

VIRPI KOIVU

European Convention on Human Rights and transition of the legal culture

Reception of the argumentation of the European Court of Human Rights
by the Finnish supreme jurisdictions



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Virpi Koivu

**European Convention on Human Rights
and transition of the legal culture**

– Reception of the argumentation of the European Court of Human Rights
by the Finnish supreme jurisdictions

ACADEMIC DISSERTATION

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To get at the point when one can say that a doctoral dissertation is complete is impossible. However, it is possible to achieve a moment when one is happy with the result to the extent that the manuscript is ready to be handed over for assessment. My research may have seemed an eternal one for those who have – repeatedly – asked the question “is it done already”, but there are two good reasons for the lengthy process. First and foremost, it would not have been possible to know at the early phases of the research what is actually worth a doctoral dissertation, to get something personal and something new in the final outcome. Therefore, I took the advice of my instructors to adopt a wide approach to the topic, given the massive research materials. This was an excellent advice despite that, as a result, the exact topic has changed twice. Thus, although I introduced the preliminary field of research some ten years ago, I did not start with the analysis of the European case law until in 2008. To go through the study of European and national case law took almost six years. Second, legal culture does not change overnight. When I noticed, in the middle of my research, that there were some profound changes taking place in the discourse of the supreme jurisdictions, it gave a reason to further refine the topic. It was too tempting to let it be and instead of completing the research quickly, I decided to intentionally spend extra years observing national jurisprudence.

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IV Abbreviations

AC – Appeal Cases

BGBI – Bundesgesetzblatt

BVerfG – Bundesverfassungsgericht

BvR – Verfassungsbeschwerden

CETS – Council of Europe Treaty Series

CommDH – Commission des Droits de l'Homme

EC – European Community

ECHR – European Court of Human Rights

ECJ – European Court of Justice

ECR – European Court Reports

ETS – European Treaty Series

EU – European Union

GC – Grand Chamber

GG – Grundgesetz

HD – Högsta domstolen

HE – Hallituksen esitys (Government proposal)

ICJ – International Court of Justice

KHO – Korkein hallinto-oikeus (Supreme Administrative Court)

KKO – Korkein oikeus (Supreme Court)

NJA – Nytt Juridiskt Arkiv

PeVL – Perustuslakivaliokunnan lausunto (Opinion of the Constitutional Law Committee)

PeVM – Perustuslakivaliokunnan mietintö (Report of the Constitutional Law Committee)

RF – Regeringsform

SFS – Svensk författningsserie

TR – Tingsrätt

UK – United Kingdom

UKSC – United Kingdom Supreme Court

UN – United Nations

UNGA – United Nations General Assembly

UNTS – United Nations Treaty Series

WLR – Weekly Law Reports

1. Introduction

1.1 *European protection of human rights*

The European Court of Human Rights was established together with a Committee on Human Rights as a result of negotiations between a number of European states after the Second World War, by the European Convention for the Protection of Human Rights and Fundamental Freedoms¹ (referred to as “the European Convention on Human Rights”). The Committee has been abolished through the adoption of Protocol No. 11 which set up a single European Court of Human Rights and brought about a few other procedural amendments to the Convention. The European mechanism with the Court was created to ensure external control of compliance by the States parties to the Convention with its provisions and to provide a last resort remedy for those who have suffered violations of human rights. The European Convention on Human Rights coexists with international instruments adopted for the protection of human rights, particularly at the level of the United Nations, and is supplemented by a number of other European Conventions, such as the European Social Charter, European Convention on the Prevention of Torture and the European Convention on Human Rights and Biomedicine, as well as by the European Union Charter of Fundamental Rights. The competence of the European Court of Human Rights is limited to the protection of those rights that are set out in the European Convention on Human Rights and its additional Protocols², but when applying the Convention and interpreting the scope

1 ETS 5, as amended by Protocol No. 11 (ETS 155) and Protocol No. 14 (CETS 194). Protocols No. 15 (CETS No. 213) and 16 (CETS No. 214) have not entered into force yet. They introduce further procedural changes explained in sections 3.5 and 6.3 below. Note: Conventions and agreements opened for signature between 1949 and 2003 were published in the “European Treaty Series” (ETS No. 001 to 193 included). Since 2004, this Series is continued by the “Council of Europe Treaty Series” (CETS No. 194 and following).

2 The rights set out in the Convention and the (first) Protocol thereto include the right to life, the prohibition of torture, the prohibition of slavery and forced labour, the right to liberty and security, the right to a fair trial, no punishment without law, the right to respect for private and family life, the freedom of thought, conscience and religion, the freedom of expression, the freedom of assembly and association, the right to marry, the right to an effective remedy, and the prohibition of discrimination, as well as the right to protection of property, the right to education and the right to free elections. Those have later been supplemented with the prohibition of imprisonment for debt, the freedom of movement, the prohibition of expulsion of nationals and the prohibition of collective expulsion of aliens (Protocol No. 4, ETS No. 46), the abolition of the death penalty (in all circumstances) (Protocol No. 6, ETS No. 114, and Protocol No. 13, ETS No. 187), procedural

of those rights, it has the possibility to resort to the provisions and international case law of other human rights instruments as well as to prevailing level of protection and legal opinions existing within the national legal systems.

The European Convention on Human Rights is a regional convention, whereas the International Covenant on Civil and Political Rights is open for accession to any State. The provisions of the European Convention on Human Rights are largely based on the Universal Declaration of Human Rights, as well as on the International Covenant on Civil and Political Rights. Like the latter, the European Convention on Human Rights only provides for civil and political rights (although e.g. the First Protocol affords protection of possessions). The economic, social and cultural rights are provided for in a separate instrument also at the European level in the same way as at the international level. Thus, the European Convention and the United Nations instruments, particularly the International Covenant on Civil and Political Rights, coexist and are in principle applicable at the same time³. In principle, a person claiming to be a victim of a human rights violation can file a complaint under the mechanism of his choice, either the European Convention or the International Covenant, but it may be advisable to apply some caution for tactical reasons⁴. Furthermore, there are some conditions of access to those remedies. First, the texts of those instruments set out some conditions of admissibility of complaints. The Committee under the Optional Protocol to the Covenant does not examine a complaint which is at the same time being examined under another procedure of international investigation or settlement. Second, those States that were already parties to the European Convention on Human Rights at the moment of ratifying the International Covenant on Civil and Political Rights, entered a reservation to the text to the effect that in case the complaint has already been examined by another international monitoring body, the Committee under Optional Protocol to the Covenant has no competence to examine it. The provisions of the Covenant together with the reservations mean that the choice of procedure is somewhat limited. Of the States covered by the present study, Finland appears to be the only one without such a reservation. Although the accession to the European Convention on Human Rights took place later, Finland did not enter a comparable reservation to it either despite certain other reservations.

safeguards relating to expulsion of aliens, the right of appeal in criminal matters, the right to compensation for wrongful conviction and the right not to be tried or punished twice (Protocol No. 7, ETS No. 117), as well as an extension of the general prohibition of discrimination (by any public authority) (Protocol No. 12, CETS No. 177).

3 There may also be other international mechanisms available for seeking redress in the case of human rights violations depending on the right in question, for example under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (by filing a communication to the Committee against Torture) (UNTS, vol. 1465, p. 85).

4 Hannum 1994, p.35. Hannum suggests that it is advisable for the reason that international bodies tend to compare applications with other situations that may be more compelling.

Nevertheless, today, most applicants appear to rather file a complaint with the European Court of Human Rights particularly for the reason of a rather efficient control mechanism of the enforcement of judgments, whereas the views of the Committee are not legally binding in the same sense as the judgments of the European Court of Human Rights⁵. The numbers of complaints dealt with by the Committee are also modest with those dealt with by the European Court of Human Rights. However, according to Bunn-Livingstone, one may speak of legal pluralism in the sense that the international legal system provides for more than one legal order (i.e. a regional one and an international one) which might result in differing outcomes of proceedings. In principle, if the international legal system was understood as encompassing both international and regional human rights conventions, such a situation would in her view entail weak legal pluralism as the legal system itself provides for the alternative legal orders. However, she also points out that in the case of human rights treaties, one may speak of strong legal pluralism. This, in her view, lies in the nature of the conventions themselves as human rights are considered universal and thus the system claims universal standards instead of pluralistic ones.⁶ However, this view can also be criticised. The view of Bunn-Livingstone may be sustained in case the international human rights instruments are applied universally as such. However, the opponents of this view are also right in pointing out that despite the widespread support for the human rights conventions, not all their provisions are equally applied in all States parties to them⁷.

Thus, despite the rather universal nature of human rights and the apparent similarities between international and regional instruments, there are also differences. The differences are explained by the fact that at a regional level, States share more in common than they do on an international scale and they might, for example, be prepared to agree on a higher level of protection in some respects, whereas in others they might prefer a looser formulation than the international instrument provides for. The language used in the European Convention on Human Rights and that used the International Covenant on Civil and Political Rights have considerable similarities, which is not surprising, given that they are products of the same decade, and share a large number of States parties having contributed to the negotiations. One must not forget, however,

5 Under Article 5(4) of the Optional Protocol, the Committee shall forward its views to the State Party concerned and to the individual. Thus, the wording is not particularly strong. However, in 1990, the Committee has adopted measures to monitor compliance with its views. Under those measures, the Committee asks the State to provide information on action taken in response to a violation found, and findings on non-compliance can be published in the Committee's Annual Report. (See Hannum 1994, p. 48.)

6 Bunn-Livingstone 2002, p. 51 and 53.

7 States have, for example, introduced a number of reservations to them. This, in turn, is explained by the fact that any human rights convention reflects the legal systems and legal cultures of a large number of States – thus existing in the background – and not all the provisions are acceptable to all of them.

that there are considerable differences between legal systems and legal cultures of the variety of States parties to the European Convention on Human Rights.

Although the International Covenant on Civil and Political Rights was subject to negotiations simultaneously and was adopted slightly later, the European Convention on Human Rights together with its control mechanism meant a dramatic change to the protection of fundamental rights that had traditionally been considered to fall within the scope of national sovereignty. The constitutional traditions of protecting fundamental rights in the States parties to the Convention varied from the rather advanced ones in France and Germany to weaker ones. There were also differences in the preparedness of States parties to accept the binding jurisdiction of the created European Court of Human Rights. Despite the rather advanced pieces of legislation that had existed in Germany prior to the era of national socialism, the historical developments with the World Wars proved that it was necessary to ensure a strong protection of human rights at the European and universal levels. In the light of the Preamble to the European Convention on Human Rights, the intention of the signatories was to take into account the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948 as well as the common heritage of political traditions, ideals, freedom and the rule of law, with a view to taking the first steps for the collective enforcement of certain rights stated in the Universal Declaration. Thus, their aim was to go enforce those rights, but in some respects to go further at the European level. The feature making the European system unique is the binding nature of the final judgments of the Court under Article 46 of the Convention. However, the fact that recognition of the Court's jurisdiction remained for a long time optional weakened the development of the case law until the 1970s. The European Convention on Human Rights also provides for a further guarantee of compliance with the Convention by vesting in the Committee of Ministers of the Council of Europe a competence to supervise the execution of judgments.

The number of States parties to the European Convention on Human Rights has constantly increased, and along with the expanding workload of the European Court of Human Rights has expanded as knowledge of the Convention and of the Court has grown in the States parties. The Convention provides for inter-State cases and individual applications including applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the rights set forth in the Convention or an additional Protocol. An individual application to the European Court of Human Rights is the last resort judicial remedy, meaning that all available domestic remedies must have been exhausted first. After the final decision in the domestic proceedings, the applicants have six months to file an application. The rights protected under the Convention are not absolute, however, but the Convention provides for certain restrictions on those rights. The Convention also allows reservations, which must nevertheless not be general in character. The

possibility for restrictions provided for in the Convention has led to an extensive and complex body of case law which is increasingly also applied as a source of law by national jurisdictions when faced with cases involving the protection of fundamental rights or human rights. That case law is a unique international source of law and the European Court of Human Rights has further developed the meaning given to the provisions of the Convention through case law. The Court has also developed its own judicial style and legal language. The application and interpretation of the Court's case law has consequently led to the emergence of a body of national case law serving also today as one applicable source of law for the European Court of Human Rights.

The present study falls within the rather wide context of the application and interpretation of the case law of the European Court of Human Rights but focuses on the gradual transition of the legal culture of protecting human rights and fundamental rights in the Finnish legal system, which has developed through the discourse used in that case law and in Finnish case law, as delimited in section 1.3 below. The present study is addressed at the research community, as a contribution to a series of studies on the European Convention on Human Rights and its impact on the case law of national jurisdictions. The aim is to show, with the example of the Finnish supreme jurisdictions, how the change of legal culture in that respect is dependent on both the constitutional traditions and the characteristics of the legal system, including traditions of interpreting law. The discourse of courts is dependent on that legal framework, which may slow down the transition of legal culture. The present study is, however, also addressed at the national judiciary, for whom even recommendations are presented on how the culture of protecting fundamental rights and human rights could be made even stronger through a dialogue with the European Court of Human Rights. The aspect of such a dialogue has been addressed to a lesser extent in Finnish legal research than in continental Europe.

1.2 *Discourse of the European Court of Human Rights and earlier research*

Given the abundance of case law, concerning a variety of States and legal systems, the European Convention on Human Rights and its control mechanism have also given inspiration to extensive research, including comprehensive overviews of the case law under the Convention⁸. However, there is not that much research focusing particularly on the language used by the Court, although its discourse has been touched upon in

⁸ The works of scholars consulted for the purposes of the present study include, in particular, Harris & al. 2014, Pellonpää & al. 2012, Danelius 2012, White & Ovey 2010, and Frowein & Peukert 2009.

some studies⁹. Those studies have focused on the standards and methods of interpretation of the Convention, particularly as used by the Court itself, and not that much on how those principles have been approached by national jurisdictions although some of the most recent studies concerning legal systems other than the Finnish one have paid some attention to it. Judicial language or discourse develops particularly through case law. Furthermore, discourse highlights the approach of the court to sources of law and principles of interpretation. In Finland, one of the most recent studies includes an analysis of the changing argumentation of the Supreme Court with regard to the protection of human rights, although with a focus on the control of constitutionality of legislation¹⁰. Insofar as judicial language of national courts is concerned, it has been studied to some extent, including the judicial style of court decisions in various countries. Furthermore, particularly in the past few years, quite a few works have been produced on the methods of interpretation of the European Court of Justice. The language of law and the field of legal translation have also been subject to a wide range of research, from various perspectives, whereas the language of international treaties, in particular, has not been studied to the same extent although there is considerable research into the interpretation of treaties: such research has mainly focused on the methods and principles of interpretation in general. There is also some research on the language policies of different international organisations, most notably on the language policy of the European Union and the interpretation of Union law, as well as on the language of diplomacy and international co-operation in general.

Levi draws a distinction between three major areas of research on language and law, 1) the study of spoken language in legal settings; 2) the study of language as a subject of the law; and 3) the written language of the law¹¹. Legal language may be divided into sub-sectors depending on the users of the particular type of language, such as the language used by courts and the language of legislation. Insofar as courts are concerned, one might speak of official language or judicial language, depending on the context or of discourse of the court. Furthermore, there may be different types of legal language depending on the field of law, each having its own typical style, expressions and terms and concepts.¹² The language of international human rights law would be one of such fields. In the case of international human rights law, one may further distinguish expressions and concepts that are specific to the context of protection of human rights as well as those that are specific to the language of international agreements. The language of international treaties is a particular type of legal language, being a result of compromises between the legal concepts and expressions of different

9 For example Senden 2011.

10 Lavapuro Juha, *Uusi perustuslakikontrolli*, University of Turku 2010.

11 Levi 1990, p. 13.

12 For more details, see Mattila 2012, p. 4-6.

legal systems and cultures, on the one hand, and between the diverse political views of different state parties to the treaty in question, on the other. One could also say that the language of international treaties constitutes a sector of its own within the science of legal linguistics, although one may note quite a few similarities between the language of international treaties and that of the legislation of the European Union, for example. In a human rights convention, the impact of the political views of States that have contributed to its drafting are intertwined with the desire to guarantee as high a level of collective enforcement of human rights as possible.

In the present study, however, the principles of interpretation of the European Court of Human Rights play a more significant role than linguistic issues, although the focus is on judicial discourse. The purpose is to analyse in what manner the principles of interpretation have been applied through discourse, and whether the Court's discourse reflects a transition of the legal culture of protecting fundamental rights and human rights, although discourse is understood in a rather wide sense. Such signs may include, in particular, expansion of the scope of the Convention rights, development of the meaning of the concepts used in the Convention, and various methods and expressions used by the Court to give priority for stronger protection of certain rights over the State's discretion to legislate on such matters. Thus, those signs may be both linguistic expressions and statements of fact or law. The same applies to the discourse of the national supreme jurisdictions. The present study focuses on the application and interpretation of the European Convention on Human Rights by the European Court of Human Rights and the application of its case law by the Finnish supreme jurisdictions, but given the abundance of research on the Court's case law and the methods of interpretation and the variety of national case law, the research topic is delimited to certain groups of cases that demonstrate the transition most clearly in Finland. In most cases, treaty interpretation is a matter for the parties to the treaty in question. However, under international treaties, there are cases where a specific treaty body has been established, entrusted with the task of controlling compliance with treaty provisions and interpreting those provisions. In this respect, the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights)¹³ and the European Court of Human Rights constitute a unique example of control mechanism, comprising a judicial body which has produced an abundant body of case law and which has provided authoritative interpretations and clarified the meaning of the Convention.

13 ETS No. 5, done at Rome on 4 November 1950. The Convention entered into force on 3 September 1953. Finland ratified the Convention on 10 May 1990.

1.3 Transition of the legal culture

The present dissertation is interdisciplinary, combining the sciences of legal linguistics, constitutional law and international treaty law or, to be more precise, international human rights law. The study analyses the transition of the legal culture of protecting fundamental rights and human rights in Finland from the emergence of the European Convention on Human Rights and development of the language of the European Court of Human Rights to their reception at the national level. Finland is today a member State of the Council of Europe and a party to the European Convention on Human Rights. The text of the European Convention on Human Rights reflects the standards of protection that the States parties thereto have been willing to afford to their citizens. The judgments of the European Court of Human Rights provide authoritative statements on how it should be read and interpreted, which further develop the standards of protection and thus the legal culture of protecting human rights and fundamental rights. The development of case law continued for decades before Finland acceded to the Convention, and has continued since Finland's accession for approximately 25 years. The late accession to the Convention means that of the 65 years of its existence, the Finnish judiciary has only been applying it for 25 years, taking aboard 40 years of development of the standards of protection as such. This is a strong generalising statement. The aim with this research is to analyse that development, which now constitutes an essential element of the Finnish legal system, from a wide historical perspective, ending at the analysis of national case law to see how its adoption has succeeded by the supreme jurisdictions. It is argued that the transition of the legal culture in an individual legal system does not take overnight in a case where the standards of protection have developed without the presence of that legal system for a long period of time. It is further argued that their reception is still not complete. Therefore, the development of the legal culture as a consequence of the European Convention on Human Rights in Finland is studied at three phases and comparisons are made with other legal systems to explain how foreign that element of the legal system is traditionally for the Finnish judiciary. Finally, those presumptions are confirmed by analysing the discourse of the Finnish supreme jurisdictions.

Thus, the present dissertation is based on the underlying presumption that the language of international human rights instruments reflects the political will and international culture of protecting human rights, as stated by the entity of states parties to the instrument in question. As for individual states, however, the legal culture of protecting human rights is a more complex issue, involving also the intertwined aspect of constitutional or fundamental rights. The texts of international human rights conventions are static until officially amended, and in individual states parties they receive their meaning from state practice, including case law. Thus, the legal cultures of protecting human rights vary from those showing less respect for the internationally

agreed standards to more advanced ones. Political declarations, government documents, legislation and court judgments, through their language, further reflect the culture and standard of protecting human rights and fundamental rights. Considering that legal culture is a wide concept, it is necessary to delimit it. For the purposes of the present research, the legal culture of protecting fundamental rights and human rights is limited to the legal texts guaranteeing that protection and their enforcement through the judiciary. As a whole, the national legal culture would comprise a large variety of other elements, such as legislative policies and general legal opinions. Although only the final stage of the research focuses on national supreme jurisdictions, to include or exclude certain factors affecting the transition in national case law, it is necessary to approach that topic from a wide perspective. Thus, a wide perspective of development of the Convention is meant to assess how foreign that new European element was originally for the Finnish legal system, and an analysis of the development of the case law of the European Court of Human Rights – taking first place without the presence of Finnish cases – is meant to explain to what extent this extensive body of case law meant new elements in the legal system. For that purpose, also selected other legal systems are briefly analysed to exclude the impact of those foreign legal systems on the Finnish case law. It is well known that those legal systems are the most familiar ones for the Finnish judiciary and foreign materials are widely consulted. However, those elements are not necessarily visible in the discourse of the national supreme jurisdictions as explicit references, but are rather indirectly present in the legal thinking. Therefore, their presence is examined through comparison of sources of law, methods of interpretation and judicial style. An effort is made to assess whether and how the new element, European case law, has affected judicial style and legal culture of protecting human rights and fundamental rights in Finland.

The study is divided into three phases of transition of the language of human rights law and legal culture in Finland under the impact of the European Convention on Human Rights, where the case law of the European Court of Human Rights constitutes the key element which has brought about a dramatic change in how the Convention rights are to be interpreted and understood. The aim of the research is to study, first, how the language of international human rights law has emerged, as a particular legal culture, starting from a historical overview of the protection of basic rights and liberties and the emergence of constitutional instruments protecting such rights, and moving to the emergence of international instruments for the protection of human rights, particularly the European Convention on Human Rights. This historical overview covers the first phase of transition, where the Convention is drafted under the influence of negotiating States having their own traditions and cultures which are brought under a common umbrella, which in turn has an impact on the national legal systems and judiciaries. This first phase, placing the European Convention in a wider context, took place without Finland participating in the negotiations. The European

Convention on Human Rights has, nevertheless, been implemented in the Finnish legal system as such, which makes it important to analyse the elements that have existed in the Finnish legal system prior to the emergence of the Convention and its implementation, and those that appeared as a result of the Convention. The purpose of this rather extensive phase of the study is to assess from a historical and constitutional point of view the efforts required for the national supreme jurisdictions to adopt the new element in the Finnish legal system. Should the national constitutional traditions of protecting fundamental rights, including their scope, have considerable similarities with those that are visible in the European Convention on Human Rights, it would presumably require fewer efforts than in the opposite case. Whereas Finland did not take part in the negotiations, Sweden did. Finland shares a considerable part of legal history with Sweden, which has also had an impact on constitutional traditions, and the Swedish law was largely maintained even during the Russian era although there was influence from Russia on the political and administrative institutions. Those do not fall within the scope of the present dissertation. However, there is also influence from legal systems other than the Swedish one, particularly the German legal system. The concepts of human rights and fundamental rights are used without separating them from one another for the reason that in the Finnish case law which has emerged upon Finland's accession to the European Convention on Human Rights, they have been interpreted on the basis of the same criteria. Thus, it is necessary to also assess the historical constitutional developments.

The second phase of transition is the development of the language of the Convention in a wide sense, i.e. under the case law of the European Court of Human Rights, within the framework of a unique control mechanism, partly independently but partly also under the influence of a variety of legal cultures. In this context, although the development of case law takes place under the impact of the individual complaints and indirectly the languages and legal cultures of States parties, the transition of the meaning of Convention provisions takes place rather independently and has changed considerably from what the negotiating States perhaps had originally in mind. The underlying presumption in this part of the study is that the language of the European Court of Human Rights, used in its judgments, develops under the impact of a variety of elements, including the legal cultures represented by the judges themselves and those of the states subject to complaints, but also the personal capacities of the judges. Thus, when looked into from the perspective of an individual state party to the Convention, in this case Finland, the language of the Court develops under a great variety of legal cultures, some of which may be extremely foreign to the Finnish one. Until Finland's accession to the Convention, which took place at a late moment when compared with the other selected States, this development took place without the presence of Finnish cases. The Finnish judiciary has not needed to pay attention to the development of European case law until rather recently. Therefore, the focus of the second phase of

the study is on the abundant case law which was upon Finland's accession adopted in the Finnish legal system as such, although some of the more recent cases are looked into as they represent clear changes in the interpretation of the Convention meaning and some of them have ended up to the Court's case law through Finnish applicants. However, this is all brought under the umbrella of protecting human rights, and the judgments are considered to reflect the legal culture of protecting human rights and fundamental rights. This element is no longer a static one, and is again implemented at the national level through the application of the case law of the European Court of Human Rights as a source of law, although it does not tell the entire truth about the cultures of protecting fundamental rights at the national level. However, it does provide some important elements for the analysis of the transition at the national level. This is particularly so because in this phase of transition, highlighting the development of the interpretation of the Convention, Finnish cases have gradually begun to play a role. This element of the protection of human rights and fundamental rights requires constant awareness of the European case law by the national judges to allow gradual transition of the legal culture.

The third and last phase of transition is what takes place at the national level, under the impact of the Convention system and the case law of the European Court of Human Rights on national case law and legal culture. The third phase of the research aims, in particular, to assess in more detail whether and to what extent the argumentation of the European Court of Human Rights has in practice been received by the Finnish supreme jurisdictions. This is the most relevant phase for the analysis of the *de facto* transition of the legal culture of protecting human rights at the national level. The study is based on the underlying assumption that the language of national jurisdictions is a reflection of that culture, bearing in mind that it is only one element of the legal culture as a whole, in the same way as the texts of international human rights conventions reflect the standards of protection. National judgments tell what the reality is at the national level. An analysis is made of how the case law of the European Court of Human Rights has been taken into account in national cases involving the interpretation of certain human rights or constitutional rights and how the manner of treating it has changed since the earliest judgments until today, as reflected in the discourse of the supreme jurisdictions.

Prior research made into case law in Finland has shown that before Finland's accession to the European Court of Human Rights, there were hardly any references to the provisions of international conventions on human rights and it was even rare to directly refer to the fundamental rights provisions of the Constitution¹⁴. Instead of repeating

14 See Scheinin 1991, p. 215, 216 and 222 concerning the Supreme Court. According to Scheinin, the Supreme Administrative Court has been a foregoer and there have been somewhat more references to both the Constitution and human rights conventions (*Ibid.* p. 241 and seq.) although it is far from the existing practice.

that research, the case law with references to the European Convention on Human Rights and the relevant case law is analysed instead of older case law to assess whether there is an ongoing transition of the legal culture in Finland, through the application and interpretation of the European Convention on Human Rights and whether and how that transition is visible in the judicial discourse of the supreme jurisdictions. It is a well known fact that the impact of the European Convention on Human Rights in Finland is dramatic when compared with the United Nations instruments. It is also rather well known in Finland that the application of the European Convention on Human Rights and the relevant case law has gradually increased since Finland's accession to the Convention to a significant extent, and this has been addressed in some studies. However, hardly any research has been made into whether there are other signs of change in the discourse of the supreme jurisdictions indicating a transition of the legal culture. In particular, the judgments of the European Court of Human Rights can be treated by national jurisdictions as purely external elements to be taken into account, but the way they are applied through methods and standards of interpretation may bring them gradually towards strong internal elements. The bigger the difference in style is between early cases and the more recent ones, the stronger the transition of the legal culture is. The relevance of changes in legal discourse for the conclusions of the present dissertation is explained in more detail in sections 1.4.2 and 1.4.3 below. At the outset, it appears that where the applicable international human rights convention is not supported by case law of a court, national jurisdictions are not willing to provide interpretations of their own. The European Convention on Human Rights appears to have the opposite effect particularly because of the binding European case law.

The final stage of the study is to assess the impact of the legal argumentation used by the European Court of Human Rights on legal culture and discourse of the Finnish supreme jurisdictions, as well as its conceptualisation and understanding by the judiciary. The European Court of Human Rights and the Finnish supreme jurisdictions (the Supreme Court and the Supreme Administrative Court) have been chosen as a research topic due to the abundance of advanced case law of the European Court of Human Rights and its rather strong impact on the Finnish legal culture over a relatively short period of time. The impact on the discourse appears to be stronger than in the big legal systems used as sources of comparison for the present research. However, the aim with this thesis is to demonstrate through an analysis of the discourse of the Finnish supreme jurisdictions that the real understanding of that case law has taken place only later. A further aim is to demonstrate that the development of a dialogue between the European Court of Human Rights and the Finnish supreme jurisdictions is still an ongoing process, and the reception of the argumentation of the European Court of Human Rights is still not complete. For that purpose, dialogue is understood as a form of interaction whereby the two levels of jurisdictions take one another's case law into account. Such a dialogue is on occasion said to exist also in other legal systems. Where

dialogue is successful, the emphasis of the legal culture of protecting human rights is at the national level in an effort to correct violations before them ending up to the European Court of Human Rights. That would be an indication of a more profound change of the legal culture, and one aim with the most recent reforms of the European Court of Human Rights and national legislations has been to go to that direction. Therefore, such a dialogue should perhaps be recommended.

Finland has been chosen as an example for the analysis of the transition of legal culture of protecting human rights and fundamental rights at the national level, first, for the reason that Finland acceded to the Convention later than the other Nordic countries part of the same family of legal systems and the other States used as sources of comparison and, second, the impact of the European case law on the national jurisprudence has been strong over a shorter period of time than for those other States. Thus, despite having been under the influence of the Nordic and Germanic legal traditions, Finland represents a State which has implemented the result of negotiations in which it did not take part around forty years later. Further, to assess the overall impact of the European Convention on Human Rights, it is interesting to look into other international instruments and the constitutional traditions of protecting fundamental rights. The Finnish legal system had been applying the United Nations instruments for a while before acceding to the European Convention on Human Rights, which makes it interesting to assess the impact of the Convention on the legal culture in more detail when compared with other human rights instruments. Even the accession to the United Nations covenants took place somewhat twenty years after their adoption. However, the impact of those instruments on national jurisprudence has been modest and they were only seldom referred to. Furthermore, a few years after the accession to the European Convention on Human Rights, the constitutional provisions on fundamental rights were revised, which allows assessment of the impact of the Convention on them too. Furthermore, the case law of the supreme jurisdictions of Finland in which the case law of the European Court of Human Rights has been applied is easily available. That is particularly important in scientific research that aims at analysing the discourse used by those jurisdictions. It is argued in this thesis that the constitutional developments in Finland have been equally important for the transition of the legal culture of protecting fundamental rights as the European Convention on Human Rights. However, those constitutional amendments were made around the time of accession to the Convention. Further, it is interesting to note that the references to constitutional rights or other international human rights law were rare and rather mechanic in nature prior to Finland's accession to the European Convention on Human Rights, and have also increased upon the application of the European Convention on Human Rights and the relevant European case law.

For a transition of the legal culture to be possible, it is necessary that there is the technical preparedness to receive European case law, consisting of the implementation

of the Convention into the national legal system as well as the possibility to apply international case law as a binding source of law. Those technical requirements as well as the relationship between the national Constitution and the Convention and the approach of the national judiciary to principles of interpretation of law, when compared with those of the Court, play a strong role. In the assessment of the transition of legal culture and in the analysis of judicial discourse, it is to be kept in mind that there are other strong elements affecting the legal culture as represented by the judgments of the supreme jurisdictions, and what takes place as a result of the case law of the European Court of Human Rights does not happen in isolation from the other elements. There may be other changes taking place in the legal system prior to or simultaneously with the increasing number of European materials, which make it possible to increasingly receive the European case law, such legislative or procedural changes. In the Finnish legal system, the constitutional provisions on fundamental rights were revised shortly after Finland's accession to the European Convention on Human Rights, expanding their scope and aligning them with the Convention. Another factor to be kept in mind is the impact of changes in political views and attitudes. For the transition in the human rights culture in Finland to be possible in the first place, it was necessary that certain changes took place in political settings. Those changes lead to the Europeanisation of the legal system in general.

Furthermore, another essential factor making a transition of the legal culture is the knowledge and experience of national judges of the European system of protecting human rights. It is further required that the national judiciary in general has a positive attitude towards the application of foreign and European sources of law, in addition to the national ones.

Therefore, in the conclusions, an effort is made to assess also various external factors that might partly explain the extent to which the national judiciary is receptive to the argumentation of the European Court of Human Rights. Some scholars have analysed the scope of existing studies on the Convention and the Court and, finding that until recently most of them have focused on the normative and procedural aspects, have called for more research on the social aspects of the Convention and protection of fundamental rights and human rights¹⁵. It is true that human rights are not a purely legal phenomenon¹⁶. As pointed out by Verschraegen¹⁷, the significance of human rights is not only about the legal protection of individuals against abuse of power, but is part

15 See e.g. Greer 2013, p. 149-153. This would indeed be relevant in view of the fact that the development of the case law of the European Court of Human Rights was for a while affected by the geo-political settings in Europe. (Madsen 2011, p. 43-45. Those settings also essentially affected the late accession of Finland to the Convention.

16 Madsen 2013, p. 82.

17 Verschraegen 2013, p. 78. The development of society has also lead to the expansion of the list of rights (Ibid. p. 67).

of a wider societal context. The change of legal culture of protecting human rights and fundamental rights is a long process involving not only changes of law but also of the societal and constitutional settings. The changes of law and judicial discourse (surface structure of law) may reflect a change of legal culture (deep structure of law) but there may be a difference in terms of time. This research makes a further effort to go the direction of assessing the signs of change in the legal culture instead of only providing an overview of cases, as reflected in the judicial discourse. However, the purpose of this thesis is not to go deep into political or social change¹⁸, but to remain in the legal settings of judicial behaviour, including the wider context of the constitutional developments.

To assess the interaction between different legal and other factors on the transition of legal culture of protecting fundamental rights, it is also relevant to carry out some research into such other foreign elements as may play a role, particularly other legal systems, to exclude misinterpretation of the influence of the European Convention on Human Rights and the relevant European case law. The Nordic legal systems and particularly that of Sweden have played a major role in the shaping of the Finnish legal system, due to historical reasons¹⁹. It is important to assess the relationship between their respective constitutional provisions on fundamental rights. Further, it is a known fact that the German legal system has had considerable influence on the Nordic ones²⁰. Therefore, even Germany has been chosen as an example of a foreign legal system subject to analysis to ensure the correctness of presumptions concerning the rather modest foreign impact when compared with the European case law. The French legal system has been chosen as a further example due to its high significance in the historical developments protecting human rights and fundamental rights and its impact on other modern legal systems in Europe, and the English legal system as an example of an entirely different legal system with strong focus on precedents, which, nevertheless, has served as a source for many other legal systems in the world and the English legal culture and language has gradually gained a dominating position as regards the presence of foreign elements in Finnish legal studies in the past decades²¹. The English-speaking world is also where the first human rights instruments appeared.

18 As pointed out by Madsen, the study of human rights as a societal phenomenon would necessarily imply addressing the structural societal transformations prompted by the evolution of human rights. (Madsen 2013, p. 82.)

19 See Koivu and Mattila 2006, p. 27-28.

20 This applies to the role of civil-law tradition in general, which is clearly visible in the field of interpretation of law (Ibid. p. 24). However, in Finland, the influence of the German legal culture and language has been particularly strong, when compared with the influence of the French legal culture, for example, which is largely explained by societal developments in general, including trade relations already in the middle ages and the common practice of studying in German universities in the 18th and 19th centuries. The cooperation has continued widely until the 1990s, whereafter the German influence has gradually diminished. (Mattila 2012, p.301-305)

21 See Mattila 2012, p. 448-449.

The numbers of judgments finding a violation of human rights may also provide some indication of the preparedness of the legal system to apply human rights or fundamental rights provisions, although it is necessary to go into the texts of the relevant judgments to draw any conclusions or assessments. Those judgments may also indicate even considerable differences in the standards and legal culture of protecting human rights and fundamental rights. There are considerable differences particularly between Finland and Germany in the numbers of violations found by the European Court of Human Rights, in view of the periods of time of applying the Convention and the sizes of population. An effort is made by means of comparison, also with reference to the English, French and Swedish legal systems, to see whether there are essential differences that explain the problems faced by the Finnish legal system in paying attention to the provisions of the Convention, and to what extent they can be explained by systemic differences or other internal or external factors. The nature of violations found against an individual respondent State may also impose a change in the legal culture of protecting human rights and fundamental rights. It may in a way encourage national jurisdictions to change the way in which they treat the European case law, i.e. gradually change their discourse to avoid further cases ending up to the European Court of Human Rights. The Court's case law can be applied in different ways, depending on to what extent it is recognised as a source of law. The underlying assumption is that in the interpretation of the Convention, the discourse of the European Court of Human Rights plays a rather significant role and that there are differences in the receptiveness of national legal systems to the judicial argumentation or discourse of the Court. The analysis of Finnish case law is limited to the discourse used by the national supreme jurisdictions, in an effort to analyse to what extent the national judiciary is receptive to the argumentation of the European Court of Human Rights, and what type of an impact it has had on the transition of the legal culture. Further, an analysis is made of whether the transition of the Finnish legal culture is visible in the discourse used by the supreme jurisdictions.

In the analysis of the discourse of the European Court of Human Rights and the supreme jurisdictions of Finland, the development of the legal framework of protecting fundamental rights and human rights and the development of the language of human rights law, as factors delimiting discourse, as well as the principles of interpretation of law as a relevant element affecting the discourse are taken into account. Thus, apart from the aforementioned developments, an analysis is made of the relationship between the principles of interpretation of treaties and those of the interpretation of law in general. The said principles are placed in the framework of the interpretation of the European Convention on Human Rights by the European Court of Human Rights. The sources of law and the principles of interpretation of law affect and define the judicial discourse. Considering that there are differences between legal systems, which might at least partly explain some of the problems faced by States parties to the Convention and particularly those faced by the Finnish supreme jurisdictions, a

brief analysis is made of the principles of interpretation applied in the selected States to see whether there are so significant differences in their approach to application of international law or to the interpretation of law in general that might play a role in the problems faced by national courts in the application and interpretation of human rights law, particularly the European Convention on Human Rights, as demonstrated by the case law of the European Court of Human Rights. Finally, an effort is made to conclude whether those differences affect the receptiveness of the legal system to the methods of interpretation developed by the European Court of Human Rights, in order to draw conclusions concerning the Finnish legal system. The purpose of this analysis is to find support for the conclusions made about the developments in the Finnish supreme jurisdictions, but the purpose of this thesis is not to present any definitive conclusions concerning those other legal systems. Therefore, the relevant sections remain rather descriptive.

1.4 Research methods

The topic of this research is approached from a wide perspective. First, it has been necessary to go through a variety of research materials to see what is worth studying in the field of the European Convention on Human Rights apart from research already done by others. Second, without looking into European and national case law it would have been impossible to see what kind of a change in the judicial discourse of the supreme jurisdictions has taken place, and on which elements that change is based. Thus, to select the research materials, it has been necessary to carry out not only some comparison of the implementation of the European Convention on Human Rights in the selected five legal systems but also some analysis of judicial discourse. Judicial discourse is also, for the purposes of this research, understood in a rather wide sense, encompassing entire judgments in an effort to find those elements in the judgments that provide signs of a transition of the legal culture of protecting fundamental rights and human rights. Even the provisions of the legal instruments on which the judicial discourse is based constitute fragments of discourse. It was found out that in national judgments, those parts of the judgments that contain references to the case law of the European Court of Human Rights indicate most clearly a change of the legal culture of protecting fundamental rights and human rights. Another change in the background consists of changes made to the Finnish Constitution. All these have been imposed by the European Convention on Human Rights to a large extent.

Comparison is a rather general method used in legal research, whereas discourse analysis goes deeper into the contents of law placing the emphasis on the language instead of systems. The study of constitutional instruments and international human rights instruments may remain at a rather general level, being rather comparison and

general text analysis. The first phase of the research also represents a rather traditional type of legal research. Instead, the second phase of the research goes deeper into the language of human rights law as represented by judgments of the European Court of Human Rights. However, given that the purpose is to arrive at conclusions concerning the transition of the legal culture of protecting human rights and fundamental rights in Finland, the discourse analysis of the judgments of the European Court of Human Rights remains rather descriptive but introduces some elements of critical discourse analysis as explained in section 1.4.3 below. A more detailed discourse analysis is left for the third and final phase of this research, to look for concrete signs of change of legal culture in the national judgments. Such signs could be for example increase of detailed argumentation in the light of European case law, the use of different standards or methods of interpretation or emergence of new concepts or other elements.

1.4.1 Comparative law

Comparative law as a method of legal science is traditionally understood as the comparison of the legal systems of different nations. According to Zweigert & Kötz, this can be done on a large scale or on a smaller scale. They draw a distinction between macro-comparison, i.e. the comparison of the spirit and style of different legal systems, the methods of thought and procedures they use, and micro-comparison, dealing with specific legal institutions or problems, i.e. with the rules used to solve actual problems or particular conflicts of interest. However, as Zweigert & Kötz point out, the dividing line between macrocomparison and microcomparison is flexible, and one must often do both at the same time.²² A similar comparison has been drawn by David²³. The comparison of the selected four legal systems in the present thesis, in addition to the Finnish one, remains mainly at the macro level. However, some case law of those legal systems is looked into, entailing some micro-level comparison. That is necessary to confirm the findings of scholars. A similar division as has been made by Zweigert & Kötz and David may also be applied to legal linguistics, and comparison is a rather usual research method used for the study of legal language. According to Mattila, macro-level legal linguistics means research that focuses on legal languages at a general level, covering e.g. history, main characteristics or coherence, whereas micro-level legal linguistics deals with the use and meaning of individual terms.²⁴ For the purposes of the present study, both are needed. As pointed out by Husa, it is not sufficient to study case law, but it is also necessary to know the context i.e. the prevailing customs and practices²⁵. Thus, a wider context with the history of the European Convention on

22 Zweigert & Kötz 1998, p. 4 and 5.

23 David 1982, p.110-112.

24 Mattila 2010 (1), p. 729.

25 See Husa 2011, p. 222.

Human Rights and the development of its interpretation has been chosen as the basis of comparison, added by a comparison of the approaches of the selected legal systems to the case law under it, before advancing to the comparison of national case law of the Finnish supreme jurisdictions.

The overall approach to comparison in this research is rather descriptive when the constitutional developments, sources of law and methods of interpretation of law in the five legal systems as well as the judgments of the European Court of Human Rights are studied. The purpose such macro-comparison is to see to what extent the Finnish constitutional traditions have similarities with the other legal systems, and whether any differences found may explain the late accession to the European Convention on Human Rights, and whether there are such differences in constitutional traditions compared with the other four legal systems that may explain challenges in the reception of the case law of the European Court of Human Rights. The more the developments in the legal systems share similarities upon accession to the Convention, the more reason there is to conclude that the changes have been imposed by the Convention. The wider historical reasons for the Finnish constitutional developments are kept in mind while comparing the legal systems. A similar comparative approach is used to the study of the judicial style and traditional methods of interpretation, in the light of those of the European Court of Human Rights. As explained in the foregoing, the purpose of that comparison is also to exclude the presence of foreign influence in the transition of the way of interpreting the European case law by the Finnish supreme jurisdictions.

To start with, comparison is carried out to analyse the presence of selected constitutional traditions in the language of the European Convention on Human Rights as well as the further impact of the Convention on the development of national legal traditions. This does not mean that those constitutional traditions would be the only ones that have affected the contents of the Convention. The language of the Convention is analysed in the light of other corresponding human rights conventions, and compared with selected national instruments for the protection of fundamental rights or basic rights and liberties, in an effort to see how the elements included in other instruments have affected the European Convention. Further comparison is made between the approaches of the selected legal systems to the different sources of law and particularly to the application of case law as a source of law, as well as between the judicial styles of those legal systems. To what extent discourse of the European Court of Human Rights fits in the judicial traditions of Finland, by drawing some comparisons with the selected other States, is analysed. Furthermore, to what extent the European Court of Human Rights has paid attention to either internal or lateral traditions of states parties is also briefly analysed. Comparison is also used in the discourse analysis of the case law of the Finnish supreme jurisdictions, in an effort to see to what extent the case law of the European Court of Human Rights and the transition of the legal culture is visible in the national case law. Furthermore, the language used

by the Court in its judgments is analysed and compared with the terminology used in the Convention, and further with the judicial language of selected states, to assess the transition taking place in the Finnish case law in an effort to see to what extent it can be explained through national implementation of the European case law. The purpose of looking into other legal systems is to exclude the impact of other foreign elements that would be more dominating than the European Convention on Human Rights and the relevant case law. Furthermore, it is presumed that the development may be similar in the selected European legal systems as regards changes in the application of the European Convention and the European case law as sources of law, and that the changes have emerged for the same reason, although there may be differences in the techniques used for interpretation. Thus, as the final step of comparison, the judicial style of the judgments of the Finnish supreme jurisdictions is analysed over a defined period of time, to see whether and in what manner the judicial style of the European Court of Human Rights has affected or has started to affect the judicial style in Finland. In doing that, the cases of both Finnish supreme jurisdictions are compared with one another. Micro-comparison through discourse analysis is used to analyse details.

David identifies various problems that may be related to comparison, most importantly the different conceptions of what is understood by rules of law, differences between concepts, as well as differences between the structures of law and different classifications of rules of law²⁶. Those differences are paid attention to in the present study when comparing the different approaches to sources of law and interpretation of law. However, as explained in the foregoing, some micro-level comparison is done by means of a more refined research into national case law. When compared with the earlier research carried out on the application and interpretation of the European Convention on Human Rights and the relevant case law of the European Court of Human Rights in Finland, which has been close to the mainstream research on the Convention, the purpose of the last phase of research is to carry out in in-depth analysis of the case law of the Finnish supreme jurisdictions. That also involves necessarily macro-comparison between the different judgments, but discourse analysis is used for the purposes of micro-comparison. Thus, in the present thesis, discourse analysis is a more detailed method of comparative research. Discourse analysis as a method of research is addressed in more detail below to highlight its relevance for micro-comparison and in-depth analysis of change in the legal culture.

The approach of Mattila to legal linguistics and comparative law shares much in common with that of Zweigert & Kötz. According to Husa, the latter represent the so-called functional comparative law which is the mainstream theory²⁷. Thus, it is interesting from the point of view of legal linguistics in that both sciences attempt to

26 David 1982, p. 110-113.

27 Husa 2011, p. 211.

study the functions that a given concept or term have in different contexts, i.e. in different legal systems²⁸. In the present study, it is particularly the case law of the European Court of Human Rights that constitutes such a concept, and it is supplemented by the different approaches to its interpretation. Glenn applies a somewhat different approach to the study of legal systems. Abandoning the traditional and perhaps more practical comparison between legal systems, Glenn goes beyond the limits of a nation-state by analysing legal traditions from a wider perspective. Glenn draws a distinction between internal traditions (i.e. traditions that exist within a larger tradition) and lateral traditions that appear to exist across the borders of several larger legal traditions²⁹. This distinction is interesting for the purposes of the present study in that the language of human rights law may be stated to exist across the borders of national legal systems and traditions, representing thus a lateral tradition in terms of Glenn, while it coexists with national traditions both with regard to the interpretation of law and to the protection of human rights. In the Finnish legal system and jurisprudence, the interpretation of constitutional rights coexists with that of the rights protected by the European Convention on Human Rights. Also, there are other elements existing in several or all legal systems, which are based on the common origins of law for example through the influence of Roman law and the use of Latin. In the view of Glenn, for a tradition to become universal, i.e. applicable within all the legal traditions to which it adheres, a certain degree of normativity is required. Furthermore, he suggests that it is also necessary to pay attention to other traditions. As Glenn points out, “whether a given tradition is universalising [...] will be a question of how it reconciles its own normativity with its own tolerance of other traditions. This latter question raises the general issue of the complexity of traditions, of how traditions manage their relations with other traditions.”³⁰ Indeed, this is relevant for the transmission of human rights language across borders. It may be held that for a supranational element to be internalised by a national legal tradition, it must some way or another fit in the existing framework.

1.4.2 Micro-comparison through discourse analysis

The essential method used for the purposes of comparing and analysing the judgments of the European Court of Human Rights and those of the supreme jurisdictions of Finland against one another is discourse analysis. It is based on the understanding that judicial discourse is a demonstration of legal culture where legal linguistic expressions gradually change along with changes of law, bearing in mind that the more profound changes of legal culture may require more time than the judicial discourse. The more there

28 See Husa 2011, p. 223 and 224. Husa finds that this concerns, in particular, legal translation. Indeed, for a comparatist studying the legal system, knowledge of the language at least to some extent is necessary for the understanding of that system.

29 For more details, see Glenn 2004, p. 343-347.

30 Glenn 2004, p. 347 and 348.

is variation in the linguistic expressions, the less complete the change is. The linguistic fragments are necessarily analysed for the purposes of the micro-level comparison of judgments to detect the signs of change. Those linguistic fragments both in European and national case law include the use of various concepts and expressions that demonstrate cultural change such as references to the Convention as a living instrument, references to the existence of a European standard or explicit references to the development of law or morals. Relevant linguistic fragments may also consist of increased presence of such references as the Convention as a living instrument or autonomous meaning, or certain standards of methods of interpretation. It is presumed that certain methods of interpretation are resorted to in those cases where the protection of human rights has been strengthened more clearly than in other cases and thus the legal culture has undergone a transition. In the national case law, the relevant linguistic fragments include, in particular, the fragments of discourse where references are made to the European case law and the ways of doing it. Micro-comparison through discourse analysis is used to see how the way of applying the European Convention and the European case law has gradually changed. It is also applied to the judgments of the Finnish supreme jurisdictions. The purpose is to arrive at a conclusion concerning the changes in legal culture by means of analysing the supreme jurisdictions' discourse, in an effort to see whether the changes in legal culture are traceable through changes in discourse.

The European Court of Human Rights combines a variety of sources of law, including sources indicating changes in society (making the Convention a living instrument). The Convention provisions are rather static, but the Court uses other sources of law in the interpretation of those provisions, and developments in the Court's judicial discourse demonstrate changes in how the judges see the European standards of protecting human rights. In the same way, the changing judicial discourse of the Finnish supreme jurisdictions indicates how the approach to the application of the European Convention and the relevant case law has changed. Those changes may include, among others, not only changes in opinions or interpretation but also additional elements in the discourse which have not existed before. In particular, the judgments of the Finnish supreme jurisdictions are compared against one another to see whether there are increased details, references to concepts, standards or methods of interpretation that have not been used before, or different style of argumentation. In view of the limitations set by the legal system on the discourse used by the national courts, it is also relevant to analyse the approach of the legal system to the sources of law and methods of interpretation of law, to explain the particular characteristics of the discourse of the Finnish supreme jurisdictions. The implications of those factors on the discourse of the supreme jurisdictions of Finland are assessed not only in the light of the domestic approach, but also in the light of the sources of law and methods of interpretation used by the European Court of Human Rights and the jurisdictions of the selected legal systems used as sources of comparison.

The focus of the research into case law is on micro-comparison through discourse analysis, but discourse cannot be analysed in isolation from the principles and methods of interpretation of law. This allows not only comparison between different human rights instruments, the two authentic language versions of the Convention and consequently the Court's case law, but also between different linguistic and legal cultures³¹. In the conclusions, an effort is made to see whether and how the Court's discourse has been received by Finnish supreme jurisdictions, and what the general attitude of the national courts is to the discourse of the European Court of Human Rights, including the methods of interpretation of law. However, Van Hoecke points out that problems of statutory interpretation are often approached from the point of view of interpretation arguments rather than interpretation methods. Furthermore, a distinction is drawn between objective or scientific methods, on the one hand, and subjective or evaluative methods, on the other. According to Van Hoecke, in most argumentation approaches a mixture of both is found. He refers to external and internal perspectives of argumentation.³² When put in the context of interpretation of the European Convention on Human Rights, internal perspectives of argumentation would include various aspects such as the facts of the case and applicable provisions of law, whereas external perspectives would consist of a wider context including prevailing conditions of society. Argumentation analysis could focus on the means by which the parties attempt to convince the court of their views, on the one hand, and by which the court attempts to convince the audience (the parties, higher courts, and the general public) of its judgment, on the other.³³ Both appear in the judgments of the European Court of Human Rights and in those of the Finnish supreme jurisdictions, although the structure of reasoning has some differences.

The conclusions concerning the Finnish supreme jurisdictions are made on the basis of analysing to what extent they resort to the case law and style of judicial reasoning of the European Court of Human Rights as an external or internal perspective of argumentation in relation to the elements of the national legal system as an internal perspective. The concepts used by Van Hoecke are brought to a more concrete level in the light of the references to European case law. It is suggested that the closer to

31 Legal culture is understood as meaning the characteristics or qualities that a State or group of States has in its procedural and substantive law and legal system. Bunn-Livingstone includes in the concept of legal culture the country's or group of countries' (or regions') set of rules, values, ideologies, traditions, attitudes, and norms inherent in the law and legal system. She points out that these are dynamic concepts that change with time as they are shaped by historical, political, economic and social factors. (Bunn-Livingstone 2002, p. 41 and 43)

32 Van Hoecke 2002, p. 134 and 135.

33 Van Hoecke 2002, p. 125. Van Hoecke observes that those sets of arguments consist of both elements that are worded in terms of "empirical truth" and of elements that inevitably require some evaluative choice. The latter cannot be approached in terms of "true" or "false" but in terms of "better" or "worse" interpretation.

the style of argumentation of the European Court of Human Rights the discourse of the Finnish supreme jurisdictions is, the more it is used as a strong internal element of argumentation. Signs of such strong internal elements include, among others, the use of similar methods of interpretation – although not necessarily bearing the same name – and the use of autonomous concepts as developed through the European case law. It is also assessed through discourse analysis to what extent there is transition in the use of such elements of argumentation. This can be done through objective analysis. However, apart from what types of expressions are clearly visible in the discourse of the supreme jurisdictions and may be analysed on objective grounds, it is inevitable that there are also subjective elements present, which may be more difficult to analyse. Such elements would include for example signs of a general attitude of judges. Thus, a further element subject to discourse analysis in the present study is the use of the subjective or evaluative perspectives of argumentation advocated by Van Hoecke. Those perspectives may, in particular, include societal elements. An effort is made to see whether the European Court of Human Rights and the Finnish supreme jurisdictions focus mainly on legal argumentation, or whether it is supplemented by practical argumentation.

In the view of Alexy, mere legal discourse or argumentation is not sufficient but a decision needs to be reached, by reducing the number of solutions into one by means of the rules of rational practical argumentation.³⁴ Thus, particularly in the field of human rights, the judges need to resort to even complicated balancing of rights against one another, with a view to giving priority to one of them. That is typical particularly in the balancing of the freedom of expression or the protection of national security against the right to private life. The outcome may be different depending on how much weight the judges put on the different criteria. This, in turn, is particularly challenging for a legal system which traditionally underlines literal interpretation of law. Further, even if the legal system relies on rather strict legalistic traditions and judgments are bound by the rules of law, there may be differences in the ways in which the judges combine the legal rules with a wider perspective. The possibility for different outcomes even through the application of the same provisions of law or the same case law constitutes a further challenge for discourse analysis. However, signs of change in the legal culture may be detected by looking into the presence and ways of balancing of the different criteria for giving priority for a certain constitutional right or Convention right, in an effort to see those fragments of discourse have changed. How successful this is depends on how explicitly the judgments set out the balancing of those criteria. Insofar as constitutional rights argumentation is concerned, Alexy appears to be of the view that there necessarily is a rationality gap. The constitutional rights argumentation is determined and structured to some extent by the legal basis, but this determination is incomplete. Therefore, general practical argumentation is a

34 See Alexy 2004, p. 371.

necessary component of constitutional rights discourse, sharing also the uncertainty of its outcome.³⁵ This could be said to apply to the argumentation of the European Court of Human Rights and there are examples of such supplementing general practical argumentation. Inevitably, the discourse and argumentation is supplemented with general practical arguments based on experience and on the subjective views of the judges and not everything is necessarily explicitly written in the text of the judgment, as part of the reasoning of the courts remain behind “closed doors”. Nevertheless, even in the case of constitutional rights argumentation, or fundamental rights argumentation, rationality is relevant to make it convincing and to afford it a law-making effect, i.e. to make it legitimate, and it is necessary to justify the argumentation by sufficient proof. Habermas draws a distinction between two sides of law: its positivity and its claim to rational acceptability³⁶. According to Habermas, there is an internal relation between the validity of a proposition and the proof of its validity. In the words of Habermas, “what is valid must be able to prove its worth against any future objections that might actually be raised”.³⁷ Thus, the receptiveness of the argumentation of the European Court of Human Rights by its audience, i.e. the national courts and authorities, requires internal coherence between the statement and the justifying arguments. It must be both understandable and acceptable in the experience of the audience. The requirement of acceptability of argumentation also imposes restrictions on the formulation of the courts’ discourse i.e. on the manner of using the language. Legal argumentation, when supported with binding rules, is usually legitimate as such, but the persuasiveness of judgments may be supplemented by means of general practical argumentation.

1.4.3 Critical discourse analysis

It is mentioned in the foregoing that apart from micro-comparison of national case law, comparison is also made between different human rights instruments, the two authentic language versions of the Convention and consequently the Court’s case law, but also between different linguistic and legal cultures. For this purpose, even macro-comparison is carried out to some extent by means of discourse analysis, and discourse is put in a wider constitutional and legal context. The study of judicial discourse is typically placed within the framework of the science of legal linguistics. There are different ways of characterising legal linguistics as a branch of science. According to Mattila, legal linguistics is a branch of science that studies the development, charac-

35 Alexy 2004, p. 386 and 387.

36 Habermas 1996, p. 38.

37 Habermas 1996, p. 35. In the view of Habermas, there is a tension between facticity and validity, constituting the validity dimension of language: truth and the discursive conditions for the rational acceptability of truth claims are mutually explanatory. (Ibid.)

teristics and use of legal language³⁸. Essentially, legal linguistics has as its main object the linguistic study of legal language in its different aspects and manifestations, in order to find the means and define the appropriate techniques to improve its quality. In the view of G emar, the methods of legal linguistics are, due to this close link with linguistics, those of social sciences and particularly socio-linguistics.³⁹ Or, as expressed by Cornu, legal linguistics is, in general, a particular application of the science of linguistics to the legal language. He characterises legal linguistics as applied linguistics, where those key concepts (*signifi e/ significant*) and branches of linguistics (semantics, syntax) are chosen that best serve the purposes of the research. For the purposes of applying linguistic analysis to the language of law, it is semantics that plays the most important role.⁴⁰ Without going into details, suffice it to note that semantics is a subdivision of semiotics, which is a relatively new branch of linguistics. Semantics focuses on the relations between the sign (*la signe*) and the significant (*la chose signifi e*), in the search for meaning.⁴¹ Semantic theories of law, in turn, refer to such theories of law according to which lawyers must follow certain linguistic criteria when interpreting law, and which originally have focused also on the meaning of words. According to a more modern approach, this encompasses the use of legal concepts.⁴²

It is worth noting that discourse analysis is closely associated to a variety of fields of science such as cultural anthropology, sociology, critical social and linguistic theories, structural linguistics, communication theories, speech act theories and theories of text analysis⁴³. One could also speak of text analysis instead of discourse analysis. In general, in a legal context, linguistic analysis can contribute to correct understanding of what is said or written. However, the difference between the concepts of text and

38 Mattila 2010 (1), p. 719.

39 G emar 1982, p. 135.

40 For more details, see Cornu 2005, p. 24-31.

41 Didier 1990, p. 91. Words can be studied in isolation or together with other words in which case one can speak of semantics of discourse. (Ibid. p. 111) In the search for the meaning of a particular treaty provision, the ordinary meaning of words, i.e. the way in which a certain word is normally understood by any reader, is relevant. However, as is pointed out by Lauzi ere, the search for the meaning of words in a piece of legislation is not that easy, and the words may not have the same meaning in a literary work as they have in a piece of legislation. Nor may synonyms be used to the same extent in legislative texts as they are used in literature (Lauzi ere 1982, p. 41-47).

42 Dworkin 1986, p. 32. According to Dworkin, semantic theories of law presuppose that lawyers and judges use mainly the same criteria when deciding whether the propositions of law are true or false; they suppose that lawyers actually agree about the grounds of law. The semantic theories have a close link with legal positivism (Dworkin 1986, p. 33) and with the literal meaning approach to the interpretation of law.

43 For details, see a figure presented by Titscher & al. 2000, p. 51.

discourse analysis⁴⁴ is not dramatic, and both aim at interpreting the meaning of the text or discourse. Some scholars prefer to speak of critical discourse analysis, referring to a rather recent field of social sciences and putting emphasis on societal aspects of discourse. According to Niemi-Kiesiläinen & al., the traditional methods of legal sociology appear to neglect sociological analysis of legal discourse, i.e. the process in which legal argumentation constructs concepts and social reality⁴⁵ although, according to Levi, the areas of psycholinguistics and sociolinguistics are an increasingly significant trend in linguistics⁴⁶. The present research aims at paying attention to social realities in the interpretation of the European Convention on Human Rights without, however, constituting research in the field of social sciences. Even the European Court of Human Rights pays attention to the prevailing standards and morals in democratic society, which may impose some limits to the development of case law. Through discourse analysis, it is assessed to what extent development may be detected through fragments of discourse, in the light of external factors. Such fragments of discourse could include for example extensive explanations of developments of society or moral conceptions. One may note that discourse analysis does not exclude analysis of external factors, as is explained below in section 1.4.1, and in view of the Court's approach to the interpretation of law, they are even called for. Discourse does not take place in isolation from external factors but is dependent on the legal framework and is affected by social realities. As pointed out by Niemi-Kiesiläinen & al., the system of facts is independent from the existence of a text or discourse, whereas discourse analysis is based on a theory of social construction in which the discourse, including legal discourse, is seen as constructing the social world.⁴⁷ Therefore, extensive analysis is carried out of the constitutional developments and traditions of interpreting law. Following the idea of critical discourse analysis, the purpose in the present research is to carry out research into the change of legal culture through the analysis of three stages of development, where three major stages of the research all require a considerably different approach. Therefore, a flexible method of discourse analysis is chosen. Also, considering the need for cross-disciplinary materials, the concepts of argumentation and discourse are used

44 Some scholars prefer to draw a distinction between discourse or conversation analysis and text analysis, the first one meaning in the first place the analysis of speech acts, and the latter meaning the analysis of written language. However, for the purposes of this study, discourse analysis is understood as a wider concept, covering also written discourses. (See Green 1990, p. 249) In the view of Garre, also translation strategies have a close link with legal interpretation, both dealing with aspects of text and sentence structure. (Garre 1999, p. 116) However, the objective of translation is different from that of legal interpretation, and the strategies of translation are not discussed in this study.

45 Niemi-Kiesiläinen & al. 2006, p. 24 and 25.

46 Levi 1990, p. 8.

47 Niemi-Kiesiläinen & al. 2006, p. 21-23.

interchangeably⁴⁸. Only the study of case law is close to the traditional idea of discourse analysis but is still focusing on the signs of change in the legal culture through judicial discourse, since individual linguistic elements would not be very useful for that purpose.

In view of the wide range of elements to be compared, Fairclough's approach to discourse analysis appears to be particularly convenient in that in each case of changes in society – in the present case changes in the legal culture of protecting human rights and fundamental rights – critical discourse analysis is brought into dialogue with other sociological and social scientific research in order to investigate to what extent and in what ways these changes are changes in discourse, as well as to explore the socially transformative effects of discursive change⁴⁹. According to Fairclough & al. (2011), “in contrast with some branches of linguistics, critical discourse analysis is not a discrete academic discipline with a relatively fixed set of research methods, but a problem-oriented interdisciplinary research movement, subsuming a variety of approaches. Those approaches share interest in the semiotic dimensions of power, injustice, abuse, and political-economic or cultural change in society.”⁵⁰ In the present case, research into historical constitutional developments as well as development of the legal system and legal language in Finland represents the other sociological and social scientific research of relevance for the research into judicial discourse. The judgments of the Finnish supreme jurisdictions reflect the transition of legal culture of protecting human rights to the extent that there are changes in discourse. Fairclough sees discourses as diverse representations of social life, and critical discourse analysis is the analysis of the dialectical relationships between semiosis (including language) and other elements of social practices⁵¹. In the present study, the approach of the Finnish legal system to applying and interpreting the European Convention on Human Rights and the relevant case law of the European Court of Human Rights is treated as an example of social practice, and the case law of the supreme jurisdictions of Finland are treated as a discourse representing that system.

48 In doing so, the author does not intend to neglect the fact that linguists rather see argumentation as a specific type of discourse. See e.g. Van Eemeren & al., according to whom argumentation uses language to justify or refute a standpoint, with the aim of securing an agreement in views. The study of argumentation typically centres on one of two subjects: either interactions in which two or more people conduct or have arguments such as discussions or debates; or texts such as speeches or editorials in which a person makes an argument. (Van Eemeren & al. 2011, p. 85) Thus, a court judgment typically involves argumentation.

49 See Fairclough & al. 2011, p. 362.

50 Fairclough & al. 2011, p. 357. The critical discourse analysis has, however, its origins in linguistic research and is closely associated with critical linguistics and social semiotics. (Ibid. p. 361 and 362.)

51 Fairclough 2001, p. 123. “Semiosis” refers to semiotics/ semantics, and includes all forms of meaning making – visual images, body language, as well as language. (Ibid. p. 122.) See also Fairclough 2010, p. 234-239, where he proposes a four-step methodology for critical discourse analysis (a dialectical-relational version of critical discourse analysis), which is rather a combination of theory and methods instead of a clear-cut method.

Discourse is both historical⁵² (context bound) and interpretative and explanatory⁵³. The constitutional protection of fundamental rights and the international protection of human rights constitute a wider historical context, to which the application and interpretation of the European case law belong. However, for the purpose of discourse analysis, it is necessary to even limit the context. Context can be used as a representation of a whole communicative episode, including the communicative event (text, talk) itself, or as a representation of the relevant social environment of such an event⁵⁴. In other words, one may speak of a verbal context or a social situation or context⁵⁵. Consequently, the analysis of context may be restrictive and focus only on the user context (e.g. the court), or assess wider implications that the use of particular discourses may have even externally⁵⁶. One manner of limiting the analysis is the principle of local interpretation. This principle instructs the hearer/ reader not to construct a context any larger than he needs to arrive at an interpretation.⁵⁷ Although the historical and legal framework plays a role in the shaping of discourse, for the final stage of the present study it is only relevant to look into those cases where the European Convention on Human Rights and the case law of the European Court of Human Rights have been applied. Thus, while bearing in mind the wider historical context of protecting fundamental rights and human rights, research is carried out into such Finnish judgments over a certain period of time and the fragments of discourse in those judgments are compared with one another. It is noted in the foregoing that the discourse of the European Court of Human Rights – as an example of constitutional rights argumentation – and the discourse of national courts inevitably entails some degree of general practical argumentation as well as subjective evaluative elements. Thus, it is useful to assess also some

52 There is also a historical approach to critical discourse analysis, which is nevertheless not treated in more detail in the present study. The discourse-historical approach, which is closely associated with the idea of emphasizing context, adheres to the socio-philosophical orientation of critical theory, and follows a complex concept of social critique. (See Wodak 2001, p. 64.) However, some of the general ideas of critical discourse analysis relevant for the present research are also found in the historical approach, the interdisciplinary nature, the problem oriented nature, and the analysis of the historical context and its integration into the interpretation of discourses and texts (Ibid. p. 69 and 70).

53 Fairclough & al. 2011, p. 372. Discourse is not produced without context and cannot be understood without taking the context into consideration. Discourses are always connected to other discourses which are produced synchronically and subsequently. Discourse can be interpreted in very different ways, depending on the context and audience. (Ibid.)

54 Van Dijk 2010, p.117. Van Dijk speaks of an inclusive definition and an exclusive one, and appears to prefer in his book the latter definition, i.e. the one referring to the relevant social environment. (Ibid. p. 118)

55 Van Dijk 2009, p. 2. The verbal context includes preceding or following words, sentences, speech acts or turns within a discourse or conversation, whereas the social situation refers to the specific situation of a given text or talk.

56 Ruuskanen 2006, p. 57.

57 Brown & Yule 1983, p. 59.

wider implications instead of the communicative event only. Furthermore, one needs to bear in mind that even context-bound discourse allows some degree of variation in the choice of expressions⁵⁸, which have an impact on the judicial style⁵⁹.

Critical discourse analysis begins with defining the research topic, and methodology is the process during which this topic is further refined so as to construct the objects of research⁶⁰. To define the topic, a decision needs to be made on what one wishes to observe. To do that, it is necessary to know why it is interesting to carry out research on a particular part of cultural change. Once that has been established, the procedures to arrive at the observations can be decided.⁶¹ Various scholars have stated that the culture of applying international human rights instruments in Finland has dramatically changed over the past two decades since accession to the European Convention on Human Rights, and some have also said that this has had an impact on the judgments. It is interesting to assess whether and to what extent this has taken place, and whether the change in that part of the legal culture is visible in the national courts' discourse. For that purpose, it is necessary to find those types of Convention rights under which the national case law shows the strongest examples of cultural change, and further to detect those fragments of judgments in which it may be seen, through the phase of micro-comparison of the references to the case law of the European Court of Human Rights. Upon detecting the elements of discourse demonstrating cultural change, the research method may be further refined to assess the degree of transition in the reception of the argumentation of the European Court of Human Rights. It is further interesting to assess what would be the recommended approach of the national courts to the application and interpretation of the case law of the European Court of Human Rights, to continue the scientific dialogue.

58 See Van Dijk 2010, p. 134. Apart from variation, discourse is related to the concept of style, which is a property of discourse and could be described as being the result of choices among alternative, variable structures. Most of the properties of style coincide with those of variation. (Ibid. p. 143.) For the purposes of the present study, one could speak of judicial style.

59 Another concept which is closely related to those of discourse and context is that of genre. According to Van Dijk, genre may refer to either the contextual features or the discourse structure type. (Van Dijk 2010, p. 149.) For the purposes of the present study, the relevant genre would be the discourse type or style of judgments.

60 Fairclough & al. 2011, p. 358. Fairclough does not wish to present a strict method of critical discourse analysis, but provides a suggestion for the analytical framework. According to the proposed framework, analysis should be carried out on the network of practices within which the analysed problem is located, on the relationship of semiosis to other elements within the particular practice concerned, and on the discourse (the semiosis itself). (See Fairclough 2001, p. 125.)

61 See Titscher & al. 2000, p. 12.

1.5 Selection of materials

Both the chosen research methods and the selection of materials need to serve, first, the purpose of analysing the emergence of the Convention and its implementation, second, the purpose of analysing the development of the language of the Convention through the discourse of the European Court of Human Rights and, third, the purpose of analysing the development of the discourse of the Finnish supreme jurisdictions. Some explanations need to be provided for the selection of European and national case law. In the selection of relevant case law, a decision needs to be made on whether to carry out research into the whole body of case law concerning Finland or whether one should focus on the most interesting cases, or whether to carry out a more profound research into the case law on certain Convention provisions. According to Van Hoecke, the comparison of case law instead of mere comparison of rules has become increasingly popular, which is understandable in that the analysis of legal rules alone does not provide an adequate picture of the way in which a legal system works. He nevertheless draws attention to the fact that research very often focuses on so-called hard cases or cases decided by the highest court instances, and raises the question of whether this is sufficient. However, as is pointed out by Van Hoecke, the case law also needs to be accessible to allow reliable comparison, and another challenge would be to assess to what extent the cases are identical in facts and/or in law, although the practical solutions might be the same.⁶² Thus, apart from the purpose of the research and the research methods, the accessibility of the case law has to be taken into account.

The final decision on which judgments to include in the research may need to be done in the course of the discourse analysis as only that analysis proves whether they are useful for the purposes of the research. On the one hand, even a rather limited sample may sometimes be sufficient, but on the other hand, the conclusions become the more reliable the more extensive the data is. Once again, since the purpose is to analyse the transition of the legal culture in Finland, attention is paid to those cases that are most useful for assessing that transition and provide a sufficient selection of cases that are at least to some extent analogical or similar. Thus, in the selection of the national cases for the purposes of discourse analysis, attention has been paid to those articles of the European Convention on Human Rights that have produced the largest number of judgments against Finland, based on an underlying assumption that they also constitute important groups of cases at the national level. It is also presumed that those groups of cases provide a sufficient degree of analogy. This is not limited to so-called hard cases, but in respect of the given group of cases, all judgments of the supreme jurisdictions are looked into. A reasonable balance has been sought between the number of judgments of the Supreme Court, on the one hand, and the number of

62 Van Hoecke 2004, p. 168-171.

judgments of the Supreme Administrative Court, and attention has been paid to the total numbers of judgments relating to the application of the case law of the European Court of Human Rights. In the drawing of conclusions, it is important to bear in mind that lower courts of law are an inherent part of the judiciary and the extent to which the European case law is received by the judiciary as a whole, would provide a more solid and reliable ground for a statement concerning a change in the legal culture as a whole. However, given that the case law of the supreme jurisdictions is de facto followed by the lower courts of law, the study is limited to that case law. Thus, the underlying assumption is that the main trends of the transition of legal culture are reflected or visible in the discourse of the supreme jurisdictions. All judgments of the European Court of Human Rights are easily accessible, including a detailed statement of reasons. Furthermore, Finnish case law of the supreme jurisdictions is also easily available, and cases relating to the application of European case law are most often published as precedents. In respect of the Supreme Administrative Court, even non published judgments are included. This makes it possible to draw reliable conclusions within the framework of the selected groups of cases.

As regards sources of comparison in the theoretical assessment of the receptiveness of the legal system to European case law, in the light of the characteristics of the legal system and judicial style of judgments of the legal system, the United Kingdom and France have been chosen as reference states for the reason that they represent authentic languages of the Convention and official working languages of the European Court of Human Rights. Those two legal systems are also among the big European legal systems the elements of which are rather well known by Finnish judges. Further, Germany has been chosen as an additional reference State for the reason that it constitutes an essential element in the development of continental legal cultures, and the German legal system and thinking have also had considerable impact on the Finnish legal system among the various foreign legal systems throughout the legal history. Germany also provides an interesting example of a State party where it appears to have been relatively easy to adapt to the argumentation of the European Court of Human Rights when analysed in the light of the numbers of violations found against different States parties. Instead, in Finland, the development has taken place over a much shorter period of time, and there is some controversy of views as to whether considerable development actually exists. When compared with Germany, the number of violations found is relatively high considering the size of the population and the shorter period of time. Sweden is included in the research as a reference State for the reason of a partly common legal history with Finland and the smaller number of violations despite the much earlier ratification of the Convention. Not only works of scholars but also some judgments of supreme jurisdictions of the selected four legal systems have been studied to look for similar elements of discourse as in respect of the Finnish supreme jurisdictions. This makes it possible to assess to what extent

the transition of the legal culture in Finland might have been affected by other legal cultures instead of merely by the development of European human rights law. Some case law of the selected legal systems is looked into. However, a detailed analysis of the transition of the legal culture, by means of micro-comparison through discourse analysis, is only carried out in respect of Finland. A further reason for the selection of States is the history of protection of fundamental rights and human rights, to which particularly the English-speaking world and France have contributed considerably but with different results at the national level. The constitutional traditions of protecting fundamental rights in Finland and Sweden have been considerably different from those in France and Germany. The selection of States thus provides an interesting overview of different constitutional traditions some of which have played a larger role in the international developments. Further, the historical developments in Germany were a major reason for the emergence of the strong protection of human rights after the Second World War, whereas the United Kingdom and France were among the victors of war that played an important role in the negotiations leading to the adoption of the European Convention on Human Rights. Germany and Sweden also participated in the negotiations, whereas Finland did not.

The main challenge in the selection of data has been how to decide which provisions of the Convention would be most useful to assess, in particular, the change of legal culture in Finland. For that purpose, some statistical and empirical research has been carried out into the case law of the European Court of Human Rights. For the purpose of selecting the relevant case law of the European Court of Human Rights, to analyse the Court's discourse, that case law has been analysed in the light of the Court's statistics as on 31 December 2013, including the total number of judgments rendered by the Court concerning the aforementioned States, particularly judgments finding a violation of the Convention and judgments concerning the specific provisions of the Convention subject to the present study. Two specific Convention articles have been selected for closer analysis of the development of the language used by the European Court of Human Rights for the reason that they have raised interesting conceptual and linguistic problems and have also produced a large number of cases from several States, largely due to the fact that the European Court of Human Rights has expanded the meaning and scope of those Convention provisions. The other provisions have been chosen by verifying which Articles of the Convention have been subject to a relatively large number of cases against Finland, using other States included in the scope of the study as reference States. Thus, for comparative purposes, attention has also been paid to the most relevant articles concerning the selected States parties. An overwhelming majority of cases against Finland have concerned fair trial rights under Article 6 of the Convention, which provision has also raised interesting linguistic issues. France and the United Kingdom, representing the two authentic languages of the Convention and States which have also faced the two

largest numbers of judgments, appear to have had the same problem. On the basis of the Court's statistics as on 31 December 2013, it may be concluded that in respect of the five States covered by the present study, when taken together, the numbers of cases under Articles analysed were as follows: the number of cases concerning Article 6, covering both the right to a fair trial and the length of proceedings, was 915, whereas those concerning Article 5 was 154, those concerning Article 8 was 152 and those concerning Article 10 was 66. The cases concerning Article 6 constitute thus an overwhelming majority of cases. When compared with the other selected States and the numbers of cases taken together under Article 10, in particular, the total number of cases against Finland concerning the application of Article 10 is considerable in proportion to the total number for all the five states (18 out of the total of 66) although the number of cases under Article 8 is also significant (23 out of the total of 152). Furthermore, the total number of judgments against Finland in which a violation has been found (129) is high when assessed in the light of the total number of judgments against Finland (166).

Furthermore, for the purpose of analysing the development of the discourse of the Finnish supreme jurisdictions in the application and interpretation of the case law of the European Court of Human Rights, an analysis was made of which provisions of the Convention have produced the largest groups of cases at the national level. Those appear to include particularly Article 8 and Article 10. They also represent groups of cases with clearest change as regards the application and interpretation of the Convention, with increasingly detailed references to the European case law. Furthermore, in the overall research into the published precedents of the supreme jurisdictions, it appears that the development of argumentation has been more rapid in respect of those two Convention provisions than in respect of other provisions thereof. Thus, the selection of national case law subject to the closer discourse analysis has been made on that basis, as they provide a relatively solid basis for assessing whether there are signs of transition of the legal culture visible in case law. However, in view of the overwhelming number of judgments against Finland before the European Court of Human Rights concerning compliance with Article 6, the national case law concerning that provision has been analysed to support the conclusions made, and a sufficient number of cases exist. The number of cases under Article 5 dealt with by the supreme jurisdictions of Finland is too low to draw conclusions on as an isolated group of cases, although it has produced some interesting examples of detailed argumentation in the light of judgments of the European Court of Human Rights, including a clear change of transition of the standards of protection at the national level.

The selection of cases has been done by having the target audience of the research in mind. In order to allow a scientific dialogue, and to make the conclusions interesting for a wider audience including the national judiciary, the procedures chosen to arrive at conclusions must be recorded in such a way that they are verifiable by both

the researcher and others, i.e. they must be transparent⁶³. A further challenge is the limitation of the research materials, i.e. the discourses, keeping in mind the requirement of transparency. A researcher employs discourse analysis and other qualitative methods to analyse what types of discourses exist and how they are used, particularly in the case of empiric studies. In the view of Niemi-Kiesiläinen & al., for the purpose of limiting the discourses, a rather small sample of examples may be sufficient, without needing significant statistical surveys. They suggest that saturation is critical in this respect, i.e. no further research is required at the point where no new discourses are found.⁶⁴ The data studied in discourse analysis is always a fragment of discourse and the discourse analyst always has to decide where the fragment begins and ends.⁶⁵ Thus, the quality of the research materials, i.e. the case law of the Finnish supreme jurisdictions, in view of the purposes of the study is born in mind in the selection of cases for the detailed analysis of signs of transition of the legal culture of protecting fundamental rights and human rights in the discourse of the supreme jurisdictions. At the same time, it is ensured that the selected research materials are representative enough for the purpose of drawing reliable conclusions. To define the fragments of discourse to be analysed, those parts of the judgments are chosen in which the supreme jurisdictions apply and interpret the case law of the European Court of Human Rights. Those fragments of discourse are rather easily identifiable and they should be sufficient to assess the visibility of the change of legal culture in that respect.

