts do internalize and implement ECtHR case-law. To summarize, there so far seems to be no conflicting legal reasoning connected to the legal concept of *substantiation*. However, such conflicting legal reasoning do exist, which will become clear in the next section.

8.8 Conflicting Legal Arguments

Although there are significant agreement and overlapping of arguments, as described above, there are also significant disagreements between Swedish courts and the Swedish government on one side and the ECtHR on the other side. The conflicting legal reasonings can be derived from legal arguments containing conflicting legal reasonings delivered in the different cases. But it can also be derived from the fact that Swedish courts and the Swedish government doesn't give any arguments at all in relation to certain legal issues.

8.8.1 Obligation to Assess Risks Factors

In several cases Swedish courts and the Swedish government admits that the applicant had *indicated* a real risk. For example, in the case of F.N AND OTHERS v. SWEDEN (2012) they acknowledged that the applicant indicated membership in a targeted group, namely a political party. Without yet going into the disagreement regarding what is required by the applicant to substantiate a real risk the following can be said. Swedish courts and the Swedish government in the mentioned and in other cases gives legal arguments regarding the legal obligation of Swedish authorities to assess risk factors that conflicts with the ECtHR. Referring to risk factors that Swedish authorities are aware of. Swedish courts and the Swedish government frequently arguing that they are not obligated to assess risk factors under certain circumstances. One such circumstance related argument frequently given is that "the local authorities are not aware of the risk factor" (e.g. case of S.F AND OTHERS v. SWEDEN (2012), case of F.G. v. SWEDEN (2016) and case of X v. SWEDEN (2018)). Another such circumstance related argument that especially highlights this is that "the applicant did not want to use the affiliation to the targeted group as a ground for asylum" (case of F.G. v. SWEDEN (2016)). The ECtHR in all cases rejects these arguments given by Swedish courts and the Swedish government and it frequently argues that Swedish authorities must assess risk factors that they have been made aware of. In the case of F.G. v. SWEDEN (2016) arguing that its *"not possible for an individual to waive the protections accorded to him under Article 3"* and that *"the assessment of the existence of a real risk must necessarily be a rigorous one"*. Thus, making clear that it doesn't matter if an applicant wants to rely on a risk factor or not for asylum. All risk factors must be thoroughly assessed to determine if there is a real risk.

The ECtHR in the other cases consistently arguing that, regardless of anything ells, "Swedish authorities must assess the accumulated risk of screening of returnees together with other risk factors" (e.g. case of S.F AND OTHERS v. SWEDEN (2012). Specifically arguing that

regardless of local authorities at the present are aware of the applicant and/or presently inclined to ill-treat the applicant future risk of such linked to screening must be assess by Swedish authorities. Noteworthy is then that Swedish courts, don't do so in any of the cases. In fact, it only mentions screening in the last case of X v. SWEDEN (2018). Stating that screening in that case don't poses a risk for detection and thus don't need to be assessed. This is by itself noteworthy since the ECtHR in this case argued that detection already had occurred and would be reinforced during the screening.

8.8.2 The Legal Interpretation of the Legal Concept of Substantiation

Swedish courts and Swedish government in all cases presents legal arguments that relates to the interpretation of the legal concept of substantiation that conflicts with the arguments related to the same given by the ECtHR in the same case. The conflicting legal reasoning derives from conflicting understandings regarding what is required, by the applicant and otherwise, to substantiate that there is in *real and personal risk* for the applicant to be subjected to *ill-treatment* if deported. Swedish courts and the Swedish government clearly interprets the applicant's responsibility to substantiate a real risk to mean that he or she must *prove* that such risk exists. This can be derived from the mentioned alternation between the words *substantiation* and *proven* etc. by Swedish courts when giving the same types of arguments. It can also be derived from the fact that the Swedish government, as a standard rule and regardless of which of these words are used by Swedish courts refers and restates the arguments of Swedish courts to justify that the applicant failed to *substantiate* a real risk. But most clearly it can be derived from the logic and substance of these arguments given by Swedish courts and the Swedish government. Which becomes clear when reading the quotations mentioned in the last section. That their interpretation of *substantiation* conflict with ECtHR case-law becomes clear when reading the arguments given by the ECtHR in relation to this.

