CHAPTER 10

SWEDEN: EUROPEAN COURT OF HUMAN RIGHTS ENDORSEMENT WITH SOME RESERVATIONS

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1. CRITICISM OF THE EUROPEAN COURT OF HUMAN RIGHTS

The European Court for Human Rights (ECtHR) is rarely discussed in critical terms in Swedish media or in contemporary legal and political debate in Sweden. The limited discussion on the role of the ECtHR may be linked to the historical development of the constitutional protection of human rights in Sweden, the status of the convention, and aspects of Swedish legal culture. In this section, the development of constitutional protection of fundamental rights in Sweden is outlined, followed by a section with examples of criticism of the ECtHR.

1.1. THE DEVELOPMENT OF CONSTITUTIONAL PROTECTION OF FUNDAMENTAL RIGHTS IN SWEDEN

1.1.1. *Ratification of the ECHR*

When Sweden ratified the European Convention on Human Rights (ECHR) in 1952, the 1809 *Regeringsform* (Instrument of Government)¹ was still in force. This old fundamental law had to some extent been inspired by Enlightenment

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¹ This fundamental law in its original wording, as well as subsequent amendments until its repeal in 1974, has been published in Swedish in the volume *Sveriges konstitutionella urkunder* (The Constitutional Documents of Sweden) (SNS 1999); English translations of the fundamental laws in their wording of the mid-1950s are found in *The Constitution of Sweden* (Documents published by the Royal Ministry for Foreign Affairs, New Series II:4, Stockholm

ideals of protection of individuals and separation of powers.² As still is the case, the Instrument of Government formed the Swedish constitution together with other fundamental laws. Far-reaching protection of the freedom of the press was set down in a special fundamental law, the *Tryckfrihetsförordning* (Freedom of the Press Act), tracing its origins to 1766.³ Apart from the provisions on the freedom of the press, fundamental rights were protected through ordinary legislation rather than constitutional law. There was no equivalent to the catalogues of rights found in constitutions dating from about the same time, eg in the USA or Norway.⁴ Furthermore, the changes in the way Sweden was governed that had taken place since the early 20th century – such as the introduction of parliamentarism and universal suffrage – were not reflected in the 1809 Instrument of Government. Later research has labelled the period ca 1920–1975 as the ‘half-a-century without a constitution’.⁵ To summarise, at this time constitutional law had a limited role in Sweden, and the status of constitutional protection of human rights was in general very weak. In spite of this, individual rights and freedoms were for the most part respected to a very high degree in Sweden through ordinary legislation and through the practice of the courts and administrative authorities. The institution of the *Justitieombudsman* (the Parliamentary Ombudsman), formed an important part of this protection of individual rights through its formally non-binding decisions establishing a common understanding of the limits of public power.⁶ In spite of the existing protection in practice, it can be said that the ECHR – and especially the possibility of taking a case to the ECtHR – filled an empty space in Swedish constitutional law.

At the time of Sweden’s accession to the ECHR, the Government held the view that Swedish law did not need any amendments to fulfil the requirements of the convention.⁷ Also when Sweden – rather late – recognised the jurisdiction

1954). In 1974, a new Instrument of Government was adopted, the 1974 Regeringsform SFS (Svensk författningssamling [Swedish Code of Statutes]) 1974:152.

² Torbjörn Vallinder, ‘Montesquieu and Constitution-making in Sweden, 1809–1815 Part I’, *Yearbook of the New Society of Letters at Lund* 1989 (Lund University Press 1989) 112.

³ SFS 1949:105, which was preceded by a Freedom of the Press Act of 1812; Joakim Nergelius, *Media Law in Sweden* (Kluwer Law International 2015) para 51–59; Torbjörn Vallinder, ‘Montesquieu and Constitution-making in Sweden, 1809–1815 Part II’, *Yearbook of the New Society of Letters at Lund* 1992 (Lund University Press 1992) 103, 107 ff.

⁴ Elisabeth Palm, ‘Human Rights in Sweden’ in Hugo Tibergh and others (eds), *Swedish Law. A Survey* (Juristförlaget JF 1994), 62 ff; Joakim Nergelius, *Constitutional Law in Sweden* (Kluwer Law International 2011) para 248 on the only provision on general protection of rights in art 16 of the 1809 Instrument of Government, which rephrased medieval royal oaths concerning the King’s duty to protect individuals.

⁵ Joakim Nergelius, ‘Constitutional Law’ in Michael Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 40; the expression was coined by Fredrik Sterzel, former professor of public law at Uppsala university and Supreme Court judge.

⁶ Iain Cameron, ‘Protection of Constitutional Rights in Sweden’ [1997] *Public Law* 501–502.

⁷ Prop (Proposition – Government Bill) 1951:165 *angående godkännande av Sveriges anslutning till Europarådets konvention angående skydd för de mänskliga rättigheterna och de*

of the ECtHR in 1966, it did so safe in the assurance that existing Swedish law fulfilled the requirements of the convention and its protocols.⁸ Accordingly, there were no measures to incorporate or transform the convention into Swedish domestic law. In the 1960s and 1970s, however, the expansion of the welfare state, including compulsory measures against individuals in taxation or compulsory care of young persons, brought attention to matters of protection of individual rights. The Social Democratic Party – the leading political force in Sweden of the time – was sceptical to constitutional protection of human rights, since such rights were perceived as legal obstacles to societal reforms carrying out the democratically founded legislative will.⁹

A new Instrument of Government was adopted in 1974. The new fundamental law expressly based on the ideals of popular sovereignty, implying that democratically elected politicians, and not judges, should decide matters of general importance.¹⁰ The *travaux préparatoires* stated that there was no difference in substance between a court and an administrative agency.¹¹ In this way the new fundamental law continued a historical tradition of unclear distinctions between judiciary and administration.¹²

The 1974 Instrument of Government was amended in 1976 and 1979 with provisions on fundamental rights and freedoms. To a certain extent, these rights were inspired by the articles of the ECHR and the ECtHR case law. These provisions were for the most part phrased as rules aiming at the legislative process, laying down procedures limiting the majority's room for legislation entirely or protecting parliamentary minorities. The fundamental rights could therefore only be invoked as part of an argument concerning constitutional review of a provision in an individual matter.¹³ The compromise leading to the constitutional amendments included limitations on the constitutional review of acts of law by requiring a manifest error for a court to set aside an unconstitutional provision in an act of law or governmental ordinance.¹⁴

Under these limitations, the Swedish courts very rarely set aside provisions in acts of law or governmental ordinances with reference to the protection of

grundläggande friheterna (Concerning Approval of the Accession of Sweden to the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms), 11–13.

⁸ Carl Lidbom, 'Lagstiftningsmaktens gränser' (the Limits of Legislative Power) [1993–94] *Juridisk tidskrift vid Stockholms universitet* 283, 284. Lidbom was Minister of Justice and a key figure in the implementation of the legal reforms initiated by the Social Democratic Governments of the 1960s and 70s.

⁹ Stig Strömholm, 'General Features of Swedish Law' in Michael Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 17 f; Cameron, 'Protection of Constitutional Rights in Sweden' (n 6) 488, 490 and 504.

¹⁰ Cameron, 'Protection of Constitutional Rights in Sweden' (n 6) 504.

¹¹ Prop 1973:90 *Ny regeringsform och ny riksdagsordning m.m.* (New Instrument of Government and New Riksdag Act etc) 233.

¹² Cf Nergelius, *Constitutional Law in Sweden* (n 4), para 217.

¹³ Nergelius, 'Constitutional Law' (n 5) 45.

¹⁴ See also section 3.1 on the current procedure for constitutional review.

fundamental laws. Owing to legal culture and factors relating to career paths (which often involved service on the Government Offices), Swedish judges tended to be loyal to the political will expressed in the governmental *travaux préparatoires* behind legislation.¹⁵ As for the ECHR, the case law of the two supreme courts from the early 1970s meant that the convention could not be directly applied by Swedish courts since it had not been incorporated or transformed into Swedish law. In this way, a dualism between the ECHR and Swedish domestic legislation was established.¹⁶ In spite of this, there were occasional examples of references to the convention by the two supreme courts.¹⁷ In much the same way, the Parliamentary Ombudsman did not directly apply the convention and the ECtHR case law.¹⁸

In politics, the view on the protection of individual rights divided the right-wing and the left-wing parties, with the Social Democrats remaining sceptical to constitutional protection of fundamental rights. The social democratic Prime Minister Olof Palme was famously quoted in 1983 stating that he did not want the ECtHR to develop into “a play house for Gustaf Petrén”, referring to a judge of the Supreme Administrative Court who was a well known proponent of the idea of fundamental rights.¹⁹ In this climate, turning to the ECtHR could be seen as a means for individuals to obtain justice where the Swedish public authorities and courts had failed to protect their rights against the state. In a number of cases during the 1980s, the ECtHR found that Sweden had infringed convention rights.²⁰

Well into the 1980s and 1990s, references to the rights enshrined in the ECHR, the case law of the ECtHR or, indeed, in the Instrument of Government, by a party to proceedings in a Swedish court were considered strange. In the legal culture of the time, such references were seen as an indication that the party did not have a sound foundation for his claims. In 1993, the president of the Göta Court of Appeal and former Minister of Justice Carl Axel Petri summarised his impressions on the attitude:

¹⁵ Nergelius, *Constitutional Law in Sweden* (n 4) para 294 ff.; Cameron, ‘Protection of Constitutional Rights in Sweden’ (n 6) 503 f.; John Bell, *Judiciaries within Europe. A Comparative Review* (CUP 2006) 295.