Data collection is not considered to constitute a specific phase of research that must be completed before the analysis begins. Thus, it is useful to first carry out the collection of initial data and through the first analysis find indicators for meaningful samples. On the basis of those results, decisions on further collection of data can be made.⁶⁶ For the purposes of the present study, the whole case law of the Finnish supreme jurisdictions in which the case law of the European Court of Human Rights constitutes the large-scale data, from which the cases with references to a particular Convention article are

63 Titscher & al. 2000, p. 11 and 12. Titscher & al. observe that the clearer the relationship between the selected theoretical approach, the research strategy, and the methods and procedures employed in a piece of research, the easier it will be for other researchers to reconstruct and even repeat the conclusions derived from it. (Ibid. p. 11.)

64 Niemi-Kiesiläinen & al. 2006, p. 29.

65 Brown & Yule 1983, p. 69. To decide what constitutes a satisfactory unit for analysis, a chunk of conversational discourse can, for example, be treated as a unit of some kind because it is on a particular topic. The notion of topic is clearly an intuitively satisfactory way of describing the unifying principle which makes one stretch of discourse about something and the next stretch about something else. (Ibid. p. 70) When the elements in the topic framework and the interrelationships between them have been identified, the analyst has some basis for making judgments of relevance with regard to conversational contributions. (Ibid. p. 83)

66 See Meyer 2001, p. 23 and 24. This type of an approach is called "theoretical sampling", where the collection of data is continued as the research is carried out and new questions may arise, to be analysed through the collection of new data or re-examination of existing data. (Ibid. p. 24)

analysed through discourse analysis as a method of micro-comparison. On the basis of that analysis, a decision has been made on the number of further cases needed and on the further Convention articles to be analysed, with a view to finding support for the conclusions made in the light of the first analysed cases.

2. First phase of transition of the legal culture – from constitutional protection of fundamental rights to the European Convention on Human Rights

2.1 Finnish constitutional traditions prior to accession to the European Convention on Human Rights

Despite its existence since the 1950s, the European Convention on Human Rights and its monitoring mechanism are relatively new elements in the Finnish legal system. Prior to Finland's accession to the European Convention on Human Rights, the protection of fundamental rights of citizens was essentially based on the provisions of the Constitution until 1975 when Finland ratified the relevant United Nations instruments, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The constitutional provisions on fundamental rights also remained for a long time unchanged since their enactment upon declaration of independence until a reform of those provisions in 1995, which took place shortly before a complete reform of the Constitution that entered into force in 2000. Until Finland's independence, the constitutional traditions were largely affected by those of the neighbouring states.

Finland remained under the Swedish rule until 1809 and thus the legal traditions as well as the constitutional traditions and the traditions of protecting fundamental rights were largely those of Sweden throughout the Swedish rule. Already the unified local laws (i.e. those of towns and rural communities) of the 14th century applied to the Finnish territory as such⁶⁷. Even the history of a written constitution can be traced back to the Middle Ages, where the first constitutional instrument regulated certain privileges of the estates⁶⁸. The first rather advanced constitutional acts did not emerge, however, until in the 18th century⁶⁹. The cession of Finland to Russia did not change

67 Mattila 2002, p. 312.

68 Kastari 1972, p.11. The King was under an obligation to protect those privileges, although they were rather restricted.

69 Kastari 1972, p. 12. Those Swedish acts can be said to have been advanced even at a universal level in that they regulated systematically and in detail the legal structures and functions of the state and were also rather effective. (Ibid.) The first individual right that enjoyed the protection of a constitutional act was the freedom of press. (Ibid. p.30)

the settings of the legal system, but the Finnish legal system maintained its Nordic character, and the Swedish-Finnish legal system still existed in the 19th century⁷⁰. Some reception of foreign law took place in the 19th century, particularly that of German law, but the Swedish law constituted the basis for Finnish law.⁷¹

Similarly with other legislation, during the period of autonomy under the Russian rule between 1809 and 1917, the Swedish constitutional acts remained in force⁷², which meant that Finland still shared to a large extent the constitutional law traditions with Sweden. However, the Finnish constitutional traditions began to emerge shortly after the declaration of independence. In the 1920s, the leading international model of a constitution was the French *Charte* of 1814, which was further developed by the southern states of Germany.⁷³ Thus, inspiration for the Finnish national constitutional acts was derived from continental Europe in addition to the existing Swedish traditions. Jyränki points out that due to the late codification, as well as different conceptions of codification between the Finns and Russians, there were lacunae in the constitutional law during the period of autonomy⁷⁴. A new Parliament Act (*valtiopäiväjärjestys, riksdagsordning*) was adopted in 1906, although a reform of the Constitution Act (*hallitusmuoto, regeringsform*) was not achieved. At the same time, a freedom of expression, assembly and association act (1906) was adopted as a new constitutional act, following the models of Prussia, Austria and Belgium.⁷⁵

The already repealed Constitution Act of Finland of 1919 was the first Finnish constitutional act to contain rather classical fundamental freedoms. This is rather late

70 Mattila 2002, p. 312.

71 Björne & Vepsä 2010, p 22 and 23. That concerned for example the 1734 civil code, which was the basis of civil law in Finland. The reception of foreign law was made easier by the fact that the natural law traditions remained in Finland until the 19th century.

72 Suksi 2011, p. 88. Those constitutional acts included the 1772 Form of Government (Constitution) and 1789 Union and Security Act. See also Jyränki 1989, p. 418 and 419. Jyränki notes that the Swedish constitutional acts were only partly applicable in the autonomous grand duchy of Finland, but no new codifications were made of the applicable parts of those acts. Nor were the governmental and administrative arrangements of the period of autonomy codified in a single constitutional act.

73 Jyränki 1989, p. 407.

74 Jyränki 1989, p. 422. Suksi 2011, p. 90. Suksi observes that this was also partly due to resistance by Finns against Russian influence.

75 Jyränki 1989, p. 460. Suksi 2011, p. 90 and 91. That was later replaced by the Freedom of press Act (*painovapauslaki* 1/1919), which was supplemented in 1971 by an Act on broadcasting responsibility (*radiovastuulaki* 219/1971), and those two Acts have later been replaced with the Act on the use of freedom of expression in the mass media (*laki sananvapauden käyttämisestä joukkoviestinnässä* 460/2003). Also the new Act has the status of ordinary law. The Act, which provides the details on the responsibilities relating to the use of the freedom of expression, but has been applied only seldom (see e.g. KHO:2011:22, KHO:2009:82, KKO:2012:58, KKO:2010:88 and KKO:2009:9). Both supreme jurisdictions most often rely on the provisions of the Constitution and of international conventions on the freedom of expression.

in comparison with the traditions of continental Europe, which is largely due to the common history with Sweden. A separate Chapter on fundamental rights was included in the Constitution Act of 1919⁷⁶ although that list of rights was still rather modest⁷⁷. Furthermore, a possibility to enact derogations from the Constitution by means of a special procedure was included in the Constitution Act⁷⁸. Further constitutional acts were enacted in 1922 and 1928⁷⁹. However, the fundamental rights provisions of the Constitution Act of 1919 remained in force without amendments for more than 70 years and were at the beginning of the 1990s among the oldest fundamental rights provisions in force in Europe. It was a typical product of the beginning of the 20th century, protecting mainly the classical rights and freedoms of citizens, such as the liberty of person, freedom of religion, freedom of expression, assembly and association, and equality before the law.⁸⁰ In the view of Nergelius, there was a particular characteristic of the Finnish system of protecting fundamental rights, i.e. the traditionally strong protection of property rights, which is strong even at the international level, although this conclusion is not so easy to make on the basis of the provisions on fundamental rights alone. Such a conclusion can, according to Nergelius, rather be made on the basis of the fact that other provisions of law, destined to restrict the enjoyment of possessions, have been enacted through the procedure applied to the enactment of constitutional laws, whereas this has not been done so often in respect of legislation in other fields.⁸¹ Apart from the protection of property rights, the protection of the freedoms of association and assembly, the freedom of personal liberty and requirements of a fair trial can be said to have long traditions, although the particularly formal protection of those rights and liberties is a more recent phenomenon⁸². Thus, before accession to the

76 See Kastari 1960, p.1 and Jyränki 1989, p. 490. According to Jyränki, its provisions followed largely at least those of the constitutions of Prussia and Belgium. In his view there were no signs, however, of that the fundamental rights provisions would have been meant to restrict the measures of the legislator. (Ibid. p. 490 and 491)

77 According to Hidén, the list of rights was not only brief when compared with those of several other states, but the rights provisions were also rather compact. (Hidén 1971, p. 15 and 16.)

78 For details, see Jyränki 1989, p. 495. This appears to be an element in common with the Constitution of Prussia. The possibility of enacting derogations from the Constitution was also applied (see Jyränki 1989, p. 496).

79 Suksi 2011, p. 92. Those included the Act of 1922 on the right of Parliament to control the lawfulness of official duties of members of the Government, the Chancellor of Justice and the Parliamentary Ombudsman, the Court of Realm Act of 1922 and the Parliament Act of 1928.

80 HE 309/1993 vp, p. 5. According to Kastari, the list of rights was drawn up in the spirit of the universal liberalistic trend which had originated in the Bill of Rights in some North American Colonies and in the Declaration of Rights promulgated by the French revolution (Kastari 1960, p. 3).

81 Nergelius 1996, p. 198.

82 Hidén 1971, p.11 and 12. The fair trial provisions have not originally been in the Constitution but in other legislation regulating judicial procedure.

European Convention on Human Rights, the Finnish constitutional traditions have been affected by both its common history with Sweden and the Russian era, as well as to some extent by continental European elements. Those constitutional traditions, being part of the common traditions of States parties to the European Convention on Human Rights, are visible in the text of the Convention although Finland did not take part in the negotiations. However, when compared with the provisions of the European Convention on Human Rights, the provisions of the Finnish Constitution on fundamental rights were modest and not well suited to be applied by courts of law as such. That observation finds support from research made into the application of fundamental rights provisions and international human rights conventions prior to Finland's accession to the European Convention on Human Rights.

The constitutional provisions on fundamental rights were not particularly actively applied by the national courts before the 1980s but were rather used as a means of ensuring the constitutionality of ordinary legislation⁸³. Considering that Finland acceded to the European Convention on Human Rights later than the other States examined in this study, and the ratification of the International Covenants did not take place until in the late 1960s, the transition of the legal culture of a strengthened protection of human rights subject to international monitoring began somewhat later, although the constitutional provisions enacted in 1919 did provide stronger protection than prior to Finland's independence. The ratification of the two International Covenants, however, brought about some change in the culture of protecting human rights and fundamental rights and the national courts started to apply both the constitutional provisions and the provisions of international human rights conventions to an increasing extent around mid-1980s. The International Covenant on Civil and Political Rights provides for similar rights as the European Convention on Human Rights. Unlike in the other Nordic countries, Finland incorporated the Covenant into the national legal order through an incorporation act at the level of ordinary law, which made it directly applicable law in national courts in the same way as other laws at the same hierarchical level⁸⁴. Thus, the rights protected by the European Convention on Human Rights were enforceable through the relevant United Nations instrument already prior to Finland's accession to the Convention, and there was also an international monitoring mechanism ensuring compliance with the United Nations obligations. At that time, the provisions of the Constitution were not as extensive. Despite that, the International Covenant

83 See e.g. Kastari 1960, p. 2. According to Kastari, the provisions on fundamental rights were, however, rather influential in limiting the scope of the legislator.

84 Scheinin 1989, p. 195. The direct applicability of the International Covenant on Economic, Social and Cultural Rights was more limited in that it was incorporated by a presidential decree, which meant that it would be superseded by a domestic act of Parliament (Ibid. p. 197), although there are other applicable rules of interpretation in addition to the rule of *lex superior* (including *lex posterior* and *lex specialis*).

on Civil and Political Rights and the International Covenant on Civil and Political Rights also had an impact on the interpretation of the Constitution, meaning that they could be interpreted more broadly than earlier, as well as on the interpretation of other legislation. They also had the potential of limiting the competence of the legislator in that the international human rights obligations should be taken into account in the enactment of further legislation⁸⁵.

In the light of the foregoing, the first signs of a changing legal culture, imposed by the international requirements of protecting human rights, emerged in national case law. However, those cases in which international provisions were effectively applied remained isolated ones as the courts still appeared to prefer reference to the provisions of the Constitution. Before Finland's accession to the European Court of Human Rights, there were hardly any references to the provisions of international conventions on human rights and despite the slight preference for constitutional provisions, it was still rare to directly refer to the fundamental rights provisions of the Constitution⁸⁶. The national courts in Finland started to apply international human rights conventions more actively upon accession to the European Convention on Human Rights. This is explained in more detail in sections 2.6.3 and 4.3 below. It is interesting to note that the court practice of applying even fundamental rights provisions of the Constitution seems to have changed rather dramatically upon accession to the European Convention on Human Rights. It is argued that before that element in the legal system, the standards and culture of protecting human rights and fundamental rights were relatively weak. Both the technical preparedness and the general willingness of the judiciary to apply those provisions were lacking, despite the existence of legal provisions including the International Covenant on Civil and Political Rights. Therefore, it is relevant to study the European developments in detail to see, first, what exactly has been adopted to be applied at the national level and how foreign it is for the national legal system. It is asserted that the more differences there are between the Convention rights and the constitutional system, the more difficult it is for national courts to adapt to the Convention system. In the following, an analysis is made of how the international human rights law first emerged alongside the national constitutions, which elements of the selected legal systems are visible the contents of the European Convention on Human Rights and what the impact of the Convention has been on those systems, and how the first phase of transition of the legal culture of protecting human rights and fundamental rights in Finland took place upon implementation of the Convention. It is well known that the application of fundamental rights and human rights law by the supreme jurisdictions has increased gradually since then, but it is argued in this thesis that the historical developments explain at least to some extent why the transition is still ongoing.

85 See Scheinin 1989, p. 197 and 198.

86 See Scheinin 1991, p. 215, 216 and 222 as well as 241 and seq.

2.2 Emergence of international human rights instruments

International human rights law is, on the one hand, part of public international law but is, on the other hand, to a large extent today based on specific international human rights treaties. International human rights law is a branch of international law aimed at ensuring compliance with the obligation of states to respect the fundamental rights and human rights of its citizens⁸⁷, and consists of a body of international rules, procedures and institutions developed to implement it and to promote respect for human rights in all countries on a worldwide basis⁸⁸. The difference between traditional international law and international human rights law is indeed that international human rights conventions limit the sovereignty of States as regards jurisdiction over their citizens, in the same way as national constitutions impose limits on governmental and legislative action. Traditionally, individuals were considered to fall within the exclusive jurisdiction of the State in which they resided. Gradually, the situation started to change already as of the first instruments prohibiting slave trade and early legal doctrines of humanitarian intervention in the 19th century, although the increase of international human rights law did not start until after the Second World War.⁸⁹ However, as De Schutter warns, there are some limits on the binding force of international human rights law due to the fact that it is addressed at a limited group of subjects of international law instead of all subjects of international law⁹⁰. However, human rights may also be seen as embodying certain collective values which at the same time define the legal interests of individual states⁹¹. Another characteristic of international human rights law is the lack of reciprocity in contrast to other branches of international law, although there are exceptions among human rights treaties⁹². Furthermore, despite the international character, effective implementation of human rights law requires some adherence to the domestic legal systems and law. As pointed out by Meron, the effectiveness of international human rights instruments depends on their observance and implementation by domestic ju-

87 See the Charter of the United Nations of 26 June 1945, Article 1, paragraph 3.

88 Hannum 1994, p.3.

89 Cassese 2005, p. 376. De Schutter 2009, p. 39. Brownlie 1990, p. 564 and 565, as well as 570-572. Brownlie also draws attention to the creation of the Commission on Human Rights in 1946, entrusted with the function of preparing the texts of the Universal Declaration, the Convention on the Political Rights of Women and the draft covenants. (Ibid. p. 571)

90 De Schutter 2009, p. 40. De Schutter reminds that sceptical views have also been expressed about the binding nature of the human rights obligations as set out in the United Nations Charter, which only bind the States and the UN institutions.

91 See Craven 2000, p. 515.

92 Craven 2000, p. 498. Craven names as one of such exceptions to the idea of non-reciprocity the European Social Charter under which the enjoyment of certain rights is dependent on the nationality of one of the States parties, on the basis of reciprocity. (Ibid. p. 499)

dicial and administrative agencies⁹³. International law does not need to be in a written form, but there are also rules that are considered to constitute customary law, although there is some controversy as to how the evidence of the existence of customary rules is derived. As concluded by De Schutter, declarations or resolutions and identifiable state practice provide some evidence of the commitment of the international community to certain values, whereas inconsistent state practice could speak against it – although even condemnations expressed by states against violations made by other states may provide evidence of customary law⁹⁴. Thus, not even wide adherence to certain rules would tell the entire truth of the *opinio juris* in case state practice demonstrates flagrant violations of those rules, although certain rules are considered absolutely binding⁹⁵. One must remember, however, that international treaties constitute the clearest evidence of customary rules in that they codify existing and emerging custom, although this statement entails the problem that treaties only bind the parties thereto and saying that they state customary law would mean that even non-parties would have to accept the contents⁹⁶. Codified rules also strengthen compliance with international law particularly where they provide for monitoring, whereas the possibility for reservations accompanying ratification weakens their binding force⁹⁷. Today, most rules of international law have already been codified. The same in principle applies to international human rights law⁹⁸. It is widely accepted that the rights set out in the Charter of the United Nations and the Universal Declaration of Human Rights have become part of customary international

93 Meron 1989, p. 80.

94 De Schutter 2009, p. 41-43.

95 Certain human rights norms may be considered to have a *jus cogens* character. De Schutter suggests that instead of *jus cogens*, one could also speak of the *erga omnes* character of those obligations. Certain rights are of such a fundamental nature that all states have an interest of protecting them as an obligation towards the international community as a whole (De Schutter 2009, p. 51).

96 Meron 1989, p. 80. There would also be further consequences, including the question of jurisdiction of international monitoring bodies over non-parties and access to international law remedies. (Ibid. p. 80 and 81)

97 It is to be noted, however, that the regime of reservations does not fit that well in the context of human rights conventions in that the essential effect of reservations and of the acceptance thereof or objection thereto is between the State entering the reservation and that accepting it or objecting to it. (See e.g. Craven 2000, p. 495)

98 Cassese 2005, p. 393 and 394. According to Cassese, the customary human rights norms consist, in particular, of certain important norms including the norm forbidding grave, repeated and systematic violations of human rights; those banning slavery, genocide and racial discrimination; the norm prohibiting forcible denial of the right of peoples to self-determination; and the rule banning torture. In his view, they constitute rules binding on States irrespective of whether they are included in a convention that has been ratified by those States. Further, in his view, there are rules of customary international law requiring States to intervene in gross and large-scale violations of human rights to discontinue such violations. (Ibid.) It is to be observed that all those rules have been codified at least in one international convention, although not all of them have been ratified by all States.

law⁹⁹. A large part of those rights, in turn, have later been included in other binding human rights instruments, including the European Convention on Human Rights. The most effective international rules of human rights law are thus included in binding multilateral conventions. There is also a large body of instruments that rather have the character of recommendations than that of binding norms. The Universal Declaration of Human Rights may be placed between recommendations and conventions, insofar as the legal effect is concerned¹⁰⁰. In general, an international human rights convention is a treaty within the meaning of the Vienna Convention on the Law of Treaties¹⁰¹ in the same way as any other treaty entered into with other subjects of international law (states or international organisations), with an intention to create obligations under international law¹⁰². However, one distinctive feature is that human rights conventions create obligations on state vis-à-vis their citizens, instead of merely creating obligations towards other states parties to the convention concerned.

The European Convention on Human Rights is the international human rights instrument subject to this study, although it is not the only one playing a role in the national case law applying fundamental or human rights provisions but is even today accompanied by other instruments at the United Nations level. The historical developments leading to the drafting of the European Convention on Human Rights and their meaning for the English legal system have been described by Francis Bennion – sarcastically but with a brilliant sense of humour – as follows:

“[...] unlike the legislatures of other nations, Britain’s Westminster Parliament was not in any way confined by the detailed conditional clauses of a written constitution, usually written by different people in the distant past and required in the present to be construed by uncontrolled and unelected judges. The ideal situation of the British lasted for a long while, but was too good to last for ever. As usual, the path to Hell was paved with good intentions. [...] Who would have expected that the victors in a war against opponents of democracy would engineer what was, as it turned out, a dire reverse for democracy? Yet history teems with such quirks. Things rarely turn out the way well-meaning people expect.”¹⁰³

99 Meron 1989, p. 82.

100 For details, see Sohn and Buergenthal 1973, p. 518-522.

101 Vienna Convention on the Law of Treaties (1969), UNTS vol. 1155, p. 331, Article 2, paragraph 1, point (a).

102 This distinguishes international treaties from agreements between states governed by domestic law (see Aust 2013, p. 17). Such agreements include instruments with a variety of denominations, such as Memoranda of Understanding, concluded typically directly between the competent authorities, with a view to facilitating cooperation and leaving their implementation to be arranged within the framework of existing national provisions of legislation.

103 Bennion 2009, p. 141 and 142.

That is perhaps one of the most radical views expressed by legal scholars, but of course, is not the whole truth. What is true is that the European Convention on Human Rights is a product of peoples who wished to prevent the atrocities leading to World War II from happening again, and most certainly, the intentions were good. However, the Convention and its language is not exclusively a product of victors of World War II but should rather be seen as a product of longer historical developments as will be given account of below. At the same time with the drafting of the European Convention on Human Rights, similar efforts were taken at the international level within the framework of the United Nations in an effort to strengthen the international protection of human rights, and largely for the same historical reasons.

The history of international agreements may be traced back to ancient times but, as Bunn-Livingstone points out, the ancient agreements would hardly meet the criteria set for treaties as we understand them today. The first treaty considered to represent international law in the eyes of the Western world is perhaps the Treaty of Westphalia of 1648.¹⁰⁴ In this perspective, and as mentioned in the foregoing, the first international instrument for the protection of human rights was adopted rather late. Until World War II, the responsibility for such protection was considered to belong to the domestic affairs of states, and no international interference was considered appropriate. However, the atrocities of World War II, particularly those under the German national socialist rule¹⁰⁵, changed the attitudes in this respect. The international efforts to create instruments and mechanisms for the purpose of ensuring universal respect for human rights and for preventing the atrocities of World War II from happening again were launched by the Allied Powers. It was decided that the protection of human rights and fundamental freedoms should become one of the main functions of the new United Nations organisation (UN). The United Nations Charter provides for a general obligation of respect for human rights, as well as for the establishment of a Human Rights Commission to implement this task. However, it is to be noted that the political philosophy and the human rights agenda of the Allied Powers largely determined the selection of human rights to be protected through international instruments and the

104 For more details, see Bunn-Livingstone 2002, p. 78-80.

105 See e.g. *Collected Edition of the Travaux Préparatoires*, Vol. I, in which the statement of France provides an example of the concerns caused by the Second World War (p. 40): "... Three things still threaten our freedom. The first threat is the eternal reason of State. [...] Montesquieu said: "Whoever has power, is tempted to abuse it." [...] Then there is the second threat: Fascism and Hitlerism have unfortunately tainted European public opinion. These doctrines of death have infiltrated into our countries. They have left their mark. They have poisoned certain sections of public opinion. Racialism did not die out with Hitler. [...] Finally, and above all, freedom is in danger in our countries [...] because of the economic and social conditions of the modern world."

mechanisms of protection.¹⁰⁶ The idea of drafting a Universal Declaration of Human Rights was presented at the same conference in which the Charter of the United Nations was drafted, but more detailed consideration was needed and the Declaration was finally adopted in 1948¹⁰⁷.

As is pointed out by Hannum, the UN involvement in the protection of human rights has rapidly expanded since then. New international instruments have been adopted throughout the existence of the United Nations.¹⁰⁸ Such instruments include, among others, the Universal Declaration of Human Rights¹⁰⁹ and the Convention on the Prevention and Punishment of the Crime of Genocide¹¹⁰ in 1948, the International Convention on the Elimination of All Forms of Racial Discrimination¹¹¹ in 1965, the International Covenant on Civil and Political Rights¹¹² and the International Covenant on Economic, Social and Cultural Rights¹¹³ in 1966, the Convention on the Elimination of All Forms of Discrimination against Women¹¹⁴ in 1979, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment¹¹⁵ in 1984, the Convention on the Rights of the Child¹¹⁶ in 1989, and, most recently, the Convention on the Rights of Persons with Disabilities¹¹⁷ and the International Convention for the Protection of all Persons from Enforced Disappearance¹¹⁸ in 2006. This international involvement was also reflected at the regional level, in particular in Europe. The European Convention on the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) was adopted shortly after the adoption of the Universal Declaration.

An international convention is the result of a complex process of negotiations and drafting, involving a variety of sources for the formulation of provisions. Among

106 Sohn and Buergenthal 1973, p. 506 and 507. Hannum 1994, p. 4 and 5. Wesel 2010, p. 570. White & Ovey 2010, p.3. The instruments resulting from the work of the Allied Powers include, apart from the Charter of the United Nations, the Universal Declaration of Human Rights and the Convention on the Prohibition of Genocide. In the view of Cassese, the United Nations Charter was the turning point in the protection of human rights, as it constitutes the basis for internationally binding human rights obligations. (Cassese 2005, p. 378.) See also Brownlie 1990, p. 569.

107 Sohn and Buergenthal 1973, p. 514 and 515.

108 Hannum 1994, p. 5.

109 United Nations General Assembly Resolution 217A (III) of 10 December 1948.

110 UNTS vol. 78, p. 277.

111 UNTS vol. 660, p. 195.

112 UNTS vol. 999, p. 171, and vol. 1057, p. 407.

113 UNTS vol. 993, p. 3.

114 UNTS vol. 1249, p. 13.

115 UNTS vol. 1465, p. 85.

116 UNTS vol. 1577, p. 3.

117 UNTS vol. 2515, p. 3.

118 UNTS vol. 2715, Doc. A/61/448.

these sources, both other international instruments and national legislations play an important role. States participating in the negotiations contribute to the drafting by proposing different wordings, often containing elements of their own legislations. This is very often due to the fact that for a treaty provision to be acceptable for a negotiating State, it must fit in its national legal system when implemented. It is in principle possible that the wording of the national legislation of a negotiating State ends up in the text of a provision of the international treaty as such, although it is more likely to be adjusted in the process of the negotiations based on the views and wishes of all the States involved. The final result is a compromise of those views and wishes, which is also reflected in the language of the treaty in question. The same holds true for international human rights conventions.

2.3 Development of the language of international human rights law

The language of international treaties shares much in common with the language of law in general, but is still a branch of its own within the general concept of legal language. The language used in international treaties is a result of negotiations between the contracting states, containing elements of the legal systems of two or more states with regard to both the language and the contents. Although an examination of the texts of agreements reveals that the language of treaties contains the same kinds of concepts and expressions as any legislative texts, the final outcome is a political compromise, which has its impact on the language. Therefore, it is typical of treaties that clear and precise legal language may often give way for intentionally ambiguous formulations.

The most usual original language of international treaties today is English, but this has not always been the case. In the Middle Ages, the language of international relations and treaties was Latin, which was replaced with national languages along with the rise of nation states. At first, the prevailing language was French, which remained for a long time the language of diplomacy and aristocracy. Until the end of the Second World War, French enjoyed an equal position with English e.g. in the League of Nations and in the Permanent Court of International Justice. French as the language of diplomatic and international relations was only overthrown by English after the Second World War.¹¹⁹ The position of English as the language of international relations was further strengthened by the rise of the number of international organisations.¹²⁰ The number of different types of international organisations has increased since the 19th century as inter-state relations increased along with industrialisation and increase in international trade. The increased international relations made it necessary to create

119 See Hardy 1962, p. 72, and Tabory 1980, p. 4 and 5.

120 Hardy 1962, p. 72.

an appropriate framework for the adoption of certain common rules and standards.¹²¹ In most international organisations, English is at least one of the official languages. In the United Nations, which replaced the League of Nations, English and French remained first the working languages, although the status of an official language was in 1945 given to Chinese, Russian and Spanish as well. These three languages became working languages by 1973, and in addition the status of an official language and working language was also given to Arabic.¹²²

Although in most international organisations today, including in Europe, English today is the mostly used language of diplomacy and the most usual language of drafting of treaties, in formal terms it enjoys an equal position along with one or more other languages, and particularly multilateral conventions are usually drafted in two or more authentic languages, all texts being equally authentic. In fact, international conventions have for a long time been drafted in several languages and their number has steadily grown since the end of the First World War¹²³. The fact that an international organisation has several languages most often means that even treaties negotiated under the auspices of that organisation are drafted in several languages – the choice of authentic languages seems to coincide with the official languages of the organisation in question. European conventions concluded within the framework of the Council of Europe, including the European Convention on Human Rights, are authentic in two languages, English and French. United Nations conventions are today done in the six official languages of the organisation. The Council of Europe applies, at least officially, a principle of simultaneous drafting (co-drafting) of the two authentic language versions of its Conventions.

The change in the language of international relations has, in a way, its counterpart in the developments of the language of national legislation. In the same way as for international agreements, the language of law in Europe was originally Latin due to the Roman influence. Latin as the language of law is based on Roman law (*jus commune*) which refers to the legal system that developed within the Roman Empire and, serving as a basis for supranational law, has had an impact on all modern legal systems. Although there were differences in the reception of Roman law in the selected States, Latin has played a role in the language of law in all five of them and was particularly strong in the States of continental Europe (France and Germany).¹²⁴ Thus, the use of Latin coincided with the reception of Roman law that served as the basis for the construction of European, continental law¹²⁵. It did have an impact even in the Nordic

121 Groom 1990, p. 5. Hannikainen 1988, p. 37.

122 For more details, see Groom 1990, p. 6-9.

123 See Tabory 1980, p. 4 and 5.

124 Mattila 2012, p. 207. See also Glenn 2004, p. 134.

125 Glenn 2004, p. 133.

states, although the reception of Roman law remained modest as law as a science also developed rather late. The influence of Roman law and Latin was perhaps the least in Finland that remained for a long time under Swedish influence and the first pieces of legislation were in Swedish. In addition, in the 19th and 20th centuries German played a more important role in the development of legal terminology. The role of Latin can be partly explained by the influence of the Church on all sectors of society in the Middle Ages, as Latin was also the language of the Church. Furthermore, in the early Middle Ages, national languages were still underdeveloped particularly as written languages. Roman law and Latin were also taught at universities.¹²⁶ Thus, Latin served as a lingua franca for a long time despite the fall of the Roman Empire, particularly as written language and as the language of sciences including law.¹²⁷ All European legal languages are originally based on Latin, and the transition from Latin to the new national languages was particularly slow in the field of law when compared with other fields of sciences.¹²⁸

The Latin dominance gradually diminished, however. In England, this took place already since the 14th century¹²⁹, which may be explained by the history of the country and its legal system as explained in the foregoing, as well as by the history of the English language. In continental Europe, the break-up of Latin dominance took place considerably later, due to the reception of Roman law. According to Šarčević, in France, the French language began to replace Latin as the language of law in the 16th century, whereas in Germany there were efforts to draft laws already in the 13th century, but Latin was reinstated as the language of law in Germany towards the end of the 15th century as a result of the reception of Roman law. High German was not accepted as a uniform written language until in the first half of the 17th century.¹³⁰ Thus, as Latin remained the dominant language of law in Europe for a long time, and was in practice the only common language, it was natural that its position in international relations also remained strong until a rather late moment. At the moment of drafting of the European Convention on Human Rights, however, the position of French and English as the languages of diplomacy and the language of international relations had already overthrown that of Latin.

Despite that, the influence of Latin can still be seen in the national legal systems and languages, first, in the style of modern legal languages that still reflect the phrasal

126 See Šarčević 2000, p. 26, and Letto-Vanamo 2008, p. 1130 and 1131.

127 Mattila 2012, p. 207.

128 Mattila 2012, p. 212 and 213.

129 Šarčević 2000, p. 28. Although English courts never received Roman law, Latin had become the dominant written language for statutes, charters and writs, and statutes written in Latin could still be found around 1461. (Ibid.)

130 Šarčević 2000, p. 29 and 30. See also Arntz 2002, p. 40-44. The influence of Latin on legal German has varied in the course of history, but was the strongest during the adoption of Roman law.

rhythm of old Latin of the law and, second, in the legal vocabulary of which a large part derives from Latin that was used in the Antiquity, in the Middle Ages or at the beginning of the New Age.¹³¹ However, although the influence may be even considerable, the influence of Latin on a modern legal language is not always that apparent¹³². As regards the phraseology and vocabulary, one may note that there are examples of concepts and expressions in which Latin is used as such to use the language as precisely as possible¹³³, in which case the meaning is more or less the same in all languages using those concepts and expressions, whereas in other situations the Latin heritage can be seen in terms that have a Latin origin but that have been adapted to the rules of language (formulation of vocabulary and writing)¹³⁴.

Thus, today, the influence of Latin on modern legal languages can be seen as an element creating uniformity, although there are also other elements creating uniformity in legal cultures and legal thinking, such as the increased supra-national elements of legal systems including both international human rights law and EU law. The influence of Latin can even be seen in the language used by international judicial bodies, which serves as a basis for increasing coherence in the understanding of that language and thus in the application and interpretation of European case law, although the direct use of Latin concepts and expressions in the case law of the European Court of Human Rights is not necessarily that usual or apparent. However, considering the common roots of the modern legal languages in Europe, there is at least considerable indirect influence. This is particularly so because of the influence of the French “Charte” on international human rights instruments and of the strong influence of Latin and Roman law on French law. This aspect is assessed more closely in section 2.5.2 below. Furthermore, although the language of international relations and law has changed into English, it does not mean that there would be less influence of international languages on the national legal cultures. To the contrary, the overwhelming use of English today in various sectors of society, including legal literature, and modernisation of society has lead to even more rapid influence of other legal cultures and particularly international

131 Mattila 2012, p. 224. For details, see Ibid. p. 243–246. The Latin influence on the judicial style is perhaps still the strongest in the case of French. In the case of the other legal languages covered by the present study, the influence has gradually diminished to a greater extent.

132 Arntz 2002, p. 39. This is the case, for example, in respect of German the relationship of which with Latin is a complex one and has undergone fundamental changes in the course of history. (Ibid.)

133 Mattila 2012, p. 235. According to Mattila, this is particularly the case with new legal languages as the concepts and expressions do not still have a counterpart in that language, but it may also be used in older legal languages to ensure preciseness. (Ibid.) On occasion, Latin citations are also used in international contexts to ensure the comprehensibility of the legal texts. (Ibid. p. 237)

134 Mattila 2012, p. 240.

law on the national legal cultures¹³⁵, which results in challenges in reconciling those legal cultures which all have an impact, for example, on the case law of the European Court of Human Rights which in turn shapes the contents of the modern European legal traditions. Thus, today, the national legal cultures and languages are increasingly shaped by the language of international human rights law and the international judicial bodies created to interpret it, particularly through the English language.

2.4 Drafting of the European Convention on Human Rights

The European concerns for the protection of human rights arose in the same decade as those of the Allied Powers at the international level and largely for the same reason. The European efforts to improve the protection of human rights was a response to the concerns that arose as a result of World War II and by the new threats to human rights caused by new forms of totalitarianism after the War, with an aim to prevent aggravated violations of human rights¹³⁶. It is worth noting that although Germany took part in the process, its contribution to the negotiations was rather modest. The historical events of Germany had an impact on what was considered important to be included in the European Convention on Human Rights¹³⁷, but the victors of the war played a determining role in the negotiations.¹³⁸ That influence included, among others, that of the United States¹³⁹. However, one must not forget that the German constitutional traditions share some elements in common with those of France, which is explained in more detail in section 2.5 below. Thus, there can be considered to have been at least some degree of indirect influence of German constitutional traditions too, in the form of common history. It is worth underlining, however, that the constitutional traditions presented in the following section are not the only ones that affected the contents of the Convention, but it is a product of a larger group of negotiating States. As a result of the international efforts, the European Convention on Human Rights shares more in common with the Universal Declaration of Human Rights, as well as with the International Covenant on Civil and Political Rights, than with any individual national constitution. The Covenant was under negotiations partly simultaneously, deriving

135 This does not mean, however, that the legal traditions behind the English legal language would be dominating, but that they co-exist and interact with one another. The process of exchange between traditions is accelerating today. (See Glenn 2004, p. 32.)

136 Sohn and Buergenthal 1973, p. 1000-1002, Bates 2011, p. 18, and White & Ovey 2010, p. 4. Communism was considered, in particular, to be a new form of totalitarianism.

137 Bates 2011, p. 21. In particular, the aim was to prevent the degradation of human rights from happening again, by creating an enforcement mechanism.

138 For details, see *Collected Edition of the Travaux Préparatoires*, particularly Vol. I.

139 See Henkin 1990, p. 13 and 14.

also some of its contents from the French constitutional traditions but also from other traditions such as the American constitutional texts, although one may note that the outcome of the international instruments is more detailed than the constitutions of France and the United States, for example. This also applies to the European Convention on Human Rights, although the common constitutional traditions of European states played perhaps a bigger role. Indeed, as is pointed out by White & Ovey, the interpretation of the European Convention on Human Rights may legitimately be based on a common tradition of constitutional laws and a large measure of legal tradition common to the Member States of the Council of Europe.¹⁴⁰ A further reason affecting the contents of the final text of the Convention in the course of negotiations was the need to have a European mechanism of protection of human rights rather rapidly, for which reason for example economic and social rights were excluded, and some others were left to be regulated by additional protocols such as the protection of property. Instead, the Convention provides for rather detailed provisions on fair trial rights. Also, the in the original convention that has later been replaced with a revised one, the system of individual applications and the competence of the European Court of Human Rights were made optional¹⁴¹. Although a majority of states were originally against the creation of a Court, most of them finally were prepared to accept the idea of an optional court¹⁴². The aim to have a speedy decision on the draft Convention resulted in a compromise text based on the majority opinion, but was not necessary a product that would please everyone¹⁴³. The optional nature of the system of individual applications has been seen as a factor that weakened the development of the case law for a long period of time.

Some concerns were raised during the negotiations on the drafting of the European Convention on possible duplication of efforts at the United Nations and European

140 White & Ovey 2010, p. 77.

141 See the *Collected Edition of the Travaux Préparatoires*, Vol. I, Introduction, p. XXVI and XXVIII. The European protection mechanism has, however, been later subject to changes through the adoption of the additional protocols. By Protocol No. 11, the Human Rights Committee was abolished and replaced with a single permanent European Court of Human Rights. The former case law of the Committee and the Court is, however, still relevant, and the former and present case law constitute a continuous development of the protection of the rights guaranteed by the Convention and its additional protocols. For details of the former and present mechanism, see e.g. Pellonpää et al. 2012, p. 141 and seq.

142 Bates 2011, p. 28. Of the States subject to the present research, only France was in favour of the idea of a Court. It is interesting to note that despite this, France finally ratified the Convention and accepted Court's jurisdiction very late.

143 See, for example, the *Collected Edition of the Travaux Préparatoires*, Vol. IV, p. 56, for the statement of France. According to Bates, the Convention was also consistently criticised after its adoption for the inadequacy of the substantive text as a free-standing bill of rights. (Bates 2011, p. 32)

levels¹⁴⁴. Thus, a considerable part of the provisions of the Convention are directly based on those of the Universal Declaration of Human Rights¹⁴⁵. Even the drafting of the International Covenant on Human Rights was paid attention to at the European level, due to the two sets of negotiations taking place partly at the same time.¹⁴⁶ However, some elements were excluded intentionally from the European system¹⁴⁷. Differences between the legal systems of the negotiating States were also paid attention to. For example the question of civil rights, covered by the present study, was subject to discussions, particularly for the reason that there is an important difference in concepts between the statutory law and common law countries¹⁴⁸. A comparison between the final texts of the three instruments reveals that the Universal Declaration of Human Rights covers a wider range of rights¹⁴⁹ than the two others, as the binding nature of those two made it necessary to exclude such rights as would have been difficult to approve for some negotiating states, which were thus left to be included in a separate instrument. The comparison of the three instruments also reveals that the European Convention on Human Rights includes considerable similarities with the United Nations instruments, but its provisions go in some respects further. Those provisions include, in particular, the provisions on the powers of the European Court of Human Rights. The final fair trial provisions of the European Convention on Human Rights and the International Covenant on Civil and Political Rights have similarities but are structured somewhat differently.

The languages used for drafting also have an impact on the exact contents of the provisions. As noted in the foregoing, the English and French language versions of

144 See the *Collected Edition of the Travaux Préparatoires*. For example, the definition of human rights was one of those issues that a number of negotiating States found unnecessary to deal with. (See e.g. Vol. I, p. 10 and 12)

145 For details, see the *Collected Edition of the Travaux Préparatoires*, Vol. I, p. 196 and 198. All the articles of the European Convention on Human Rights covered by the present study are originally based on those of the Universal Declaration of Human Rights.

146 See the *Collected Edition of the Travaux Préparatoires*, Vol. III, p. 26, 28, 30 and 32. The negotiations for the International Covenant on Human Rights had been initiated somewhat earlier than those on the European Convention on Human Rights, but the text was not adopted until in 1966. (See Pellonpää et al. 2012, p. 12.)

147 Such elements included for example due process elements existing only in the American legal system. (See the *Collected Edition of the Travaux Préparatoires*, Vol. III, p. 28.)

148 "It should be noted that there was some discussion in Committee about the term "civil". The "common law" countries pointed out that "civil rights and obligations", as recognized by the administrative authorities, were not protected by an administrative tribunal. In this respect, there was an important difference from the "civil law" countries. Hence the words "in a suit at law" ("contestation" in the French text) which would enable administrative proceedings to be excluded from the field of application of the Convention." (See the *Collected Edition of the Travaux Préparatoires* the *Collected Edition of the Travaux Préparatoires* , Vol. III, p. 30.)

149 Including the right to seek asylum (Article 14), the right to nationality (Article 15), and a variety of economic, social and cultural rights (Articles 22 to 27).

the European Convention on Human Rights are authentic language versions. The Convention does not provide for the precedence of either language version. Thus, in accordance with Article 33(3) of the Vienna Convention, the terms used in both authentic language versions of the European Convention on Human Rights are presumed to have the same meaning. However, this does not exclude the possibility that national courts in the English or French speaking States parties to the Convention have faced problems in the application or interpretation of its text. In principle, even those States parties where the official languages of the legal system are languages other than English or French, the authentic language versions should be resorted to in the application and interpretation of the Convention, despite that the Convention has been translated into other languages. The Finnish courts in practice use the Finnish and Swedish translations, for example, but official language versions are resorted to at least in cases of doubt as to the correctness of the translation¹⁵⁰. This is necessary not only to ensure a correct interpretation of the Convention, but also because it is on the basis of the original texts that the European Court of Human Rights develops the meaning of its provisions.

2.5 Elements in common between the national constitutional traditions and the Convention

It is not rare to have human rights or fundamental rights provisions in domestic legislation, particularly in the constitution, and in fact the protection of fundamental or human rights emerged first at the national level, long before the first international instrument to that effect was drafted. The national provisions of some states have even been used as a model for certain international conventions for the protection of human rights. The first American declarations of human rights as well as the French declaration of human rights and citizen's rights can be considered sources of inspiration for present-day human rights conventions adopted at the international or regional level¹⁵¹. However, when looking into the texts of the relevant instruments, one may note that despite the national sources of inspiration, the texts of international human rights conventions and particularly the European Convention on Human Rights and the International Covenant on Civil and Political Rights are considerably more detailed and developed than the provisions of early national constitutions such as the French one, or the American one. One may note that unlike the European Convention on Human Rights and the most recent examples of European constitutions, the United

150 See more on this issue e.g. Koivu and Mattila 2006, p. 43-48, particularly p. 45.

151 See e.g. Favoreu 1990, p. 38-40. According to Favoreu, the United States exported to Europe the idea of a written constitution, and contributed to the idea of a bill of rights.

States Constitution is rather a political document instead of a legal one¹⁵² although the rights are enforceable in courts of law¹⁵³. In turn, the international conventions have served as models for countries that have later adopted national constitutional or statutory provisions on the protection of fundamental rights and also for the Charter of Fundamental Rights of the European Union¹⁵⁴. Further, there is also uncertainty about the impact of the United States constitution in France due to the strong traditions in France and continental Europe¹⁵⁵.

The concepts of human rights and fundamental rights¹⁵⁶ have a close connection with the emergence of the concepts of constitution and constitutional law. The first instruments that may be classified as constitutions or constitutional acts in Europe were created in an effort to set certain limits on the exercise of power by the sovereign. At the same time, a number of rights were guaranteed to certain groups of citizens. Thus, not all citizens were considered equal and not all had the same political rights. The guaranteed rights rather belonged to the privileged estates of society. At the same time, however, the idea of equality of citizens before the law emerged in France along with

152 Henkin 1990, p. 1.

153 Henkin 1990, p. 9-12. The nature of the constitutional rights, in turn, affects the jurisprudence as the rights are essentially “negative”, prohibiting government e.g. to resort to racial discrimination. Thus, they do not as such create obligations on government to actively protect citizens in the same way as the European Convention on Human Rights does. (Ibid. p. 11) Such privileges are rather provided by other laws.

154 Official Journal of the European Union, C 326/02, p. 391, 26.10.2012.

155 Favoreu 1990, p. 39. Even the Founding Fathers of the United States Constitution drew some inspiration from the European intellectuals and the English traditions, although the United States was the first to adopt a modern written constitution with a bill of rights. (Ibid. p. 38, and Henkin 1990, p. 1)

156 A distinction is often drawn between human rights and fundamental rights in that the first mentioned ones have their origin in international conventions of universal application, whereas the latter are based on a constitution guaranteeing them a certain permanent and legal nature due to the higher hierarchical status of constitutional law provisions. Both are understood to reflect fundamental social values. In addition, human rights are considered to belong to all irrespective of the person’s origin, sex, age or social status, for example. (See Ojanen 2001, p.38 and 39) The material contents of the two may be identical, and identical provisions may be found in an international human rights instrument and a constitution. Other denominations are also used referring to a narrower set of rights, including citizen’s rights, civil rights and liberties or fundamental freedoms. The European Convention on human rights speaks of both human rights and fundamental freedoms. Fundamental freedoms refer to the same concept as civil liberties which relate to the principles regulating the relationship between the individual and the state in representative democracy (see Gearty 2004, p. 33). Thus, they largely refer to political freedoms, whereas human rights include the remaining protected rights of the individual that can only be restricted in exceptional circumstances.

the revolution of 1789 and in the United States.¹⁵⁷ However, since the 18th century, the idea of the equality of citizens was linked to the efforts to change existing structures of society. This is what the five States parties to the European Convention on Human Rights covered by this study, i.e. the United Kingdom, France, Germany, Sweden and Finland, roughly speaking had in common insofar as constitutional developments were concerned, although those developments did not result in a written constitution for the United Kingdom and there were quite a few other differences due to the particular historical developments and settings¹⁵⁸. Furthermore, for the purposes of this chapter, one must bear in mind that Finland was not among those States parties that took part in the negotiations for the drafting of the European Convention on Human Rights, whereas the other States covered by the present study participated¹⁵⁹. Although the 19th century has been described as the century of written constitutions¹⁶⁰, the development of the protection of human rights was not remarkable¹⁶¹. The following provides a brief overview of the historical developments of constitutional law and of the protection of human rights and fundamental freedoms in the selected four States¹⁶², in an effort

157 In comparison, in the United States, the essential factor behind the Constitution and the Bill of Rights was the “sin of slavery”. Thus, the American Constitution and the idea of protecting fundamental rights rely on the principle of equal protection of citizens, although slavery was not abolished entirely until upon the Thirteenth Amendment to the Constitution. (See Dorf & Morrison 2010, p. 125 and 127) In other respects, the Bill of Rights does not underline very strongly the principle of equality or prohibition of discrimination (see Amendments to the Constitution of the United States (Bill of Rights), December 15, 1791).

158 Although the constitutional traditions in France and Germany and to a certain extent also in England were founded on the feudal system, particularly since the late Middle Ages they continued to develop in different settings. In France, the developments lead to a stronger status of the monarchy, whereas in Germany the monarchy began to erode and in England, a rather influential Parliament began to develop alongside the monarchy, laying thereby the foundations of the European parliamentarism. See Wesel 2010, p. 285.

159 For details on the negotiations, see *Collected Edition of the Travaux Préparatoires*. A total of twelve nations took part in the negotiations. The final text was signed by Belgium, Denmark, France, Germany, Iceland, Ireland, Italy, Luxembourg, The Netherlands, Norway, (the Saar), Turkey, and the United Kingdom. The signature of Greece and Sweden was effected slightly later. (See Vol. VII, the Final Text of the Convention, p. 48 and seq.) Of the States covered by the present study, France, the United Kingdom and Sweden appear to have been rather actively involved in the discussions (see Vol. I to VIII).

160 Wesel 2010, p. 437.

161 Wesel 2010, p. 445.

162 As regards the legal systems subject to the present study, a rough division is made between the English legal system as a common law system and the others as statutory law systems. Statutory law systems are in some studies referred to as civil law systems. “Statutory law systems” is preferred for the reason that “civil law” may have several meanings. Civil law is considered to encompass the law governing the relations between and among private individuals, or it is considered to encompass municipal law in contrast to natural law or international law. The Anglo-American lawyer would think of this generally as all law other than criminal law and constitutional law, whereas in continental Europe, civil law is generally considered to include the civil code as well

to see whether and how those constitutional traditions are visible in the text of the Convention, and in section 2.6.2 and 2.6.3 it is assessed whether the Convention has had a further impact on the constitutional traditions. As pointed out by Höfling, constitutional law should be open and develop along with time¹⁶³. At least in principle, adapting the legal system to the requirements of the Convention should be the easier the more there is in common with the constitutional traditions of the legal system in question. Although the first constitutional instruments protecting human rights were English ones, the French constitutional developments in respect of the protection of fundamental rights are particularly important because of the strong influence that the French declaration of human rights has had not only on international conventions on human rights but also indirectly on the legal systems of many states. The German developments are also worth examining for the reason of the impact of the German history on the drafting of the Convention and the impact of the German legal system on the Swedish and Finnish legal systems. At the European level, the Swedish historical developments are not that significant when compared with France and Germany, as there was no detailed list of fundamental rights in the Swedish Constitution at the moment of adoption of the Convention. Despite that, particularly the freedom of press (and expression) has strong traditions in the Swedish legal system.

The fundamental rights provisions of the Constitution that Finland had at the time of drafting of the European Convention on Human Rights shared very little in common with the final result of the Convention. Instead, the constitutional developments in Finland demonstrate how significant the impact of the Convention has later been on the Finnish constitutional provisions on fundamental rights, but there is also indirect influence from the constitutional traditions in Sweden and in continental Europe. Sweden has been slow in reforming its fundamental rights provisions, which has perhaps had some impact in Finland too. As explained in more detail in section

as various other branches of law such as contract law and family law. It is rather common to use the expression private law to mean more or less the same as civil law, to draw a distinction between private law and public law. Continental European legal systems are often described by comparative lawyers as civil law systems, primarily based on civil codes derived from Roman law (as distinguished first from canon law and then from common law). One distinguishing characteristic of civil law systems is that they do not consider torts and contracts as separate areas of law but consider them to constitute together the law of obligations, although this is separate from commercial law. (Rossini 1998, p. 7. See also *Black's Law Dictionary*.) However, the details of the legal systems apart from constitutional law and methods and principles of interpretation of law are not covered by the present study.

163 Höfling 1987, p. 77. Höfling speaks of "die offene Ordnung des Grundgesetzes". He further speaks of the openness of the Constitution, dividing it into structural, functional and linguistic-material openness. In his view, the linguistic and material openness of constitutional interpretation is particularly important in respect of the fundamental rights provisions of the Constitution (Ibid. p. 78-82) In German, the terms used by Höfling are „strukturelle Offenheit“, „funktionelle Offenheit“, and „sprachlich-materielle Offenheit“.

2.6.2.5 below, even the fundamental rights provisions Constitution of Finland have rather recently undergone a major reform, which took place late when compared with Germany but in the same way, around the same time as accession to the European Convention on Human Rights. However, there are considerable differences in the problems faced by these two legal systems with the Convention. It is argued that this is due to historical constitutional developments. Therefore, it is relevant to provide an overview. In the foregoing, a brief historical overview is given of the constitutional protection of fundamental rights in order to provide for the constitutional framework for the preparedness of the national legal system to adopt the European practice of applying human rights and to assess what kind of an impact the European Convention on Human Rights has had on further developments of the constitutional protection of fundamental rights. Furthermore, although the Finnish constitutional traditions have not played a role in the drafting of the Convention, they do contribute to the development of the case law of the European Court of Human Rights in the same way as those of any State party to the Convention today. The present fundamental rights provisions of the Constitution are relatively strong and in line with the Convention.

2.5.1 English traditions

Instruments protecting human rights or fundamental rights first appeared in the English-speaking world. The British Magna Carta (1215, 1225), Petition of Right (1627), Habeas Corpus Act (1679) and Bill of Rights (1688) are considered to be the first adopted texts. However, the first declarations of human rights in the modern sense were included in the Constitution of the State of Virginia (1776) as well as in the Declaration of Independence of the United States of America (1776). These latter instruments in turn had an impact on the French *Déclaration des droits de l'homme et du citoyen* adopted in 1789 which was followed around the same time by the Bill of Rights in the United States¹⁶⁴. Magna Carta provided for a limited set of fundamental rights, including recognition that no one should be denied of justice or punished except by judgment of their peers or by the law of the land¹⁶⁵. That protection against denial of justice could be considered the foregoer of the more recent protection of the right to a fair trial which has later become established in the common law systems and which has also served as a source of inspiration for international human rights instruments.

164 *Déclaration des droits de l'homme et du citoyen de 1789*, and Amendments (three through twelve) to the Constitution of the United States, known as the Bill of Rights, ratified on December 15, 1791 (proposed on September 17, 1787). See Ségur 2007, p. 13 and 25, and Wesel 2010, p. 315. For more details on the development of the American Constitution, see e.g. Tushnet 2006, p. 8-17, and for details concerning the contents and interpretation of the Constitution, see e.g. Dorf & Morrison 2010.

165 See Leyland 2007, p. 10.

In other respects, the early British constitutional acts mainly provided for privileges aimed at the protection of property rights¹⁶⁶, which appears to also have been the case for example in Sweden.

Despite that there was an example in England of fundamental rights provisions as early as in the 13th century, there has been no written constitution providing for such rights in more recent times and, although there is an increasing body of statutory law, the legal system has still largely developed through case law. This does nevertheless not mean that there has been no constitutional law in England. To the contrary, such rules and principles have been developed by means other than a specific statutory instrument¹⁶⁷. However, the documentation of the British constitution would be a hard task as even today, the constitutional rules and principles are found in numerous statutes and reports as well as in a multitude of case law, including European materials.¹⁶⁸ A basic constitution can be considered to consist of the Scotland, Northern Ireland, and Government of Wales Acts, the Representation of the People Act 2000, and the Freedom of Information Act 2000¹⁶⁹. This will not be elaborated on in more detail in the present study¹⁷⁰. In fact today, although there is still no written instrument called a constitution, most of the applicable law in the English legal system as well as in other common law systems is already in statutory form. In England, this means not only the laws enacted by Parliament, and subordinate legislation, but also EU law and other international elements incorporated into the legal system.¹⁷¹ It may also be noted that although the expression “public law”¹⁷² is not used in common law systems,

166 See Leyland 2007, p. 10 and 11, and Gearty 1997, p. 56-59.

167 Marshall 2003, p. 31. In the view of Marshall, the United Kingdom does have a constitution in the sense that there is a “combination of legal and non-legal (or conventional) rules that currently provide for the framework of government and regulate the behaviour of the major political actors”, and further in the sense that there is a “totality of legal rules, whether contained in statutes, secondary legislation, domestic judicial decisions or binding international instruments or judicial decisions, that affect the working of government”. However, there is neither any particular instrument called “a constitution” nor other statutes or instruments having such a particular status as would make it necessary to apply a special procedure to their amendment or repeal.

168 See Marshall 2003, p. 36, and Leyland 2007, p.9.

169 See Gearty 2004, p. 38. Gearty finds those acts to constitute more a “written constitution” and more democratic than it was before.

170 For details on the sources of constitution and on constitutional conventions, see e.g. Leyland 2007, p. 20-32.

171 Bennion 2009, p. 5 and 6.

172 Public law is the law governing relations between the sovereign and private individuals, as understood by continental lawyers. Public law covers administrative law, constitutional law and, in some countries, criminal law. See Rossini 1998, p. 7.

the concept of constitutional law¹⁷³ is known in common law systems, including the English legal system.

Insofar as the protection of human rights or fundamental rights is concerned, the developments in the United Kingdom were affected by many factors, including wars and economic growth, but unlike in Germany, for example, they did not lead to strengthened protection of fundamental rights, although some rights and particularly the protection of property did enjoy considerable protection.¹⁷⁴ According to Leyland, those constitutional arrangements have evolved in phases reflecting the political, social, and economic experiences of many centuries¹⁷⁵. Furthermore, some improvements took place throughout the 20th century in the protection of equality as well as in the freedom of thought, association and expression.¹⁷⁶ Although the government increasingly paid attention to human rights, particularly as a result of the ratification of various international human rights conventions, it took time before those international conventions actually had an effect on municipal law.¹⁷⁷ They are, however, today among the sources of constitutional law. Although the more recent sources of constitution were not available at the time of drafting of the European Convention on Human Rights, and there was very little in common with the English constitutional sources of constitutional law and the Convention, they mean today as part of the English law that the English constitutional law has gradually become closer to those of the continental legal systems as regards the rights enjoying protection.

The lack of a written constitution at the moment of drafting of the European Convention on Human Rights and the relatively slow development of national provisions on the protection of fundamental rights mean that the impact of English constitutional traditions on the text of the European Convention on Human Rights is rather modest. Despite that, the ideas of the equality and freedoms of thought, association and expression as well as the protection of property are among those common values and traditions of European States that are visible in the text of the Convention. The early civil rights instruments of the English-speaking world, with the idea of basic civil liberties, do play a role as a source of inspiration, but rather indirectly through the constitutional developments in continental Europe, particularly in France. However,

173 Constitutional law means the law affecting the exercise of sovereign power over the individual, as well as the structure of government and the balance of powers among the branches of government. In the United States, constitutional law is derived solely from the Constitution. In the United Kingdom, constitutional law is not derived from a single instrument, but from various documents, statutes and case law, as well as constitutional conventions (i.e. practice). See Rossini 1998, p. 7.

174 Feldman 2003, p. 402-404. It may be noted that the strong protection of property is a feature that emerged early also in the French legal system and is a feature in common with the Finnish constitutional traditions, for example.

175 Leyland 2007, p.9.

176 For more details, see Feldman 2003, p. 406-410.

177 Feldman 2003, p. 439.

in the light of the preparatory work of the European Convention on Human Rights, the common law system has played a role in the draft text, particularly through the American constitutional traditions which have served as an example for the drafting of the relevant United Nations instruments. Those, in turn, have been used as the main model for the drafting of the European Convention on Human Rights and the United States was among those victors of war that played a strong role in the drafting of the human rights instruments. An example of the strong elements of common law traditions visible in the text is particularly the fair trial rights strongly established in the American legal system. The fair trial elements similar to the ones in the Bill of Rights of the United States Constitution are missing in the early constitutional acts of the States covered by the present study, but due to the shared common law traditions with the United States, some English influence can be found to exist in the fair trial provisions of the Convention as explained in the foregoing. Those have also been included in the present fundamental rights provisions of the Constitution of Finland. Apart from the fair trial rights, the clearest elements in common with the English constitutional traditions and the Convention include property rights as well as later the right to equality and the freedoms of thought, association and expression. These developments have some similarities with the Swedish ones.

2.5.2 French traditions

As mentioned in the foregoing, the French declaration of human rights and citizen's rights (*Déclaration des droits de l'homme et du citoyen*) can be considered one of the sources of inspiration for present-day human rights conventions. At the time of its adoption as a result of the French revolution, it was also one of the most advanced instruments protecting the rights of citizens. The emergence of the French Constitution and of the idea of protecting the rights of citizens, resulting in the adoption of the Declaration, have their origins in the period of Enlightenment and the revolution of 1789 referred to above, which clearly distinguish the French developments from the English and German ones¹⁷⁸, for example, where no comparable revolution took place. Further, as explained in the foregoing, there was influence from the United States, although the degree of impact has been subject to debate¹⁷⁹. According to Boyron, the revolution of 1789 meant a total shift in constitutional change, and modern constitutional history is often regarded as having begun at that time¹⁸⁰. The Declaration of human rights and citizen's rights can also be considered to have launched the gradual change in the culture of protecting the rights of citizens at a European level.

178 See Zweigert & Kötz 1998, p. 136.

179 Favoreu 1990, p. 39.

180 Boyron 2011, p. 116. There was an ideological, societal, cultural and legal change.

When looking into the constitutional texts of France, existing at the moment of drafting the European Convention on Human Rights, it becomes clear that there are certain provisions in the Declaration that have served as a source of inspiration for those of international instruments. Those provisions include, in particular, the early equivalents of the prohibition of forced labour, the liberty and security of person, the principle of no punishment without law, the freedom of religion and thought, the freedom of expression and the freedom of assembly¹⁸¹. The Declaration also became an important source from which general principles of law have been derived in France, such as the equality of citizens before the law¹⁸². However, considering that the French Declaration of human rights and citizen's rights is a product of an earlier century, it is evident that the provisions of the European Convention on Human Rights and other international instruments are considerably more detailed and provide for more extensive lists of rights as a result of negotiations. One may note, for example, that the existing French constitutional texts did not provide for the protection of private life. In comparison, the Belgian constitution of 1831 did provide for a right to enjoy such protection¹⁸³. Both the French and Belgian constitutions provide for the right to equality before the law. However, although the Belgian constitution appears to have borrowed several elements from the French Declaration, it had a few additional elements including an explicit prohibition of death penalty, which is an indirect way to provide for the right to life¹⁸⁴. Thus, despite that the French Declaration has been a source of inspiration for several national and international instruments protecting fundamental and human rights, it is not the only one but the international instruments are products joining a large number of constitutional traditions, and the efforts to provide an even stronger protection of human rights after World War II lead to more advanced instruments than any national ones. Nevertheless, the fact that the fundamental rights provisions of the Belgian constitution have considerable similarities with those of the French one, demonstrates that the influence of the French constitutional traditions is not limited to the drafting of the European Convention on Human Rights, but there is further going influence. Both have been looked into even in the drafting of the Finnish Constitution, as well as a variety of other ones such as the German and Dutch ones.

Historical reasons may be found for the relatively strong influence of French constitutional traditions on the European Convention on Human Rights. The creation of

181 See *Déclaration des droits de l'homme et du citoyen de 1789*. The French Declaration, supplemented by a Preamble to the Constitution in 1946, is most clearly a document underlining natural rights, deriving from the sovereignty of the nation, when compared with other continental European instruments.

182 Steiner 1997, p. 268 and 269.

183 To be precise, the Belgian constitution provides for the inviolability of home and secrecy of communications.

184 See *Constitution de la Belgique du 7 février 1831, Titre II – Des Belges et de leurs droits*.

new constitutional law in France began as a result of the revolution in 1789 through the drafting of a declaration of human rights and citizen's rights which was adopted in 1789, whereas the new Constitution was adopted two years later in 1791.¹⁸⁵ Although the Declaration was the first advanced instrument protecting human rights in continental Europe, only a certain privileged group of the nation could exercise political rights. That limitation on the enjoyment of political rights appears to have been shared with the other legal systems covered by the present study. Furthermore, a distinction was made between passive and active rights, i.e. civil rights and political rights.¹⁸⁶ The concepts of civil rights and political rights have later found their way to the International Covenant on Civil and Political Rights, albeit their meaning today may be somewhat modified, and the enjoyment of political rights is not limited to a privileged group of the nation. Thus, the early French idea of drawing a distinction between passive and active rights is visible in the Covenant, and even in the European Convention on Human Rights. Also, the European Convention on Human Rights provides for both sets of rights despite some differences in terminology.

The basic ideas in the Declaration, deriving influence from the earlier texts drafted in the English-speaking world¹⁸⁷, are that all human beings were born free and equal, insofar as their rights and obligations were concerned, which is also the underlying idea of the existing international human rights instruments including the European Convention on Human Rights. However, there is no explicit prohibition of discrimination in the Declaration comparable with Article 14 of the Convention, which is a stronger expression of the principle of equality, except that the Preamble of 1946 prohibits discrimination between men and women. In the view of Glenn, the emergence of rights is linked with the idea of the centrality of person¹⁸⁸, which thus interestingly coexisted with the developments of the law of property. However, as referred to in the foregoing, certain groups of persons still at the end of the 18th century enjoyed stronger rights than others, and only certain types of rights belonged to all. The principle of equality of citizens before the law has found its way to constitutions in other States and is also visible in the European Convention on Human Rights.

The Declaration was attached as preamble to the 1791 Constitution. In addition, the first chapter of the Constitution consisted of a provision protecting certain fundamental rights (*Dispositions fondamentales garanties par la Constitution*). The guaranteed rights were still considered natural rights that the Constitution also defined as rights of the

185 Jyränki 1989, p. 145.

186 See Jyränki 1989, p. 148 and 149, and Steiner 1997, p. 269.

187 Ségur 2007, p. 13. In the view of Ségur, the main difference between the Anglo-Saxon texts and the French Declaration was that the first-mentioned ones were rather pragmatic, whereas the latter was more ideological.

188 Glenn 2004, p. 142.

citizen that could not be restricted by the legislator.¹⁸⁹ Apart from those rights, important aspects included in the 1793 Constitution were a stronger protection of property rights and the idea of the freedom of religion, which included the right to civil marriage and divorce as well as the separation of the state and the church. The early property rights can be considered as the origin of modern economic, social and cultural rights.¹⁹⁰ The early emergence of the protection of property rights should perhaps be seen in the context of the development of society in general, particularly the growing industrialisation and trade and the growing influence of those involved in trade. Such a special status afforded to property rights, along with the classic civil liberties, also existed in other legal systems, including the English, German and Nordic ones. As regards the European Convention on Human Rights, the protection of property is included in a separate protocol, which is due to that the level of protection is considerably different in the various States parties. Including the provisions in a separate protocol allows for those with a higher level of protection or protection by national constitutions to advance with implementation faster.

Further amendments were made to the Constitution in 1814, 1830 and 1848¹⁹¹, but despite the ideological change, no major changes really took place insofar as the material contents of the rights were concerned, apart from included the freedom of expression in 1814 and a possibility of derogating from the rights in time of '*état de siège*' in 1848¹⁹². Freedom of association was recognised for the first time in 1901¹⁹³. Later, the fundamental rights provisions of the French Constitution became a combination of the old Declaration of 1789 and the preamble of the Constitution of 1946. Particularly the old Declaration links citizens' rights strongly with the sovereignty of the people, but this fundamental idea is also reflected in the 1946 addition. The list of rights – as understood today – is also included in the preamble to the Constitution of 1958 which is still in force. Thus, the present Constitution affords a relatively strong protection of fundamental rights, following the spirit of early times. However, when compared with the provisions of the European Convention on Human Rights and the Basic Law of Germany, the fundamental rights provisions of the French Declaration and Constitution appear to be rather outdated, and therefore the strong protection of human rights and fundamental rights is a combination of the Constitution and the Convention.

189 Jyränki 1989, p. 163. See also Ségur 2007, p. 13. Ségur names three particular characteristics of the rights protected by the Declaration: first, they were individual i.e. they could not be enjoyed by groups or communities; second, they were absolute; and third, there is a strong focus on the idea of liberty (of which the political rights were derived).

190 Jyränki 1989, p. 163 and 164.

191 Boyron 2011, p. 116, footnote 2.

192 Jyränki 1989, p. 182, 190 and 195.

193 See Boyron 2011, p. 137.

The impact of the French constitutional traditions on the development of the text of the European Convention on Human Rights can be said to be particularly strong, when compared with that of other States parties to the Convention covered by the present research. This is even more so because the French traditions have also served as a significant source of inspiration for the constitutions of other European states, meaning also indirect influence on the Convention through the other States parties attending the negotiations. One may note, however, that the economic, social and cultural rights (apart from the freedom of religion) existing in the French constitution as from early times, particularly employment rights and educational rights, did not end up in the text of the Convention. Instead, a separate international instrument at universal level has been drawn up to protect those rights, and another one at the European level. In principle, the French legal system should have been more prepared to adopt the European Convention on Human Rights and the case law of the European Court of Human Rights than the Finnish one, if assessed purely in the light of constitutional law which in Finland was until recently less developed in respect of the protection of fundamental rights. However, the question of legal and technical preparedness is not that simple. Even though the French constitutional fundamental rights provisions were more detailed than the Finnish ones, they were not necessarily that well suited either for being directly applied by the judiciary.

2.5.3 German traditions

The early developments of German constitutional law appear, in the eyes of a foreigner, rather complicated, due to the existence of small principalities, cities and villages that were loosely associated for centuries until this association was institutionalised at the end of the 15th century, the impact of the Roman empire, the Reformation which divided Germany into Catholics and Protestants, and finally the Thirty Years' War that resulted in the Peace Treaty of Westphalia which could be said to constitute a predecessor of German constitutions.¹⁹⁴ According to Heun, the constitutional developments followed closely the revolutionary developments in France¹⁹⁵, which can be said to be largely a result of the influence of Roman law on the legal system in general. In the view of Jyränki, insofar as the German constitutional law is concerned, the most interesting developments from a European perspective started in 1815 as the German empire split into several sovereign duchies, constituting the German Confederation (*Deutscher Bund*) which replaced the Empire. As mentioned above, the South German states had been under considerable influence of France, and although a relatively modern Constitution was adopted for Bavaria in 1808, its form and contents resembled those of the French

194 Heun 2011, p. 13.

195 Heun 2011, p. 15.

Constitution.¹⁹⁶ The German history is characterised by variation between the existence of several German States and a united Germany, and the individual German States also had their own constitutions. The Constitution of Prussia (1850) was the first one in which the provisions on fundamental rights were more numerous and more detailed than in the earlier constitutions of South German States. The possibility of restricting the fundamental rights by means of law was also included in the Constitution of Prussia, for example concerning the protection of property, although the constitution protected property rather against interference by other individuals than by the state¹⁹⁷ which has been a rather disputed aspect of the protection of human rights in modern times. In essence, it is considered that human rights instruments provide protection against interference by the state, but the state may be under an obligation to take legislative measures to ensure the enjoyment of rights even vis-à-vis individuals. Nevertheless, the protection of property and the possibility of derogating from the afforded rights has also been included in the European Convention on Human Rights, although in a modernised form.

Although the fact that the Constitution of Prussia contained fundamental rights provisions should perhaps not be overemphasised, the new Constitution of the German Empire meant a weaker protection of the rights of citizens as no list of fundamental rights was included in the text¹⁹⁸. Furthermore, in the same way as the Constitution of Prussia, the Constitution of the German Federation provided for the possibility to derogate from the provisions of the constitution to protect national security or to intervene in a situation of emergency by means of an emergency decree (*Notverordnung*).¹⁹⁹ As mentioned in the foregoing section concerning France, such a possibility also existed in the French constitution of 1848, i.e. in the same period of time. It is possible that the early German provisions allowing for derogations have played a role in the drafting of the limiting clauses in the European Convention on Human Rights, although the concept of margin of appreciation is based on French law as explained in section 3.3 below.

After World War I, the Constitution of Weimar of 1919 derived elements from the French and US constitutions as well as from the constitution of Belgium of 1831 and, in the view of Heun, it was the first really democratic and liberal constitution²⁰⁰. The provisions on fundamental rights and obligations of citizens included in the Constitution of the Republic of Weimar (1919) were already close to their modern counterparts. The protection of fundamental rights was now seen as an element providing for the

196 Jyränki 1989, p. 196. See also Wesel 2010, p. 441, and Heun 2011, p. 14. On earlier developments in more detail, see Wesel 2010, p. 318, and Heun 2011, p. 13.

197 Jyränki 1989, p. 236 and 237. See also Wesel 2010, p. 448.

198 Wesel 2010, p. 448.

199 See Jyränki 1989, p. 239 and 240.

200 Heun 2011, p. 17.

economic and social security of citizens, and also the cultural rights of citizens were considered to be of importance. A separate chapter providing for fundamental rights was thus included in the Constitution, and particularly the provisions on economic, social and cultural rights and property rights can be considered advanced ones, although as mentioned in the foregoing, there were rather extensive property rights in the French Constitution already in 1793.²⁰¹ This strong protection against interference with property rights is one of the elements existing also in modern human rights instruments. Thus, it seems that the strongest element of the early German constitutions that is visible in the European Convention is that of the protection of property – in Protocol No. 1 to the Convention – although the nature of protection differed in the German constitutions. This is also something that the German constitutional traditions share in common with those of the other legal systems covered by the present study.

Without going into details about the more or less complete disruption of the protection of fundamental rights during the national socialist era, suffice it to say that the development of national socialism and the atrocities of World War II meant a disaster for respect for the equality of citizens before the law. However, the defeat of Germany as a result of World War II and the resulting war crimes proceedings might at least partly explain the strong protection of fundamental rights in the present Constitution of Germany. The Constitution of the Federal Republic of Germany or as it is called in German, “the Basic Law” (*Grundgesetz für die Bundesrepublik Deutschland*)²⁰² was initiated and influenced by the Allied Powers, although it was drafted by a parliamentary council. The draft Constitution passed by the parliamentary council was adopted by the parliaments of all German *Länder* in 1949, subject to approval by the Allied Powers, and provided for the federal and regional levels of government²⁰³. Thus, although the Basic Law was drafted largely as a result of pressure by the Allied Powers, its contents are essentially based on old constitutional traditions and the contents have been decided by the Germans themselves. Furthermore, as explained in the foregoing, the provisions of the Weimar Constitution and thus those of the Basic Law have drawn elements from the Western constitutional traditions, particularly the French and American ones, in general. The Constitution was adopted with a view to preventing future disasters comparable to that of the dictatorship, and to ensuring the control of constitutionality and the protection of fundamental rights²⁰⁴ and thus the reasons for its adoption were largely the same as those for the adoption of the European Convention on Human Rights. Chapter I of the Basic Law provides for the protection of fundamental rights and contains a list of rights, including not only individual liberties but also certain

201 Jyränki 1989, p. 339, and Heun 2011, p. 17 and 18.

202 Bundesgesetzblatt Teil III, 100-1, 23.5.1949.

203 Wesel 2010, p. 556 and 557, and Heun 2011, p. 9-11. East Germany had its own constitution also adopted in 1949 (Heun 2011, p. 12).

204 Wesel 2010, p. 566.

collective rights. According to Kommers, these are known as institutional guarantees some of which are in fact outside the list of rights.²⁰⁵ According to Heun, the list of fundamental rights was placed at the beginning of the Constitution so as to underline the liberal and free character of the new political system²⁰⁶, which is also visible in the contents of certain rights of the Basic Law²⁰⁷. According to Kommers, many of the basic rights provisions of the present Basic Law are based on those of the old Weimar Constitution²⁰⁸, the difference being that in the Weimar Constitution, the basic rights were considered goals, whereas in those in the Basic Law are enforceable²⁰⁹. This view is supported by Heun, according to whom also the enforceability of fundamental rights introduced a new era of protection of fundamental rights²¹⁰.

Although Germans appear to have played a rather modest role in the discussions on the contents of the European Convention on Human Rights, which is largely a product of the victors of war, the German constitutional traditions are part of the common European traditions and values that are visible in the text of the Convention. When looking into the fundamental rights provisions of the Basic Law, one may note that they have more similarities with those of the European Convention on Human Rights than the French constitutional texts, which is due to that it was drafted at the same time and largely for the same reason. Despite that, the provisions of the Basic Law clearly indicate the need to provide even further going provisions in some respects, caused by the aggravated violations of the rights of protection of private life and home and lack of equality of parts of the population during the National Socialist era. That is demonstrated by both strong protection of home and property and strong emphasis on the protection of equality of all citizens. Those do exist in the European Convention on Human Rights, but in less detail. It is interesting to note that despite the German

205 Kommers 2006, p. 170.

206 Heun 2011, p. 1.

207 Kommers explains that the core principles in the Basic Law are rooted in three major legal traditions that have shaped contemporary German constitutionalism, namely those of classical-liberal, socialist and Christian-natural law of thought (Kommers 1989, p. 36). The liberal tradition is behind the classical freedoms listed in several articles of the list of fundamental rights. According to Kommers, the substantive values represented by all those traditions are, however, enormously important in the interpretation of the Basic Law (Ibid. p. 37).

208 Apart from the basic rights provisions of the German Constitution, there are such provisions also in the new constitutions of *Länder*. In those cases, the latter remain in force insofar as they are in conformity with the provisions of the federal Constitution (see Fisher 1997, p. 23).

209 Kommers, 1989, p. 38. In the view of Kommers, the Basic Law as a twentieth-century constitution is interesting in that it subjects positive law to a higher moral order. (Ibid. p. 39) Further, Germans commonly agree that the Basic Law is a constitution of substantive values, embracing both rights and duties. (Ibid. p. 37) Thus, basic rights provisions as constitutional values are given a higher hierarchical status than the provisions of law.

210 Heun 2011, p. 191 and 192. The increased importance given to fundamental rights has meant a fundamental change practically in all fields of law (Ibid. p. 191).

influence on the legal system of Finland, particularly through the common legal history with Sweden, the constitutional traditions of protecting fundamental rights appear to have had less influence. Nor has Sweden had as detailed provisions as Germany on fundamental rights until rather recently. The longer constitutional traditions with lists of fundamental rights may have introduced a stronger culture of protecting those rights earlier than in Finland. That together with the Basic Law which has considerable similarities with the Convention may partly explain the fact that the German legal system has not appeared to have problems with the Convention system to the same extent as the Finnish one. The fundamental rights thinking appears to be a more recent product in Finland, which may still be visible in the development of national case law despite that the Finnish constitutional provisions on fundamental rights were revised entirely to align them with the Convention rights.

2.5.4 Swedish traditions

Sweden is seldom mentioned in the context of historical studies on constitutions, perhaps for the reason that it is difficult to place Sweden in an international framework in this respect. According to some views, the real constitutional developments of Sweden may be considered to begin around 1693²¹¹ although the *konungabalken* (*Magnus Erikssons landslag*) from the 14th century may be said to be the first written constitution, providing e.g. for the election of the king and a minimum protection for citizens against interference with their rights by the state²¹². The reason for why the latter has not always been considered a constitutional act is perhaps that no distinction was really drawn between it and other acts. The first pieces of legislation that were specifically called constitutional laws appeared in the 18th century.²¹³ Indeed, the most important other pieces of legislation that appeared alongside the aforementioned 1734 codification were constitutional laws. These included the Form of Government of 1720 (*regeringsform*) and the Parliament Act of 1723 (*riksdagsordning*) as well as the Freedom of Press Decree of 1766 (*tryckfrihetsförordning*).²¹⁴ In the view of Jyränki, those Swedish constitutional acts, particularly the Form of Government and the Parliament Act, were rather advanced in comparison with those of other countries in the same era.²¹⁵ Furthermore, the Freedom of Press Decree did not have many equivalents in Europe, the closest examples being found in Great Britain and the Netherlands. This Decree, in the view of Inger, was of crucial importance for the further development of the freedom of expression in Sweden²¹⁶ although according to Axberger, it lost its

211 See e.g. Wesel 2010, p. 316 and 317.

212 Nergelius 1996, p. 589.

213 Nergelius 1996, p. 590.

214 Inger 1986, p. 134.

215 Jyränki 1989, p. 52.

216 Inger 1986, p. 135.

relevance in a few years' time and the freedom of expression was even abolished for a while²¹⁷. Nevertheless, the freedom of expression could also be perhaps the strongest element that the Swedish legal traditions have in common with the high European level of protection, although there was protection of the freedom of expression also in other European states. It is interesting to note that despite the common legal history with Sweden, it is particularly the freedom of expression that is among those Convention rights that have produced most challenges for the Finnish judiciary although the situation has clearly improved along with new national case law. The freedom of expression is today one of the core elements of democratic society, and is included in the European Convention on Human Rights.