The ECtHR already in in the first case of R.C v. SWEDEN (2010) argues the following. First, the applicant is *"in principle"* responsible to substantiate a real risk in the way described in the previous section. Second, that *"owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements and the documents submitted in support thereof"*. The ECtHR to this statement adding that if there are *"strong reasons to question the veracity of an asylum seeker's submissions, the individual must provide a satisfactory explanation for the alleged discrepancies"*. Third, in relation to evidence substantiating a real

risk, that *"where such evidence is adduced, it is for the Government to dispel any doubts about it.* The ECtHR noteworthy repeats this argumentation in all cases and in some cases also expressively states that the applicant doesn't need to *prove* a real risk for that risk to be substantiated. This become especially clear in the case of X v. SWEDEN (2018) when the ECtHR argues that *"certain degree of speculation is inherent in the preventive purpose of Article 3 and that it is not a matter of requiring the persons concerned to provide clear proof of their claim that they would be exposed to proscribed treatment"*. Thus, it's clear that the ECtHR considers the following. First, that the responsibility of the applicant to substantiate a real risk doesn't mean that the applicant must *prove* that such risk exists, but rather to provide clear indication of such. Second, that the initial burden of proof falls on the applicant but that such burden is transferred to Swedish authorities as soon as such clear indications are provided. Meaning that Swedish authorities, if there are no strong reasons to question an account of real risk, must prove that such risks don't exist and that failure to do so means that deportation is prohibited.

The conflicting interpretations of the word *substantiation* become especially clear in the cases of R.C v. SWEDEN (2010), in which Swedish courts argues the following. Namely, that the *"applicant had failed to show that he had been tortured"*. This by pointing to the fact the *"*[Migration] *Board found that the medical certificate did not prove that he had been tortured"*. The Swedish government in the same case referring to these findings arguing that the *"medical certificate […] provided insufficient proof of torture injuries"*. Specifically arguing that *"it could not be ruled out that the* [scars] *might also have been a result of the applicant's earlier activity as a football player"*. The ECtHR in opposition to this and by noting the importance of granting the benefit of the doubt arguing the following. Namely, that since the medical report *"gave a rather strong indication to the authorities that the applicant's scars and injuries may have been caused by ill-treatment or torture"*. Meaning that Swedish authorities thus was responsible to *"dispel any doubts that might have persisted as to the cause of such scarring".*

These clearly conflicting understandings of the legal interpretation of the word *substantiation*, or more precisely what is required to substantiate a real risk, is symptomatic for all the cases. I am therefore inclined to believe that Swedish courts and the Swedish government are fixed in their interpretation of the legal concepts of substantiation. Even their interpretation clearly conflicts with the interpretation made by the ECtHR and significantly with accumulating ECtHR case-law. Swedish courts and the Swedish government consistently in all cases

demanding evidence that prove that a real risk exist to grant that such risk is substantiated. This to be compared with the ECtHR that only demands that the applicant give clear indications of such a risk, preferably supported by submitted evidence, to substantiate a real risk.

This conflict becomes even clearer when considering that Swedish courts and the Swedish government hardly ever mentions the *benefit of the doubt* and that when they do they don't grant it. This to be compared to the ECtHR that instead mentions the significance of granting this in every case. As showed in the earlier stated quotation. The ECtHR applying the benefit of the doubt in the specific cases to argue that claims of past ill-treatment or affiliation to a targeted group etc. as well as evidence supporting such claims as a standard should be assumed to correspond with reality. Unless, as mentioned, there are strong reasoning to question the applicants account which the applicant fails to clarify or if Swedish authorities dispel the account. Thus, one may conclude that the conflicting legal reasoning regarding the correct interpretation of the word *substantiation* comes down to the following. The ECtHR arguing that the real risk is substantiated, and the burden of proof discharged and thus transferred to Swedish authorities as soon as the applicant presents clear indications of such risk. Whilst Swedish courts and the Swedish government argues that the burden of proof never gets discarded and thus never gets transferred to Swedish authorities and that that proof rather than clear indications are required to substantiate a real risk

Significantly, neither Swedish courts nor the Swedish government even in one case argues that they *dispelled* a substantiated real risk. This also corresponds with the assumption that they interpret a *substantiated real risk* to be a *proven real risk*. Considering this interpretation is reasonable to believe that Swedish courts and the Swedish government would consider it to be somewhat contradictory to *disprove* a *proven* real risk. In line with this notion they instead consistently argue that the applicant failed to substantiate a real risk. For instance, as in the case of N. v. SWEDEN (2010), by arguing that "the account is not credible" and/or "the supportive evidences are not strong enough". Swedish courts and the Swedish government consistently arguing that the applicants account of real risk must be consistent, coherent and unaltered to be credible, as in the case of N. v. SWEDEN (2010) and the case of J.K AND OTHERS v. SWEDEN (2016). Moreover, both arguing that even if such account is credible it must also be supported by evidence to be substantiated, as in the case of N. v. SWEDEN (2010) and the case of F.G. v. SWEDEN (2016). Swedish courts and the Swedish government for such reasons consistently arguing that a real risk was not substantiated. Whilst the ECtHR,