¹⁶ *NJA* (Nytt juridiskt arkiv part I, the Yearbook of the Supreme Court) 1973, s. 423; *RÅ* (Regeringsrättens årsbok, the Yearbook of the Supreme Administrative Court) 1974 ref. 121; Laura Carlson, *The Fundamentals of Swedish Law* (2nd edn, Studentlitteratur 2012) 80 f.; Rune Lavin, ‘Högsta förvaltningsdomstolen och Europakonventionen’ (The Supreme Administrative Court and the European Convention) [2012] *Förvaltningsrättslig tidskrift* 339–341.

¹⁷ *RÅ* 81 2:14; *RÅ* 1988 ref. 79; Lavin (n 16) 340–341.

¹⁸ Cameron, ‘Protection of Constitutional Rights in Sweden’ (n 6) 502.

¹⁹ Fredrik Sterzel, ‘Gustaf Petrén till minne’ (In Memory of Gustaf Petrén), in *Rättighetsperspektiv till minne av Gustaf Petrén* (Rights Perspectives in Memory of Gustaf Petrén) (Rättsfonden 2007) 14 f.

²⁰ *Sporrong and Lönnroth v Sweden* (1982) Series A no 52; *Pudas v Sweden* (1987) Series A no 125-A; *Tre Traktörer Aktiebolag v Sweden* (1989) Series A no 159.

If you were a judge in Sweden in the 1960s and someone referred to the European Convention, you considered him either a *rättshaverist* [someone obsessively claiming his alleged rights through recurrent judicial procedures] or a madman.²¹

The Swedish attitude towards the ECHR gradually changed in the late 1980s and early 1990s. The two supreme courts started to use the ECtHR case law when interpreting provisions in Swedish law. In the Supreme Administrative Court case *RÅ* 1988 ref. 79, concerning compulsory care, the court referred to the relevant ECtHR case law. In *NJA* 1992 s. 532, the Supreme Court interpreted Swedish provisions on procedural law in a restrictive manner to comply with the ECtHR case law.²² Also the Parliamentary Ombudsman occasionally referred to the convention and the Strasbourg case law.²³

Legislative reforms were carried out in order to make Swedish law in line with the requirements of the ECHR. Among other things, this included the possibility of judicial review of governmental decisions in administrative matters (Article 6 of the ECHR).²⁴

1.1.2. *Incorporation of the ECHR*

1.1.2.1. General Features

In connection with the Swedish preparations for joining the European Union, the ECHR was incorporated into Swedish law in 1995. The convention was made an ordinary Swedish act of law, accompanied by a constitutional provision providing that no act of law or other provision may be adopted if it contravenes the ECHR.²⁵ This legislation was the result of a political compromise between the Socialist parties (among them the Social Democrats, which as already mentioned were sceptical to judicial interference in political decisions) and the liberal and conservative parties (supporting constitutional protection for individual rights).

²¹ Carl Axel Petri [contribution to a debate] in Fredrik Sterzel (ed), *Europakonventionens införlivande med svensk rätt* (The Incorporation of the European Convention in Swedish Law) (Rättsfonden 1993) 67.

²² Iain Cameron, *An Introduction to the European Convention on Human Rights* (7th edn, Iustus 2014) 191 f.; Nergelius, *Constitutional Law in Sweden* (n 4) para 244; Lavin (n 16) 340–344.

²³ *JO* (Justitieombudsmännens ämbetsberättelse – Annual Report of the Parliamentary Ombudsmen) 1986/87 s. 151.

²⁴ See the Lag om rättsprövning av vissa förvaltningsbeslut (Act on Legal Review on Certain Administrative Decisions), SFS 1988:205; now replaced by Lag om rättsprövning av vissa regeringsbeslut (Act on Legal Review of Certain Governmental Decisions), SFS 2006:304.

²⁵ Lag om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna (Act on the European Convention for the Protection of Human Rights and Fundamental Freedoms), SFS 1994:1219; ch 2 s 19 of the 1974 Instrument of Government.

In short, the main idea behind the reform, as expressed in the *travaux préparatoires*, was that conflicts with the ECHR should primarily be avoided through the mechanisms of the thorough legislative procedure. The main responsibility for fulfilling the requirements of the ECHR, in other words, should lie with the legislature. If there, however, were discrepancies between the convention and a provision of Swedish domestic law, they would have to be dealt with by the courts, interpreting domestic legislation in conformity with the ECHR, using traditional means of solving conflicts between acts of law, or carrying out a constitutional review under the procedure laid down in the Instrument of Government, mentioned above (section 1.1.1). Furthermore, the special status of an international convention protecting human rights could also be taken into account.²⁶ The incorporation of the ECHR as an ordinary act of law, but at the same time protected in a fundamental law, with the mentioned guiding comments in the preparatory works, rendered the ECHR an unclear status in the Swedish hierarchy of norms.²⁷

The incorporation of the ECHR initially caused practical problems for the courts, since they to a large extent did not have access to the publications of the ECtHR case law. Nor did they, apparently, have much secondary literature on the ECHR and the case law. For example, the Supreme Administrative Court had to rely on the last few years' ECtHR case law publications, which happened to be available in the court since a judge of the court previously had served as a judge in the ECtHR. Rune Lavin, former professor of public law at Lund University and president of the Supreme Administrative Court, has remarked that the preparations for the incorporation of the ECHR in Swedish law were very limited in comparison to the efforts made for the courts in relation to the EU membership.²⁸ This lack of resources may, at least initially, have had implications on the use of the convention and the attitudes toward it. In 1997, the Supreme Court judge Hans Danelius published a Swedish commentary to the convention and the ECtHR case law.²⁹ This work, subsequently in new editions, has been much cited by Swedish courts in cases involving the convention.

²⁶ Prop 1993/94:117 *Inkorporering av Europakonventionen och andra fri- och rättighetsfrågor* (Incorporation of the European Convention and other Matters on Rights and Freedoms) 37–38; Bet (Betänkande – Opinion from a Riksdag Committee) 1993/94:KU24 *Inkorporering av Europakonventionen och andra fri- och rättighetsfrågor* (Incorporation of the European Convention and other Matters on Rights and Freedoms) 19–20.

²⁷ Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 193–202; Iain Cameron and Thomas Bull 'Sweden' in Janneke Gerards and Joseph Fleuren (eds), *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law* (Intersentia 2014) 274; Cameron, 'Protection of Constitutional Rights in Sweden' (n 6) 492 f; Nergelius, *Constitutional Law in Sweden* (n 4), para 246 and 315.

²⁸ Lavin (n 16) 344.

²⁹ Hans Danelius, *Mänskliga rättigheter i europeisk praxis. En kommentar till Europakonventionen om de mänskliga rättigheterna* (Human Rights in European Case Law. A Commentary to the European Convention on Human Rights) (Norstedts Juridik 1997).

In 2010 a constitutional reform strengthened the protection of individual rights in the light of the ECHR and EU law. The requirement of a manifest error to set aside an unconstitutional provision was abolished. One reason for this was the problem of this kind of limitation in relation to the ECHR.³⁰

The ECHR and the case law of the ECtHR had a considerable impact on the development of the protection of individual rights in Sweden.³¹ In contrast, the domestic constitutional protection, apart from the freedom of the press, was relatively weak, only indirectly applicable in individual cases. Even today, when the domestic constitutional protection has been reinforced, this legal heritage may account for the general lack of criticism towards the ECtHR in media, academia, and politics.

In spite of the legislative reforms concerning the status of the ECHR, the attitude of Swedish judges towards the convention and the case law of the ECtHR may, however, still be described as cautious. In legal literature this has been explained by the traditional interpretation methods, involving adherence to written legislation and detailed *travaux préparatoires*. In contrast, the methods of interpreting law in the light of a body of case law are less well-developed. Also, the career paths, where aspiring judges are under supervision by senior judges for a long time before getting tenure, may contribute to an attitude of sticking to tradition and avoiding possibly controversial matters such as the ECHR (see also on service in the Government Offices as another part of the career paths section 1.1.1).³² Negative attitudes to references to the ECHR and the ECtHR case law may also still be found in the Swedish judiciary.