The old constitutional acts were repealed by subsequent enactments, the Form of Government of 1772 and an association act (*förenings- och säkerhetsakt*) of 1789²¹⁸, which were again repealed by a new Form of Government in 1809.²¹⁹ The new Form of Government included quite a few elements of the French constitutions of 1791 and 1795, although it was a new type of entity with a large number of new characteristics of its own. Nor did the Form of Government of 1809 provide for the protection of fundamental rights in the same way as the French or German constitutions, but contained a similar basic provision as the acts of 1720 and 1772, which, in the view of Jyränki, rather seemed to protect the king. The provision indeed only set a requirement for the king to use power in a legal and fair manner and to avoid unnecessary interference with citizens' rights.²²⁰ The only example of a stronger and rather modern fundamental right, as also earlier, was the freedom of press (guaranteed by means of a separate decree).²²¹ The decree on the freedom of press of 1812 remained in force until 1949 when it was replaced again by a new one²²².

The Constitution was not amended again until in 1866²²³. Although there was an apparent conflict between the outdated provisions of the Constitution of 1809 and the existing state practice and organisation and despite the rather unclear legal situation²²⁴,

217 Axberger 2012, p.18.

218 See Jyränki 1989, p. 73. Wesel 2010, p. 443. Inger 1986, p. 139.

219 Jyränki 1989, p.259.

220 See Jyränki 1989, p. 275 and 276. See also Nergelius 1996, p. 592, who largely appears to share the view of Jyränki. In his view, the 1809 constitutional act was largely affected by the ideological perceptions of the time in other parts of Europe and the most relevant questions were the distribution of powers and the question of whether the provisions of the act were binding on the legislator. This latter question was later elaborated on through case law.

221 Axberger 2012, p. 18. For more details, see Jyränki 1989, p. 261-264.

222 Axberger 2012, p. 20. The 1949 decree differed strongly from the prior one, which was partly affected by the experiences during World War II. (Ibid.) The decree has been amended on several occasions (Ibid. p. 21 and 22).

223 Wesel 2010, p. 443.

224 Holmberg & Stjernquist 2000, p. 29.

the Constitution of 1809 remained in force until 1974, and the 1974 Constitution²²⁵ is the first one to contain a more detailed list of fundamental rights. Thus, the protection of fundamental rights in the Swedish constitutional law was strengthened rather late and the Swedish constitutional traditions had very little in common with the European Convention on Human Rights. Rather, the Convention has had a positive impact on the development of Swedish legislation, including the Constitution. However, the preparatory work of the European Convention on Human Rights indicate that the Swedish delegation has contributed actively to the discussions on the draft text and thus, the Swedish legal traditions and ideas of the protection of human rights have played a role in the same way as those of other negotiating States. As regards the strong constitutional law protection of the freedom of expression, the Swedish legal system appears to have faced no major problems with the Convention system which may be explained by that the traditions have emerged rather early when compared with other European states. It is difficult, however, to draw such generalising statements. In respect of the protection of property rights, which in Sweden has traditionally been strong, the Swedish legal system has struggled with the wide meaning given to the concept of civil rights in connection with certain property rights. One may observe that the slow development of the constitutional protection of fundamental rights, and the fact that the old constitutional provisions were not well suited for being directly applied by the national judiciary, has had the potential of creating problems. Due to the relatively long common legal history between Finland and Sweden, and the similarities of the legal systems, the problems faced by Finland could have been similar without legislative amendments.

2.6 Transposition of the European Convention into the national legal systems

2.6.1 Legal framework

In the foregoing, it is explained how the constitutional traditions of the selected States parties to the European Convention on Human Rights have affected the emergence of the text and language of the Convention. For that text to be part of the national legal culture, however, it is necessary that it is part of the applicable law in the State party concerned. Apart from the characteristics of the legal system and judicial traditions in general, the status of international agreements in the legal system may affect the way in which their provisions are taken into account in adjudication. The aim with the examples of legal systems selected for this study is to show how the way of implementation plays

225 *Regeringsform SFS 1974:152*. This constitutional act is supplemented by constitutional acts on crown succession, freedom of the press and freedom of expression, i.e. by *Successionsordning SFS 1810:0926*, *Tryckfrihetsförordning SFS 1949:105* and *Yttrandefrihetsgrundlag SFS 1991:1469*.

a role. Furthermore, the legal systems may have different hierarchies of sources of law and legal rules²²⁶. Even in the case of international law, certain rules may enjoy a higher hierarchical status than others. De Schutter suggests that human rights occupy such a position among the rules of international law²²⁷. However, traditionally, there has been no hierarchy of norms between the different sources or rules of international law, at least as regards customary law and treaties²²⁸. Gerards and Fleuren point out that the dualist tradition is considerably younger than the monist tradition, and is closely connected with the increasingly strong role given to national parliaments²²⁹. Apart from customary law and treaties, there are various other sources of international law such as general principles of law recognised by the community of nations²³⁰, international case law and different types of soft law (recommendations and declarations). Treaties have differing statuses in the legal systems of the states covered by this study. Traditionally, the legal systems have been divided into monistic and dualistic systems in respect of the status of treaties. However, this may be rather misleading as legal systems often

226 Cassese 2005, p. 198.

227 De Schutter 2009, p. 48. He justifies his argument with reference to the wording of Article 103 of the UN Charter, according to which “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”. One of those obligations is to promote and encourage respect for human rights and for fundamental freedoms for all. Further justification for the superior hierarchical position can be derived from the peremptory character of certain norms of international law, such as certain fundamental rights.

228 Article 38(1) of the Statute of the International Court of Justice mentions international conventions, international custom, and general principles of law recognised by civilised nations, and as subsidiary means for the determination of rules of law, judicial decisions and the teachings of highly qualified publicists of the various nations. Cassese 2005, p. 198. However, since late 1960s, certain fundamental rules have been upgraded to give the status of peremptory norms of international law (*jus cogens*), including certain norms of international human rights law (the self-determination of peoples, the prohibition of aggression, genocide, slavery, racial discrimination and, in particular, racial segregation or apartheid). (Ibid. p. 199) This higher status means that those norms cannot be derogated from.

229 Gerards and Fleuren 2014, p. 335 and 336. Therefore, whether the constitutional law fits in the monist or dualist tradition depends on constitutional history of the state in question. (Ibid. p. 336)

230 In the view of Cassese, general principles of international law are rather considered a subsidiary source of law, to which recourse may be had if there are no rules produced by a primary source of law (treaties, custom, unilateral acts of states). Such a rule could be, for example, the principle of respect for human rights, but even it has been codified e.g. in the European Convention on Human Rights. (Cassese 2005, p. 188) However, Brownlie pays attention to the Statute of the International Court of Justice and points out that it escapes the classification as a subsidiary means, but is not immediately dependent on the consent of states in the same way as international conventions and customary law. (Brownlie 1990, p. 15) One may note that such principles of law as have been codified in several conventions, have a stronger status than others, as those conventions also provide evidence of the existence of the general principles of law. Also judicial decisions provide evidence of established principles of law.

contain elements of both monism and dualism²³¹, as also appears from the analysis of the selected States below. Thus, the relevance of the division into monistic and dualistic legal systems could even be questioned, as suggested by Gerards and Fleuren²³². Their position can be shared in that a mere technical implementation does not necessarily mean that the international treaty in question is de facto applied by national courts. What is more relevant is that the means of implementation offers the national courts the tools that they need for applying it. However, it is undeniable that the provisions of international law have a stronger role where they are clearly made part of applicable law and enforceable by courts of law. Further, for the legal systems of the Member States of the European Union, changes have been imposed by the membership of the European Union, as the status of EU law differs from other international law²³³. However, as is pointed out by Frowein, although this discussion on monism and dualism seems to be somewhat outdated, it is clear that the international legal order and the many national legal systems remain separate²³⁴. Therefore, an examination of the monistic and dualistic elements of legal systems is relevant, particularly as effective application by the domestic courts of the provisions of a human rights convention requires that it is applicable and enforceable as law at the national level. This assertion is demonstrated in the light of the examples of the selected five legal systems, particularly by comparing the Swedish and English legal systems with the other cases. Those two legal systems allow technical implementation, but there is the additional possibility to actually insert substantive provisions into national law.

231 See e.g. Aust 2013, p. 162. Aust suggests that the United Kingdom represents the purist form of dualism.

232 Gerards and Fleuren 2014, p. 337. The authors points out that the theoretical notions of monism and dualism say very little about the kind of methods and instruments a certain state will have at its disposal to give effect to international norms in its national legal system, and that those concepts should therefore rather be regarded as "schemes" which can assist in ordering the different constitutional systems and mechanisms states employ to implement international law in their domestic legal orders.

233 EU law, including the case law of the European Court of Justice, enjoy a similar status in each legal system of the European Union irrespective of whether the traditional system of implementation is dualist or monist.

234 Frowein 1996, p. 85. The reason for why the classification of legal systems between monist and dualist ones has to some extent been abandoned by jurists is perhaps that it is traditionally based on theories or schools of thought, where some scholars advocate monism and others dualism. (For traditional schools of thought, see Brownlie 1990, p. 32-34) However, it appears that modern scholars rather examine the way in which legal systems de facto treat international law and treaties. This appears rather clearly in respect of commentaries on the European Convention on Human Rights. It has proven that its application is the more efficient at national level the more effectively it has been incorporated.

In monistic systems, treaties are considered to be part of the domestic legal system upon signature²³⁵ or acceptance/ ratification as such, without separate incorporation into domestic law²³⁶. Instead, in dualistic systems treaties and national law are regarded as distinct sources of law and courts are in principle only bound by national law. Thus, in order for treaties to become applicable law in a dualistic system, they need to be specifically made part of the domestic legal system. The methods of doing this (and the denominations given to those methods) vary from state to state, but they could all be considered to fall under the concept of incorporation²³⁷ in its most general sense. The European Convention on Human Rights does not require incorporation, and nor has the European Court of Human Rights considered this necessary, but it has been considered to have certain advantages with regard to the efficiency of protection of the rights guaranteed by the Convention. Furthermore, the practical meaning of the distinction between monist and dualist countries has diminished as nearly all the States parties to the Convention, whose legal system requires separate incorporation, had incorporated it into their domestic legal systems²³⁸. However, in the view of Pellonpää & al., the fact that a State Party to the Convention has incorporated the Convention into its domestic law does not seem to have a significant effect on the de facto significance of the Convention in the national application of law. He justifies this argument with reference to cases against Austria, where the Convention has been given a strong constitutional status from the beginning, and to those against the United Kingdom, where the Convention had a rather weak status for a long time.²³⁹

235 One must stress, however, that mere signature does usually not mean that the treaty becomes legally binding particularly as regards multilateral conventions, but is an expression of consent to act in accordance with the object and purpose of the treaty.

236 Cassese draws a distinction between two types of monistic systems, the so-called monistic view advocating the supremacy of municipal law, as well as the monistic theory maintaining the unity of the various legal systems and the primacy of international law. (Cassese 2005, p. 213) The first one actually denied the existence of international law as a distinct and autonomous body of law, reflecting extreme nationalism, whereas according to the other theory, international law exists above national legal orders which must conform to international law and in cases of conflict, international law prevails. (See Cassese 2005, p. 214 and 215)

237 On occasion, the concept used is "transformation" particularly when the treaty requires some implementing legislation (see Aust 2013, p. 167, footnote 23 – Brownlie, *Principles of Public International Law*, p. 31 and 32). This comes from the idea that to become binding on domestic authorities and individuals, international law must be 'transformed' into national law through the various mechanisms for the national implementation of international rules. (Cassese 2005, p. 214) Apart from automatic incorporation, there are various forms of legislative incorporation, including specific implementing legislation and simple one or two provisions stating that the treaty in question must be complied with, possibly together with the text of the treaty as a schedule or other annex. (Cassese 2005, p. 220 and 221)

238 Danelius 2012, p. 36, Pellonpää & al. 2012, p. 47-49.

239 Pellonpää & al. 2012, p. 55 and 56. According to the Court's statistics on 31 December 2013, the number of judgments against Austria, finding a violation, was 242, and that concerning the United Kingdom was 297.

In brief, of the legal systems subject to this study, the French one is monistic, without requiring separate implementation of the Convention. Its status is below the Constitution, but it prevails over other legislation. The other legal systems, the English, German, Finnish and Swedish ones, are dualistic although all except the English one appear to be de facto mixtures of both. In all these States, the Convention has been given the status of ordinary law, but in England and Sweden, the Convention has been transformed into an act of Parliament with material contents. The status of the Convention in the legal systems covered by this study is already rather established, although England and Sweden enacted their specific implementing legislation long after ratification. The application of the Convention in all those systems has been subject to research over a long period of time, and even in Finland it has been subject to research as of the accession of Finland to the Convention. The extent to which and the way in which the Convention is applied within the legal system concerned affects the degree to which it is capable of modifying the legal culture. In the following, comparative observations are made in respect of the four selected legal systems, followed by an analysis of its impact on the Finnish legal system. That allows an assessment of the first stage of transition of the Finnish legal culture of protecting fundamental rights and human rights.

2.6.2 Impact of the European Convention on the protection of fundamental rights in the five selected legal systems – comparative remarks

2.6.2.1 English legal system

Insofar as treaties are concerned, the English legal system is dualistic, and in order for them to become applicable in courts of law, they need to be specifically made part of the national legal system. If any provision of a treaty requires implementation in the domestic law of the United Kingdom, legislative action is taken. Under the act of Parliament giving effect to the accession of the United Kingdom to the European Community, when certain Community treaties are entered into, they operate in domestic law without the need for any further legislative action. If a law is made to give effect to the provisions of a treaty, that law has the same status as any other law of the same type.²⁴⁰ Thus, in principle, the system of implementation of international treaties into the English legal system is comparable to that of the Finnish legal system, but in practice the United Kingdom does not necessarily explicitly implement all those treaties to which it is a party. That has the potential of weakening the applicability of international agreements in the national legal system. Furthermore, in principle it is possible for Parliament to enact subsequent national legislation that is in conflict with the treaty provisions, as treaties are not considered supreme law in the English legal system²⁴¹.

240 Treaty Making 2001, p. 289. Masterman 2014, p. 301.

241 Aust 2013, p. 171.

Considering that there were no constitutional or other statutory provisions on fundamental rights in the English legal system, the application of international human rights conventions in English courts has been a challenge until the end of the 1990s. The number of violations found by the European Court of Human Rights against the United Kingdom is among the highest²⁴². The United Kingdom was among the first states to sign and ratify the European Convention on Human Rights (the ratification taking place on 8 March 1951). The Convention was nevertheless not incorporated into the English legal system, which created certain difficulties. Traditionally, the Parliament has enjoyed strong powers of enactment of legislation, and this also meant that the Parliament could enact any laws, even by way of derogation of the provisions of the Convention. Furthermore, as the Convention was not incorporated, the courts of law could not apply its provisions in the same way as other laws. In cases of discrepancies between an act of Parliament and the Convention, the Courts could not give precedence to the Convention, but could only declare that the act was in violation of the Convention's provisions while still having to apply the national legal act as such. Even where the court noted that the application of the act entailed a violation of the Convention and would most likely lead to a complaint before the European Court of Human Rights, it had to apply it. Despite this, the courts did not entirely ignore the provisions of the Convention but could, for example where the meaning of domestic provisions was unclear, interpret the domestic provisions in a way that was in conformity with the Convention²⁴³, and the case law of the European Court of Human Rights could be taken into account when developing common law²⁴⁴. According to Gearty, a gradual change in the general attitude towards the Convention began to occur since the late 1960s, and there were occasional references to the Convention as of the 1970s²⁴⁵.

Schiemann suggests that on those rare occasions when courts did apply some provisions of international human rights law, they were rather the provisions of the European Convention on Human Rights than those of the UN Covenants, for example. In this respect, Schiemann draws a parallel with the European Court of Justice which has – although referring on occasion to the international treaties for the protection of human

242 According to the Court's statistics on 31 December 2012, the total number was 289 out of 486 judgments.

243 Slapper & Kelly 2003, p. 24 and 25.

244 Feldman 2003, p. 440. As a result of the case law of the European Court of Human Rights, changes were even made to domestic legislation, including the enactment of the Contempt of Court Act of 1981 (*Sunday Times v. the United Kingdom, Application no. 6538/74, judgment of 26 April 1979*) and the Interception of Communications Act of 1985 (*Malone v. the United Kingdom, Application no. 8691/79, judgment of 2 August 1984*), and amendments to the Mental Health Act of 1983 (*X. v. the United Kingdom, Application no. 7215/75, judgment of 5 November 1981*) (see Feldman 2003, p. 441).

245 Gearty 1997, p. 66 and 71. For a more detailed analysis of the developments in the 1970s and 1980s, see *Ibid.* p. 71-77.

rights in general, to which the Member States are parties – shown preference for the European Convention on Human Rights and to the findings of the European Court of Human Rights as evidencing common principles of Union law.²⁴⁶ Manchester & Salter point out, however, that before the enactment of the Human Rights Act, the Convention provisions were rather taken into account as a means of interpretation, to assist in cases of doubt.²⁴⁷ This appears to be somewhat equivalent to the principle of human rights friendly interpretation of law, which was the prevailing practice in Finland until the 1990s. Hoffmann names the principle of proportionality, referred to by both the European Court of Justice and the European Court of Human Rights, and the principle of legitimate expectations as examples of European influence on the English legal system. While the principle of proportionality was not traditionally known in the legal system, it has emerged in national case law bit by bit. According to Hoffmann, the principle first emerged in 1985²⁴⁸. That principle is also well-known in the Finnish legal system, and is capable of helping national jurisdictions to adapt themselves to the Convention system, although knowledge of the other principles of interpretation is also necessary.

However, the status of the European Convention on Human Rights in the English legal system changed along with the enactment of the Human Rights Act 1998²⁴⁹. The Act incorporates the provisions of the European Convention on Human Rights, making it thus possible for courts of law to apply the Convention. The first and foremost objective of the Human Rights Act was to enhance the application of the Convention at the domestic level, and it is considered to have changed the situation in the United Kingdom considerably, although there appear to be somewhat differing views on how extensive the impact has been. Another objective with the Act was to provide victims of violations a possibility to seek redress at the national level, without needing to have recourse to the European Court of Human Rights. While the English courts earlier could not afford sufficient protection for citizens in cases of violations of their rights through acts of the legislature that were in derogation of the Convention, but the only protection available was to exhaust all domestic remedies and take the case through the European control mechanism, the new Human Rights Act extended the means

246 For details, see Schiemann 1998, p. 142-144. Case law cited: [1974] ECR 507 and [1978] 1366 at 1378, as well as *R v. Ministry of Defence, ex p. Smith*, [1996] 2 WLR 305.

247 Manchester & Salter 2006, p. 158 and 159. In the view of Manchester & Salter, the English courts did not show much willingness to resort to the Convention and the Court's case law in those cases where there was ambiguity in statutory provisions, but rather did so in other cases. Furthermore, it was in principle possible for national courts to issue judgments that were not compatible with the obligations under the Convention.

248 Hoffmann 1998, p. 154 and 155. Case cited: *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374.

249 Human Rights Act 1998 c. 42.

available to the domestic courts.²⁵⁰ The Human Rights Act also specifically provides for situations of incompatibility with the Convention. According to section 3(1) of the Act, “So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”²⁵¹ In the view of Marshall, human rights legislation has also radically changed the way in which legislation in the United Kingdom is drafted and the conditions under which executive authority is exercised, thereby even affecting constitutional rules and principles²⁵². However, although it is recognised to be an effective tool to implement the obligations under the Convention, there has also been some resistance towards its application²⁵³, which may also be partly due to its wording.

250 For details, see Masterman 2014, p. 308-310, White & Ovey 2010, p. 102-105, Slapper & Kelly 2003, p. 23-29, and Warbrick 2007, p. 34.

251 Human Rights Act 1998, s. 3(1).

252 See Marshall 2003, p. 64. However, according to a Review of the Implementation of the Human Rights Act published by the Department of Constitutional Affairs there has been no significant impact on criminal law, nor on counter-terrorism legislation, whereas in other areas of law the impact has been beneficial. According to Clayton, the said Report further concluded that there had also been a significant but benevolent effect on the development of government policy, and that the overall impact of the Human Rights Act was not marginal, and it had involved the courts in a more intense scrutiny of the Executive than had previously been concluded. (Clayton 2007, p. 12) As regards the principles of interpretation of law, MacCormick is of the view that the Act has had a significant effect on the application of the teleological method of interpretation of law, not only in respect of the provisions of the Human Rights Act itself but also those of other laws (MacCormick 2010, p. 132-134). This view is shared by Bennion (see Bennion 2009, p. 155). Bennion finds that the addition of a new strong criterion to the rules of statutory interpretation reopens old precedents.

253 See Warbrick 2007, p. 34, Clayton 2007, p. 12 and 13, and Manchester & Salter 2006, p. 90 and 157. Marshall also points out that Article 13 of the Convention providing for the right to effective remedy has been omitted from the Act, which is why the effectiveness of the domestic system under the new Act should perhaps not be over-emphasised. He correctly notes that the question can in any case be tested by challenging the national procedure before the European Court of Human Rights. He further notes that the wording of the Act may also impose some challenges, naming as examples the meaning and scope of the term “public authority” as well as the uncertain relationship between the giving of declarations of incompatibility and the manipulation of the terms of statutes to achieve conformity with. He therefore questions whether the terms of the Human Rights Act have actually changed the rules for the interpretation of statutes. (Marshall 2003, p. 61) Clayton also points out that the scope of application of the Human Rights Act is largely dependent on the meaning to be given to “public authority”. Problems in this respect have been recognised in a Joint Committee’s report (The Meaning of Public Authority under the Human Rights Act), noting that the combined effects of a restrictive judicial interpretation of the relevant subsection and the changing nature of private and voluntary sector involvement in public services have compromised a relevant provision of the Act in a way which reduced the protection it was intended to give. (See Clayton 2007, p. 14 and 15)

Today, under section 2 of the Act, the English courts have a duty to take the judgments of the European Court of Human Rights as well as any opinion of the earlier Human Rights Commission into account²⁵⁴ although the wording “take into account” is perhaps not very strong²⁵⁵. However, they do not take effect automatically in domestic law, but the courts only need to take them into account so far as they are relevant to the proceedings in which a question relating to a Convention right has arisen²⁵⁶. Furthermore, if statutory provisions are found to be in conflict with the Convention, the courts have a duty to acknowledge and declare such a conflict. In the view of Manchester & Salter, it would also appear unlawful to give effect to provisions of common law that are in conflict with the Convention. Despite this, the Court’s case law is only considered to have persuasive authority as precedents.²⁵⁷

Thus, the ratification of the Convention by the United Kingdom was not a decisive factor in changing the legal culture of protecting fundamental rights in the English legal system, whereas the enactment of national legislation implementing it was. Before the enactment of the Human Rights Act, there was even resistance towards the application of the European Convention on Human Rights and the relevant case law. In the view of Fenwick & al., this could be partly explained by the lack of solidly based political and popular support for the Act.²⁵⁸ Masterman adds that the structure of the Convention and the exceptions to the rights protected under it as well as relatively flexible expressions have been a challenge for domestic courts.²⁵⁹ Furthermore, Masterman refers to the margin of appreciation doctrine and the use of flexible expressions by the Court as justifications that would support the view that the Strasbourg case law should not

254 Under section 2(1) of the Act, “a court or tribunal determining a question which has arisen in connection with a Convention right must take into account any a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights, b) opinion of the Commission given in a report adopted under Article 31 of the Convention, c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or d) decision of the Committee of Ministers taken under Article 46 of the Convention, whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

255 See Clayton 2007, p. 18. Clayton notes, however, that when treaty obligations are incorporated into domestic law, such an obligation is construed by reference to the principles of international law governing its interpretation rather than domestic principles.

256 See Gearty 2004, p. 12.

257 Manchester & Salter 2006, p. 58-60. The obligation, under the Act, to interpret legislation in accordance with the Convention applies to both existing and future legislation. According to Manchester & Salter, this also affects the doctrine of precedence in that even binding precedents may need to be rejected in case they are not in conformity with the Convention (Ibid. p. 168 and 169).

258 Fenwick & al. 2007, p.2 and 3. This view is confirmed by Gearty, according to whom the situation began to change in the mid-1990s. (Gearty 1997, p. 77 and 78.)

259 Masterman 2005, p. 915.

be binding on the national judiciary.²⁶⁰ Despite the persisting resistance, there now exist national provisions of law providing for the protection of specific fundamental and human rights. In general, particularly the amendments to national legislation have had a strong impact on the English legal system²⁶¹, although the developments as of the moment of ratifying the Convention until the present increased practice of applying the Convention have been relatively slow when compared with Finland. This could be explained by the relatively restrictive wording of the Human Rights Act²⁶². However, it will only be possible to assess the impact of the Human Rights Act, in ensuring respect for the Convention rights, over a longer period of time once there is evidence of how its provisions have been interpreted and applied. A brief overview of the published precedents of the United Kingdom Supreme Court indicates that there is an increasing number of judgments in which references have been made to the European Convention on Human Rights and the case law of the European Court of Human Rights, and there are examples of judgments in which the references are relatively detailed²⁶³. However, it still appears to be far from an established practice²⁶⁴. Thus, an overview of the case law of the Supreme Court confirms the views presented by the aforementioned scholars in that the Human Rights Act has significantly improved the protection of human rights at the national level. There appears to be an ongoing transition of the legal culture of protecting fundamental rights and human rights, although the change has taken place relatively slowly. However, the more recent public debate on the role of the European Convention on Human Rights, showing once again signs of resistance towards it and of preference for national law, shows that the change is not necessarily that permanent.

260 Masterman 2007, p. 64. Such flexible expressions include e.g. admissible, ordinary, useful, reasonable, desirable, and pressing social need. Those expressions leave considerable margin of discretion for judges. According to Clayton, it has even been suggested that the margin of appreciation doctrine could be used, through national case law, to remove problems that the English legal system has faced with the Convention and the Human Rights Act. (See Clayton 2007, p. 12) This is an interesting suggestion given that the margin of appreciation as a concept has been foreign to the English legal system. One might even raise the question whether such an approach could in some situations run counter the purpose of the doctrine.

261 Masterman 2014, p. 311-315.

262 See e.g. Gearty 2004, p. 12.

263 [2011] UKSC 35, Judgment of 13 July 2011, [2013] UKSC 23, Judgment of 1 May 2013, and [2014] UKSC 20, Judgment of 26 March 2014. These judgments provide even detailed references to the case law of the European Court of Human Rights in a few opinions. In the view of Masterman, the increased references have also been a result of the Human Rights Act (Masterman 2014, p. 318).

264 See e.g. [2013] UKSC 9, 20 February 2013, and [2014] UKSC 28, 14 May 2014. It is also important to note that the UK Supreme Court judgments consist of opinions of individual justices, and it is possible that only one or two of them include references to the European Convention on Human Rights or to the case law of the European Court of Human Rights.

2.6.2.2 French legal system

Insofar as the implementation and application of the European Convention on Human Rights is concerned, France should not have faced similar problems as the United Kingdom with regard to treaties, and the French legal system is clearly monistic. The treaties to which France is a party are automatically incorporated into the domestic legal system. According to Article 55 of the Constitution, “duly ratified or approved treaties or agreements shall, upon their publication, have higher authority than statutes, subject, in respect of each agreement or treaty, to its application by the other party”.²⁶⁵ However, the Constitution is hierarchically above international law²⁶⁶. Article 55 of the French Constitution not only requires publication but also subjects the application of the international agreement to a requirement of reciprocity. Thus, in principle, an agreement would only prevail over a domestic law where it is also applied by the other party or parties in question. In comparison, although the Finnish legal system is somewhere between a dualistic and monistic system, the Finnish practice of *in blanco* implementing acts mean that in both legal systems the text of the European Convention on Human Rights is applied as such in the same way as in France.

However, one must remember that human rights conventions are a special case among international agreements. Although they require States parties to them to act in accordance with their obligations under the convention, in the same way as under any other international agreement, these obligations are characteristically not so much obligations vis-à-vis other parties but obligations to provide certain guarantees for the protection of the rights of individuals residing within their jurisdiction. Thus, human rights conventions directly create rights for individuals, and the requirement of reciprocal application would be misplaced. Considering that international agreements are not specifically transposed into French law, however, they need to be directly applicable to have relevance in the legal system. This also concerns the European Convention on Human Rights. The direct applicability is, according to Sudre, subject to two conditions. Firstly, the direct applicability must have been intended by the States parties. When looking at the wording of international human rights conventions, it is evident that they are intended to create rights for individuals, which can be directly invoked by them before a court. Secondly, the provisions of the convention need to be precise

265 Article 55 of the Constitution reads as follows: “*Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.*” Incorporation occurs upon signature not subject to ratification or upon ratification, approval or accession, without the need for a separate statutory or administrative instrument. However, the text must be published in the official Gazette (*Journal Officiel*) to be valid vis-à-vis third parties. (Treaty Making 2001, p. 167) See also Aust 2013, p. 164, and Lageot 2014, p. 155.

266 See Lageot 2014, p. 156.

enough to make it possible to apply them in a national legal system.²⁶⁷ Although the provisions of the European Convention on Human Rights contain some ambiguity as has been observed in the foregoing, in the same way as any international agreement, they are clearly formulated and, as noted above, have a lot in common with national constitutional provisions and should be without any problems even in a legal system where the text has not been specifically incorporated. According to Lageot, all the human rights provisions of the European Convention on Human Rights and of its additional protocols have been given direct effect in the French Legal system.²⁶⁸ Furthermore, there is today a considerable amount of case law of the European Convention on Human Rights supporting the application of the Convention, although it is another issue to what extent national courts follow its case law. According to Sudre, this view has generally been accepted in France insofar as the European Convention on Human Rights and the International Covenant on Civil and Political Rights are concerned, and these conventions are without doubt directly applied by French courts, but there has been more reluctance to accept direct applicability in respect of certain other human rights conventions²⁶⁹. Thus, the relatively strong wording used in the European Convention on Human Rights seems to be behind its recognition as part of the French legal system, as directly applicable law in France, without having been specifically implemented, and in cases of conflict with national laws, it is to be given precedence. Also, both the European Convention on Human Rights and the International Covenant on Civil and Political Rights provide for an international complaint mechanism.

Insofar as the application of the Convention in France is concerned, however, one should remember that France only ratified the Convention in 1974²⁷⁰. Despite the late ratification and even later recognition of the right to submit individual applications in 1981, France rather rapidly attained a high number of violations of the Convention, and it is today in fact the highest one of the States parties subject to the present study²⁷¹. The French courts have, however, increasingly begun to resort to the text of the European Convention on Human Rights or its protocols, either *ex officio* or upon

267 Sudre 2007, p. 39. Lageot 2014, p.156 and 157.

268 Lageot 2014, p. 157. According to Lageot, nor have the French courts found it difficult to admit the direct applicability of the Convention (Ibid.)

269 Sudre 2007, p. 40

270 The late ratification was explained by both problems in national legislation, particularly as regards the rules on the safeguards for people in custody after arrest, and political resistance (Steiner 1997, p. 276-278).

271 According to the Court's statistics on 31 December 2012, the total number of violations found was 646 out of 877 judgments.

it being invoked by one of the parties to the case at hand²⁷². Lageot suggests that the application of the Convention includes taking fully account of the case law of the European Court of Human Rights and that there are almost standard references to the case law in national judgments²⁷³. Despite this, according to Pacteau, the references to judgments of the European Court of Human Rights have not entailed quotations of the case law, or its interpretations and doctrine.²⁷⁴ His view appears to be confirmed by an overview of judgments of the Cour de Cassation from the past few years²⁷⁵. Lageot has analysed the French judgments from the perspective of whether the French courts actually apply methods of interpretation similar to those of the European Court of Human Rights and suggests that it is only seldom clear and where they do so, the method most often applied is that of proportionality²⁷⁶. In the view of Margénaud, national judges in France in the field of civil and criminal law have, however, sometimes even shown excellent knowledge of the Convention²⁷⁷. The case law of the European Court of Human Rights has also gradually had an impact on the work of the judiciary

272 See Steiner 1997, p. 282-288. Most of such case law has until late 1990s relates to criminal proceedings under Article 5 of the Convention (Ibid. p. 282), but the Convention has also had an impact on a variety of other types of national case law including those under Articles 6 and 8 of the Convention (Ibid. p. 294-304). According to Margénaud, between January 1986 and September 1997, there were already as many as 5717 judgments issued by the *Cour de cassation* in which the Convention was referred to, of which a great majority (4642 judgments) were criminal law ones. In the view of Margénaud, there is no doubt that there is a positive tendency to take the Convention into account in national case law, although this conclusion has been made exclusively in the light of the case law of the *Cour de cassation*. (Margénaud 1998, p. 232) His conclusion appears to be supported by the application of the Convention in the field of administrative law, however, and by 1997, there were approximately 550 judgments of the *Conseil d'Etat* alone, in which the Convention had been referred to. (See Pacteau 1998, p. 252) In the light of the analysis made by Lageot, this practice has continued, and Lageot suggests that the French courts have never hesitated to apply the provisions of the Convention (Lageot 2014, p. 162).

273 Lageot 2014, p. 166 and 169. According to Lageot, the principle of proportionality is usually applied only if the case law of the European Court of Human Rights forms a sufficient basis for it. (Ibid. p. 180)

274 Pacteau 1998, p. 259. He suggests, however, that there is perhaps no obligation to do so as, formally, the Convention does not constitute part of the applicable administrative law in the French legal system. (Ibid. p. 161) As suggested in section 3.2.2 below, more profound references may appear in the non-published documentation relating to the judgments, which have not been covered by the present research.

275 See e.g. *Cour de Cassation, Première chambre civile, Arrêt n° 688 du 11 juin 2009, Arrêt n° 689 du 11 juin 2009, Arrêt n° 1308 du 10 décembre 2009, Arrêt n° 1309 du 10 décembre 2009, Arrêt n° 198 du 25 février 2010, Arrêt n° 343 du 31 mars 2010, and Arrêt n° 301 du 17 mars 2011.*

276 Lageot 2014, p. 178-181.

277 Margénaud 1998, p. 244.

in France, which has been particularly strong in the field of criminal proceedings²⁷⁸, and Pacteau suggests that some degree of dialogue between national courts and the European Court of Human Rights could be already said to exist towards the late 1990s, and although such a dialogue takes place rather slowly²⁷⁹, this view is already shared by other scholars²⁸⁰. The existence of a dialogue is nevertheless hard to conclude from the relatively brief references to the case law of the European Court of Human Rights.

Some improvements have also taken place in the constitutional provisions on the protection of fundamental rights, although the original provisions from 1789 and 1946 still exist. The ratification of the European Convention on Human Rights has not as such entailed amendments to constitutional law, but the French Constitution has undergone amendments since the signing of the Convention to take into account, in particular, political changes²⁸¹, the membership of France in the °European Union²⁸², and more recently in 2008 (entry into force on 1 March 2010), to provide for a mechanism of review of legislation after its entry into force with regard to constitutional rights and freedoms²⁸³. The latter reform brings the French system of control of constitutionality closer to the German system, although there still are differences, particularly the lack of a possibility to complain over measures taken by the national authorities. The new indirect constitutional complaint has three steps: 1) the question raised by a litigant, 2) the single or double transmission decision by a court, and 3) the ruling by the Constitutional Council on the constitutionality of the legislative act or provision.²⁸⁴ Some new rights have been introduced into the French Constitution in

278 See Steiner 1997, p. 289-294, and Lageot 2014, p. 170. The 1993 reform of the *Code penal* (code of criminal procedure) was aimed at achieving compliance with the requirements of the European Convention on Human Rights (Steiner 1997, p. 293), and the Code penal was amended for a second time to comply with the Convention in 2011 (Lageot 2014, p. 170). The case law has also had a significant impact on other types of cases, such as administrative law cases (Lageot 2014, p. 170-175).

279 Pacteau 1998, p. 281.

280 See Lageot 2014, p. 182-184.

281 Boyron 2011, p. 121. A new constitution was drafted in 1958 as a result of the Algerian war, the threat of a military coup, and a political crisis, and has later undergone amendments. No new list of rights was included in the constitution, but the old one was maintained.

282 See Favoreu and Oberdorff 2000, p. 97.

283 *Décret n° 2010-148 du 16 février 2010, Code de procédure civile, Article 126-2 and seq., Code de procédure pénale, Article R49-22 and seq.* Under the new legislative provisions, three courts (*Conseil constitutionnel, Conseil d'État* and *Cour de cassation*) have the possibility to state on the unconstitutionality of provisions of law and, where necessary, to repeal those provisions. For more detailed comments on the reform, see Pfersmann 2010, p. 223. Until the entry into force of the amendment, the Constitutional Council has only been able to exercise such review within one month of the adoption of the bill. See also Boyron 2011, p. 139.

284 Pfersmann 2010, p. 236.

1971, 1999, 2005, and 2008²⁸⁵. Those amendments have not, however, entailed stronger protection for the rights included in the Convention, but a large part of the Convention rights still rely on the text of the Convention in France. From the point of view of the protection of fundamental rights, the most important new element common with the German system is the possibility of an individual litigant to raise the question of constitutionality, although Pfersmann considers the requirement of the initiative of a litigant to be at the same time a weakness of the system.²⁸⁶ Pfersmann also draws attention to the importance of reasoning judgments, which in his view is a requirement by the law in respect of decisions on constitutionality.²⁸⁷ In respect of general courts of law, particularly *Cour de Cassation*, inadequate reasoning of judgments has been one of the problems France has faced before the European Court of Human Rights. The overall impact of this constitutional reform on the protection of fundamental rights and particularly on the resolution of problems at the national level, which at the outset should at least in the long run contribute to a decreasing number of complaints before the European Court of Human Rights, remains to be seen.

In conclusion, despite the rather clear status of the Convention in the French legal system, and the long existence of national provisions on fundamental rights, which would give reason to believe that no major problems should occur, there have been problems for other reasons. Despite the differences between the legal systems of France and Finland, the technical criteria for the direct applicability of the Convention exist in both legal systems, but the French courts have perhaps been slower in adapting themselves to the practice of applying it, and even slower in making references to the European case law. Furthermore, when compared with Finland, the transition of the legal culture of protecting human rights under the Convention appears to have taken place rather slowly, despite the long traditions of respect for fundamental rights in the French legal system. This concerns particularly the general attitudes towards the European control mechanism.

285 Boyron 2011, p. 136. Those rights include, in particular, strengthened protection of equality between men and women, and environmental rights.

286 For more details, see Pfersmann 2010, p. 236-238. Pfersmann points out, however, that the same weakness also exists in the German system, although the latter is in some respects a stronger system. In both systems, the constitutional complaint does not entail a right to have the question examined on the merits, but only the constitutionality of the provision or a legislative act will be examined. (Ibid. p. 237)

287 Pfersmann 2010, p.242. This requirement, in the view of Pfersmann, concerns particularly those cases where primary legislation is annulled, whereas routine-like decisions declaring the complaint inadmissible, for example, do not need to state such detailed reasons.

2.6.2.3 German legal system

The German Basic Law states that the general rules of international law, including customary international law, are an integral part of national law, but does not provide for the status of international agreements²⁸⁸. However, upon certain amendments, the Basic Law provides for the principles of openness towards international law (*Völkerrechtsfreundlichkeit*, preamble to the Basic Law) and towards European law (*Europarechtsfreundlichkeit*, Article 23 of the Basic Law).²⁸⁹ In respect of international agreements, Aust classifies Germany among monistic states, but I would rather suggest that the system is a mixture of both monistic and dualistic elements²⁹⁰. Aust also himself points out that although they are limited in number, such international agreements that contain normative elements and treaties affecting federal legislation or of high political importance require consent of Parliament²⁹¹. Thus, in the cases of international agreements with normative elements, a national legal act is necessary to implement it, which means that such international agreements enjoy the same status as any other laws at the same hierarchical level. This has been also done in respect of the European Convention on Human Rights, which was ratified by Germany on 5 December 1952, having been implemented at the national level by means of an Act on 7 August 1952²⁹², which is an *in blanco* implementing act without any material contents. Thus, the German system resembles the Finnish one. In both legal systems, international treaty provisions are directly applicable upon implementation particularly where they are formulated in a sufficiently precise manner. In cases of conflict, the normal rules of the interpretation of law in principle apply²⁹³, which in principle could even entail the supremacy of the Constitution. However, as is suggested by Danelius, it could also be considered that the European Convention on Human Rights is given special weight as providing for fundamental rights of the individual²⁹⁴, and the Federal Constitutional Court has the

288 *Grundgesetz*, Article 25.

289 *Grundgesetz*, Article 23. See also Voßkuhle 2010, p. 179.

290 *Grundgesetz*, Article 59, according to which the treaties relating to political relations or legislation must be consented to by *Bundestag* and *Bundesrat* (legislative bodies) in the form of a federal law. My view is supported by Klein, according to whom it is rather an academic question as to whether international rules are transformed into domestic law or whether they are applied as such. He calls the German system a moderately dualist system (Klein 2014, p. 190 and 193).

291 Aust 2013, p. 164. According to Aust, the German system does not allow reservations to be made to the treaty in question.

292 *Gesetz über die Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, *Bundesgesetzblatt* (BGBl 1952 II, p. 685).

293 Klein 2014, p. 192, 195 and 196.

294 Danelius 2012, p. 37.

possibility to interpret national law consistently with the rules of international law²⁹⁵. In any case, despite the existence of the formal framework for applying the provisions of the European Convention on Human Rights, the Convention has played a smaller role in Germany than in most other States parties to it.²⁹⁶

In the same way as the Finnish Constitution, the German one has provided for a list of fundamental rights protected by the constitution. That list of fundamental rights also has considerable similarities with the European Convention list of rights. The list of fundamental rights in the Basic Law is detailed, but some of the amendments to the Basic Law have entailed restrictions on the enjoyment of fundamental rights²⁹⁷, although the list of rights has been amended only seldom. According to Woelk, those restrictions were at the time found controversial and raised even severe criticism. However, they were not as such found by the Constitutional Court to be incompatible with the essential core, human dignity, but were found to be proportionate to the objective of protecting public interest²⁹⁸. Despite the similarities with the European Convention, the Federal Constitutional Court has traditionally been more active in applying the national provisions protecting fundamental rights than in paying attention to the provisions of the Convention²⁹⁹. Frowein explains that this is because, strictly speaking, the Federal Constitutional Court is only competent to interpret the fundamental rights provisions of the German Basic Law, and not those of international agreements, although he points out that there would have been no obstacle for the Federal Constitutional Court to take the provisions of the European Convention on Human Rights into account indirectly³⁰⁰ and, on occasion, they are taken into account. According to Voßkuhle, the Federal Constitutional Court today frequently consults the text of the Convention and the case law of the European Court, and suggests that in doing so, the Federal Constitutional Court has de facto raised them to a constitutional level

295 Klein 2014, p. 196.

296 Frowein 2005(1), p 12.

297 Those amendments include the enactment of a law on phone-tapping that allows restrictions on Article 10 (privacy of communications) in 1968, the introduction of Article 16a in 1993, limiting the guarantees of political asylum, and the amendment of Article 13 (inviolability of home) in 1998 allowing technical surveillance in the case of particularly serious crime. See *Grundgesetz für die Bundesrepublik Deutschland*.

298 Woelk 2011, p. 150 and 151. The criticism has concerned, in particular, the consequences that the restrictions would entail on the guarantees of effective legal remedies.

299 This observation can be made by examining the published case law of the Constitutional Court. On occasion, references are, however, made to the European Convention on Human Rights or even to the case law of the European Court of Human Rights. See e.g. *Bundesverfassungsgericht, 2 BvR 1436/02 vom 24.9.2003, 2 BvR 1481/04 vom 14.10.2004, 2 BvR 1113/06 vom 25.9.2009, 2 BvR 1396/10 vom 16.4.2012 and 2 BvR 1380/08 vom 18.8.2013*.

300 Frowein 2005(1), p. 12 and 13. See also Voss 1997, p. 155. Voss confirms the strict interpretation of the competence of the Federal Constitutional Court.

as a means of interpretation.³⁰¹ The rather significant change, which has taken place at a late stage, is in some respect comparable with that of the United Kingdom. It is most likely explained by the revised provisions of the Basic Law, but also the dialogue between scholars and the judiciary might be partly behind it – possibly also behind the constitutional amendments. As explained in the foregoing, the German judicial traditions have a close link with academic views.

When compared with the Finnish legal system, the technical criteria for the applicability of the Convention resemble those of the German legal system, but it appears that the Finnish judiciary have been more active in adapting themselves to the application of the Convention. This is interesting in that the number of violations found against Germany by the European Court of Human Rights is smaller than those against Finland. Thus, this gives reason to conclude that the existence of formal technical criteria for the applicability of international sources of law does not necessarily lead to their active application.

The weaker role of the Convention in the German legal system, when compared with Finland for example, might be largely explained by the strong role of the Federal Constitutional Court. The German law provides for a system of constitutionality review and constitutional complaints which resemble the individual complaints mechanism of the European Court of Human Rights. The Federal Constitutional Court (*Bundesverfassungsgerichtshof*) has competence to examine the constitutionality of federal and state (*Länder*) legislation, including from the point of view from the protection of fundamental rights. This competence may be roughly divided into concrete judicial review (Article 100 of the Basic Law) and abstract judicial review (Article 93)³⁰². However, from the point of view of the protection of fundamental rights, the possibility of individual citizens to file complaints against acts of public authorities (*öffentliche Gewalt*)³⁰³ (constitutional complaints, *Verfassungsbeschwerde*) is a more interesting part of the work of the Constitutional Court. According to Heun, this also constitutes the overwhelming majority of the cases dealt with by the Constitutional Court.³⁰⁴ An overview of the

301 Voßkuhle 2010, p. 187. He goes even further by stating that in fact, the Federal Constitutional Court has a constitutional obligation to take the Convention and the European Court's case law into account in the light of the principle of openness towards international law. (See Voßkuhle 2010, p. 188. The principle of openness towards international law was introduced by the revised provisions of Article 23 GG.) See also Frowein 2005(2), p. 280-282.

302 Heun 2011, p. 171.

303 See Fisher 1997, p. 21. This concept is considered to include the executive, the legislature and the judiciary.

304 Heun 2011, p. 173. The right to lodge a complaint belongs to anyone entitled to enjoy the rights protected by the Basic Law, including foreigners and legal entities. The yearly number of complaints examined by the Federal Constitutional Court is around 6000, which amounts to approximately 95 per cent of its workload. However, there are conditions to the admissibility of a complaint. The act of the public authority, subject to the complaint, must have a legal effect and the violation

case law of the Constitutional Court appears to confirm that observation, and there appears to be an abundant case law of constitutional complaints. This national practice of constitutional complaints by individual citizens perhaps at least partly explains why the number of human rights complaints at the European level against Germany³⁰⁵, in proportion to the size of population and the year of ratification of the Convention, is lower than those against Finland, although according to Voss, only a very small part of the constitutional complaints are successful³⁰⁶. Kastari, for example, has been of the view that the weakest point in the Finnish system has been that the Constitutional Law Committee of Parliament has not enjoyed a status comparable to that of a constitutional court³⁰⁷. Having that status would make both the constitutionality review of legislation and the protection of fundamental rights stronger.

In any case, although some problems have been faced in the implementation of the European Convention on Human Rights, Germany also appears to have faced less problems before the European Court of Human Rights than the other states subject to the present study – with the exception of Sweden perhaps – particularly in view of the size of its population and the early moment of ratification of the Convention. In general, it appears that the German legal system has adapted itself without major problems to the European control mechanism, which might be partly explained by the heavy burden of the World Wars, whereby particular attention has been paid to respect for fundamental rights and to the control of constitutionality of legislation at the national level, but also by the relatively liberal approach to the interpretation of statutes that appear to be in conflict with the Convention. The German legal system also has a flexible approach to the applicable sources of law, whereby the Federal Constitutional Court is able to apply the case law of the European Court of Human Rights as guidance, even for the interpretation of constitutional basic rights³⁰⁸. However, Voss points out that although it has been usual for German courts for a long time already to refer to the provisions of the Convention, it was rare for German courts to refer to the case law of the European Court of Human Rights³⁰⁹ until more recently. According to Klein, the impact of that case law on national judgments is becoming more and more

must affect the complainant directly. It is also required that ordinary legal remedies must have first been exhausted. (Ibid. p. 174 and 175) These conditions in fact resemble the conditions of admissibility of the applications to the European Court of Human Rights. See also Voss 1997, p. 151.

305 According to the Court's statistics on 31 December 2013, the total number of violations found against Germany was 173 out of 263 judgments.

306 Voss 1997, p. 151. The possibilities of success can to some extent be explained by the aforementioned strict criteria of admissibility.

307 See Kastari 1960, p. 9.

308 Voss 1997, p. 156.

309 Voss 1997, p. 168. Voss explains this with both the strong national system of protecting basic rights and possible general unfamiliarity with the published case law. (Ibid. p. 169)

evident³¹⁰, which conclusion is confirmed by the overview of the past judgments of the Federal Constitutional Court. Until recently, the impact of the European Convention on Human Rights and of the case law of the European Court of Human Rights on the German legal system has also been considered generally low, and the majority of cases in which a violation has been found for a long time related to Article 6³¹¹. A significant change in the national law on criminal proceedings and civil proceedings has, however, been introduced as a result of the judgments against Germany. Under the amended provisions, it is possible to reopen national proceedings as a result of a violation found by the European Court of Human Rights.³¹² One could assert that the problems that Germany has faced in the European Court of Human Rights could even be explained by the strong reliance on national provisions. Furthermore, as is pointed out by Voßkuhle, the entry into force of Protocol No 11 to the Convention, strengthening the status of the individual complaints mechanism, has also resulted in more cases brought against Germany³¹³. This appears to be so despite that Germany recognised the competence of the European Court of Human Rights to receive individual applications upon ratification of the Convention. Thus, people increasingly resort to the European mechanism in addition to the national one. The more recent problems faced by Germany have to a large extent been related to Article 5 of the European Convention on Human Rights. Those problems are repetitive in nature and created pressure to amend national legislation to better comply with the requirements of the Convention (see section 4.2.3 below). This is not necessarily a negative impact, but indicates that some dialogue between the European Court of Human Rights and the national jurisdictions exist. It also is a sign of an ongoing increased transition of the legal culture.

It is difficult to assess whether the earlier situation with relatively few complaints, when compared with France and the United Kingdom, for example, has been caused more by a general resistance to the international protection of fundamental rights or by the fact that the national legal system has provided for a rather effective system of protection, which may have not made it necessary for citizens to resort to further complaint to the European Court of Human Rights. As mentioned in the foregoing, according to a strict interpretation of the competence of the Federal Constitutional

310 Klein 2014, p. 203.

311 Voss 1997, p. 129. There have nevertheless been cases of impact on national legislation, such as in the field of legal expenses, where the national law was amended to also allow compensation for legal costs in administrative or regulatory proceedings apart from criminal proceedings (*Gerichtskostengesetz*, BGBl vol. I p. 1082), as well as the legislation governing the length of proceedings in criminal and civil law cases. See *Ibid.* p. 161-164.

312 See Klein 2014, p. 204 and 205. Those changes took place in 1998, concerning criminal proceedings, and in 2006, concerning civil proceedings.

313 Voßkuhle 2010, p. 180.

Court, it only has competence to examine violations of constitutional rights and not those protected by the European Convention on Human Rights, which speaks in favour of a conclusion that the slow increase in the number of complaints to the European Court of Human Rights is explained by both. It appears, nevertheless, that there was a rather rapid transition of the legal culture directly upon enactment of the Basic Law together with the ratification of the European Convention on Human Rights, but further developments in the German legal system have appeared rather late with the exception of the aforementioned amendments to the national legislation, which also raised some criticism from the point of view of effective remedies. Apart from the increasing numbers of complaints to the European Court of Human Rights, also the national constitutional complaints have increased in number.

2.6.2.4 Swedish legal system

Treaties to which Sweden is a party do not automatically become incorporated into domestic law. A separate legislation or administrative act is required if the treaty contains provisions that are not in conformity with existing laws and regulations. Different methods may be used, varying from amending existing rules of law or introducing new legislation to prescribing that the text of the treaty or relevant provisions thereof shall have the force of Swedish law³¹⁴. As a general rule, treaty provisions acquire a legal status in domestic law only if they are incorporated by means of a legislative or administrative act. Their status is thus determined by the level of the act chosen to incorporate them.³¹⁵

Thus, although the Swedish legal system is usually placed among the dualistic systems in respect of international agreements, in view of the flexible means of implementing them Sweden seems to have rather applied for a long time a mixture of a monistic and dualistic system³¹⁶. When compared with Finland, the difference is that the Finnish legal system always requires specific implementation. The European Convention on Human Rights was not incorporated upon its ratification on 4 February 1952³¹⁷, but this took place considerably later. There was a debate on the need to incorporate the Convention already in the 1970s but the idea met with resistance due to political

314 Prop. 1993:94:117, kapitel 9.

315 Treaty Making 2001, p. 267. Cameron and Bull 2014, p. 266.

316 Prop. 1993:94:117, kapitel 9. See also Cameron and Bull 2014, p. 267, according to whom the present stricter approach to implementation appears to be a creation of case law of the Supreme Court (*Högsta domstolen*). Particularly as a result of the problems faced with the application of the European Convention on Human Rights, the Swedish Supreme Court and Supreme Administrative Court (*Högsta förvaltningsdomstolen*) found that the Convention did not create rights that could be directly invoked before national courts in the absence of national legislation implementing it.

317 Prop. 1951:165.

reasons.³¹⁸ The Act incorporating the Convention³¹⁹ entered into force at the beginning of 1995, providing explicitly that the Convention shall apply as law in Sweden. However, this did not entail any dramatic change in Sweden, as the Swedish courts had started to increasingly apply the provisions of the Convention in their case law already before the incorporation, towards the end of the 1980s and the beginning of the 1990s despite that they were not directly applicable law in the country³²⁰, as well as the case law of the European Court of Human Rights. Today, especially the Supreme Court strives at taking the provisions of the Convention into account as much as possible³²¹, and the references have become more frequent and detailed. This is made easy by the technique of implementation in the same way as in Finland, whereby the provisions of the Convention have been implemented as such. Problems could be caused by possible conflicts between the implementing act and the constitution, as in such a situation the provisions of the constitution would prevail. However, such a situation has only seldom appeared³²². According to Cameron and Bull, Swedish courts pay particular attention to judgments of the European Court of Human Rights in those cases where Sweden has been a party to the case, and this may lead to changes in the traditional interpretations of national law or in the assessment of the proportionality of national measures³²³. In their view, however, it is not easy to assess the exact impact of the case law on the legal system, although particularly under the case law on Article 6 changes in national legislation have been made. In that particular case, Swedish legislation was also found to be in conflict with the European Convention on Human Rights. The more significant influence is perhaps the way the Convention and the case law under it affect the interpretation of law in general, in conformity with the Convention.³²⁴

318 Holmberg & Stjernquist 2000, p. 51.

319 Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna. The amendments to the Convention have been taken into account by Act No. 2010:239. The English and French originals of the Convention have been published in the Swedish Treaty Series together with a Swedish translation.

320 However, Nergelius points out that although the Supreme Court showed willingness to pay attention to the Convention and the European case law, they were not formally part of applicable law in Sweden and therefore the incorporation is in his view significant (Nergelius 1996, p. 611).

321 See e.g. *Högsta domstolen*, judgments B119-06 NJA 2006 s. 467 (NJA 2006:53), Ö1082-09 NJA 2009 s. 280 (NJA 2009:30), B1982-11 NJA 2012 s. 1038 (NJA 2012:94), B4946-12 NJA 2013 s. 502 (NJA 2013:48), and Ö1526-13 NJA 2013 s. 746 (NJA 2013:67). The judgments include even detailed references to the case law of the European Court of Human Rights.

322 Cameron and Bull 2014, p. 275.

323 Cameron and Bull 2014, p. 277. In the same way as in Finland, the supreme jurisdictions play a particular role in taking a position on the impact of the case law of the European Court of Human Rights.

324 For details, see Cameron and Bull 2014, p. 278-283.

In general, it is interesting to note that in Sweden, a transition of the legal culture of protecting fundamental rights started to take place directly as a result of the judgments of the European Court of Human Rights, without waiting for the incorporation of the Convention.

Although Sweden had aimed at taking the provisions of the European Convention on Human Rights into account when drafting the fundamental rights provisions in the 1970s, this effort was not too successful. As of 1982, Sweden was found to have violated the Convention provisions in a number of cases, particularly with regard to the right to a fair trial.³²⁵ Some of the problems faced in Sweden will be given account of in more detail below in the case study on Article 6, paragraph 1. Despite those problems, when compared with the Finnish legal system, the Swedish one appears to have had fewer problems in the light of the Court's statistics³²⁶, and is the lowest of the States covered by the present study although the size of the population is also small.

The constitutional protection of fundamental rights has also been strengthened, largely due to the impact of the European Convention on Human Rights. After a number of part-reforms of the Constitution, a debate and preparations for an overall reform was launched in the 1950s, particularly as a result of revised provisions on parliamentary elections. The need for more effective and modern constitutional provisions was finally recognised.³²⁷ The final proposal for an overall reform of the Constitution was submitted in 1972 (1973:90).³²⁸ A separate Chapter on fundamental rights, i.e. certain basic civil and political rights, was included in the 1974 Form of Government³²⁹. The need to supplement those provisions was not reviewed until in the 1990s and at the same time, it was proposed that the European Convention on Human Rights be

325 See Holmberg & Stjernquist 2000, p. 50. These cases include, inter alia, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A no. 52, *Pudas v. Sweden*, judgment of 27 October 1987, Series A no. 125-A, *Bodén v. Sweden*, judgment of 27 October 1987, Series A no. 125-B, *Tre Traktörer Aktiefbolag v. Sweden*, judgment of 7 July 1989, Series A no. 159, *Allan Jacobsson v. Sweden (No. 1)*, judgment of 25 October 1989, Series A no. 163, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A no. 171-A, *Mats Jacobsson v. Sweden*, judgment of 28 June 1990, Series A no. 180-A, *Skärby v. Sweden*, judgment of 28 June 1990, Series A no. 180-B, and *Fredin v. Sweden (No. 1)*, judgment of 18 February 1991, Series A no. 192.

326 On 31 December 2013, the total number was 54 out of 130 judgments issued for Sweden. The difference is considerable in view of the late moment of accession of Finland to the Convention.

327 Holmberg & Stjernquist 2000, p. 30 and 31. Despite that, a further part-reform of the Constitution was proposed in 1967 and approved in 1968-1969.

328 See Holmberg & Stjernquist 2000, p. 33.

329 *Regeringsform, 2 kapitel (Grundläggande fri- och rättigheter)*, SFS 1974:152. See also Nergelius 1996, p. 607.

incorporated in Swedish law³³⁰. The reason for the specific incorporation, unlike in the case of other applicable human rights conventions, was the special character of the European Convention on Human Rights as an instrument creating law through the case law of the European Court of Human Rights. Around the same time, the freedom of expression was further strengthened by supplementing the freedom of press decree with a new freedom of expression act in 1992 to adapt legislation to other forms of media³³¹ which has again been amended to take into account new developments in the media³³². Upon the legislative amendments and particularly the incorporation of the Convention into Swedish law, the protection of fundamental rights is now considered to be relatively strong in Sweden. In the view of Berggren & al., the protection of property could perhaps be even stronger, although it has also been suggested that in some respects, the protection of property in Sweden today is even stronger than it would be under the Convention.³³³ When compared with Finland, the technical criteria for the application and interpretation of the European Convention on Human Rights have been entirely met later after ratification. That also made the transition of the legal culture of protecting fundamental rights and human rights slower than in Finland, but it appears to have been slower also in France and England. In that respect, it is interesting to note the low total number of violations found against Sweden, which could perhaps be explained by inactivity or weaker awareness of the Convention provisions among lawyers.

2.6.2.5 Finnish legal system

As regards the status of international agreements in the domestic legal system, Finland is in principle an example of a dualistic system. International treaties must be separately implemented in order for them to become applicable at the national level. This is done either at the level of an ordinary act of Parliament or at the level of a decree, affording international agreements the same hierarchical status, respectively. The implementing act is normally an Act (or decree) *in blanco*, meaning that the provisions of the treaty are incorporated as such, and therefore I would suggest that the Finnish legal system

330 Prop. 1993/94: 117. The intention of the Government was to further strengthen the protection of fundamental rights as guaranteed by Chapter 2 of the Constitution (*Regeringsform*) (kapitel 11). In addition, the meaning of the European Convention in the national legal system was strengthened by stating that national acts of Parliament or other legislation should not be in conflict with the Government's obligations under the Convention (kapitel 10). See also Nergelius 1996, p. 609.

331 Axberger 2012, p. 24. The reason for maintaining both was a concern over that the freedom of press would be weakened through the new act as it was necessary to impose certain restrictions on media other than printed ones. (Ibid. p. 24 and 25.)

332 Axberger 2012, p. 27.

333 Berggren & al. 2001, p. 188 and 189. They refer to the opinion of Bengtsson B. (1994), according to whom such a stronger element is, in particular, the right to compensation in connection with the regulation of the use of land areas.

is rather between a monistic and a dualistic system than a purely dualistic system. Sometimes, however, additional legislative amendments (transformation) may be necessary. The European Convention on Human Rights was implemented by means of an act of Parliament *in blanco*, which in principle means that eventual conflicts between the provisions of the Convention and those of other acts of Parliament would be resolved by means of normal rules of interpretation of laws. Thus, the Convention does not in principle enjoy any special status with regard to national legislation. It was nevertheless found necessary to make various amendments to legislation, to take the Convention duly into account. Such amendments concerned, among others, criminal investigations and enforcement of sentences. In addition, Finland found it necessary to make a reservation to the Convention.³³⁴ The reservation³³⁵ concerned, in particular, the right to an oral hearing under several procedural laws. In order to withdraw the reservation, Finland enacted various amendments to legislation, including provisions on both civil and criminal and administrative law proceedings. Thus, already accession to the European Convention on Human Rights brought about such considerable amendments to national legislation that meant a step forward in the transition of the legal culture of protecting fundamental rights and human rights, particularly in the form of strengthened provisions on fair trial. Those amendments made also the fundamental rights provisions more easily enforceable in courts of law. Despite that the Convention could in principle be overridden by special legislation or later legislation along with the normal rules of interpretation, however, Finnish courts tend to interpret national legislation in a way that takes the provisions of the European Convention (as well as other human rights conventions and the provisions of the Constitution on fundamental rights) into account. This is also considered to have been the intention of Parliament³³⁶. They have even been given effect of a binding source of law as indicated in sections 4.3 and 4.5 below. However, in the field of procedural law, human rights friendly interpretation of law is not sufficient as procedural rules are most often absolute in nature. The transition in respect of strengthened fair trial rights took place gradually.

It is observed in the foregoing that prior to the accession of Finland to the European Convention on Human Rights, the constitutional provisions on fundamental rights remained unchanged for a long time. Slightly later than the debate on the reform of the constitutional acts in general, a debate on the need to revise the fundamental rights provisions was launched. These ideas were expressed first in the 1970s, but the reform was not carried out until in the 1990s. A constitutional law committee set up in 1970 outlined already the main principles, but a comprehensive list of fundamental

334 For details, see Pellonpää & al. 2012, p. 60-63.

335 Reservation contained in the instrument of ratification deposited on 10 May 1990 – as amended by the partial withdrawals of reservation dated 20 December 1996, 30 April 1998, 1 April 1999 and 16 May 2001.

336 PeVL 2/1990 vp, p. 2 and 3.

rights was proposed by a fundamental rights committee with mandate for the years 1989 to 1992.³³⁷ That list of rights contained elements of international human rights conventions.³³⁸ In order to harmonise the Constitution with existing international instruments for the protection of human rights, particularly the European Convention on Human Rights, and to make it better correspond to the needs of modern society, the fundamental rights provisions of the Constitution were revised in 1995 before an overall reform of the Constitution in 1999. In the reform of the provisions on fundamental rights, the protection of fundamental rights was extended to cover all persons residing within the jurisdiction of Finland, and not only the Finnish citizens, and provisions on economic, social and cultural rights were added. Thus, its contents became closer to those of the German Basic Law. A further aim with the reform was to increase the legal significance of fundamental rights in general. The Government recognised the fact that courts of law had only to minor extent applied fundamental rights provisions in their decisions.³³⁹

Thus, the transition of the legal culture in favour of stronger protection of fundamental rights and human rights began already partly as a result of other human rights conventions, which paved the way for accession to the European Convention on Human Rights. However, the first element of a stronger change in the legal culture of protecting fundamental rights took place particularly as a result of the European Convention on Human Rights, which was the harmonisation of the provisions of the Constitution with those conventions. Further, one of the aims with the reform was to increase the direct applicability of fundamental rights provisions by courts and other authorities.³⁴⁰ The classical civil rights were maintained in the list of rights, but in a more extensive and detailed form³⁴¹. The greatest difference between the earlier fundamental rights provisions and the new ones is the insertion of fair trial provisions written from the perspective of the individual.³⁴² The new fair trial provisions of the Constitution are also significant in that those of the European Convention on Human Rights are largely based on common law traditions, in the same way as those of the International Covenant on Civil and Political Rights, and the Finnish legislation on

337 Jyränki 2000, p. 277.

338 Jyränki 2000, p. 277.

339 HE 309/1993 vp, p. 5 and 6. Act Nos. 969-972/1995.

340 See Viljanen (V-P) 1996, p. 797.

341 Saraviita 1997, p. 23. For example, the freedom of expression was made more precise by defining its scope, and by adding a restriction clause (Ibid. p. 24).

342 HE 309/1993 vp, p. 21. See also Viljanen (V-P) 1996, p. 789. Viljanen notes that the fair trial provisions, in particular, have been adopted rather directly from the provisions of human rights conventions. Another example of such provisions is the provision on the right to respect for private life. Other provisions are rather domestic in nature, such as access to public documents. (Ibid. p. 791)

civil and criminal procedure differed in many respects from such traditions³⁴³. Scheinin has studied the application of fundamental rights and human rights provisions by the Finnish judiciary prior to accession to the European Convention on Human Rights and has observed that it has not been a consistent practice to directly refer to the fundamental rights provisions of the Constitution³⁴⁴. Also, the same observation concerns the provisions of international human rights conventions, and they were only gradually becoming an established binding source of law in the case law of the Finnish supreme jurisdictions³⁴⁵. Clear intentions of facilitating the direct applicability of the fundamental rights provisions, through the reform of the Constitution, also brought a clear change in the legal culture of applying international human rights conventions. The European Convention on Human Rights can be said to constitute a dramatic change in the legal culture of protecting fundamental rights and human rights. Therefore, it is possible that also the general attitude towards the protection of fundamental rights has changed although a stronger human rights thinking in the judiciary is a rather young product in Finland. This together with the fact that the earlier provisions of the Constitution were not designed for being directly applied by courts most likely explain the early rather mechanic references and the way in which the references to the European Convention on Human Rights and the case law of the European Court of Human Rights have developed in the past twenty years, as explained in more detail in sections 4.3 and 4.5 below.

The new Constitution of Finland was adopted in 1999, which entered into force on 1 March 2000³⁴⁶. The earlier reformed provisions on fundamental rights were included in the new Constitution as such, but there were some changes made to update the text to the needs of present-day society, such as in the provisions on the right to private life³⁴⁷. The Constitution of 1999 now contains rather detailed and modern provisions on fundamental rights, in a specific Chapter. However, as Jyränki points out, the overall reform of the Constitution has entailed a changed framework also for the protection of fundamental rights. Although the material contents of the

343 See Saraviita 1997, p. 25. The differences between the Finnish legislation and the European Convention on Human Rights made it necessary for Finland to enter reservations to Article 6 of the Convention, which have later been withdrawn.

344 Scheinin 1991, p. 274.

345 Scheinin 1991, p. 276 and 277. Despite slow development, there were already examples of such cases from the Supreme Court and the Supreme Administrative Court by 1991.

346 Act No 731/1999.

347 Saraviita observes that as of the reform of the Constitution in 1995, a series of amendments to legislation have been enacted, as a result of technical developments (particularly new forms of media) and new means of criminal investigations, entailing restrictions on the right to private life and also changes in legal terminology (Saraviita 2011, p. 179). Also, as regards the provisions on the freedom of expression, the publicity of official documents was made a fundamental right upon the reform. (Saraviita 2011, p. 207).

fundamental rights provisions remained largely unchanged, some changes have taken place in the mechanisms of implementing them.³⁴⁸ Saraviita notes that whereas the modern fundamental rights system introduced by the reform of 1995 was made part of a constitutional act that remained in other respects outdated, the Constitution of 2000 provided a more efficient framework for its implementation³⁴⁹. In the view of Saraviita, the new Constitution did not mean a sudden or dramatic change in the constitutional law traditions, but is rather a continuation of the old traditions³⁵⁰. Despite that, the adoption of the new Constitution supported the transition of the legal culture that started with the accession to the European Convention on Human Rights and the reform of the constitutional provisions on fundamental rights. Thus, the transition of the legal culture of protecting fundamental rights and human rights did not end but was further strengthened. Furthermore, the new Constitution entailed changes in other legislation, most importantly that on immigration. The new provisions extended the protection of fundamental rights to also concern immigrants residing in Finland, without a nationality requirement³⁵¹. That means indirect influence of the European Convention on Human Rights. In section 4.3 below, the impact of the case law of the European Court of Human Rights on national legislation is assessed in more detail.

The transition of legal culture is not complete, however, by merely changing the applicable legislation but the provisions of the international conventions and the Constitution also need to be applied. In Finland, the application of international human rights conventions and the constitutional fundamental rights provisions by domestic courts has increased along with years. They have also increasingly been paid attention to in the interpretation of other legislation. According to the view of the Constitutional

348 Jyränki 2000, p. 277. The relevant provisions of the Constitution include, in particular, sections 1(3), 2(2), 5, 73(1), 80, 94(3), 106, 118, 123 and 124.

349 Saraviita 2011, p. 117. An example of such new provisions was the prohibition in section 80 to delegate public duties to a level lower than acts of Parliament, where those duties entail restrictions on fundamental rights.

350 Saraviita 2011, p. 1. This means that in the interpretation of the constitutional law provisions, even the old provisions and materials relating to them have relevance even today. For example, the scope of the provisions on the freedom of expression in the new Constitution did not entail dramatic changes with regard to the earlier ones apart from the aforementioned publicity of official documents (note 347), although in this respect the technological development must be borne in mind. Also, as regards the provisions of Article 5 of the Convention, one may note that the right as such has existed from early times. Saraviita observes, however, that particularly the judgments of the European Court of Human Rights have meant more precise provisions of the Constitution and other national law and have lead to more detailed judgments of national jurisdictions. International human rights conventions and particularly the European Convention on Human Rights played a role in that administrative deprivations of liberty were made subject to judicial control. Thus, the scope of national law as regards judicial control has been extended due to the accession to international human rights conventions. (Saraviita 2011, p. 156 and 199)

351 HE 28/2003.

Law Committee in 1982, the Finnish courts are under an obligation to interpret the provisions of ordinary law and decrees in a manner that contributes to the protection of fundamental rights, and this obligation is based on that the fundamental rights provisions are at a higher hierarchical level than the provisions of ordinary law. The Constitutional Law Committee has later confirmed and refined this view in the context of providing its report on the fundamental rights reform.³⁵² Irrespective of whether the obligation to take fundamental rights provisions into account is based on their hierarchical status or not, it must be borne in mind that the provisions of the European Convention on Human Rights are in force at the level of ordinary law in Finland. The Constitutional Law Committee has underlined that where there are several justified interpretations of law, the courts must choose the one that best contributes to achieving the purpose of fundamental rights and eliminates conflicts with the Constitution. Despite this, the Constitutional Law Committee has also pointed out that there is reason to interpret the fundamental rights provisions of the Constitution in conformity with the international human rights conventions.³⁵³

In the 1970s and the 1980s, it was still rather rare for Finnish courts to apply the provisions of international human rights conventions or even national provisions of law on fundamental rights³⁵⁴, but as of the beginning of the 1990s, human rights provisions have gradually gained an established status at least in the administration of law by the last-instance courts and they have been applied both directly and indirectly. One factor contributing to this development is, without doubt, the entry into force of the European Convention on Human Rights for Finland as well as the exceptional

352 Perusoikeustyöryhmän muistio 1982, p. 21, and PeVM 25/1994 vp., p. 4. In the view of Scheinin, however, the obligation on a human rights friendly interpretation of law is not based on the higher hierarchical status of fundamental rights provisions, but rather on the fact that those provisions lay down rights for citizens and entail a strong value element, and as fundamental values they must be given the emphasis they deserve (Scheinin 1989, p. 65 and 195).

353 PeVM 25/1994 vp., p. 4 and 5. In principle, there might appear a conflict between a fundamental rights provision of the Constitution and a provision of the European Convention on Human Rights, in which case the constitutional provision would in strict hierarchical terms prevail. However, along with the fundamental rights reform of the Constitution in 1995, the aim has been to harmonise the interpretation between the two. (See Viljanen (V-P) 1996, p. 797) Viljanen identifies also limits to the harmonisation, including the fact that the Convention only provides for a minimum level of protection and the task of the national system is to define, where appropriate, a higher level of protection of individual rights. (Ibid. p. 797 and 798) Article 60 of the Convention explicitly provides that “Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.” Furthermore, the possibility of applying the case law of the European Court of Human Rights is restricted by the application of the doctrine of the margin of appreciation, which constitutes an impediment to the use of that case law as a source of interpretation of the fundamental rights provisions of the Constitution. (Ibid. p. 799)

354 For details, see Scheinin 1991, p. 273-279.

control mechanism under the Convention. By 2005, Finnish case law contained already a good number of references to the provisions of the European Convention on Human Rights and to the case law of the European Court of Human Rights, in particular. The Convention and the case law have mostly been taken into account as part of the so-called human rights friendly interpretation of law.³⁵⁵ As is pointed out by Pellonpää & al., “human rights friendly” interpretation of law requires, however, that there is sufficient knowledge of the provisions of the Convention³⁵⁶. The reform of the fundamental rights provisions of the Constitution further strengthened the direct application of fundamental and human rights by national courts.³⁵⁷ Thus, practice has confirmed the good intentions with the introduction of strengthened protection of fundamental rights and human rights.

Although there were also some reserved attitudes towards the European Convention at the end of the 1980s, Finland is today among those States parties to the Convention that take its provisions seriously and judgments of the Court are complied with at the national level. Even judgments finding a violation of the Convention are seen rather as an element improving the protection of human rights.³⁵⁸ Thus, although the courts generally welcomed a more flexible approach to the application and interpretation of fundamental rights provisions before accession to the European Convention, it seems that the latter had an even more dramatic impact. It appears that a rather profound change has been taking in place in the Finnish judiciary. This involves not only an increased application of international elements, including the case law of the European Court of Justice and the European Court of Human Rights, but also an increased role given to case law as a source of law in general.³⁵⁹

Insofar as the case law of the European Court of Human Rights is concerned, in particular, the fact that the European Convention on Human Rights played an important role in the formulation of the constitutional provisions on fundamental rights has further underlined the role of the Court’s case law.³⁶⁰ The impact of the European

355 Ojanen 2005, p. 1215 and 1216, and Jääskinen 2001, p. 605 and 606. This appears to reflect the situation in State administration in general. Prior to 1989, it was rare for State officials to pay attention to human rights issues in daily administration, whereas since Finland’s accession to the Council of Europe, the situation started to change gradually, and today human rights are increasingly taken into account and voluntary training is arranged particularly for judges and prosecutors. (See Heyns & Viljoen 2002, p. 273 and 274)

356 Pellonpää & al. 2012, p. 65.

357 Viljanen (V-P) 1996, p. 797.

358 See e.g. Ervo 2006, p. 411 and 416. According to Ervo, some lawyers saw the Convention even as a threat towards national democracy Ervo herself sees it rather as a possibility. (Ibid. p. 411 and 412)

359 Ojanen 2005, p. 1214.

360 On the relevance of the Convention, see HE 309/1993 vp, p. 8. On the assessment of the meaning of the Court’s case law, see Ojanen 2005, p. 1215. On the one hand, the Convention has brought about some positive developments, particularly in the field of procedural law (see e.g. Ervo 2006, p.

Convention on Human Rights and the Court's case law on the legal system as a whole should not, however, be over-emphasised. Finland acceded to the Convention relatively late and as is observed by Pellonpää³⁶¹, the foundation for the protection of human rights was rather solid, when compared with certain new democracies at that moment. Finland was already a party to the International Covenant on Human Rights and, in principle, the legal system and the judiciary should have been rather receptive to the application of the case law of the European Court of Human Rights. The extent to which the national supreme jurisdictions have effectively applied the Convention provisions is assessed in more detail in section 4.5 below. As is further observed by Pellonpää, however, the accession was not without problems, but there were some challenges relating to the principles of a fair trial, such as deficiencies in the guarantees of an oral hearing³⁶² which was also one of the reasons for Finland's reservation to the Convention. The provisions of Article 6 of the Convention and the corresponding provisions of the International Covenant on Civil and Political Rights were also the reason for supplementing the provisions of the Constitution, thereby affording the fair trial rights the status of constitutional law instead of merely providing for them at the level of ordinary law as earlier³⁶³. Despite the problems, upon acceding to the Convention, there was already a large amount of information on the impact that the Convention has had on other legal systems and on the problems faced by other legal systems in compliance with the Convention provisions, including through an abundant body of case law of the European Court of Human Rights. Thus, in principle, this has helped the Finnish legal system to adapt to the Convention requirements.

In conclusion, the general impact of the European Convention on Human Rights on the Finnish legal system has been significant. The first phase of transition of the legal culture of protecting fundamental rights in Finland began already upon the ratification of the two International Covenants, but the most radical change took place upon accession to the Convention and through the related revision of the fundamental rights provisions of the Constitution. The transition brought about by the accession to international human rights conventions and particularly the European Convention on Human Rights has taken place without major problems. However, due to the fact that

420). Ervo, on the other hand, expresses concern over that the increased emphasis in the national judiciary on the application of the Convention and the Court's case law as sources of law has led to a situation where the case law concerning the interpretation of the Constitution's fundamental rights provisions has developed to a lesser extent (Ervo 2006, 417) and draws attention to the need to develop their interpretation particularly in respect of those rights that are not covered by the Convention (Ibid. p. 418).

361 Pellonpää 2009(2), p. 221.

362 Pellonpää 2009(2), p. 223. Pellonpää compares Finland with Sweden where the most fundamental problem was a lack of sufficient legal remedies in administrative law. For more details on fair trial requirements, see Ibid. p. 224-233.

363 Saraviita 2011, p. 281.

the practice of the Finnish supreme jurisdictions of referring directly to human rights or fundamental rights provisions has only become an established practice upon receiving the European Convention on Human Rights and the case law of the European Court of Human Rights as sources of law, it is interesting to analyse the Court's case law. The provisions of the Convention as such, when compared with the International Covenant on Civil and Political Rights, are not dramatically different. However, it is presumed that the fact that its provisions are enforceable through international judicial proceedings is the decisive element which has imposed a change at the national level.

The language of the European Convention has also been adopted in technical terms by the harmonisation of the constitutional provisions on fundamental rights, and the Convention has been made effectively applicable. However, although the Convention and the case law of the European Court of Human Rights have been increasingly applied by national courts as sources of law, it is another issue of interest in which manner the case law has been applied in practice, which has been subject to study to a lesser degree. The transition of a legal culture is not simple and does not take place overnight. Even considerable time may be needed for a more profound change, which may be detected in the way in which the national jurisdictions treat the European Convention on Human Rights and the case law of the European Court of Human Rights. The discourse of national jurisdictions may show similarities or differences with that of the European Court, which may constitute signs of the degree of understanding and conceptualisation of the Convention. The methods of interpretation of law constitute the basis for the courts' approach to the case law. In section 4.1, efforts are made to assess whether there are any major differences between the Finnish legal system and the selected other legal systems as regards technical criteria for the applicability of the European Convention on Human Rights, i.e. the applicable sources of law and the methods and rules of interpretation of law, and as regards the de facto impact of the Convention on those legal systems, that could provide explanations for the large number of applications made against Finland before the European Court of Human Rights. In particular, there is a striking difference with the German legal system. However, one must bear in mind that it is difficult to draw any definitive conclusions on the basis of applications or numbers of violations found, as particularly in respect of Finland, the violations have to some extent been repetitive in nature, which is a sign of systemic or legislative problems rather than of problem of interpretation of law. There may also be other factors behind large numbers of applications such as increased knowledge of the Convention among lawyers and the lack of a national mechanism for redressing violations of fundamental rights and human rights, separate from the regular court procedures. To draw conclusions about the preparedness of national supreme jurisdictions apply the Convention and the case law under it necessarily requires research into judgments of those jurisdictions. However, the foregoing analyses of the impact of the Convention, as well as of constitutional developments, may provide explanations for

how the Finnish supreme jurisdictions have approached the new sources of law and for any changes that have taken place. Thus, constitutional developments constitute a contextual framework for the transition in the discourse of the supreme jurisdictions.