rejecting these arguments, consistently arguing that a real risk was substantiated, underscoring the importance of granting the benefit of the doubt. Thus, Swedish courts and the Swedish government on one side and the ECtHR on the other side looks at the same *evidence* but comes to different legal conclusions regarding the value of the type of evidence submitted and the credibility of the specific evidence submitted. This shows that they have conflicting legal opinions regarding the degree of evidence required to substantiate a real risk and also the circumstances when the benefit of the doubt should be granted or even considered. Swedish courts and the Swedish government clearly putting a heavier *burden of proof* than the ECtHR considers proper. Thus, further illuminating that Swedish courts and the Swedish government interprets a substantiated risk in a way that conflicts with the interpretation defined by the ECtHR.

8.9 Analysing Conflicting Legal Reasoning

As discussed, if Swedish courts and the Swedish government fully abided by the ECHR as defined by ECtHR they would interpret the word *substantiate* in the same way as the ECtHR and thus put the same *burden of proof* on the applicant as the ECtHR. They would moreover also not ignore any part of ECtHR case-law that they are aware of. However, Swedish courts and the Swedish government clearly don't interpret the word in the same way as the ECtHR and puts a heavier burden of proof on the applicant then the ECtHR. Swedish courts and the Swedish government also clearly ignores parts of ECtHR case-law, which becomes especially clear from their consistent refusal to assess the accumulated risk of screening of returnees together with other risk factors. Risk factors that without the practice of screening might not substantiate a real risk but together with it might. These obvious reinterpretations and ignoring of ECtHR case-law can easily be compared to Pound's (1910) theory. It seems as if Swedish courts evade the legal influence of ECtHR case-law in a way similar to how US state courts, as described by Pound, (1910) evade from the case-law of the US Supreme Court. Meaning Swedish courts *reinterpret* the legal meaning of such *law in books* and even ignores the existence of such. This is also supported by the findings of Helfer (2008a, pp.132-133, 137), Çalı, (2010, p.334), Hoffmeister (2006, pp.722-724) and Krisch (2008, pp.206, 215) that governments and domestic courts implement the ECHR but don't fully implement ECtHR case-law.

The fact that the reinterpretation and the ignoring of ECtHR case-law seem to facilitate an interpretation of the ECHR as putting the entire burden of proof on the applicant can also be compared with Pound's (1910) theory. Here by drawing on Pound's (1910) claim that courts

reinterpret or ignore superior *law in books* to make such fit with their own legal and/or moral values or with the facts of reality as they perceive it. A claim that moreover is similar to the claim by Helfer (2008a, pp.132-133, 137) that European domestic courts generally gives privilege to their own legal values over ECtHR case-law when implementing the ECHR. A practice that for obvious reasons can be compared to the observed practice of Swedish courts do implement the ECHR but to reinterpret or ignore certain aspects of ECtHR case-law. This could be interpreted as Swedish courts harmonizing domestic court practice with their own legal values rather than on ECtHR case-law. Such interpretation is in line with the findings of for example Shany (2005, p. pp.909-910, 939) and Krisch (2008, pp.206, 215) that domestic courts even they generally implement the ECHR don't do so when it comes to legally sensitive issues. Which, in relation to article 3, moreover seem to be limited to the legal question of asylum. Which, in the light of Pounds (1910) legal theory, indicate that asylum is a sensitive legal issue for Swedish domestic courts and that Swedish courts thus adhere to legal reasoning that conflict with the ECHR as defined by ECtHR case-law to avoid ECtHR influence over this issue.

To conclude, my observations supports that Swedish authorities are reluctant to "take over" the burden of proof from the asylum seeker even under the circumstances were ECtHR case-law states that they should. If this is systemic for Swedish courts that handles asylum cases this should reasonably have the practical effect of reducing the number of asylum seekers that can stay in Sweden. This since the ECtHR only can hear a fraction of such supposed systematic wrongfully denied asylum cases. Thus, it is not unreasonable to believe that this is part of the overall agenda of Swedish courts and in extension the Swedish government. A notion that I will discuss further in the following chapter.