1.1.2.2. The Development of Case Law

After incorporation, the two supreme courts interpreted Swedish law in the light of the ECtHR, as had been foreseen in the *travaux préparatoires*. Additionally, there were examples amounting to applying the convention provisions directly or setting aside national legislation. Especially, the rights under Article 6 of the ECHR were given a prominent place in the case law. The Supreme Administrative Court thus set aside domestic administrative law provisions forbidding appeal in order to comply with the ECHR and the ECtHR case law.³³ Similarly, the Supreme Court took the ECHR into account in criminal cases concerning, among other things, the right to a public hearing and the principle of equality of arms.³⁴

³⁰ SOU (*Statens offentliga utredningar*, Swedish Government Official Reports Series) 2008:125 *En reformerad grundlag* (A Reformed Fundamental Law) 381.

³¹ Nergelius, *Constitutional Law in Sweden* (n 4) para 22.

³² Cameron and Bull (n 27) 264, 277.

³³ Lavin (n 16) 352–353.

³⁴ Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 110–111.

The Supreme Court case *NJA* 2005 s. 462 concerned the right to damages under the national tort legislation for breaches of the ECHR. In the case, the Supreme Court held that it is possible to found a claim directly on the ECHR, if this is necessary to fulfil the requirements of the convention. This right has been further developed in later case law.³⁵ In the Supreme Court case *NJA* 2009 N 70 – published in the Supreme Court Yearbook as a case note and not a precedent – the court remarked that the development after *NJA* 2005 s. 462 meant that there now was a general principle of law that Sweden has to fulfil obligations to pay damages for infringements of the ECHR. The Supreme Court further stated that if the domestic legislation on damages, possibly interpreted in the light of the ECHR, does not leave room for the payment of such damages, the obligation will have to be fulfilled without support in written legislation. In a similar fashion, the Supreme Administrative Court has lowered administrative sanction fees in order to compensate for infringements of art 6 of the ECHR (*RÅ* 2000 ref 66 and *RÅ* 2006 ref 43).

The much discussed case *NJA* 2005 s. 805 concerned a pastor in a small Pentecostal church on the island of Öland who in very strong words had criticised homosexuality in a sermon.³⁶ He was prosecuted for the criminal offence *hets mot folkgrupp* (incitement to hatred against a group).³⁷ The Supreme Court held that the sermon expressed contempt for homosexuals as indicated in the provision of the Penal Code, considering the statements in the *travaux préparatoires*.³⁸ Concerning the protection of rights under the Swedish constitution (ch 2 s 1 of the Instrument of Government), the court held that the freedom of religion and the freedom of speech did not require the criminal law provision to be set aside. In its assessment under the ECHR, the court concluded that the relevant Swedish legislation on the matter as such would fit within the framework of the ECHR. The Supreme Court added, however, that it must be considered whether the application of the provision in the individual matter would constitute a breach of the convention. In this context, the court stated, the case law of the ECtHR must be taken into account. After referring to a number of judgments from that court, the Supreme Court reached the conclusion that the case law called for a comprehensive assessment of the circumstances. In the present case, the Supreme Court held that it was likely that the ECtHR would find the limitation of the freedoms involved to be disproportionate.

³⁵ Nergelius, *Constitutional Law in Sweden* (n 4) para 324.

³⁶ For a comment to the case in English, see Nergelius, *Constitutional Law in Sweden* (n 4) para 326 ff.

³⁷ Ch 16 s 8 of the Brottsbalk (Penal Code) (SFS 1962:700).

³⁸ See on the role of *travaux préparatoires* as an important means of interpretation in Swedish law (including constitutional law) Hans-Heinrich Vogel, 'Sources of Swedish Law' in Michael Bogdan (ed), *Swedish Legal System* (Norstedts Juridik 2010) 34; Nergelius, 'Constitutional Law' (n 5) 41.

Rather than seeing the provision as actually conflicting with the ECHR and the ECtHR case law, the Supreme Court interpreted the provision on incitement restrictively, leading to the acquittal of the defendant. In its subsequent case law on the provision banning incitement against homosexuals in relation to the freedoms under the ECHR, the Supreme Court has continued to use a comprehensive assessment of the circumstances in the light of the case law of the ECtHR.

To this author, there are no indications that the judgment aimed at taking the lead in the development of rights in Europe. The judgment in *NJA* 2005 s. 805 may rather be seen as an attempt of balancing the right of free speech, freedom of religion, and the interest of a group not to be harassed. An interesting feature of the judgment is the method used by the Supreme Court. Rather than interpreting the law in the light of the established case law, the court made a prognosis on how the ECtHR would assess the matter, should it come before that court. This method may be seen as a pragmatic means of independent application of the convention in the light of the lengthy procedures before the ECtHR.³⁹ As is dealt with below (section 3.2), however, parts of the case law also implied a limitation of the impact of the ECtHR case law.

1.2. EXAMPLES OF CRITICISM

In difference to public debate in certain other European countries, there has not been a surge in criticism in the last few years. There are however examples of sporadic critical appraisals of the ECtHR. A few examples may highlight various aspects of this.

An important point of criticism has been the workload of the ECtHR and the consequences for the quality of the court's activities. In 2011 representatives of *Migrationsverket* (the Swedish Migration Board) were quoted in media criticising the ECtHR for insufficient information regarding decisions by the court on impediments to enforcement. According to the Board, the ECtHR's lists with the names of persons concerned were deficient, which caused additional administrative work for the Board.⁴⁰

In the same vein, *Högsta domstolen* (the Supreme Court) in one case questioned the handling of an individual matter before the ECtHR. In the Supreme Court decision *NJA* 2011 s. 518, the Government had decided to

³⁹ Cf Thomas Bull, 'Freedom of Expression and the Limits of Tolerance: A Swedish Saga' in Thomas Bull (ed), *Fundamentala fragment. Ett konstitutionellt lapptäcke* (Fundamental Fragments. A Constitutional Patchwork) (Iustus 2013) 279, 283.

⁴⁰ Freja Salö, 'Hård svensk kritik efter avvisningsstopp' (Severe Swedish Criticism after Halted Deportations) *Svt Nyheter* (17 November 2010) <www.svt.se/nyheter/inrikes/hard-svensk-kritik-efter-avvisningsstopp> accessed 24 June 2015; cf the annual report of the Board *Årsredovisning Migrationsverket* 2011 (Dnr 112–2012–393) 33.

extradite a man to Rwanda to stand trial for genocide and crimes against humanity. During the proceedings, he had been remanded into custody. After he had lodged a case before the ECtHR, the Swedish authorities had suspended the extradition, following an indication from the ECtHR under its Rules of Court. The case before the Supreme Court concerned whether he should remain in custody. The court noted that the ECtHR had decided that the case should be given priority. In spite of this, the case had not been decided although more than two years had passed since the application to Strasbourg. The Supreme Court stated that the workload of the ECtHR is well known, but that lack of resources or inefficiency should not be to the disadvantage of the individual. The court concluded that the handling of the case was not reasonably efficient, and that there was uncertainty as to when the proceedings before the ECtHR would reach a final decision. Against this background, the court decided that the defendant should be released from custody. A certain degree of irritation on part of the Supreme Court judges may be detected in the rather straightforward wording of the decision. In the judgment of the ECtHR, which was delivered in October 2011, the section headed *Events during the proceedings before the Court* briefly mentions that the applicant was released from detention by the Supreme Court in July the same year. The ECtHR did not make any further remarks relating to the criticism from the Swedish Supreme Court.⁴¹

Given the strong weight traditionally given to the protection of the freedom of the press in Sweden, it is no surprise that the ECtHR case law relating to mass media occasionally has given rise to criticism. In the *von Hannover* case⁴², the ECtHR found that there had been a breach of the right under Article 8 of the ECHR since the German courts had not struck a fair balance between the competing interests of private life and the freedom of expression.⁴³ In the Swedish constitutional setting, the outcome of the case may interfere with the provisions of the 1949 Freedom of the Press Act and the 1991 Fundamental Law on Freedom of Expression⁴⁴, the latter protecting expressions in radio, television and certain other types of mass media.⁴⁵

The *Justitiekansler* (Chancellor of Justice) Göran Lambertz (later Supreme Court judge) put forward in an article in 2007 that the *von Hannover* case serves an illustration of the problems of the role of the ECtHR. He emphasised that Sweden under the convention is obliged to accept values from other cultures, although these values may deviate considerably from the Swedish ones. In

⁴¹ *Ahorugeze v Sweden* App no 37075/09 (ECtHR, 27 October 2011) para 25.