3. Second phase of transition of the legal culture – development of the meaning of the Convention under the case law of the European Court of Human Rights

The first phase of transition of the legal culture, i.e. a strengthened protection of human rights at the European level, took place as the States parties to the European Convention on Human Rights reached a common understanding of what they understood to be acceptable from the point of view of all negotiating States³⁶⁴ and needed for ensuring adequate level of protection through its implementation in the national legal systems. That level of protection and the wording of the Convention are binding on the States parties to the Convention, and signifies a transition of legal culture particularly in those States parties where the level of protecting human rights has been lower or where the practice of applying human rights or fundamental rights provisions by the national judiciary has been modest or even inexistent. However, at the same time, the States parties transferred the competence for the interpretation of the provisions of the Convention to the European Court of Human Rights. In the view of Madsen, the development of the Court's case law was largely affected by the geopolitical settings in Europe until mid-1970s³⁶⁵, and the first decade of action was indeed dominated rather by inter-state complaints as the Court's jurisdiction was only accepted by the required eight States in 1958. The development of more refined case law began upon the increasing acceptance of the optional jurisdiction of the Court to examine individual complaints and has undergone a significant transformation since late 1970s³⁶⁶. It is through the individual complaints that the Court has given independent meanings to the concepts used in the Convention and has widened the scope of the rights protected. The European Court of Human Rights has repeatedly underlined the nature

364 As observed by Bates, there was a wide agreement on the adoption of the Convention, but originally, the majority of states participating in the negotiations objected to the idea of a Court. Finally, the optional nature of the Court made it possible to reach agreement on its creation. (Bates 2011, p. 28)

365 During the 1950s the Commission only admitted five applications and a little more than 50 in the 1960s, of which only a limited number ended up in actual decisions (see Madsen 2011, p. 51).

366 Madsen 2011, p. 46, 51 and 52). Whereas Sweden and Germany accepted that jurisdiction rather early (1952 and 1955), France and the United Kingdom did so considerably later (1981 and 1966, respectively).

of the Convention as being a living instrument³⁶⁷. This means that the substance of the provisions of the Convention is not static, but their interpretation develops along with a modern understanding of their contents, bearing in mind the development of society and ideas of law and morals.

Thus, the transition of the legal culture of protecting human rights has continued, and the presumption for the purpose of this chapter is that a second phase of transition of the legal culture has taken place as the language of the Convention in a wide sense, i.e. under the case law of the European Court of Human Rights, has developed within the framework of a unique control mechanism, partly independently but partly also under the influence of a variety of legal cultures. The legal cultures and particularly constitutional traditions of the States parties played a role in the drafting of the text of the Convention, but their influence did not stop there. The different legal traditions still have a continued impact on the interpretation of the Convention. In this context, the impact of individual complaints and indirectly the languages and legal cultures of States parties on its interpretation is analysed, while assuming that the transition of the language of the Convention takes place rather independently and has changed considerably from what the negotiating States perhaps had originally in mind. One of the clearest examples of Convention articles in the interpretation of which the existence of common legal traditions (or common legal ground or European consensus) play a significant role is Article 8, which can be rather easily detected where the Court carries out comparison between the legal systems³⁶⁸. Typically, where the Court considers that no European consensus exists, it affords the national authorities a wide margin of appreciation in the application of the Convention. The situation does not, however, need to be static but the legal situation in the States parties to the Convention may change along with the development of society and through case law. Vice versa, the changing legal traditions in States parties have a further impact on the way in which the Court interprets the Convention. Although the Court works rather independently, some degree of interaction between it and the national jurisdictions does exist. However, in this context it is also important to underline that the personal capacities and professional backgrounds of the individual judges participating in judicial decision-making play a significant role in the development of the case law³⁶⁹. A further development is

367 See e.g. the judgments in the cases of *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A, no. 26, § 31, and *Matthews v. United Kingdom*, Grand Chamber judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, § 39.

368 See e.g. *Rees v. the United Kingdom*, judgment of 17 October 1986, series A 106, § 37; *Christine Goodwin v. the United Kingdom*, Grand Chamber judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, §§ 84 and 85; and *Hämäläinen v. Finland* (appl. No. 37359/09), Grand Chamber judgment of 16 July 2014, §§ 72 and seq., which clearly indicate the emerging change in the legal situation and morals, while leaving still a considerable margin of appreciation for the national authorities in providing for adequate protection of rights under national legislation.

369 Madsen, for example, has studied this in more detail (see Madsen 2011, p. 55).

taking place as the European Union is currently negotiating on accession to the European Convention on Human Rights, and the exact relationship between the European Court of Human Rights and the European Court of Justice is decided in the course of those negotiations. The possible impact of the case law of the European Court of Justice is not covered by this study, but some comparative remarks are made between the methods of interpretation of the two courts in the conclusions as regards possible future developments. When looking into the case law of both European courts, some indications of resorting to the case law of the other court already exist in those situations where the Convention or the provisions of European Union legislation play a role in deciding the case.

In the application and interpretation of the Convention, the European Court of Human Rights applies a variety of sources of law and principles and rules of interpretation. As regards the sources of law applied by the Court, they have similarities with both those applied by the International Court of Justice and the European Court of Justice, and with those applied by national courts, although the Rules of Court of the European Court of Human Rights remain silent on the sources of law and principles of interpretation. Under the Statute of the International Court of Justice, that Court may apply international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of a general practice accepted as law; the general principles of law recognized by civilized nations; and judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law³⁷⁰. The rules concerning the applicable sources of law in national legal systems are often similar, but they are often divided into binding and permissible sources of law. In some legal systems, mainly written legislation and case law are used as binding sources of law. Nor are they always stated in writing, but may rather be based on established practice. The sources used by the European Court of Human Rights include a variety of sources including both international and national ones, although the main emphasis appears to be on the text of the Convention and on its own previous case law. As regards the principles and rules of interpretation, the practice of the European Court of Human Rights in interpreting the European Convention on Human Rights has been affected particularly by general principles of interpretation of treaties based on the Vienna Convention on the Law of Treaties³⁷¹, which serve as the starting point. However, the European Court of Human Rights has developed its own approach to the interpretation of treaty provisions in view of the purpose of the European Convention on Human Rights, including additional principles of interpretation. Thus, the sources of law and rules and principles of interpretation applied by the Court have become established through the case law.

370 Statute of the International Court of Justice, Article 38.

371 UNTS vol. 1155, p. 331.

In the following, a closer analysis is made of the principles and rules affecting the interpretation of the European Convention on Human Rights, as applied and developed by the European Court of Human Rights. It is worth underlining that both the general principles of interpretation of international treaties and those developed by the Court itself apply, the first mentioned being the starting point. The analysis is, however, started with an overall examination of the discourse and judicial style of the judgments of the European Court of Human Rights. That analysis is followed by a comparison of the Court's judicial style with those of the selected five States, in order to see to what extent the style of the Court's discourse is affected by national legal systems and to what extent it is unique. In view of the working languages of the Court, it is presumed that the impact of the judicial languages and styles of the English and French legal systems on the judicial style of the European Court of Human Rights is greater than that of other legal systems. Comparative remarks are, nevertheless, made of the German, Swedish and Finnish judicial styles too. In the subsequent sections, the interaction with the Court's general judicial discourse and the treatment of the various principles and rules of interpretation is analysed.

3.1 Discourse and style of judgments of the European Court of Human Rights

For the purposes of the present study, the judgments of the European Court of Human Rights are treated as an example of legal discourse. Maley has adopted a rather extensive definition of legal discourse, covering any sources of law, in which case the legal discourses are written texts, as well as pre-trial processes (spoken and written texts), trial processes (spoken texts) and recording and law-making (written texts)³⁷². Even fragments of judgments are treated as examples of discourse. As observed by Bengoetxea, discourse represents the context in which argumentation takes place, and justification occurs within a given discourse³⁷³. This may be an entire section of the judgment or a paragraph thereof. In the introduction, it is observed that the judicial discourse of the European Court of Human Rights – as an example of constitutional rights argumentation – entails some degree of general practical argumentation as well as subjective evaluative elements. In this section, the Court's discourse is assessed in general terms in the light of both judgments and fragments thereof as communicative events as well as in the light of wider implications instead of the communicative events only, paying attention to other eventual elements of interpretation apart from the strictly legal arguments. Further, the context of interpretation may consist of both

372 Maley 1994, p. 16.

373 Bengoetxea 1993, p. 144.

internal and external elements, such as other provisions of the Convention and other instruments of international law and even existing standards in the States parties to the Convention. The Court may refer e.g. to a European consensus by means of carrying out comparison between the legislations of States parties instead of merely interpreting the Convention articles, and may resort to flexible reasoning. When assessing wider implications, even the wider historical context of constitutional protection of fundamental rights and the international protection of human rights is on occasion used.

The judgments of the European Court of Human Rights are structured in general in a rather formalistic manner and usually include a description of the national procedure, the facts of the case, the applicable national law and Convention provisions, the parties' statements, the *dispositif* i.e. a summary of the Court's rulings on the alleged violations of the Convention, and any concurring or dissenting opinions of the individual judges³⁷⁴. The Court systematically provides an overview of its earlier case law expressing established meanings given to the provisions, followed by its application to the instant case. Thus, in its reasoning, the Court advances from general principles to conclusions in individual situations, thereby applying a method of deduction³⁷⁵. This method is easily identifiable in the judgments as the Court clearly separates the statement of general principles from their application to the case at hand. An overall analysis of the language used by the European Court of Human Rights reveals that despite that it could be criticised in some respect (for a lack of precision), the Court is rather transparent in its reasoning particularly as regards the application of case law. It is to be admitted, however, that the Court tends to use repeatedly rather abstract expressions when reasoning its judgment with reference to prior case law. On the one hand, it may leave questions as to how exactly it has reached its conclusions and this makes the discourse analysis approach a challenge, but on the other hand, the idea of critical discourse analysis makes it possible to apply a flexible approach to the assessment of the Court's argumentation. Thus, the idea is not to carry out a very detailed

374 According to Rule 74 of the Rules of Court, paragraph 1, a judgment as referred to in Articles 28, 42 and 44 of the Convention shall contain (a) the names of the President and the other judges constituting the Chamber or the Committee concerned, and the name of the Registrar or the Deputy Registrar; (b) the dates on which it was adopted and delivered;

(c) a description of the parties; (d) the names of the Agents, advocates or advisers of the parties; (e) an account of the procedure followed; (f) the facts of the case; (g) a summary of the submissions of the parties; (h) the reasons in point of law; (i) the operative provisions; (j) the decision, if any, in respect of costs; (k) the number of judges constituting the majority; (l) where appropriate, a statement as to which text is authentic. Further, according to paragraph 2, any judge who has taken part in the consideration of the case by a Chamber or by the Grand Chamber shall be entitled to annex to the judgment either a separate opinion, concurring with or dissenting from that judgment, or a bare statement of dissent.

375 See e.g. *Karhuvaara and Iltalehti v. Finland*, judgment of 16 November 2004, §§ 37 to 42 for a statement of general principles, and §§ 43 to 55 for their application to the individual case.

discourse analysis, but to assess the signs of cultural change in the Court's discourse as wider communicative events, which is why I have placed the method in the framework of critical discourse analysis which is interdisciplinary in nature. The signs of change looked for are nevertheless linguistic or textual elements.

In the view of Ruuskanen, the language used by the judiciary is for various reasons more objective than that used by other authorities, and elements traditionally attached to the judiciary include impartiality and objectivity. On occasion, however, courts may directly cite the language used by parties, in which case it may be characterised even by strong expressions of values and other subjective elements. Courts may also refrain from using the language of the parties, either in parts of the judgment or in the whole judgment, in which case the objective nature of the language is at its strongest.³⁷⁶ The European Court of Human Rights does refer to the arguments presented by the parties, but they are clearly separated from those of the Court. That practice makes the Court's reasoning to appear particularly objective. As regards the general style of the Court's judgments, one may note a change after the first few judgments. The first judgments follow the judicial style used by the French courts, whereas that strictly formalistic single-sentence form was abandoned in later ones³⁷⁷. In the view of Merrills, that change of the Court's style of judgment has had a significant bearing on its ability to develop the law³⁷⁸. Although the main duty of the court is to decide cases before it, it may support its decisions with judgments which, if they are fully reasoned, may develop the law³⁷⁹. As observed by Merrills, poor reasoning of judgments would also create an obstacle to the acceptance of its reasoning by those using its judgments, whereas a good style improves acceptance³⁸⁰. One may indeed observe that there is significant development of law taking place through the case law of the European Court of Human Rights. One may note that in general, the judicial argumentation of the European Court of Human Rights appears to be rather persuasive, given that the Court uses affirmative statements of fact and law, on the basis of which conclusions are made. The judicial style is also clear. The receptiveness of the national jurisdictions to the Court's discourse is affected not only by the capacity and preparedness of the

376 Ruuskanen 2006, p. 51-53.

377 See *Lawless v. Ireland*, judgment of 1 July 1961, Series A no. 3, compared with the *Case relating to certain aspects of the laws on the use of languages in education in Belgium* (Application n° 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) judgment of 23 July 1968, Series A No. 6.

378 Merrills 1993, p. 29. In the view of Merrills, there is a close relation between style and substance, and the single-sentence style, being cumbersome, makes it difficult to support a conclusion with different kinds of arguments. Thus, the new style has removed at least one of the obstacles to adequate reasoning. (Ibid.)

379 Merrills 1993, p. 35. The Court may even decide to go further and deliberately develop the law. (Ibid.)

380 Merrills 1993, p. 30.

national jurisdictions to apply and interpret the case law, but also by the quality of the Court's judgments.

The quality of judgments consists of different elements of discourse that together make them persuasive. Alexy defines legal discourse as a special case of general practical discourse, where legal discourse and general practical discourse are integrated³⁸¹. Legal discourse is usually persuasive by nature, where there is no uncertainty about the interpretation of the relevant provisions of law. However, where different outcomes would be possible, general practical discourse is needed to supplement legal discourse. This is often the case with the judgments of the European Court of Human Rights. It is interesting to see whether there are structural differences between legal discourse and general practical discourse. Nordman has compared the structure of Swedish legal language with that of ordinary language, and notes that there are in fact no huge differences between the two, although legal language perhaps uses more nouns and more relative and conditional clauses and inserted clauses than the ordinary one³⁸². Her findings would speak in favour of the concept of "special case" of Alexy. Bengoetxea also supports the idea of special case, but refines the thesis by suggesting that general discourse is only resorted to where specific legal arguments are not sufficient³⁸³. This is typical of legalistic traditions that underline legislation as the most relevant source of law. One may note that the facts of the case in the judgments of the European Court of Human Rights are clearly separated from the statement of law. In general, it is possible to find support for the view of Nordman also in these judgments as there are no major differences in the linguistic structures of the two sections of judgments, although language in the statements of facts is more flexible. In those parts of the judgments where the Court states the applicable Convention provisions and applies them to the case at hand, the reasoning appears to be somewhat more mechanic, which would represent the special case of ordinary language.

Bengoetxea further raises the question of whether the special case thesis could be applied to moral argumentation too, noting that this question is related to the larger question of the relationship between ethics and law. He appears to be of the view that moral discourse is a paradigm of general practical argumentation, and therefore

381 Alexy 1989, p. 212. Alexy justifies this definition with three grounds: 1) legal discussions are concerned with practical questions (what should or may be done or not done); 2) these questions are discussed under the claim to correctness; and 3) legal discussions take place under constraints, although he recognises that the special case thesis is open to attack on all three points.

382 Nordman 1984, p. 958, 963 and 964.

383 Bengoetxea 1993, p. 142. Bengoetxea refers to the case law of the European Court of Justice and notes that the Court appears to resort to legal justification in clear cases, but where legal arguments drawn from the clear text of the law are not sufficient to justify the judgment, other forms of argumentation are used to supplement them and the latter become legal by the mere fact of them being used in a judicial context. (Ibid. p. 143)

legal argumentation would also be a special case of moral argumentation.³⁸⁴ The main difference, in his view, between legal justification and moral justification is that legal justification is more context-bound, i.e. consist of reasons that fit in the legal system.³⁸⁵ Alexy considers that legal discourses are concerned with the justification of a special case of normative statements which express legal judgments, and draws a distinction between two aspects of justification: internal justification and external justification. With internal justification, he means the question of whether an opinion follows logically from the premises adduced as justifying it, while external justification refers to the correctness of those premises.³⁸⁶ Alexy further divides external justification into six groups of rules and forms: 1) interpretation, 2) dogmatic argumentation, 3) use of precedents, 4) general practical reasoning, 5) empirical reasoning, and 6) the so-called special legal argument forms.³⁸⁷ The use of elements of internal justification and external justification, methods of interpretation and use of precedents in legal argumentation, as well as general practical (or moral) reasoning are looked into in respect of both the judgments of the European Court of Human Rights in section 3.4 and the judgments of the Finnish supreme jurisdiction in section 4.5 below. In the view of Merrills, the persuasiveness of a judgment is enhanced if a court can support its conclusion with cumulative reasons instead of resting the decision on a single point, and this technique is especially useful in cases where there are factual as well as legal issues and it is possible to deal with both in the judgment³⁸⁸.

In general, it may be observed that the judgments of the European Court of Human Rights appear to contain both legal justification and moral justification, and one could say that moral argumentation particularly fits the context of human rights. For example, where the Court examines whether interference with the enjoyment of rights has been justified, legal argumentation can be traced in the judgments with the key words “based on law”, followed by moral justification expressed by the words “necessary in a democratic society”. Whereas “based on law” expresses the condition that the interference must be allowed by the provisions of law (including the Convention), the expression “necessary in a democratic society” is more value-bound³⁸⁹ and leaves more margin of

384 Bengoetxea 1993, p. 144, 145 and 147.

385 Bengoetxea 1993, p. 159.

386 Alexy 1989, p. 221.

387 A more simple division would be into: 1) statute, 2) dogmatics, 3) precedent, 4) reason, 5) facts, and 6) special legal argument forms. The latter include e.g. analogy, *argumentum e contrario*, *argumentum a fortiori*, and *argumentum ad absurdum*. See Alexy 1989, p. 231, 232 and 279.

388 Merrills 1993, p. 31.

389 Both legislation and international conventions may also contain other value-bound expressions such as ‘willful’, ‘reasonable’, ‘negligent’, ‘unconscionable’. Maley points out that in the drafting of legislation, deliberate flexibility is achieved by the use of such subjective terms, which provide judges with discretion to decide whether the relevant behavior was, in their judgment, ‘reasonable’, and so on, in the circumstances of the case. See Maley 1994, p. 27.

discretion for the Court to assess whether the interference was justified. In the light of the aforementioned argument of a special case, the judgments of the European Court of Human Rights are considered to constitute judicial or legal discourse instead of general one, which includes supplementing general practical reasoning. The aforementioned expressions denoting legal argumentation and moral justification appear practically in all judgments. Insofar as Alexy's division into internal and external justification of legal arguments is concerned, a few observations may be made on the basis of the judgments of the European Court of Human Rights. In particular, an essential question is whether the case references, i.e. the precedents, should be rather considered internal justifications (normative statements) or external justifications for the provisions of the Convention which are clearly internal justifications for the judgment, and what would be the implications that follow for national legal systems. Alexy treats precedents as an example of external justification, which should make them rather easy for national judiciaries to receive. However, as appears from the foregoing, the Court has repeatedly developed the meaning of the Convention provisions through its case law. Thus, there are clearly elements that only appear from the case law, which bring them closer to normative statements or internal justifications, although the case law is partly used to support the correctness of the interpretation of the Convention provisions. That conclusion also fits into the division made by discourse analysts into internal (verbal) context and a wider external context³⁹⁰. The wider context and external justifications require more subjective evaluation than internal rather objective justifications. Considering that the Court's judgments follow often even more clearly from prior case law than from the Convention provisions, in the case of the European Court of Human Rights, it would perhaps be more correct to state that the case references are part of legal discourse which are integrated with the arguments concerning Convention provisions through general practical discourse and principles of interpretation. Accordingly, the more national legal systems treat precedents purely as external justifications, the more difficult it may be for them to adapt to the argumentation of the European Court of Human Rights. This is also analysed in respect of the Finnish supreme jurisdictions.

As regards the manner in which the European Court of Human Rights applies precedents, the judicial style appears to be different from the traditional mechanic references in the Finnish case law, which is explained in detail in section 4.5 below. However, some variation in the style may be detected when assessing the Court's judgments as a whole. The case law of the European Court of Human Rights provides numerous examples of situations where the Court has integrated Convention provisions with statements of case law by means of discourse. On occasion, the Court even gives priority to case law, for example as follows:

390 See, in particular, Van Dijk 2009 and 2010 (see notes 54 and 55).

*“According to the Court’s well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual’s self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness, without which there is no “democratic society”. This freedom is subject to the exceptions set out in Article 10 § 2, which must, however, be strictly construed. The need for any restrictions must be established convincingly (see, for example, *Lingens v. Austria*, judgment of 8 July 1986, Series A no. 103, p. 26, § 41, and *Nilsen and Johnsen v. Norway [GC]*, no 23118/93, § 43, ECHR 1999-VIII).”³⁹¹*

In that paragraph, the Court thus provides the main rule in the light of its established case law (“According to the Court’s well-established case law ...”) and makes it more precise with reference to the relevant Convention provision (“This freedom is subject to the exceptions set out in Article 10 § 2 ...”), which is a clear example of using case law as an internal justification instead of an external one. Thus, the Court uses linguistic means to link those two elements of legal discourse. The Court’s case law also provides examples of situations where the Court fulfils the so-called rationality gap by means of external justifications, for example by criminal law principles and the principle of proportionality as follows:

*[...]In view of the margin of appreciation left to Contracting States a criminal measure as a response to defamation cannot, as such, be considered disproportionate to the aim pursued (see *Lindon, Otchakovsky-Laurens and July v. France [GC]*, nos. 21279/02 and 36448/02, § 59, ECHR 2007-..., *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II and *Rumyana Ivanova v. Bulgaria*, no. 36207/03, § 68, 14 February 2008).[...]”³⁹²*

The Court thus also uses the margin of appreciation as a supporting justification for the possibility to set limits on the freedom of expression where the interference is carried out to provide a sanction in response to such expressions as fulfill the elements of defamation. The Court appears to link even external justifications with statements in its own case law, which is a means of increasing the legitimacy of the Court’s reasoning, although it could be even more legitimate if the Court provided

391 *Karhuvaara and Iltalehti v. Finland*, judgment of 16 November 2004, § 37. See also *Selistö v. Finland*, judgment of 16 November 2004, § 46. The Court goes further in defining the limits of the freedom of expressions in the subsequent paragraphs of those judgments.

392 *Ruokanen and Others v. Finland*, judgment of 6 April 2010 (Appl. No. 45130/06), § 50. In that paragraph, the Court also refers to a Council of Europe resolution as a further external justification.

clearer criteria for what would be considered disproportionate. One may note that there are cases in which the Court elaborates more on the reasoning, and which later constitute precedents. In such judgments, also the nature of argumentation is more complex, containing not only legal arguments and references to legal sources but also moral arguments to a larger extent than in other judgments. In later judgments of a similar kind, the so-called repetitive cases, the Court most often merely refers to the earlier case law without going into a very detailed justification. This also applies to the treatment of prior case law in the judgments.

In section 3.4 below, a micro-comparative analysis is carried out by looking into each principle or rule of interpretation used by the European Court of Human Rights when reasoning its judgments, to look for such limited fragments of discourse that disclose signs of transition of the legal culture of protecting human rights and fundamental rights in Europe. Instead of merely describing them, those principles or rules are studied in the light of case law to find such relevant linguistic elements. The selection of case law for closer scrutiny is based on some prior knowledge about those principles or rules of interpretation that are known to be referred to particularly in such cases where the Court has expanded the scope of application or meaning of Convention terms. The principles and rules of interpretation are classified by Alexy as belonging to examples of external justification. That view can be shared – the Court does not always elaborate in detail in which manner those principles and rules have been applied but rather uses them as elements linking the legal discourse and general practical discourse. The most relevant principles and rules of interpretation have been subject to numerous studies and are rather easily identifiable in the Court's judgments. It is concluded that in general, the Court applies a rather flexible approach to the different principles and rules of interpretation, although of the traditional rules of interpretation established in the Vienna Convention on the Law of Treaties, it appears to put emphasis on the principle of object and purpose of the Convention. The technique by which the Court uses this principle has met some criticism as regards clarity. On the other hand, to meet the underlying idea of treating the Convention as a living instrument and the objective of collective enforcement of rights, it may be safer to apply a flexible wording. This may also help the national legal systems to adapt to the judicial style of the Court. However, flexibility should not be at the expense of the quality and clarity of style. As regards the fragments of discourse in the case law looked into, presenting signs of transition of the legal culture, they often appear to constitute elements of general practical discourse supplementing legal arguments. Such fragments include e.g. reasoning behind the expansion of the meaning of certain concepts (autonomous meaning).

The European Court of Human Rights also has also shown preparedness to deviate from its prior case law. One may note that this is a feature in common with the Finnish legal system in which precedents have traditionally not been binding. Although the Court has underlined the principles of legal certainty, foreseeability and equality before

the law, it has stated the importance of being able to adapt its case law to changing conditions in the States parties to the Convention. It is observed that the fragments of discourse indicating that need, as simple statements, are also a sign of a transition of the legal culture of protecting fundamental rights and human rights. When put in a historical context, two observations can be made. First, the stronger the transition is, the further it is from the original ideas of the meaning of the Convention provisions. Second, the stronger the binding force of judgments, the more efficient is the collective enforcement of rights. In particular, changes in society make it necessary to change the national legislation that may be applied together with the Convention provisions. The Court pays attention to such changes in its case law, but no new rights may be written by means of new case law. Thus, there are signs of the transition of the legal culture of States parties to the Convention in the case law, but the more concrete evidence confirming such a transition is to be found in the national legal systems. Nevertheless, there is some degree of identifiable transition in the Court's case law already in the sense that the Court extends the scope of the existing rights as set out in the Convention. However, as observed in the foregoing, the Court also pays attention to the existence of a European consensus in certain situations, and in its absence applies a more cautious approach to developing the scope of Convention provisions. This is assessed in more detail in section 3.4.6 below. Despite that the application of precedents by the Court should be considered as part of the legal discourse and as de facto internal justification, the rather flexible approach to the use of precedents as a source of law makes it closer to the doctrines applied in the German and Nordic legal systems, which are generally more flexible than the English one. Also the structure of judgments with the exception of the first few ones appears to be closer to those legal systems, whereas it has considerable differences with the French and English ones.

Although the analysis of judgments of the European Court of Human Rights as an example of discourse events proves that signs of transition of the legal culture are visible in the texts as a whole, the way in which such a transition has taken place may be easier to identify by analysing individual fragments of discourse by means of micro-comparison through discourse analysis. For example, by analysing how the Court applies the principle of systematic or contextual interpretation, i.e. how the Court treats the different types of context in which it interprets the Convention provisions, one may see whether the signs of a transition are linked to a particular type of context (see section 3.4.2). Those include, in particular, the other provisions of the article in question, the other articles of the Convention, the Convention and its Protocols as a whole, other international instruments, as well as case law of other judicial bodies. When analysing the judgments, the use of context as a means of interpretation appears rather clearly from the wording, one of the most typical expressions used being that "the provisions of the Convention and its Protocols must be assessed as a whole". When referring to other international instruments, the Court usually uses a rather flexible expression,

stating e.g. that “the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part”.

On occasion, one may note that the Court refers to the legislations of member States of the Council of Europe, when stating a change in the legal or moral conceptions in Europe, for example. However, the use of comparison is not always that apparent or systematic, and the Court may also be criticised for the reason that it is not always clear how it has reached a conclusion on the existence or non-existence of a consensus between States parties or of a common legal tradition, although it is also recognised that a more transparent or substantiated approach could meet resistance in the national legal systems applying the Court’s case law. An analysis of case law reveals that there is some reason for that criticism. Although the Court may provide even an extensive analysis of sources when resorting to comparison, the conclusion made on the basis of that analysis may leave questions open as to how it has been reached³⁹³. In the case studies on Article 5, paragraph 1, in section 3.4.10.3 below, it is also observed that it is not always that clear how the Court has compared the legal systems and legislations. However, although the wording used in the conclusion may be rather loosely formulated, the reasoning behind it may be detected from the analysis of the sources referred to. Furthermore, one must remember that it is also typical of the judgments of national courts to express the sources used when resorting to comparison, whereas the precise line of reasoning is not necessarily stated but the statement of sources is followed by a rather loosely formulated conclusion. Thus, it may be even a recommended practice for an international judicial body to use flexible wordings as its case law should be received by all the States parties representing a variety of legal systems and cultures, although it is also necessary for the national judiciary to be able to detect the legal principle set out in the judgment. Furthermore, one must remember that courts must be treated as independent institutions where the judges enjoy a considerable margin of discretion as regards particularly the external elements of justification, whereas it is important to state the internal elements of justification, i.e. the normative statements, in a clear and transparent manner. The more transparent the general practical discourse is, however, the more legitimacy the judgments are given and the easier it is for other courts to receive it. However, one must also remember that the aforementioned elements of obscurity may be counter-productive and decrease the reception of the Court’s argumentation.

Nevertheless, those parts of judgments where the Court resorts to comparison between legal systems, underlining the development of society instead of a European

393 See e.g. *Al-Adsani v. the United Kingdom*, Grand Chamber judgment of 21 November 2001, Reports of Judgments and Decisions 2001-XI, § 66. The Court states that “The Court, while noting the growing recognition of the overriding importance of the prohibition of torture, does not accordingly find it established that there is yet acceptance in international law of the proposition that States are not entitled to immunity in respect of civil claims for damages for alleged torture committed outside the forum State.”

standard, are a relatively clear sign of a transition of the legal culture of protecting fundamental rights and human rights. As explained in the foregoing, Article 8 judgments constitute an example of such situations where evolution of the legal situation and morals in the States parties is clearly taking place, and those judgments are referred to below. Before analysing the existence of such signs in respect of individual rules and principles of interpretation in detail, some comparative remarks are made of the judicial styles of the five selected States parties to the Convention to assess similarities and differences with the discourse and judicial style of the European Court of Human Rights. It is argued that closer the judicial style of the Finnish supreme jurisdictions and the manner of treating the European case law are to those of the European Court of Human Rights, the easier it should be to receive the Court's argumentation. This is analysed in more detail in section 4.5 below, in the light of individual judgments and fragments of discourse, but the purpose of section 3.2 is to provide background for that analysis.

3.2 *The European Court's discourse and its similarities with and differences from the judicial style of national courts – comparative aspects*

In the foregoing, an analysis is made of the structure and style of the judgments of the European Court of Human Rights. In general, the approach of the national courts to the application of case law as a source of law and particularly the way in which they are applied play an important role in the preparedness to apply the case law of the European Court of Human Rights. The rules and principles of interpretation are one important element from which it may be detected. It is concluded in the foregoing that the references made by prior case law by the European Court of Human Rights should rather be considered as part of legal discourse and as elements of internal justification than as elements of external justification. It is further observed that the main rules and principles of interpretation are easily detected from the Court's discourse, but that it is not always clear how it has reached its conclusions through their application. The treatment of the various principles of interpretation in comparison with the way in which the European Court of Human Rights applies them, is one way of analysing the differences in the discourse and judicial style. This is one essential element that is analysed in section 4.5 below concerning the transition of the legal culture in Finland. There may also be other differences, such as general ideological and conceptual differences that affect the style of judgments.

The judicial style of the European Court of Human Rights, in the same way as the Convention system as a whole, derives elements from the languages and legal traditions of the States parties to the Convention. It is presumed that this is the case particularly in

respect of the English and French language, but it is worth assessing the judicial styles of English and French courts to see to what extent there has been influence, in comparison with the three other legal systems covered by the present study. The purpose of this analysis is at the same time to help assess, in section 4.5 below, whether the discourse of the Finnish supreme jurisdictions is affected only by that of the European Court of Human Rights, or to whether there are other foreign elements present and to what extent. The underlying assumption being that in the past twenty years, the changes in discourse are mainly a result of European influence, the aim is to exclude the possibility of the impact of other foreign elements. It is customary for the Finnish judiciary to consult, in particular, Nordic sources of law, but also other foreign sources of law with which the judges are particularly familiar. It is to be underlined, however, that is not only the legal systems, but also the backgrounds of the judges that may have played a role, given that there is one judge from each State party present in the European Court of Human Rights. It is also important to bear in mind that the European Court of Human Rights works independently as an international judicial body, and its separation from the national legal systems and the application of international human rights law, in contrast to national legislation, have contributed to its judicial style and discourse.

3.2.1 English judicial style

The ideological and conceptual differences between the common law systems (English legal system) and the statutory law systems have implications on the legal discourse of judges in the said systems. In the view of Maley, the discourse of continental law judges is more restrained and frequently rigid in style and format, whereas that of common law judges focus more on the construction and balancing of argument³⁹⁴. The English style of judgments has been more flexible from early times, placing emphasis on personalized discourse and individual form and content³⁹⁵. Still today, in respect of the highest court (Supreme Court³⁹⁶), the judgment consists of individual speeches in which each judge participating in the case provides his own opinion³⁹⁷. However, it is

394 Maley 1994, p. 42. In the view of Maley, common law judges have assumed an independence and individuality unmatched elsewhere, and developed guild-like skills of argumentation and reasoning and mastery of the specialized vocabulary. (Ibid. p. 42 and 43)

395 Wetter 1960, p. 32. Of the legal systems covered by the present study, Wetter has compared the English judicial style with the style of judgments in France, Germany and Sweden.

396 The United Kingdom Supreme Court replaced the judicial function of the House of Lords through the Constitutional Reform Act 2005.

397 See e.g. judgments [2011] UKSC 35, judgment of 13 July 2011, [2013] UKSC 9, judgment of 20 February 2013, [2013] UKSC 23, judgment of 1 May 2013, [2014] UKSC 20, judgment of 26 March 2014, and [2014] UKSC 28, 14 May 2014, which have been analysed for the purposes of the present study.

also possible that one judge proposes a judgment on appeal, agreed on by others³⁹⁸. The speeches are placed after one another without any joining elements or explanations. The language used in the speeches may be rather colourful, and particular attention is paid to reasoning. The judgments frequently refer to case law and legislation, but to varying degrees also to other materials, including case law of the European Court of Human Rights³⁹⁹. Today it is more common to refer to academic opinions than earlier. Dissenting opinions are included in the judgment as such. Sometimes the judges may share each others' views, but approach the question in a different way⁴⁰⁰. A typical English judgment starts with a description of facts, which is often fairly detailed, followed by a discussion of the legal issues⁴⁰¹. On occasion, references to the European case law are even detailed and combined in a rather complex manner with the provisions of national legislation and the national case law⁴⁰², whereas in others the references to the Convention or case law are brief⁴⁰³. According to Bankowski and MacCormick, the style of opinions in the higher English courts is discursive rather than deductive, which makes them considerably different from those in France. The reasoning involved is a mixture of the general and the formal, and particular and substantive. Thus, the style is rather formalistic but it tends to be argumentative rather than magisterial.⁴⁰⁴ When looking into the aforementioned selection of judgments, one may confirm that particularly with regard to the application of sources of law the style of argumentation is more formalistic. Those fragments of discourse are indeed supplemented by others representing rather general practical discourse. These peculiarities may make the understanding of the judgment rather challenging.

398 See e.g. [2013] UKSC 23, judgment of 1 May 2013, in which one justice only provided a concurring alternative judgment (agreeing on the outcome, however).

399 See e.g. [2011] UKSC 35, judgment of 13 July 2011, in which both EU law and the European Convention on Human Rights together with relevant case law, and national case law are referred to.

400 Maley observes that a number of judges may come to the same conclusion, but by different reasoning processes; or they may come to entirely different conclusions. (Maley 1994, p. 43)

401 See e.g. the speech of Lord Reed in [2013] UKSC 23, judgment of 1 May 2013, which is a good example of such an approach. Lord Carnwath, with his concurring speech, proposes a more straightforward approach, which means that there is also some degree of variation of judicial discourse both within and between judgments.

402 Ibid. See also [2014] UKSC 20, judgment of 26 March, and [2011] UKSC 35, judgment of 13 July 2011.

403 See [2013] UKSC 9, judgment of 20 February 2013, and [2014] UKSC 28, judgment of 14 May 2014.

404 Bankowski and MacCormick 1997, p. 318 and 319. See also Mattila 2010 (2), p. 113-117, who has summarised the views presented by various authors. Common law judges do not regard the application of law as a purely mechanical process. Reasoning is involved, a kind of reasoning by analogy. They not only declare the law, but also make explicit the reasoning processes which have led them to the decision, the cases they have considered, the analogies they have considered and rejected. (Maley 1994, p. 43)

The rather profound and balanced reasoning of common law judges is a feature in common with the judgments of the European Court of Human Rights and the strong traditions of case law with references to prior cases are elements that at least in principle should make it rather easy for English courts to receive the argumentation of the European Court of Human Rights. The English legal system clearly uses precedents as internal elements of legal discourse. However, the doctrine of precedents used by the English judiciary is stricter and more formalistic than that used by the European Court of Human Rights, and the style of treating the precedents of the European Court of Human Rights is different. That may also be affected by the fact that there is no uniform way of writing Supreme Court precedents. Thus, although there is inevitably some influence of the English legal language on the judicial discourse of the European Court of Human Rights, there is less impact of common law on the structure of its discourse and judgments. When compared with the judgments of the European Court of Human Rights, the structure of English judgments, particularly Supreme Court judgments, is strikingly different as the decision of the European Court of Human Rights is clearly set out as expressing the view of the whole Court, whereas the view of the Supreme Court needs to be derived from the opinions of individual judges. Although the European Court of Human Rights derives elements from its prior case law, it always states first the applicable provisions of the Convention, the meaning of which has then been made more precise through their interpretation in case law. Thus, the technique used by the European Court of Human Rights is different from that used by the UK Supreme Court⁴⁰⁵ although today, it has become more customary for the justices of the UK Supreme Court to also start with the applicable provisions of legislation. The peculiarities of common law judgments may in turn render it difficult to adopt the way of legal reasoning of the European Court of Human Rights, despite that in principle the English legal system might be more prepared for the application of case law as a source of law than the other legal systems covered by the present study. There are, however, examples of judgments already in which the references are rather skilful.

3.2.2 French judicial style

The language used by the French judiciary – especially the *Cour de Cassation* but to some extent also the lower courts – reflects the particular style of the French legal thought.

405 However, as suggested by Goodman, the English courts today pay more attention to the statement of reasons particularly as regards the clarity of language, partly due to the incorporation of the Convention into national law through the Human Rights Act of 1998 (see Goodman 2005, p. 10). There are various means for judges to clarify their opinions, e.g. by means of introducing titles, which have become common in lengthy judgments, or numbered principles (Ibid. p. 73 and 74).

This is visible in the content, structure and phraseology of decisions⁴⁰⁶. The judgments tend to follow a certain form⁴⁰⁷, with very brief and formal reasoning. When compared e.g. with German judgments, the French ones are strikingly shorter⁴⁰⁸. According to Wetter, the early French judgments (until 1960) have shared common elements with those in Germany and Sweden, particularly in so far as the format and compactness of expression are concerned⁴⁰⁹. One may note, however, that towards present times, the styles of writing judgments in the legal systems covered by the present study have departed from one another as it has become more common to provide detailed reasons for the judgments. Today, it is an established practice in the French judiciary to provide reasons for the judgment, although it has not always been the case⁴¹⁰ and the reasons may still be rather compact. The late introduction of compulsory reasoning may explain the fact that even today, French judgments are more compact than those in Germany, and when looking into the selection of judgments analysed for the purposes of this study, one may note that in the *Cour de Cassation*, judgments are still very dense and compact. The reasons provided by the court mainly refer to legislation, and it is hard to analyse the way in which the principles of law and interpretation have in practice been applied, and it is not customary to have references to the case law of the European Court of Human Rights⁴¹¹. Even in the most elaborated cases, the references to the European Convention on Human Rights are rather definitions of the conduct that constitutes a violation of the Convention provisions. The judgments of the French *Cour de Cassation* have some similarities with those of the European Court of Justice, but differ considerably from the judgments of the European Court of Human Rights, which are very extensive. The structure of judgments is also different, with the excep-

406 For the purposes of the present study, a selection of judgments of *Cour de Cassation (Première chambre civile)*, have been looked into, including *Arrêt n° 688 du 11 juin 2009*, *Arrêt n° 689 du 11 juin 2009*, *Arrêt n° 1308 du 10 décembre 2009*, *Arrêt n° 1309 du 10 décembre 2009*, *Arrêt n° 198 du 25 février 2010*, *Arrêt n° 343 du 31 mars 2010*, and *Arrêt n° 301 du 17 mars 2011*.

407 The form and content of both civil and administrative law judgments are regulated by law. Any judgment is composed of five elements: *mentions* (public or not, parties, a report has been read, composition of the court), *visas* (summary of briefs and documents presented by the parties), *motifs* (brief statement of facts and justifying arguments), *dispositif* (decision proper, the ruling on the issue), and *formule exécutoire* (order to execute the judgment). See Troper and Grzegorzcyk 1997, p. 106 and 107, and Mattila 2011, p. 99.

408 David & Jauffret-Spinosi 2002, p. 113-114. See also Mattila 2010 (1), p. 720, Grewe 1998, p. 214, Troper & al. 1991 [1998], p. 172 and p. 197-200, as well as Troper and Grzegorzcyk 1997, p. 107. According to Troper and Grzegorzcyk, the style can be described as being magisterial.

409 Wetter 1960, p. 28.

410 David & Jauffret-Spinosi 2002, p. 113. The compulsory practice of reasoning judgments was established in France in 1790 (Ibid.). The obligation to provide reasons for the judgment is today based on the provisions of the *Code de procédure civile* and *Code de procédure pénale* although they do not provide for detailed instructions.

411 See e.g. *Cour de cassation, Première chambre civile, Arrêt n° 198 du 25 février 2010*, which includes several references to the Convention, but those are very brief.

tion of the first few judgments of the European Court of Human Rights that appeared to follow the structure of French judgments. The considerably different technique of writing judgments have the potential of creating problems in the reception of the argumentation of the European Court of Human Rights, and might be one factor behind the high number of violations found in cases against France, although there are most likely other more profound systemic or cultural problems.

The German way of reasoning is closer to that of the European Court of Human Rights, although it is perhaps more dogmatic than the rather concrete and pragmatic way of reasoning of the European Court, whereas the French style of reasoning is far from concrete⁴¹². In Germany, the statements of reasons in judgments tend to be wide-ranging and loaded with citations. The judgments of French courts have, on the one hand, been criticised for not stating reasons clearly enough, and in the decisions of the *Cour de Cassation* there is no particular section devoted to the facts of the case or to the history of litigation. This also makes it difficult to assess in which manner the judiciary develops the law. Insofar as the *Cour de Cassation* is concerned, this brief and compact style is due to that the court does not review the decisions of lower courts as to facts (merits) but can merely quash the decision of a lower court due to incorrect application of statutes, and refer it back for a new hearing.⁴¹³ As reminded by Troper & al., however, the French courts have now power to review legislation and to invalidate unconstitutional acts⁴¹⁴, which might in future contribute to an increasing number of more elaborate judgments. There has already been a tendency to move towards more elaborate and substantiated decisions, especially by judicial courts, partly because of influence of European courts, but partly because of the influence of the *Conseil Constitutionnel*.⁴¹⁵ On the other hand, Mattila points out that the texts of the French judgments do not provide an entirely correct picture of what the judges do. In reality, they go through sources of law profoundly. This is visible e.g. in commentaries (notes) on judgments that are published in legal periodicals. The judgments and the commentaries constitute a functional entity. The deliberations would also be visible in the memorandum of the judge and the opinion of the advocate general, which in respect of the highest jurisdiction are published in the court's database. These instruments supplementing the judgment can be very detailed and refer to a wider range of materials than legislation alone.⁴¹⁶ Thus, although on the basis of the judgments alone one would draw a conclusion that there is very little influence

412 This is the view of Grewe, among others. See Grewe 1998, p. 214 and 215.

413 Zweigert & Kötz 1998, p. 120-130. Troper & al. 1991 (1998), p. 171 and 172.

414 Troper & al. 1991 (1998), p. 172.

415 See Troper and Grzegorzcyk 1997, p. 108.

416 Mattila 2011, p. 100, and Mattila 2010 (1), p. 720.

from the French judicial style and discourse⁴¹⁷ on the discourse of the European Court of Human Rights, there may be significantly more influence from the French legal language on the language of the Court – particularly as regards the French language versions of judgments. However, both the English and French language judgments of the European Court of Human Rights follow an identical structure, and it is strikingly different from that of the French *Cour de Cassation* judgments.

3.2.3 German judicial style

The German style of writing judgments is very coherent and the language used is rather abstract and anonymous, without containing individual elements. This is largely due to the fact that the minimal content of a judicial decision is based on statutory provisions⁴¹⁸, the list of elements being rather detailed. The inclusion of dissenting opinions in the judgments is usually not allowed.⁴¹⁹ As mentioned in the foregoing concerning French judgments, the style of early German judgments has shared some similarities with them, as well as with Swedish judgments⁴²⁰. Some of these characteristics are still common, although the style of detailed reasoning in those legal systems differs from one another. A selection of judgments of the Federal Constitutional Court⁴²¹ shows that the discourse is still neutral, but the reasoning is rather detailed. According to Alexy & Dreier, the style of German courts is in principle deductive, legalistic and magisterial, but at the same time to a high degree discursive, substantive and argumentative.⁴²² In the view of Mattila, the German judgments resemble Finnish judgments in many respects, with the exception that in German ones, the conclusions of the court are placed at the beginning of the judgment, followed by the statement of reasons, contrary to the Finnish ones in which the reasons are provided first. The use

417 A brief overview of judgments of the Belgian *Cour de cassation* indicates that nor has there been significant influence from the Belgian judicial style either. The Belgian judicial style is, however, more modern and straightforward than the French one, and there are some examples of rather extensive reasoning. However, the references to the European Convention on Human Rights are generally brief.

418 The various codes of judicial procedure provide listings of the elements to be included in a judgment. According to s.313(1) of the Code of Civil Procedure, the decision has to contain 1) the designation of parties, their representatives and the attorneys of record, 2) the designation of the court and judges, 3) the day on which the trial was brought to an end, 4) the operative provisions of the decision, 5) the facts, and 6) the reasons on which the decision is based. Similar listings are contained in other codes of procedure. See Alexy and Dreier 1997, p. 21.

419 Alexy & Dreier 1991 (1998), p. 105. Dissenting opinions only appear in constitutional adjudication. For details of the structure of judgments, see *Ibid.* p. 103-106.

420 See note 409.

421 The judgments analysed for the purposes of the present study include *Bundesverfassungsgericht* judgments 2 BvR 1436/02 vom 24.9.2003, 2 BvR 1481/04 vom 14.10.2004, 2 BvR 1113/06 vom 25.9.2009, 2 BvR 1396/10 vom 16.4.2012 and 2 BvR 1380/08 vom 18.8.2013.

422 Alexy and Dreier 1997, p. 21.

of subtitles is also rare in German judgments.⁴²³ When compared with French judgments today, reasoning is profound and a variety of sources of law is usually referred to, including not only legislation but also case law, preparatory work and opinions of scholars⁴²⁴. In comparison with Finnish judgments, reference to academic views is more frequent⁴²⁵. The profound reasoning is interesting in that when compared with France, the reasoning of judgments became compulsory even later⁴²⁶. Alexy & Dreier draw a distinction between two styles of reasoning present in judgments, that of expert reasoning and that of justifying a decision, the expert reasoning being more discussive than the rather formal model of juristic syllogism⁴²⁷.

The German style can also be explained with historical reasons. At the end of the Middle Ages, Germany was divided into hundreds almost independent entities, which also lead to non-uniform legal system. This, together with the development of universities, lead to that Roman law was adopted in the areas part of the German-Roman empire. This in turn had a profound effect on the German legal system which became rather abstract and relied largely on concepts. In the administration of law, scholars were increasingly relied upon and they replaced non-learned judges. Court proceedings were more of a formality, and the decisions were based on the opinions of scholars (*Aktenversendung*). Thus, particularly in the 16th and 17th centuries, law faculties de facto acted as highest judicial instances. The tradition of dialogue between judges and scholars still continues today.⁴²⁸ This might give reason to presume that German courts would be particularly receptive to influence by the European Court of Human Rights and to a practice of referring to the Court's case law as a source of law, and there are

423 Mattila 2010 (2), p. 107, and Arntz 2001, p. 298. Arntz notes that a special characteristic of German judgments is to construct the descriptive part of the judgment (*Tatbestand*) by placing the statements of the parties (*Vortrag/Antrag des Klägers, Vortrag/Antrag des Beklagten*) after the statement of facts (*Sachstand*). The reasons (*Entscheidungsgründe*) are placed at the end of the judgment. That is also characteristic of Finnish judgments.

424 Arntz 2001, p. 300 and 301, David & Jauffret-Spinosi 2002, p. 113 and 114, Markesinis & al. 1997, p. 7 (opinions of scholars). See also Mattila 2010 (2), p. 108. For examples of such references, see e.g. paragraphs 40 and 44 in *Bundesverfassungsgericht judgment 2 BvR 1481/04 vom 14.10.2004*.

425 See Mattila 2010(2), p. 108. The German judgments have often been described as being close to scholarly writings and the style has from early times been abstract and objective (see Wetter 1960, p. 26).

426 David & Jauffret-Spinosi 2002, p. 113. The compulsory reasoning of judgments was introduced in Germany in 1879.

427 Alexy & Dreier 1991 (1998), p. 103 and 104.

428 Markesinis & al. 1997, p. 9. See also Mattila 2011, p. 98, and Mattila 2010 (2), p. 108 and 109. Arntz divides the development of German as a legal language into four periods, during which for example the influence of Latin has varied. The influence of Latin was particularly strong during the period from the adoption of Roman law in the fourteenth and fifteenth centuries until the end of the eighteenth century. (Arntz 2002, p. 41. For details, see, p. 40-44)

also examples of such references⁴²⁹. When compared with the references included in the UK Supreme Court judgments referred to in the foregoing, however, the technique of referring to the case law of the European Court of Human Rights appears to be somewhat less elaborate. In any case, the German way of reasoning judgments, although there are differences when compared with that of the European Court of Human Rights for example in the structure of judgments, suggests that the profound way in which the European Court of Human Rights reasons its judgments might be less “foreign” to German courts than to some others such as the French courts.

As regards the possible influence of the German judicial style on the discourse and style of judgments of the European Court of Human Rights, one could say that they are closer to one another than the French judgments, apart from the earliest judgments of the European Court of Human Rights. It is difficult to assess, however, to what extent there is German influence or to what extent it is influence from Germanic legal systems in general. There is a rather large group of States parties with legal traditions that are close to one another, including the Nordic ones. Even the judgments of the European Court of Human Rights appear to have some characteristics of scholarly writings and appear to be deductive in the same way as German judgments. The contents of both are rather strictly regulated. Furthermore, the variety of sources of law is equally extensive. However, the discourse of the European Court of Human Rights with regard to the application of precedents appears to be more detailed and elaborate.

3.2.4 Swedish judicial style

Swedish is an official language of court proceedings in two States covered by the present study, i.e. Sweden and Finland. Given that Finland was part of Sweden and the legal system was thus the same until 1809 as explained in the foregoing, also the language of legislation was the same. Also, the language of court proceedings in Finland was Swedish until a rather late moment. Even under the Russian rule, part of legislation was still drafted in Swedish in Finland, until the original language of drafting gradually changed in favour of Finnish⁴³⁰. The language of legislation and other legal and official texts has been subject to systematic research in the Nordic countries since the 1960s⁴³¹.

Insofar as the language of judgments is concerned, the Swedish language in the

429 See e.g. *Bundesverfassungsgericht* judgment 2 BvR 1380/08 vom 18.8.2013 with several references, in which the interpretation of law appears to be based on both national law and the Convention although the decision relates to a constitutional complaint. The references are not always that detailed, however, even where the reasoning may otherwise be even very detailed (see e.g. an older judgment 2 BvR 1436/02 vom 24.9.2003).

430 *Svenskt lagspråk i Finland* 2010, p. 47.

431 See Landqvist 2010, p. 47. In respect of research on legal Swedish, the majority studies have, according to Nordman, focused on the language of legislation. For more details, see Nordman 2008, p. 254-257.

two States started perhaps to develop their own ways earlier and more rapidly than in respect of legislation. Judgments are to some extent drafted in Swedish also in Finland in case it is the language of proceedings, although the number of such judgments is small. Each court of course writes its own judgments independently, although they do follow a certain pattern in both States, and in both States the judiciary is divided into general courts of law and administrative courts⁴³², and the style of judgments in the two branches differs to some extent. Although the two States and their legal systems have been separate since 1809, there are still some similarities in the language and structure of judgments. However, in Finland, the same structure is followed in respect of both judgments issued in Finnish and those issued in Swedish. In general, in the judgments issued in both States, the statement of reasons and the conclusions are placed in the end of the text of the judgment, preceded by the parties' claims, questions of law and facts, although in Sweden it has been suggested that the order be switched so that the decision is placed at the beginning of the text⁴³³. When compared with the judgments of the European Court of Human Rights, the order is more or less the same in the judgments of Swedish and Finnish courts.

Landqvist observes that the language of judgments is to some extent affected by the fact that the judgments issued both in Sweden and Finland are primarily addressed at the parties, despite that they are of use for other courts and authorities as well as for scholars. This is perhaps the most striking difference between German and Swedish and Finnish judgments⁴³⁴. As observed in the foregoing, German judgments sometimes constitute a sort of a dialogue among courts and scholars. Landqvist is, nevertheless, of the view that the judgments issued in Finland are somewhat easier to conceive than those issued in Sweden for the reason that the sentences are usually shorter and subtitles are used⁴³⁵, which would give reason to assume that the addressees of the judgments have been taken better into account in Finnish courts.

An analysis of a few judgments of the Supreme Court of Sweden, in which the European Convention on Human Rights and the case law of the European Court of Human Rights has been used as sources of law, gives reason to believe that the judicial style may be changing to some extent in Sweden⁴³⁶. This observation is supported by

432 The names of the courts are partly different in the two countries.

433 See Landqvist 2010, p. 62. In respect of Sweden, Landqvist refers to a report concerning the increase of trust in the judiciary (SOU 2008:106).

434 The early Swedish judgments have shared elements in common with both French and German judgments, although the style has been somewhat closer to the French one (Wetter 1960, p. 25 and 26).

435 Landqvist 2010, p. 62 and 63.

436 The judgments of *Högsta domstolen* analysed for the purposes of the present study include *NJA 2006 s. 467* (*NJA 2006:53, mål B119-06*), *NJA 2009 s. 280* (*NJA 2009:30, mål Ö1082-09*), *NJA 2012 s. 1038* (*NJA 2012:94, mål B1982-11*), *NJA 2013 s. 502* (*NJA 2013:48, mål B4946-12*), and *NJA 2013 s. 746* (*NJA 2013:67, mål Ö1526-13*).

Bergholtz and Peczenik, who have analysed the style of judgments from the 19th century until the present⁴³⁷. In the judgments issued before the entry into force of the Act incorporating the European Convention on Human Rights into national law, there are some references to the Convention, but the references are very concise. One may also note that the courts rather paid attention to the provisions of the Convention instead of applying them.⁴³⁸ This can be explained by the fact that the Convention and thus the case law of the European Court of Human Rights were not formally part of applicable law in Sweden. In the judgments issued after the entry into force of the Act incorporating the Convention, the Convention is clearly stated as being applicable law in Sweden. In the early judgments where references to case law already appear, the references are still in most cases brief and contain no analysis of the contents of the case law, despite that the Convention provisions are already used in a more detailed manner in the reasoning. In some recent judgments the references are, however, extensive and detailed. In the judgments concerning the prohibition of double sanction⁴³⁹, referred to in section 4.2.2 below, the Supreme Court advanced from old case law to new one, and analysed the significance of the Convention provisions and of the change of interpretation in the case law of the European Court of Human Rights for the application of law in Sweden.⁴⁴⁰

Generally, given the rather flexible approach of the Swedish legal system to the use of sources of law and the more frequent resorting to the principle of objective and purpose of law than in Finland, the Swedish judiciary should in principle be able to adapt itself to the discourse of the European Court of Human Rights. The number of violations found against Sweden is rather low when compared with Finland, which gives reason to believe that there have been no major problems faced by the judiciary despite the slow resorting to the application of the case law. It is, however, only rather recently that the judiciary has shown preparedness to resort to more detailed reasoning

437 In their view, the style of the opinions of Swedish higher courts have changed continually since the end of the 19th century, from deductive, brief and magisterial justification, resembling that of French judgments, towards a more discursive, elaborate and argumentative style. For details, see Bergholtz and Peczenik 1997, p. 295 and 296.

438 In the words of the Supreme Court of Sweden, "I detta sammanhang finns det anledning att beakta innehållet i artikel 6 av Europakonvention om de mänskliga rättigheterna." See NJA 1991, p. 512. Or alternatively, "Även bestämmelserna i artikel 6 punkt 1 i Europakonvention om de mänskliga rättigheterna har betydelse för prövning av frågan om muntlig förhandling borde hållits i TR:n." See NJA 1993, p. 109.

439 NJA 2013 s. 746 (NJA 2013:67, mål Ö1526-13), in which the references to the case law of the European Court of Human Rights are rather close to those in recent Supreme Court judgments in Finland, with rather detailed argumentation, and NJA 2010 s. 168 I och II (NJA 2010:19, mål B2509-09 and mål B5498-09, decided jointly).

440 NJA 2010, p. 168. A very detailed analysis can also be found e.g. in NJA 2009, p. 280, whereas in NJA 2008, p. 868, the technique of referring to the case law of the European Court of Human Rights was still brief.

with regard to the case law of the European Court of Human Rights. The potential problems faced by the Swedish judiciary in the receptiveness to the Court's discourse are presumably rather similar to those faced by the Finnish courts. As regards the possible influence of the judicial style of Swedish courts on the discourse and style of the European Court of Human Rights, one could place the Swedish legal system in the same group of States with Germany, which together appear to have played a rather strong impact on the Court's approach to reasoning. The impact of the Swedish legal system alone would be hard to assess.

3.2.5 Finnish judicial style

Swedish was, as observed in the foregoing, the language of legislation and court proceedings in Finland until a late moment and Finnish is thus rather young as a legal language. However, it is perhaps the language of court proceedings that played the most significant role in the development of Finnish as a legal language, despite the undeniable impact of early translations of legislation. Important steps in this respect were the first court records that were drafted in Finnish and the use of Finnish as a language of legal science, as well as⁴⁴¹ a general change of the practice applied to the language of authorities and court proceedings, particularly a language decree issued in 1863 that officially allowed the use of Finnish in official documents directly concerning the Finnish population. However, it was not possible to use Finnish in court proceedings until a new decree was issued in 1883, concerning the Swedish and Finnish in court proceedings. Thereby Finnish became the main language of court proceedings due to the fact that the majority of the population was Finnish-speaking.⁴⁴² Despite this, the legislation was still drafted in Swedish, and then translated into Finnish, during the Russian rule.⁴⁴³ Nevertheless, the drafting of decisions and records in Finnish supported the development of the language of legislation and legal language in general in Finland.

The early Finnish judgments were not very clearly structured. Subtitles were not used to structure the judgment, and the reasoning and conclusion were typically placed in the same sentence, cut by several defining clauses. Consequently, the sentences tended to be long and hard to understand by others than lawyers. The understanding of judgments was made even more difficult by the Swedish influence, as the earliest judgments were drafted in Swedish and that language had a considerable influence even on the judgments drafted in Finnish. This style of writing judgments was for a long time defended by its preciseness and conciseness, but has later been given up. However, until the 1970s, the judgments followed a certain pattern, and the style was rather archaic. Today, particularly the statement of facts and the presentation of the

441 Pajula 1960, p. 149 and 154.

442 Pajula 1960, p. 178-180, and p. 201.

443 Landqvist 2010, p. 45.

views of the parties are, insofar as the sentence structure is concerned, like any descriptive text. The different parts of the judgments are separated by subtitles and the conclusions are placed at the end of the judgment.⁴⁴⁴ When looking into the case law of the supreme jurisdictions⁴⁴⁵, one may note that there is some degree of variation in the discourse and style of judgments both between courts and within court, although the judgments generally follow a pre-determined structure.

As mentioned in the foregoing, the style of legal reasoning in Finnish court judgments has similarities with the German traditions, with some minor differences. The focus is clearly on the contents of legislation, which is considered the primary source of law. Although the courts have increasingly started to refer to the case law of the European Court of Human Rights, for instance, the legalistic tradition can still be clearly seen in the reasoning. This might be explained by the fact that the conceptual legal thinking (*Begriffsjurisprudenz*) was a strong element until the 1950s, as given account of by Aarnio⁴⁴⁶. According to Aarnio, over the past fifteen years, a clear development in the style of reasoning towards more discussive can be identified. However, the internal structure of reasoning is still more deductive than discussive as to its nature.⁴⁴⁷ The rather recent developments in the style of legal reasoning used by the courts, most strikingly by the Supreme Court, is a result of a long process which seems to involve not only the change in the legal culture (legal theory) pointed out by Aarnio⁴⁴⁸, but also the increasing presence of international elements in the legal system⁴⁴⁹. Particularly the binding nature of the judgments of the European Court of Human Rights de facto forces national courts to take the judgments into account. This could be seen as a shift towards the recognition of case law as a source of law – in some cases with equally binding nature as that of written legislation – and towards harmonisation of legal traditions between statutory law and common law systems. One cannot speak of a system of precedence within the meaning of a common law system but, as was observed in the foregoing, the doctrine of precedents used by the European Court of Human Rights is in fact closer to the German and Nordic ones, which should make it easier for the Finnish judiciary to adapt to the discourse and style of judgments of the Court.

444 Mattila 2010(3), p. 195, 199 and 200.

445 For the analysed judgments, see Chapter V.

446 Aarnio 1997(1), p. 37-39.

447 See Aarnio 1997(2), p. 72. Aarnio observes that substantive arguments are increasingly an integral part of reasoning, which also means that in several cases the reasoning is nowadays quite extended and elaborate, although there are still examples of the contrary.

448 For details, see Aarnio 1997(1), p. 44-52.

449 Lavapuro 2011, p. 468. According to Lavapuro, a significant change in that respect has taken place around 2008, particularly in the Supreme Court but to some extent also in the Supreme Administrative Court, with has lead to a more detailed balancing of the principles set out in the case law of the European Court of Human Rights. (Ibid.)

When compared with the style of the judgments of the European Court of Human Rights, one may note that until late 1990s, Finnish judgments were often criticised for not being well enough reasoned. Particularly in the field of administrative law, the reasoning sometimes consisted of the statement of the applicable provisions of law, without detailed explanation for the decision in other respects. As of the end of the 1990s, however, the reasoning in the Finnish judgments has become more detailed, largely due to the influence of the judgments of the European Court of Human Rights but also to that of the European Court of Justice. Thus, apart from strictly legal discourse, there is today increasingly supplementing general practical reasoning present in the judgments, which brings in more subjective elements. The rather persisting practice of brief reasoning might have had the effect that the Finnish courts have not been particularly receptive to the argumentation of the European Court of Human Rights, although in the past few years one may note a tendency to increasingly refer to the European Court's case law. The change means, as a minimum, that the case law is now accepted as a binding source of law. Also, the technique of referring to case law appears to be undergoing a transition towards stronger internal elements, which is discussed in more detail in section 4.5 below. However, it does still not prove that the judicial style of the European Court of Human Rights would have been internalised. The degree of internalising the style of argumentation may be assessed by looking at how the various standards and methods of interpretation as well as precedents are used, including both legal and general practical argumentation. Lavapuro observes that in principle, the national courts should increasingly interpret the European Convention on Human Rights in the light of corresponding principles of interpretation as the European Court of Human Rights does. He finds that they have done so to some extent, particularly the application of the principle of proportionality is self-evident and is traditionally an inherent part of the resolution of conflicts of interpretation, but finds that the same requirement concerns even the more controversial principles of interpretation, such as the principle of evolutive interpretation, and in his view they should be applied more often. Instead, he calls for caution in respect of the application of the principle of margin of appreciation.⁴⁵⁰ This is addressed also in more detail in section 4.5.

A closer comparison between the judicial styles indicates indeed that although the judicial style of the Finnish supreme jurisdictions has not as such changed dramatically over the past twenty years, the style of referring to the judgments of the European Court of Human Rights has gradually changed, which might have even further-reaching effects on the reasoning. In the early judgments, the case law of the European Court of Human Rights were already clearly treated as an internal element of justification,

450 Lavapuro 2011, p. 469. According to Lavapuro, the doctrine of the margin of appreciation should rather be seen as a principle of determining the distribution of competence between the European Court of Human Rights and the national authorities. (Ibid.)

in terms of Alexy, whereas there appears to be a gradual change towards using them increasingly as an even stronger internal element of legal discourse, although the change is still not definite. Lavapuro has studied that change particularly in the light of a number of judgments of the Supreme Court and considers that it represents a rather deep-going change in the legal culture and finds that the judicial argumentation has become wider in scope and that in his view there can already be seen some degree of dialogue in the application of the case law of the European Court of Human Rights. He finds that it is also necessary for the national courts to adopt at least part of the logic of the European Court of Human Rights, to avoid future violations of the Convention, although there are challenges in its application at the national level.⁴⁵¹ Lavapuro's observation can be largely shared, particularly when looking at the national case law as a whole and comparing it with that of the European Court of Human Rights. Some form of dialogue can be observed not only in the cases of the Supreme Court referred to by Lavapuro⁴⁵², but also in certain more recent cases of the Supreme Court and the Supreme Administrative Court⁴⁵³. Those cases are looked into in more detail below. Also, the question of whether one may speak of a real dialogue is analysed closer.

Thus, the impact of the European case law on the discourse of the Finnish supreme jurisdictions has been rather impressive, and it has taken place within a relatively short period of time, which merits that development to be studied further. Given that Finland was not a State party to the Convention during those years when the Court's judicial style began to emerge and develop, there is hardly any impact from the Finnish legal system on the case law despite the common legal traditions with Sweden. Today, however, there is influence through the interaction between the European Court of Human Rights and national jurisdictions, in the same way as for any legal system represented in the Court. As observed in the foregoing, the development of the Court's case law is based on its discourse and judicial style. An essential part of this is the way in which the Court interprets law, i.e. the Convention. The following two sections provide an overview of how the case law of the European Court of Human Rights develops through the application of the various methods of interpretation, including an analysis of whether the application of an individual method is typically

451 Lavapuro 2011, p.474. Those challenges include, in particular, the difficulties in deriving rules of general application given that the Court's judgments are based on individual applications, the differences in the traditional principles of interpretation which in Finland are often based on material law, and the changes taking place in the Court's case law. Particularly the principle of evolutive interpretation imposes challenges as, in principle, each court should be able to interpret the European Convention on Human Rights in the light of its case law as it is at the moment of issuing the judgment. (Ibid. p. 475)

452 KKO:2001:96, KKO:2002:116, KKO:2005:136, KKO:2009:27 and KKO:2009:80.

453 Lavapuro has also paid attention to the latter judgment of the Supreme Administrative Court, which is also interesting in that it was taken to the European Court of Human Rights which found that no violation had taken place.

linked with signs of transition of the legal culture and what types of signs can be detected. It is argued that such a link exists with certain methods of interpretation, showing more signs of transition. As mentioned in the foregoing, those signs may include various linguistic or textual elements. Further, it is assessed to what extent the transition of the legal culture of protecting human rights and fundamental rights (through development of case law) has the potential of creating problems for national jurisdictions. In section 4.5 below, similar signs are looked for in the judgments of the Finnish supreme jurisdictions.

3.3 Starting point of interpretation – general principles of interpretation of treaties

It is typical of international treaties that they constitute political compromises, which may sometimes lead to ambiguous wordings that may be difficult to understand and to be translated into other languages. Or, sometimes treaty provisions may contain terms or concepts that are not familiar or are not used in some legal systems. In such cases, domestic courts inevitably need to interpret the provisions in question. Although treaties such as the European Convention on Human Rights, which is not meant to be only applied between the states parties to it but also by the state party in relation to natural persons residing within its jurisdiction, should be drafted as precisely as possible, it is characteristic of the European Convention on Human Rights to use general formulations that are applicable to various types of cases where the individual circumstances of the case are different. On the one hand, such formulations allow flexibility in the interpretation of the Convention, to take into account changes in society and legal thinking, but on the other hand, they are a challenge for the courts interpreting them. In establishing the meaning of a treaty provision, a court may resort to different principles and methods of interpretation as in respect of any provisions of law, such as historical interpretation (on the basis of “*travaux préparatoires*”), literal interpretation, teleological interpretation and/or contextual interpretation. One should remember, however, that the Rules of Court of the European Court of Human Rights do not contain provisions on the acceptable sources of law or the rules or principles of interpretation. Therefore those have become established through the case law. The Court has resorted, on the one hand, to the general principles of interpretation of international treaties and, on the other hand, to the general principles of interpretation of law as recognised by the States parties. It is observed in the foregoing that the States parties have, however, agreed on a great degree of independence for the Court in the Convention.

As regards the interpretation of international treaties applicable to the European Convention on Human Rights, the guiding principles are those found in the Vienna

Convention on the Law of Treaties. Articles 31 and 32 of the Vienna Convention provide for the general rules and supplementary means of interpretation of treaty provisions. According to Article 31(1),

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

Article 31, paragraph 2, of the Vienna Convention further defines 'context' as follows:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument relating to the treaty.

In respect of the European Convention on Human Rights, context in the light of the foregoing provisions would include the text of the Convention and additional Protocol No. 1, as well as subsequent additional protocols which are considered to constitute an integral part of the Convention upon their ratification by the parties. In the light of theories of discourse analysis, the provisions of Article 31, paragraph 2, appear to coincide with the idea of internal context. As regards external elements, Article 31, paragraph 3, of the Vienna Convention further provides as follows:

There shall be taken into account, together with the context:

- a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- c) any relevant rules of international law applicable in the relations between the parties.

Those provisions would, in terms of discourse analysis, fall within the concept of external elements. The parties to the European Convention on Human Rights have not concluded any specific agreements regarding its interpretation, but have agreed through the provisions of the Convention on the establishment of the European Court of Human Rights. According to Article 32, paragraph 1, of the European Convention on Human Rights, “the jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the protocols thereto which are referred to it as provided in Articles 33, 34 and 47”⁴⁵⁴. Thus, Article 32, paragraph 1, of the European Convention on Human Rights constitutes an agreement between the parties regarding the interpretation of the treaty within the meaning of the Vienna Convention on the Law of Treaties. As regards the main principles of interpretation under the Vienna Convention, including the ordinary meaning to be given to the terms of the treaty in their context, and the object and purpose of the treaty, the European Court of Human Rights has referred to those principles on several occasions⁴⁵⁵. The Court has also, on occasion, been confronted with the question of applicability of other international conventions, referred to in Article 31, paragraph 3 subparagraph (c), of the Vienna Convention on the Law of Treaties, such as the United Nations Convention on the Law of the Sea.⁴⁵⁶ It is perhaps more common, however, for the Court to refer to other human rights instruments such as the Convention on the Rights of the Child. In the case of *Saadi v. the United Kingdom*, among others, the Court also took a position on the applicability of general principles of international law.⁴⁵⁷ As is pointed out by Ost & van de Kerchove, the development of the Court’s doctrine of interpretation began already with its first judgment in the *Lawless* case, although in their view

454 The articles referred to provide for inter-state applications, individual applications and advisory opinions. Under Article 32, paragraph 2, “in the event of dispute as to whether the Court has jurisdiction, the Court shall decide”. Thus, the role given to the European Court of Human Rights is rather independent.

455 The Court has stated this, among others, in the case of *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, §§ 29 and 30, thus already before the entry into force of the Vienna Convention. The Court has referred to the Vienna Convention e.g. in the cases of *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A No. 98, § 64, *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A No. 102 § 117, and *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A No. 201, § 100, and *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, §§ 61 and 62. In the latter case, the Court explicitly stated that “in ascertaining the Convention meaning of this phrase, it will, as always, be guided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties” (§ 61).

456 See *Medvedyev v. France*, Grand Chamber judgment of 29 March 2010, Reports of Judgments and Decisions 2010.

457 *Saadi v. the United Kingdom*, Grand Chamber Judgment of 29 January 2008, Reports of Judgments and Decisions 2008, § 62. In the Court’s words, “the Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties”.

the first clear statement of the doctrine can be found in the *Golder* judgment.⁴⁵⁸ The foregoing would give reason to state that the case law constitutes an external element of argumentation. However, it is argued in this thesis that it should rather be treated as an internal element of argumentation.

The aforementioned main rule in Article 31, paragraph 1, of the Vienna Convention is useful where the authentic texts of the treaty do not contain divergences, or where the divergences are insignificant for the outcome of the reading of the treaty provisions. However, as is pointed out by Hakapää, although the language used should mean what is stated, it may sometimes be difficult to establish the ordinary meaning of the expressions used in the treaty⁴⁵⁹. Also, the way in which expressions are understood in different legal systems may differ even significantly. The Vienna Convention on the Law of Treaties further allows a special meaning to be given to a treaty provision. According to Article 31, paragraph 4:

A special meaning shall be given to a term if it is established that the parties so intended.

That provision is interesting in the light of the case law of the European Court of Human Rights in that the Court interprets the meaning of the Convention provisions rather independently. Although it is not that clear what the parties have intended in respect of special meanings to be given to terms used in the Convention, the European Court of Human Rights appears to resort to that possibility. If the Court's interpretative practice was to be criticised for one reason or another, its practice of giving Convention provisions an independent or autonomous meaning could be a source of criticism, although the jurisdiction given to the Court in Article 32 of the European Convention on Human Rights is extensive and, when understood in the widest possible sense, should be considered to cover the possibility in Article 31, paragraph 4, of the Vienna Convention on the Law of Treaties. Even if not criticised, the idea of independent or autonomous meaning is an element creating challenges for the national legal systems. That element of interpretation is addressed in more detail in section 3.4.10 below.

The Vienna Convention on the Law of Treaties also provides for further rules of interpretation. According to Article 32 of the Convention:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to

458 Ost & van de Kerchove 1989, p. 253, refers to *Lawless v. Ireland*, judgment of 1 July 1961, Series A no. 3, and *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18.

459 Hakapää 2008, p. 31.

confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

a) leaves the meaning ambiguous or obscure; or

b) leads to a result which is manifestly absurd or unreasonable.

Those options are even more clearly external elements of justification than those provided for in Article 31, paragraph 3. When looking into the wording of Article 32, one may note that although it mentions specifically the preparatory work of the treaty and the circumstances of its conclusion, it is not exhaustive but provides for flexibility in treaty interpretation. In terms of discourse analysis, that calls for resorting to subjective elements of interpretation. The European Court of Human Rights has also used the flexibility allowed by the Vienna Convention on the Law of Treaties in treaty interpretation. For example, in the so-called Belgian language dispute, the European Court of Human Rights not only underlined the need to read both language versions together, but also resorted to supplementary means of interpretation as, although the general objective and purpose of Article 14 of the Convention was to prohibit discrimination, it does not require to forbid any difference in treatment that would lead to an absurd result. Thus, the Court declined an extensive interpretation of the provision.⁴⁶⁰ In addition, the Court referred to the need to read Article 14 in the light of other relevant provisions, i.e. in that case Article 2 of Protocol 1⁴⁶¹. On occasion, the Court may decline to take the provisions of Article 14 into account, in case it has found a breach of another substantive provision of the Convention, in which case it

460 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium" (Application n° 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) judgment of 23 July 1968, Series A No. 6, § 10, reads as follows: "In spite of the very general wording of the French version ("sans distinction aucune"), Article 14 (art. 14) does not forbid every difference in treatment in the exercise of the rights and freedoms recognised. This version must be read in the light of the more restrictive text of the English version ("without discrimination"). In addition, and in particular, one would reach absurd results were one to give Article 14 (art. 14) an interpretation as wide as that which the French version seems to imply. One would, in effect, be led to judge as contrary to the Convention every one of the many legal or administrative provisions which do not secure to everyone complete equality of treatment in the enjoyment of the rights and freedoms recognised. The competent national authorities are frequently confronted with situations and problems which, on account of differences inherent therein, call for different legal solutions; moreover, certain legal inequalities tend only to correct factual inequalities. The extensive interpretation mentioned above cannot consequently be accepted."*

461 *Ibid.* § 11. This approach has been confirmed e.g. in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985 (Plenary), A94, § 71.

resorts to a more restrictive interpretation⁴⁶². However, the interpretation of provisions of law or a treaty is a continuous process in which it may be difficult to strictly separate the various rules of interpretation, but in the same way as in discourse analysis, both objective and subjective elements of interpretation interact. According to Germer, the drafters of the Vienna Convention did not even intend to draw a strict line between the authentic elements of interpretation in Article 31 and the supplementary means of interpretation in Article 32 but intended them to operate in a single combined process. Furthermore, the supplementary means of interpretation may be used to confirm the meaning resulting from the application of Article 31.⁴⁶³ As is explained below in more detail, the European Court of Human Rights has also developed a practice of combining the various rules and principles of interpretation, despite that the emphasis may be given to an individual rule.

The Vienna Convention also provides for special rules of interpretation of treaties authenticated in two or more languages, which is thus of relevance for the interpretation of the European Convention on Human Rights. According to Article 33:

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic text discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

The foregoing provisions mean that the European Convention on Human Rights is equally authentic in both English and French, and those language versions are presumed to have the same meaning. On the one hand, given that only two language versions are

462 See e.g. *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A No. 45, § 67, and *Airey v. Ireland*, judgment of 9 October 1979, Series A no. 32, § 30.

463 Germer 1970, p. 419.

authentic, there are potentially not so many significant discrepancies between the two language versions that would give reason to systematically compare them, which presumption is confirmed by that the Court only seldom needs to resort to comparing the language versions although it has on occasion done so. On the other hand, comparison between language versions may be a supporting element of interpretation of the Convention provision in case of doubt, even if there are not as such discrepancies between them. It is also worth reminding that the plurilingual nature of a treaty should not be over-emphasised. As is observed by Germer, among other authorities, the problems of interpretation that are related to plurilingual treaties are not essentially different from those arising from treaties with only one authentic text. A judge interpreting a treaty must always look for the meaning which the parties intended to give to the terms of the treaty.⁴⁶⁴ For the purposes of reconciling the divergent language versions, Hardy makes a distinction between several methods available: mere comparison of texts, reference to the context, reference to documentary evidence of how the discrepancy has occurred, if available, and reference to preparatory work⁴⁶⁵. It may be presumed that these methods are in practice applied together, and the European Court of Human Rights has on occasion resorted to comparison and references to the context. Hardy further suggests other methods of conciliating authentic language versions, of which perhaps reference to the original language version is the most convincing one.⁴⁶⁶ The European Court of Human Rights has not taken a position on which language version would be the original one, but has treated them on an equal footing. The reference to the original language version would indeed be particularly useful in the case of treaties which have more than two authentic language versions.

It is recalled again that there are only two authentic language versions to be compared, and the problem of predictability of interpretation does not relate so much to divergence between them but rather to other elements relating to the interpretation of the Convention. Thus, the principles in Article 33 of the Vienna Convention on the Law of Treaties should not be emphasised despite that the Court has on occasion resorted to comparing the two language versions. It is not surprising that the Court has resorted to a larger extent to other means of interpretation instead of comparison. However, in the case of the European Convention on Human Rights, the parties to the Convention have delegated the power of interpretation to the European Court of Human Rights whose interpretations are binding on the States, and the Court has developed additional rules and principles of interpretation. The aforementioned principles set out in the Vienna Convention on the Law of Treaties apply to the European Convention on Human Rights as general principles interpretation, which constitute

464 Germer 1970, p. 425 and 426.

465 For details, see Hardy 1962, p. 82-98.

466 For details, see Hardy 1962, p. 98-106.

the basis for developing the language of the Convention and for the transition of the legal culture of protecting human rights both at the European and at the national level. In the following, an analysis is made of how the European Court of Human Rights has applied those principles and the additional rules and principles developed for interpreting the Convention in its case law, in an effort to assess to what extent the meaning of the Convention provisions has evolved and what type of a transition of the legal culture has taken place.