9 Conclusions and Discussion

Looking to my findings regarding *how* the legal reasoning of Swedish courts and the Swedish government conflict with the legal reasoning of the ECtHR I would summarize it as Swedish courts and the Swedish government doing the following. First, putting a higher burden of proof on the applicant to substantiate a real risk by requiring *proof* of such risk. This whilst the ECtHR generally, in the light of the benefit of the doubt, only requires *clear indications* of such. Second, putting a narrower extent as to the obligations of Swedish authorities to assess risk factors leading to a substantiated real risk. Consequently, putting several limitations as to

what risk factors and under what circumstances such obligations apply. This to be compared to the ECtHR which argues that there are no such limitations. The legal reasoning of Swedish courts and the Swedish government clearly conflicting with the ECHR as defined by ECtHR case-law on these two points. It's also clear that Swedish courts and the Swedish government consistently hold on to these conflicting legal reasonings even in the light of accumulating ECtHR case-law stating that they are in the wrong.

This behaviour of Swedish courts seems to be as collected from Pound's (1910) "tool-box" of strategies to evade superior *law in books*. What I mean by this is that Swedish courts and in extension the Swedish government clearly reinterpret the legal meaning of certain legal concepts defined in ECtHR case-law. Putting a conflicting legal meaning to the legal concept of substantiation and consequently putting different "heaviness" on the burden of proof laid on the applicant to substantiate a real risk. Thus, clearly using the strategy of reinterpretation. But also, by simply ignoring the existent of specific ECtHR case-law which for obvious reasons correlate to Pound's (1910) strategy of ignoring. The strategy ignoring becomes especially clear when noting that Swedish courts and the Swedish government consistently fail to assess the accumulated risk derived from local authorities screening of returnees. Remembering that the Swedish government had access to the earlier case-law in every new case and that Swedish courts had access to in at least in the last three case and still didn't fully implement it. But rather continued to reinterpret and/or ignore certain parts of ECtHR case-law.

My findings as mentioned clearly determines that Swedish courts and the Swedish government puts a higher burden of proof on the applicant compared to the ECtHR regarding the what is required for the applicant to fulfil his or her responsibility to substantiate a real risk. They likewise clearly show that Swedish courts and the Swedish government define the extent of Swedish authority's obligations to assess such risks conflict with what is defined by ECtHR case-law. Swedish courts and the Swedish government putting forward different reasons to justify this whilst the ECtHR argues that no exceptions from this obligation exists. Looking to the dates of the judgments and comparing them with the dates of the forestalled court proceedings mentioned in the case-files I can also conclude the following. That Swedish courts in the last three cases had access to the case-law derived from the first two cases. Looking to the substance of the ECtHR case-law created in the first two cases I can conclude that Swedish courts did not in the last three cases harmonize their legal reasoning with the

case-law created in the first two cases. Even they were obligated to do and even they clearly had access to it.

Based on my conclusions above I would say that the legal issue of asylum, as mentioned before, seems to be especially sensitive to Swedish courts and to the Swedish government. A concussion which is supported by the findings of Shany (2005, p. pp.909-910, 939) and Krisch (2008, pp.206, 215) that domestic courts even they generally implement the ECHR don't do so when it comes to legally sensitive issues. This since the absent of article 3 violation in relation to any other legal issue indicates that Swedish institutions are proactive in preventing article 3 violations in all other fields. Whilst they seem to take a more passive stance in relation to the field of asylum. Swedish courts and the Swedish government not themselves violating article 3. But also, not actively protecting it when it comes to asylum seekers that might have such right violated on foreign soil. Swedish courts and the Swedish government seem to simply not see it as their responsibility to proactively protect the rights of foreigner from foreign treats that could lead to ill-treatment. In other words, even they in theory are fully committed to fulfil their obligations to the ECHR, they don't fulfil this obligation in practice.

This differs between the law in theory and the law in practice is clearly in line with Pound's (1910) claim that courts are unwilling to execute legal issues that are sensitive to them. Which, as Pound (1910) explain, often is due to conflicting legal values. A legal value that in the case of Swedish courts then would be that asylum is not a right that must be given by a proactive state. But rather a right that the state only must grant when an asylum seeker has fulfilled some rigorous requirements.

The underlying agenda of Swedish courts and the Swedish government could however be more sinister or discouraging. Drawing on Pound's (1910) reservation that law in action can never be harmonized with the law in books if the people executing this law are incompetent or have malicious and/or criminal intents. Remembering that the Agent in the case of X v. SWEDEN (2018) put the applicant in real risk of ill-treatment and then withheld this information from Swedish courts putting the applicant in further danger of ill-treatment. The actions of this agent could have been unintentional and thus be the result of incompetence. But it could also have been a deliberate action, either to cover up a mistake of to further an agenda to put the applicant in danger. If so this would be an intentional criminal act and thus more difficult to root out from the Agency.