⁴² *Von Hannover v Germany*, ECHR 2004-VI.

⁴³ *Von Hannover v Germany* para 76 ff.

⁴⁴ SFS 1991:1469; Nergelius, *Media Law in Sweden* (n 3) para 84–90; Nergelius, *Constitutional Law in Sweden* (n 4) para 282–285.

⁴⁵ Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 124; for a more detailed discussion (in Swedish) see SOU 2012:55 43–44.

Lambertz's opinion, the ECtHR had gone too far in the *von Hannover* judgment. This kind of decisions should be made by the national legislatures and not by European judges. In his view, the judgment indicated a problem with the ECtHR and its activist application of the convention.⁴⁶

During the last few years, the ECHR has got much attention among Swedish lawyers concerning its case law on the *ne bis in idem* principle (Article 4 of protocol No 7 to the ECHR) in relation to the Swedish system of imposing *skattetillägg* (tax surcharge) in combination with prosecution for a tax offence.⁴⁷ In its 2004 inadmissibility decision in *Rosenquist v Sweden* the ECtHR had held that the Swedish system did not violate the *ne bis in idem* principle.⁴⁸ In *Zolotukhin v Russia*⁴⁹ and *Ruotsalainen v Finland*⁵⁰ the ECtHR revised its interpretation of what should be seen as "the same offence" in the meaning of Article 4 of protocol No 7, with implications also, as it would turn out, for Swedish law (see also below section 3.2.).⁵¹

In a comment relating to the development of this case law Sten Heckscher, former president of the Supreme Administrative Court⁵², stated that the workload of the ECtHR, regrettably, makes it an institution in crisis. He continued:

Against this background it is possible to ask questions, which ultimately concern the function, quality, and authority of the court. Is the court able to keep track of its own case law? Is it able to focus on its important mission instead of challenging convention states having a reasonable protection for human rights in mostly technical matters that have great importance for the national legal systems, but barely belong in a discussion on infringements of human rights? There must be some threshold for claims of such infringements!⁵³

⁴⁶ Göran Lambertz, 'Normprövning och demokrati' (Constitutional Review and Democracy) [2007] *Svensk Juristtidning* 809, 822 ff.

⁴⁷ See for a summary of the development of the case law in the matter *Dev v Sweden* App 7356/10 (ECHR 27 February 2015) para 17–26; see also in EU law Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; Ulf Bernitz, 'The Åkerberg Fransson Case. Ne bis in idem: Double Procedures for Tax Surcharge and Tax Offences not Possible' in Joakim Nergelius and Eleonor Kristoffersson (eds), *Human Rights in Contemporary European Law* (Hart 2015) 191.

⁴⁸ *Rosenquist v Sweden*, App no 60619/00 (ECtHR, 14 September 2004).

⁴⁹ *Zolotukhin v Russia*, ECHR 2009-I.

⁵⁰ *Ruotsalainen v Finland*, App no 13079/03 (ECtHR, 16 June 2009).

⁵¹ Ola Zetterquist, 'Ne bis in idem and the European Legal Tsunami of 2013: A Vision from the Bench' in Joakim Nergelius and Eleonor Kristoffersson (eds), *Human Rights in Contemporary European Law. Swedish Studies in European Law Volume 6* (Hart 2015) 132–134.

⁵² In Swedish *Högsta förvaltningsdomstolen*; before 2011 *Regeringsrätten* (literally the Government Court). Traditionally, both names have been translated as the Supreme Administrative Court.

⁵³ Sten Heckscher, 'Finns det någon europeisk rätt?' (Is There European Law?) in Ulrika Andersson, Christoffer Wong and Helén Örnemark Hansen (eds), *Festskrift till Per Ole Träskman* (*Festschrift for Per Ole Träskman*) (Norstedts Juridik 2011) 234 (Swedish in the original, translated by the present author).

In the same contribution, Heckscher regretted that Swedish academics to a large extent show a far-reaching servility to the ECtHR without questioning the decisions by that court.⁵⁴

Rune Lavin (see section 1.1.2.1.) put forward that the lack of consistency in the ECtHR case law was a source of irritation during his time as the president of the Supreme Administrative Court. Especially, this applied to the case law on Article 6, where the ECtHR modified principles rather soon after their introduction.⁵⁵

The ECtHR's *ne bis in idem* case law was also criticised from the standpoint of public international law. It was thus argued that the Court's case law sometimes goes beyond the legitimate scope of interpretation allowed for by the 1969 Vienna Convention on the Law of Treaties. In such situations, the Court acts beyond its competence (*ultra vires*), which means that this kind of "progressive" case law not necessarily should be regarded as valid. As in other situations of actions *ultra vires* in public international law, states may decide to accept or refute this case law.⁵⁶

There are too few instances of negative appraisal of the ECtHR and its case law in Swedish debate to draw any general conclusions on the character of this criticism. It might, however, be noted that the criticism from the Migration Board and the Supreme Court related to individual cases before the ECtHR. Even though also Heckscher and Lambertz took individual cases as their point of departure, their criticism was more systemic in nature, as was also Lavin's. As already indicated, this kind of systemic criticism is not common in Swedish legal debate. Given the traditional constitutional focus on popular sovereignty and the limited role of judges in matters considered to be political, enshrined in the 1974 Instrument of Government, it is somewhat surprising that there has not been more criticism of the ECtHR's case law. The incorporation of the convention into a Swedish act of law does not, generally speaking, seem to have given rise to a more critical view on the role of the ECtHR. The explanation for this may be sought in the historic function of the ECHR in raising the standard of constitutional protection of rights in Sweden.

Rather interestingly, there has also been little attention to the ECtHR case law in Swedish media. Apart from the explanation already mentioned, it may be speculated that this has to do with the relatively limited media attention to matters of constitutional law, including aspects of European law. This may in turn be connected to the weak constitutional tradition and the focus on politics, rather than legal argumentation, in public debate. In many instances, it seems

⁵⁴ *Ibid* 232 f.

⁵⁵ Lavin (n 16) 355.

⁵⁶ Fredrik Stenhammar, 'Internationell anarki i svenska domstolar? Ett folkrättsligt perspektiv på "HD-upproret" om skattetilläggen' (International Anarchy in Swedish Courts? A Public International Law Perspective on the "Uprising against the Supreme Court" on Tax Surcharges) [2011/12] *Juridisk tidskrift vid Stockholms universitet* 477, 491 ff.

as if discussions on fundamental laws, EU law, and the ECHR are perceived as technical matters of interest only to specialists.

2. COUNTER-DYNAMICS AT THE POLITICAL LEVEL

2.1. POLITICS AND THE CONVENTION SYSTEM

As already mentioned, the Convention system is in general not a topic in the political debate in Sweden. The ECHR is generally not mentioned in the party platform documents of the political parties represented in the *Riksdag*, although these documents usually make reference to the protection of human rights. Occasionally, in specific matters, the ECHR and the ECtHR case law may be used as arguments in the political discussion. However, there has not been any discussion on the need for the Convention system as such or the Swedish participation. Interestingly, *Sverigedemokraterna* (the Sweden Democrats), a nationalist party opposing immigration and EU Membership, has not publicly criticised the ECHR or the ECtHR. In a number of private members' motions in the *Riksdag* (the parliament) on freedom of association and situations of exclusion from trade unions with reference to political views, representatives of that party have expressed support for the rights under the Convention system.⁵⁷

As mentioned above (section 1.1.1.) the Social Democrats traditionally have opposed judicial assessment of matters perceived as being political. However, in the current debate, there seems to be little opposition to the Convention system from that party. As all other parties represented in the *Riksdag*, the Social Democrats today seem to endorse the convention system.

As a special form of counter-dynamics at the political level, the discussions on the *Gustafsson v Sweden*⁵⁸ case may be mentioned, although they go back to events some decades ago and thus do not necessarily reflect current attitudes. The case concerned the politically sensitive matter of the scope for trade unions' industrial action measures to force an employer to be part of a collective agreement. Representatives of the Swedish trade unions allegedly suggested that an outcome demanding a proportionality assessment would require Sweden to withdraw from the convention and then ratify it again with a reservation.⁵⁹

⁵⁷ Mot. (*Motion – Private Members' Motion*) 2011/12:K387; 2012/13:K283; 2014/15:66.

⁵⁸ *Gustafsson v Sweden*, ECHR 1996–II.

⁵⁹ Bo G. Andersson and Lilian Öhrström 'Politisk seger: M var berett att backa. Seger för Gustafsson kunde minska fackets makt' [Political Victory: Moderate Party was Ready to Give in. Victory for Gustafsson could Diminish Trade Union Power] *Dagens Nyheter* (Stockholm, 22 October 1996).