3.4 Principles of interpretation of the European Court of Human Rights in the light of case law

An examination of the case law of the European Court of Human Rights shows that, although the principles set out Vienna Convention on the Law of Treaties may serve as the starting point of interpretation of the Convention, the Court in reality applies a hybrid approach to interpretation, which appears to be rather a combination of the said principles and general principles of interpretation of law. In the view of White & Ovey, the general principles of the Vienna Convention must be applied with caution. This is due to two reasons, in particular: first, the interpretation of the Convention is subject to international adjudication instead of taking place between the parties to the Convention and, second, in any interpretation of the Convention, attention should be paid to its specific object and purpose, which is to protect citizens from interference from State authorities.⁴⁶⁷ This view appears to be supported by Matscher.⁴⁶⁸ Matscher points out that the Vienna Convention remains silent on the relation between static or historical interpretation and evolutive or dynamic interpretation, but clearly refers to the wording and object and purpose⁴⁶⁹. Thus, the principles of evolutive and dynamic interpretation have been developed by the Court itself. It appears that it is the same types of problems of interpretation, that have been faced by national legal systems, which have also lead to the development of the methods and criteria of interpretation of the European Court of Human Rights.⁴⁷⁰ Senden draws

467 White & Ovey 2010, p. 66, 71 and 72. See also Ost & van de Kerchove 1989, p. 261 and 262. The latter observe that although the references to the Vienna Convention are not frequent, they are well established (*constante*).

468 Matscher 1998, p. 20. Matscher observes that the Vienna Convention does not draw a distinction between such treaties as create rules applied to individuals and those that only create rights and obligations between the parties to the treaty.

469 Matscher 1998, p. 19.

470 This is the conclusion of Frowein (2005(1), p. 6).

a distinction between methods of interpretation and principles of interpretation.⁴⁷¹ For the purpose of this study, no such a distinction is drawn but they are all treated as rules or principles of interpretation.

Particularly in the early years of the application of the European Convention on Human Rights, some of its provisions have given rise to confusion in the courts of States parties to the Convention. Most of the problems faced were not so much questions of wording or meaning, but rather related to the scope of application of the Convention, although there are also cases where the underlying problem has been at least partly of a linguistic nature, most notably under Article 6, paragraph 1, of the Convention. Today, there are less such conceptual problems as there is already abundant case law of the European Court of Human Rights where the Court has taken a stand in respect of those treaty provisions which have given rise to differing interpretations. However, it appears that the Court has continued to expand the scope of the rights protected, particularly through the application of the principle of dynamic or evolutive interpretation, which continues to present challenges for the national jurisdictions. In the following, the individual principles of interpretation as developed by the Court are assessed in the light of its case law. At the same time, an assessment is made whether signs of transition of the legal culture of protecting fundamental rights and human rights may be detected in the application of those principles, through the Court's discourse. It is observed in the foregoing that such signs can be identified at least to some extent on the basis of an overview of the case law as a whole.

3.4.1 Ordinary meaning or literal interpretation

As stated in the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in accordance with the ordinary meaning to be given to the terms in their context and in the light of its object and purpose. In a strict sense, that means literal interpretation of the text. The European Court of Human Rights has on occasion referred to the ordinary meaning of words when interpreting the provisions of the Convention, although not always so obviously and literal interpretation has not always been the decisive method. Ost & van de Kerchove, among others, consider that the approach of the European Court of Human Rights to literal interpretation has varied from case to case, being sometimes the decisive principle of interpretation but remaining on occasion in the background as the Court has given more weight to other factors such as the spirit of

471 Senden 2011, p. 390. In the view of Senden, an interpretation method is a technique that clarifies which substantive argument has been used in order to support a specific reasoning and which helps the judge to objectify its reasoning. An interpretative principle serves as an objective or aim that can be taken into account when interpreting a provision with the help of an interpretation method. (Ibid.) However, The European Court of Human Rights does not appear to clearly distinguish methods and principles from one another, but rather refers to the various principles by using specific denominations.

the Convention.⁴⁷² The Court is, nevertheless, bound by the text of the Convention in that it could hardly “write” new rights into the Convention.⁴⁷³ The Court has referred to the ordinary meaning of words in various cases, using also other expressions such as “sufficiently clear”, “normal”, “evident” and “natural”.

In the case of *Johnston and Others v. Ireland*, for example, the Court explicitly referred to the wording of Article 31, paragraph 1, of the Vienna Convention in assessing whether the “right to marry” under Article 12 could be understood as including the “right to divorce”. In the Court’s words, “in order to determine whether the applicants can derive a right to divorce from Article 12, the Court will seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose”. Further, “the Court agrees with the Commission that the ordinary meaning of the words “right to marry” is *clear*, in the sense that they cover the formation of marital relationship but not their dissolution. [...]”⁴⁷⁴. In that case, the interpretative situation was relatively simple. The wording of Article 12 does not explicitly refer to the right to divorce. Instead, the provision may raise other questions in the light of national law. The provision speaks of the right of men and women and limits the right to marry by linking it to national laws governing the exercise of that right. The scope of the provision has proven to be particularly problematic with regard to the right of transsexuals to marry someone of the sex opposite to their re-assigned gender. In the case of *Rees v. the United Kingdom*, the Court stated as follows:

In the Court’s opinion, the right to marry guaranteed by Article 12 (art. 12) refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 (art. 12) is mainly concerned to protect marriage as the basis of the family.

Furthermore, Article 12 (art. 12) lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the

472 Ost & van de Kerchove 1989, p. 263 and 264.

473 Grewe points out that in this respect, national courts interpreting constitutions have more flexibility than the European Court of Human Rights. For example in Germany, judges have shown some willingness to recognise rights not explicitly spelled out in the Constitution. (Grewe 1998, p. 227)

474 In the Court’s words, “in order to determine whether the applicants can derive a right to divorce from Article 12, the Court will seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose”. Further, “the Court agrees with the Commission that the ordinary meaning of the words “right to marry” is clear, in the sense that they cover the formation of marital relationship but not their dissolution. [...]” *Johnston and Others v. Ireland*, plenary judgment of 18 December 1986, Series A 112, §§ 51 and 52.

*very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind.*⁴⁷⁵

That strictly literal interpretation has been confirmed in later case law⁴⁷⁶. Considering the strongly affirmative nature of that reasoning, it is persuasive as such and gives the reader legal foreseeability. However, some developments in the legal situation and interpretation have taken place since the *Rees* and *Cossey* judgments. In the case of *Christine Goodwin v. the United Kingdom*, the Court stated as follows:

It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of Corbett v. Corbett, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. [...] ⁴⁷⁷

In this fragment of discourse, the Court uses general practical reasoning to convince the audience of a changed situation, meriting a different interpretation of the Convention provisions. The relevant linguistic elements include expressions such as “not persuaded that at the date of this case it can still be assumed”, “there have been major social changes” and “dramatic changes brought about developments in medicine”. Thus,

475 *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A 106, §§ 49 and 50.

476 See *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series A 184, §§ 44 to 46. The Court further stated that “although some Contracting States would now regard as valid a marriage between a person in Miss Cossey’s situation and a man, the developments which have occurred to date (see paragraph 40 above) cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 (art. 12) on the point at issue.” (§ 46) Thus, the Court remained with the strict interpretation of Article 12 even though there had been developments in the legal conceptions in the States parties to the Convention.

477 *Christine Goodwin v. the United Kingdom*, Grand Chamber judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, § 100.

the principle of ordinary meaning, together with context, may not as such be fruitful for the purpose of analysing possible transition of the legal culture of protecting fundamental rights particularly where the conceptions in the different legal systems as to the meaning of the term are rather similar, but it is necessary to resort to a wider context and external elements of argumentation, even sources of other sciences. However, when read together with the national laws relating to the exercise of the right, there could be evolution of the legal situation changing the meaning. The transition of the legal culture in such cases would take place more on the basis of national legislation than through the interpretation of the Convention. As regards possible right of persons of the same sex to marry, according to national laws, the Court has not for the time being gone as far as reading the Convention provision to guarantee such a positive obligation for the States, and it would go beyond the wording of the provision. However, it would be interesting to see how the Court would interpret it in situation where national laws permitted it. The situation would, however, then be rather linked to other means of interpretation.

Matscher points out that insofar as the Convention contains ordinary terminology, it is not problematic to interpret the provisions rather freely, in accordance with the ordinary meaning of words. However, the situation is different with regard to legal terminology. He raises the question of whether such terminology should be interpreted in accordance with the meaning it is given in the national legal system concerned, or in national legal systems collectively, or whether it should be interpreted autonomously.⁴⁷⁸ An example of legal terminology would be, for example, the concept of “possessions” in Protocol No. 1 to the Convention, which may raise questions such as the personal or material scope of the concept⁴⁷⁹. In such cases, a literal interpretation may always not be sufficient to decide the exact meaning of the provision but other principles of interpretation may be called for, such as the margin of appreciation. The Court may also be faced with the weighing of conflicting interests, which may be given priority even if a strict interpretation of the first part of the provision – “No one shall be deprived of his possessions” – is accepted as such. For example, in the case of *Lithgow and Others v. the United Kingdom*, the interpretation of the provision in the light of the ordinary meaning of words was more complicated, and while sharing the applicants’ view as to the grammatical meaning of the provision to some extent, the Court did not agree

478 Matscher 1998, p. 26.

479 See e.g. *Marckx v. Belgium*, judgment of 13 June 1979, Series A 31, in which the Court decided whether illegitimate children could enjoy less extensive rights than legitimate ones under national laws, and *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A 52, in which the Court considered a variety of intangible assets as belonging to the concept of possessions, as well as *Tre Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989, Series A 159, in which the Court found that even a licence to serve alcoholic beverages fell within the concept as one of the principal conditions for carrying on business.

in all respects but resorted to the *travaux préparatoires* as a supplementary means of interpretation as mentioned in the foregoing.⁴⁸⁰ The Court accorded the Government a wide margin of appreciation in determining when a deprivation of possessions should occur. Thus, the more the Court departs from literal interpretation and gives room for other principles of interpretation, the more there is transition of legal culture taking place. The supplementary means of interpretation are treated below.

3.4.2 Context

As regards the additional criterion of context in Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, there are different types of context that may be identified, including the other provisions of the article in question, other articles of the Convention, the Convention as a whole including its Protocols, as well as other international instruments or even case law of other judicial bodies.⁴⁸¹ It appears from the foregoing reference to the protection of possessions, for example, how the Court takes into account other provisions of the same article when interpreting the situation. In the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, for example, the Court has referred to other articles of the Convention as follows:

“ According to the Court’s established case-law, Article 14 (art. 14) complements the other substantive provisions of the Convention and the Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 (art. 14) does not necessarily presuppose a breach of those provisions - and to this extent it is autonomous -, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter [...].”

It did not find a violation of Article 8 taken alone, but considered that there had been discrimination in that case and thus found a violation of Article 14 taken together with

480 *Lithgow and Others v. the United Kingdom*, plenary judgment of 8 July 1986, Series A 102, §§ 114 to 119. The case concerned the interpretation of Article 1(1) of Protocol 1, the second sentence of which reads “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.” There was no disagreement on the meaning of the words “no one”, but the scope and contents of the general principles of international law was put into question. The Court found, with support from the preparatory work, that they were only meant to cover non-nationals and did not apply to the taking of property from the State’s own nationals, whereas nationals would be covered by the provisions of national law.

481 Ost & van de Kerchove 1989, p.271.

Article 8.⁴⁸² One of the most typical cases where two Convention articles are indeed applied together are those of discrimination under Article 14 of the Convention, as that provision cannot be applied alone. According to White & Ovey, however, the question of context has most often become relevant in the case of interpretation of some provisions of the additional Protocols, which have not been entirely ratified by the State party concerned.⁴⁸³ In the case of *Maaouia v. France*, the Court used a context encompassing Article 6 and Protocol No. 7, to establish the meaning of “criminal charge” and thus the applicability of Article 6, paragraph 1, as follows:

*The Court points out that the provisions of the Convention must be construed in the light of the entire Convention system, including the Protocols. In that connection, the Court notes that Article 1 of Protocol No. 7, an instrument that was adopted on 22 November 1984 and which France has ratified, contains procedural guarantees applicable to the expulsion of aliens. In addition, the Court observes that the preamble to that instrument refers to the need to take “further steps to ensure the collective enforcement of certain rights and freedoms by means of the Convention ...”. Taken together, those provisions show that the States were aware that Article 6 § 1 did not apply to procedures for the expulsion of aliens and wished to take special measures in that sphere. [...]*⁴⁸⁴

Thus, the Court excluded from the scope of criminal charge aspects that were regulated by other explicit provisions in Protocol No. 7. In the same judgment, the Court also took into account a wider context, paying attention to the fact that, in general, such orders were not classified as criminal within the member States of the Council of Europe⁴⁸⁵. The Court may also refer to the context in looser terms, as for example in the case of *Guzzardi v. Italy* in which the Court stated that “without losing sight of the general context of the case, the Court recalls that, in proceedings originating in an individual application, it has to confine its attention, as far as possible, to the issues raised by the concrete case before it”⁴⁸⁶. In that piece of discourse, the Court

482 *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A 94, §§ 71 and 83. In the case of *Rasmussen v. Denmark*, the Court applied Article 14 together with Articles 6 and 8, but found no violation (judgment of 28 November 1984, Series A 87, §§ 32 to 34 and 42).

483 See White & Ovey 2010, p. 70.

484 *Maaouia v. France*, Grand Chamber judgment of 5 October 2000, Reports of Judgments and Decisions 2000-X, § 36. The case concerned the classification of exclusion orders as preventive measures for the purpose of immigration control.

485 The Court noted that “the domestic legal order’s characterisation of a penalty cannot, by itself, be decisive for determining whether or not the penalty is criminal in nature. Other factors, notably the nature of the penalty concerned, have to be taken into account. (Ibid. § 39)

486 *Guzzardi v. Italy*, judgment of 6 November 1980, Series A 39, § 88.

does not specify whether it refers to the internal context or a wider external context. However, the Court has on occasion underlined the importance of adopting an extensive approach to the context of interpretation. The European Court of Human Rights has explicitly stated that “the Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions”.⁴⁸⁷ Thus, in terms of discourse analysis, the Court refers to the concept of internal context, covering both the text of the Convention and its Protocols, but adopting as wide an approach as possible.

As for the concept of external context, Article 31, paragraph 3 subparagraph (a), of the Vienna Convention on the Law of Treaties has no relevance for the interpretation of the European Convention on Human Rights, but under subparagraph (b), there shall be taken into account, together with the context, any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. As noted in the foregoing, that subparagraph has a connection to the doctrine of precedents applied by the European Court of Human Rights, which is a rather flexible one. The Court has expressed its doctrine of precedents as follows: “While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in Contracting States and respond, for example, to any emerging consensus as to the standards to be achieved. It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.”⁴⁸⁸ The Court’s doctrine of precedents has perhaps more in common with the Scandinavian and German legal systems than it has with the English legal system as the latter’s doctrine of precedents is a more formal and stricter one. The Court has also suggested that this approach to the changing condi-

487 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, Reports of Judgments and Decisions 2008, § 62. In the Court’s words, “The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions”.

488 *Stafford v. the United Kingdom*, judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, § 68. See also earlier judgments in the cases of *Cossey v. United Kingdom*, judgment of 27 September 1990, Series A 184, § 35, *Marckx v. Belgium*, judgment of 13 June 1979, Series A 31, § 41, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A 39, § 95.

tions should also apply with regard to domestic legal orders⁴⁸⁹. It must be underlined, however, that an overall analysis of the Court's discourse in its judgments indicates that the Court's case law has become such an essential part of the Court's interpretation practice, serving often as the starting point. Therefore, although in terms of the Vienna Convention it might belong to the concept of external context, it should rather be treated as an internal element of justification and argumentation.

As regards Article 31, paragraph 3 subparagraph (c), of the Vienna Convention on the Law of Treaties, referring most clearly to external context in terms of discourse analysis, it is observed already in the foregoing that the Court has also, on occasion, been confronted with the question of applicability of other international conventions such as the United Nations Convention on the Law of the Sea or the Convention on the Rights of the Child, and with the applicability of general principles of international law. It is somewhat questionable whether that wider context would rather fit in the framework of supplementary means of interpretation. In the light of the judgment of *Saadi v. the United Kingdom*, the Court itself seems to draw a distinction between other provisions of international law and supplementary means of interpretation, however, stating as follows:

*[...] The Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties [...]. Recourse may also be had to supplementary means of interpretation, including the preparatory works to the Convention, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure or manifestly absurd or unreasonable (Article 32 of the Vienna Convention).*⁴⁹⁰

In any case, in terms of discourse analysis, references to contexts other than the text itself constitute external elements of argumentation. Other provisions of international law may also be a demonstration of the transition of legal culture in the States parties to the European Convention on Human Rights. In such cases, the references to a wider context and external elements of argumentation are linked with the transition of legal culture. For example, in the case of *Christine Goodwin*, the European Court of Human Rights paid attention to the development of the right to marry within the European Union as a whole, as follows: “[...] The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the

489 *Stafford v. the United Kingdom*, judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, § 69. In that case, the Court even resorted to an extensive analysis of national case law.

490 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, Reports of Judgments and Decisions 2008, § 62.

reference to men and women.”⁴⁹¹ The Court does not necessarily give decisive weight to the developments among a smaller group of nations, but depending on the State against which the application has been made, it may be of even great relevance in the interpretation of the legal situation at hand.

3.4.3 Object and purpose of the Convention

Although according to Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, the starting point for interpretation is the ordinary meaning of the provision, the object and purpose of the Convention has to be kept in mind in line with that Article. The object and purpose are often referred to as teleological interpretation. Reliance on the object and purpose allows more flexibility of interpretation than strictly literal interpretation. On occasion, the European Court of Human Rights refers explicitly to the object and purpose of the treaty using the wording of the Vienna Convention, as explained in connection with the aforementioned case of *Johnston and Others v. Ireland*, as follows: “in order to determine whether the applicants can derive a right to divorce from Article 12, the Court will seek to ascertain the ordinary meaning to be given to the terms of this provision in their context and in the light of its object and purpose”.⁴⁹² Or the Court may use a looser expression such as the following: “Given that it is a law-making treaty, it is also necessary to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the Parties.”⁴⁹³ In such cases it appears clearly from the Court’s discourse that it has paid attention to the object and purpose of the treaty, but one has to remember that it most often does so even if not referring to it explicitly. The latter expression of the Court’s discourse even indicates that the object and purpose of the treaty may alleviate the principle of literal interpretation so as to allow room for a transition of the legal culture of protecting fundamental rights and human rights, given that the intention of the Parties was to ensure effective collective enforcement of those rights and to go even further than at the international level.

White & Ovey point out that the object and purpose of the Convention have perhaps played the most influential role in the adjudication of the European Court of Human Rights, although the Court has not applied any hierarchical approach to the different means of interpretation but rather sees the interpretation as a single complex operation.⁴⁹⁴ When looking at the style of reasoning in the Court’s judgments as a whole,

491 *Christine Goodwin v. the United Kingdom*, Grand Chamber judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, § 100.

492 *Johnston and Others v. Ireland*, plenary judgment of 18 December 1986, Series A 112, §§ 51 and 52.

493 *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7, § 8.

494 White & Ovey 2010, p. 65. (Golder, § 30)

this approach entails a larger amount of general practical argumentation than in the Finnish traditions, for example. Reference to object and purpose, if not supported by convincing legal arguments, would have the potential of weakening persuasiveness and foreseeability, depending on how consistently the object and purpose is interpreted in a similar manner. It is also the view of Ost & van Kerchove that teleological interpretation is the dominating method applied by the Court⁴⁹⁵ although the Court's approach to the different rules and principles is generally rather flexible. As pointed out by Frowein, going beyond the mere wording of the Convention, the teleological interpretation represents the strongest form of legal protection.⁴⁹⁶ Senden, however, has criticised the European Court of Human Rights by stating that within the case law of the Court, the object and purpose of a particular treaty provision are not always substantiated, nor is it always explained how the object and purpose have been established⁴⁹⁷ although she admits that there are many signs of teleological interpretation in the Court's case law⁴⁹⁸. That observation is correct, but one must bear in mind that the Court has on several occasions underlined the living nature of the Convention, perhaps intentionally deviating from the strict concept of object and purpose of the Convention⁴⁹⁹. It is interesting to note that the Court only seldom refers to the *travaux préparatoires* of the Convention when referring to the object and purpose, although the most usual means of establishing the intention of the legislator in Finland, for example, is to resort to the preparatory work. The Court has rather adopted a wide concept of object and purpose, of which the other rules and principles of interpretation developed by the Court itself constitute an extension. Thus, the wide approach to the object and purpose is a means of interpretation that could leave more room for transition of legal culture, but it also entails more subjective elements of interpretation than mere wording of the provision, and in the light of the Court's case law the linguistic elements attesting transition are often lacking when the Court refers to object and purpose. One must also remember

495 Ost & van de Kerchove 1989, p.295.

496 Frowein 2005(1), p. 5.

497 Senden 2011, p. 392.

498 Senden 2011, p. 392. Senden uses the concepts of micro-teleological interpretation and meta-teleological interpretation: micro-teleological interpretation refers to a method whereby the object and purpose of a provision or a treaty are used to justify an interpretative conclusion; meta-teleological interpretation is a concept referring to the phenomenon that certain interpretative principles are based on an understanding of the object and purpose of the treaty system as a whole (Ibid. p. 391).

499 This view appears to be shared by Lavapuro who points out that the general principles of interpretation do not as such directly define the contents of individual rights, but rather the judicial approach of the European Court of Human Rights to human rights provisions (Lavapuro 2011, p. 470). Thus, the Court commits itself to effective implementation of certain principles expressing the rights of the individual even in changing conditions, basing itself on two abstract criteria: the nature of the Convention as an international law instrument and its special character as an agreement on the collective enforcement of human rights (Ibid.).

that some aspects of reasoning often remain behind “closed doors” even in national case law, which makes the discourse analysis a challenge.

3.4.4 Supplementary means of interpretation

Under Article 32 of the Vienna Convention on the Law of Treaties, supplementary means of interpretation are resorted to when the interpretation under the main rules leave the meaning ambiguous or obscure or where it leads to a result which is manifestly absurd or unreasonable. The preparatory work of the treaty are mentioned specifically as such supplementary means, in addition to the circumstances of its conclusion. As regards the case law of the European Court of Human Rights, *travaux préparatoires* have been referred to on occasion explicitly with reference to Article 32 of the Vienna Convention. For example, in the *James and Others* case, the Court reasoned exceptionally profoundly on the need to consult the preparatory work:

Confronted with a text whose interpretation has given rise to such disagreement, the Court considers it proper to have recourse to the travaux préparatoires as a supplementary means of interpretation (see Article 32 of the Vienna Convention on the Law of Treaties).

Examination of the travaux préparatoires reveals that the express reference to a right to compensation contained in earlier drafts of Article 1 (P1-1) was excluded, notably in the face of opposition on the part of the United Kingdom and other States. The mention of the general principles of international law was subsequently included and was the subject of several statements to the effect that they protected only foreigners. Thus, when the German Government stated that they could accept the text provided that it was explicitly recognised that those principles involved the obligation to pay compensation in the event of expropriation, the Swedish delegation pointed out that those principles only applied to relations between a State and non-nationals. And it was then agreed, at the request of the German and Belgian delegations, that “the general principles of international law, in their present connotation, entailed the obligation to pay compensation to non-nationals in cases of expropriation” (emphasis added).

Above all, in their Resolution (52) 1 of 19 March 1952 approving the text of the Protocol and opening it for signature, the Committee of Ministers expressly stated that, “as regards Article 1 (P1-1), the general principles of international law in their present connotation entail the obligation to pay compensation to non-nationals in cases of expropriation” (emphasis added). Having regard to the negotiating history as a whole, the Court considers that this Resolution must be taken as a clear indication that the reference to the general principles of international law was not intended to extend to nationals.

*The travaux préparatoires accordingly do not support the interpretation for which the applicants contended.*⁵⁰⁰

An analysis of the foregoing fragment of discourse discloses that the Court placed considerable weight on the intention of the parties in the light of the *travaux préparatoires*. The reference to them may also be made less extensively. In the case of *Johnston and Others v. Ireland*, the Court referred to the *travaux préparatoires* to seek further support for the interpretation that the protection of the right to marry under Article 12 intentionally excludes the right to divorce, as follows:

[...] Moreover, the foregoing interpretation of Article 12 (art. 12) is consistent with its object and purpose as revealed by the travaux préparatoires. The text of Article 12 (art. 12) was based on that of Article 16 of the Universal Declaration of Human Rights, paragraph 1 of which reads:

*“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.”*⁵⁰¹

This is an example of those provisions where intentional derogation has been made from the international instrument serving as the model for the Convention (“dissolution” has been excluded), but the first phrase in the foregoing fragment of discourse indicates that the *travaux préparatoires* were merely used to support the interpretation already made by the Court. On occasion, the Court may also explicitly note that there is no need to consult the preparatory work to establish the meaning of the provision. In the *Lawless* case, the Court found, approving the Commission’s line of reasoning, that there was no need to resort to the preparatory work when the wording of the provision was sufficiently clear.⁵⁰² The Court, however, only seldom refers to the “*travaux préparatoires*” of the Convention to support the general rules of interpretation under the Vienna Convention on the Law of Treaties⁵⁰³. The approach of the European Court

500 *James and Others v. the United Kingdom*, judgment of 21 February 1986, Series A 98, § 64.

501 *Johnston and Others v. Ireland*, plenary judgment of 18 December 1986, Series A 112, § 52.

502 *Lawless v. Ireland*, judgment of 1 July 1961, Series A 3, § 11. The Commission considered that it was not permissible to do so, finding that this was a well-established rule concerning the interpretation of international treaties. In support of its reasoning, the Commission had, however, resorted to the preparatory work and to a comparison of the two authentic language versions of the Convention, noting that no support for the Government’s submissions was received from the preparatory work. See also White & Ovey 2010, p. 66 and 67.

503 See Matscher 1998, p. 19.

of Justice to preparatory work in respect of the founding Treaties seems to be rather similar in that they are only seldom referred to.⁵⁰⁴

As Danelius observes, there is a good reason for the European Court of Human Rights not to refer to the preparatory work. It is characteristic of the European Court of Human Rights to apply a dynamic approach to the interpretation of the Convention, taking into account the development of society and changes in legal thinking in the States parties⁵⁰⁵, and in view of the nature of the Convention as a living instrument⁵⁰⁶. There is some truth in that statement. It is unclear, in the light of the preparatory work of the Convention whether the parties have intended to go as far as the Court has gone. However, in the light of the preamble to the Convention and its preparatory work there has been a clear intention to go further at the European level, when compared with the international instruments, and the responsibility for interpretation has intentionally been transferred to the European Court of Human Rights. A considerable part of the provisions refer to national laws, and nor are those static.

There are also other supplementary means of interpretation available, although it may be difficult to say whether they should rather be included in the concept of context. For example, in assessing whether the situation in a certain State is in compliance with the provisions of the Convention, the Court may compare it with the situation in other States parties to the Convention. For example, in the case of *Vogt v. Germany*, the Court assessed the requirement of political loyalty imposed on civil servants, by comparing its existence with other States as well as other parts of Germany as follows:

*[...] Another relevant consideration is that at the material time a similarly strict duty of loyalty does not seem to have been imposed in any other member State of the Council of Europe, whilst even within Germany the duty was not construed and implemented in the same manner throughout the country; a considerable number of Länder did not consider activities such as are in issue here incompatible with that duty.*⁵⁰⁷

In that fragment of discourse, the Court uses external elements of argumentation in negative linguistic terms, stating that something does not exist in the light of external sources of argumentation. Such negative linguistic statement has also been used for example in the case of *Maaouia v. France*, when determining whether exclusion orders should be classified as criminal law sanctions within the meaning of Article

504 Arnull 1998, p. 120 and 121.

505 Danelius 2012, p. 50.

506 See e.g. the judgments in the cases of *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A 26, § 31, and *Matthews v. United Kingdom*, Grand Chamber judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, § 39.

507 *Vogt v. Germany*, Grand Chamber judgment of 26 September 1995, Series A 323, § 59.

5, paragraph 1, of the Convention, in which the Court sought further support for its interpretation by reasoning as follows:

*On that subject, the Court notes that, in general, exclusion orders are not classified as criminal within the member States of the Council of Europe. Such orders, which in most States may also be made by the administrative authorities, constitute a special preventive measure for the purposes of immigration control and do not concern the determination of a criminal charge against the applicant for the purposes of Article 6 § 1. The fact that they are imposed in the context of criminal proceedings cannot alter their essentially preventive nature. It follows that proceedings for rescission of such measures cannot be regarded as being in the criminal sphere either [...]*⁵⁰⁸

Thus, in that case, the Court carried out comparison between the criminal law systems and legislations of the member States. An analysis of the discourse reveals that although it is apparent from the text that the Court has resorted to comparison, it is difficult to analyse how exactly the comparison has taken place on the basis of the foregoing two fragments of discourse. According to Pellonpää & al., comparison between different legal systems by the Court is not always systematic⁵⁰⁹, which statement finds support in case law. Comparison may also take place between the two language versions of the Convention, in accordance with the special rules in Article 33 of the Vienna Convention on the Law of Treaties. For example, in the case of *Wemhoff v. Germany*, the Court reasoned as follows:

The Court cannot accept this restrictive interpretation. It is true that the English text of the Convention allows such an interpretation. The word “trial”, which appears there on two occasions, refers to the whole of the proceedings before the court, not just their beginning; the words “entitled to trial” are not necessarily to be equated with “entitled to be brought to trial”, although in the context “pending trial” seems to require release before the trial considered as a whole, that is, before its opening.

But while the English text permits two interpretations the French version, which is of equal authority, allows only one. According to it the obligation to release an accused person within a reasonable time continues until that person has been “jugée”, that is, until the day of the judgment that terminates the trial. Moreover, he must be released

508 See *Maaouia v. France*, Grand Chamber judgment of 5 October 2000, Reports of Judgments and Decisions 2000-X , § 39. *Vogt v. Germany*, Grand Chamber judgment of 26 September 1995, Series A 323, § 59,

509 Pellonpää & al. 2012, p. 293.

“pendant la procédure”, a very broad expression which indubitably covers both the trial and the investigation.

*Thus confronted with two versions of a treaty which are equally authentic but not exactly the same, the Court must, following established international law precedents, interpret them in a way that will reconcile them as far as possible. [...].*⁵¹⁰

Thus, the Court used the method of reconciliation between the language versions as referred to in the Vienna Convention. Comparison between language versions is not usual, and has mainly taken place in some early case law. Whereas the comparison between the two language versions of the Convention represents an internal element of argumentation, relating to the narrower concept of context, the comparison of developments in the States parties represents a wider context, an external perspective of argumentation in the same way as other international instruments or provisions of international law. Senden, on the one hand, has presented some criticism concerning the use of comparison by the Court, finding that there is obscurity in how the Court has reached a conclusion on the existence of consensus or common tradition in some cases, whereas in others it has not found enough support for its existence.⁵¹¹ The analysis made of the foregoing fragments of discourse appears to support at least to some extent that criticism. Senden has, on the other hand, considered that although it might be desirable to see more transparent and revealing interpretative conclusions in the case law of the European Court of Human Rights, it often means a more substantive approach, which could in turn result in resistance from states that do not agree with such a substantive approach.⁵¹² Kiikeri considers the comparative method used by the European Court of Human Rights more pluralistic than the one applied by the European Court of Justice, demonstrating a variety of comparative interpretations to the same subject. Nevertheless, he also points out that the European Court of Human Rights tends to rather use the comparative method in support of conservative views. Thus, the comparative method has, in the view of Kiikeri, only seldom been used by the Court to justify a change in legal interpretation. The comparative method is closely related to those situations where the Court has afforded the respondent State a wide margin of appreciation, i.e. has decided that the national authorities are in a better position to assess the situation.⁵¹³ That statement also finds support from an overview of the Court’s case law as a whole. However, there are also examples of such judgments in which comparison indicates

510 *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7, §§ 7 and 8.

511 Senden 2011, p. 395.

512 Senden 2011, p. 403. Thus, her main conclusion has been that it is difficult to suggest any concrete improvements to be made, given the complicated multilevel context in which the Court operates (Ibid.).

513 Kiikeri 2001, p. 185-187.

changes in the legal culture, for example in the aforementioned cases under Article 8. The case of *Christine Goodwin v. the United Kingdom* illustrates that kind of a situation:

*[...] There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women [...]*⁵¹⁴

In the light of that judgment, the Court has resorted to both comparing social changes, developments of medicine and science and changes of legislation, as well as developments in other international instruments, to support its finding that the right to marriage between men and women should today be considered to also belong to such couples in which one of the spouses has a reassigned gender, thus extending the scope of the provision. That kind of expanding discourse further has links with certain other principles of interpretation, such as the principle of effective protection. The comparative method has the potential of demonstrating transition of the legal culture of protecting fundamental rights and human rights, although the Court has perhaps resorted to it less than it could. Thus, on the basis of an analysis of the comparative elements alone, it would be difficult to draw definitive conclusions.

3.4.5 Margin of appreciation

The principle of “margin of appreciation” is a concept which is not based on the provisions of the Vienna Convention on the Law of Treaties. Furthermore, it is not mentioned in the text of the European Convention on Human Rights. Like the principle of autonomous meaning, it is something that has appeared in the European control mechanism through the case law of the Court, and is traditionally foreign to most national legal systems. In brief, the essential elements of the doctrine, that the Court still refers to today, may be outlined as follows:

514 *Christine Goodwin v. the United Kingdom*, Grand Chamber judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, § 100.

[...] Certainly, the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals [...]. In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field [...]

Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired [...]. Furthermore, a limitation will not be compatible with Article 6 para. 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.⁵¹⁵

The margin of appreciation is often linked with the principle of proportionality as can be seen in the quotation above. In essence, the principle means that the right protected by the Convention is not an absolute one, but may be subject to reasonable and proportionate restrictions. In certain situations, the national authorities are better placed to assess whether restrictions are necessary. The principle of margin of appreciation is closely related to the restrictions allowed in respect of the protection afforded by the provisions of the Convention. According to the Convention, any restrictions must be based on law and they must be necessary in democratic society. Insofar as the necessity in democratic society is concerned, the Court has often stated that there must be a pressing social need for the restriction. For example:

[...] The adjective "necessary", within the meaning of Article 10 para. 2 (art. 10-2), implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (art. 10). [...] ⁵¹⁶; and

515 See *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A 93, § 57.

516 *Sunday Times v. the United Kingdom* (No. 2), judgment of 26 November 1991, Series A 217, § 50. See also *Tammer v. Estonia*, judgment of 6 February 2001, Reports of Judgments and Decisions 2001-I, § 60.

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. The Court notes at this juncture that, whilst the adjective “necessary”, within the meaning of Article 10 para. 2 (art. 10-2), is not synonymous with “indispensable” (cf., in Articles 2 para. 2 (art. 2-2) and 6 para. 1 (art. 6-1), the words “absolutely necessary” and “strictly necessary” and, in Article 15 para. 1 (art. 15-1), the phrase “to the extent strictly required by the exigencies of the situation”), neither has it the flexibility of such expressions as “admissible”, “ordinary” (cf. Article 4 para. 3) (art. 4-3), “useful” (cf. the French text of the first paragraph of Article 1 of Protocol No. 1) (P1-1), “reasonable” (cf. Articles 5 para. 3 and 6 para. 1) (art. 5-3, art. 6-1) or “desirable”. Nevertheless, it is for the national authorities to make the initial assessment of the reality of the pressing social need implied by the notion of “necessity” in this context.

Consequently, Article 10 para. 2 (art. 10-2) leaves to the Contracting States a margin of appreciation. [...] ⁵¹⁷

Thus, as the foregoing fragment of discourse indicates, the Court has also explained in detail what is meant by “pressing social need”, implying that restrictions on the freedom of expression are to be avoided and limited to the strictly necessary. Even under national constitutional law, rights are not considered absolute in the sense that they could not be restricted under any circumstances. In constitutional law, a distinction is drawn between restriction or limitation of rights and a temporary derogation from the protection afforded⁵¹⁸. The Finnish Constitution, for example, does not contain any general limitation or derogation clause but the possibility of derogation is provided for in various fundamental rights provisions such as the provision on the freedom of expression.⁵¹⁹

According to Yourow, however, the margin of appreciation doctrine emerged first through cases in which States parties were considered to have the right to derogation from the Convention in a situation of a public emergency which threatens the life of nation⁵²⁰. In his view, the origins of the doctrine are already in the *Larwless* case concerning preventive detention of a member of the Irish Republican Army, in which the Court reasoned with detailed description of facts as follows:

517 *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A 24, § 48.

518 See Ojanen 2001, p. 65.

519 For more detailed analysis concerning the possibilities of limiting fundamental rights under the Constitution, see Ojanen 2001, p. 67-75.

520 Yourow 1996, p. 15.

Whereas, in the general context of Article 15 (art. 15) of the Convention, the natural and customary meaning of the words “other public emergency threatening the life of the nation” is sufficiently clear; whereas they refer to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed; whereas, having thus established the natural and customary meaning of this conception, the Court must determine whether the facts and circumstances which led the Irish Government to make their Proclamation of 5th July 1957 come within this conception; [...]

Whereas, despite the gravity of the situation, the Government had succeeded, by using means available under ordinary legislation, in keeping public institutions functioning more or less normally, [...];

Whereas, in conclusion, the Irish Government were justified in declaring that there was a public emergency in the Republic of Ireland threatening the life of the nation and were hence entitled, applying the provisions of Article 15, paragraph 1 (art. 15-1), of Convention for the purposes for which those provisions were made, to take measures derogating from their obligations under the Convention.⁵²¹

An analysis of the Court’s discourse indicates, however, that it indeed is a description of a typical situation to which the principle of margin of discretion or appreciation relates, but the principle itself is difficult to identify. The Court describes the situation in detail, but does not clearly state that it is for the national authorities to assess what is strictly required by the situation. When looking at the linguistic elements of discourse, the words “the Irish Government were justified” are a simple conclusion on the basis of facts. The Court has later expressed itself in clearer terms, starting with the concept of “discretion”. Still in the case of *Klass and Others v. Germany*, also pertaining to national security, the Court refers clearly to the principle by using the term “discretion”, as follows:

As concerns the fixing of the conditions under which the system of surveillance is to be operated, the Court points out that the domestic legislature enjoys a certain discretion. It is certainly not for the Court to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (cf., mutatis mutandis, the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 45–46, para. 93, and the Golder judgment of 21 February 1975, Series A no. 18, pp. 21–22, para. 45; cf., for Article 10 para. 2, the Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41–42, para. 100, and the Handyside judgment of 7 December 1976, Series A no. 24, p. 22, para. 48).

521 *Lawless v. the United Kingdom*, judgment of 1 July 1961, Series A 3, §§ 28 to 30.

*Nevertheless, the Court stresses that this does not mean that the Contracting States enjoy an unlimited discretion to subject persons within their jurisdiction to secret surveillance. [...]*⁵²²

The above fragment of discourse also clearly indicates the role of national authorities. As appears from the cases of *Sunday Times* and *Handyside* cited in the foregoing, the term “discretion was later replaced with the French concept “margin of appreciation” despite that it is foreign to the English language and legal system⁵²³.

While the application of the doctrine was rather rare at the beginning, since the Belgian language dispute⁵²⁴ it has gradually started to gain wider application, apart from national security, in other types of cases involving important national interests such as public morals, the common idea being that in these types of cases the national authorities are considered to be better placed to assess the requirements of the situation than an international judicial body which is geographically and sometimes in terms of time distant from the events involving a restriction of rights⁵²⁵. Thus, the doctrine highlights the subsidiary role given to the Convention in such cases, and is admittedly a controversial one particularly for the reason that it is applied differently depending on the degree of discretion allowed to the state varying according to the context⁵²⁶. Letsas criticises the Court for controversy surrounding the doctrine of margin of appreciation, which in his view has been caused by a failure to distinguish between what he calls the substantive concept of the doctrine and the structural concept of the doctrine. In his view, the substantive concept is most clearly related to the limitation clauses in Articles 8 to 11 of the Convention. The structural concept is essentially

522 *Klass and Others v. Germany*, plenary judgment of 6 September 1978, Series A 28, § 49.

523 According to Yourow, the origins of the margin of appreciation doctrine can be found in the classical martial law doctrine and in the jurisprudence of the French *Conseil d'Etat* and other equivalent continental institutions, reviewing the legality of administrative action and discretion. The term itself has existed in the French legal system as such (*marge d'appréciation*) but the German system contains some comparable concepts (see Yourow 1996, p. 14). Yourow names the German principles of *Beurteilungsspielraum*, *Ermessensfehler*, *Ermessensspielraum*, *Ermessensmissbrauch*, *Ermessensüberschreitung*, and *unbekannte/unbestimmte Rechtsbegriffe* as being close concepts to that of margin of appreciation.

524 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (Application n° 1474/62; 1677/62; 1691/62; 1769/62; 1994/62; 2126/62), judgment of 23 July 1968. That case shows that the term “discretion” was in fact introduced by the Commission (see section A, § 4).

525 Yourow 1996, p. 21. Such other types of cases include e.g. freedom of expression cases under Article 10 (see *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A 24, § 47, and *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Series A 30, §§ 58 and 59, in which the term “margin of appreciation” is already used), cases concerning the lawfulness of detention under Article 5 (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A 114, § 50), and cases concerning the right to respect for private and family life under Article 8 (see *Dudgeon v. the United Kingdom*, judgment of 22 October 1981, Series A 45, § 52).

526 Harris & al. 2014, p. 16 and 17.

related to the expression according to which national authorities are better placed to assess what is required by the situation.⁵²⁷ In this respect, Letsas further criticises the Court for rather taking the moralistic preferences of the majority of states (European consensus) as being synonymous with the idea of public morals, instead of leaving it for the national authorities to assess what the moralistic preferences of the majority are. According to him, the original idea (as reflected in the aforementioned *Handyside* and *Sunday Times* judgments) was that requirements of morals vary from place to place and from time to time and state authorities are better placed to define and apply these requirements “by reason of their direct and continuous contact with the vital forces of their countries”.⁵²⁸ It is indeed true, in the light of the Court’s case law, that it is sometimes unclear on what basis the Court makes its finding as regards reference to public morals, but on the other hand, some commentators have called for even stronger emphasis on the concept of European consensus by means of comparison, which is for the purposes of this chapter analysed as a separate standard of interpretation (see section 3.4.6 below). However, I would not find the absence of a clear distinction between the different aspects of the margin of appreciation called for by Letsas that problematic. Instead, there could even be a risk of a state getting away with a clear problem in legislation where the Court did not seek to find some common ground for assessment of public morals.

Harris & al. even warn about the risk that as a result of the application of the margin of appreciation a state’s law or conduct might even escape condemnation⁵²⁹. In the light of the analysis of case law in section 4.5 below, I would not find that a huge concern for the Finnish legal system. It is in fact rather seldom that national jurisdictions invoke the doctrine to merely state that there is no interference with rights. In my view, the doctrine of margin of appreciation as such is not that well suitable for being applied at the national level, as it is more a means of shifting the responsibility for the assessment of the situation to the national authorities. Rather, in the case of Finnish supreme jurisdictions, they resolve the cases relating to derogation clauses by assessing what is in fact required by the situation and what are the acceptable limits of interference. This does not mean that there would be no protection of fundamental or human rights, but the Finnish supreme jurisdictions have aimed at ensuring the minimum protection even in cases such as national security balanced against the right to privacy. Thus, although national authorities enjoy a certain margin of appreciation in the field of national security, for example, it does not mean that the applicants should be deprived of access to judicial assessment of whether the interference with the right to private life has remained within the acceptable limits. In case such a deprivation takes place, it could give reason to take

527 Letsas 2007, p.81, 85, 90 and 91.

528 Letsas 2007, p. 121.

529 Harris & al. 2014, p. 11.

the case to the European Court of Human Rights under the procedural provisions of the Convention, particularly Article 13 but also other procedural safeguards based on the substantive Convention rights⁵³⁰. As observed by Brems, particularly in those cases where the domestic margin of appreciation is wide, procedural scrutiny by the European Court of Human Rights functions as a check on state discretion, although this scrutiny is not limited to the situations of a wide margin of appreciation⁵³¹. This makes it important to pay attention to the reasoning in the national judgments.

Nevertheless, considering that the principle of margin of appreciation is not based on the Vienna Convention on the Law of Treaties, and it is only seldom known in a national legal system, its application has the potential of creating challenges at the national level or it may be easily applied in situation where it is perhaps not the best option for the interpretation of the Convention article. In this respect, it is particularly the area of restrictions based on public morals under Articles 8 and 10 that may prove challenging⁵³². This has probably been the most usual source of confusion and is closely related to the principle of dynamic or evolutive interpretation explained in section 3.4.9 below. The application of the principle of margin of appreciation is presumably easiest for those legal systems, where it is traditionally known. However, an overview of the national case law of those legal systems indicates that the principle is not usually referred to in connection with the application of the Convention or the case law of the European Court of Human Rights. As regards those legal systems, where it is more usual to have detailed references to case law, one may note that the term margin of appreciation has not existed in the legal language of the English legal system, nor in those of the Nordic legal systems, but in the same way as in the German legal system, close concepts can be found. For example, in the Finnish legal system, the terms “*harkinta*” and “*harkintavaltta*” could be used, and the closest Swedish equivalent would be “*prövning*”. Perhaps that explains that in some national case law in Finland, the concept of margin of appreciation has been referred to as a justification for derogations from the Convention right, as explained in section 4.5 below.

530 For an overview, see Brems 2013, The procedural obligations under substantive provisions, such as Articles 8 and 10, may be both positive and negative obligations on states, although this distinction is not always that clear. At any rate, it may be necessary for the Court to verify the quality of domestic legislation from the point of view of whether it affords sufficient procedural protection against arbitrary interference (p. 139), and the absence of such safeguards could even result in a violation of the substantive right under the Convention article in question for the reason that the right cannot be effectively enjoyed without effective procedures (p. 147).

531 Brems 2013, p. 160. In the view of Brems, a finding of deficient procedural safeguards should automatically lead to a narrow margin of appreciation, leaving less room for domestic authorities to restrict human rights.

532 This is also named by Letsas who refers to the idea that in those cases where there is no uniform conception of public morals in Europe, the national authorities are better placed to assess the local values. (Letsas 2007, p. 91)

When compared with the principles of autonomous meaning and effectiveness, the principle of margin of appreciation has been more beneficial for the respondent Governments, and it indeed may work to the opposite direction instead of strengthening the protection of fundamental rights and human rights, if not applied with caution. In the cases where the margin of appreciation has been referred to, some problems of linguistic interpretation have also arisen. On the basis of an analysis of the fragments of discourse cited in the foregoing, one may note that in general, there are hardly any signs of a transition of legal culture linked with the application of the principle of margin of appreciation. Rather, that principle is a sign of a situation where there is little room for strengthening the legal protection. Should there be indications of change, they are usually based on developments in the national legislation. In general, the style of reasoning in connection with references to the margin of appreciation is rather brief and mechanic when compared with those judgments where the Court resorts to expanding the scope of Convention rights. Further, the general practical or moral argumentation is not always particularly convincing, although legal arguments as such are persuasive.

3.4.6 European standard or European consensus

One principle limiting the application of the principle of margin of appreciation is that of a European standard, which may also appear in the case law of the European Court of Human Rights with different linguistic expressions, including “European consensus”, “common ground” or “common conceptions”, although the Court may be criticised for having sometimes an inconsistent approach to its use⁵³³. The margin of appreciation left for the national authorities is smaller in cases where the Court considers a common European standard to exist. This has often been the case in respect of the freedom of expression, for example, and the Court has been able to assess the necessity of restrictions independently.⁵³⁴ For example, in the case of *Sunday Times*, the Court has stated the main principles of the freedom of expression, constituting clearly established common ground in the States parties to the Convention and entailing a narrow margin of appreciation, as follows:

[...] Freedom of expression constitutes one of the essential foundations of a democratic society; subject to paragraph 2 of Article 10 (art. 10-2), it is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Freedom of expression, as enshrined in Article 10 (art. 10), is subject to a number of exceptions

533 See notes 511 and 569.

534 Pellonpää & al. 2012, p. 306 and 307, Matscher 1998, p. 34 and 35.

which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established. [...] ⁵³⁵

Thus, although the wording does not clearly refer to a common European standard, it is considered to exist in those cases where the restrictions on the enjoyment of the right in question must be interpreted narrowly. Instead, the Court often refers explicitly to a European standard, European consensus or common conception or ground in negative terms, i.e. by stating where it is not possible to find that it exists. That is often the case in respect of the protection of morals or the freedom of religion, as appears from the foregoing section on the margin of appreciation. For example, in the case of *Handyside*, the Court reasoned as follows:

[...] In particular, it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era which is characterised by a rapid and far-reaching evolution of opinions on the subject. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the “necessity” of a “restriction” or “penalty” intended to meet them. [...] ⁵³⁶

Further, in the case of *Otto Preminger Institut*, the Court stated that

*As in the case of “morals” it is not possible to discern throughout Europe a uniform conception of the significance of religion in society (see the *Müller and Others v. Switzerland* judgment of 24 May 1988, Series A no. 133, p. 20, para. 30, and p. 22, para. 35); even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference. ⁵³⁷*

535 *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Series A 30, § 50.

536 *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A 24, § 48.

537 See e.g. *Otto-Preminger-Institut v. Austria*, judgment of 20 September 1994, Series A 295-A, § 50. See also *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A 133, §§ 30 and 35, and *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, Series A 276, § 35.

In those fragments of discourse, the Court expresses the situation in negative terms, i.e. a European standard does not exist. Thus, by way of drawing an *e contrario* conclusion from the above fragments of discourse, a European standard of protection typically exists in such cases where there is less room for changing the provisions of law and they remain rather static. The Court may also use different types of wordings when referring to the European standard or a uniform European conception, for example as follows:

As to legal developments in this area, the Court has examined the comparative study which has been submitted by Liberty (see paragraph 35 above). However, the Court is not fully satisfied that the legislative trends outlined by amicus suffice to establish the existence of any common European approach to the problems created by the recognition in law of post-operative gender status. In particular, the survey does not indicate that there is as yet any common approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection, or the circumstances in which a transsexual may be compelled by law to reveal his or her pre-operative gender.⁵³⁸; or

*[...] These observations are particularly relevant here. Several States have, through legislation or by means of legal interpretation or by administrative practice, given transsexuals the option of changing their personal status to fit their newly-gained identity. They have, however, made this option subject to conditions of varying strictness and retained a number of express reservations (for example, as to previously incurred obligations). In other States, such an option does not – or does not yet – exist. It would therefore be true to say that there is at present little common ground between the Contracting States in this area and that, generally speaking, the law appears to be in a transitional stage. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation. [...]*⁵³⁹

Although the linguistic expression is slightly different, an analysis of the Court's discourse indicates that there is no difference in the way in which it is used. The European standard, which is closely connected with the margin of appreciation, may sometimes be difficult for individual States to conceive. National courts and authorities seldom make such an extensive comparison between standards of the protection of rights in different states that it would affect their own decision-making. The concept of a European standard, as a guiding principle concerning the interpretation of the Convention, is also based on the case law of the European Court of Human Rights. Furthermore, the

538 *Sheffield and Horsham v. the United Kingdom*, Grand Chamber judgment of 30 July 1998, Reports of judgments and decisions 1998-V, § 57.

539 *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A 106, § 37.

Court's opinion on various issues seems to have changed along with time, although in some cases slowly. For example, in early cases concerning the rights of homosexuals and transsexuals the Court did not find a common European standard to exist, but afforded the States a wide margin of appreciation. However, since 2002, the Court has been more willing to recognise that there is an emerging change in the legal situation the change of sex, for example, should result in certain legal effects that need to be recognised.⁵⁴⁰ Such evolving interpretation by the Court may create some challenges of application of the Convention at the national level, which may be resolved by resorting increasingly to principles of interpretation applied by the European Court of Human Rights. In any case, the application of the principle of European standard leaves some room for strengthening the legal culture of protecting fundamental rights and human rights, and the fragments of discourse analysed in the foregoing indicate that it is often linked to signs of transition of legal culture, although it is applied together with other principles of interpretation. The relevant linguistic elements may include expressions such as “legal developments”, “legislative trends” or “transitional stage” as well as simple statements of fact and law. However, the other relevant principles of interpretation, particularly the principle of dynamic interpretation and principle of autonomous meaning, are more clearly those that allow considerable transition of the legal culture.

3.4.7 Principle of proportionality

Apart from the European standard, the margin of appreciation is restricted by the principle of proportionality. The principle of proportionality is most evident in those situations where the Convention expressly allows restrictions upon a right⁵⁴¹, but it is present in any case law of the European Court of Human Rights and should not be unknown in national legal systems⁵⁴². Raitio observes that in Finland the principle has been known at least since the 16th century⁵⁴³. The principle of proportionality is present, in particular, in those fragments of discourse where the Court assesses whether the restrictions on the enjoyment of the right in question are proportionate and justified and where it needs to balance conflicting rights against one another. Cases concerning freedom of expression typically involve its balancing against other conflicting interests, for example the right to privacy or the protection of morals. In those cases, for example, the Court has expressed the principle of proportionality in essence as follows:

In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held

540 See *Christine Goodwin v. the United Kingdom*, Grand Chamber judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, § 85.

541 Harris & al. 2014, p. 13.

542 Matscher 1998, p. 37.

543 Raitio 2005, p. 357.

*against the applicant and the context in which he made them. In particular, it must determine whether the interference in issue was “proportionate to the legitimate aims pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient” [...] In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts [...].*⁵⁴⁴

In that fragment of discourse, the expression used for referring to the principle of proportionality is very clear (“whether the interference in issue was proportionate to the legitimate aim pursued”). On occasion, the linguistic expression used may be less clear. For example, the Court has reasoned as follows on the need to reconcile the conflicting rights:

*Nevertheless, Article 10 para. 2 (art. 10–2) does not give the Contracting States an unlimited power of appreciation. The Court, which, with the Commission, is responsible for ensuring the observance of those States’ engagements (Article 19) (art. 19), is empowered to give the final ruling on whether a “restriction” or “penalty” is reconcilable with freedom of expression as protected by Article 10 (art. 10). The domestic margin of appreciation thus goes hand in hand with a European supervision. Such supervision concerns both the aim of the measure challenged and its “necessity”; it covers not only the basic legislation but also the decision applying it, even one given by an independent court. In this respect, the Court refers to Article 50 (art. 50) of the Convention (“decision or ... measure taken by a legal authority or any other authority”) as well as to its own case-law (Engel and others judgment of 8 June 1976, Series A no. 22, pp. 41–42, para. 100).*⁵⁴⁵

In that fragment of discourse, the expression “whether [...] is reconcilable with” indirectly refers to the principle of proportionality and the need to carry out a balancing exercise. In the protection of morals, again, the national authorities enjoy a relatively wide margin of appreciation, but it is not unlimited. The principle of proportionality is of importance particularly for the press in their task of informing the public of matters of general importance. The right to the freedom of expression is subject to restrictions, but the Court has stated on numerous occasions that “the exceptions set out in Article 10 § 2, [...] must [...] be construed strictly [...and the] need for

544 *Tammer v. Estonia*, judgment of 6 February 2001, Reports of Judgments and Decisions 2001-I, § 61.

545 *Handyside v. the United Kingdom*, judgment of 7 December 1976, Series A 24, § 49.

any restrictions must be established convincingly⁵⁴⁶, which narrows the scope of the margin of appreciation afforded to the State. Thus, the Court has held, for example, that the limits of acceptable criticism are wider as regards a politician as such than as regards a private individual⁵⁴⁷. The Court set such limits in its case law by excluding from the freedom of expressions for example insults without being considerations of general importance⁵⁴⁸ or information of an intimate nature⁵⁴⁹. Nor are direct threats considered acceptable by the Court⁵⁵⁰.

The principle of proportionality is present even in those cases involving the protection of the rights under Article 8 of the Convention, which do not involve the freedom of expression as a conflicting interest, but rather the interests of society. For example, in the case of *K. and T. v. Finland*, the Court stated concerning the application of the principle of proportionality as follows:

*[...] The reasons relied on by the national authorities were relevant but, in the Court's view, not sufficient to justify the serious intervention in the family life of the applicants. Even having regard to the national authorities' margin of appreciation, the Court considers that the making of the emergency care order in respect of J. and the methods used in implementing that decision were disproportionate in their effects on the applicants' potential for enjoying a family life with their new-born child as from her birth. This being so, whilst there may have been a "necessity" to take some precautionary measures to protect the child J., the interference in the applicants' family life entailed in the emergency care order made in respect of J. cannot be regarded as having been "necessary" in a democratic society.*⁵⁵¹

The above fragment of discourse indicates that, when applying the principle of proportionality, the Court carefully assesses the restrictions imposed on the enjoyment of the right to private life against the need of society to protect the child, by examining to what extent the measures were necessary and what their impact was in view of the aim. Thus, the principle of proportionality is closely related to the idea of necessity in democratic society. In other words, the restrictions imposed must not go further than what is necessary in democratic society and they must be proportionate to the legitimate

546 See e.g. *Tammer v. Estonia*, judgment of 6 February 2001, Reports of Judgments and Decisions 2001-I, § 59. See also *Lingens v. Austria*, judgment of 8 July 1986, Series A 103, § 41, and *Nilsen and Johnsen v. Norway*, Grand Chamber judgment of 25 November 1999, Reports of Judgments and Decisions 1999-VIII, § 43.

547 *Lingens v. Austria*, judgment of 8 July 1986, Series A 103.

548 *Tammer v. Estonia*, judgment of 6 February 2001, Reports of Judgments and Decisions 2001-I.

549 *Ruusunen v. Finland*, judgment of 14 January 2014 (Appl. No. 73579/10).

550 *Delfi AS v. Estonia*, judgment of 10 October 2013 (Appl. No. 64569/09).

551 *K. and T. v. Finland*, judgment of 12 July 2001, Reports of Judgments and Decisions 2001-VII, § 168.

aim pursued. Thus, the Court needs to assess the seriousness of the violation of the protected right in the light of the importance of the need for the restriction. However, as is pointed out by Pellonpää & al., the necessity in democratic society is also assessed in the light of the historical and other circumstances of the State concerned. He raises the question of whether this might lead to different interpretations of rights in respect of different States parties to the Convention⁵⁵². This might also create confusion concerning the interpretation of the Convention in the long run, considering that national courts and authorities today increasingly follow the Court's case law. It is difficult to say to what extent such different results in respect of different States exist, but in the assessment of Pellonpää & al., they are relatively rare⁵⁵³. In the same way as some of the aforementioned principles, the principle of proportionality leaves some room for strengthening the protection of fundamental rights and human rights, being a principle limiting the measures that the national authorities may take in restricting rights. However, the fragments of discourse of the European Court of Human Rights, in which the application of the principle of proportionality appears, do not show much signs of a transition of the legal culture as such. Thus, it is not among those principles that allow for the most considerable transition of the legal culture, but it rather ensures through its application that the protection remains at a high European level. When assessing the judicial style in connection with the application of the principle of proportionality, one may note that the general practical reasoning supplementing the legal arguments appears to be profound and thus rather persuasive. Given the rather static nature of the high standard of protection, the principle of proportionality and the relevant legal argumentation and general practical argumentation in the European case law should be rather easy for the Finnish supreme jurisdictions to adopt. Although it does not show strong elements of transition of the legal culture at the European level, except perhaps over a longer period of time, the principle of proportionality may be used at the national level to strengthen the standards of protection.

3.4.8 Principle of effectiveness and positive obligations

The principle of effectiveness is closely related to that of autonomous meaning. According to the words of the Court, the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective⁵⁵⁴. The Court has further stated that “in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental

552 Pellonpää & al. 2012, p. 310.

553 Pellonpää & al. 2012, p. 310.

554 *Airey v. Ireland*, judgment of 9 October 1979, Series A 32, § 24. See also *the Case “relating to Certain aspects of the laws on the use of languages in education in Belgium” v. Belgium* (so-called “Belgian linguistic case”), judgment of 23 July 1968, Series A 6, §§ 3 and 4.

freedoms”⁵⁵⁵. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective⁵⁵⁶. The Convention leaves the national authorities a considerable margin of appreciation in deciding how to guarantee the protection of the rights set out in the Convention, but the persons protected by the Convention must be able to effectively enjoy those rights. As appears from the foregoing, the Court has accepted, among others, a wide margin of appreciation in respect of the legitimate aim of protecting national security, but even in those cases there must exist adequate and effective guarantees against abuse.⁵⁵⁷ The principle of effectiveness is an underlying principle, which is related to the possibilities of de facto applying and enforcing all the Convention rights, and it has become an essential part of the Court’s case law. Thus, for example, in the case of *Airey*, the Court further reasoned as follows:

[...] It must therefore be ascertained whether Mrs. Airey’s appearance before the High Court without the assistance of a lawyer would be effective, in the sense of whether she would be able to present her case properly and satisfactorily.

[...] It seems certain to the Court that the applicant would be at a disadvantage if her husband were represented by a lawyer and she were not. Quite apart from this eventuality, it is not realistic, in the Court’s opinion, to suppose that, in litigation of this nature, the applicant could effectively conduct her own case, despite the assistance which, as was stressed by the Government, the judge affords to parties acting in person.

*In Ireland, a decree of judicial separation is not obtainable in a District Court, where the procedure is relatively simple, but only in the High Court. A specialist in Irish family law, Mr. Alan J. Shatter, regards the High Court as the least accessible court not only because “fees payable for representation before it are very high” but also by reason of the fact that “the procedure for instituting proceedings ... is complex particularly in the case of those proceedings which must be commenced by a petition”, such as those for separation (*Family Law in the Republic of Ireland, Dublin 1977, p. 21*).*

Furthermore, litigation of this kind, in addition to involving complicated points of law, necessitates proof of adultery, unnatural practices or, as in the present case, cruelty; to establish the facts, expert evidence may have to be tendered and witnesses may have to be found, called and examined. What is more, marital disputes often entail

555 *Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A 25, p. 90, § 239.

556 *Artico v. Italy*, judgment of 13 May 1980, Series A 37, p. 16, § 33. *Soering v. the United Kingdom*, judgment of 7 July 1989, Series A 161, § 87.

557 See *Leander v. Sweden*, judgment of 26 March 1987, Series A 116, §§ 59 and 60. See also *Klass and Others v. Germany*, judgment of 6 September 1978, Series A 28, §§ 49 and 50.

an emotional involvement that is scarcely compatible with the degree of objectivity required by advocacy in court.

For these reasons, the Court considers it most improbable that a person in Mrs. Airey's position (see paragraph 8 above) can effectively present his or her own case. [...]

The Court concludes from the foregoing that the possibility to appear in person before the High Court does not provide the applicant with an effective right of access and, hence, that it also does not constitute a domestic remedy whose use is demanded by Article 26 (art. 26) (see paragraph 19 (b) above).⁵⁵⁸

Thus, under the principle of effectiveness, the Court has widened the meaning of certain concepts used in the Convention, e.g. the meaning of “legal assistance” in Article 6, paragraph 3 subparagraph (c). In above fragment of discourse, the expansion of the scope is rather difficult to detect, as it arrives at the conclusion on the basis of a series of separate arguments. The Court has found that in certain civil cases, the State may be under an obligation to provide legal assistance free of charge even though the Convention explicitly imposes this obligation only in respect of criminal law cases.⁵⁵⁹ As suggested by the above fragment of discourse, the principle of effectiveness is also related to the requirement of Article 13 of the Convention that the applicants must have had an effective remedy available in the national legal system, to be able to enjoy the protection of rights guaranteed by the Convention. As observed by Danelius, it is not required that the effective remedy must be a court, but even administrative remedies may be sufficient to fulfil the criteria set out in Article 13. However, it is not enough to have a formal remedy available, but the applicants must have de facto access to the remedy to have their case examined, with reasonable prospects of success⁵⁶⁰. There are also other criteria set out by the Court, such as a decision within a reasonable time, which can also be effectively enforced.⁵⁶¹ It is further required, however, that the applicant has an arguable claim, for Article 13 on effective remedies to become applicable⁵⁶². Nor does the result of the proceedings have to be favourable for the applicant, but an arguable claim is sufficient to fulfil the requirements⁵⁶³. The principle of effectiveness is, in the light of the foregoing citations of the Court's discourse, among those that provide most potential for strengthening the protection of fundamental rights and human rights to the extent of constituting a transition of legal culture. Another such principle is the

558 *Airey v. Ireland*, judgment of 9 October 1979, Series A 32, § 24.

559 *Airey v. Ireland*, judgment of 9 October 1979, Series A 32, §§ 24 to 26.

560 See Danelius 2012, p. 506.

561 Danelius 2012, p. 508.

562 See Frowein & Peukert 2009, p. 392.

563 Frowein & Peukert 2009, p. 393.

principle of positive obligations. In its case law, the European Court of Human Rights has assessed in certain situations, whether the national authorities not only have the obligation to ensure peaceful enjoyment of the rights protected by the Convention, but also to take active steps in guaranteeing those rights. Typical situations involving the principle of positive obligations include the right to life and the prohibition of torture. For example, in the case of *L.C.B. v. the United Kingdom*, the Court assessed the existence of a positive obligation to protect life as follows:

The applicant complained in addition that the respondent State's failure to warn and advise her parents or monitor her health prior to her diagnosis with leukaemia in October 1970 had given rise to a violation of Article 2 of the Convention.

In this connection, the Court considers that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction [...] It has not been suggested that the respondent State intentionally sought to deprive the applicant of her life. The Court's task is, therefore, to determine whether, given the circumstances of the case, the State did all that could have been required of it to prevent the applicant's life from being avoidably put at risk.⁵⁶⁴

In the above fragment of discourse, the idea that the national authorities are under an obligation to take active steps to protect life is clearly expressed and derived from Article 2 itself. The signs of transition of the legal culture are, however, difficult to detect. That element is rather based on the entire judgment as a communicative event, and a series of judgments to that direction impose an obligation on the respondent State to take legislative or other measures to strengthen protection at the national level. The principle of positive obligations is interesting from a linguistic point of view particularly in those cases where it is difficult to derive from the wording of the provision in question. For example, in the case of *Aksoy v. Turkey*, although the principle is inherent in the Court's discourse, it is less expressed in less explicit terms in the following fragment of discourse:

The nature of the right safeguarded under Article 3 of the Convention (art. 3) has implications for Article 13 (art. 13). Given the fundamental importance of the prohibition of torture (see paragraph 62 above) and the especially vulnerable position of torture victims, Article 13 (art. 13) imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.

564 *L.C.B. v. the United Kingdom*, judgment of 9 June 1998, Reports of judgments and decisions 1998-III, § 36.

Accordingly, as regards Article 13 (art. 13), where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a “prompt and impartial” investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court’s view, such a requirement is implicit in the notion of an “effective remedy” under Article 13 (art. 13) (see, mutatis mutandis, the Soering judgment cited at paragraph 62 above, pp. 34–35, para. 88).⁵⁶⁵

Thus, the Court has derived the positive obligation to carry out investigations in respect of the allegation of torture, prohibited by Article 3, in the light of Article 13 and by resorting to the provisions of the International Convention on the Prohibition of Torture. Quite a few Articles of the Convention have been formulated so that they prohibit States from interfering with certain rights. It has, nevertheless, been established in the Court’s case law that all these provisions may also entail a positive obligation on the States to ensure that the persons residing in their territories also de facto can enjoy the protected rights, also vis-à-vis other private individuals. Such a positive obligation may take e.g. the form of legislation.⁵⁶⁶ Thus, it has a link with the principle of effectiveness. Along with time, the principle of positive obligations is well established today. However, in the same way as the principle of effectiveness, there are indications of transition of legal culture tied with the application of the principle of positive obligations, although the linguistic signs may not always be that apparent as for example in the case of the principle of autonomous meaning.

3.4.9 Dynamic or evolutive interpretation

In strict terms, the principle of object and purpose of the treaty suggests that the Convention should be interpreted in a manner that reflects the intention of the parties as regards the aim. Thus, it would not allow changes in society to be taken into account. One of the situations in which such a traditional approach, linked with the principle of literal interpretation, is the right to marriage under Article 12. In the case of *Johnston and Others v. Ireland* cited in section 3.4.4 above, that right was considered to belong

565 *Aksoy v. Turkey*, judgment of 18 December 1996, Reports of judgments and decisions 1996-VI, § 98.

566 Danelius 2012, p. 53 and 54.

to couples representing the opposite sexes, and the right to divorce was not considered to be included. However, for example, in the Charter for Fundamental Rights of the European Union, the reference to men and women have been explicitly excluded from the relevant provision, which gives reason to suggest that there have been developments in some States parties to the Convention. Thus, it raises the question of whether such developments in society should be taken into account in the interpretation of the Convention. The principle of dynamic interpretation entails that changes in social or political attitudes should be taken into account. The Court has repeatedly underlined that the Convention must be interpreted as a living instrument⁵⁶⁷. For example, in the case of *Tyrer*, the Court reasoned as follows:

*[...] The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. Indeed, the Attorney-General for the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review.*⁵⁶⁸

The above fragment of discourse represents the most usual way in which the Court refers to the essence of the principle, in that the Convention is interpreted by the Court according to the prevailing standards and conditions in the member States as a whole. However, the wording of the judgment in this particular case has also raised criticism for not clearly explaining how the concept of “living instrument” actually resulted in the specific way of deciding the case, without a reference to national legislations or comparative study of judicial corporal punishment it remained unclear why the Court considered the abolition of such a punishment to constitute a commonly accepted standard⁵⁶⁹. Letsas refers to the case of *Marckx*⁵⁷⁰, in which there is an important difference when compared with the *Tyrer* judgment in that the Court explicitly referred to two international conventions to demonstrate the existence of a commonly accepted standard.⁵⁷¹ There may be also other types of discourse which indirectly refer to the

567 See e.g. the judgments in the cases of *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A 26, § 31, *Loizidou v. Turkey* (Preliminary Objection), Grand Chamber judgment of 23 March 1995, Series A 310, § 71, and *Matthews v. United Kingdom*, Grand Chamber judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, § 39.

568 *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A 26, § 31.

569 Letsas 2007, p. 76.

570 *Marckx v. Belgium*, judgment of 13 June 1979, Series A 31.

571 Letsas 2007, p. 77. Letsas finds that in this judgment, the concept of “living instrument” refers in particular to evolving European attitudes and beliefs instead of some specific legislation to be found in the majority of States parties.

same principle, although the Court does not explicitly use the term “living instrument”, but refers to prevailing conditions or emerging consensus. For example, in the case of *Christine Goodwin*, the Court reasoned as follows:

Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition (see paragraphs 55–56 above). [...]

[...] The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.⁵⁷²

In that fragment of discourse, the expressions “emerging consensus” and “a continuing international trend towards legal recognition” are linguistic elements indicating ongoing transition of the legal protection of the right in question. The Court may also apply the principle that the Convention is interpreted in the light of present-day conditions with reference to the provisions of national law, particularly in those cases where the national authorities enjoy a wide margin of appreciation, and in the absence of a common European standard, for example in the case of *Hämäläinen* as follows:

In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one. [...]

Turning now to the domestic system, the Court finds that Finnish domestic law currently provides the applicant with several options. [...] Contrary to the situation in some other countries, in Finland a pre-existing marriage cannot be unilaterally annulled or dissolved by the domestic authorities. Accordingly, nothing prevents the applicant from continuing her marriage.⁵⁷³

572 *Christine Goodwin v. the United Kingdom*, Grand Chamber judgment of 11 July 2002, Reports of Judgments and Decisions 2002-VI, §§ 84 and 85.

573 *Hämäläinen v. Finland*, Grand Chamber judgment of 16 July 2014 (Appl. No. 37359/09), §§ 75 and 76.

Those fragments of discourse under Article 8 of the Convention indicate that the principle of interpretation of the Convention as a living instrument is indeed well-established in the case law, but there are several linguistic means of expressing the principle. In the above fragment of discourse in the *Hämäläinen* judgment, the transition of the legal culture is expressed more indirectly than in the preceding fragment of discourse taken from the *Christine Goodwin* judgment, as the Court refers to the situation in some other countries. The Court thus recognised the nature of the Convention as a living instrument, but found that in some situations the domestic authorities still enjoy a wide margin of appreciation and was not prepared to go as far as recognising the right to same-sex marriage. On the one hand, the dynamic or evolutive interpretation may create challenges for the national jurisdictions applying the Convention and the Court's case law, as it may potentially reduce foreseeability of judgments. On the other hand, it would be difficult to determine the precise scope of the right in great detail in a single judgment but it may need to be developed through a series of judgments, as it would be impossible to foresee all the consequences or possible occasions for its application. Thus, some development is inevitable. Nor is the concept as well known to national legal systems as the principles based on the Vienna Convention on the Law of Treaties are. The dynamic or evolutive interpretation, as a very far-reaching form of teleological interpretation, is indeed often named as a specific method of interpretation instead of or in addition to teleological interpretation⁵⁷⁴. It must be borne in mind, however, that teleological interpretation should be rather well known in national legal systems, although in some legal systems it is given more weight than in others and in some States it might at least partly derive particularly from the case law of the European Court of Human Rights. Different names could be given to the principle that the national courts apply, depending on the context. For example, in the field of criminal law, certain fundamental principles may play a role in addition to the wording of the law, e.g. the principle of the benefit of doubt, has a close connection with teleological interpretation⁵⁷⁵.

Matscher prefers to speak of evolutive interpretation instead of dynamic one as, in his view, society and consequently the legislator can be dynamic, but not a judge. The task of a judge is to interpret the rules within the meaning they have been given according to the ideological and social conceptions of the given moment.⁵⁷⁶ As observed by Harris & al., when applying the principle of dynamic interpretation, the Court must

574 For details, see Ost & van de Kerchove 1989, p. 295-300, who use the French term *l'interprétation évolutive*. Letsas, in turn, observes that a careful reading of the "living instrument" approach reveals that it is a reiteration of the Court's principle of autonomous meaning. (Letsas 2007, p. 79) These two have indeed a lot in common.

575 For more detailed analysis concerning the application of teleological interpretation at the national level, see e.g. Frände 2008, p. 544-552.

576 Matscher 1998, p. 25.

assess whether a change in the policy of the law has achieved a sufficiently wide acceptance in European states to make it possible to expand the meaning of the Convention right⁵⁷⁷. However, as is pointed out by White & Ovey, the Convention cannot be interpreted so widely as to include completely new rights into the Convention, as this could hardly be considered to have been the original meaning of the parties, and nor can it be interpreted so as to extend the jurisdictional basis of the Convention.⁵⁷⁸ That also limits the application of dynamic interpretation to those cases where the wording of the Convention provision is flexible enough. Although it may have seemed that the Court has rather been interested in evolution towards the moral truth instead of finding a common European consensus, particularly in early case law⁵⁷⁹, the Court in principle applies the principle of living instrument in both types of situations⁵⁸⁰. The principle of dynamic or evolutive interpretation is most clearly a principle that is applied in those fragments of discourse and judgments that represent changes in the case law and thus transition of the legal culture of protecting fundamental rights and human rights.

Sometimes, although rarely, the Court has been criticised for being too conservative. In the view of Orakhelashvili, the Court has in two rather recent judgments adopted too restrictive an interpretation of the provisions of the Convention, failing to accord due importance to the nature of the European Convention as an instrument of public order establishing obligations of an objective nature. Orakhelashvili even suggests that the Court feels free to pick and choose between different methods of interpretation as if there were no order or hierarchy between these methods.⁵⁸¹ However, when analysing the case law of the Court as a whole, it rather seems that the Court aims at combining methods, which has also been the intention of the drafters of the Vienna Convention. It also appears that signs of transition of the legal culture

577 Harris & al. 2014, p. 9. In the view of Harris & al., the Court has generally been cautious and has preferred to follow state practice rather than adopt a new approach.

578 White & Ovey 2010, p. 72. Despite this, they suggest that some commentators have observed a new approach to the interpretation of the Convention, which extends the evolutive approach by seeking to integrate interpretation of the civil and political rights and economic, social and cultural rights, thereby limiting the division between the Convention and the European Social Charter. (Ibid. p. 75 and 76) See also Harris & al. 2014, p. 9.

579 Letsas 2007, p. 79.

580 Mowbray 2013, p. 26–35. Mowbray provides examples of both cases in which there is evolution in social relationships (moral conceptions) and cases in which there are clearly changes in human rights standards.

581 Orakhelashvili 2003, p. 567. The judgments referred to are *Bankovic, Stojanovic, Stoimenovski, Joksimovic and Sukovic v. Belgium, the Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom*, Grand Chamber decision as to the admissibility of 12 December 2001 (Appl. No. 52207/99), and *Al-Adsani v. the United Kingdom*, judgment of 21 November 2001 (Appl. No. 35763/97).

often appear together with the application of several principles of interpretation, instead of one, although it is possible to identify signs of such transition even in the case of individual principles. Apart from the principle of dynamic interpretation, the principle of autonomous meaning represents a principle that clearly demonstrates signs of transition of the legal culture.

3.4.10 Autonomous meaning

The Vienna Convention on the Law of Treaties refers to ordinary meaning, which is the main principle of interpretation of individual terms or concepts, and to special meaning that may be given to a term or concept. The principle of autonomous meaning differs from those principles, but is closer to the idea of special meaning. The principle of autonomous meaning developed by the European Court of Human Rights in its case law is particularly interesting from a linguistic point of view, given that it is clearly attached to the meaning of words. The principle of autonomous meaning is first explained in general, with reference to views expressed by scholars, followed by a more detailed analysis of the Court's discourse in the light of case studies based on selected provisions of the Convention. The principle of autonomous meaning has raised considerable interest among scholars, particularly as it has expanded the meaning of the Convention provisions. Its application may be justified, but it may also raise concerns and criticism. With this principle, the Court means that certain concepts used in the Convention do not necessarily have the same meaning as the concepts used in national legal systems. The European Court of Human Rights has resorted to the principle of autonomous meaning to guarantee a European standard for the protection of human rights, which is enhanced by giving those concepts an independent meaning, and has done so particularly with regard to certain concepts under Articles 5, 6 and 7. In the Court's words, the principle of autonomous interpretation may be summarised for example in respect of the concept of a "penalty" in Article 7⁵⁸² as follows:

The concept of a "penalty" in this provision is, like the notions of "civil rights and obligations" and "criminal charge" in Article 6 para. 1 (art. 6-1), an autonomous Convention concept. [...] To render the protection offered by Article 7 (art. 7) effective, the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision [...].

The wording of Article 7 para. 1 (art. 7-1), second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other factors that may be taken into account as relevant in this connection are the nature and purpose of the measure

582 Article 7 falls outside the present study in other respects.

*in question; its characterisation under national law; the procedures involved in the making and implementation of the measure; and its severity.*⁵⁸³

Thus, the above fragment of discourse shows that for a measure to be characterised as a penalty, it is relevant to go beyond the word and examine the nature and purpose of the measure, apart from its characterisation under national law. The application of the principle of autonomous meaning is justified in that it makes it possible to avoid differences of application arising from differences of terminology.⁵⁸⁴ It is so particularly because, as pointed out by Sudre, the Court has resorted to it in such situations where there has been an objection by a State party to the application of a right guaranteed by the Convention, invoking a definition given to a concept in the national legal system of that State. The Court has used the principle of autonomous meaning to overrule such an objection. Thus, the Court has refused to consider the national definition as a decisive one when resorting to the principle.⁵⁸⁵ In the view of Letsas, the Court originally made use of this principle particularly to counter the possibility of circumventing the Convention guarantees⁵⁸⁶. Matscher supports this conclusion and points out that the intention of the Parties has not been to give a Convention provision a meaning that would be specific to a single State party, but there must be an intended meaning corresponding to the common intention of the Parties. Therefore, and because of the law creating-nature of the Convention, autonomous interpretation is well justified.⁵⁸⁷ Insofar as the protection of human rights is concerned, it is important to ensure the full enjoyment of rights by all subjects covered by the Convention. Pellonpää & al. indeed point out that this principle underlines the nature of the Convention as an instrument enhancing the protection of fundamental rights and freedoms, which are part of the common heritage of the States parties, instead of creating reciprocal rights for States.⁵⁸⁸ One may note that the principle of autonomous interpretation also helps avoid situations where the terminology applied within a particular legal system would be placed in a more advantageous position than others, although the Convention inevitably contains terminology that may be said to be more familiar to those legal systems that have the advantage of having English or French as the official language of legislation.