My overall conclusions are also supported by the findings of Helfer (2008a, pp.132-133, 137), Çalı (2010, p.334) Hoffmeister (2006, pp.722-724) and Krisch (2008, pp.206, 215) that domestic courts generally implement the ECHR but don't do so in line with ECtHR case-law. At least not to the extent they are legally obligated to. As I have shown, this is certainly the case when it comes to Swedish courts that clearly, indirectly by interpreting domestic law in harmony with the ECHR, implements the ECHR but don't do so in line with all ECtHR case-law. My findings are moreover, as mentioned, supported by the findings of Helfer (2008a, pp.132-133, 137) that domestic courts generally ignore ECtHR case-law in favour of domestic legal values when implementing the ECHR.

My conclusions are moreover supported by Pound's (1910) claim that the legal reasoning of jurists is based on their legal and moral values but that they at the same time are inclined to uphold the appearance of legality when doing so. Swedish courts and the Swedish government are clearly aware of the ECtHR case-law that demands substantiation etc. But whilst agreeing on many legal issues they also choose to reinterpret or ignore certain legal concepts and issues defined in this case-law. They also use the same legal terminology as the ECtHR, thus upholding the appearance of legitimacy. Even they in practice in relation to some legal issues and to some legal concepts executes a *law in action* that conflict with the *law in books*. The law in book being the ECHR as defined by ECtHR case-law. This becomes apparent when the ECtHR judge that the legal implantation of Swedish courts is based on, with the ECHR, conflicting legal reasoning and Swedish courts continue to abide to such. Even they must know that this is not in line with the ECHR as defined by ECtHR case-law. But, as discussed, the possibility of failure to adhere to the case-law due to incompetence can't be ruled out. Also remembering that both possibilities are lifted by Pound (1910). But it to me seems improbable that incompetence would be the answer since the ECtHR frequently commends Swedish authorities and Swedish courts for their general legal professionality and sound legal practices. Since the cases refer to legal issues similar in nature this means that the case-law from the earlier judgments are highly relevant for the legal reasoning in the following cases. Thus, it to me also seems believable that Swedish courts are aware of the interpretation required by ECtHR case-law but simply chose to evade from the correct interpretation. Especially in regard to the word *substantiate* which is defined by ECtHR case-law. I conclude that Swedish courts, or rather the jurists operating Swedish courts, have inherent legal reasoning based on in Swedish courts established legal values that simply

conflicts with that defined by ECtHR case-law. A conclusion that is supported by Pound's (1910) theory and by for example Helfer (2008a, pp.132-133, 137).

My conclusions thus to some degree contradicts the findings of several other researchers. First, that Swedish courts prefer to refer exclusively to domestic law but do so in harmony with the ECHR and gives legal supremacy to ECtHR case-law, as found by Martinico's (2012, pp.412, 418, 422). Second, that the legal reasoning of domestic courts harmonizes with the ECHR once the ECHR is written into domestic law, as observed by Richardson (2005, p.127-128) and predicted by Bahadur (2001, pp.785-789). Third, that domestic courts harmonize their legal reasoning with what is defined by ECtHR case-law (or the case-law of similar courts), as found by Haydon and Scraton (2000, pp.416, 436, 440-441), Richardson (2005, p.127-128), Cleveland (2010, pp.225-226, 229-230, 261-264) and Helfer and Voeten (2014, p.77). This since Swedish courts, even if they clearly do implement some parts of the ECHR as defined by some parts of ECtHR case-law, also don't implement certain parts of this.

It could simply be so that Swedish courts simply considers Swedish law to be adequate for the securing of human rights in Sweden. Resulting in a belief that there is no need to adhere to ECtHR case-law when implementing the domestic law which is already harmonized with the ECHR. This would be in line with the findings of Guiraudon (2000, pp.1114-1115), Moravcsik (2000, pp.219-220), Krisch (2008, pp.186-187) and Çalı, Koch and Bruch (2013, p.982), that domestic institutions in nations with advanced human rights regimes are less inclined to refer to the ECHR. This since they believe that domestic law provides equally strong human rights protection as the ECHR and the related case-law. Such belief however does not correspond with the facts discovered in this study in relation to Swedish domestic law. However, if Swedish courts did fully adhere to and implemented ECtHR case-law, this would lead to Swedish domestic law court practices being fully harmonized with the ECHR not only in theory but also in practice.

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