In the case, the ECtHR held that there had not been a violation of Article 11 of the ECHR (freedom of association), that Article 1 of Protocol No 1 (protection of property) did not apply to the matters complained of by the applicant, and that Articles 6 (right to a fair hearing) and 13 (right to an effective remedy) did not apply in the case. After the procedure before the ECtHR, there were allegations that the Government had put forward incorrect factual information before the court. In a series of articles, the Swedish newspaper *Dagens Nyheter* claimed that the state had used misleading material from the trade unions.⁶⁰ The ECtHR later dismissed a request for revision.⁶¹

2.2. POLITICAL STRATEGIES AT THE EUROPEAN LEVEL: REFORM OF THE CONVENTION SYSTEM

In this section, some remarks are made on the Swedish political strategies relating to reform of the Convention system. The following account is based on Swedish governmental and parliamentary materials and on Council of Europe materials.

In the process of reforming the Convention system, the Swedish Government⁶² expressed a strong support for such reforms. During its chairmanship of the Committee of Ministers in 2008, Sweden took initiatives to make it possible for the ECtHR to apply the central provisions of Protocol No 14 to the ECHR, awaiting Russia's ratification of that protocol. These initiatives included Protocol No 14*bis* to the ECHR. The Swedish Government also engaged actively in the committees established as a result of the Interlaken

⁶⁰ Bo G. Andersson and Lillian Öhrström 'Staten använde falska uppgifter: restaurangägaren Torgny Gustafsson på Gotland fälldes på ett anonymt telefonsamtal' [The State used False Information: Restaurant Owner Torgny Gustafsson on Gotland was judged after Anonymous Phone Call] *Dagens Nyheter* (Stockholm, 20 October 1996) www.dn.se/arkiv/nyheter/europadomstolen-staten-vann-pa-falska-uppgifter-resturangagaren-torgnygustafsson-pa/ accessed 4 August 2015; Bo G Andersson och Lillian Öhrström 'Målet mot Gustafsson: Politiskt spel i rätten. Regeringen visste om att LO:s uppgifter var hörsägen' [The Case against Gustafsson: Political Game in Court] *Dagens Nyheter* (Stockholm, 21 October 1996) www.dn.se/arkiv/nyheter/malet-mot-gustafsson-politiskt-spel-i-ratten-regeringen-visste-om/ accessed 4 August 2015; Bo G Andersson och Lillian Öhrström 'Bristande bevisning om Iherbaden. Presidenten i Europadomstolen kritisk. "Regeringen har ansvar"' [Insufficient Evidence on the Iherbaden. ECtHR President Critical. "The Government is Responsible"] *Dagens Nyheter* (Stockholm, 5 November 1996) <www.dn.se/arkiv/nyheter/bristande-bevisning-om-ihrebadan-presidenten-i-europadomstolen-kritiskregeringen-har/> accessed 4 August 2015; Cameron and Bull (n 27) 292.

⁶¹ *Gustafsson v Sweden* [II], ECHR 1998-V.

⁶² After the election in 2006 until the one in 2014 the Government was formed by a conservative/liberal coalition between the Moderate Party, the Liberal Party, the Centre Party, and the Christian Democrats. After the election in September 2014 a coalition between the Social Democratic Party and the Green Party forms the Government.

conference in February 2010.⁶³ The Committee on Foreign Affairs of the *Riksdag* welcomed the strong Swedish commitment to the reform and the engagement in the committees. It noted that there had been discussions on the introduction of application fees for complaints to the ECtHR. The committee held that it did not look favourably on such a development.⁶⁴ As far as can be established by the accounts of governmental and parliamentary work in the field, there has been political unity on the support for the Government's engagement in the reform process.

During the high level conference in Brighton in 2012, Sweden supported the adoption of the UK's draft declaration. Especially, Sweden welcomed the draft's focus on national implementation and execution of ECtHR judgments.⁶⁵ This focus of the Government well reflected the positions expressed by the Committee on Foreign Affairs.⁶⁶ The priorities of the Government in relation to the reform process were reiterated at the high level conference in Brussels in 2015.⁶⁷

In 2015, the Government proposed that the *Riksdag* approve Protocol No 15 to the ECHR and amend the Swedish Act on the European Convention. The proposed legislation did not include any adaptations of the domestic court procedure.⁶⁸

2.3. POLITICAL STRATEGIES AT THE NATIONAL LEVEL

As mentioned above, the criticism of the ECtHR has been very limited. The examples of criticism put forward in section 1.2. to a large extent focus on the shortcomings of the Convention system concerning an efficient adjudication of cases. The Swedish Government's engagement in reform of the ECtHR may be seen as a result of the general awareness of the problems. As indicated in the preceding section, the reform of the ECtHR has not been a major or controversial matter in Swedish politics. To the knowledge of this author, there have not been any political proposals aiming at diminishing the importance of the ECtHR. Nor are there any signs of such intentions from the political parties represented

⁶³ Skr (Skrivelse – Written communication from the Government) 2010/11:54 *Redogörelse för verksamheten inom Europarådets ministerkommitté m.m. år 2009 samt första halvåret 2010* (Account of the Activities in the Committee of Ministers of the Council of Europe, etc 2009 and the first half of 2010) 7 f.

⁶⁴ Bet 2010/11:UU12 *Europarådet* (The Council of Europe) 14.

⁶⁵ Council of Europe, *Proceedings. High Level Conference on the Future of the European Court of Human Rights, 18–20 April 2012* (H/Inf [2012] 3) 93.

⁶⁶ Bet 2011/12:UU17 *Europarådet* (The Council of Europe) 23.

⁶⁷ Council of Europe, *Proceedings. High-Level Conference on the Implementation of the European Convention on Human Rights, our shared responsibility, Brussels 26–27 March 2015* (H/Inf [2015] 1) 111.

⁶⁸ Prop 2015/16:18 *Ändringsprotokoll nr 15 – Nya regler för att öka Europadomstolens effektivitet* (Amendment Protocol No 15 – New Rules to Enhance the Efficiency of the European Court).

in the *Riksdag*. As stated above (section 2.1.) the convention – and apparently also the ECtHR’s case law – enjoys a high degree of support on all sides of the political spectrum.

In line with what has been said, there is not much attention given to the judgments of the ECtHR in contemporary Swedish politics. When necessary, legislative proposals address matters relating to the ECHR and the ECtHR case law. The legislative procedure in Sweden normally includes an official report drafted by experts, which is published and thus may be subject to public debate. Under the constitutional framework the Government shall require comments from authorities concerned when drafting a legislative proposal. Also private entities are given an opportunity to express opinions on suggested legislation.⁶⁹ Furthermore, *Lagrådet* (the Council on Legislation), a constitutional body consisting of members coming from the Supreme Courts, shall scrutinise legislative proposals and give attention to possible constitutional aspects, including the relation to the ECHR. This all means that possible conflicts with the ECHR or ECtHR case law are likely to be high-lighted in the legislative process.⁷⁰ Given the high political esteem of the ECHR, it is probable that the Government and *Riksdag* generally are prepared to adjust proposals in order to match the requirements of the ECHR. The same would apply to situations where new ECtHR case law affects existing Swedish legislation. Situations where the Swedish legislature has refused to adapt Swedish legislation in order to comply with a judgment from the ECtHR, or where legislation has limited the impact of ECtHR case law through restrictive interpretation, seem to be rare. This author is not familiar with any such examples (see, however, section 3.2. below concerning the alleged passivity on part of the Swedish legislature concerning the development after the *Zolotukhin* judgment).

3. COUNTER-DYNAMICS AT THE JUDICIAL LEVEL

3.1. NATIONAL SUPREME COURTS AND THE CONVENTION SYSTEM

As already indicated, Sweden has two parallel supreme judicial bodies. The Supreme Court adjudicates criminal and civil cases and the Supreme Administrative Court is the last instance for administrative cases, including matters of social security and taxation.⁷¹ The judgements of the supreme courts

⁶⁹ Ch 7 s 2 of the 1974 Instrument of Government; Vogel (n 38) 30–32.

⁷⁰ Ch 8 s 20–21 of the 1974 Instrument of Government; Cameron, ‘Protection of Constitutional Rights in Sweden’ (n 6) 493 and 503.

⁷¹ Ch 11 s 1 of the 1974 Instrument of Government.

are not formally binding on lower courts and their judges, but are nevertheless respected as precedents to a very high degree.⁷²

These courts have the same scope for constitutional review as other courts. If a court finds that a provision conflicts with a rule of fundamental law or superior statute, it shall set aside that provision in the individual case, this according to ch 11 s 14 of the 1974 Instrument of Government. (Interestingly, the same applies for administrative bodies according to ch 12 s 10, a rule that illustrates the unclear distinction between courts and administrative agencies in the Swedish constitutional system.⁷³) As mentioned above, the limitation to manifest errors in ch 11 s 14 was abolished in 2010. At the same time, as a result of a political compromise, a second paragraph was introduced demanding that the court pay attention to both the role of the *Riksdag* as the representative of the people and the precedence of fundamental laws.