However, according to the Preamble to the Convention, its provisions derive from the common traditions of the States parties. Thus, on the one hand, Sudre raises the

583 *Welch v. the United Kingdom*, judgment of 9 February 1995, Series A 307-A, §§ 27 and 28.

584 See *White & Ovey* 2010, p. 69. See also Sudre 1998, p. 94 and 95, and Letsas 2007, p. 41, 42 and 49.

585 Sudre 1998, p. 101 and 102.

586 Letsas 2007, p. 42.

587 Matscher 1998, p. 29.

588 Pellonpää & al. 2012, p. 287.

question of whether there is place for entirely autonomous interpretation as it might be foreign to the national courts and authorities, and might thereby reduce the legitimacy of the interpretation⁵⁸⁹. Macher shares some of that criticism and has warned of the danger of going beyond the law's boundaries⁵⁹⁰. On the other hand, there are situations where the Court explicitly refers to the national legal orders, particularly in the case of lawful detention under Article 5⁵⁹¹. The most legitimate source of criticism would perhaps be, however, that the principle of autonomous meaning and interpretation probably deviates from what the authors of the Convention had in mind. Furthermore, it is questionable whether it is consistent with the principles set out in the Vienna Convention on the Law of Treaties, despite that the Court has been given considerable independence in the interpretation of the European Convention on Human Rights. Considering that certain concepts in the Convention have been given a meaning independent from those they may have been given in the national legal systems, such concepts have the potential of creating problems in the application of the Convention at the national level and may even lead to a large number of applications against the State before the European Court of Human Rights. The practice of resorting to autonomous interpretation may de facto have the potential of reducing foreseeability of the Court's judgments, even if this did not amount to illegitimate judicial discretion. However, as is pointed out by Frände, it is important that the legally correct solution is applied instead of the foreseeable one⁵⁹², bearing in mind that the legally correct meaning of a concept used in the Convention may even significantly differ from the one used in the national legal system⁵⁹³. When read in accordance with the literal meaning of words, the wording of a provision might not lead to the desired result. At any rate, the Vienna Convention on the Law of Treaties underlines the importance of bearing the object and purpose of the treaty in mind when interpreting it, which has also been paid attention to by the European Court of Human Rights.

To derive the autonomous concepts developed by the Court from its case law is not necessarily easy, although in the doctrine, various lists have been suggested⁵⁹⁴. In the view of Sudre, the differing lists only constitute further proof of that the Court

589 Sudre 1998, p. 120.

590 *Öztürk v. Germany*, judgment of 21 February 1984, Series A 73. Dissenting opinion of Judge Macher. See also Letsas 2007, p. 48 and 49. Letsas observes that if true, such a danger would entail a risk of illegitimate judicial discretion by going beyond what is accepted in domestic law.

591 Matscher 1998, p. 28.

592 Frände 2008, p. 551.

593 Letsas 2007, p. 52. Further, in such a situation, there is usually divergence in the way in which different legal systems classify the concept and understand it. (Ibid. p. 53)

594 Letsas identifies those of criminal charge, civil rights and obligations, possessions, association, victim, civil servant, lawful detention, and home (Letsas 2007, p. 42 and 43).

has not adopted a very consistent approach to the concept of autonomous meaning.⁵⁹⁵ The principle applied by the European Court of Human Rights is best highlighted by certain provisions of the Convention that have given rise to problems of interpretation, containing vague or imprecise concepts. Such concepts indeed call for efforts to harmonise the interpretation of the relevant provisions, although it may be difficult to identify precise limits⁵⁹⁶. In the following, the development of the Court's discourse and the transition of the legal culture of protecting fundamental rights and human rights are assessed in the light of case studies relating to Article 6, paragraph 1, and Article 5, paragraph 1, in respect of which it is relatively easy to identify autonomous concepts. The case law under Articles 6 and 5 has developed considerably as a result of the great number of judgments and, according to Yourow, as a result of that case law, there is already an impressive consensus in the law and practice of States parties to the Convention and the national legislation relating to due process has gradually become more uniform than e.g. family law⁵⁹⁷. Nevertheless, the extensive case law under the aforementioned articles demonstrate that there have been problems in the national legal systems, and those provisions have also produced some of the most interesting problems of interpretation from a linguistic point of view. Thus, those provisions also serve as a useful basis for assessing transition of the legal culture through the Court's case law. Furthermore, in the case of those provisions the Court has perhaps most considerably extended the scope of application of the Convention. In general, it may also be observed that the style of argumentation in the case of both dynamic interpretation and autonomous meaning include a considerable amount of general practical reasoning, which may entail the risk of weakening foreseeability of the case law and reducing the persuasiveness of the discourse. Despite that, it appears that the principle of autonomous meaning does not appear to have imposed major problems for the Finnish supreme jurisdictions. Instead, the reception of argumentation in connection with the principle of dynamic interpretation has provided more challenges. On the basis of the relevant case law, one may note that the linguistic means of referring to the autonomous meaning is rather consistent, and is as such a sign of transition of the legal culture, but the best way of detecting it is to see how the Court has expanded the scope of the Convention provision in question to cover new situations. The focus of the analysis of case law under Article 6, paragraph 1, is on the application of the principle of autonomous meaning, but the analysis will inevitably entail references to other principles and methods of interpretation. Insofar as Article 5, paragraph 1, is

595 For details, see Sudre 1998, p. 96-98. Sudre identifies only seven concepts that he would count as autonomous ones : *arrestation, droits et obligations de caractère civil, matière pénale, témoins, accusation, peine, biens*. This list differs only slightly from the more recent one identified by Letsas.

596 Letsas 2007, p. 49. According to Letsas, this is particularly because of the differences as to how the various legal systems understand and qualify these concepts.

597 See Yourow 1996, p. 186 and 187.

concerned, the analysis will focus on the aspect of extending the applicability of the right by other means.

3.4.10.1 Case study: Article 6, paragraph 1 – “civil rights and obligations”

Article 6, paragraph 1, constitutes perhaps the best known example of those provisions of the European Convention on Human Rights that have not only produced a large number of violations in most States parties, mainly due to structural problems in the legal system (length of proceedings), but have also generated problems of interpretation. More precisely, it is the concept of “civil rights and obligations” that has been particularly problematic.⁵⁹⁸ According to Article 6, paragraph 1,

“in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time”.

In the other authentic language version of the Convention, French, the expression is slightly different, as the text speaks of “*droits et obligations de caractère civil*”, but in practice the meaning is the same.

The term of “civil rights” in the European Convention on Human Rights could be considered as meaning something similar as the same term used in the International Covenant on Civil and Political Rights, as the types of rights protected by the Convention are more or less the same as those covered by the Covenant, although there are differences. First, the concept of civil rights is to be distinguished from economic and social rights⁵⁹⁹. Second, the concept has in principle been considered to be distinct from that of political rights⁶⁰⁰. The European Court of Human Rights has, however, somewhat refined these distinctions as explained below. The text of the European Convention on Human Rights does not itself clarify what is meant by “civil rights”. Nor does the International Covenant on Civil and Political Rights explicitly do so, although in the light of its preamble, the concept of “civil and political rights” is linked with the idea of civil and political freedom (civil liberties). In this context, it is interesting to note that in the Finnish translation of the Covenant, “civil rights” has been translated as “*kansalaisoikeudet*”, which could be reversely translated into English as “citizen’s rights” which is also a rather wide concept and is perhaps somewhat misleading. As

598 Karapuu 1999, p. 175 and 176. For more details, see e.g. Danelius 2012, p. 51 and 163, concerning problems in Sweden, and White & Ovey 2010, p. 247-253, for a general overview of cases under the concept of civil rights and obligations.

599 These rights are protected at the international level by the International Covenant on Economic, Social and Cultural Rights, and at the European level by the European Social Charter (revised, 1996, ETS 163).

600 *Pierre-Bloch v. France*, judgment of 21 October 1997, Reports 1997-VI.

in respect of many other provisions of the Convention, the Court has developed the interpretation of the provision through its case law and has given the concept a rather wide meaning or, in terms used by the Court, an autonomous meaning without it being dependent on its classification under national law⁶⁰¹. This principle has been reiterated in numerous subsequent judgments in the discourse of which the essential elements of the autonomous meaning can be identified:

*The Court reiterates that, according to the principles enunciated in its case-law [...] it has first to ascertain whether there was a dispute (contestation) over a "right" which can be said, at least on arguable grounds, to be recognised under domestic law. The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and, finally, the result of the proceedings must be directly decisive for the right in question.*⁶⁰²

*Article 6 § 1 of the Convention is not aimed at creating new substantive rights without a legal basis in the Contracting State, but at providing procedural protection of rights already recognised in domestic law.*⁶⁰³

*The term "right" must nevertheless be given an autonomous interpretation under Article 6 § 1 of the Convention.*⁶⁰⁴

Thus, although not dependent on national law, there must be a dispute over a right which has its basis in national law and which is already recognised in domestic law. Further, not only the existence of a right is decisive, but also the scope and manner of its exercise and the result of the proceedings must be decisive for the right. It has not been particularly problematic for the Court to determine the various situations between private parties, regulated by private law, that fall within the scope of Article 6, including e.g. the law of contract, succession law, family law, employment law and property law. However, as Harris & al. point out, it is more challenging as regards the regulation of the relations between private persons and the state⁶⁰⁵. In the light of the Court's case law, one way of defining the limits of Article 6, paragraph 1, could be by means of assessing what should be excluded from its scope of application. In the European Convention on Human Rights, the concept of civil rights is only used in Article 6, paragraph 1, and on the basis of the text of the Convention alone, it would be difficult

601 *König v. Germany*, judgment of 28 June 1978, Series A 27, § 88. See also *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A 22.

602 *Zander v. Sweden*, judgment of 25 November 1993, Series A 279-B, § 22

603 *W. v. the United Kingdom*, judgment of 8 July 1987, Series A 121-A, § 73.

604 *Alatulkkila and Others v. Finland*, judgment of 27 July 2005 (Appl. No. 33538/96), § 48.

605 See Harris & al. 2014, p. 380.

to establish the types of rights meant by the concept. One may attempt to define civil rights by first identifying those rights that could be classified as political rights – one may consider that the remaining ones are meant to be civil rights. The Court has held in the *Pierre-Bloch* judgment that the right to stand for election to national parliament, for example, does not fall within the scope of Article 6, paragraph 1, as it was a political right instead of a civil one⁶⁰⁶. An examination of the text of the Covenant reveals that only the rights related to the conduct of public affairs and elections, protected by Article 25, are expressly political rights, although there are certain rights closely related to the exercise of these rights, such as the right to hold opinions and freedom of association (Articles 19 and 22). The latter rights can also be found in the European Convention on Human Rights (Articles 9 and 11), whereas the rights relating to political life and elections are not expressly mentioned in the Convention. This would give reason to suggest that the meaning of civil rights is probably intended to be wider. Indeed, this has been confirmed by the Court's case law, and the Court has held that the exercise of the freedom of assembly and association would fall outside the scope to the extent it is related to political purposes⁶⁰⁷. In other cases, they could fall within the scope of Article 6, paragraph 1. However, normally the freedom of expression cases would enjoy protection under Article 10 and the freedom of association cases would fall within the scope of Article 11 unless the dispute in question concerns e.g. access to court. In the view of Letsas, the freedom of association has in the light of the *Chassagnou and Others* case already developed to the level of an autonomous concept in itself, which further strengthens the protection of the freedom of expression⁶⁰⁸. The impact of the wide interpretation of the freedom of association can already be seen in Finnish case law, as explained in section 4.5 below.

The European Court of Human Rights has, on occasion, excluded some rights other than political rights from the scope of application of Article 6, paragraph 1, such as cases concerning national security and immigration and asylum. In the case of *Maaouia*, for example, the Court reasoned as follows:

606 *Pierre-Bloch v. France*, judgment of 21 October 1997, Reports of Judgments and Decisions 1997-VI, §§ 50-52.

607 See *AB Kurt Kellermann v. Sweden*, judgment of 26 October 2004 (Appl. No. 41579/98) concerning the freedom of association.

608 *Chassagnou and Others v. France*, judgment of 29 April 1999, Reports of Judgments and Decisions 1999-III, § 100. In the Court's words, "Freedom of thought and opinion and freedom of expression, guaranteed by Articles 9 and 10 of the Convention respectively, would thus be of very limited scope if they were not accompanied by a guarantee of being able to share one's beliefs or ideas in community with others, particularly through associations of individuals having the same beliefs, ideas or interests. The term "association" therefore possesses an autonomous meaning; the classification in national law has only relative value and constitutes no more than a starting-point." See Letsas 2007, p.47.

The Court therefore considers that by adopting Article 1 of Protocol No. 7 containing guarantees specifically concerning proceedings for the expulsion of aliens the States clearly intimated their intention not to include such proceedings within the scope of Article 6 § 1 of the Convention.

*In the light of the foregoing, the Court considers that the proceedings for the rescission of the exclusion order, which form the subject matter of the present case, do not concern the determination of a “civil right” for the purposes of Article 6 § 1. The fact that the exclusion order incidentally had major repercussions on the applicant’s private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6 § 1 of the Convention (see, mutatis mutandis, the *Neigel v. France* judgment of 17 March 1997, Reports 1997-II, pp. 410-11, §§ 43-44, and the *Maillard v. France* judgment of 9 June 1998, Reports 1998-III, pp. 1303-04, §§ 39-41).⁶⁰⁹*

That conclusion may have a connection to the fact that the Court has also in general afforded States a wide margin of appreciation in cases relating to immigration. That approach has been confirmed in later case law⁶¹⁰ and is consistently applied in Finnish case law as explained in section 4.5 below.

The situation is not, however, that easy as is demonstrated by various examples of the Court’s case law concerning the interpretation of Article 6, paragraph 1. In respect of the concept of “civil rights” in Article 6, paragraph 1, of the Convention, it was clear that there were considerable differences in the way of classifying different types of rights in the different legal systems, most notably between the Anglo-Saxon and continental systems, and that it was not possible to found the interpretation of the concept of “civil rights” on a commonly accepted distinction between private and public law. Therefore, the European Court of Human Rights chose to give the concept a meaning that was generally applicable irrespective of differences between legal systems. Thus, given that it was hard to find a common denominator, the Court applied a negative approach to the development of an autonomous meaning. The Court has typically examined the concept of civil rights in the context of assessing whether Article 6, paragraph 1, is applicable to the case at hand. Thus, in the argumentation of the Court, there is a link between the autonomous meaning and the applicability of the right in question. As pointed out by Sudre, the applicability of the right is in fact the very essence of the

609 *Maaouia v. France*, judgment of 5 October 2000, Reports of Judgments and Decisions 2000-X, §§ 37 and 38.

610 *Mamatkulov and Askarov v. Turkey*, Grand Chamber judgment of 4 February 2005, Reports of Judgments and Decisions 2005-I, § 82, in which the Court applied the approach adopted in the *Maaouia* judgment, excluding the deportation of aliens from the scope of Article 6, paragraph 1.

process of giving a concept an autonomous meaning⁶¹¹. However, the applicability of the right does not in all cases involve a concept with an autonomous meaning, but the Court rather extends the applicability of the right, including a certain concept, to cover a wider range of activities by means of dynamic interpretation⁶¹². The Court has elaborated on the meaning of the “civil rights” on numerous occasions, and has taken a position on what types of rights should be included within the scope of Article 6, paragraph 1. The question of whether it has relevance in administrative proceedings has been important particularly for those States that draw a distinction between private and public law, including Finland. The first case of significance is considered to be the judgment given in the case of *Ringeisen v. Austria*, in which the Court stated that

[...] For Article 6, paragraph (1) (art. 6-1), to be applicable to a case (“contestation”) it is not necessary that both parties to the proceedings should be private persons, which is the view of the majority of the Commission and of the Government. The wording of Article 6, paragraph (1) (art. 6-1), is far wider; the French expression “contestations sur (des) droits et obligations de caractère civil” covers all proceedings the result of which is decisive for private rights and obligations. The English text “determination of... civil rights and obligations”, confirms this interpretation.

*The character of the legislation which governs how the matter is to be determined (civil, commercial, administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (ordinary court, administrative body, etc.) are therefore of little consequence.*⁶¹³

Thus, for the applicability of Article 6, paragraph 1, it is not decisive how a particular right is classified under national law. This does not mean that national law would not play any role, but it means that the material contents of the right in national law are more important than its classification. In the light of the case law of the European Court of Human Rights, there can be “civil rights and obligations” at stake, for example, in various cases of proceedings between a private person and the state in the fields of administrative law (such as expropriation or confiscation, and fishing rights)⁶¹⁴ and

611 See Sudre 1998, p. 103 and 104. See also Harris & al. 2014, p. 379 and 380.

612 Harris & al. 2014, p. 387. As pointed out by Harris & al., the wide meaning results partly from the extensive interpretation given to the word “determination”, but also partly from the Court’s dynamic understanding of what amounts to a right for the purposes of Article 6.

613 *Ringeisen v. Austria*, judgment of 16 July 1971, Series A 13, § 94. See also *König v. Germany*, judgment of 28 June 1986, Series A 27, § 89.

614 *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A 52, § 83, and *Posti and Rahko v. Finland*, judgment of 24 September 2002, Reports of Judgments and Decisions 2002-VII, §§ 50-58. In the *Posti and Rahko* judgment, the Court set as a decisive criterion the direct effect of limitations on fishing on the applicant’s livelihood.

claims for damages against the state e.g. on the basis of seizure of property⁶¹⁵, even where the basis of the claim is of a public law nature, and the right to engage in commercial activity or to practise a profession⁶¹⁶. What appears to be decisive is whether there are pecuniary consequences for the private person concerned, although it is not alone a sufficient criterion⁶¹⁷. It is interesting to note that, although economic and social rights fall outside the scope of the Convention as such, the Court has considered that it may be difficult to draw a distinction between civil rights and employment and social rights⁶¹⁸, and that in those cases where the private law aspects of the social security rights concerned are more dominating than the public law aspects, Article 6, paragraph 1, may apply⁶¹⁹. Instead, for example in the field of taxation, the Court has found the public law relationship to be more dominating⁶²⁰. One of the most recent problems relating to the meaning of "civil rights", and in respect of which there have been differing views in States parties, has been whether and to what extent civil servants should be afforded protection under Article 6, paragraph 1, of the Convention. In this respect, the case of *Pellegrin v. France*⁶²¹ has been a landmark case. Before the *Pellegrin* judgment the Court had held that disputes relating to the recruitment, careers and termination of service of civil servants were as a general rule outside the scope of Article 6, paragraph 1. That general principle of exclusion had however been limited and clarified in a number of judgments. In the *Pellegrin* judgment, the Court reasoned as follows:

The Court accordingly considers that it is important, with a view to applying Article 6 § 1, to establish an autonomous interpretation of the term "civil service" which would make it possible to afford equal treatment to public servants performing equivalent or

615 *Air Canada v. the United Kingdom*, judgment of 5 May 1995, Series A 316-A.

616 *König v. Germany*, judgment of 28 June 1986, Series A 27. *Bentham v. the Netherlands*, judgment of 23 October 1985, Series A 97. *Tre Traktörer Aktieföretag v. Sweden*, judgment of 7 July 1989, Series A 159. *Hornsby v. Greece*, judgment of 19 March 1997, Reports of Judgments and Decisions 1997-II, and *Kingsley v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV.

617 *Editions Périscope v. France*, judgment of 26 March 1992, Series A 234-B, §§ 39 and 40, and *Ferrazzini v. Italy*, Grand Chamber judgment of 12 July 2001, Reports of Judgments and Decisions 2001-VII, § 25.

618 In *Airey v. Ireland*, judgment of 9 October 1979, Series A 32, § 26, the Court observed that "whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of economic and social nature" and that "... there is no water-tight division separating that sphere from the field covered by the Convention".

619 *Feldbrugge v. the Netherlands*, judgment of 27 July 1987, Series A 124-A, § 40, and *Deumeland v. Germany*, judgment of 29 May 1986, Series A 100, § 74.

620 *Ferrazzini v. Italy*, Grand Chamber judgment of 12 July 2001, Reports of Judgments and Decisions 2001-VII, §§ 29 and 30.

621 *Pellegrin v. France*, Grand Chamber judgment of 8 December 1999, Reports of Judgments and Decisions 1999-VIII.

similar duties in the States Parties to the Convention, irrespective of the domestic system of employment and, in particular, whatever the nature of the legal relation between the official and the administrative authority (whether stipulated in a contract or governed by statutory and regulatory conditions of service). In addition, this interpretation must take into account the disadvantages engendered by the Court's existing case-law [...].

To that end, in order to determine the applicability of Article 6 § 1 to public servants, whether established or employed under contract, the Court considers that it should adopt a functional criterion based on the nature of the employee's duties and responsibilities. In so doing, it must adopt a restrictive interpretation, in accordance with the object and purpose of the Convention, of the exceptions to the safeguards afforded by Article 6 § 1.⁶²²

The Court thus created an even new autonomous concept, that of “civil service”, and restricted the applicability of Article 6, paragraph 1, with reference to the nature of functions of the officials. The Court thereby also set limits on the interpretation of the concept. The Court further ruled that “the only disputes excluded from the scope of Article 6, paragraph 1, of the Convention are those which are raised by public servants whose duties typify the specific activities of the public service in so far as the latter is acting as the depositary of public authority responsible for protecting the general interests of the State or other public authorities. A manifest example of such activities is provided by the armed forces and the police.”⁶²³ According to the Court itself, *Pellegrin* constitutes a first step away from the previous principle of inapplicability of Article 6 to the civil service, towards partial applicability. In a further case, *Vilho Eskelinen*, the Court has already recognised a need to develop the case law further.⁶²⁴ In the Court's view, where national law allows a dispute with a civil servant to be brought before a court, the rights at issue are deemed to be “civil”. If a domestic system bars access to a court, the Court will verify that the dispute is indeed such as to justify the application of the exception to the guarantees of Article 6. If it does not, then there is no issue and Article 6 § 1 will apply.⁶²⁵ In the view of Lemmens, although the Court

622 *Pellegrin v. France*, Grand Chamber judgment of 8 December 1999, Reports of Judgments and Decisions 1999-VIII, §§ 63 and 64.

623 *Pellegrin v. France*, Grand Chamber judgment of 8 December 1999, Reports of Judgments and Decisions 1999-VIII § 66.

624 *Vilho Eskelinen and Others v. Finland*, Grand Chamber Judgment of 19 April 2007, Reports of Judgments and Decisions 2007-II, §§ 43 to 64.

625 *Vilho Eskelinen and Others v. Finland*, Grand Chamber Judgment of 19 April 2007, Reports of Judgments and Decisions 2007-II, §§ 61 and 62. The Court found that there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies.

limited its reasoning to only apply to the situation of civil servants, this new approach reduces the importance of the nature of the right as the factor to determine whether the right is a civil one or not. In his view, it opens the door for the application of the new approach even outside civil servants and their employers.⁶²⁶ The Court has already extended the scope of application of Article 6, paragraph 1, to apply first to the right of access to higher education and later to the right of access to primary education⁶²⁷, which constitutes another recent example of extension of scope. At any rate, the case of *Vilho Eskelinen* does extend the application of Article 6 from partial applicability, as stated in the *Pellegrin* judgment, to full applicability where the civil servants have access to court.

However, in the light of Article 6, paragraph 1, it is not sufficient that the case concerns a civil right or obligation, but there must also be a dispute (*contestation*). Thus, in the case of *Bentham*, the Court has reasoned as follows:

The principles that emerge from the Court's case-law include the following:

(a) *Conformity with the spirit of the Convention requires that the word "contestation" (dispute) should not be "construed too technically" and should be "given a substantive rather than a formal meaning" [...].*

(b) *The "contestation" (dispute) may relate not only to "the actual existence of a ... right" but also to its scope or the manner in which it may be exercised [...]. It may concern both "questions of fact" and "questions of law" [...].*

(c) *The "contestation" (dispute) must be genuine and of a serious nature [...].*

(d) [...] *"the ... expression 'contestations sur (des) droits et obligations de caractère civil' [disputes over civil rights and obligations] covers all proceedings the result of which is decisive for [such] rights and obligations" [...].*⁶²⁸

In conclusion, it is easy to identify linguistically those cases where the Court has resorted to developing the concept of civil rights, and the Court in most cases explicitly refers to the principle of autonomous meaning. Particularly in the field of administrative

626 Lemmens 2013, p. 298 and 299. Lemmens bases his view on a more recent case concerning educational rights, although the Court did not refer to the case of *Vilho Eskelinen*, suggesting that the development of the case law in this respect has not ended yet.

627 See *Emine Araç v. Turkey*, judgment of 23 September 2008, Reports of Judgments and Decisions 2008, §§ 24 and 25, and *Oršuš and Others v. Croatia*, Grand Chamber judgment of 16 March 2010, Reports of Judgments and Decisions 2010, §§ 106 and 107.

628 *Bentham v. the Netherlands*, judgment of 23 October 1995, Series A 97, § 32.

law, including provisions of law on “civil service”, one may identify a clear transition of a legal culture of protecting the rights of civil servants, through the expansion of the concept of “civil rights”. It also appears that the Court has given a rather wide meaning to the concept of “dispute”, which is relevant for the interpretation of the provision. It has sometimes been suggested⁶²⁹ that in the process of giving a concept an autonomous meaning, the Court in fact seeks a common denominator, i.e. derives the meaning from the common legal traditions of the States parties, which necessarily involves comparison, and in the absence of such a common denominator, the Court gives the concept an autonomous meaning. However, Sudre points out that it is not so evident from the judgments of the Court how the common denominator is determined, although it seems clear that the Court is reluctant to reduce the common denominator to a level below what is desirable to guarantee the effective protection of the right in question. Sudre further observes that in the case of some concepts, such as the concept of civil rights and obligations, it would be difficult to establish a common denominator as the concept does not exist in the legal systems of all the States parties.⁶³⁰ Would its existence in only some legal systems be sufficient to determine that there is a common denominator? Letsas also draws attention to the challenges imposed by this semantic aspect of the principle of autonomous meaning, suggesting that the European Court of Human Rights appears to be willing indirectly to review national legislation, the emphasis being put on the domestic use of the concept⁶³¹. The seeking of autonomous meaning through such review may entail risks. At any rate, one should perhaps adopt a rather critical approach to this aspect of the autonomous meaning.

I would rather suggest that it is more usual for the Court of Human Rights to resort to further specifying the concept of civil rights by other means, particularly by means of expanding the scope of application of Article 6, paragraph 1. On occasion, elements of comparison can be identified in connection with the examination of the scope of application. The fragments of discourse analysed indicate that the transition of the legal culture of protecting fundamental rights and human rights relates to such concepts that are not particularly restrictive, but may allow differing interpretations in different States parties to the Convention. The expansion of the scope of application of Article 6, paragraph 1, in such a manner has the potential of creating challenges in the national jurisdictions. Whether that has created problems in the Finnish legal system, and whether it has resulted in an equivalent transition in Finland, is analysed

629 E.g. Sudre (1998), see notes below.

630 Sudre 1998, p. 123 and 124.

631 Letsas 2007, p. 43-46. Letsas identifies four aspects with the human rights violations based on autonomous concepts: the fallibility of national classifications, directing by the applicant of her challenge against these domestic classifications, supporting of the challenge by arguments about what really should count as an instance of the relevant legal concept in broader terms, and the interdependence of the ECHR concepts and domestic legislation.

in section 4.5 below. At any rate, Article 6, paragraph 1, and the interpretation given to the concept of civil rights constitutes a clear example of such provisions under which the legal culture at the national level has begun to evolve.

3.4.10.2 Case study: Article 6, paragraph 1 – “criminal charge”

Another example of concepts with an autonomous meaning can also be found in Article 6, paragraph 1, that of “criminal charge”.⁶³² As in respect of “civil rights and obligations”, the Convention does not define this concept either, but it has acquired its substantive meaning through the Court’s case law. The Court has rather early drawn a distinction between criminal proceedings and disciplinary proceedings, meaning that the latter fall outside the scope of Article 6, paragraph 1. However, in line with the reasoning in respect of the concept of “civil rights”, the Court has found that for the purpose of deciding whether a determination of “criminal charge” is at hand, the classification under domestic law is not decisive, although it plays a role. In respect of the distinction drawn between criminal proceedings and disciplinary proceedings, the case of *Engel and Others v. the Netherlands* is considered to be a landmark case⁶³³. In that case, while acknowledging the States’ right to draw a distinction between criminal proceedings and disciplinary proceedings but noting that this should be subject to conditions so that the object and purpose of the Convention is not put at risk, the Court outlined the criteria for the existence of a criminal charge as follows:

In this connection, it is first necessary to know whether the provision(s) defining the offence belong, according to the legal system of the respondent State, to criminal law, disciplinary law or both concurrently. This however provides no more than a starting point. The indications so afforded have only a formal and relative value and must be examined in the light of the common denominator of the respective legislation of the various Contracting States.

The very nature of the offence is a factor of greater import. When a serviceman finds himself accused of an act or an omission allegedly contravening a legal rule governing the operation of armed forces, the State may in principle employ against him disciplinary law rather than criminal law. [...]

However, supervision by the Court does not stop here. Such supervision would gener-

632 For a detailed analysis of case law relating to this concept, see e.g. Pellonpää & al. 2012, p. 546-555. Danelius 2012, p. 163-170. Frowein & Peukert 2009, p. 158-166. White & Ovey 2010, p. 243-247.

633 *Engel and Others v. the Netherlands*, plenary judgment of 8 June 1976, Series A 22, §§ 80 to 85. For comments on the significance of the case, see Frowein & Peukert 2009, p. 159, Danelius 2012, p. 164 and 165, and Pellonpää & al. 2012, p. 547.

ally prove to be illusory if it did not also take into consideration the degree of severity of the penalty that the person concerned risks incurring. In a society subscribing to the rule of law, there belong to the “criminal” sphere deprivations of liberty liable to be imposed as a punishment, except those which by their nature, duration or manner of execution cannot be appreciably detrimental. The seriousness of what is at stake, the traditions of the Contracting States and the importance attached by the Convention to respect for the physical liberty of the person all require that this should be so. [...] ⁶³⁴

On these premises, the Court reasoned that the choice of disciplinary proceedings under the Dutch law was justified, but that they also fell within the scope of criminal law. However, the potential severity of the sentences was decisive for the determination that the applicants were entitled to the guarantees of Article 6, paragraph 1. In that particular case, the Court explicitly referred to the common denominator of the legislations of Contracting States but did not elaborate in great detail on how the common denominator was sought.⁶³⁵ However, the *Ravnsborg* case provided further guidance. Whereas in the *Weber* case, the sanction was found to be criminal in nature for the reason that it applied to the whole population instead of just parties to the proceedings, in the *Ravnsborg* case the applicant was found guilty of misconduct in court but the sanction was only found to be closer to a disciplinary one than a criminal one, taking into account the severity of the sanction⁶³⁶. A rather complex analysis has on occasion been necessary in drawing a distinction between disciplinary sanctions and criminal law sanctions, e.g. in cases concerning prisoners found guilty of misconduct in prison. The Court has also considered that disciplinary sanctions for prisoners serving their sentences may be so severe that they fall within the scope of Article 6, paragraph 1.⁶³⁷ Apart from disciplinary proceedings, there are other types of regulatory proceedings in which it may be challenging to decide whether they fall within the criminal sphere of Article 6, paragraph 1, such as sanctions imposed on violations of traffic regula-

634 *Engel and Others v. the Netherlands*, plenary judgment of 8 June 1976, Series A 22, § 82.

635 The Court also paid attention to the nature and the degree of severity of the penalty in the case of *Weber v. Switzerland*, judgment of 22 May 1990, Series A 177, §§ 33 and 34, in which the Court found the “criminal realm” of Article 6 § 1 to be applicable. A contrary conclusion was reached in *Pierre-Bloch v. France*, judgment of 21 October 1997, Reports 1997-VI, § 59, concerning electoral legislation.

636 *Weber v. Switzerland*, judgment of 22 May 1990, Series A no. 177, § 33. *Ravnsborg v. Sweden*, judgment of 23 March 1994, Series A 283-B, §§ 34 and 35.

637 See *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A 80, § 72, and *Ezeh and Connors v. the United Kingdom*, Grand Chamber judgment of 9 October 2003, Reports of Judgments and Decisions 2003-X, § 129. The Court further specified, on the one hand, that the extreme gravity of the offence may be indicative of its criminal nature. On the other hand, that does not conversely mean that the minor nature of an offence can, of itself, take it outside the ambit of Article 6. (*Ezeh and Connors* judgment, § 104)

tions. In the light of the purpose of the Convention and the autonomous nature of the concept of “criminal charge”, the Court has given three criteria to be applied in determining whether an offence qualifies as “criminal”: the legal classification of the offence in domestic law, the nature of the offence and the nature and degree of severity of the possible penalty:

The Convention is not opposed to States, in the performance of their task as guardians of the public interest, both creating or maintaining a distinction between different categories of offences for the purposes of their domestic law and drawing the dividing line, but it does not follow that the classification thus made by the States is decisive for the purposes of the Convention.

[...] if the Contracting States were able at their discretion, by classifying an offence as “regulatory” instead of criminal, to exclude the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7), the application of these provisions would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the object and purpose of the Convention.

Having thus reaffirmed the “autonomy” of the notion of “criminal” as conceived of under Article 6 (art. 6), what the Court must determine is whether or not the “regulatory offence” committed by the applicant was a “criminal” one within the meaning of that Article (art. 6). For this purpose, the Court will rely on the criteria adopted in the above-mentioned Engel and others judgment [...]. The first matter to be ascertained is whether or not the text defining the offence in issue belongs, according to the legal system of the respondent State, to criminal law; next, the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6), to the ordinary meaning of the terms of that Article (art. 6) and to the laws of the Contracting States.⁶³⁸

Thus, in this case, the Court has sought to find a common denominator by referring to the national classifications and has thus applied a more positive approach to the development of an autonomous meaning than in the case of civil rights, and this is also identifiable linguistically in numerous cases. The Court has further specified in the case of *Janosevic*, rejecting the first criterion i.e. the classification under domestic law, that the criteria are alternative and not cumulative, although the Court has also found that a cumulative approach is not excluded:

638 *Öztürk v. Germany*, judgment of 21 February 1984, Series A 73, §§ 49 and 50.

It is therefore necessary to examine the surcharges in the light of the second and third criteria mentioned above. These criteria are alternative and not cumulative: for Article 6 to apply by virtue of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, or should have made the person concerned liable to a sanction which, by its nature and degree of severity, belongs in general to the “criminal” sphere. This does not exclude that a cumulative approach may be adopted where the separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a “criminal charge” [...].⁶³⁹

Thus, although the Court has referred to national classification, it has aimed at including those sanctions that are by virtue of their severity to be considered criminal irrespective of how they have been named by the national legal systems. In the case of *Janosevic v. Sweden* the Court found that even fines that could not be converted into a prison sentence, if the amount was substantial, were to be considered criminal in nature, whereas in the aforementioned *Weber* case the possibility of converting the fines into a prison sentence contributed to the severity and criminal nature of the sanction⁶⁴⁰. Already earlier, apart from certain types of disciplinary proceedings, the Court has also considered certain proceedings under taxation laws, for example, to be equivalent to criminal law proceedings, which has created problems of interpretation in some legal systems, such as in the *Janosevic* case. Depending on the legal system, the questions of taxation would fall either within public (administrative) law or private law, the latter being the case mainly in common law systems. For example, in France, a distinction has been drawn between tax deception (“*manoeuvre frauduleuse*”) and tax evasion (“*soustraction frauduleuse*”), of which only the latter has been considered to constitute a criminal offence. In the case of *Bendenoun v. France*, the Court took a position on whether a tax surcharge constituted a criminal sanction for the purposes of Article 6, paragraph 1. Again, the Court recognised that the surcharges were imposed under the General Tax Code, but noted that the Code imposed penalties that were essentially intended as a punishment to deter reoffending, and were imposed under a general rule, whose purpose is both deterrent and punitive, and the surcharges were very substantial, and therefore found them to be “criminal” within the meaning of

639 *Janosevic v. Sweden*, judgment of 23 July 2002, Reports of judgments and decisions 2002-VII, § 67.

640 *Janosevic v. Sweden*, judgment of 23 July 2002, Reports of judgments and decisions 2002-VII, § 67. *Weber v. Switzerland*, judgment of 22 May 1990, Series A 177, § 34. For a more recent case, see e.g. *Jussila v. Finland*, Grand Chamber judgment of 23 November 2006, Reports of Judgments and Decisions 2006-XIV, §§ 30 and 31, and *Sergey Zolotukhin v. Russia*, judgment of 10 February 2009, Reports of judgments and decisions 2009, § 53.

Article 6, paragraph 1.⁶⁴¹ In contrast, in the case of *Benham v. the United Kingdom*, the Court agreed with the Government in that under English law, the proceedings in question are regarded as civil rather than criminal in nature. However, the Court noted that the law concerning liability to pay community charge and the procedure upon non-payment was of general application to all citizens, and that the proceedings in question were brought by a public authority under statutory powers of enforcement. In addition, the proceedings had some punitive elements. The Court further paid attention to the relatively severe maximum penalty of three months' imprisonment and to the fact that the applicant was ordered to be detained for thirty days, and concluded that the applicant was charged with a criminal offence for the purposes of Article 6, paragraphs 1 and 3.⁶⁴² The principles applied in the *Bendenoun* have later been confirmed in Swedish and Finnish cases⁶⁴³, and as explained in more detail in 4.5 below, have had an impact on the development of national case law. The Court has further developed the case law as regards the concept of criminal charge in relation to the application of the principle of ne bis in idem under Article 4 of Protocol No 7, confirming that administrative sanctions may be criminal in nature and that Article 4 of Protocol No. 7 must be understood as prohibiting the prosecution or trial of a second "offence" in so far as it arises from identical facts or facts which are substantially the same⁶⁴⁴. In the same way as in respect of the autonomous nature of

641 *Bendenoun v. France*, judgment of 24 February 1994, Series A 284, § 47. Similar conclusion has been made e.g. in the case of *Janosevic v. Sweden*, judgment of 23 July 2002, Reports of judgments and decisions 2002-VII. In that case, the Government had paid attention to the *Bendenoun v. France* judgment, but denied the punitive and deterring purpose of the tax surcharge. The applicant, in turn, contested this and pointed out that the tax surcharges had replaced earlier criminal-law procedures and had therefore earlier been classified as criminal penalties. The Court agreed with the applicant and considered the surcharges to fall within the concept of "criminal charge". (§§ 61 to 63, § 71) See also *Västberga Taxi Aktiebolag and Vulic v. Sweden*, judgment of 23 July 2002 (Appl. No. 36985/97), §§ 76 to 82.

642 *Benham v. the United Kingdom*, Grand Chamber judgment of 10 June 1996, Reports 1996-III, § 56.

643 Similar conclusion has been made e.g. in the case of *Janosevic v. Sweden*, judgment of 23 July 2002, Reports of judgments and decisions 2002-VII. In that case, the Government had paid attention to the *Bendenoun v. France* judgment, but denied the punitive and deterring purpose of the tax surcharge. The applicant, in turn, contested this and pointed out that the tax surcharges had replaced earlier criminal-law procedures and had therefore earlier been classified as criminal penalties. The Court agreed with the applicant and considered the surcharges to fall within the concept of "criminal charge". (§§ 61 to 63, § 71) See also *Västberga Taxi Aktiebolag and Vulic v. Sweden*, judgment of 23 July 2002 (Appl. No. 36985/97), §§ 76 to 82, *Jussila v. Finland*, Grand Chamber judgment of 23 November 2006, Reports of Judgments and Decisions 2006-XIV, §§ 37 and 38, and *Ruotsalainen v. Finland*, judgment of 16 June 2009 (Appl. No. 13079/03), §§ 45 and 46. In the cases of *Jussila* and *Ruotsalainen*, the decisive criterion was that the purpose of the punishment was to deter re-offending.

644 For a recent case, see *Sergey Zolotukhin v. Russia*, judgment of 10 February 2009, Reports of judgments and decisions 2009, § 82.

criminal charge, the Court has observed on several occasions that the legal characterisation of the procedure under national law cannot be the sole criterion of relevance for the applicability of the principle of *ne bis in idem* under Article 4 § 1 of Protocol No. 7. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the object and purpose of the Convention, and the nature of the offence of “minor disorderly acts”, together with the severity of the penalty, may be such as to bring the applicant’s conviction on 4 January 2002 within the ambit of “penal procedure” for the purposes of Article 4 of Protocol No. 7⁶⁴⁵. Further, what is relevant is whether a prior acquittal or conviction has, upon the commencement of new proceedings, acquired the force of *res judicata*⁶⁴⁶. Particularly the cases of *Jussila* and *Ruotsalainen* as well as that of *Sergey Zolotukhin* cited here have also had a major impact on the case law of the Finnish supreme jurisdictions.

The concept of “criminal charge” has also come up in other contexts, such as in relation to the length of proceedings. In early case law concerning the length of proceedings, the Court still applied a rather restrictive approach to the expression “in the determination of ... any criminal charge”, stating that “the period to be taken into consideration for verifying whether this provision has been observed necessarily begins with the day on which a person is charged, for otherwise it would not be possible to determine the charge, as this word is understood within the meaning of the Convention”. As for the final point, the Court stated that “Article 6(1) ... indicates as the final point, the judgment determining the charge; this may be a decision given by an appeal court when such a court pronounces upon the merits of the charge.”⁶⁴⁷ The Court has reiterated this in later case law, stating that the determination of a criminal charge is considered to cover “the whole of the proceedings in issue, including appeal proceedings and the determination of sentence”.⁶⁴⁸ In the event of conviction, there is no “determination” of any criminal charge, within the meaning of Article 6, paragraph 1, as long as the sentence is not definitively fixed⁶⁴⁹. Thus, this suggests that

645 *Sergey Zolotukhin v. Russia*, judgment of 10 February 2009, Reports of judgments and decisions 2009, §§ 53 and 57.

646 *Sergey Zolotukhin v. Russia*, judgment of 10 February 2009, Reports of judgments and decisions 2009, § 83.

647 *Neumeister v. Austria*, judgment of 27 June 1968, Series A 17, §§ 18 and 19.

648 *T. v. the United Kingdom*, Grand Chamber judgment of 16 December 1999 (Appl. No. 24724/94), § 108. In that case, the Court needed to assess whether the tariff-setting procedure in respect of young offenders under English law amounted to a sentencing exercise. It was contested by the Government that asserted that the fixing of the tariff was merely an aspect of the administration of sentence already imposed by the Court. The Court did not agree with this contention. (§§ 107 to 110) See also a similar case of *V. v. the United Kingdom*, Grand Chamber judgment of 16 December 1999, Reports of Judgments and Decisions 1999-IX, §§ 108 to 111.

649 *Eckle v. Germany*, judgment of 15 July 1982, Series A 51, § 77.

Article 6, paragraph 1, does not apply to proceedings which take place after the final determination of sentence, such as review of sentence after the decision has become final. Furthermore, for example extradition proceedings are considered to fall outside the concept of “criminal charge” and Article 6, paragraph 1, although the existence of a violation of the Convention may need to be assessed in the light of other provisions, such as Article 3 in the case of *Soering v. the United Kingdom*⁶⁵⁰. However, through later case law, the Court has extended the scope of the provision in other respects. In distinction from most national legal systems, the Court has considered that “even if the primary purpose of Article 6, as far as criminal matters are concerned, is to ensure a fair trial by a “tribunal” competent to determine “any criminal charge”, it does not follow that the Article has no application to pre-trial proceedings”⁶⁵¹. In the context of assessing the reasonableness of the length of criminal proceedings, the Court has in its case law expanded the interpretation concept of “charge”. For example, in the case of *Eckle v. Germany*, the Court stated as follows:

*In criminal matters, the “reasonable time” referred to in Article 6 par. 1 (art. 6-1) begins to run as soon as a person is “charged”; this may occur on a date prior to the case coming before the trial court [...], such as the date of arrest, the date when the person concerned was officially notified that he would be prosecuted or the date when preliminary investigations were opened [...]. “Charge”, for the purposes of Article 6 par. 1 (art. 6-1), may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” [...].*⁶⁵²

Thus, what is decisive is that the proceedings involve a determination of sentence, and the suspect has become substantially affected by the proceedings, which also takes into account the differences in the legal systems. This principle has been confirmed in later case law, such as in the *Yankov and Others* case⁶⁵³ in which the period was considered to begin when the applicants were formally questioned by the police. The Court appears to have adopted a wide interpretation of the expression “in the determination

650 *Soering v. the United Kingdom*, plenary judgment of 7 July 1989, Series A 161.

651 *Brennan v the United Kingdom*, judgment of 16 October 2001, Reports of Judgments and Decisions 2001-X, § 45.

652 *Eckle v. Germany*, judgment of 15 July 1982, Series A 51, § 73. See also *Deweert v. Belgium*, judgment of 27 February 1980, Series A 35, §§ 42 and 46. This expansion of the concept of “criminal charge” began to develop already with the judgment of *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7. (See § 19 of the judgment.)

653 *Yankov and Others v. Bulgaria*, judgment of 23 September 2010 (Appl. No. 4570/05), § 23.

of criminal charge”⁶⁵⁴. The concept of “criminal charge” exists in all the legal systems subject to the present study, but the meaning that has been given to “criminal charge” in the Court’s case law appears to be a more extensive one and certainly differs from the definitions that would be given to the concept in the national legal systems. It appears that all the five States have encountered some problems with regard to the interpretation of the concept, particularly in respect of the difference drawn between disciplinary proceedings and criminal ones, on the one hand, and between tax procedures and criminal proceedings, on the other (see section 4.2). Violations have on occasion been found despite that the national courts have resorted to an even extensive analysis of the Court’s case law, such as Swedish courts. The technique applied by the Court in arriving at an autonomous meaning in the case of “criminal charge” is different from that of “civil rights”, placing more emphasis on a positive approach to finding a common denominator between the legal systems. In the same way as in respect of the concept of “civil rights and obligation”, the examined fragments of the Court’s discourse with regard to the concept of “criminal charge” provide signs of a clear transition of the legal culture of protecting fundamental rights and human rights, towards strengthened and more extensive protection.

3.4.10.3 Case study: Article 5, paragraph 1 – “liberty and security of person” and “arrest and detention”

In addition to Article 6 of the Convention, Article 5 is an example of those provisions of the Convention that have had the most significant effects on the national legal systems of States parties. According to Frowein, this is particularly the case in respect of paragraphs 3 and 4 of Article 5⁶⁵⁵. However, it is particularly paragraph 1 thereof that has produced problems of interpretation, namely with regard to the concepts of “liberty and security of person” and “arrest and detention”, and under which the Court has resorted to the principle of autonomous interpretation. According to Article 5, paragraph 1 of the Convention,

“everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

654 This is also the view of Lemmens, for example, who nevertheless points out that not all decisions taken within the criminal sphere of Article 6 would qualify as criminal sanctions. Those falling outside include, in particular, precautionary or preventive measures. (Lemmens 2013, p. 300) However, measures such as preventive detention may entail protection of rights under other provisions of the Convention, particularly Article 5.

655 Frowein 2005(1), p. 3.

- b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

Although the concept of deprivation of liberty has attained its autonomous meaning through the case law under Article 5, paragraph 1, its meaning began to develop as of the early cases under Article 5, paragraph 3, which concerned the practice of prolonged periods of detention while awaiting trial or re-trial⁶⁵⁶. For example, in the case of *Stögmüller v. Austria*, the Court reasoned as follows:

[...] It is true that paragraph (1) (c) (art. 5-1-c) authorises arrest or detention for the purpose of bringing “before the competent legal authority” on the mere grounds of the existence of “reasonable suspicion” that the person arrested “has committed an offence” and it is clear that the persistence of such suspicions is a condition sine qua non for the validity of the continued detention of the person concerned, without its being necessary to go into the point whether detention maintained in spite of the disappearance of the suspicions on which the arrest was grounded violates Article 5 (1) (art. 5-1) or Article 5 (3) (art. 5-3) or these two provisions read together.

Article 5 (3) (art. 5-3) clearly implies, however, that the persistence of suspicion does not suffice to justify, after a certain lapse of time, the prolongation of the detention. That paragraph stipulates that the detention must not exceed a reasonable time. 4. Nor does the Court accept the distinction proposed by the Austrian Government between

656 Cases in which a violation was found included *Neumeister v. Austria*, judgment of 27 June 1968, Series A 8, *Stögmüller v. Austria*, judgment of 10 November 1969, Series A 9, while no violation was found in *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7, and *Matznetter v. Austria*, judgment of 10 November 1969, Series A 10. See also Yourow 1996, p 25.

*the length of the detention and the grounds for the detention, which latter, in the Government's view must be assessed in relation to Article 5 (1) (c) (art. 5-1-c) alone and are irrelevant to the concept of the "reasonableness" of the length of the detention within the meaning of paragraph (3) of the same Article (art. 5-3). [...]*⁶⁵⁷

Thus, while not providing a clear definition of lawful arrest or detention or deprivation of liberty in a criminal law case, the Court paid attention to what threshold is sufficient to make it lawful. Further, the Court provided clarification for the temporal definition of detention as well as to the concept of conviction in Article 5, paragraph 1 subparagraph (a) in the case of *Wemhoff* as follows:

It remains to ascertain whether the end of the period of detention with which Article 5 (3) (art. 5-3) is concerned is the day on which a conviction becomes final or simply that on which the charge is determined, even if only by a court of first instance.

The Court finds for the latter interpretation.

*One consideration has appeared to it as decisive, namely that a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5 (1) (a) (art. 5-1-a) which authorises deprivation of liberty "after conviction". This last phrase cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest at the hearing of convicted persons who appeared for trial while still at liberty, whatever remedies are still open to them. [...]*⁶⁵⁸

When analysing the above fragments of discourse from the early judgments of the Court, one may note that the Court sometimes derives meanings for the concepts included in the Convention from the general principles of law, such as criminal law, even through implicit reference. That is confirmed by a further example, in which the Court explicitly refers to national law. As regards the criterion of "lawfulness" in Article 5, paragraph 1, the Court has observed that

The main issue to be determined is whether the disputed detention was "lawful", including whether it was in accordance with "a procedure prescribed by law". The Convention here refers essentially to national law and establishes the need to apply its rules, but it also requires that any measure depriving the individual of his liberty must be compatible with the purpose of Article 5 (art. 5), namely to protect the individual

657 *Stögmüller v. Austria*, judgment of 10 November 1969, Series A 9, § 4.

658 *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7, § 9.

from arbitrariness [...]. What is at stake here is not only the “right to liberty” but also the “right to security of person”.⁶⁵⁹

Where the “lawfulness” of detention is in issue, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. [...]⁶⁶⁰

Thus, it appears that in respect of the interpretation of Article 5, paragraph 1, the Court more easily puts emphasis on the contents of national law than in respect of Article 6, paragraph 1. What is meant by lawful detention after conviction, within the meaning of Article 5, paragraph 1 subparagraph (a) is relatively clear. It must take place after a conviction by a competent court. However, the Court has clarified what is meant with “conviction” for the purposes of Article 5, paragraph 1 as follows:

[...] In the Court’s opinion, comparison of Article 5 par. 1 (a) (art. 5-1-a) with Articles 6 par. 2 and 7 par. 1 (art. 6-2, art. 7-1) shows that for Convention purposes there cannot be a “condamnation” (in the English text: “conviction”) unless it has been established in accordance with the law that there has been an offence – either criminal or, if appropriate, disciplinary [...]. Moreover, to use “conviction” for a preventive or security measure would be consonant neither with the principle of narrow interpretation to be observed in this area [...] nor with the fact that that word implies a finding of guilt. [...].⁶⁶¹

Thus, the Court has found that the provision of Article 5, paragraph 1 subparagraph (a) has to be interpreted narrowly. In other situations, it would be necessary to examine whether they fall within the scope of the remaining subparagraphs. The Court has further noted that mere compliance with national law is not conclusive of whether the deprivation of liberty complies with the requirements of Article 5, paragraph 1. In the Court’s words, “the Court’s case-law indicates that it may be necessary to look beyond the appearances and the language used and concentrate on the realities of the

659 *Bozano v. France*, judgment of 18 December 1986, Series A 111, § 54. See also *Stafford v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, § 63.

660 *Stafford v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, § 63.

661 *Guzzardi v. Italy*, plenary judgment of 6 November 1980, Series A 39, § 100.

situation”⁶⁶². Insofar as subparagraph (a) is concerned, for example, the Court has further reasoned that “[...] the Court has to consider whether there [is] a sufficient connection, for the purposes of Article 5 (art. 5), between the [...] decision and the deprivation of liberty at issue.⁶⁶³ However, this provision has raised questions of interpretation, particularly with regard to continued detention in the case of probation/ release on parole. The Court has found that where there is a sufficient causal connection between the original judgment and a later deprivation of liberty or recall to prison, even the latter may fulfill the requirements of Article 5, paragraph 1 subparagraph (a)⁶⁶⁴.

“Although it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law, under Article 5 § 1 failure to comply with domestic law entails a breach of the Convention and the Court can and should therefore review whether this law has been complied with”.⁶⁶⁵ In the *Bozano v. France* judgment (paragraph 54), the Court further observed that “what is at stake ... is not only “the right to liberty” but also the “right to security of person””. It is in particular the element of “security of person” that provides protection against arbitrariness, i.e. Article 5, paragraph 1 “enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty”.⁶⁶⁶ In the *Bozano* judgment, the Court also noted that “the difference between deprivation

662 *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A 50, § 38.

663 *Van Droogenbroeck v. Belgium*, judgment of 24 June 1982, Series A 50, § 39. *Stafford v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, § 64.

664 *Stafford v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, §§ 62 and 81. In this particular case, the Court found no sufficient causal connection between the applicant’s continued detention after the expiry of the fixed term sentence for fraud, and his original *mandatory* life sentence imposed upon him for murder, and found that there was no power under domestic law to impose indefinite detention on him to prevent future non-violent offending. A different situation was at hand in *Weeks* case, in which the *discretionary* life sentence was an indeterminate sentence expressly based on considerations of his dangerousness to society, factors which were susceptible by their very nature to change with the passage of time. On that basis his recall, in the light of concerns about his unstable, disturbed and aggressive behaviour, could not be regarded as arbitrary or unreasonable in terms of the objectives of the sentence imposed on him and there was a sufficient connection for the purposes of Article 5 § 1(a) between his conviction and recall to prison. (*Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A 114, §§ 46 to 51.) See also Pellonpää & al. 2012, p. 408 and 409.

665 *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, § 73. “The Court must moreover ascertain whether domestic law itself is in conformity with the Convention, including the general principles expressed or implied therein. On this last point, the Court stresses that, where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied.” In this respect, the Court also referred to the need to ensure a sufficient quality of the law, i.e. “it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness”. (§ 76)

666 *Aksoy v. Turkey*, judgment of 18 December 1996, Reports of Judgments and Decisions 1996-VI, § 76.

of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance”⁶⁶⁷. Pellonpää & al. note that the expression “security of person” has not been given an independent meaning in the Court’s case law, but it has mainly been linked with the “deprivation of liberty” although in some situations there may be a positive obligation for the State to ensure the security of a person⁶⁶⁸. The clearest effort to define the deprivation of liberty can be found for example in the case of *Engel and Others*, in which the Court reasoned as follows:

In proclaiming the “right to liberty”, paragraph 1 of Article 5 (art. 5-1) is contemplating individual liberty in its classic sense, that is to say the physical liberty of the person. Its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. As pointed out by the Government and the Commission, it does not concern mere restrictions upon liberty of movement (Article 2 of Protocol no. 4) (P4-2). This is clear both from the use of the terms “deprived of his liberty”, “arrest” and “detention”, which appear also in paragraphs 2 to 5, and from a comparison between Article 5 (art. 5) and the other normative provisions of the Convention and its Protocols.

In order to determine whether someone has been “deprived of his liberty” within the meaning of Article 5 (art. 5), the starting point must be his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4 para. 3 (b) (art. 4-3-b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 (art. 5) either.”⁶⁶⁹

Thus, the Court has not given the concept of “deprivation of liberty” or those of “arrest or detention” very precise limits, but has aimed at defining their scope through certain rather loose criteria established through case law. In this analysis, the Court has apparently examined the ordinary meaning of the terms “deprivation of liberty”, “arrest” and “detention”, and has also interpreted the provision in the light of the internal context of the Convention. In the judgment issued in the case of *Guzzardi v. Italy*, for example, the Court has further noted that

667 *Bozano v. France*, judgment of 18 December 1986, Series A 111, § 93.

668 Pellonpää & al. 2012, p. 393. In this respect, Pellonpää & al. further observe that the United Nations Human Rights Committee has given the expression a somewhat wider meaning in the interpretation of the International Covenant on Civil and Political Rights and has considered that the right to the security of person may also be attached to situations other than those of deprivation of liberty. (Ibid. footnote 249)

669 *Engel v. the Netherlands*, plenary judgment of 8 June 1986, Series A 22, §§ 58 and 59.

[...] Deprivation of liberty may, however, take numerous other forms. Their variety is being increased by developments in legal standards and in attitudes; and the Convention is to be interpreted in the light of the notions currently prevailing in democratic States [...].⁶⁷⁰

The Court has thus, by reference to the “notions currently prevailing”, implicitly referred to the need to compare the different contents given to the concept in different legal systems. The fragment of discourse also suggests that there is room for transition of the legal culture of protecting the right under Article 5, paragraph 1. The reference to the increase of variety through developments in legal standards and attitudes leaves room for dynamic interpretation, and thus the concept of “deprivation of liberty” has been given a relatively autonomous meaning. Thus, although the Court has referred to the notions prevailing in the national legal systems as regards the interpretation of the concepts of “arrest and detention”, the Court has expanded the interpretation of Article 5, paragraph 1, by giving a rather autonomous meaning the more general concept of “deprivation of liberty” and has included in it such cases that would perhaps not traditionally be included in the concepts of “arrest and detention” in the national legal system.

Apart from what is normally understood by arrest and detention, for criminal law purposes, a deprivation of liberty may be at hand in other situations too. In the case of *Steel and Others v. the United Kingdom*, for example, the Court found that detention as a result a refusal “to be bound over not to breach the peace”, despite that “breach of the peace” was not classified as a criminal offence under English law, was to be considered deprivation of liberty, and the breach of the peace must be considered an “offence” within the meaning of Article 5, paragraph 1, bearing in mind the nature of the proceedings in question and the penalty at stake.⁶⁷¹ The Court has included in the concept of “deprivation of liberty” for example the placement of persons of unsound mind in psychiatric institutions⁶⁷², as well as placement under supervision with an obligation to reside on a small island⁶⁷³.

670 *Guzzardi v. Italy*, plenary judgment of 6 November 1980, Series A 39, §95.

671 *Steel and Others v. the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VII, §§ 46 to 50 and 66 to 70.

672 See e.g. *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A 33, § 39, in which the Court specified the conditions for such placement by stating that “except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of “unsound mind”. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder.”

673 *Guzzardi v. Italy*, plenary judgment of 6 November 1980, Series A 39. A comparable situation was at hand in the cases of *M. v. Germany*, judgment of 17 December 2009 (Appl. No. 19359/04), and *Haidn v. Germany*, judgment of 13 January 2011 (Appl. No. 6587/04).

In the *Guzzardi* judgment which concerned special supervision with a view to preventing the commission of offences, the Court noted that “special supervision accompanied by an order for compulsory residence in a specified district does not of itself come within the scope of Article 5. However, the Court continued by stating that “it does not follow that “deprivation of liberty” may never result from the manner of implementation of such a measure”. In finding that the situation involved a deprivation of liberty within the meaning of Article 5, paragraph 1, the Court paid attention to that the applicant had had few opportunities for social contacts, the restrictions on movement were rather strict, the applicant was liable to punishment by “arrest” if he failed to comply with his obligations, and more than sixteen months had elapsed between his arrival on the island and his departure from another district on the mainland. Furthermore, the Court stated that “it is admittedly not possible to speak of “deprivation of liberty” on the strength of any of these factors taken individually, but cumulatively and in combination they certainly raise an issue of categorisation from the view point of Article 5”.⁶⁷⁴ Similarly, in the case of *Amuur v. France*, where the applicants had been refused entry into the French territory and were held in the airport’s transit zone for twenty days, the Court paid attention to the particular circumstances. Whereas order to stay in the transit zone would not automatically entail deprivation of liberty within the meaning of Article 5, paragraph 1, but rather a restriction on liberty, the Court found that the applicants’ possibility to freely leave the zone to any other country was rather theoretical.⁶⁷⁵ In both those cases the Court examined the concrete situation instead of limiting the analysis to strictly legal criteria, and thus resorted to an external context of argumentation, in line with its reasoning in the afore-cited *Engel* judgment. In the latter judgment, the Court reasoned that the obligation of conscripts to stay within a restricted area of the military base is normally not considered inappropriate, but where their liberty is restricted to such an extent that the restrictions are significantly more severe than in other European States, the restrictions may amount to deprivation of liberty.⁶⁷⁶

Another interesting case in which the Court assessed the situation relating to a restricted area is that of *Medvedyev v. France*. In particular, the Court needed to take position as to the applicability of Article 5, paragraph 1, on board a ship outside the French territory. On the grounds that the French warship had left the French harbour on a particular request by the French authorities to intercept the ship registered in Cambodia, and the latter was under de facto command of the French naval forces

674 *Guzzardi v. Italy*, plenary judgment of 6 November 1980, Series A 39, §§ 94 and 95.

675 *Amuur v. France*, judgment of 25 June 1996, Reports of Judgments and Decisions 1996-III, §§ 43, 48 and 49.

676 *Engel v. the Netherlands*, plenary judgment of 8 June 1986, Series A 22, § 59. For the scope of application of Article 5 § 1, see also Pellonpää & al. 2012, p. 392-396, and White & Ovey 2010, p. 210-212.

during the interception continuously until their trial in France, the Court found the Convention to apply as an exception to the territoriality principle set out in Article 1 of the Convention. As for the applicability of Article 5, paragraph 1, to the case the Court recognised, in line with the *Amuur* and *Engel* judgments referred to in the foregoing, that the applicants were already in a place where their freedom of movement was restricted as such, but found that the situation amounted to a deprivation of liberty within the meaning of Article 5, paragraph 1, throughout the voyage as the ship's course was imposed by the French forces.⁶⁷⁷

“Sub-paragraphs (a) to (f) of Article 5, paragraph 1, contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of the grounds”.⁶⁷⁸ For example, in the case of *A. and Others v. the United Kingdom*, concerning deportation and detention pending the implementation of the deportation which constituted a derogation in time of public emergency (threat of terrorist acts) under section 14 of the Human Rights Act 1998 and pursuant to Article 15 of the Convention, the Court found that the Government had made too wide an interpretation of the exceptions allowed to the exhaustive list, and did thus not strike a balance between the State's interests against those of the detainee.⁶⁷⁹

It is suggested that in respect of Article 5, paragraph 1, the Court has more generally resorted to expanding the meaning by using legal and contextual criteria instead of creating to the concepts an autonomous meaning in the same sense as in respect of the concepts of “civil rights” and “criminal charge” under Article 6, paragraph 1, although it has attempted to give the concepts of “conviction” and “detention” an independent meaning. This is also visible in the reasoning of the Court in its judgments referred to in the foregoing. In the case of Article 5, paragraph 1, the creation of an autonomous

677 *Medvedyev v. France*, Grand Chamber judgment of 29 March 2010, Reports of Judgments and Decisions 2010, §§ 66, 67, 74 and 75. In this particular case, the Court also assessed the applicability of other rules of international law, including the Vienna Convention on the Law of the Sea, to which both France and Cambodia were parties, and two other conventions to which only France was a party.

678 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, Reports of Judgments and Decisions 2008, § 43.

679 *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, Reports of Judgments and Decisions 2009, § 171. The Court further assessed whether the Government could validly derogate from its obligations under Article 5 § 1 by invoking a public emergency pursuant to Article 15 of the Convention. The Court recognised the wide margin of appreciation allowed for States in this respect and agreed with the House of Lords in that there was a public emergency threatening the life of the nation. (§§ 173 to 181) The Court noted, nevertheless, that “it is ultimately for the Court to rule whether the measures were “strictly required”. The Court found that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals, and found also a violation on this ground in respect of the majority of the applicants. (§§ 182 to 190)

meaning is rather linked with the more general concept of “deprivation of liberty” than the terms used in the text of the provision, and is thus not as easy to identify as in respect of the concepts referred to in Article 6, paragraph 1. The Court has also explicitly referred to the interpretation of the provisions of Article 5 in accordance with national law. As regards the seeking of a common denominator, Sudre is of the view that the Court has rather been willing to give the problematic concepts a useful meaning than a common meaning⁶⁸⁰. This is perhaps easiest to see in those cases of discourse in which the Court resorts to applying contextual criteria instead of purely legal ones. At any rate, the Court’s discourse under both Article 6, paragraph 1, and Article 5, paragraph 1, have an equal potential of leading to considerable transition of the legal culture of protecting the rights set out in those provisions. There are, however, other situations which are interesting to look at for the purposes of further analysing the receptiveness of national legal systems and courts to the argumentation of the European Court of Human Rights. Apart from the principle of autonomous meaning, the principle of proportionality and the principle of margin of appreciation are interesting from that perspective. Those will be looked into from a national perspective in section 4.5 concerning the Finnish judiciary. Before advancing to the assessment of those aspects, a future challenge for the European Court of Human Rights is analysed below.

680 Sudre 1998, p. 127.

4. Third phase of transition of the legal culture – development through national case law

4.1 Receptiveness of national legal systems to the case law and argumentation of the European Court of Human Rights

The third phase of transition of the legal culture in the protection of human rights or fundamental rights takes place at the national level, under the impact of the case law of the European Court of Human Rights on national case law and legal culture. Such a transition may take place both in the general practice of applying human rights or fundamental rights provisions, including both international and national ones, and in the way in which the argumentation of the European Court of Human Rights is de facto adopted. The transition of legal culture is affected not only by the preparedness of the legal system to adopt international rules and way of reasoning of an international judicial body, but also by other more subjective factors. Thus, before moving on to assess the third phase of transition in Finland in detail, it is necessary to analyse the technical and legal preparedness of the legal system to apply the case law of the European Court of Human Rights and new principles of interpretation of law. The transition of the legal culture may be fast in those cases where the legal system is already technically prepared to adopt such new elements, but even in those cases the development may be slow due to other factors such as deep-rooted traditions of writing judgments and legal reasoning, or simply by general reluctance to apply international sources of law. Some legal systems, in which the way of legal reasoning is closer to that of the European Court of Human Rights, may be faster in adopting the new elements, although general conclusions may be difficult to make.

As regards the transition of the Finnish legal culture, which is the main focus of this study, one may presume in the light of studies already made that the protection of human rights and fundamental rights has been considerably strengthened since the 1980s. That development started already prior to Finland's accession to the European Convention on Human Rights, as the national jurisdictions increasingly began to apply other international human rights conventions, but upon accession to the European Convention the practice became more frequent. However, the practice of referring to the case law of the European Court of Human Rights has developed at a slower pace. It may be concluded that such a practice has developed and the Finnish judiciary (the supreme jurisdictions) is frequently referring to the case law, but it still remains rather technical. One may observe in some judgments more profound analysis of the Court's

case law, but mostly the reasoning of the supreme jurisdictions still appears to be very different in nature.

In the following section, the technical preparedness of the Finnish legal system to adopt the case law and argumentation of the European Court of Human Rights is analysed in the light of the legal and technical settings, i.e. the relationship between the national legal system and international law as well as the legal system and judiciary in general, in comparison with the selected other States parties to the European Convention on Human Rights. This constitutes the foundation for the transition of legal culture. Furthermore, an assessment is made of whether the aforementioned concepts with an autonomous meaning have created conceptual problems in those States parties. Finally, in section 5, an analysis is made of the complaints made against Finland before the European Court of Human Rights and of the way in which the national supreme jurisdictions have de facto applied the European Convention and the case law under it. Conclusions concerning the third phase of transition of the legal culture are made on the basis of that analysis.

4.1.1 General criteria for receptiveness

There are various types of technical criteria that need to be met by the legal system in order for it to be able to apply the European Convention on Human Rights and the case law under it. First, the Convention has to be part of applicable law at the national level. In the foregoing analysis of the first phase of transition of the legal culture, it is concluded that the Convention has become part of applicable law in the selected legal systems, although at different paces and by different means. It is further reminded that there are various means of making the national application of the Convention more effective, most importantly its incorporation into national law. Although it is not required in all legal systems covered by the present study, it has proven that the national jurisdictions have been more active in applying the Convention where there are clear national provisions to that effect. It may be sufficient, however, that the Convention has merely been made of national law by means of *in blanco* implementing act.

Second, an effective application of the Convention and for a correct understanding of its provisions, it is not sufficient to apply the Convention, but it is necessary for the courts to also be able to apply the case law of the European Court of Human Rights as a source of law. It is presumed that it is also more efficient in those cases where it is accepted as a binding source of law. By meeting that criterion, it is possible for the national legal system and judiciary to be receptive to the case law and thereby to the second phase of transition of the legal culture. Furthermore, going a step further, an efficient application of the case law of the European Court of Human Rights means that the national judiciary is also receptive to the argumentation of the Court. An efficient application of that case law means that the application is not mechanic, but that it also involves understanding and application of the principles of interpretation adhering to

the European case law. That would in turn require that even other sources of law are accepted and applied by the national courts, apart from case law. Also, the language used in the Convention may create problems in the event that there are differences in the manner in which the concepts used in the Convention are understood. In the following, an analysis is made of the technical preparedness of the selected legal systems to adhere to the required sources of law and the principles of interpretation applied by the European Court of Human Rights, and of whether the selected autonomous concepts have imposed problems for those legal systems.

A reserved approach to case law as a source of law, particularly in statutory law systems, could entail problems for the judiciary in taking the provisions of the European Convention on Human Rights duly into account. The case law of the European Court of Human Rights constitutes an essential tool in the interpretation of the Convention and in fact, it is particularly through case law that its provisions become effective. This tool would be particularly useful for national courts and its use should be encouraged. As is observed by Kiikeri, it is through national court decisions that the objectives of the Convention can in fact be achieved⁶⁸¹. Kiikeri draws attention to the distinction between the legal system of the European Union and the system of protection of human rights created by the European Convention on Human Rights. Whereas the Member States of the European Union seem to have accepted the supremacy of Union law over their national legislation⁶⁸² – in the fields falling within Union competence – as a fact and the European Court of Justice enjoys an autonomous position in the interpretation of Union law, this is not necessarily the case in respect of human rights law and the case law of the European Court of Human Rights. In the view of Kiikeri, which can be concurred with, national courts and the European Court of Human Rights may both interpret the provisions of the Convention, although neither the Convention nor the Court has imposed an obligation for national courts to apply and interpret the Convention, nor to take the Court's case law into account as a source of law. The European Court of Human Rights has, in any case, final say in determining whether the Convention provisions have been interpreted correctly. However, as is correctly pointed out by Kiikeri, the interpretation carried out by the Court is interpretation *a posteriori*, meaning that the possible violation of the Convention has already taken place.

681 Kiikeri 2001, p. 71.

682 For example in Finland, there have appeared to be no major difficulties in national courts insofar as the supremacy of Union law is concerned. Since the early years of membership in the Union, the problems that have emerged have mainly been related to the questions of direct effect and the effect of Union law on the interpretation of national law (Jääskinen 1999, p. 416. Kanninen 2003, p. 1263). The founding members of the European Communities did, however, face some problems in the early years with the principles of supremacy and direct effect as these principles were still new, whereas for later members such as Finland, the principles were already well established at the moment of accession (see Kanninen 2003, p. 1253 and 1254).

Its task of interpretation is dependent on the filing of a complaint by an individual who considers that his rights have been violated.⁶⁸³ Thus, the national courts have no possibility to file a request for a preliminary ruling concerning the interpretation of the Convention in the same way as they have in respect of the interpretation of Union law. In fact, the *ex post facto* nature of the system of interpretation of the Convention by the European Court of Human Rights speaks in favour of recognition of its case law as a source of law by national courts, in order to prevent future violations of the Convention. As explained in more detail in section 4.5 below, the Convention and the relevant case law have also been accepted as sources of law in Finland since its implementation into the national legal system. What is more interesting, however, is the way in which it has been accepted and applied. One of the underlying arguments in this study is that instead of just taking the case law of the European Court of Human Rights as such, particularly the national supreme jurisdictions should aim more at a real dialogue with the Court. A dialogue should be called for as that would also help to address violations of human rights more effectively at the national level, at the earliest possible stage, and thereby to reduce the workload of the European Court of Human Rights. A real dialogue also would contribute to a better harmonisation of the legal systems, which in turn would assist in the reception of the international case law. A dialogue has been found to exist by scholars in a variety of other legal systems already, although to a varying degree⁶⁸⁴. In the analysis made in section 4.5 below, the possible existence of signs of a dialogue in the discourse of the Finnish supreme jurisdictions is assessed. This study focuses on the signs of transition of the legal culture of protecting fundamental rights and human rights independently of the parallel transition of the application of EU law and the relevant case law. I would nevertheless suggest that today, the systems of protecting fundamental rights by the European Court of Justice and by the European Court of Human Rights can no longer be treated in isolation from one another (see the conclusions on future prospects in section 5.4 below).

4.1.2 Applicability of the Court's case law as a source of law

International law, including customary law, international treaties and case law of international judicial bodies, has today a significant impact on national jurisdictions. As appears from section 2.6.1 above, all those elements are essential sources of international law. Frowein observes that national legal systems are dependent on international law, and rules of international law are increasingly applicable by domestic courts. This is the case, among others, in respect of the provisions of international human rights conventions.⁶⁸⁵ By this, Frowein apparently means that an increasing part of national

683 For a detailed analysis, see Kiikeri 2001, p. 69-77.

684 See the conclusions made by Gerards and Fleuren, (Gerards and Fleuren 2014, p. 364-366).

685 Frowein 1996, p. 85 and 86.

law derives from the provisions of international law. However, it is through the national legal systems that the international law develops, and hence there is constant interaction between the two legal orders. International law acquires its meaning where it is effectively applied not only among the parties to international agreements, but also by national jurisdictions. As regards international human rights law, it is in particular the European Convention on Human Rights and the European Court of Human Rights that have influenced the national legal systems covered by the present study considerably, not only through the Court's own case law but also through national courts, although there are differences between States parties to the Convention in the application of the principles developed by the European Court.⁶⁸⁶ One has to remember, however, that this does not necessarily take place in isolation from other applicable human rights instruments, including national constitutions. As for the relationship between international conventions on human rights and the provisions on fundamental rights in national constitutions, the first mentioned essentially define the minimum standard of protection to which states parties have consented to. Such a minimum standard should, nevertheless, not prevent states from affording a higher level of protection. In addition, international conventions have a harmonising effect on the protection of fundamental rights.⁶⁸⁷ This applies to all the States and legal systems covered by the present study.

An underlying presumption is that any judicial decision-making is based on law, and any judgment must be based on acceptable sources of law.⁶⁸⁸ Insofar as the sources of law used for the purposes of interpretation are concerned, the primary source of law is most often written law, particularly where the legal system in question is based on statutory law (legislation). The formal status of statutory law as a source of law is based on the understanding that provisions of law are binding and they are to be applied as the basis for a judgment, where those provisions of law are applicable to the case⁶⁸⁹. This may be said to also apply to common law systems, although the binding rules are to be found in those parts of prior judgments that are considered to constitute precedents as briefly explained below⁶⁹⁰. Of the legal systems included in this study, this concerns to some extent all but particularly the French, German, Finnish and Swedish legal systems (hereinafter referred to together as "statutory law systems"). The differences between the approaches of legal systems to the admissible sources of law are perhaps the most striking between common law systems and statutory law systems, i.e. in the present case between the English legal system, on the one hand, and the other four legal systems, on the other. In the English legal system, written law has traditionally

686 Frowein 1996, p. 89.

687 PeVM 25/1994 vp, p. 170. See also Lavapuro 2010, p. 169-171.

688 Klami 1997, p. 155.

689 Nuotio 2004, p. 1271.

690 See e.g. Byrd 1997, p. 3 and 4. This indeed is the most striking difference in the general approach to different sources of law.

meant earlier case law. This tradition is still clearly visible and the system of precedence is the element on which the legal system is mainly based. In general, even in a legal system underlining the role of statutory law, case law may be recognised as a source of law, but it is generally considered to be a supplementary one⁶⁹¹. As is observed by Lauzière, among others, common law judges rather seek rules and principles of law from case law, based on repetitive cases, whereas civil law judges rely on legislation as the primary source of rules and principles of law⁶⁹². However, one may note that the English legal system has in some respects moved towards a statutory system, largely because of European influence. According to Slapper & Kelly, statutory law is already considered the predominant method of law-making, including the law of the European Union⁶⁹³. This is not necessarily the case concerning other common law systems.

Case law as a source of law consists of a number of judgments i.e. decisions made in individual cases, or more precisely the reasoning behind those decisions, that may nevertheless have value as principles. In brief, precedents are those decisions that are considered to have at least some authoritative value.⁶⁹⁴ One may also speak of a norm-creating nature of judgments.⁶⁹⁵ As observed by Strömholm, there are some challenges relating to the use of precedents. First and foremost, one needs to establish those elements of the judgment that constitute generally applicable principles. Second, the cases need to be identical as to the relevant facts and circumstances, for that those generally applicable principles apply to both. Furthermore, each case should be looked at as a whole, taking all facts and circumstances into account. Thus, the overall assessment of the case might make it necessary to reach a different conclusion.⁶⁹⁶

Of the legal systems covered by the present study, as a source of comparison, the case law has a clearly stronger status in the English legal system than in any of the other four systems, which has entailed perhaps more considerable attention to the theories of argumentation although, according to Luhmann, the difference between the statutory law and common law systems in this respect should not be overemphasised.⁶⁹⁷ In any case, there is difference in the approach to the application of precedent. According

691 See Nuotio 2004, p. 1271.

692 See Lauzière 1982, p. 45-47. Although Canada does not fall within the scope of the present study, it is interesting to note that the differences existing between the common law system and civil law system have imposed challenges particularly in Canada, and not least because of conceptual differences. In the Canadian framework, the two systems co-exist and problems have emerged both in connection with drafting national legislation that needs to be exist in both English and French, and in later interpretation of law particularly for the different role of legislation as a source of law.

693 Slapper & Kelly 2003, p. 55 and 56.

694 For details, see Tolonen 2003, p. 119 and 120.

695 Tolonen 2003, p. 120.

696 See Strömholm 1996, p. 502-508.

697 Luhmann 1993, p. 365.

to Bankowski and MacCormick, the English system of precedent is a relatively strict application of precedent even where a precedent is not binding in the narrow sense.⁶⁹⁸ According to MacCormick, the binding nature of precedents may vary, both within the legal system and between legal systems. Some of the legal systems may apply a doctrine of strictly binding precedents, whereas others – particularly mixed legal systems – may apply a doctrine of persuasive precedents.⁶⁹⁹ That approach to the doctrine of precedence applied in the English legal system does not apply to the statutory law systems covered by the present study. The terminology used in common law, with regard to precedents, is rather detailed, whereas e.g. in the Finnish legal system one quite simply may speak of the binding or non-binding nature or of the guiding nature of prior case law, although the term ‘precedent’ has been taken into use by the Supreme Court⁷⁰⁰. In the view of Bankowski and MacCormick, however, there has been some evolution in the use of precedent taking place in the English courts both in the formal practice and in the willingness of the higher courts to develop the law.⁷⁰¹ Furthermore, changes in international environment have led to increase in the practice of citing decisions taken both in the courts of other Commonwealth countries and decisions of the Supreme Court of the United States, as well as the European courts.⁷⁰² Feldman is of the view that in the United Kingdom, as a common law system, lawyers have been particularly well suited to advance arguments in the light of the developing case law of the European Court of Human Rights, and suggests that this was in fact one of the reasons for why so many cases were brought against the United Kingdom.⁷⁰³ However, despite that the

698 Bankowski and MacCormick 1997, p. 323. In a strict system of precedent, precedent is simply any prior decision of any court that bears a legally significant analogy to the case now before a court. If the prior decision is of a superior court in the same hierarchy, it will be a binding precedent that must be followed whereas in other cases it will be a persuasive precedent, possibly a relevant analogy for decision of the present case; or it may illustrate an important legal dividing line between one class of cases and cases of the class now in issue. (Ibid.)