The wording of the provision reflects a development in Swedish constitutional law, where constitutional review gradually has grown more important, partly under the influence of the ECHR. If adopted legislation should conflict with the ECHR – perhaps owing to new case law from the ECtHR – the court should, as discussed above (section 1.1.2.1.) apply the domestic legislation in conformity with the ECHR or, if that is not possible, set aside the relevant Swedish provision in the individual case. The latter situation is seen as a special case of applying the constitutional review procedure under of the Instrument of government.⁷⁴ According to a study of case law of the Supreme Courts, the Courts of Appeal, and the Administrative Courts of Appeal from 2000 to 2010, there is a strong tendency that the courts opt for interpretation in conformity with the ECHR instead of setting aside Swedish provisions.⁷⁵

3.2. JUDICIAL STRATEGIES: LIMITS TO FOLLOWING THE EUROPEAN COURT OF HUMAN RIGHTS' CASE LAW

As described above, the ECHR has gradually extended its impact on Swedish law, especially after incorporation of the convention. However, at least in some situations, there have been examples of the two supreme courts limiting the impact of the ECHR and its case law in Swedish courts. Although the case law

⁷² See Vogel (n 38) 34.

⁷³ Henrik Wenander, 'Förvaltningens lagprövning' [Constitutional Review by the Administrative Sector] [2015] *Förvaltningsrättslig tidskrift* 421; Cameron and Bull (n 27) 270 describes the Swedish system for constitutional review as 'extremely diffuse'.

⁷⁴ Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 196–197.

⁷⁵ Karin Åhman, *Normprövning. Domstols kontroll av svensk lags förenlighet med regeringsformen och europarätten 2000–2010* (Constitutional Review. Court Control of Swedish Law's Conformity with the Instrument of Government and European Law) (Norstedts Juridik 2011) 209.

has clarified important aspects, there are still some uncertain points concerning the status of the ECHR in Swedish law.

To start with, the constitutional status of the ECHR (see section 1.1.2.1.) implies that conflicts between Swedish fundamental laws and the convention that cannot be solved through ECHR conform interpretation, will have to be solved to the advantage of the domestic fundamental law. The Supreme Administrative Court case *RÅ* 2006 ref. 87 concerned a request for access to public documents, which is a constitutionally protected right laid down in the Freedom of the Press Act. As provided for in that fundamental law, an exhaustive catalogue of exceptions to the right of access to documents is set out in a special act of law (at the time of the case the Secrecy Act).⁷⁶ In the case, a person had requested access to documents concerning the recruitment of certain higher ranking civil servants of *Riksrevisionen* (the Swedish National Audit Office). The Supreme Administrative Court stated that there was no exception in the Secrecy Act from the principle of publicity in this case. Concerning an argument basing on the right to privacy (for the civil servants) under Article 8 of the ECHR, the court held that the right to access to document was laid down in a fundamental law, without any exceptions in the Secrecy Act concerning the rights under the ECHR. Therefore, secrecy to the benefit of the individuals concerned could not be founded on the ECHR.⁷⁷

Furthermore, a special – and criticised – case involving the ECHR was the Supreme Court case *NJA* 1998 s. 817. It concerned the recognition of a Norwegian judgment on tort liability relating to defamation in a much discussed television film on seal hunting in Norway. The respondent, who lived in Sweden and had been held liable in a Norwegian court, claimed that the enforcement of the judgment would violate his right to free speech under Article 10 of the ECHR. The Supreme Court referred to the ECtHR case *Iribarne Perez* as well as to Danelius's influential Swedish commentary to the ECHR and ECtHR case law.⁷⁸ The court concluded that its assessment of the conformity of the Norwegian judgment with the ECHR could not amount to a full reassessment. Considering the procedure before the Norwegian court and its balancing of interests involved, the Supreme Court held that the Norwegian judgment did not involve a violation of Article 10 of the ECHR. Later, the ECtHR found that Norway had violated the respondent's rights under the convention.⁷⁹ Joakim Nergelius, professor of public law at Örebro University, has described the Supreme Court judgment as

⁷⁶ Sekretesslag (Secrecy Act) *SFS* 1980:100; now replaced by the Offentlighets- och sekretesslag (Access to Information and Secrecy Act) *SFS* 2009:400.

⁷⁷ Cameron and Bull (n 27) 275.

⁷⁸ *Iribarne Pérez v France* (1995) Series A no 325-C; Danelius (n 29).

⁷⁹ *Bladet Tromsø and Stensaas v Norway*, ECHR 1999-III. A subsequent application to the ECtHR against Sweden was declared inadmissible, *Lindberg v Sweden* App no 48198/99 (ECtHR, 15 January 2004).

a “clear error” and “embarrassing”.⁸⁰ Rather than being an example of a judicial strategy of limiting the impact of the ECHR, the outcome may be explained by the high degree of trust between the Nordic countries.⁸¹

On a more general level, the two supreme courts have reasoned along lines limiting the impact of the ECtHR case law through a requirement of “clear support” to set aside domestic legislation. The focal point of this discussion has been the *ne bis in idem* principle relating to tax surcharges and the changes in the ECtHR case law (see section 1.2.).

This development may be linked to the concern over the quality and consistency in the ECtHR case law expressed by high ranking judges (see section 1.2.). In RÅ 2009 ref. 94 the Supreme Administrative Court thus held:

The two new judgments of the European Court of Human Rights in 2009 [*Zolotukhin v Russia* and *Ruotsalainen v Finland*] indicate a development of the case law of the court. However, they do not concern the Swedish legal system [...]. The Supreme Administrative Court concludes that the regime that applies under Swedish internal legislation is compatible with the ECHR.⁸²

In a criminal case relating to tax offences, NJA 2010 s. 168 I–II, the Supreme Court underlined the responsibility of the legislature to make sure that Swedish legislation follows the ECHR concerning more systemic matters. The Supreme Court thereafter referred to previous case law and stated that a precondition for setting aside a regime that applies under Swedish internal legislation should be that there is clear support in the convention or in the ECtHR case law.⁸³

This development was not uncontested. The case law of the supreme courts led to what has been called a judicial uprising among lower courts. A number of lower courts distanced themselves from the Supreme Court interpretation of the ECtHR case law in their judgements, whereas others stood by the precedents of the supreme courts. This was a most unusual situation for the Swedish court system.⁸⁴

The professor of public law at Uppsala University (later Supreme Administrative Court judge) Thomas Bull put forward in 2012 that the requirement of “clear support” established in the case law was unfortunate,

⁸⁰ Nergelius, *Constitutional Law in Sweden* (n 4) para 322; Nergelius, *Media Law in Sweden* (n 3) para 75.

⁸¹ Ulf Bernitz, ‘Nordic Legislative Co-operation in the New Europe: a Challenge for the Nordic Countries in the EU Perspective’, [2000] 39 *Scandinavian Studies in Law* 29, 30–31; Henrik Wenander, *Fri rörlighet i Norden. Nordiska gränshinder i rättslig belysning* (Free Movement in the Nordic Area. Nordic Border Barriers in Legal Perspective) (Juristförlaget i Lund 2014) 9–10.

⁸² Swedish in the original, translated by the present author.

⁸³ NJA 2010 s. 168 I para 32 and 37; see for the establishment of the “clear support” requirement NJA 2000 s. 622 and NJA 2004 s. 840; Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 199; Cameron and Bull (n 27) 279–283.

⁸⁴ Zetterquist (n 51) 133.

since it practically requires the existence of a ECtHR case dealing explicitly with Swedish law in order to set aside Swedish legislation. This would mean that the national court would not assess the interpretation of the ECHR on its own. Instead, the court would leave this to the ECtHR, an institution in crisis. As an alternative, Bull suggested, the Swedish courts should act loyally with the convention system and interpret the ECtHR case law to find out whether the case law on a certain matter is relevant to Swedish law. In his view, the practical effect of a court setting aside a Swedish provision conflicting with the ECHR is not very dramatic. Applying the ECtHR case law also in situations that do not fall under the “clear support” requirement does not have the capacity of breaking down entire systems of national law. It may only imply that a certain provision will not be applied until the legislature has altered the relevant provision. If Swedish courts would engage in the suggested kind of interpretation of the ECtHR’s case law, this would lighten the workload for the ECtHR and constitute a basis for a judicial dialogue much needed for the convention system to work in practice. Bull noted that there already were examples of this suggested approach in the Supreme Court’s case law, eg in *NJA* 2005 s. 462 concerning the right to damages (see section 1.1.2.2.).⁸⁵

The matter of *ne bis in idem* in relation to the Swedish system of tax surcharges later reached the CJEU. In the *Åkerberg Fransson* case, the CJEU held that EU law precludes the upholding of a requirement of “clear support” in relation to the EU Charter of Fundamental Rights.⁸⁶ After this case, the Supreme Court, sitting in plenary, in *NJA* 2013 s. 502 elaborated on the “clear support” requirement in relation to the ECHR. The court now stated that the point of departure is that a Swedish court must be able to set aside an act of law which violates the ECHR, also in situations when the matter has not yet been assessed by the ECtHR. There are, however, reasons to show restraint. Factors such as the importance of the right, the type of legislation, the legal and practical consequences, as well as the opportunities for the legislature to adapt Swedish legislation to the ECHR need to be taken into account.⁸⁷ The Supreme Court concluded that there now was support for viewing the Swedish regime on tax surcharges and criminal sanctions as violating the ECHR. The Supreme Court further remarked that “[t]he development of the law in the European Court for Human Rights since 2009 has not brought about the legislative measures

⁸⁵ Thomas Bull, ‘Vem axlar Europadomstolens börda? Europarätten som ett gemensamt ansvar’ (Who Takes over the Burden of the ECtHR? European Law as a Common Responsibility) in Thomas Bull (ed), *Fundamentala fragment. Ett konstitutionellt lapptäcke* (Fundamental Fragments. A Constitutional Piece of Patchwork) (Iustus 2013), also published in Johan Hirschfeldt and others (eds), *Vänbok till Sten Heckscher (Liber Amicorum for Sten Heckscher)* (Iustus 2012).

⁸⁶ C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105 para 48.

⁸⁷ *NJA* 2013 s. 502 paras 54 and 55.

that could have been expected”, thus relating to its statements in 2010 on the responsibility of the legislature.⁸⁸

This decision has been seen as an attempt at upholding the traditional Swedish view on the division of functions between the judicial and legislative bodies. Furthermore, it may also be seen as limiting the impact of the “clear support” requirement. At the same time, the decision promotes some degree of judicial restraint concerning the impact of ECtHR case law.⁸⁹

The described requirement of “clear support” in the case law of the supreme courts should not be seen as creating room for entirely deviating from the case law of the ECtHR, but rather as a narrow interpretation of the impact of this case law. The legalistic approach traditionally taken in Swedish legal culture, with its great respect for hierarchies, seems to imply that the ECHR as well as the case law of the ECtHR is respected. To this author’s knowledge, there have not been any discussions suggesting that a Swedish court simply should disregard a judgment of the ECtHR. After all, as stated above, the ECHR is held in high esteem, and is since 1995 also incorporated in the Swedish legal system as an act of law.⁹⁰ The development of the “clear support” requirement may be seen as an attempt to solve the conflict of loyalties to the national legislature and the ECtHR. This conflict may be seen as the result of the constitutionally unclear position of the ECHR, and even more so the case law of the ECtHR, in relation to hierarchy of norms in Swedish law.

As already touched upon, there have also been examples of a less restrictive way to deal with the impact of the ECtHR case law. Whereas the two supreme courts seem to have applied the “clear support” requirement in certain situations where the ECtHR case law would have called for setting aside national legislation, the courts in other cases have interpreted the applicable legislation in conformity with the ECHR and the ECtHR case law.⁹¹ In such cases, there has not been any reference to a requirement of “clear support”. This latter case law of the supreme courts has developed prior and parallel to the development of the “clear support” requirement.

⁸⁸ The Government had, however, appointed a commission of inquiry in 2012, which normally is the first stage of the legislative procedure. A few months after the Supreme Court decision in *NJA* 2013 s. 502, the commission presented its findings and suggestions in *SOU* 2013:62 *Förbudet mot dubbla förfaranden och andra rättssäkerhetsfrågor i skatteförfarandet (Ne bis in idem and other Matters of Legal Certainty in the Tax Procedure)*. In 2015, the Government proposed legislative changes in Prop 2014/15:131 *Skattetillägg: Dubbelprövningsförbudet och andra rättssäkerhetsfrågor (Tax Surcharges: Ne bis in idem and other Matters of Legal Certainty)*.

⁸⁹ Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 201; Cameron and Bull (n 27) 282–283.

⁹⁰ Nergelius, *Constitutional Law in Sweden* (n 4) para 332 remarks that there is a “very clear – perhaps even too big – respect from the Supreme Court in relation to the ECtHR”.

⁹¹ Cameron and Bull (n 27) 279–280.

An alternative to strategies limiting the impact of the ECtHR case law could be a judicial dialogue between national supreme courts and the ECtHR. The procedural setting means that there is not always room for a direct dialogue within a case, such as in the CJEU system of referrals for preliminary ruling (see, however, the regime of advisory opinions envisaged in Protocol No 16 to the ECHR). In some instances, for example in the *NJA* 2005 s. 805 case just mentioned, the national application of the ECtHR to the favour of the individual means that the substance of the case may not be dealt with by the ECtHR.

In situations where the individual has exhausted the domestic remedies without reaching the desired outcome, the situation of course is different. Cameron and Bull have highlighted the case *Vejdeland and others v Sweden*⁹² as a good example of dialogue with the ECtHR. The case concerned the Supreme Court judgement *NJA* 2006 s. 467, where a group of persons had been convicted of incitement to hatred against a group for distributing leaflets expressing contempt of homosexuals in a school. The persons claimed that their freedom of expression under Article 10 of the ECHR had been infringed. The ECtHR, however, concluded that the balancing of interests carried out by the Supreme Court was not disproportionate and that the reasons given did fulfil the requirements of the convention. The transparent reasoning of the Supreme Court may have helped to show the ECtHR that the ECHR aspects were assessed in a serious way.⁹³

3.3. JUDICIAL STRATEGIES: NATIONAL DYNAMICS IN FUNDAMENTAL RIGHTS PROTECTION

3.3.1. *The Place of ECHR and the ECtHR Case Law in Rights Protection*

As touched upon above (section 1.1.), the historical development of constitutional review has taken place during a long time and has gone from a very limited review to today's wider mandate. The abolition of the requirement that an error in an act of law or governmental ordinance be manifest in order to set aside the provision has, at least nominally, widened the scope. Under the Instrument of Government, both courts and other public bodies have the competence – and indeed the duty – of setting aside provisions in conflict with the constitutional provisions (see section 3.1.). Since the Instrument of Government provides that legislation contravening the ECHR may not be adopted, the mandate for ECHR review could be seen as rather strong. However, this mandate is not necessarily as strong in practice. As has been shown above (section 3.1.), the case law, most specifically the “clear support” requirement has limited the scope for

⁹² *Vejdeland and others v Sweden*, App no 1813/07 (ECtHR 9 February 2012).

⁹³ Cameron and Bull (n 27) 283.

such review. In legal literature, this requirement has been described as being analogous to the margin of appreciation for the states established in the ECtHR case law.⁹⁴ Swedish supreme courts do not seem to have used arguments relating to the margin of appreciation allowed for by the ECtHR to any higher degree.

Furthermore, the legal culture of the courts may also limit the scope for review. Vital parts of this legal culture include the traditional confidence in the wisdom of the legislature and a tendency to adhere to written legislation and *travaux préparatoires* rather than perhaps unclear ECtHR judgments dealing with foreign jurisdictions (see sections 1.1.1. and 3.2.). The thorough legislative process may also mean that it is less likely that legislation in conflict with the ECHR is adopted (see section 2.3.).

Given the historical development of the protection of rights, it comes as no surprise that the ECHR and the ECtHR case law normally form an important part of the argumentation in Supreme Court and Supreme Administrative Court cases involving fundamental rights. Cameron and Bull have concluded that “Swedish courts routinely make reference to major cases from the ECtHR and national standard literature on the Convention”.⁹⁵ The most important piece of literature seems to be Hans Danelius’s Swedish commentary to the ECHR and the ECtHR case law, mentioned above (section 1.1.2.1.).