699 As an example of a mixed legal system MacCormick names the Scottish legal system in which both main doctrines of precedents are applied. According to him, irrespective of the binding degree of the precedent, it is the *ratio decidendi* that constitutes the binding element of the precedent, as opposed to *obiter dicta* that are other statements of opinion on the law, which go beyond those necessary for deciding the case. Thus, *ratio decidendi* refer to the specific rules or principles of law that have governed the decision whose *ratio* they are. For more detailed explanation of the use of precedents in the English legal system, see MacCormick 2010, p. 141-161. See also Tolonen 2003, p. 128, Slapper & Kelly 2003, p. 83-85, and Manchester & Salter 2006, p. 4.

700 Instead, the Supreme Administrative Court still speaks of decisions published in the Yearbook, which perhaps characterises the traditional difference between the administration of justice in civil law cases, on the one hand, and administrative law cases, on the other hand.

701 The main procedural evolution in the application of precedent in recent years has been the decision of the House of Lords to change the practice by which it regarded itself as bound by its own decisions. See Bankowski and MacCormick 1997, p. 348.

702 Bankowski and MacCormick 1997, p. 351 and 352.

703 Feldman 2003 p. 438.

English legal system is in principle well prepared to apply case law, it took a long time before the English courts began to apply the case law of the European Court of Human Rights. Upon the enactment of the Human Rights Act that case law has become increasingly important as a source of law and its impact pursuant to the application of the Human Rights Act has been extensive⁷⁰⁴. This might be explained by the rather strict approach to precedents. Today, there are already examples of even detailed and elaborated references to that case law made by the United Kingdom Supreme Court.

In the four statutory law systems, the focus of the legal argumentation on the contents of legislation and on literal interpretation of law is clearly visible, and case law is given importance to varying degrees. In brief, they may be considered either to constitute precedents or they are only given value as guiding principles, i.e. they may rather be considered to produce guidelines for future adjudication, or they are understood to have a status somewhere between the two extremes⁷⁰⁵. When compared with the English legal system, the approach of the French legal system to precedent differs perhaps more than of the other statutory law systems. According to Troper and Grzegorzczuk, in the French legal language, the word 'precedent' never means a binding decision, because courts are never bound by precedents⁷⁰⁶. Thus, in France, the status of legislation as a source of law appears to be the strongest of all the legal systems covered by the present study, and case law is seldom referred to although there is a recent legislative change that may gradually lead to a stronger role of prior case law⁷⁰⁷. The courts are in principle only bound to apply the provisions of statutory law as a source of law, although particularly the preparatory work of legislation are widely used to assist interpretation. The French courts have also been slow to apply the case law of the European Court of Human Rights, although today, they do apply that case law as a standard source of law particularly where France has been a party to the case and the cases are of relevance for the French legal system⁷⁰⁸. However, when compared with the other selected legal systems, the references made to that case law are even today

704 This is the view of Masterman (2014, p. 318).

705 See e.g. Aarnio 1997, p. 49 and 50.

706 In a strong sense, precedent refers to a decision of a higher court, not as a legal, but as an authoritative argument, implying that this decision, without being binding, ought to be followed by the lower court. In a weak sense, precedent refers to a decision in a similar case by any court, even by a lower one, which could serve as a positive or negative model. See Troper and Grzegorzczuk 1997, p. 111.

707 The relevant institutional change was introduced by a statute of 15 May 1991 (Article L 151-1 et s. du code de l'organisation judiciaire). Upon that change, any judge in the judicial system of courts can ask the Court of Cassation for advice on the interpretation of a statute on a new and difficult legal issue arising frequently, although that advice is not legally binding (See Troper and Grzegorzczuk 1997, p. 111).

708 See Lageot 2014, p. 169. According to Lageot, the administrative courts have traditionally shown more reluctance towards the application of the case law of the European Court of Human Rights than general courts of law.

extremely brief and more technical, which can perhaps be explained by the traditional judicial style of court decisions.

In Germany, courts are not generally bound by precedents but they may play an important role in the courts' reasoning and in legal literature. According to Alexy & Dreier, the only case of formal bindingness concerns precedents of the Federal Constitutional Court, which are strictly binding on all courts and authorities⁷⁰⁹. This view is supported by Kommers, according to whom an obligation to apply precedents exists particularly in respect of constitutional law.⁷¹⁰ According to Alexy and Dreier, the relative overall role of precedent in the decision making of courts depends on which other authoritative materials are relevant. If the case can be decided according to the wording of a statute, precedent will play no or nearly no role.⁷¹¹ Thus, it appears that in the same way as in Scandinavia, a difference is made between such sources of law as must be taken into account and those that should be taken into account, precedents falling within the latter category⁷¹². In Germany, legislation is a compulsory source of law in the same way as in the other statutory law systems covered by the present study, whereas others are admissible and used to a varying degree. However, as explained in section 3.2.3, the reasoning in German judgments is profound and a variety of sources of law is usually referred to. What is particularly interesting to note is the strong position of opinions of scholars, due to historical reasons, which appears to be a unique character of the German legal system, even when compared with the English legal system in which the sources of argumentation are multiple. In the view of Kommers, it is particularly in the interpretation of the Constitution (Basic Law) where academic writings carry at least as much weight as precedents⁷¹³. As appears from the foregoing, an overview of the case law of the Federal Constitutional Court indicates that even today, the provisions of the national Basic Law and of the Convention play a stronger role than the case law of the European Court of Human Rights. That may be largely explained by the limits of the constitutional complaints. However, as a result of national case law of the Federal Constitutional Court, whenever the provisions of the Convention are applicable, also the relevant case law of the European Court of Human Rights has to be applied

709 Alexy & Dreier 1997, p. 26. According to Alexy and Dreier, however, it is not a common practice to categorize different precedents according to their bindingness. Rather, it is discussed how strong the binding force of precedents is in general, or if there is any binding force at all. (Ibid.) However, in legal doctrine the binding force of precedent is highly contested (Alexy and Dreier 1997, p. 31).

710 Kommers 2006, p. 192.

711 See Alexy and Dreier 1997, p. 24.

712 Alexy & Dreier 1991 (1998), p. 91 and 92.

713 Kommers 2006, p. 193. According to Kommers, the Court relies heavily on treatises and commentaries of established legal professionals. This is largely due for historical reasons as in Germany, in the same way as in other code law countries, enacted law has traditionally been produced by legal scholars, historians and theorists.

to the case in question. In the same way as in the French legal system, however, those judgments of the European Court of Human Rights that directly concern Germany tend to be of more importance. Despite this, the role of all relevant judgments of the Court serve as means of providing guidance for the application and interpretation of the Convention.⁷¹⁴ Thus, although not systematic and only on occasion detailed, however, there are increasingly references made to that case law.

In Sweden, earlier case law has not been a widely recognised source of law in the interpretation of law, although in the past twenty or thirty years previous cases have increasingly been resorted to. According to Strömholm, this recent development is largely due to a reform of procedural law. Nevertheless, still in the second half of the 1990s there was no consistent or uniform practice of applying earlier case law, nor had any particular methods been developed to do so. In the view of Strömholm, one could not speak of genuine use of case law as a source of law. For this, in his view, there should be generally accepted and consistently applied methods and the courts should also respect those methods with regard to the use of case law. Strömholm notes that these do not exist in Sweden.⁷¹⁵ In Sweden, a 'precedent' refers to a published decision (reported in the NJA), the reason of which is mainly to guide future decision making by the courts.⁷¹⁶ The same largely has largely applied to Finland, and important judgments of the supreme jurisdictions have been considered to have some value as precedents. Particularly the cases published by the supreme jurisdictions themselves in their year-books are considered to have a guiding impact on later adjudication by lower courts. Even in Sweden, the case law applied as a source of law is mainly that developed by the highest court instances. Strömholm makes a distinction between cases the binding nature of which is relative and those of which it is absolute, the latter mainly relating to the common law systems.⁷¹⁷

The distinction drawn by Strömholm appears to coincide with that made by MacCormick. One may note that today, at least the Supreme Court of Sweden has begun to increasingly apply the case law of the European Court of Human Rights as a source of law, and the supreme jurisdictions in general have an important role in the interpretation of new case law of the European Court of Human Rights and in the evaluation of its impact on the Swedish legal system⁷¹⁸. In the same way as in the

714 Klein 2014, p. 203 and 204.

715 For details, see Strömholm 1996, p. 498-500.

716 According to Bergholtz and Peczenik, this takes place in three ways: according to justice, utility and as a contribution to a coherent and well-designed body of law, utility probably being the strongest drive behind the rationale. See Bergholtz and Peczenik 1997, p. 297. Although not strictly binding, precedents are regularly followed by Swedish courts, and the actual role of precedents has constantly increased. (Ibid. p. 299)

717 Strömholm 1996, p. 505.

718 Cameron and Bull 2014, p. 276.

other legal systems analysed for the purposes of this research, the Swedish courts also pay particular attention to those cases where Sweden has been the respondent state, although also other judgments are resorted to⁷¹⁹. Still in the 1990s, this appeared to be rare despite that examples of references to that case law can be found. Those references were, nevertheless, rather brief and in the light of them, it is hard to say whether the cases were in fact analysed.⁷²⁰ From the past few years, one may already find examples of Supreme Court cases where the court has even resorted to a detailed analysis of the case law of the European Court of Human Rights. In a case concerning the extradition of a suspect to Rwanda, for example, the Supreme Court consulted already several cases of the European Court of Human Rights and made a rather detailed analysis of the situation in the light of that case law. In that particular case, the Convention provisions had been invoked already by the defendant, but despite that the analysis made by the Supreme Court is remarkable.⁷²¹ An even more extensive consultation of the case law of the European Court of Human Rights can be found e.g. in a later case concerning the principle of *ne bis in idem* under Article 4 of Protocol No. 7 to the Convention.⁷²² When compared with the same types of precedents of the Finnish supreme jurisdictions, one may note that the style of argumentation has some similarities.

As regards case law, the situation in Finland is largely similar with Germany and Sweden in that the legal system traditionally underlines the importance of legislation as the main source of law. The law does not provide for the relevance of case law, but it is an acceptable and authoritative source of law⁷²³. As observed in the foregoing, the case law that has mainly been applied as an authoritative source of law is that of the supreme jurisdictions. Although they have traditionally not been considered to constitute precedents, they are today frequently resorted to and constitute *de facto*

719 Cameron and Bull 2014, p. 277.

720 See e.g. the judgments of the Supreme Court of Sweden NJA 1991, p. 512, and NJA 2008, p. 868. Despite the more than fifteen years' time between these two judgments, no significant difference can be observed in the technique of reference.

721 NJA 2009, p. 280. In this case, the Supreme Court also consulted a number of other foreign materials, such as reports on the conditions prevailing in Rwanda, including reports made by non-governmental organisations, and decisions of the International Criminal Tribunal for Rwanda, the Ministry of Justice of Finland and the High Court of Justice in London. The Supreme Court assessed whether extradition, in the light of the conditions in the judicial system in Rwanda, would be in conflict with Article 6 of the Convention, finding that there was some uncertainty particularly as regards the possibility to have witnesses heard (equality of arms) but that there was no obstacle to extradition.

722 The judgment of the Supreme Court of Sweden NJA 2010, p. 168. The Supreme Court included sixteen cases of the European Court of Human Rights, one case of the European Court of Justice and seven national cases in the list of case law used as a source of law.

723 See e.g. Aarnio 1997(2), p. 79 and 80. The concept 'precedent' has a special position in the Finnish system of application of law. The case law of the supreme jurisdictions guide the administration of justice of lower courts but the lower courts of justice are not legally bound by it.

precedents, and the lower courts of law follow the developments, including any changes of view that the supreme jurisdictions explicitly present in new precedents. The supreme jurisdictions themselves also refer to their prior case law and it appears that in case there is reason to deviate from prior precedents, the reasons are explicitly stated. Although the Finnish legislation does not provide for the status of the case law of the European Court of Human Rights, in the same way as for example the rather recent provisions of English law, the Convention provides for a binding control mechanism, and the Finnish authorities – as well as the authorities of any State Party – is today under an obligation to take the judgments of the European Court of Human Rights into account. This has also been recognised by the supreme jurisdictions as shown in section 4.5 below.

In the view of Koskelo, the appearance of the international elements in the legal system has de facto made it necessary to expand the concept of sources of law. Both the membership of the European Union and the accession to the European Convention on Human Rights have entailed an increasing role of case law as a source of law in national courts, whereas earlier the Finnish jurisprudence has largely focused on the provisions of legislation.⁷²⁴ Insofar as the relevance of human rights and fundamental rights are concerned, she points out, like Ojanen⁷²⁵, that one should mainly speak of a strong impact on the interpretation of law, which in some cases may be entirely based on the case law of the European Court of Human Rights. Koskelo refers to a precedent of the Supreme Court (KKO 2009:80) concerning a request for reversal of judgment, in which the court confirmed the significance of the Strasbourg case law.⁷²⁶ The Supreme Court reiterated, referring to earlier case law⁷²⁷, that the European Convention on Human Rights was applicable law in Finland and even that its incorrect application could constitute a ground for reversal of judgment. In such a case, the interpretations given by the European Court of Human Rights after the original national judgment would be taken into account.⁷²⁸ Today, the case law of the European Court of Hu-

724 Koskelo 2010, p. 27 and 33.

725 Ojanen 2005, p.1216. Ojanen speaks of the "strong binding nature" of the judgments of the European Court of Human Rights.

726 Koskelo 2010, p. 33 and 34.

727 KKO:1998:33 and KKO:2008:24.

728 KKO:2009:80, paragraph 7. The earlier cases of reversal of judgment related to judgments of the European Court of Human Rights concerning those particular judgments, whereas in KKO:2009:80, the Supreme Court took into account even judgments given by the Strasbourg court in other cases. The Supreme Court found that although the original judgment of the Supreme Court did not appear to be in conflict with the then case law of the European Court of Human Rights, at the time of re-hearing the later developments of case law gave reason to find that there was a conflict between the original judgment and later interpretations of the Court (paragraph 36).

man Rights is accepted even as a binding source of law⁷²⁹, and in the same way as in Sweden, it is increasingly applied by the supreme jurisdictions, and there are already many examples of such judgments in which the references to that case law are rather detailed. Thus, the criterion of the applicability of the case law as a source of law in the courts is met. Whether there is preparedness to go further and also receive the argumentation of the European Court of Human Rights, to strengthen the third phase of transition of the legal culture, it is necessary to have an even more flexible approach to permissible sources of law.

4.1.3 Applicability of other sources of law

The increasing international elements, particularly the Union law and the European human rights law, present in the legal systems subject to this study have affected them in various ways. They have not only affected the way in which the legal system is understood and how sources of law are looked at, but also the legal reasoning to some extent. In particular, it has become necessary for national courts to take foreign sources into account in adjudication. This is inevitable insofar as the Union law and the European Convention on Human Rights and relevant case law are concerned, but as Smits points out, it would be desirable to also look into the case law of other States, applying the relevant provisions of European law, although this has been done to a lesser extent⁷³⁰. A more flexible approach to the use of sources of law also makes it easier for national courts to adapt themselves to the judicial discourse and use of principles of interpretation by the European Court of Human Rights. When compared with one another, it appears that the German legal system applies the most flexible approach to different sources of law than the others, although particularly in Finland and Sweden there has been some move towards a wider approach to sources of law other than legislation and case law. It also appears that particularly in those judgments of the United Kingdom Supreme Court that have links with the protection of fundamental rights, a greater variety of sources of law are used, although that Court still relies strongly on its own prior precedents as well as to prior case law of other English courts. It seems that of the legal systems covered by the present study, in the light of an overview of national case law and doctrine, the French jurisdictions are the most reluctant ones in applying a flexible approach to different sources of law. Although the case law of the European Court of Human Rights, for example, is today cited as an applicable source of law, the references to sources of law other than legislation and case law are extremely rare when compared with the other legal systems.

In those cases where sources other than legislation or case law are applied, the Finnish supreme jurisdictions tend to refer to general principles of law supplementing

729 See KKO:1996:80 and KKO:2009:80, for example.

730 For details, see Smits 2004, p. 234-236.

legal argumentation. In particular, they have traditionally represented legal standards for which support must be provided by sources of law. The same has applied to the so-called “contextual arguments” (*reelle hensyn*), which are a peculiarity of the Scandinavian legal systems and which rather supplement the information provided by sources of law. They are of particular importance in teleological interpretation of law.⁷³¹ Similarly, in the light of the case law of the European Court of Human Rights, the contextual arguments appear to play a role particularly in those situations where the Court resorts to the principles of evolutive or dynamic interpretation, European standard, margin of appreciation and autonomous meaning.

However, today, references to principles of law and contextual arguments appear to be increasing and scholars also increasingly recognise all such authoritative grounds that may be invoked in the resolution of a case as sources of law, although they divide the sources of law into three categories depending on their binding nature⁷³². As an example of contextual arguments that should in some situations be given high importance despite the existing provisions of law one may name human rights and fundamental rights⁷³³. More frequent references to principles of law, including principles of interpretation of law, and contextual arguments would bring the argumentation of the Finnish supreme jurisdictions closer to that of the European Court of Human Rights. The advantage with a certain flexibility of interpretation of law is that it makes it possible to take into account the development of society and new legal situations. That also increases the preparedness of national jurisdictions to adapt themselves to the approach chosen to different sources of law by the European Court of Human Rights, which is a flexible one, particularly the tendency to treat the Convention as a living instrument.

Legal principles, as part of legal culture, play an important role in the identification and systematisation of legal situations, entailing interaction between the surface structures (rules) and deep structures of law (legal culture). Further, a human rights friendly systematisation of legal rules helps to maintain the internal coherence of the legal order.⁷³⁴ That opinion fits well together with the observations presented by Alexy concerning the activities of courts in supplementing legal arguments with general

731 Tuori 2000, p. 175 and 197.

732 See in particular Nuotio 2004, Karhu 2003, p. 803, p. 1269, Aarnio 1989, p. 217, and Peczenik 1988, p. 239. Peczenik nevertheless makes a distinction between sources of law that are so binding that they shall (*skall*) be taken into account (in Sweden only the law), those that have such a significant authoritative status that they are close to binding (must (*bör*) be taken into account), and those that may be taken into account (p. 240-245).

733 Karhu 2003, p. 803 and 804.

734 Karhu 2003, p. 805. Tuori also speaks of surface structures and deep structures of law. The deep structures represent the common ideas of law, which may be shared by different legal systems, whereas the surface structures are the expressions of those ideas and change more rapidly than the deep structures (for details, see Tuori 2000, p. 171-178 and 202-212).

practical arguments, to fill in a rationality gap⁷³⁵. One may note that any systematisation of legal rules helps to maintain the internal coherence of the legal order in that today, various sectors of legislation are interdependent and changes in one piece of law may have implications on several others. An effort to aim at systematisation of legal rules and principles in fact appears to apply to the case law of the European Court of Human Rights. Although some scholars have criticised the Court for unpredictability in its approach to the interpretation of the Convention, such critical views – in the view of Lavapuro – often fail to actually study the case law, which would allow to see that it is legally structured and rather systematic, and a certain predictability may be observed.⁷³⁶ When looking into the way in which the Court reasons, advancing from main principles to exceptions and to the facts of the concrete case indeed increases the consistency of case law, which is also reflected in national case law. However, as regards the change of legal culture, the situation is more complicated than a mere change of legal rules or case law. It is important to note that the surface structure of law, i.e. the way a piece of legislation is written or the way in which the court reasons, does not tell the entire truth about the legal culture. Even a change of case law does not necessarily reflect the more profound conditions of society i.e. how the law is understood. The surface structure of law changes more rapidly than the deep structures. Thus, despite that the case law of the European Court of Human Rights changes, it does not necessarily mean that it is rapidly adopted by the national jurisdictions.

At any rate, the applicability of a wider range of sources of law than earlier appears to find support from both scholars and case law. One may assert that those legal systems that have adopted a flexible approach to the admissible sources of law for the purposes of interpretation should be more open to the rather open approach of the European Court of Human Rights to sources of law. In this respect, one would assume that the German legal system should be particularly well equipped to recognise and apply the case law of the European Court of Human Rights, and this even seems to have been the case. One would assume so also in respect of the English legal system for the reason that the role of national case law is traditionally strong, and there is reason to believe that it should not be a particularly hard task for domestic courts to even apply foreign case law, at least in theory. However, it is to be borne in mind that in assessing the receptiveness of the legal system to the case law of the European Court of Human Rights, including the principles and arguments set out therein, the approach to sources of law is not sufficient, but what is equally or even more important is the way in which those sources of law are treated, i.e. the methods and principles of interpretation of law. These two elements are inter-dependent. In the following, the analysis is continued with reference to such methods and principles.

735 See note 35.

736 Lavapuro 2010, p. 117.

4.1.4 Principles of interpretation of the Court and national approaches to the interpretation of law

4.1.4.1 General aspects

As explained in the foregoing, the European Court of Human Rights applies the general principles of interpretation of international treaties when applying the Convention, with certain additional principles developed in the Court's case law. This is not necessarily the case in all States parties to the Convention, and there might be even considerable differences in the principles of interpretation used. National legal systems may have different approaches to the applicable sources of law, they may put emphasis on different methods of interpretation and they may have adopted different techniques of interpreting law, which may not only differ from one another, but they may also be different from those applied by international courts, although in both cases the methods of interpretation could be roughly divided into those underlining the intention of the legislator and those focusing on the literal meaning of the piece of legislation⁷³⁷. According to the first-mentioned view, judges should not interpret law as they believe it should be read but the way the legislator intended it to be read, and whenever the text of the piece of legislation is not clear, the judges should look into the legislative history to establish what the legislator really intended.⁷³⁸ However, insofar as the European Court of Human Rights is concerned, this approach does not hold entirely as the Court appears to have a rather modern approach to the establishment of the meaning of the Convention provisions. The Court does refer to the purpose of the Convention, but as explained in the foregoing, seldom with reference to the preparatory work as the Convention is rather interpreted as a living instrument. A similar approach may have to be adopted for the interpretation of such statutes that have been drafted a long time ago and no longer meet the requirements of developments that have taken place in society⁷³⁹. That takes place only seldom in Finland, but it is possible as shown in the analysis of the national case law. Thus, the analysis of the classical methods of interpretation applied by the supreme jurisdictions is of relevance for the reason that despite the emergence of new sources of law, in which a different approach to the interpretation of law has been adopted, the national jurisdictions still appear to

737 See Lindroos-Hovinheimo 2011, p. 279, who refers to the works of an early Finnish scholar, Frans Oskar Lilius, already making this division and noting that the historical school of thought focused rather on the intention of the legislator. The literal meaning has perhaps been the focus in later decades as the principle of legalism gained ground.

738 Dworkin 1986, p. 314 and 315. Dworkin calls this "the speaker's meaning" of law. A judge who accepts this meaning would usually present his conclusions as statements of the meaning of the statute itself. (Ibid. p. 315)

739 See Dworkin 1986, p. 348.

dominantly apply the classical methods. The purpose of this thesis is not to go into a profound analysis of those methods but for the purposes of analysing the discourse of the supreme jurisdictions as it was at the time of Finland's accession to the European Convention on Human Rights, that discussion constitutes an essential background to see how they interact or possible merge with the methods of interpretation developed by the European Court of Human Rights. At the time of Finland's accession, the classical methods were the dominating ones and are still visible in the national case law.

Furthermore, theories of interpretation or principles or techniques of interpretation may bear different names, both within one legal system and in different legal systems, as proposed by legal scholars. The division into common law countries and statutory law countries, referred to in the foregoing, also plays a role in the interpretation of law. Although that division is rather typical in comparative research and the results of such research are today rather common knowledge, some of those elements are pertinent for the purposes of the present study. In the legal systems covered by the present study, the rough division into the two major groups of countries is visible both in the approach of the legal system to the sources of law and in the principles and techniques applied to interpret those sources, although there are some characteristics that rather belong to a particular legal system. That has also changed since Finland's accession to the European Convention on Human Rights. The legal systems in Europe have gradually moved closer to one another as regards interpretation of law, which is largely due to supranational elements in the legal systems.

The interpretation of a text is an essential part of judicial reasoning, having as its objective not only to find the meaning of the piece of text, but also to assess its effects⁷⁴⁰. The elements in common to be taken into account in any interpretation of law include, in particular, the literal meaning and the objective and purpose of the text as well as the context, i.e. those principles that can also be found in the Vienna Convention on the Law of Treaties and in the case law of the European Court of Human Rights. As pointed out by Luhmann, the way in which a piece of legislation or an international agreement is read usually depends on the particular context in which it is applied. What is also common for any interpretation of law is its aim to determine how it should be read, by means of a set of arguments used to justify the correct reading.⁷⁴¹ Furthermore, as is observed by Alexy & Dreier, there is some uncertainty caused by

740 Gémar 1995, p. 11. This is to say that whatever the method of interpretation is, be it in common law or civil law systems, the meaning of the text is always at play, which entails necessary the meaning of words. However, the lawyers of all cultures have always aimed at reducing, to a minimum, errors of law that might have serious consequences. (Ibid. p. 159-160)

741 See Luhmann 1993, p. 364. According to Van Hoecke, the context plays a key role in the attachment of a particular meaning, exerting a fundamental influence on the meaning of words, sentences or texts. Such a context may be explicit or implicit, linguistic or non-linguistic, written or spoken, or legal or non-legal. (Van Hoecke 2002, p. 137)

the openness of statutory interpretation, due to the application of various methods of interpretation, which may lead to different outcomes.⁷⁴² This can be seen in any legal system, but it is particularly typical of judgments of the House of Lords in the English legal system, as they consist of separate opinions of the justices. Also, as G mar points out, there are other factors affecting the logical reasoning, depending on the place and other circumstances.⁷⁴³ Thus, the background of the person interpreting the legal text also plays a role, increasing the presence of subjective elements of interpretation. All these elements can be said to apply to any interpretation of law.

Šarčević suggests that national courts tend to resort to the principles and methods of interpretation of national law even when applying international agreements, particularly in such States where incorporation of international agreements is required by the legal system for them to become applicable law. She mentions the United Kingdom as an example⁷⁴⁴ but this would also apply to the other States subject to the present study, except for France. Indeed, incorporation may place the implementing legislative act at the same level with any other piece of legislation with the same hierarchical status in the legal system in question, which in turn may result in the application of similar methods of interpretation with those of the international agreement. Whatever the method of interpretation resorted to in domestic courts is, however, the interpretation is also affected by other factors.

The methods of interpretation of treaties, as given account of in the foregoing, have some peculiarities, which are largely based on the fact that treaties are products of negotiations that may sometimes be long and cumbersome, leading to a result that is a compromise representing the views of an even large number of negotiating parties. However, those methods of interpretation also share some elements in common with the methods and principles applied to the interpretation of law and contracts. What characterises both the interpretation of treaties and the interpretation of private or administrative law contracts, to distinguish them from legislation, is a stronger focus on the intention of the parties, whereas legislation is a product of parliamentary procedures and what is to be established is the intention of the legislator. The search for the meaning of a treaty provision, where interpretation is required, is thus about establishing the meaning intended to be given to the provision by the parties that represent a variety of

742 See Alexy & Dreier 1991 (1998), p. 77.

743 G mar 1995, p. 160 and 161. He draws a distinction between the historical, comparative, analytical, sociological and philosophical (ethical) perspectives that in his view are present, subconsciously or implicitly, in most forms of interpretation of texts.

744 Šarčević 2000, p. 218. Her view appears to be supported by Viljanen (V-P) concerning Finland. In his view, as the provisions of the European Convention on Human Rights, for example, have been implemented by means of an ordinary Act of Parliament, the normal rules of interpretation of law (such as the principles of *lex posterior* and *lex specialis*) would apply. In addition, the principle of human rights friendly interpretation of law applies in the application of law. However, he admits that a change is taking place in the application of the principle of *lex posterior*.

legal systems and cultures. Van Hoecke draws a distinction between the subjective and objective meaning. In addition to the subjective and objective elements of meaning, Van Hoecke has also drawn attention to the distinction between the sender-meaning and the receiver-meaning that have a close link with the subjective and objective elements of meaning and interpretation. The meaning that the author of a piece of legislation or an agreement has intended to give to the text is not necessarily the same as the interpretation of the text by the receiver.⁷⁴⁵

The aforementioned observations of Van Hoecke are interesting when put in the context of the case law of the European Court of Human Rights. The Court may be said to apply a method of establishing the objective intention of parties as it only seldom refers e.g. to preparatory work that might help establish the real intention of parties. Search for the real intention of parties may be more visible in early case law, but the further the Court has gone in interpreting the Convention, the clearer it has become that it is assessing the meaning of the Convention provisions as an external observer. One must remember that this is also part of what the parties originally intended as they decided to vest the competence of interpreting the Convention in a special judicial body. Nevertheless, the transfer of competence does not exclude the application of the Convention at the national level. To the contrary, national courts are faced with questions of application and interpretation without first having the possibility to request a preliminary ruling from the European Court of Human Rights. As for the distinction between the sender-meaning and receiver-meaning of the text, there are two aspects to be taken into account. First, the text of the Convention was drafted by the representatives of the contracting parties who had a certain meaning in mind when establishing the wording of the Convention. Thus, the contracting parties constitute the first-hand sender of the meaning, whereas the Court is a receiver of the text. Second, as a result of the transfer of competence in the interpretation of the text, the Court has assumed the role of a sender of the meaning and the contracting parties are in turn a receiver of the interpretations given by the Court to the provisions of the Convention. Consequently, the roles have changed and today, what is relevant is how the national authorities and courts receive and understand the meanings given to the Convention provisions. In this respect, there have been and can emerge differences between the various legal systems involved. Considering that Germany has had relatively few problems in the application of the Convention at the national level, when compared with France and the United Kingdom, the rather open attitude of the legal system towards interpreting law and international treaties, including preparedness to

745 Van Hoecke 2002, p. 136. Apart from the sender-meaning and the receiver-meaning, Van Hoecke also mentions the concept of *prima facie meaning* which means the meaning attributed to the text by the reader at first sight. He points out that the *prima facie meaning* is usually rather clear when the text of the law is clear, but that this does not necessarily mean that the sender-meaning and the receiver-meaning are the same. (Ibid. p. 136 and 137)

search for the objective intention of the legislator or the parties, may be one factor explaining it, albeit not the only one.

The approach to the sources of law further affects the techniques and methods of legal reasoning. According to Smits, courts in statutory law countries have shown more preparedness to apply a wider range of methods in the interpretation of legislation, whereas courts in common law systems have rather relied on literal interpretation – due to the supremacy of common law, statutes have been interpreted as restrictively as possible in order to establish the plain meaning of the statute. The traditionally central role of legislation and thus the existence of abstract legal rules in statutory law countries has entailed a rather formal deductive way of reasoning by courts, whereby the rule is set out first, as provided for by the legislation, followed by the establishment of the facts of the case and resulting in a logical outcome of the application of the rule to the concrete case (deduction). According to Smits, this is clearly visible e.g. in the case law of the French *Cour de Cassation*. In contrast, the common law traditions of legal reasoning highlight the relevance of case law, although the distinction between the two legal traditions has become less clear in recent times as e.g. the English legal system today relies increasingly on statutory law. Further, there are differences between statutory law systems as well. Although both in the French and the German legal systems legislation is typically rather exhaustive, which has resulted in rather scarce legal reasoning in judgments, German courts tend to provide more detailed reasons for their judgments, referring extensively to case law and doctrine. The French courts, particularly *Cour de Cassation*, have traditionally avoided very detailed reasoning.⁷⁴⁶

4.1.4.2 Interpretation of legislation – comparative observations

Within the common law system covered by the present study, i.e. the English legal system, there appears to exist a wide range of names given to interpretative techniques and rules. A classical distinction is made between these rules of statutory interpretation: the literal rule, the golden rule and the mischief rule⁷⁴⁷ although denominations equivalent to those used in continental legal systems are also used⁷⁴⁸. The essential contents of the literal meaning rule are that the judge is to consider what the law actu-

746 For details, see Smits 2004, p. 230-234. Hart suggests that courts would typically rely on the provisions of legislation in plain (clear) cases, whereas interpretation is needed in those cases where it is not clear whether the provisions of law apply or not (so-called fact cases). The canons of interpretation cannot entirely remove the uncertainties – Hart calls this situation as the open-texture of law. (Hart 1994 (1997) p. 126 and 128) This would presumably be the case particularly in civil law systems, where precedents would indeed be constituted by the latter cases, whereas common law systems have traditionally applied a different approach.

747 For details, see Slapper & Kelly 2003, p. 174-179. See also Bennion 2009, p. 79 and 80.

748 Bankowski and MacCormick use the distinction between linguistic, systemic and teleological (or evaluative) interpretative arguments (Bankowski and MacCormick 1991(1998), p. 364). For details, see *Ibid.* p. 365-373.

ally says instead of assessing what it might mean. When compared with the methods of interpretation of the European Court of Human Rights one might assume that the emphasis in the English legal system on a rather literal interpretation of law might be a factor decreasing the preparedness of the national courts to apply and adopt the way of reasoning of the European Court of Human Rights.

Apart from teleological-evolutive arguments advocated by MacCormick⁷⁴⁹, the different methods cited by English scholars are not in favour of an evolutive approach. However, as a common law system, the English legal system has longer traditions of applying case law as a source of law, and common law has been given priority over a long period of time. Thus, one would presume that it is precisely the national practice of applying case law that would make the English legal system particularly apt to adopt the argumentation of the European Court of Human Rights. The style of writing judgments in England is, however, very different and as observed in the foregoing, the doctrine applied to precedents is considerably stricter than that of the European Court of Human Rights. Furthermore, the aforementioned views of scholars suggest that at least in principle, the elements of argumentation used by the European Court of Human Rights also exist in the English legal system. One may note that the number of violation found against the United Kingdom by the European Court of Human Rights, and there have been problems faced by the legal system. However, it is observed in the foregoing that the English courts have increasingly begun to apply the case law of the European Court of Human Rights. The technique of applying it is still somewhat different.

In the French legal system, the concise style of judicial decisions makes it difficult to assess the use of particular methods of interpretation by courts. The statement of reasons normally includes a quotation from the provisions of law and sometimes an interpretation thereof. However, according to Troper & al., courts do not usually define an issue of gap-filling nor issue a clear interpretation but content themselves to assert that the words of the statute have a certain meaning, referring possibly to the plain meaning or on occasion to the preparatory work or the purpose of the statute.⁷⁵⁰ That observation is confirmed by an overview of the case law of *Cour de Cassation*. Literal interpretation appears to be clearly the one favoured by French courts, which also underlines the relevance of linguistic arguments, but on occasion courts supplement them with genetic, systemic or purposive interpretation. Only in rare cases may courts openly disregard linguistic arguments, with a view to formulating a new rule (*contra*

749 For a detailed analysis, see MacCormick 2010, p. 124-137. The argumentation of MacCormick is essentially based on the understanding that linguistic arguments are always liable to, and often require, supplementation by recourse to other arguments. In the case of legal argumentation, these other arguments are concerned with matching the interpreted text to the legal context (legal system) (see Bankowski and MacCormick 1991(1998), p. 366).

750 Troper & al. 1991 (1998), p. 197.

legem).⁷⁵¹ The focus on literal interpretation appears to be an element in common with the English legal system. The strong emphasis on literal interpretation of law until recent times and rather strict rules of applying provisions of law may be a factor explaining the relatively slow development in France in applying the provisions of the European Convention on Human Rights as a source of law, including the case law of the European Court of Human Rights, in the same way as in the English legal system where the incorporation of the Convention took place at a late moment. However, the increasing references to the Convention in national case law and the tendency in France to move towards teleological interpretation of law may be presumed to increase the preparedness of the legal system to adopt the reasoning of the European Court of Human Rights.

The German classification of methods of interpretation is rather close to the Scandinavian one. In the German legal system, the focus of general courts of law appears to be on literary interpretation (*Wortlaut, philologische Auslegung, grammatische Auslegung*)⁷⁵², which is distinguished from logical interpretation. As mentioned in the foregoing, literal interpretation has also been the dominating method of interpretation in the English and French legal systems. Further, Alexy & Dreier draw a distinction between genetic and historical interpretation⁷⁵³. Apart from the systematic and teleological interpretation, also referred to by most Scandinavian scholars, Alexy & Dreier specifically mention comparative interpretation as a separate method⁷⁵⁴. The systematic interpretation focusing on the context of the Convention as a whole has been adopted also by the European Court of Human Rights, and the German practice of constitutional interpretation appears to be close to it. Insofar as teleological interpretation is concerned, the German courts appear to apply it with prudence in the same way as courts in the Scandinavian legal systems although, according to Kommers, it does enjoy significant support particularly by the Constitutional Court⁷⁵⁵. In general, it appears

751 Troper & al. 1991 (1998), p. 190 and 191.

752 Alexy and Dreier call the principle of literal interpretation that of semiotic interpretation. See Alexy & Dreier 1991 (1998), p. 82.

753 Genetic interpretation refers to the intention of the legislator, and historical interpretation refers to the investigation into the history of concepts, doctrines and institutions as distinguished from the intention. Alexy and Dreier 1991 (1998), p. 85-87.

754 Insofar as the teleological method is concerned, they further divide it into subjective and objective methods (see Alexy and Dreier 1991 (1998), p. 87-89). Kommers names four methods of judicial reasoning commonly used in any interpretation of law i.e. historical, grammatical, systematic and teleological methods, but goes further in identifying modes of judicial review that in his view reflect the Constitutional Court's approach to the interpretation of the Basic Law, including textual (literal), structural (systematic) and teleological interpretation, but also mentions drafting history, proportionality and practical concordance (*praktische Konkordanz*) as well as certain other features of interpretation. (Kommers 2006, p. 196. For details of the named modes of judicial review, see p. 197-206.)

755 Kommers 2006, p. 200.

that the methods of interpretation applied by the German judiciary are largely similar with those applied by the European Court of Human Rights, although the terms used are not always the same.

The Scandinavian traditions of theory of interpretation of law appear to use concepts that differ from those used in the common law traditions but share some features with the German and French legal systems, being statutory law systems, although the principle of literal interpretation is shared by all of them. However, according to Peczenik and Bergholz, there are also some elements of common law in the Swedish legal system, having also impact on the interpretation of law⁷⁵⁶.

Peczenik draws a distinction between literary (linguistic), systemic and logical (functional), interpretation of law, on the one hand, and between reductive, restrictive, extensive and analogical interpretation, on the other, as well as teleological interpretation.⁷⁵⁷ Strömholm adds to these the concepts of subjective and objective interpretation, of which the aforementioned methods are subcategories, the systematic and teleological methods representing objective methods of interpretation.⁷⁵⁸ The classifications made by Peczenik and Strömholm are very detailed, which makes it difficult to compare them with common law traditions. This might be partly explained by the different nature of the legal system. Literary and systematic interpretation as well as teleological interpretation seem to coincide with those named by MacCormick, whereas particularly the categories of reductive, restrictive, extensive and analogical arguments rather appear to be ways of reasoning that MacCormick speaks of in a different context. However, the classifications of Peczenik and Strömholm have similarities with the German ones, although they appear to be even more detailed. Although the Swedish legal system, in the same way as Scandinavian legal systems in general, seems to have borrowed the main methods and principles of interpretation of law from the Germanic legal traditions, it seems that the practice of interpretation of law, nevertheless, differs more from that of the European Court of Human Rights than the German practice does, particularly as regards the German Constitutional Court. Furthermore, in principle the hierarchical status given to the Convention in the Swedish legal system has the potential of creating problems.

The Finnish legal system has been rather legalistic, where statutory law has traditionally played a strong role although, according to Aarnio, in recent times there has been

756 See Peczenik and Bergholz 1991 (1998), p. 311. The Anglo-American influence is nevertheless rather limited.

757 For details, see Peczenik 1990, p. 179-207. In his classification, teleological interpretation appears to constitute part of functional interpretation (see Peczenik and Bergholz 1991(1998), p. 316). See also Strömholm 1996, p. 436-438 and 447-456, and Aarnio 1991 (1998), p. 132-142. In this writing, Aarnio speaks of linguistic (semantic or syntactical) arguments, systemic arguments (intention/purpose, systemic interpretation, customary law, precedents, comparative arguments, historical arguments, legal-dogmatic arguments, analogy/e contrario), as well as teleological and evaluative arguments.

758 For details, see Strömholm 1996, p. 453-456.

a shift towards a more flexible approach. The observations presented in the foregoing concerning the Swedish methods of interpretation of law largely apply to the Finnish legal system. The Finnish and Swedish legal systems are in many respects similar or even identical, and therefore even the methods and techniques of interpretation of law have similarities. However, Aarnio mentions one particular difference. In Finland, the higher courts do not refer to the intention and purpose of the statute as often as is done in Sweden.⁷⁵⁹ Although this is sometimes done, particularly with the help of preparatory work, it is more widely recognised that if semantic and structural interpretation fails, the task of the interpreter is to determine the site of the norm within the system of norms. In practice this means that the decision is based on the legal system or on the fundamental principles of the appropriate part of the legal system.⁷⁶⁰ Those observations can be confirmed on the basis of an overview of the case law of the Supreme Court and the Supreme Administrative Court.

When looking into the methods of interpretation of law, there are elements that appear to have been borrowed from foreign legal systems, particularly the Swedish and German ones. This may also partly explain the rather flexible approach to the use of precedents. However, there are certain differences, particularly more frequent reliance on structural or teleological interpretation, which may make the German legal system more prepared to adopt the reasoning of the European Court of Human Rights. Despite the increasing reference to the European Convention and the case law of the European Court of Human Rights as sources of law, the increased application of human rights does not appear to have changed the general approach to the principles of interpretation of law. New types of methods of interpretation usually occur in the context of referring to the fundamental rights or human rights provisions. As regards the principles of interpretation applied by the European Court of Human Rights, however, not all of them are still visible in national case law. Although some scholars have called for increased application of other sources of law, particularly general principles of law, those are still today less visible in the case law of the supreme jurisdictions as is elaborated on in more detail in section 4.5 below. However, some transition appears to be taking place. In principle, there should not be any major problem, from a theoretical point of view, to develop the approach to the sources of law and principles of interpretation of law to an even more flexible one.

4.1.4.3 Interpretation of constitutional rights – comparative observations

Insofar as the interpretation of constitutional law provisions and fundamental rights provisions are concerned, one may note that in those legal systems where a written constitution exists, the constitution usually contains at least some provisions on funda-

759 Aarnio 1991 (1998), p. 135.

760 Aarnio 1991 (1998), p. 137.

mental rights. Grewe points out, however, that constitutions only seldom provide for specific rules on their interpretation, which affords a rather large degree of flexibility⁷⁶¹. Thus, a rather similar approach could be adopted with regard to the interpretation of national constitutions as with regard to the interpretation of the Convention. This is the general approach chosen in Finland, as shown in the analysis of the case law of the supreme jurisdictions in section 5 below.

In the English legal system, the interpretation of constitutional rights is a rather recent aspect of the interpretation of law for the reason that there were no constitutional or other statutory provisions on fundamental rights until the enactment of the Human Rights Act of 1998. The new provisions, enhancing the application of the European Convention on Human Rights, have also had an impact on the interpretation of law despite that in general the same types of principles of interpretation are applied as in respect of any application and interpretation of law. First, the provisions of other legislation must be read in conformity with the Convention rights and, second, the Human Rights Act has enhanced the application of the teleological method of interpretation of law (see section 2.6.2.1 above). This can be said to be an important change in a legal system that has traditionally relied strongly on literal interpretation of law. However, more time is needed to assess in which manner the principle of teleological method has in fact been applied and whether it has been applied in the same way as it is applied by the European Court of Human Rights. At any rate, in the view of Masterman, the Human Rights Act has resulted in that the national courts have responded to judgments of the European Court of Human Rights against the United Kingdom by modifying their approach to the relevant domestic law. However, although the courts have this possibility, it has not replaced the common law doctrine of precedent, but domestic courts are still formally bound by applicable domestic precedents even if they are inconsistent with the Convention until replaced by a new precedent. Effective application of the case law of the European Court of Human Rights is also restricted by internal constitutional limitations as domestic courts cannot impose amendments to legislation found incompatible with the Convention.⁷⁶² Despite the limits set by the national legal system, there appears to be already some form of interaction between the United Kingdom Supreme Court and the European Court of Human Rights⁷⁶³. Thus, the overview of the case law of the Supreme Court made for the purpose of this research as well as the works of scholars appear to confirm a conclusion that the culture of interpreting fundamental rights in the English legal system has undergone

761 Grewe 1998, p. 200.

762 Masterman 2014, p. 320 and 321.

763 See, in particular, Masterman 2014, p. 323. According to Masterman, the English courts even have adopted a restrictive approach to the application of the principle of margin of appreciation, and have instead placed an emphasis on the nature of the Convention as a living instrument. (Ibid. p. 324)

a significant transition, which has increased the receptiveness of the legal system to the argumentation of the European Court of Human Rights.

Insofar as constitutional law in France is concerned, Troper & al. mention certain special aspects worth mentioning. In their view, the distinction between constitutional and non-constitutional principles and values is far from clear. As reasons for this they mention, first, that the preamble of the present Constitution refers to the Declaration of Human Rights and to the preamble to the 1946 constitution. The latter text mentions “fundamental principles recognised by the laws of the Republic”. By virtue of this, all general principles can be considered constitutional, even when they have been first established by an ordinary statute and when that statute does not explicitly so state. Second, courts do use principles and values, which can be intellectually related to a constitutional text, such as the Declaration of Human Rights, but courts often do so without referring to the text.⁷⁶⁴ As regards the interpretation of constitutional rights in the French legal system, Troper & al. suggest that teleological interpretation is mainly applied by the *Conseil constitutionnel* when reviewing the conformity of statutes to the Constitution.⁷⁶⁵ According to Grewe, this also appears to be the case in respect of the interpretation of the constitutional provisions themselves, although she speaks of evolutive interpretation. According to her, the tendency is rather towards seeking the objective intention of the text instead of the subjective intention of the legislator, and the preparatory work is seldom referred to although it has on occasion been done by the *Conseil constitutionnel*.⁷⁶⁶

The tendency towards evolutive interpretation may be at least partly explained by the influence of the European Convention on Human Rights and the case law of the European Court of Human Rights.⁷⁶⁷ Indeed, the French courts have in the past years rather carefully followed judgments of the European Court of Human Rights issued against France, including their legal effects, and sometimes those judgments have resulted in changes of interpretation of national law and even changes of judicial

764 Troper & al. 1991 (1998), p. 205.

765 Troper & al. 1991 (1998), p. 193. It is to be borne in mind that the task of the *Conseil constitutionnel* is limited to the interpretation of the conformity of statutes with the Constitution, but including any legal text referred to it. In doing this, the *Conseil constitutionnel* needs to assess the conflicting interpretations by parliament, the petitioners and, eventually, the *Conseil constitutionnel* itself. (Rousseau 2007, p.36) In the view of Rousseau, constitutional judges guarantee that meaning has been derived from a constitutional provision in accordance with a procedure calling for deliberations from those players. However, in the complex production of meanings, the constitutional court is only one of the players. In his view, the choice of one meaning is never final, an interpretation can evolve and new rights can be recognised (Ibid. p. 38, 39 and 43). This view is in line with the principle of evolutive interpretation applied by the European Court of Human Rights.

766 Grewe 1998, p. 204 and 205.

767 Grewe 1998, p. 206.

techniques⁷⁶⁸. In France, however, a dialogue or interaction between the European Court of Human Rights and national courts is perhaps difficult to identify. In the view of Grewe, one may at most speak of marginal influence of the European Court on national case law.⁷⁶⁹ More recently, French courts have increasingly resorted to judgments of the European Court of Human Rights concerning other respondent states, but there are some limits to their applicability as guidance for interpretation imposed by the national legal system⁷⁷⁰. Further, in the light of an overview of French judgments made for the purposes of this research, the rather mechanic references to the case law of the European Court of Human Rights make it difficult to identify the way in which that case law has de facto been applied, although there may be examples of cases where national judges resort to reasoning close to evolutive interpretation and even the existence of some degree of dialogue is mentioned⁷⁷¹. It appears to be rare, however, and in the light of the overview of recent French judgments, most of them appear apply rather traditional methods of interpretation, which is also admitted by Lageot⁷⁷². It is also to be noted that the number of judgments by the European Court concerning inadequate reasoning of judgments in France, for example, is relatively high. The references to the case law of the European Court of Human Rights have increased but this has not affected the style of French judgments considerably.

In the German legal system, there are no major differences as regards the methods of interpretation of law in general and those applied for the interpretation of constitutional rights. It seems that the Federal Constitutional Court has, however, applied a rather dynamic method of interpretation of the constitution. Heun shares the view of Kommers in that the Constitutional Court has been more creative in the interpretation of constitutional law than other courts of law have been in the interpretation of civil and criminal law, in particular, which is explained by the nature of constitutional law. According to Heun, constitutional law can be characterised as vague and responsive, and such an openness leaves the Constitutional Court considerable flexibility in the interpretation of the constitution. Thus, although the Constitutional Court applies the normal methods and rules of interpretation of law, they have not restricted it but it has shown more willingness to resort to teleological interpretation and to seek the

768 Lageot 2014, p. 170-173.

769 Grewe 1998, p. 212.

770 See Lageot 2014, p. 174 and 176-178. A particular obstacle is that the French courts are not competent to impose amendments to national legislation (Ibid. p. 177), which is a feature in common with the English legal system.

771 Lageot is of a somewhat different view, finding that the ordinary courts dealing with criminal and civil law cases apply the standards of the European Court of Human Rights in much the same way as the Court itself does. Lageot bases her view largely on the application of the principle of proportionality, and in her view, the margin of appreciation is hardly ever applied. (Lageot 2014, p. 178-180)

772 Lageot 2014, p. 180 and 181.

objective intention of the Constitution instead of the subjective or real intention of the legislator.⁷⁷³ Furthermore, in the same way as the European Court of Human Rights has developed the meaning of the Convention provisions through teleological interpretation, a corresponding phenomenon may, in the view of Grewe, be observed in the interpretation of constitutional law provisions⁷⁷⁴. Such a progressive development is the more visible the further the court departs from the literal interpretation of provisions, in favour of the spirit of those provisions.⁷⁷⁵ It may be noted that such an open interpretation is particularly fit in the context of human rights and fundamental rights, and the Constitutional Court has also further developed the meaning of fundamental rights provisions and extended their application from what was probably originally intended by the legislator⁷⁷⁶, similarly as has been done by the European Court of Human Rights with regard to the Convention provisions.

Klein finds, however, that instead of using the denominations given by the European Court of Human Rights to the various standards and methods of interpretation, the national courts rather interpret the Convention in the way the European Court of Human Rights has done⁷⁷⁷, which appears to be a feature shared with the French judiciary. Although the terms used are not always the same, similar principles seem to exist in the German legal system, including the margin of appreciation and the principle of proportionality.⁷⁷⁸ Without going into details about the other principles

773 Kommers 2006, p. 200. Heun 2011, p. 6, 7 and 181. Heun further notes that within the teleological method, practically all kinds of arguments are possible, including political, economic or ethical considerations. In his view, this leaves an almost unlimited latitude to the interpreter, although the wording of the text (*Wortlaut*) is considered to constitute the borderline. (Ibid. p. 181) Kommers explains the different approach to the interpretation of the Basic Law by that the state is not regarded as the source of fundamental rights, as the core of individual freedom and human dignity is considered anterior to the state. In his view, inalienable rights, justice, values, and other such notions arguably present in the Basic Law militate against the methodology of legal positivism, which together with *Begriffsjurisprudenz* have been traditionally prevailing elements in the interpretation of law in Germany. (Kommers 1989, p. 46 and 47.)

774 Grewe 1998, p. 221. According to Grewe, this development takes place by means of an adaptation of the Constitution or a general conception of fundamental rights. Such adaptation may also be done by supplementing the national provisions with the international law. (p. 221 and 222) See also Klein 2014, p. 210, according to whom teleological interpretation today is widely recognised and applied.

775 Grewe 1998, p. 223.

776 See Heun 2011, p. 192 and 193. Fundamental rights have traditionally been understood as values, but the Constitutional Court has given up this concept and rather refers to fundamental rights as objective principles without, nevertheless, changing the normative effects of the original value concept. (Ibid. p. 199)

777 Klein 2014, p. 210. Klein also admits that it is difficult to identify from the wording of the national judgments whether the courts apply standards developed by the European Court of Human Rights or those developed by the Federal Constitutional Court.

778 Kommers 2006, p. 201 and 202.

mentioned by Kommers, it is interesting to note that the principle of interpretation in conformity with the Constitution (*verfassungskonforme Auslegung*) is one of the principles applied⁷⁷⁹, and its counterpart exists in the Finnish legal system. When compared with the English and French legal systems, the German technique of interpreting law appears to be closer to that of the European Court of Human Rights, and in the light of the case law of the Federal Constitutional Court, there are already examples of rather advanced references to the case law of the European Court of Human Rights. In the view of Klein, the references are more developed in those cases where the judgment of the European Court of Human Rights directly concerns Germany, in which case the conclusions better fit the German legal system. In such cases, the Federal Constitutional Court has aimed at carefully following and adapting the principles to national cases in the specific field of law.⁷⁸⁰

The better preparedness at the national level to also interpret constitutional provisions on fundamental rights in a manner which is closer to its European counterpart, including an effective national control mechanism, may largely explain the low number of violations found against Germany by the European Court of Human Rights, particularly in the light of the size of German population. The German judiciary has been more prepared for an open approach to the interpretation of fundamental rights than the English and French ones. In Germany, particularly the Federal Constitutional Court seems to have entered into a successful dialogue with the European Court of Human Rights⁷⁸¹. As an example of interaction between the courts, Grewe names the discussion on horizontal effects of the Convention, i.e. its effects on relations between individuals. In the German legal system, such effects (*Drittwirkung*) have been subject to a rather lively discussion.⁷⁸² This, in turn, might be explained by the strong status of the Federal Constitutional Court. Although the interpretation of fundamental rights provisions may be open to value-judgments, the control exercised by the Constitutional Court appears to be accepted not only as a possibility but as a requirement.⁷⁸³

There are no particular methods in the Swedish legal system concerning the interpretation of fundamental rights provisions of law, but the provisions on the control of constitutionality of legislation play a role in that provisions of ordinary law may need to be set aside in case of conflict with the constitutional provisions on fundamental rights. The Swedish practice of the control of constitutionality of legislation is somewhat similar with that of Finland in that the courts only have the possibility of refraining from the application of such provisions of ordinary law as are in conflict with the constitution. However, under the provisions of the constitution (*Regeringsform/ RF*

779 Kommers 2006, p. 204.

780 See Klein 2014, p. 207.

781 See e.g. Klein 2014, p. 214.

782 See Grewe 1998, p. 220, and Klein 2014, p. 208 and 209.

783 See e.g. Alexy 2004, p. 367.

11:14), the conflict must be apparent (*uppenbar*). This strict requirement has, according to Nergelius, been subject to criticism.⁷⁸⁴ In the view of Cameron and Bull, it is difficult to assess whether the case law of the European Court of Human Rights has had an impact and to what extent to the constitutionality review, but despite the rather incoherent picture, there are some examples where the national supreme jurisdictions have refined their approach to the assessment of constitutionality of national legislation⁷⁸⁵. Insofar as the European Convention on Human Rights is concerned, it has been implemented at the level of ordinary law. Thus, in the same way as in Finland, question might arise as to what should be done in case the provisions of the Convention are found to be in conflict with the constitution. According to RF 2:23, no legislation may be enacted in violation of the Convention. However, Nergelius points out that the RF 11:14 applies even in the case of the Convention. Thus, a strict interpretation of the principle of apparent conflict would mean that the Swedish courts should apply the Convention with some caution.⁷⁸⁶ In a way, the principle is favourable to the application of the Convention as its provisions would be set aside only in the case of an apparent conflict. However, there might be a risk of an apparent conflict. In a judgment issued by the Swedish Supreme Court, it has been suggested that the Convention should, due to its special character, be given special importance in the interpretation of law (HD Ds 1993:90, p. 204). Nergelius points out, in a somewhat criticising tone, that the preparatory work for the implementation of the Convention does not clearly enough indicate what kind of a status the Convention should be given in the interpretation of law.⁷⁸⁷ The preparatory work merely refers to the normal rules of interpretation of law as well as to the principle of interpretation in conformity with the Convention, leaving a considerable margin of discretion to courts.⁷⁸⁸

However, in the special character of the Convention, protecting the same types of rights as the Constitutions do, appears to have been recognised in the Swedish legal system and thereby the Convention has been afforded a semi-constitutional status. Nor

784 Nergelius 1996, p. 675 and 676. The source of criticism has mainly been that there may be various situations where the provisions of law are in conflict with the constitution, and it may be difficult to define what is considered an apparent conflict. Furthermore, Nergelius quite legitimately points out that citizens should also be able to trust that the provisions of the Constitution do apply.

785 Cameron and Bull 2014, p. 278-283. They name as a particular example that of taxation and the principle of *ne bis in idem*, where the case law of the European Court of Human Rights has led to a reassessment of national legislation in the same way as in Finland. In the case of Sweden, the national jurisdictions found the applicable Swedish law to be unconstitutional. (Ibid. p. 281) Those judgments have also been analysed for the purposes of this research.

786 Nergelius 1996, p. 683.

787 Nergelius 1996, p. 684.

788 Holmberg & Stjernquist 2000, p. 52. Holmberg & Stjernquist nevertheless suggest that the incorporation of the Convention might lead to increasing resort to the teleological method of interpretation of law (Ibid.).

has the official status of the Convention at the level of ordinary law created problems of application. Furthermore, the Swedish legal system appears to follow a principle of human rights friendly interpretation of law in the same way as the German legal system (and the Finnish one) does. The Swedish legal system has also welcomed the case law of the European Court of Human Rights, although there are differences between the Swedish methods of interpretation of law and those of the European Court of Human Rights. As regards response to violations found by the European Court of Human Rights against Sweden, the national jurisdictions may decide to reinterpret law on appeal, reopen the case or order damages⁷⁸⁹. The possibility of reinterpreting law opens the way for developing the methods of interpretation. However, it appears that the case law of the European Court of Human Rights has not had any major impact, when assessing the judiciary as a whole, on the way in which national judgments are reasoned, and the traditional methods of interpretation are still given slight preference over the principles teleological and evolutive interpretation⁷⁹⁰. At any rate, the national technique of interpreting fundamental rights and human rights provisions has, in the light of the case law of the Swedish Supreme Court (*Högsta domstolen*) assessed for the purposes of this research, become closer to that of the European Court of Human Rights and there are already examples of cases with rather detailed discourse. In a way, the traditional methods of reasoning coexist with some fragments of discourse containing more detailed argumentation, particularly those parts of the judgments with references to the European case law.

Until late 1970s, Finnish courts were reluctant to apply the provisions on fundamental rights of the Constitution Act when deciding cases – neither as directly applicable rules nor as a means of interpretation.⁷⁹¹ However, a shift towards a more welcoming attitude towards fundamental rights has been observed.⁷⁹² Ojanen identifies four ways in which fundamental rights can be observed to affect the argumentation of national courts today, the first one of which is particularly the influence on the interpretation of other provisions of law. Second, the courts may directly apply the fundamental rights provisions as grounds for their decisions. Third, under section 106 of the Constitution, the courts have a possibility, although a limited one, to give precedence for

789 Cameron and Bull 2014, p. 283.

790 This is the assessment of Cameron and Bull who find that this is due to the dominant role given to the *travaux préparatoires* of legislation (Cameron and Bull 2014, p. 279).

791 See e.g. Viljanen (V-P) 1996, p. 794.

792 Viljanen (V-P) 1990, p. 203. Saraviita observes that a further reason for the reluctance to apply fundamental rights provisions as a basis for the judgment by courts was that before the enactment of the new Constitution in 1999, the courts were not considered competent to assess the constitutionality of laws. Section 106 of the new Constitution provides for the obligation imposed on courts to refrain from applying such provisions of ordinary laws as they find to be in conflict with the Constitution. However, this conflict needs to be apparent. (Saraviita 1999, p. 890 and 891)

the fundamental rights provisions over the provisions of ordinary law. Fourth, under section 107, the courts may not apply such provisions of law as are in conflict with the Constitution.⁷⁹³ Saraviita is, however, of the opinion that the rule on the fundamental rights friendly interpretation is a more significant tool for courts to ensure the protection of fundamental and human rights than sections 106 and 107 of the Constitution.⁷⁹⁴

As the direct application of fundamental rights and human rights provisions by national courts has increased, also the question of the harmonisation of interpretation of the two sets of rights has become pertinent. Until the fundamental rights reform of the Constitution, Finnish courts and authorities applied a doctrine under which they had been treated rather separately from the application and interpretation of international human rights conventions⁷⁹⁵ although there were some signs of changes in culture already before the reform. It appears from the judgments of the Finnish supreme jurisdictions that both sets of rights are referred to in the same fragments of discourse. Further, apart from some cases in which specific methods developed by the European Court of Human Rights are named, no particular methods of interpreting constitutional rights can be identified that would be different from those of interpreting other provisions of law. This may partly explain the rather early references to the European Convention on Human Rights, despite that they were mechanic, as there was need to seek guidance in the lack of national traditions of directly applying fundamental rights provisions or human rights provisions. In the same way as in Swedish judgments, the traditional methods of interpretation appear to coexist with those of interpreting the Convention, the latter rather appearing in the context of references to the Convention and the European case law.

The search for a solution within a wider context of the legal system is in common

793 For details, see Ojanen 2001, p. 83–86.

794 Saraviita 1999, p. 893. Should the application of law before a court allow several interpretations of the provision concerned, the court should choose the interpretation that best guarantees the fundamental right to be protected. (Ibid.) However, Saraviita also questions the possibility the Constitutional Law Committee of Parliament to impose binding rules of interpretation, such as the principle of fundamental rights friendly interpretation, on courts of law in view of the independence and impartiality of the latter. (Ibid.)

795 PeVL 12/1982 vp. According to the Constitutional Law Committee of Parliament, international conventions binding on Finland could not as such supplement or clarify the provisions of the Constitution. Therefore, the contents of such conventions could not be used as a basis for the interpretation of the Constitution. According to Viljanen (V-P), this interpretation of the Constitutional Law Committee was based on the differences between the contents of the two sets of provisions, on the differences in the possibilities of national governmental bodies to affect the application and interpretation of international human rights provisions at the international level, and on the fact that derogations could be enacted to the national fundamental rights provisions by a special Act of Parliament enacted through the constitutional legislative procedure whereas derogating from international human rights provisions would have always entailed a breach of international obligations. (Viljanen (V-P) 1996, p. 792)

with the German approach to the interpretation of constitutional provisions within the framework of the entire constitution, and that of the European Court of Human Rights to the interpretation of individual rights in the light of the Convention as a whole. However, sticking to the legal system alone is potentially too limited, and the Swedish practice of resorting more often to the intention and purpose of the statute may be a wiser approach. This factor may be one of those explaining why the number of applications against Finland before the European Court of Human Rights has been larger than that against Sweden, but most certainly not the only one. However, in principle, a more flexible approach should be possible for the Finnish judiciary in the same way as for the German Constitutional Court. Some changes have emerged in the field of interpreting law together with constitutional law, particularly as regards the provisions on fundamental rights. The most significant changes are a result of the European Convention on Human Rights.

4.2 Autonomous meaning – conceptual problems

A general comparison between the English and French authentic texts of the Convention and the German, Swedish and Finnish translations thereof would give reason to conclude that no major linguistic or conceptual problems should arise in the application of the Convention in the legal systems covered by the present study. This presumption can be confirmed on the basis of an overall analysis of the case law of the Finnish supreme jurisdictions. The same seems to apply to the other legal systems, but no definitive conclusions can be made on the basis of the small selection of judgments analysed and because of the mainly brief reasoning concerning the contents of the Convention. Furthermore, as was noted in the foregoing, the practice of the European Court of Human Rights of giving an autonomous meaning to some concepts of the Convention, particularly that of expanding its interpretation in the light of the Convention as a living instrument, could be one factor explaining the problems that a national legal system may face in its receptiveness to the case law and argumentation of the Court.

The science of law is largely dominated by concepts although their role in the science has changed from what it was during the era of “*Begriffsjurisprudenz*” at the beginning of the 20th century. Despite theoretical changes, even the core of modern legal science is the systematisation, classification and definition of concepts.⁷⁹⁶ Concepts are not neutral but carry a cultural burden and may create different images with different users and recipients. They also have a historical connection. In brief, concepts are born at a given moment, in given society and for a given purpose. The context in which concepts are used should also be taken into account. They may have different meanings depending on

796 Letto-Vanamo 2008, p. 1127.

the context, and may also depend on the time and the place.⁷⁹⁷ However, as is pointed out by Mattila, the difference between “concept” and “term” should be kept in mind, although many lawyers use them synonymously. Strictly speaking, “concept” means an abstract idea or an entity of elements characterising something, whereas “term” is the name given to that concept, or its appearance.⁷⁹⁸ To simplify, a concept is expressed with a term. Some linguists speak of the surface structure and deep structure of language, which has a close connection with the idea. First, it is worth noting that terms may have one or several meanings⁷⁹⁹. Pfersmann notes that interpretation, as an analysis of meaning, cannot do more than provide for the entire range of those meanings.⁸⁰⁰ Insofar as concepts are concerned, they may be either internally or externally identical, or internally or externally different. In the view of Schneider, a more important division for the application of law is, however, into comparable and incomparable concepts. For contrasting situations, Schneider divides concepts into four groups.⁸⁰¹ However, from a linguistic point of view, and for the comparability of different language versions of a piece of legislation or a treaty, that division is not a particularly relevant one. As regards the European Court of Human Rights, one may note in the light of the foregoing analysis of the principles of interpretation used by the Court that it does on occasion refer to the differences in meaning between the terminology used in the English and French versions of the Convention, but it is more usual for the Court to resort to a more profound analysis of the meaning of a certain concept. In doing that, the Court on occasion carries out comparison between the legislations of States parties to the Convention, but it is more frequent for the Court to analyse the level of protection than conceptual differences between different legal systems. Such differences may have relevance for the national jurisdictions applying the Convention, particularly as the case law of the European Court of Human Rights should be applied in a uniform and consistent manner. However, conceptual differences should not be overemphasised either, given that the legal systems and languages also have common roots in Roman law and in the Latin language, for example, which have a harmonising effect even today.

A linguistic comparison starts with the examination of terms or surface structures of the language. This should still be relatively easy. Bearing in mind the principle of one treaty, what is more relevant for the conveyance of meaning of the different language

797 Ruuskanen 2006, p. 47.

798 See Mattila 1999, p. 107. See also Schneider 1991, p. 41.

799 See in more detail e.g. Schneider 1991, p. 41-43.

800 Pfersmann 2010, p. 244. Interpretation, in turn, is either true or false, i.e. it either correctly or incorrectly establishes the range of meaning. Furthermore, interpretation is a set of propositions linked through logical operations. Through interpretation, one can also define the range of semantic indeterminacy and vagueness of legal prescriptions. (Ibid. p. 245)

801 Schneider 1991, p. 40 and 41. In the words of Schneider, “*Es gibt vier Gegensätze: kontraditorisch, konträr, privativ und relativ.*“

versions of a treaty is, however, whether the correspondence between the term and the concept is the same in each language version of the treaty. Thus, the concept behind the term should be the same⁸⁰². The same question arises in the comparison of the concepts of different legal systems. The same concept may be expressed with different terms not only within one language but also among different languages or different legal systems. The fact that the term appears to be different in different language versions or languages does not necessarily mean that the concept referred to would be different. Where the same concept nevertheless exists in the two legal systems concerned, there should at least in principle be a term (or expression) to express it. Difficulties arise where a certain legal concept is specific to a single legal system and the other legal language, into which it should be translated, does not have a term to convey the same meaning.

German scholars sometimes speak of the openness of law, meaning that there may be certain linguistic or systemic factors that leave room for interpretation or even give rise to problems of interpretation. Pfersmann notes that the degree of indeterminacy and vagueness of norm formulations in natural language is an open question, i.e. it is a matter of scientific semantic investigation.⁸⁰³ Alexy & Dreier suggest that each piece of legislation and each application of law confronts the language of law, and thus confronts three different types of problems: ambiguity, vagueness and evaluative openness. According to Alexy & Dreier, a word is ambiguous when it has a different meaning in different contexts, whereas a concept is vague when there are some subjects that indubitably fall within its scope, some subjects that indubitably do not fall within its scope, and a third class of subjects that cannot be said to belong to one or the other with certainty. With evaluative openness Alexy & Dreier refer to expressions, such as good faith (*Treu und Glauben*), denoting concepts that have but little descriptive meaning over and above their evaluative component. In their view, it is the task of the judiciary to fill in the descriptive meaning that matches the evaluative component.⁸⁰⁴

Bearing in mind that any legal concept has its historical and cultural background⁸⁰⁵, one may note that despite common roots in Roman law and Latin language, within the European legal systems, the greatest conceptual differences can perhaps be found between the common law system (English legal system) and the Roman-Germanic

802 The problem of congruency is also something that legal translators are constantly confronted with, and the translator should aim at a result that is the same as the desired result of the source text. The success or failure depends on whether the translator has managed to predict how the courts would later interpret the translation. (See Šarčević 2000, p. 229)

803 Pfersmann 2010, p. 244. Pfersmann reasons that in certain cases the formulation may be so precise that only one interpretation is possible, but in general norm formulations are designed so as to allow several interpretations i.e. a range of indeterminacy and vagueness.

804 Alexy & Dreier 1991 (1998), p. 74 and 75. Dworkin also refers to ambiguity and vagueness of words as usual reasons for the unclarity of a statute. The use of abstract words, for example, may also create problems. (Dworkin 1986, p. 351)

805 Niemi-Kiesiläinen & al. 2006, p. 31.

legal systems as a group. According to Mattila, the development of the common law system rather independently in the Middle Ages resulted in considerable differences in concepts when compared with those of Roman-Germanic law, particularly with regard to the basic concepts of precedence and the law of property.⁸⁰⁶ As explained in the foregoing, it is explained by the different degrees of reception of Roman law. The fact that the authentic language versions of the European Convention on Human Rights derive their terminology from such legal languages and systems in which significant conceptual differences appear, might potentially create a risk of translation problems and differences between the language versions. At the outset, in the French language version of the Convention, the terminology used seems to be largely similar to the terms used in the English version. This is natural, considering that the legal terms and also other vocabulary in these two languages are often of the same origin. It also makes translation from one language into another easier than in the case of languages having only little in common. However, it should also be borne in mind that a term may be misleading⁸⁰⁷. The same term may exist in two languages, but have a different meaning i.e. express a different legal concept. Such a phenomenon is not rare between the English and French languages. Furthermore, the term, expression or concept may have a wider or narrower meaning in one language than another. The European Court of Human Rights has stated for example in the foregoing cited case of *Wemhoff* as follows:

The Court cannot accept this restrictive interpretation. It is true that the English text of the Convention allows such an interpretation. The word "trial", which appears there on two occasions, refers to the whole of the proceedings before the court, not just their beginning; the words "entitled to trial" are not necessarily to be equated with "entitled to be brought to trial", although in the context "pending trial" seems to require release before the trial considered as a whole, that is, before its opening.

But while the English text permits two interpretations the French version, which is of equal authority, allows only one. According to it the obligation to release an accused person within a reasonable time continues until that person has been "jugée", that is, until the day of the judgment that terminates the trial. Moreover, he must be released "pendant la procédure", a very broad expression which indubitably covers both the trial and the investigation.⁸⁰⁸

806 Mattila 1999, p. 108. It is noted in section 4.1.2 above that the English system is stricter than the continental ones, which are closer to how precedents are treated by the European Court of Human Rights.

807 Mattila 1999, p. 110-112.

808 *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7, § 7.

An examination of the history of the English language reveals that the English language has been affected, among others, by French but along with time, the language has received influence from other sources and words of the same origin may today have a different meaning. In translation theory, such equivalents in another language are called “*faux amis*”. Mattila identifies a third potential problem of terminological nature, that of polysemy. This means that one legal term may have different meanings which are often interrelated but may sometimes be so far from one another that they do not seem to have anything in common.⁸⁰⁹

A closer examination of a selection of articles reveals various differences between the English and French language versions of the Convention. Considering that there are certain differences between the two authentic language versions of the Convention, which have been co-drafted, there is reason to believe that such differences appear at least to the same extent or even to a greater extent in translations of the Convention. This should not be surprising given that, as has been observed by Tabory⁸¹⁰, even legal systems using the same language may employ legal terms differently, despite that these terms seem the same at the outset. In the foregoing, certain concepts used in two provisions of the Convention are analysed in the light of the Court’s case law, i.e. Article 5, paragraph 1, and Article 6, paragraph 1. Article 5 and Article 6 of the Convention are not only the most detailed and essential provisions thereof, but are also those that have produced the largest number of cases before the European Court of Human Rights.

An extensive analysis of the Court’s case law indicates that the problems faced by States parties to the Convention under the said Articles have been rather systemic than conceptual. Perhaps the biggest conceptual problem has been the concept of civil rights referred to in Article 6, paragraph 1, which has made it necessary for the Court to elaborate on it in detail, looking not only into the linguistic or ordinary meaning of the concept but also into the object and purpose of the provision, thus arriving at an autonomous meaning. Another concept which has produced a good number of challenges for States parties to the Convention is that of criminal charge under the same provision. In the following, the aforementioned concepts with an autonomous meaning are assessed in the light of eventual problems caused for national legal systems and jurisdictions.

4.2.1 Concept of “civil rights”

In the English legal language, civil rights is usually understood as a synonym of civil liberties and of fundamental rights, meaning personal or natural rights guaranteed by the constitution and constituting restraints on government. As explained in the foregoing, however, the English legal system has remained without a written constitution

809 For more details, see Mattila 1999, p. 112-115.

810 Tabory 1980, p. 132.

despite the early constitutional instruments and present pieces of legislation, which may be classified as constitutional law. In the United States, on the other hand, a written constitution has existed for a relatively long time. According to Rossini, civil rights are generally considered to mean those rights that are enforced by law. In the United States, this refers to those rights and privileges that are guaranteed by the Constitution or by other statutes. One important aspect is the prohibition on discrimination. In those countries that do not have a constitutional guarantee of civil rights, this aspect is addressed under the international law concept of human rights.⁸¹¹ In turn, civil liberties refer to the freedom to act within the law as a member of an organized society in which public order is maintained and public welfare is protected. In the United States, these are understood as political or natural liberties and personal equality as guaranteed by the Constitution.⁸¹²

At the outset, the concept of civil rights does not seem particularly problematic as it can easily be translated into other languages, i.e. the same term appears in those languages. However, as has been explained in the foregoing, even where the terms or the expression in different languages appear to have the same meaning, the appearance may be misleading. There may be differences in the meaning between different languages and legal systems, referring to different concepts. Sometimes one term may also have several meanings.⁸¹³ Already the use of the concept in the French language poses some problems as the word “civil(e)” has different meanings depending on the context. To convey the same meaning in French as the English version of Article 6, paragraph 1 has, it would be risky to use a direct translation.

The roots of “*droit civil*” can be traced back to its Latin origin, “*ius civile*”. The term “*ius civile*” has different meanings which have partly merged along with history. According to Mattila, in the times of antiquity, the term referred, on the one hand, to the classical Roman law (as opposed to *ius honorarium*) and, on the other hand, to law applied to Roman citizens (as opposed to *ius gentium*). In the Middle Ages and later, the term was used to mean Roman law in general but also man-made law as opposed to divine or natural law (*ius divinum/ ius naturae, ius naturale*). The modern meaning of “*droit civil*” is the result of a long development. In common law countries, in legal English, the term “civil law” is often used to refer to continental European legal systems as opposed to common law systems. Thus, when the modern French concept of “*droit civil*” is translated into English, the safest translation would be “private law”.⁸¹⁴

Today, the first meaning of the French concept of “*droit civil*” is to denote the fundamental part of private law that provides for rules on persons, family, obligations and

811 Rossini 1998, p. 7.

812 Rossini 1998, p. 7.

813 For more detailed analysis of terminological problems, see e.g. Mattila 1999, p. 108-115.

814 Mattila 1999, p. 113.

contracts, and more widely to make a distinction between private law and criminal law or public law. The adjective “civil(e)” can also have the meaning equivalent to that of the English term used in the Convention, but it would be rather used in the concept of “*libertés civiles*” referring to something belonging to all citizens in their private or professional life.⁸¹⁵ However, whether the formulation used in the French version of Article 6, paragraph 1, “*droits et obligations de caractère civil*” removes the risk that a direct translation would entail, is an interesting question. This construction might be the result of an effort to avoid misinterpretation, but to interpret the phrase correctly requires a considerable knowledge of the French language. The English and French legal systems do not appear to have had major problems regarding the linguistic expression used in the Convention, which may be due to the original language status. However, particularly the French legal system has produced interesting cases to the European Court of Human Rights, referred to in the foregoing⁸¹⁶, which have resulted in expansion of the scope of the concept of civil rights in Article 6, paragraph 1, of the Convention.

As regards the other legal systems compared with the Finnish one, the German legal system does not appear to have any major problems in interpreting the concept of civil rights, despite that the German translation of the expression “civil rights and obligations” seems to be an even clearer misinterpretation of the concept of “civil rights” than the Swedish version. The German version, “*zivilrechtliche Ansprüche und Verpflichtungen*”, clearly speaks of civil law or private law, as opposed to public law. According to the definition of the German term, “*Zivilrecht*” refers to any norms of material or private law⁸¹⁷. In principle, it would be possible that the German legal system has faced similar problems with those described in the foregoing in respect of Sweden, but in that case it would seem in the light of the case law of the European Court of Human Rights those problems have been dealt with at the national level. Instead, of all the five legal systems covered by the present study, the Swedish legal system appears to have faced most problems in interpreting the concept. The concept of “civil rights and obligations” has been translated as such e.g. into Swedish, as “*civila rättigheter och skyldigheter*”. Sometimes a direct or precise translation may indeed be the safest way of dealing with a term or concept the contents of which are ambiguous or unclear, particularly in cases of treaty provisions that are a result of a political compromise. However, sometimes a direct translation may also be a risk. As later proved to be the case in respect of Swedish, a precise translation does not always provide the correct meaning of the concept. In the Swedish legal language, “*civila rättigheter och*

815 Cornu 2003 (*Vocabulaire juridique*).

816 Those cases include, in particular, *Pellegrin v. France*, Grand Chamber judgment of 8 December 1999, Reports of Judgments and Decisions 1999-VIII, *Pierre-Bloch v. France*, judgment of 21 October 1997, Reports 1997-VI, and *Maaouia v. France*, Grand Chamber judgment of 5 October 2000, Reports of Judgments and Decisions 2000-X.

817 Creifelds Rechtswörterbuch 2002.

skyldigheter” has a narrower meaning than the English “civil rights and obligations”, referring to rights and obligations of a private law nature, in the same way as it would have in the Finnish legal language if translated directly.

Choosing a translation the meaning of which is narrower than that of the term used in the authentic language version leads to a narrower scope of application of the text of the provision. In the case of Sweden, the translation led to courts excluding from the scope of application such rights as should have been afforded protection. This resulted in a number of violations of the Convention found in cases against Sweden in the European Court of Human Rights⁸¹⁸, which later made it necessary to introduce amendments to national legislation as the Swedish legal system was not found to be in conformity with the requirements of the Convention.⁸¹⁹ It must be remembered, however, that at the time the Swedish translation was made there was less case law available than e.g. when the Finnish translation was made⁸²⁰. Thus, the persons responsible for the Finnish translation of the Convention had more information available as to the meaning of its provisions through the interpretations of the Court, as well as through literature, and this information could already be taken into account in the translation. In cases of multilateral conventions, the intention of drafters is often difficult to establish, due to scarce amount of “*travaux préparatoires*”, and without other sources of interpretation such as international case law, the courts are faced with a difficult task. However, according to Danelius, until the 1980s and the 1990s, it was also rare for Swedish courts to apply the Convention’s provisions directly, which was due to that the Convention was originally not incorporated into the Swedish legal order, but this was done as late as in 1995⁸²¹. According to Pellonpää & al., it seems that the Swedish courts have become more active in referring to the Convention after its incorporation into the legal order, although it was possible to take its provisions into account also earlier - and it was also done particularly as a

818 These cases include, inter alia, *Sporrong and Lönnroth v. Sweden*, judgment of 23 September 1982, Series A 52, *Pudas v. Sweden*, judgment of 27 October 1987, Series A 125-A, *Bodén v. Sweden*, judgment of 27 October 1987, Series A no. 125-B, *Tre Traktörer Aktiebolag v. Sweden*, judgment of 7 July 1989, Series A 159, *Allan Jacobsson v. Sweden (No. 1)*, judgment of 25 October 1989, Series A 163, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A 171-A, *Mats Jacobsson v. Sweden*, judgment of 28 June 1990, Series A 180-A, *Skärby v. Sweden*, judgment of 28 June 1990, Series A 180-B, and *Fredin v. Sweden (No. 1)*, judgment of 18 February 1991, Series A 192.