However, the point of departure in the courts’ reasoning as set down in the judgments normally is the Swedish legal framework. This may be seen as natural, given the somewhat unclear constitutional status of the ECHR as compared to the clearly constitutional fundamental laws. The method may be exemplified by the Supreme Court case *NJA* 2005 s. 805 (see section 1.1.2.2.). There, the Supreme Court assessed the situation first under relevant Swedish criminal law, then in relation to domestic constitutional law, and finally to the ECHR and the ECtHR case law. The judgment may be seen as a statement of the status of the convention as a supplement to the domestic Swedish constitutional protection of rights through ordinary legislation and constitutional limits for the legislature.⁹⁶ Also the Supreme Administrative Court normally applies such a method.⁹⁷

NJA 2012 s. 400 concerned a person in possession of Manga style comic drawings depicting children in sexual situations. In assessing whether the defendant should be convicted for child pornography crime, the Supreme Court referred to the provisions on freedom of speech and freedom of information under the Instrument of Government. The court concluded that a proportionality assessment in connection to the provisions meant that the Penal code rules on child pornography should be interpreted as not including the possession of the current drawings. Given this outcome, the Supreme Court stated that it was

⁹⁴ Cameron and Bull (n 27) 280.

⁹⁵ Cameron and Bull (n 27) 276.

⁹⁶ Cameron, *An Introduction to the European Convention on Human Rights* (n 22) 139.

⁹⁷ Lavin (n 16) 355.

not necessary to examine whether it is contrary to the ECHR to criminalise the possession of such drawings. Dag Victor, a former judge of the Supreme Court, criticised the latter judgment for not looking into the ECtHR case law and for not commenting upon whether the ECHR influences the interpretation of the Instrument of Government.⁹⁸

The method of first looking into the fundamental rights of the Instrument of Government (and the Freedom of the Press Act and the Fundamental Law on Freedom of Expression) is, naturally, only available where there are parallel regulations in Swedish fundamental laws and the ECHR. In situations where there are no counterparts to ECHR rights in Swedish fundamental laws, the courts will have to refer only to the relevant convention Article. This used to be the situation for cases concerning the right to a fair trial, where references to Article 6 of the ECHR and the relevant ECtHR case law were the natural point of departure, apart from domestic procedural legislation (see section 1.1.1.). Even since the introduction of a right to a fair trial under the Instrument of Government (ch 2 s 11), the supreme courts tend to focus on art 6, omitting references to the Instrument of Government provision or mentioning it only briefly.⁹⁹

3.3.2. *A Shift in the Constitutional Role of Swedish Courts?*

The limited role of the courts in the Swedish constitutional system has historically meant that the supreme courts rarely have been in the focus of interest when it comes to solving societal problems. Consequently, the courts have not taken the lead in the development of rights. However, especially the development of the Supreme Court case law has to some extent changed this. During the last few years, the judgments of the Supreme Court may be seen as bolder in relation to the traditional role of Swedish courts in the constitutional division of functions. This development has been questioned in the light of the division of competences between the democratically elected politicians of the *Riksdag* and the judges of the Supreme Court. The critical remarks have also included the changed views on the *ne bis in idem* case law.¹⁰⁰ Notably, this development does not seem to have taken place in the Supreme Administrative Court. Consequently, the latter court has not been discussed in the same way as the Supreme Court.

⁹⁸ Dag Victor, 'Svenska domstolars hantering av Europakonventionen' (Swedish Courts' Handling of the European Convention) [2013] *Svensk Juristtidning* 343, 395.

⁹⁹ Eg *NJA* 2015 s. 222 para 6.

¹⁰⁰ See the criticism put forward by the president of the Svea Court of Appeal Fredrik Wersäll, 'En offensiv Högsta domstol. Några reflektioner kring HD:s rättsbildning' (A Supreme Court on the Offensive. Some Reflections on the Case Law of the Supreme Court) [2014] *Svensk Juristtidning* 1.

In this way, the Supreme Court may be said to have taken a lead in establishing or even developing rights for individuals. Examples already mentioned include the case law on the right to compensation founded directly on the ECHR starting with *NJA* 2005 s. 462 and on *ne bis in idem* starting with *NJA* 2013 s. 502 (however, first after a preliminary ruling from the CJEU). In the latter case, the Supreme Court explicitly referred to the passivity of the legislature as a background to its judgment on the matter. As far as is known to this author, this new role of the Supreme Court has not led to any conflicts with the ECtHR. Rather, the ECtHR has in fact expressed support for the Supreme Court case law on the right to compensation. In *Eriksson v Sweden* the ECtHR, referring to *NJA* 2009 N 70 (see section 1.1.2.2.), welcomed the development of this case law, which had as a consequence that individuals first had to seek compensation in Swedish courts before being considered to having exhausted domestic remedies. The ECtHR further remarked that both the Supreme Court and the Chancellor of Justice (who is responsible for deciding on damages claims against the state in a procedure alternative to claiming damages before a court) “have made frequent use of the Court’s case law when considering the cases before them”.¹⁰¹

It has been argued that the Supreme Court in some instances have given the rights a broader scope than required by the ECHR and the ECtHR case law. Commentators have put forward the case *NJA* 2009 s. 463 as an example of this. There, the Supreme Court held that an individual was entitled to damages from a municipality (which, under Swedish law, is an independent public body separated from the state) for infringements of convention rights.¹⁰²

4. CONCLUSION

To conclude, there is, as stated at the outset, rather little criticism of the ECtHR and its case law in Swedish legal debate. In politics, examples of critical attitudes seem to be even more rare. Above, a few explanations have been put forward. They may be summarised as follows.

First, the development of the protection of fundamental rights in Sweden has meant that the ECHR – and the ECtHR – may have been seen as a positive force offering the formal constitutional protection of the fundamental rights in Sweden that traditionally had been lacking. The reputation of the ECtHR has probably gained from the fact that the cases against Sweden have not involved aspects that are controversial to the greater public. Second, in the political perspective, it might be undesirable to appear as being opposed to human rights and the ECtHR as the institution responsible for protecting these rights. Third, the Swedish public debate normally refrains from discussing more

¹⁰¹ *Eriksson v Sweden* App no 60437/08 (ECtHR, 12 April 2012) para 50–52.

¹⁰² Cameron and Bull (n 27) 278.

formal aspects related to constitutional law, presumably since such matters are considered as being too technical to non-lawyers. Fourth, it may be speculated that the traditional hierarchical loyalty of Swedish judges to some extent also is present in the relation to the ECtHR, not least since the ECHR has been incorporated into a Swedish act of law.

This being said, it should be borne in mind that there have been some important examples of criticism in legal debate, both relating to the handling of individual cases and to more systemic deficiencies. A recurrent feature in this criticism has been the workload of the ECtHR and the effects of this on the quality of the judgments. However, this does not amount to an overall surge in criticism of the kind that may be observed in certain other countries.

What are, then, the effects of the criticism and the awareness of the problems related to the ECtHR and the convention system? Concerning politics on a European level, Sweden has engaged in the reform of the ECtHR in various ways. Interestingly, no political parties represented in the *Riksdag* have expressed scepticism to the ECHR system and the role of the ECtHR as such. It might be noted that Sweden has supported the focus on the national level in implementation and execution of the judgments of the ECtHR. There seems to be political unity in the *Riksdag* that the suggested reforms provide reasonable solutions to the problems that the ECHR system for protection of human rights is facing.

Concerning the judicial level, it can be noted that the Supreme Court has taken a constructive path in its case law on the right to damages for infringements of the ECHR. In parallel, the Supreme Administrative Court has lowered administrative fees as a compensation to the individual whose rights have been infringed. In this way, the supreme courts have possibly contributed to lightening the caseload of the ECtHR (albeit, of course, only in relation to the relatively small country of Sweden). The ECtHR has in turn, as mentioned, welcomed the development of this case law. Furthermore, the development of the case law on the right to damages and lowered administrative sanction fees would seem to fit well with the idea of enforced domestic enforcement of the convention rights endorsed by the political level in Sweden as just mentioned.

The development of especially the Supreme Court case law may clarify the relationship between the Swedish fundamental laws and the ECHR (as well as their relation to the protection under EU law not touched upon in this contribution). In this way, the case law of the two supreme courts may reflect a legal reality more complex than the one put forward in the *travaux préparatoires* to the incorporation of the ECHR into Swedish law. An example of this development is the judgment on *ne bis in idem* in *NJA* 2013 s. 502, where the Supreme Court seemingly diminished the importance of the “clear support” requirement for setting aside domestic legislation to fulfil requirements of the ECHR and ECtHR case law. In this way, the Supreme Court made room for a

more finely tuned balancing of the involved interests on the national and European level.

NJA 2013 s. 502 also illustrates the tendency of changed dynamics of the Swedish constitutional system. Traditionally the courts, including the two supreme courts, have shown deference to the political level and avoided what could be seen as political decisions. This could be linked to the societal developments during the 20th century and the principle of popular sovereignty enshrined in the 1974 Instrument of Government. In the case, however, the Supreme Court noted the passivity of the legislature and acted itself to fulfil the requirements of the ECHR as interpreted by the ECtHR in its changed case law. The case forms part of a bigger pattern with a changed constitutional role for the courts and especially the two supreme courts linked to the obligations under the ECHR and EU law.