819 See Danelius 2012, p. 163 and 171.

820 Sweden became a member State of the Council of Europe on 5 May 1949, and the Government proposal to ratify the Convention was given to Parliament at the beginning of the 1950s (Proposition 1951:165), whereas Finland acceded to the Convention forty years later, upon becoming a member of the Council of Europe on 5 May 1989.

821 For details, see Danelius 2012, p. 37-40. Until the enactment of the relevant provisions of law, the Swedish courts attempted to apply the national legislation in conformity with the requirements of the Convention. (Ibid. p. 37)

result of the relatively frequent judgments of the European Court of Human Rights finding violations.⁸²²

Partly due to the knowledge there already was of the case law under the European Convention on Human Rights, and prior experience of applying the International Covenant on Civil and Political Rights, the Finnish translation of the European Convention on Human Rights was paid considerable attention to⁸²³. An example of the profound reflection on the meaning of the Convention's provisions is the Finnish translation of Article 6, paragraph 1. In this translation, the adjective "civil" has been omitted, which thus widens the meaning even when compared with the authentic language versions. According to Karapuu, however, this solution was not a mistake but has been based on careful consideration.⁸²⁴ Apparently, reflection was made on what types of rights should be covered by the provision. Translating "civil rights and obligations" as such into Finnish would be possible, but it would not sound very natural, and a direct translation would also lead to a rather narrow scope of application of the provision.

Despite that the European Court of Human Rights has widened the meaning of "civil rights and obligations" from that derived from the authentic language versions of the Convention, the formulation of the Finnish translation goes even beyond that, as is observed by Karapuu⁸²⁵. The Finnish translation does not take a position as to the nature of rights, but covers any types of rights. Indeed, one way of dealing with an ambiguous concept is to translate it so widely that it inevitably covers all the cases meant by the original language version. Unlike a direct translation, however, such a wide translation may in turn provide too wide a scope of application for the provision⁸²⁶. Even if it is not a problem for the courts applying the provision, it may be misleading to citizens or lawyers resorting to the text of the Convention. However, as is pointed out by Karapuu, a wide translation may still be a safer choice than to exclude something of the scope of application with the risk of weakening the legal protection of citizens.⁸²⁷ For the domestic courts, the wide translation has not usually been problem and the courts frequently resort to the case law of the European Court of Human Rights, although there are perhaps some differences in the techniques applied by different courts⁸²⁸. The need to take the case law into account in the application of the Convention's provisions was also drawn attention to in the opinion

822 Pellonpää & al. 2012, p. 51 and 52.

823 PeVL 2/1990 vp, p. 3 (relating to government proposal HE 22/1990 vp). See also Pellonpää & al. 2012, p. 65.

824 Karapuu 1999, pp. 176 and 177.

825 Karapuu 1999, p. 176.

826 For a more detailed analysis between a direct and an interpretative translation, see the author's prior article (Koivu 2008, p.148-151), focusing on the challenges imposed by differing language versions for the interpretation of treaties.

827 Karapuu 1999, p. 176 and 177.

828 See Ojanen 2005, pp. 1215-1220. See in more detail Koivu & Mattila 2006, pp. 43-48.

of the Constitutional Law Committee of Parliament concerning the Government Bill to implement the Convention⁸²⁹.

The most usual types of cases against Finland before the European Court of Human Rights have involved the application of Article 6, paragraph 1. In most cases, however, the question at stake has been the right to a hearing within a reasonable time, i.e. the question of deciding what is considered to be a reasonable length of proceedings in a given case.⁸³⁰ It is also relatively often referred to by the Supreme Court and the Supreme Administrative Court in their case law. An examination of the case law of the European Court of Human Rights concerning Article 6, paragraph 1, indicates that in respect of Finland, there are only rare cases where the meaning of “civil rights and obligations”, as part of the question of the scope of application of Article 6, paragraph 1, has been the subject of dispute⁸³¹. However, the case of *Vilho Eskelinen and Others* constituted a landmark case continuing the development of case law as regards the rights of civil servants. This has in turn led to a change in the interpretation of law by the Supreme Administrative Court. In the light of the case law of the European Court of Human Rights, it would seem that the linguistic choice made in the Finnish translation has not been particularly problematic, although it must be remembered that only a very small part of domestic proceedings later become subject to examination by the European Court of Human Rights. Furthermore, in principle the Finnish judiciary should apply the authentic language versions of the Convention, although the Finnish and Swedish translations are used as tools particularly when writing the judgments. Thus, an incorrect or misleading translation could be a factor explaining incorrect application of the Convention, and may even lead to a considerable number of violations as happened in Sweden, but in reality it is more important that the Convention provisions are understood and applied correctly. Misleading translations do not necessarily constitute a factor for weak receptiveness of the legal system for the argumentation of the European Court of Human Rights. When compared with one another, it appears that the French and Swedish legal systems have faced more problems with the concept of civil rights than the three others, but for different reasons.

4.2.2 Concept of “criminal charge”

Another challenging concept for the application of the European Convention on Human Rights has been that of “criminal charge”. It was observed in the foregoing case study on Article 6, paragraph 1, that the concept of “criminal charge” or “*toute accusation en matière pénale*” exists in all the legal systems subject to the present study,

829 PeVL 2/1990 vp, p. 3. See also Pellonpää & al. 2012, p. 65 and 66.

830 Situation as it is in the light of the Court’s database of case law in August 2007.

831 *Alatulkkila and Others v. Finland*, judgment of 28 July 2005 (Appl. No. 33538/96), and *Vilho Eskelinen and Others v. Finland*, Grand Chamber judgment of 19 April 2007, Reports of Judgments and Decisions 2007-II.

and linguistically it is not as such exclusively a concept used in the Convention (German equivalent being “*eine strafrechtliche Anklage*”, the Swedish one “*en anklagelse för brott*” and the Finnish one “*rikossyyte*”). However, in the same way as in respect of the concept of civil rights, it was further observed that the meaning that has been given to “criminal charge” in the Court’s case law appears to be more extensive than the meaning given to the concept in the national legal systems, as the Court has widened the meaning of “charge”:

[...]. “Charge”, for the purposes of Article 6 par. 1 (art. 6-1), may be defined as “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”, a definition that also corresponds to the test whether “the situation of the [suspect] has been substantially affected” [...].⁸³²

One source of problems in the national legal systems may indeed have been produced by the rather extensive linguistic interpretation given to the concept by the European Court of Human Rights. As observed in the foregoing, the interpretation of the concepts of criminal charge and criminal proceedings has produced a good number of cases from all the States parties covered by the present study. One source of problems has been a distinction drawn between disciplinary proceedings and criminal ones. Such challenges have been faced for example by the English legal system in respect of disciplinary proceedings in prisons⁸³³. In judgments against Germany, the Court has taken a position on the applicability of Article 5, paragraph 1, to sanctions imposed under traffic regulations⁸³⁴. Such a problem could also be faced by the Finnish legal system. Even Finland has encountered some problems with regard to the interpretation of the concept, particularly in respect of the difference drawn between disciplinary proceedings and criminal ones, but not that many of the cases have been brought to the European Court of Human Rights.

Another source of problems has been a distinction between administrative proceedings and criminal proceedings, particularly in those legal systems where administrative law exists as a field of law. Those include almost all of the legal systems covered by

832 *Eckle v. Germany*, judgment of 15 July 1982, Series A 51, § 73. See also *Deweert v. Belgium*, judgment of 27 February 1980, Series A 35, §§ 42 and 46. This expansion of the concept of “criminal charge” began to develop already with the judgment of *Wemhoff v. Germany*, judgment of 27 June 1968, Series A 7. (See § 19 of the judgment.)

833 See *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A 80, and *Ezeh and Connors v. the United Kingdom*, Grand Chamber judgment of 9 October 2003, Reports of Judgments and Decisions 2003-X.

834 *Öztürk v. Germany*, judgment of 21 February 1984, Series A 73. See also *Lutz v. Germany*, judgment of 25 August 1987, Series A 123.

the present study, the only exception being the English legal system⁸³⁵. As appears from the foregoing, some challenges have indeed been faced by those legal systems. According to the ordinary meaning that would be given in the languages of the legal systems subject to the present study, “criminal charge” would not include administrative sanctions. The concept of criminal charge has perhaps produced more problems in Finland than that of civil right from a conceptual or terminological point of view. The reason is the administrative law nature of sanctions applied in taxation procedures. The main source of problems has been the possibility of tax increase as an administrative sanction in the field of tax law, which may be imposed in addition to a criminal law sanction, which has also been addressed by the European Court of Human Rights in two cases against Finland⁸³⁶, one of which in the light of the principle of *ne bis in idem* set out in Article 4 of Protocol No. 7. The Swedish legal system has been faced with a similar problem⁸³⁷. However, it seems that the Finnish and Swedish supreme jurisdictions have begun to take the judgments of the European Court of Human Rights already into account in later case law, which should prevent repetitive cases. In France, a comparable distinction has been drawn between tax deception (“*manoeuvre frauduleuse*”) and tax evasion (“*soustraction frauduleuse*”), of which only the latter has been considered to constitute a criminal offence.⁸³⁸ Although there are some differences in the taxation systems, and the Court has applied particularly the criterion of severity of the sanction imposed, the essential problem has been more or less the same. The European Court of Human Rights found that the imposed penalties were essentially intended as punishments, whose purpose is both deterrent and punitive, or the surcharges were found to be very substantial, and therefore found them to be “criminal” within the meaning of Article 6, paragraph 1.

As was noted by the Court in the case of *Engel and Others v. the Netherlands*, however, the formal classification of the national provisions as constituting part of criminal or disciplinary law, or both, is not decisive although it is the starting point. The nature of

835 There is case law concerning the English legal system too, but it has involved a different question. See *Benham v. the United Kingdom*, Grand Chamber judgment of 10 June 1996, Reports 1996-III. That judgment concerned the criminal nature of the sentence of imprisonment as a result of a failure to pay community charge. Although the sanction was classified as an administrative one under national law, the Court found the nature and reasons of the sanction to mean that it was criminal in nature.

836 *Jussila v. Finland*, Grand Chamber judgment of 23 November 2006, Reports of Judgments and Decisions 2006-XIV and *Ruotsalainen v. Finland*, judgment of 16 June 2009 (Appl. No. 13079/03). In the latter case, the European Court of Human Rights applied the precedent of *Sergey Zolotukhin v. Russia* (judgment of 10 February 2009), which has been referred to in subsequent cases of the Supreme Court and the Supreme Administrative Court.

837 *Janosevic v. Sweden*, judgment of 23 July 2002, Reports of judgments and decisions 2002-VII. See also *Västberga Taxi Aktieföretag and Vulic v. Sweden*, judgment of 23 July 2002 (Appl. No. 36985/97), §§ 76 to 82.

838 *Bendenoun v. France*, judgment of 24 February 1994, Series A 284, § 47.

the offence is more decisive, as well as the degree of severity of the penalty resulting from the offence.⁸³⁹ What has been relevant, in particular, is that the proceedings in question have had some punitive elements. The Court has further paid attention to the relatively severe maximum penalty and to that the tax increase or surcharges were essentially intended as a punishment to deter reoffending, and were imposed under a general rule, whose purpose is both deterrent and punitive, and were therefore “criminal” within the meaning of Article 6, paragraph 1.⁸⁴⁰ Thus, the Finnish legal system does not appear to have faced more problems with this concept than the other legal systems covered by the present study. The problem behind the violations of Article 6, paragraph 1, in respect of its criminal law aspect appears to be partly linguistic, given that the national legal systems have faced problems in giving to the concept of criminal charge as extensive an interpretation as has been given to it by the European Court of Human Rights. However, at least in Finland and Sweden, the judgments of the European Court of Human Rights have produced already a good number of national judgments where the supreme jurisdictions have developed their technique of referring to the European case law, including the Court’s discourse. This aspect is addressed in more detail below concerning the Finnish supreme jurisdictions.

4.2.3 Concepts of “liberty and security of person” and “lawful arrest and detention”

Article 5, paragraph 1, has produced a large number of cases from several States parties to the European Convention on Human Rights, including the United Kingdom, France and Germany. As regards Germany, in particular, the number is significant in the light of the total number of judgments in which a violation by Germany has been found. The most essential concepts in Article 5, paragraph 1, are those of liberty and security of person. As for the other language equivalents of the concepts of liberty and security of person as such, it is interesting to note that the French version only speaks of “*sûreté*” and the German translation of “*Sicherheit*” without underlining personal security like the English version and the Finnish and Swedish translations (*henkilökohtainen turvallisuus/personlig säkerhet*). Nevertheless, the Court has not given the concept of liberty and security of person an independent meaning, but has dealt with it as part of the concept of

839 *Engel and Others v. the Netherlands*, plenary judgment of 8 June 1976, Series A 22, § 82.

840 *Benham v. the United Kingdom*, Grand Chamber judgment of 10 June 1996, Reports 1996-III, § 56. *Bendenoun v. France*, judgment of 24 February 1994, Series A 284, § 47. *Janosevic v. Sweden*, judgment of 23 July 2002, Reports of judgments and decisions 2002-VII, §§ 61 to 63, § 71. *Västberga Taxi Aktiebolag and Vulic v. Sweden*, judgment of 23 July 2002 (Appl. No. 36985/97), §§ 76 to 82. Germany has also faced problems rather early with the relationship between the concept of criminal charge and the sanctions imposed as a result of road traffic violations (see *Öztürk v. Germany*, judgment of 21 February 1984, Series A 73, and *Lutz v. Germany*, judgment of 25 August 1987, Series A 123).

deprivation of liberty⁸⁴¹. Thus, the slight difference of wording in the different language versions should not produce any major problems, and it has not produced any so far.

The other basic concepts in Article 5, paragraph 1, are those of “lawful arrest and detention”. In comparison, Article 9 of the International Covenant on Civil and Political Rights is structured somewhat differently, as it prohibits subjection to “arbitrary arrest or detention”, but the relevant legal terms, “arrest” and “detention” are the same. Slight linguistic differences may be noted between the authentic language versions and translations subject to the present study, in respect of those concepts. The French version of the European Convention on Human Rights speaks of “*l’arrestation et ... la détention régulières*”. The meaning of “*régulière*” is somewhat different from the English concept of “lawful”. The German translation uses various linguistic formulations, required by the specificities of the German language, the essential elements being “*rechtmässig festgenommen*” and “*... festgehalten*”, but the meaning seems to be equivalent of the English version. The Finnish version also includes the element of lawfulness, using the expression “*lain nojalla*”. What is interesting to note, however, is that although “arrest” is translated with one concept, “*pidätetään*”, the concept of “detention” has been given two different translations depending on the context, “*vangitaan*” (imprisoned) and “*vapautensa riistetään*” (deprived of one’s liberty). As regards the equivalent of “imprisonment” used in the Finnish translation, Rossini explains it as referring to the punishment of being held in confinement for a certain period of time (in a jail or in a prison after sentencing), sentencing meaning the portion of criminal proceedings where punishment is decided.⁸⁴² In comparison, in the earlier translation of the Convention, only “*vangitaan*” was used, which gives reason to suspect that some problems of interpretation may have arisen during the period of time between the two translations. Such problems could have arisen, for example, in the context of preventive placement of convicts in a mental hospital upon release from prison, which would have fallen outside the original translation. Or alternatively, it has been aligned to some extent with the Swedish translation, which uses the expression “*är arresterad eller på annat sätt berövad friheten*”. The Swedish expression “*berövad friheten*” is the equivalent of any deprivation of liberty. Thus, although the provisions of Article 5, paragraph 1, had not produced major problems before the European Court of Human Rights for Finland, the potentially emerging problems in the light of the Court’s case law due to a too narrow translation were recognised and taken into account in a new translation.

As appears from section 3.4.10.3 above, instead of the concepts of arrest and detention or deprivation of liberty, the European Court of Human Rights has taken a position on the autonomous meaning of certain essential concepts relating to the deprivation of liberty. For example, the Court has clarified what is meant with “conviction” for the

841 This is the view of Pellonpää & al. (2012, p. 393).

842 Rossini 1998, p. 98.

purposes of Article 5, paragraph 1, by stating that there cannot be a “*condamnation*” (in the English text: “conviction”) unless it has been established in accordance with the law that there has been an offence – either criminal or, if appropriate, disciplinary. Moreover, to use “conviction” for a preventive or security measure would be consonant neither with the principle of narrow interpretation to be observed in this area nor with the fact that that word implies a finding of guilt.⁸⁴³ Thus, the Court also refers to the determination of the existence of a criminal offence in accordance with the law, which refers to national law. Similarly, the Court has outlined the meaning of the provisions by taking a position on the concept of “lawfulness” by stating that the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law.⁸⁴⁴ The Court has further clarified the meaning of “reasonable” with reference to the reasonableness of the length of detention. Considering the definition of the concepts with reference to national law, it should not be a major problem for the legal systems to adapt themselves to the interpretation of Article 5, paragraph 1. Despite that, it has produced problems for some legal systems and those are essentially of a systemic nature, as appears from section 3.4.10.3. That concerns particularly the French legal system and the English legal system. The problems faced by the French legal system relate in essence to the scope of “lawful detention”, for example, refusal of entry into the French territory and holding in the airport’s transit zone⁸⁴⁵ and the applicability of Article 5, paragraph 1, on board a ship outside the French territory⁸⁴⁶. As regards the English legal system, the problems have mainly been related to immigration laws⁸⁴⁷, detention relating to the prevention of terrorism⁸⁴⁸ and confinement in a military base⁸⁴⁹, but there are also cases relating to preventive detention⁸⁵⁰. Those sectors of law also appear in the national case law dealing with the application of the Convention, which gives reason to suggest that the national jurisdictions, particularly the Supreme Court, are already paying attention to the problems under Article 5, paragraph 1.

843 *Guzzardi v. Italy*, plenary judgment of 6 November 1980, Series A 39, § 100.

844 *Stafford v. the United Kingdom*, Grand Chamber judgment of 28 May 2002, Reports of Judgments and Decisions 2002-IV, § 63.

845 *Amuur v. France*, judgment of 25 June 1996, Reports of Judgments and Decisions 1996-III.

846 *Medvedyev v. France*, Grand Chamber judgment of 29 March 2010, Reports of Judgments and Decisions 2010.

847 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, Reports of Judgments and Decisions 2008.

848 *A. and Others v. the United Kingdom*, Grand Chamber judgment of 19 February 2009, Reports of Judgments and Decisions 2009.

849 *Al-Jedda v. the United Kingdom*, Grand Chamber judgment of 7 July 2011, Reports of judgments and decisions 2011.

850 *Steel and Others v. the United Kingdom*, 23 September 1998, Reports of Judgments and Decisions 1998-VII. See also *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A 93.

The German legal system has also faced problems with regard to preventive detention. The European Court of Human Rights has found in a series of judgments starting on 17 December 2009⁸⁵¹, that Germany had violated Article 5, paragraph 1, when applying preventive detention. That concept is not a new problem as appears from the judgments against the United Kingdom. However, for the German legal system, the problems that have emerged before the European Court of Human Rights are of a relatively recent nature despite that the national provisions of law had existed for a rather long time. With regard to the consequences that may result from a criminal offence, the German legal system draws a distinction between the punishment and the measures of improvement and security. Whereas a punishment as a criminal law sanction may only be imposed upon the establishment of guilt (*Schuld*), the measures of improvement or security may apply regardless of the guilt in case the offender is considered to constitute a danger to society or require particular attention⁸⁵². The concept which has proved to be problematic for Germany before the European Court of Human Rights, i.e. placement in secure custody (*Sicherungsverwahrung*), falls within the ambit of those security measures that would not necessarily require establishment of guilt under the German legal system⁸⁵³. When compared with the Finnish and Swedish translations of the concept, the German one should not be particularly problematic. Indeed, the rather recent problem that has emerged in the German criminal law system seems to be more of a systemic than of a linguistic or conceptual nature. The German authorities have already reacted to the problem and a judgment of the Federal Constitutional Court⁸⁵⁴, finding the national provisions on the imposition and duration of preventive detention unconstitutional, has led to changes in the national Criminal Code⁸⁵⁵. As the most recent judgment from November 2013 indicates, however, there may still be applications which have become pending before

851 *M. v. Germany*, judgment of 17 December 2009. That judgment has been followed by a series of repetitive judgments, including *Haidn v. Germany*, judgment of 13 January 2011, *Kallweit v. Germany*, judgment of 13 January 2011, *Mautes v. Germany*, judgment of 13 January 2011, *Schummer v. Germany*, judgment of 13 January 2011, *H.W. v. Germany*, judgment of 19 September 2013, and *Glien v. Germany*, judgment of 28 November 2013.

852 See Fisher 1997, p. 143.

853 Fisher 1997, p. 143.

854 *BVerfG, 2 BvR 2365/09 vom 4.5.2011*. The Federal Constitutional Court found that all provisions of the Criminal Code (*Strafgesetzbuch*) and of the Juvenile Court Act (*Jugendgerichtsgesetz*) on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty under the Basic Law (*Grundgesetz*). The Constitutional Court decided the case under the provisions of the Basic Law, as the European Convention on Human Rights is hierarchically below it, but gave importance to the need to ensure their interpretation in a manner that is open to international law (*völkerrechtsfreundlich*), including the Convention and the case law of the European Court of Human Rights.

855 *Strafgesetzbuch* § 66, § 66a and § 66b (BVerfGE v. 4.52011/1003). The amendments have been made directly on the basis of the judgment of the Federal Constitutional Court.

the enactment of the new provisions, and as there is still no case law under the new provisions, it remains to be seen whether the problems have been removed.

Unlike for the other legal systems covered by the present thesis, Article 5, paragraph 1, does not appear to have been a particularly problematic provision for the Finnish and Swedish legal systems. The violations found by the European Court of Human Rights still appear to be isolated cases. Questions of interpretation have emerged particularly in the determination of the scope of the provision, in the same way as in respect of Article 6, paragraph 1. Apart from the cases referred to in the foregoing, there are cases in which new problems have emerged in the interpretation of the provision. Although Finland has not faced any major problems with the provisions of Article 5 so far⁸⁵⁶, the German example shows that it does not mean that there could not emerge new types of problems later. When looking into the case law of the European Court of Human Rights, including a case against Finland⁸⁵⁷, one could predict potential problems in the field of “preventive” detention of persons of unsound mind despite the aforementioned change of translation. Although the Finnish legal system appears to have been rather receptive to the Court’s case law in the interpretation of Article 5, paragraph 1, and has even reacted to it, the Finnish legal system includes the possibility of placing released prisoners in a closed institution, where the person concerned has been found dangerous because of particularly serious criminal offences caused at least partly by mental health disorders, and poses continued risk for society because of persisting problems, under certain criteria set out in the law. Furthermore, as has been shown by a recent judgment against Finland⁸⁵⁸, there may be situations that are not conceived as arbitrary interferences in the right to liberty and security of person by the national authorities, but constitute a violation of privacy. To avoid possible problems in complying with the requirements of Article 5, paragraph 1, it is important for the competent authorities and particularly the judiciary to be receptive to the argumentation of the European Court of Human Rights.

856 The first case against Finland (out of two so far) was *Raninen v. Finland*, judgment of 16 December 1997, Reports of Judgments and Decisions 1997-VIII, in which the Court found a violation of Article 5 § 1 in that the applicant’s arrest had been unlawful between his placement in military hospital and final detention order.

857 *X. v. Finland*, judgment of 3 July 2012, Reports of Judgments and Decisions 2012. The Court found, having first reiterated the principles relating to arbitrary deprivation of liberty, that the procedure prescribed by national law did not in that case provide adequate safeguards against arbitrariness. (See § 171 of the judgment.)

858 *Lindström and Mässeli v. Finland*, judgment of 14 January 2014 (Appl. No. 24630/10). Although the case relates to the limitation of rights of prisoners, the Court examined it under Articles 3 and 8. The Court found a violation of Article 8 for the reason that there was no proper legal basis for restricting the right to privacy by controlling the use of toilet with the means resorted to.

In conclusion, the Finnish legal system has not faced any major conceptual problems with the expressions used in the European Convention on Human Rights, which would have been of a linguistic nature, apart from some challenges in the application of the concept of criminal charge. It is, however, sometimes difficult to draw a distinction between linguistic problems and problems of interpretation, as most often they go hand in hand, which is shown by the Court's technique of developing its case law through various principles of interpretation, arriving on occasion at an autonomous meaning given to an expression or concept used in the Convention. The autonomous meaning, in particular, is a source of challenges for States parties to the Convention. The same applies to some of its principles of interpretation, particularly that of evolutive interpretation. Nevertheless, the problems faced by Finland in compliance with Article 6, paragraph 1, have not been essentially problems of interpretation of the meaning of its provisions, but rather systemic problems caused by deficiencies in procedural law. At the outset, the cases in which Finland has been found to violate the provisions of Article 6, paragraph 1 - on occasion read jointly with Article 4 of Protocol No. 7 - or Article 5, paragraph 1, as well as the subsequent national case law adapting national interpretation of law to European case law indicate that in principle, the national judiciary would be receptive to the language of the Convention and the Court's argumentation insofar as the concepts used therein are concerned. The possibility of future problems as a result of new legislation or for other unpredictable reasons as in the case of Germany, however, makes it necessary to pay attention to the Court's discourse when deciding cases at the national level in the light of the Court's case law. In the following, an effort will be made to assess whether and to what extent the Finnish supreme jurisdictions have actually paid attention to conceptual problems or problems of interpretation, among other questions subject to the present study. An effort will also be made, in the light of national case law, to see whether the concept of criminal charge has remained an isolated concept that has produced challenges for the Finnish judiciary, or whether there are others in the interpretation of the other larger groups of violations, i.e. those under Article 8 and Article 10.

4.3 Impact of the case law of the European Court of Human Rights on national legal culture

In the foregoing, it is concluded that the Finnish legal system meets the technical criteria for receptiveness to the European Convention on Human Rights and the case law of the European Court of Human Rights as sources of law. It is further concluded, however, that the traditionally strong reliance of the Finnish legal system on literal interpretation could have the potential of creating problems with regard to the receptiveness of the national judiciary to the argumentation of the European Court of Human Rights, although other principles of interpretation are accepted and used to

some extent. Section 4.5 below focuses on assessing the transition of the legal culture of protecting fundamental rights and human rights through an analysis of the discourse of the Finnish supreme jurisdictions. The case law of the European Court of Human Rights and its impact on national jurisdictions, particularly where the case law has led to legislative amendments, gives reason to conclude that a significant transition of the legal culture has taken place through the interpretation of law. However, one must bear in mind that the legal culture is a wider concept, and there are also other signs of the transition of the legal culture of protecting fundamental rights and human rights, which are particularly visible in national legislation. Some of that legislation has been imposed by the European system of protecting human rights. Finland's accession to the European Convention on Human Rights has also led to significant changes in procedural law and thus to a rather dramatic change also in the culture of protecting fair trial rights. Upon those amendments, it was possible to withdraw the original reservations made to the Convention. Although there were still no violations found against Finland in cases concerning the impartiality of judges, the Finnish authorities paid attention to the lack of national provisions of law on that specific aspect of a fair trial. It has been recognised, in particular, in early judgments of the Supreme Court in which the Supreme Court assessed the question of impartiality directly in the light of the case law of the European Court of Human Rights. The need to provide for explicit rules in national legislation, to supplement the provisions of the Constitution, was addressed by means of enacting new provisions of law⁸⁵⁹. It was recognised in the legislative proposal that the outdated provisions of law had become even more problematic for the reason that the impartiality of judges is assessed also in the light of the European Convention on Human Rights, and it was therefore necessary to amend them to make them better meet present-day requirements.

Thus, the transition of the legal culture in the form of strengthened fair trial rights has continued on the basis of the case law of the European Court of Human Rights, and in the Finnish legal system that transition began already in the light of case law concerning other States parties to the Convention. Furthermore, the repeated judgments against Finland concerning delays in national proceedings finally resulted in the enactment of a national act providing for remedies in the case of delays⁸⁶⁰. That enactment is to a large extent based on the recommendation of the European Court

859 HE 78/2000 vp. The Government proposal takes into account the requirements of the European Convention on Human Rights and the case law of the European Court of Human Rights in detail in the assessment of the situation.

860 HE 233/2008 vp, introducing amendments to four acts of Parliament, including the Administrative Court Proceedings Act, and enacting a new Act on remedying delays in court proceedings. The latter applies to civil and criminal law proceedings. The case law of the European Court of Human Rights, particularly the repeated judgments against Finland were extensively taken into account.

of Human Rights, which repeatedly has held that the remedies existing under the earlier provisions, e.g. in the form of more lenient punishment in criminal proceedings, were not sufficient. The purpose of the new provisions of law was to provide more effective legal remedies for delays in proceedings, in the form of a possibility of parties to require urgent handling or financial compensation, without having to take the case to the European Court of Human Rights. The new remedies were also considered to have a preventive effect against delays in proceedings.

There are also other legislative changes based on the recommendations of the European Court of Human Rights, although some of them are partly due to the recommendations made by other international monitoring bodies. In particular, the need to carry out an overall revision of the Child Welfare Act was assessed largely on the basis of international developments, including the International Convention on the Rights of the Child and the European Convention on Human Rights. The case law of the European Court of Human Rights was taken into account in that context, including judgments issued against Finland⁸⁶¹. A later amendment to mental health legislation is directly based on a judgment against Finland, in which the national legislation was found to be in violation with the requirements of the Convention⁸⁶². Thus, despite that particular judgment being an isolated one, even an individual judgment may lead to rapid changes in legislation in case of a recommendation to that effect by the European Court of Human Rights. On occasion, there may be an ongoing public debate despite that the European Court of Human Rights has not recommended any changes. In the case of protection of transsexuals, for example, there has been an ongoing debate in Finland on the need to allow marriage between persons of the same sex, but in the case of *Hämäläinen v. Finland*, the European Court of Human Rights confirmed that there was still no European consensus on that particular issue⁸⁶³. However, some plans exist to strengthen the rights of transsexuals, with the intention to introduce the relevant amendments to Parliament in the autumn of 2014⁸⁶⁴. Further, Parliament adopted in late 2014 amendments to the Marriage Act on the basis of initiative of the

861 HE 225/2004 vp, introducing the most urgent amendments to the Child Welfare Act.

862 HE 199/2013 vp. The European Court of Human Rights gave its judgment in the case of *X. v. Finland* (Appl. No. 34806/04) on 3 July 2012. The Court found the lack of a mechanism against arbitrary decisions on involuntary treatment problematic, in that the patient had no possibility to have an independent second opinion before the continuation of treatment. Upon the Government proposal, the Mental Health Act was amended accordingly through Act No. 438/2014.

863 *Hämäläinen v. Finland*, Grand Chamber judgment of 16 July 2014 (Appl. No. 37359/09).

864 Working group with mandate until 31 September 2014, Ministry of Social Affairs and Health, based on a recommendation of the Human Rights Commissioner of the Council of Europe (CommDH(2012)27).

people, allowing same sex marriages⁸⁶⁵. There are still other amendments that need to be discussed by Parliament, particularly amendments to the Adoption Act, and nor is the public debate still over. Thus, the case law of the European Court of Human Rights may have both a direct and indirect effect on the national legal culture, on occasion together with other international developments. In Finland, the case law of the European Court of Human Rights has had a significant impact on strengthened protection of fundamental rights and human rights, and thus a transition of the legal culture under that case law clearly exists and is most clearly seen in court judgments. The purpose of micro-comparison through discourse analysis of the Finnish supreme jurisdictions is to refine that conclusion and to assess the signs of transition in their judicial discourse. The national case law is analysed in respect of the Finnish legal system to assess whether an even further reaching transition of the legal culture of protecting fundamental rights and human rights has taken or is taking place, i.e. whether the supreme jurisdictions have begun to apply the case law of the European Court of Human Rights close to the manner in which it is done by that Court itself, and whether the national case law has directly strengthened the protection of fundamental rights and human rights. Although a change is imposed by legislation, it does not necessarily mean a change in the general preparedness and attitudes of courts to apply those rights directly, or at least the transition of the legal culture of protecting them may take time.

The Finnish legal system has gradually moved towards a more flexible approach to the use of a variety of sources of law instead of applying strongly on written legislation, and there is an increasing trend to apply the European Convention on Human Rights by the national supreme jurisdictions is noted, including references to the European Court's case law. Before the past few years, for example in the Supreme Administrative Court, it has been more usual to apply the provisions of the Constitution of Finland or other relevant national legislation⁸⁶⁶, which often afford the same or even higher level of protection than those of international conventions. Until about 2005, the Supreme Court has perhaps more often than the Supreme Administrative Court applied the provisions of the European Convention on Human Rights⁸⁶⁷ but the situation has gradually changed and today both apply them frequently. There have also been other

865 M 10/2013 vp – KAA 3/2013 vp, initiative for amending the Marriage Act, the Registered Partnership Act and the Act on the establishment of post-operative sex. Although the proposed amendments to the other two Acts were dismissed, the amendments (156/2015) to the Marriage Act (234/1929) were approved in the second reading on 12 December 2014, and they are scheduled to enter into force on 1 March 2017. After the entry into force, marriage will be a union between two persons instead of a man and a woman.

866 See e.g. the judgment of the Supreme Administrative Court of Finland KHO:2004:99 concerning the freedom of religion.

867 See Ojanen 2005, p. 1218 and 1219.

differences between general courts of law and administrative courts. Whereas the general courts of law have mainly referred to the fair trial provisions of Article 6 of the Convention, the references made by administrative courts cover perhaps a larger number of provisions. However, as Ojanen observes, the references made by the Supreme Administrative Court have traditionally been more general in nature, or have merely mentioned the relevant provision of the Convention, whereas the references made by the Supreme Court to the Convention and the case law under it have somewhat earlier become rather detailed, although there have also been examples of detailed references in the case law of the Supreme Administrative Court.⁸⁶⁸

According to the legislative proposal for reforming the fundamental rights provisions of the Constitution, the international and constitutional systems of protecting rights would remain independent and there would still be some differences of interpretation despite possible similarities in wording. Despite this, the aim with the reform was to bring the two systems closer to one another.⁸⁶⁹ It is also observed that the Finnish judiciary in principle applies the national constitutional provisions on fundamental rights and the Convention provisions by applying similar principles of interpretation. In the light of the overview of case law for the purposes of the present study, those provisions are also often applied simultaneously, which means that in practice, the difference between the constitutional provisions and international human rights is gradually diminishing as they both pursue the same objective. In prior studies made concerning the application of fundamental rights and human rights provisions in Finland, it has been found that prior to the accession of Finland to the European Convention on Human Rights, it was rare to apply international human rights provisions directly by the courts, and even explicit reference to the constitutional provisions was rare. That may be explained by the traditionally different function of fundamental rights provisions, i.e. they were rather used for the constitutionality control of legislation, as well as by the fact that the constitutional provisions were less numerous before the overall reform of the fundamental rights provisions that took place around the same time with accession to the Convention. They were rather taken into account than applied directly. Thus, the underlying presumption in this study is that the impact of the European Convention on Human Rights is huge as regards the direct applicability of human rights and fundamental rights provisions, and the case law of the European Court of Human Rights is constantly applied as a source of law. Furthermore, despite that the constitutional system is formally independent of the European system of protecting human rights, the European case law has had an impact on the interpretation of the constitutional rights. Through discourse analysis in sections 4.5.1.3 and 4.5.2.3 below, an attempt is made to see whether there are, however, such significant differences in the

868 Ojanen 2005, p. 1216 and 1217.

869 HE 309/1993 vp, p. 39 and 40.

principles of interpretation applied by the national supreme jurisdictions with those of the European Court of Human Rights as could potentially create problems for the receptiveness of the Finnish legal system to the argumentation of the Court, at least at a theoretical level. It must be underlined that legal culture of protecting fundamental rights and human rights includes also a variety of factors other than strictly legal ones, particularly awareness and general attitudes.

Ojanen is of the view that in general, by 2004, the Finnish courts had already recognised a strong effect for the judgments of the European Court of Human Rights.⁸⁷⁰ An overview of the relevant case law suggests that the supreme jurisdictions have, however, accepted them as a binding source of law as from the first references to those judgments⁸⁷¹. Since 2004, it is even more clearly so. The practice of referring to the case law has indeed increased since that time. In the view of Pellonpää, the increased reference to the case law of the European Court of Human Rights by the supreme jurisdictions in Finland has extended legal protection and has narrowed the traditional line drawn between the concepts of fundamental rights and human rights. However, it has been considered that the European Convention on Human Rights sets out a minimum level of protection, whereas national constitutions may go further and impose stricter criteria for the protection of human rights.⁸⁷² The references made to the case law in earlier and later judgments will be compared and looked into in more detail through discourse analysis, to see whether there are today similar differences or whether there are fewer differences between the two supreme jurisdictions. However, even where the court has not directly referred to the provisions of human rights conventions, they may have had an indirect effect on decision-making, as general principles of law that could be applied even without the existence of an international obligation. Accordingly, international treaties may have had relevance even if the court decision does not contain any explicit reference to it.⁸⁷³ Jääskinen points out that, in comparison with the application of EU law, the case law concerning the European Convention on Human Rights is essentially different in that, instead of the application of such international provisions as result in changes in material national legislation, the application of human rights conventions rather guides the application and interpretation of national legislation.⁸⁷⁴ As explained in the foregoing, however, the case law of the European Court of Human Rights may result in legislative changes. It is typical of judicial decision-making that not everything is explicitly written out in the judgment. There may even be extensive

870 Ojanen 2005, p. 1216.

871 This view is based on the discourse in the judgments of the supreme jurisdictions, e.g. KKO:1996:80.

872 Pellonpää 2009(1), p. 108 and 113. In his view, the difference is today minor. Pellonpää has studied a number of cases, including KHO 31.12.1999 T 4398, KKO:2003:19, KKO:2005: 73, KKO:2005:82, KKO:2005:136, KHO:2007:28, KHO:2007:47, and KHO:2007:49.

873 Karapuu 1999, p. 171.

874 Jääskinen 2001, p. 606.

research into the contents of human rights provisions and relevant case law – such as that of the European Court of Human Rights – in the background.⁸⁷⁵ However, the national judgments are compared to assess whether there have been changes in the culture of writing judgments and in the way in which human rights conventions are applied and interpreted, to the extent of signifying changes in legal culture.

A traditional technique of interpreting fundamental rights provisions in Finland has rather been to take them into account in the context of interpreting other provisions of law, instead of applying them directly as a basis for the judgment. As suggested in the foregoing, the earlier constitutional provisions on fundamental rights were perhaps not even designed for direct application. Taking fundamental rights provisions into account in the application of law, as a means of interpretation, could be seen as striking a balance between the protection of the interests in question (fundamental rights) and the objective and purpose of the law the provisions of which are subject to interpretation. As is pointed out by Viljanen, “*verfassungskonforme Auslegung*” must respect the wording of the law and must not change the meaning of the law, nor jeopardise the intention of the legislator⁸⁷⁶. That principle, which means respecting conformity with fundamental rights provisions of the Constitution, has gained increasing importance in the case law of the Finnish supreme jurisdictions and other courts of law. It is as such an element that may alleviate the problems or differences that there may be between the methods or rules of interpretation used by the European Court of Human Rights and those used by the national judiciary. However, the discourse of the supreme jurisdictions is looked into to see whether that principle is referred to or if there are other linguistic elements indicating its application, as compared with direct references to fundamental rights or human rights provisions and relevant case law.

Nevertheless, the influence of constitutional rights norms has far-reaching consequences even on the character of the legal system, of which Alexy draws attention to three particularly important ones. First, they affect the contents of ordinary law in that they may exclude certain content as constitutionally impossible and, vice versa, they may require certain content as constitutionally necessary. The second consequence identified by Alexy relates indeed to the balancing of interests. In his view the nature of constitutional rights norms as principles implies the necessity of balancing interests, which does not always lead to the same result. Which result is considered correct depends on value-judgments, which renders balancing an open procedure. The third consequence, according to Alexy, concerns the nature of such openness. The validity of constitutional rights norms means that the legal system is open in respect of morality, which is most obvious in respect of certain basic concepts, i.e. dignity, freedom and

875 See Ojanen 2005, p. 1217. (This paragraph is taken from Koivu & Mattila 2006, p. 43 and 44.)

876 See Viljanen (V-P) 1990, p. 221.

equality.⁸⁷⁷ The openness of the interpretation of fundamental or human rights provisions should, nevertheless, not be seen as a problem. As has been shown by the case law of the European Court of Human Rights, it leaves room for taking development of society into account. Similarly, some degree of flexibility of a national legal system makes it possible for it to better adapt to the needs to pay attention to the European Convention on Human Rights and the Court's case law. As observed in section 4.5 below, general practical discourse and moral values also help to fill in gaps in the more technical legal discourse. This has a close connection with the principle of human rights friendly interpretation of law. However, in the same way as Gerards and Fleuren have done⁸⁷⁸, I would draw a distinction between the application of similar methods and standards as have been developed by the European Court of Human Rights, on the one hand, and the way in which the national jurisdictions actually think and reason. The aim with the final stage of this study is, in particular, to address that question. Gerards and Fleuren found in their analysis concerning a selection of legal systems that it was in fact rare for national courts to apply methods such as (meta-)teleological interpretation, evolutive interpretation or consensus interpretation. Further, although according to their analysis the English courts refer to those methods more often than the courts in the other legal systems, in their view they do not usually resort to similar line of reasoning independently of the concrete precedents of the European Court of Human Rights⁸⁷⁹. This finding is interesting from the point of view of the present study as in the light of an overview of judgments of the United Kingdom Supreme Court, the practice of referring to the case law of the European Court of Human Rights is rather recent.

When looking into the case law of the supreme jurisdictions, the aforementioned principle of balancing interests appears to be done, as is also done by the European Court of Human Rights. It has a connection with the principle of proportionality. Thus, the basic approach to the application of human rights and fundamental rights provisions appears to be the same. Furthermore, some of the principles of interpretation of law are largely similar. The principle of margin of appreciation, which does not seem to be usually referred to by the courts in Sweden, Germany and the United Kingdom but is on occasion referred to by the French courts⁸⁸⁰, appears in some judgments of the Finnish supreme jurisdictions, particularly the Supreme Administrative Court. That is not necessarily a problem in case the principle is not applied in an effort to avoid

877 Alexy 2004, p.365 and 366.

878 Gerards and Fleuren 2014, p. 361. Gerards and Fleuren speak of "application" and "deep influence" of the Convention. In their comparative analysis, Gerards and Fleuren have studied the examples of Belgium, France, Germany, the Netherlands, Sweden and the United Kingdom.

879 Gerards and Fleuren 2014, p. 362.

880 Gerards and Fleuren 2014, p. 362. Apart from France, there are also examples of the application of the margin of appreciation in Belgium and the Netherlands.

affording a protection of human rights entirely but the national court carries out a proper balancing of rights. The principle of proportionality, which is well known to the Finnish legal system, and the practice of seeking solutions within a wider context of the legal system and particularly within the framework of the entire constitution should make it rather easy to adopt the practice of the European Court of Human Rights to interpret individual rights in the light of the Convention as a whole. However, the Finnish courts do not appear to resort to the principle of teleological interpretation or the object and purpose of the statute to the same extent as the Swedish or German courts. That could be a factor decreasing the receptiveness of the national judiciary to the argumentation of the European Court of Human Rights. Furthermore, there are principles of interpretation applied by the Court which do not usually appear in the case law of the Finnish judiciary, including particularly the principle of effectiveness and the principle of autonomous meaning which are foreign to the Finnish legal system. Thus, there may be elements in the discourse of the European Court of Human Rights that are difficult to receive. That may also affect the way in which the Court's case law is applied by the national judiciary, and could make it rather mechanic. It is also characteristic for the Finnish legal system to apply law as it is at a given moment, and the dynamic approach of the European Court of Human Rights to the Convention provisions, to apply it as a living instrument, is not traditionally known in the Finnish legal system. The fact that it is particularly those principles of interpretation in connection with which the European Court of Human Rights appears to develop the law most, that are foreign to the Finnish jurisdictions, makes the transition of the legal culture of protecting fundamental rights and human rights challenging. Discourse analysis is used to analyse whether and in which manner the Finnish supreme jurisdictions actually resort to a similar line of reasoning as the European Court of Human Rights, i.e. whether is deeper-going transition in the receptiveness of that type of argumentation towards a real dialogue between the national jurisdictions and the European Court of Human Rights.

There is also a rather significant factor in the Finnish interpretation of law that may decrease the receptiveness of the judiciary to the argumentation of the European Court of Human Rights. The European Court of Human Rights is clearly a court of precedents. It very seldom deviates from its earlier case law in similar types of situations, which is to guarantee uniform application and interpretation of the Convention in the different States parties to it. An increased application of case law as a source of law could improve receptiveness of the Finnish judiciary to the argumentation of the European Court of Human Rights. The Finnish judiciary has only rather recently begun to adopt a practice of issuing precedents. The Finnish supreme jurisdictions issue *de facto* precedents, and particularly the Supreme Court has become a court of precedents, and usually decide similar cases in the same way. Even lower courts tend to follow those precedents but strictly speaking they are not bound by them. That also

means that there does traditionally not exist the same kind of technique of applying earlier case law as that of the European Court of Human Rights. This may also be a factor explain the rather mechanic references to the Court's case law. However, the relatively recent change in respect of the culture of applying precedents is interesting from the perspective of analysing the change in the legal culture.

An assessment of the theoretical principles of interpretation of law, including constitutional law provisions on fundamental rights, indicates that there are also factors in the Finnish legal system and judicial practice that may lead to a weaker receptiveness of the legal system to the argumentation of the European Court of Human Rights when compared, for example, with the German judiciary. However, one must bear in mind that the German practice of constitutional complaints, for example, may be a stronger factor explaining the relatively low number of complaints against Germany, bearing in mind also that the decisions of the German Constitutional Court seem to be rather convincing and satisfactory from the point of view of the applicants. Before advancing to the more detailed analysis of the supreme jurisdictions, an overview is carried out of the complaints made against Finland before the European Court of Human Rights to see which have been the major problems faced by the legal system, and whether there are changes taking place, as the first step of analysing the third phase of transition in the legal culture of protecting fundamental rights and human rights.

4.4 Complaints against Finland before the European Court of Human Rights

For the purpose of analysing the problems faced by Finland in the protection of rights guaranteed by the European Convention on Human Rights, the case law of the European Court of Human Rights has been analysed in the light of the Court's statistics as on 31 December 2013, including the total number of judgments rendered by the Court concerning Finland, particularly judgments finding a violation of the Convention and judgments concerning the specific provisions of the Convention subject to the present study. Those statistics have been compared with the corresponding figures concerning the other selected States. However, in respect of Finland, even some of the most recent judgments have been analysed as they also include final Grand Chamber judgments and a couple of them appear to demonstrate signs of an emerging interaction between national jurisdictions and the European Court of Human Rights.

The total number of judgments against the United Kingdom was 499, of which a violation was found in 297 cases. Of all the five States analysed, this figure constitutes the second largest number of judgments. The total number of judgments rendered by the Court against France is the biggest of the five States. The total number of judgments was 913, of which a violation was found in 674 cases. The corresponding figures

for Germany were 263 judgments and 173 violations. Also, in respect of Germany, the numbers of cases concerning fair trial rights⁸⁸¹ is significant, which seems to have constituted the main problem for all States analysed. There is also a recent problem in the German legal system, which raises interesting linguistic questions and which falls within the scope of one of the provisions chosen to be analysed, i.e. compliance of German provisions of law on preventive detention with the Convention provisions. This problem has produced a number of repetitive cases, which might partly explain the fact that the number of violations against Germany has significantly increased in the past couple of years. Otherwise no major trends of violations were identified. Germany also constitutes an interesting example of a State where the number of violations is relatively small in relation to the size of the population. It provides an interesting point of comparison with Finland that appears to have faced bigger problems considering the small size of the population.

Between the date of accession of Finland to the European Convention on Human Rights and 31 December 2013, the European Court of Human Rights has issued a total of 166 judgments concerning Finland, of which a violation of a Convention provision was found in 129 cases. The overwhelming majority of cases concern fair trial rights, of which 59 relate to the length of proceedings and 37 other aspects of a fair trial under Article 6 of the Convention. Other significant problems faced by Finland in compliance with the Convention provisions included 23 cases under Article 8 (right to the protection of private life and family rights) and 18 cases under Article 10 (freedom of expression). Thus, it appears that apart from the rather technical problems of the legal system in guaranteeing a trial within a reasonable time and certain other procedural rights as required by the Convention, Finland has mainly encountered problems in certain aspects of ensuring a fair balance between different conflicting public and private interests as well as drawing a line between the protection of privacy and freedom of expression or freedom of the press. When looking into the cases concerning the protection of private life, one may observe that there have been repetitive problems in respect of balancing the need to protect minors and the need to ensure access rights (custody, emergency and normal care orders, family reunification) which is a feature in common for both the private law and administrative law, as well as and coercive means (search and seizure).

As regards problems faced by Finland in ensuring the protection of rights under Article 6 of the Convention, they have mainly been of a rather technical nature in the light of the case law of the European Court of Human Rights. In Finland, the length of proceedings has constituted the largest number of violations of the Convention, a

881 The statistics include both the right to a fair trial and length of proceedings.

large part of which have appeared in criminal proceedings⁸⁸². One reason behind the violations has been lengthy investigations, but it would not be a correct conclusion to state that this would be because of an incorrect interpretation of Article 6, paragraph 1. It rather seems to have been a systemic problem caused by various factors⁸⁸³. Not all those factors have been removed, but a national remedy has been enacted to address the violations⁸⁸⁴. That measure supports the finding that the majority of the cases under Article 6 have been repetitive in nature. Therefore, the length of proceedings cases are not analysed in great detail in sections 4.5.1 and 4.5.2 below for the reason that the transition of the legal culture is rather seen in legislation. It is possible, however, that even procedural questions such as the right to a fair hearing within a reasonable time result in other questions concerning the rights protected under Article 6, even questions relating to the principle of autonomous meaning (see section 3.4.10.1 above)⁸⁸⁵. Unlike in Sweden, where Article 6 has raised linguistic problems and problems of interpretation of the scope of the provision, no corresponding problems have appeared in Finland apart from a couple of isolated cases concerning civil servants. However, particularly those cases against Finland have led to changes of interpretation in national case law and have also contributed to a series of precedents of the European Court of Human Rights under which the scope of Article 6 has been expanded. The question of whether such problems have been discussed to a larger extent at the national level than before the European Court of Human Rights is examined in section 4.5 below. Nor has Finland faced similar problems of interpretation of Article 5 as have appeared in Germany, and the only cases have remained isolated ones. However,

882 The problem of the length of national criminal proceedings in the light of the case law under the European Convention on Human Rights has been subject to study slightly prior to enactment of a national legislation on remedies by Spolander, who drew attention to that the majority of judgments against Finland concerning length of proceedings had concerned cases of economic crime (Spolander 2007, p. 310). According to Spolander, there had been problems both at the phases of criminal investigation and prosecution and at the phase of trial, particularly at the district court level. (Ibid. p. 312 and 313).

883 Spolander has analysed the various reasons for delays in national proceedings and called for an urgent mechanism whereby parties to the proceedings could themselves draw the attention of the authorities to the delay and where the violations of Article 6-1 could be remedied by providing a reasonable compensation. (Spolander 2007, p. 327 and 328)

884 One must bear in mind, however, that the existence of a national mechanism to remedy does not prevent the applicant from taking the case to the European Court of Human Rights in case the national court, for one reason or another, refuses to pecuniary or non-pecuniary compensation for the delay in national proceedings (see e.g. *Metzger v. Germany*, judgment of 31 May 2001 (Appl. No. 37591/97; judgment issued in French), in which case the *Bundesverfassungsgericht* refused to examine the constitutional complaint. A delay had even been observed in the national proceedings but not taken into account.)

885 In the view of Lemmens, the most spectacular example of a wide interpretation of Article 6 is the case of *Golder*, in which the Court interpreted Article 6(1) entailing the right to a court, of which the right of access to a court is an essential aspect. (Lemmens 2013, p. 301)

the cases combining Article 5 of the Convention and Article 4 of Protocol No. 7 and relating to the principle of *ne bis in idem* have led to changes of interpretation to the extent that they have even been applied *ex analogi* to other types of cases in the Supreme Administrative Court. Thus, although procedural issues and fair trial questions have appeared in a large number of cases both before the Supreme Court and the Supreme Administrative Court, the case law under those articles are mainly used for the purpose of finding support for the conclusions made in this study under the other major groups of cases where Finland has faced problems, i.e. cases under Articles 8 and 10. For the purpose of micro-comparison through discourse analysis those groups of cases are looked into in more detail below. The argumentation of the European Court of Human Rights in cases concerning the protection of private and family life and the freedom of expression is also interesting in that they represent examples of other principles of interpretation applied by the Court, i.e. the principle of margin of appreciation, the principle of effectiveness and the principle of proportionality. Of these, the principle of proportionality is well known in Scandinavian legal systems. The other two are foreign to the Finnish legal system, but it seems that in the national case law, the principle of the margin of appreciation has been referred to on occasion. Those groups of cases also constitute a clear demonstration of the transition of legal culture.

The high number of judgments in view of the size of the population makes Finland an interesting example for the purposes of this study, particularly when compared with Germany and Sweden. The total number of judgments rendered against Sweden was 114, of which a violation was found in 51 cases. The figures are rather low when compared with Finland, in view of the fact that Sweden's accession to the Convention took place at a much earlier moment. Sweden is also among those States that appear to have had the fewest problems in complying with the Convention, which is interesting considering the similarities with the Finnish legal system. Sweden appears to have had mainly problems with fair trial rights provisions, which is also the main problem for the majority of States parties. The same observations apply to Germany, taking also into account the size of the population. The number of violations found in cases concerning freedom of expression is significantly lower than in respect of Finland.

It is important to underline that the relatively high number of complaints against Finland does not necessarily mean that the national legal system is not prepared to apply the Convention rights or the Court's case law. Those complaints may be a result of great awareness among lawyers and their clients about the Convention mechanism. However, the high number of violations does indicate that there have been problems in the protection of certain rights guaranteed by the Convention, i.e. that there have been technical or other problems in the legal system or legal culture. The number of complaints concerning the length of proceedings is at least partly explained by the lack of national compensation mechanism in respect of lengthy trials until a specific Act was adopted to remove that problem, which has attracted victims to seek redress

at the European level. Since the adoption of the national provisions of law on such a mechanism, the number of complaints under Article 6 is expected to fall significantly. The question of redressing the delays in national proceedings under the new provisions of law has already been dealt with in a number of cases in the supreme jurisdictions⁸⁸⁶. This does not prevent applicants from taking their cases to the European Court of Human Rights, but a successful application would require that the national mechanism has not worked for one reason or another. Further, it is interesting to note that another group of cases with a high number of violations is that concerning the freedom of expression under Article 10. That may also partly be explained by awareness among journalists of their rights, but given the nature of those violations, they may also demonstrate a more serious problem in the legal culture. It is particularly interesting in view of the strong traditions of the freedom of the press in the Swedish legal system as explained in section 2.5.4 above, on which the Finnish legal system is largely based. The analysed cases concerning Finland do not indicate any significant legal-linguistic problems, when compared e.g. with cases against Sweden. The Court's judgments appear to rather demonstrate problems of different nature such as the scope of application of the provisions or signs of a rather weak reception of certain Convention provisions or their interpretation at the national level. However, it seems that in Finland the change of legal culture of protecting fundamental rights and human rights has taken place over a shorter period of time than in the other selected States parties to the European Convention on Human Rights. Thus, it is interesting to assess that change of legal culture in the light of national case law. In the following, the analysis will be taken a step further and the discourse of the national supreme jurisdictions will be analysed to see to what extent such a change can be detected in the texts of national judgments.

4.5 Reception of the argumentation of the European Court of Human Rights by the Finnish supreme jurisdictions – analysis of the case law

It is observed in the foregoing that the Finnish legal system recognises the status of international human rights conventions as applicable sources of law, and their provi-

886 See e.g. KKO:2011:87, KHO:2012:43 and KHO:2014:90 concerning taxation procedures, and KHO:2013:20 concerning competition laws. The new mechanisms appear to work effectively. In decision KHO:2012:43, for example, the Supreme Administrative Court has used even the new act of Parliament on remedying delays as a source of law in the assessment of the reasonable compensation, despite that it applies to civil and criminal law proceedings. The Supreme Court has also taken a position on the possibility to remedy delays in criminal investigations, in decision KKO:2011:38, despite the absence of explicit provisions of law, finding that the enacted provisions of law should be interpreted extensively. In that particular case, however, no remedy was awarded.

sions may be applied directly together with or without applying at the same time those of the Constitution. In principle, particularly through the reform of the Constitution of Finland, there should be no major problems with regard to the contents of the Convention provisions, despite that there are some differences between them and those of the Constitution. Section 7 of the Constitution on the right to life, personal liberty and integrity is less detailed than Article 5 of the Convention, despite combining the provisions of Articles 2 (right to life), 3 (prohibition of torture) and 5 (right to liberty and security). That might create some challenges in the application of the provision but in practice, section 7 should cover the same situations as Article 5. Particularly administrative deprivations of liberty have been found to fall within the scope of section 7 under the impact of the Convention. As regards section 21 providing for fair trial rights, its provisions are again less detailed than those of Article 6 of the Convention, but that provision has been enacted particularly to meet the requirements of Article 6. Since that provision is new, however, the main challenge at the national level is to change the legal culture in that, traditionally, the fair trial rights at constitutional level are not customary to the Nordic legal systems. Second, challenges may be brought about by the development of the scope of Article 6 under the case law of the European Court of Human Rights through autonomous interpretation. The wording of section 10 on the right to privacy of the Finnish Constitution is slightly different from that of Article 8 of the Convention, but the essential contents are the same. Thus, the wording of that provision should not create major problems. Although the freedom of expression as a classical fundamental right is not new, the wording of section 12 of the Constitution differs from that of Article 10 in that Article 10 provides explicitly on the acceptable grounds of derogation and requires that they are necessary in democratic society. Instead, the provisions of the Constitution provide explicitly for the possibility to enact restrictions to protect children and specify that more detailed provisions on the use of the freedom of expression are laid down by an Act of Parliament, and those provisions include access to public documents as a separate fundamental right⁸⁸⁷. The difference in wording could partly explain the challenges imposed by the protection of the freedom of expression before the European Court of Human Rights, but most likely there are also more profound reasons.⁸⁸⁸ The general spirit among the judiciary may have been to allow more easily derogations than would have been allowed under the case law of the European Court of Human Rights. That may also be explained by the fact that prior to Finland's accession to the European Convention on Human Rights, it was not customary to apply international

887 That right is a Scandinavian tradition of transparency, which does not as such create problems in the application of the constitutional provisions on the freedom of expression together with those of the Convention.

888 For the texts of the relevant provisions, see the Annex.

human rights conventions nor the fundamental rights provisions of the Constitution directly by the judiciary, as explained in sections 2.1 and 2.6.2.5 above. This in turn means that the culture of protecting fundamental rights by the judiciary was rather weak, when compared with the situation today, and has been visible in the national case law relating to the freedom of expression.

As explained in the foregoing, Finnish supreme jurisdictions began rather slowly to make profound researches into the case law of the European Court of Human Rights as a source of law. The first references to the case law appeared in the Supreme Court around 1994 and in the Supreme Administrative Court around 1999, but more detailed references can be found since 2004 and 2007, i.e. somewhat ten years later. The numbers of references in the two courts to the European case law, including both references to that of the European Court of Justice and that of the European Court of Human Rights, started also in general to increase around the same years. An explanation for the increase may be found in Lavapuro's conclusions, where he notes that in a new legal environment there is more room for different methods of resolving conflicting interpretations, including human rights or fundamental rights friendly interpretation, instead of the earlier rather categorical rules and mechanisms. In his view, the more flexible methods allow to take the context better into account. He presumes that fundamental and human rights will increasingly play a role in the practice of interpretation in the domestic courts.⁸⁸⁹ The traditions of legal interpretation do not, however, always tell the entire truth. The analysis in the light of works of scholars in section 4.1.4 indicates that traditionally, prior to the periods of time before Finland's accession to the Convention, the application of the most usual methods of interpretation in the selected legal systems for the purpose of comparison has been rather mechanic, with the exception of the English legal system. All of them have also faced challenges with the application of the case law of the European Court of Human Rights. Even the United Kingdom Supreme Court has only recently begun to resort to more detailed argumentation. Thus, it is probable that the constitutional rights traditions as a whole play a bigger role in the receptiveness of the national judiciaries to the argumentation of the European Court of Human Rights. The traditionally mechanic application of rules and methods of interpretation may have slowed down the transition of the legal culture in that respect, but does not constitute an obstacle. Not only the more developed legal environment, but also a stronger willingness to develop the case law is more relevant in that respect. Pellonpää is of the view that the case law of the European Court of Justice is already seen as part of the natural interaction between the national

889 Lavapuro 2010, p. 285. This change in the legal environment is related, in particular, to the accession of Finland to the European Convention on Human Rights, to the reform of the provisions of the Constitution on fundamental rights in 1995, and to Finland's accession to the European Union in the same year. See *Ibid.* p. 9-15.

and supranational levels of justice. Nor is the role of the European Court of Human Rights questioned.⁸⁹⁰

Nevertheless, that development has contributed to a stronger role of the judiciary in relation to the legislature, while being increasingly dependent on international courts, particularly the European Court of Human Rights insofar as the interpretation of fundamental rights is concerned.⁸⁹¹ Thus, the supreme jurisdictions refer today to the European case law rather frequently, and the expanding national cases with references to the case law of the European Court of Human Rights show that the application of foreign case law is not a problem for the Finnish judiciary. Thus, the basic criterion for the receptiveness of the national legal system to the argumentation of the European Court of Human Rights is met today as the supreme jurisdictions appear to find the case law to constitute a legitimate and binding source of law. However, the references to the case law particularly during the first ten years were rather mechanical and very brief, without actually looking into the detailed legal analysis and discourse of the Court. Thus, in the absence of transparent argumentation and assessment of the case law, there has remained some uncertainty as to what degree the national judiciary has been receptive to the argumentation of the European Court of Human Rights.

It is interesting to note that it was particularly in cases concerning the freedom of expression and the protection of privacy where the Supreme Court began to actively apply the case law of the European Court of Human Rights, with a more profound analysis of its contents. Thus, those groups of cases are analysed in more detail below. They indeed represent cases where it may be difficult to balance the conflicting interests, and the European case law provides a useful source of law. A new emerging group of cases in the Supreme Court appears to be cases concerning tax fraud in relation to the principle of *ne bis in idem* in respect of which also Sweden, for example, has faced problems in the European Court of Human Rights. That appears to be a sign of adapting national case law to the judgments issued against Finland, which in turn is a sign of some form of dialogue between national judiciary and the European Court

890 Pellonpää 2009(1), p. 105. The case law of the European courts is even regularly referred to in national preparation of law. (Ibid. p.105 and 106)

891 Pellonpää 2009(1), p. 118. Pellonpää reminds, however, that the relationship between the national judiciary and European courts is characterised by a certain kind of principle of subsidiarity. (Ibid.) This principle is indeed visible in the case law of the European Court of Human Rights as the principle of margin of appreciation, referred to frequently by the Court. The margin of appreciation requires profound weighing of conflicting interests by the national courts. The more convincing such weighing is, according to Pellonpää, the less legitimate reason the European Court of Human Rights has to intervene in the outcome of the national argumentation. (See Pellonpää 2009(1), p. 120 and 121) Ervo also points out that the application of the European Convention is a state of art (*tekniikkalaji*). In principle, the national judiciary is free to choose the manner of applying the Convention requirements, but it is important to reason the decisions clearly. (Ervo 2009, p. 249)

of Human Rights. The published Supreme Administrative Court cases contain fewer examples with references to the case law of the European Court of Human Rights than those of the Supreme Court, but a research into the non-published cases shows that the total number of such cases is larger. Furthermore, the more recent references appear to be more profound and analytical in the same way as in the Supreme Court. This trend demonstrates that the legal culture in respect of the language of human rights law has begun to change at least to some extent, but a closer analysis is needed to assess the degree of receptiveness of the supreme jurisdictions today to the argumentation of the European Court of Human Rights.

The fact that the process of adapting to the changes brought about by the Convention is still not complete has also been recognised in Finland. Koskelo is right in observing that in this respect, it is not sufficient that the supreme jurisdictions adapt to those changes but it is also necessary for lower courts, particularly courts of appeal, to comply with the procedural requirements under the Convention.⁸⁹² In certain areas, there have earlier been apparent difficulties in integrating the Strasbourg case law fully into the national case law. Viljanen (J.) names the interpretation of freedom of expression in relation to other conflicting rights as the most problematic example.⁸⁹³ This observation is interesting in that today, some ten years later, it appears to be among those areas of law in which there are most cases where the Supreme Court refers to the case law of the European Court of Human Rights. Those cases also have references to both the Constitution and the European Convention on Human Rights. It is pointed out by Pellonpää that the supreme jurisdictions in Finland have already recognised that fundamental rights provisions of the Constitution must be interpreted in the same way as the European Court of Human Rights interprets the Convention rights.⁸⁹⁴ Ervo notes that the national courts have also done so.⁸⁹⁵ Their view is shared by Koskelo, who observes that when balancing rights that appear to be in conflict with one another, in particular, the courts should resort to an extensive, analytic and profound assessment before reaching their conclusions, including analysis of the case law of the European Court of Human Rights, and calls for open argumentation and reasoning. She also suggests that there would be reason to follow the same type of argumentation as the

892 Koskelo 2010, p. 23.

893 Viljanen (J.) 2007, p. 310. Viljanen observes, however, that some of the breaches found by the European Court of Human Rights have been related to the unforeseeability of the law rather than erroneous interpretation of law by national courts. (Ibid.)

894 Pellonpää 2009(1), p. 108.

895 Ervo 2009, p. 252. Ervo is of the view that the responsibility for the development of the contents of fundamental and human rights has clearly been left to the Council of Europe and the European Court of Human Rights. However, Ervo observes that there is a difference between the Supreme Court, which appears to most often refer to the European Convention and the Court's case law, and the Supreme Administrative Court whose case law contains more references to the national Constitution. Ibid. p. 252 and 253.

European Court of Human Rights applies, which in her view is even required by the Convention.⁸⁹⁶ Thus, there are concurrent views on the needs to develop the application and interpretation of the European case law by the national courts. On the other hand, the European Convention and the Court may also be considered as having restricted the national procedural autonomy, but in the view of Pellonpää, this development has been in harmony with the traditional principles of the Finnish legal system.⁸⁹⁷ In the discourse analysis in sections 4.5.1.3 and 4.5.2.3 below, efforts are made to see whether the supreme jurisdictions have also in practice applied the principles of interpretation in the same way as the European Court of Human Rights, and whether it concerns all the principles of interpretation.

It is further argued in this thesis that the more national courts adopt a similar manner of applying and interpreting prior case law as the European Court of Human Rights, the better they are receptive to its argumentation. It is inevitable that the way in which the national supreme jurisdictions refer to the case law of the European Court of Human Rights or to foreign case law is limited to certain extent by the rules of domestic legislation, domestic case law and the traditional rules of interpretation of law. However, the case law of the European Court of Human Rights is today generally recognised by the supreme jurisdictions themselves as a binding source of law⁸⁹⁸. In the application and interpretation of that law, the principles of interpretation applied by the European Court of Human Rights, including the treatment of the Convention as a living instrument, should be taken into account. Those help to fill in the rationality gap in fundamental rights and human rights argumentation, by supporting the balancing of conflicting interests and the application of value judgments, apart from what has traditionally been found to belong to the discretion of the judiciary. Furthermore, international human rights law and particularly the European Convention on Human Rights are today part of the national legal culture, and in terms of Glenn a lateral (cross-border) legal tradition⁸⁹⁹ which is gaining an increasing role in the interpretation of law. It has already been called for by some Finnish scholars that even national constitutional law provisions on fundamental rights should be interpreted according to the same principles as the provisions of the European Convention on

896 Koskelo 2010, p 35 and 36. See also Lavapuro 2011, p. 469, who supports such an opinion.

897 Pellonpää 2009(2), p. 236. Pellonpää underlines that in respect of both the European Court of Human Rights and the European Court of Justice one should speak of interaction instead of onefold impact. (Ibid. p. 237)

898 In the judgment KKO:1996:80 of the Supreme Court, for example, it is stated that upon Finland's accession to the European Convention on Human Rights, the provisions of the Convention and the case law of the European Court of Human Rights must be taken into account. The strongly binding nature of the Convention as a source of law is confirmed in other judgments, for example in KKO:2009:80, in which the Supreme Court argues that an incorrect application of the Convention may lead to repealing of a final judgment.

899 See note 29.

Human Rights. Thus, the case law has been looked into to see whether and to what extent the constitutional provisions are referred to in the same connection with the provisions of the European Convention on Human Rights and the case law of the European Court of Human Rights. Further, an effort is also made to see whether the European case law is a purely an external perspective of argumentation or whether it is already treated partly as an internal one and what type of fragments of discourse demonstrate it, including possible subjective elements. That assessment will help in the conclusions to be drawn about the general attitude, i.e. the receptiveness, of the national judiciary to the argumentation of the European Court of Human Rights. Micro-comparison through discourse analysis is used to see whether the case law and legal discourse of the European Court of Human Rights can be said to have changed the legal culture and thereby the social reality in the legal system. As explained in the introductory sections on the research method, the fragments of discourse that are looked for include, in particular, references to the Convention and the relevant case law, references to the methods and standards of interpretation of the European Court of Human Rights and references other possible sources of law, particularly provisions of national legislation. Those fragments of discourse are analysed to look for linguistic elements indicating how they are treated, and to see if there is an ongoing transition. The linguistic elements may, for example, consist of more detailed and complex structures of sentences, or new concepts or principles, used to supplement legal arguments with general practical argumentation.

It is observed in the introduction to this thesis that it is necessary to limit the context in which the discourse analysis is made. Therefore, the analysis is mainly carried out in the context of the argumentation of the Supreme Court and the Supreme Administrative Court used in the references to the case law of the European Court of Human Rights, thus excluding the arguments presented by the lower courts of law and the parties. It is restricted to the user for the purpose of analysing the way in which the argumentation of the European Court of Human Rights has been received by the national supreme jurisdictions. However, a wider context is taken into account in an effort to see whether the argumentation resorted to by the supreme jurisdictions could have external implications⁹⁰⁰ and whether there can be seen a real change of the legal culture. As part of that wider context, an effort is made to assess whether the case law of the European Court of Human Rights is treated purely as an external or as an internal justification (source of law), the underlying presumption being that it is already *de facto* partly an internal one. Further, an assessment is also made to see whether the argumentation used by the supreme jurisdictions could contribute to a dialogue between the national courts, on the one hand, and between the national judiciary and the European Court of Human Rights, on the other hand, instead of merely applying

900 See notes 54-56.

the European case law as a source of law to an increasing extent and more analytically than before. That would necessarily require resorting to case law at least partly as an internal justification of legal opinions. Similar cases are looked for to compare and to support the conclusions.

In the following, the cases of the Supreme Court and the Supreme Administrative Court are analysed in more detail by comparing their discourse with that of the European Court of Human Rights, over a period of time of approximately twenty years starting from the first references to the European case law, in order to see whether the micro-comparison through discourse analysis reveals indications of change in the legal culture of protecting fundamental rights and human rights. As mentioned in the introductory sections on the research methods, the approach of critical discourse analysis has been adopted as it represents a flexible approach instead of a strictly defined method and is designed for analysing, among others, cultural change. However, individual linguistic elements of argumentation (discourse) are analysed to carry out micro-comparison. In terms of Van Hoecke⁹⁰¹, both internal and external perspectives of argumentation are analysed. Those coincide both with the ideas of internal and external context presented by discourse analysts and with the distinction made by Alexy between external and internal justifications of legal opinions. As has been observed by Alexy, legal argumentation is limited by statute, precedents and doctrine but that in respect of constitutional rights argumentation there is a rationality gap that can be filled in by general practical argumentation⁹⁰². It is argued in this thesis that the references to precedents in the judgments of the European Court of Human Rights constitute de facto internal justifications instead of external ones – unlike in the classification made by Alexy – and the provisions of the Convention and precedents are linked by means of various forms of general practical argumentation or discourse. As regards the interpretation of fundamental or human rights, such practical argumentation may consist of a variety of elements, including balancing of conflicting interests and value judgments.

As part of the assessment of the transition of the legal culture of protecting fundamental rights and human rights, an effort is made to see whether there exists a dialogue between the supreme jurisdictions and the European Court of Human Rights. As regards the Finnish judiciary, Lavapuro suggests that the courts have still not introduced any active human rights dialogue, but rather stick to the role of a passive listener, and calls for a more active dialogue and interpretation by the courts.⁹⁰³ According to Frowein, in the field of international law, national courts lack the mandate they need for developing national law. However, they may play a very important role

901 See note 32.

902 See notes 34 and 35.

903 Lavapuro 2010, p. 173-175. A more active approach by national courts has in fact been called for already by Viljanen (J.) (2007, p. 315) and Ojanen (2005, p. 1217-1219).

in the promotion of international law.⁹⁰⁴ Particularly in the field of human rights, this is of utmost importance. Furthermore, although the dynamic approach applied by the European Court of Human Rights may impose challenges for national courts, and makes it particularly difficult to be receptive to the argumentative style of the Court, national courts might contribute more actively to the development of the national traditions which, in the end, constitute the common standards looked into by the European Court of Human Rights. Whether one may speak of a real dialogue or some weaker form of interaction between courts depends on the legal system, and also on the nature of the cases.

Rosas points out that not all situations are examples of judicial dialogue in the narrow sense but rather represent a hierarchy of higher and lower courts and thus go beyond a willingness to be informed about and eventually be inspired by rulings of foreign courts.⁹⁰⁵ In this respect, there would hardly be any genuine dialogue in those situations where the lower courts are bound by the judgments of higher courts, particularly in such legal systems as apply a strict system of precedents. In the same way as in respect of the European Court of Justice, in the case of the European Court of Human Rights one may not speak of a higher court with competence to quash the judgments of national courts although in respect of both the European Court of Justice and the European Court of Human Rights the national legal systems are bound by their judgments.⁹⁰⁶ One may note that because of the system of preliminary rulings, a dialogue between the European Court of Justice and national courts is easier to identify than it is in respect of the European Court of Human Rights. Concerning the latter, the dialogue takes place over a period of time that may vary in length and there are also other factors involved that give reason to rather speak of interaction. Such factors include, for example, the margin of appreciation that the national courts and authorities have in respect of certain types of rights. In those cases there are more differences in the degree of protection afforded by different legal systems than in respect of other rights, which makes the identification of a dialogue more complicated. However, it is inevitable that there is some degree of interaction between the European Court of Human Rights and national courts.

Furthermore, in respect of the interpretation and application of both Union law and the European Convention on Human Rights, a dialogue between courts is made more complicated – when compared with the interpretation and application of national law – by the fact that there are different legal systems and consequently judges with considerably different backgrounds involved. As Grewe observes, the judges of the European Court of Human Rights represent national legal systems and consequently

904 Frowein 1996, p.93.

905 Rosas 2007, p. 5. Rosas has studied the judicial dialogue between the European Court of Justice and national courts, but his conclusions largely apply to the European Court of Human Rights as well.

906 For details, see Rosas 2007, p. 6-8.

their background has some effect on how the cases are dealt with and, vice versa, the European Court's judgments are implemented at the national level, and at least some elements of the case law are absorbed by the legal system concerned⁹⁰⁷ albeit to differing extents. This is added by the fact that the Convention is also directly applied by national courts, potentially with different results.

4.5.1 Supreme Court

4.5.1.1 Violations found in private law or criminal law proceedings

For the purpose of assessing the receptiveness of the Supreme Court to the argumentation of the European Court of Human Rights, and the transition of the legal culture in that respect, the case law of the European Court of Human Rights concerning the civil and criminal law sector of the judiciary has been examined in the light of the situation in Finland as a whole. When examining the legal system as a whole, one may note that the vast majority of cases in which the European Court of Human Rights has found a violation of one or more of the Convention provisions have concerned private law or criminal law proceedings. Even in the length of proceedings cases under Article 6, which has constituted the biggest problem in the Finnish legal system, the majority of judgments have been issued in private law or criminal law cases. Thus, when assessing the number of complaints and violations found alone, one could assume that there has been a problem in the receptiveness to the European Convention provisions and the case law under them in ordinary courts of law. As regards problems faced by the Finnish courts and other authorities other than the right to a fair trial and the length of proceedings under Article 6, the largest groups of cases include those under Articles 8 and 10. Of the cases concerning freedom of expression, all have their origins in civil or criminal law proceedings.

The European Court of Human Rights has issued a judgment against Finland under Article 10 in eighteen cases by the end of 2013, according to the Court's statistics. Since then (before 20 August 2014), two more judgments have been issued. Considering that there are in total only four cases in which no violation has been found and these are the most recent ones, it would seem in the light of those judgments that there could be a trend towards better understanding of the Convention provisions in freedom of expression cases, but it would be too early to draw a definitive conclusion, considering also the different natures of those four cases. Furthermore, it is underlined in the foregoing, the judgments finding a violation against a certain State does not necessarily reflect the situation at the judiciary, but may be a sign of a more profound problem such as a problem of legislation or simply that of activity among lawyers. In any case, a lower number of violations may be a sign of improved receptiveness to the argumentation of

907 Grewe 1998, p. 220.

the European Court of Human Rights in general, given that since 2004, the Supreme Court has increasingly begun to refer in detail to the case law of the European Court of Human Rights, or it is equally possible that these coincide. Around 2009 to 2011, the number of such cases has also increased. Although some scholars have stated that two judgments issued against Finland in 2004 and 2005, respectively, lead to a significant change in the Finnish judiciary, it would seem that an even more important change has taken place between 2009 and 2011. A brief analysis of the freedom of expression judgments against Finland reveals that they follow the line of argumentation the European Court of Human Rights has adopted in other similar cases, without as such constituting significant precedents, except for certain judgments that fall within a series of precedents. However, for the Finnish judiciary, they are all important judgments in that they have also led to a change in the receptiveness of the Finnish courts to the case law of the European Court of Human Rights. They also appear to have contributed to a further-reaching change in the legal culture in that respect.

Most cases against Finland concerning freedom of expression have related to the freedom of the press⁹⁰⁸. In the vast majority of cases in which a judgment has been issued against Finland in respect of compliance with Article 10, the Supreme Court had not granted leave to appeal to the applicant. This fact also supports the assertion that the legal culture towards freedom of expression has earlier been rather strict in those cases where the lower courts have found the journalists guilty of defamation or unlawful distribution of sensitive information. The number of decisions of the Supreme Court in freedom of expression cases has increased, and the Supreme Court has also increasingly begun to apply the European case law, including some decisions in which the limits on the freedom of expression and the acceptable grounds of interference in the right to private life have been analysed in more detail than earlier⁹⁰⁹. It is suggested in the foregoing that this could be partly due to the wording of section 12 of the Constitution. As regards judgments issued against Finland finding a violation of Article 8, those judgments have related mainly to family law, procedural law and rights of prisoners⁹¹⁰. In some cases the violations have been produced by investigative

908 See, for example, *Karhuvaara and Iltalehti v. Finland*, judgment of 16 November 2004, Reports of judgments and Decisions 2004-X, *Selistö v. Finland*, judgment of 16 November 2004 (Appl. No. 56767/00), *Flinkkilä and Others v. Finland*, judgment of 6 April 2010 (Appl. No. 25576/04), *Lahtonen v. Finland*, judgment of 17 January 2012 (Appl. No. 29576/09), and *Reinboth and Others v. Finland*, judgment of 25 January 2011 (Appl. No. 3086/08).

909 See, in particular, *Ruusunen v. Finland*, judgment of 14 January 2014 (Appl. No. 73579/10), and *Ojala and Etukeno Oy v. Finland*, judgment of 14 January 2014 (Appl. No. 69939/10), as well as KKO:2010:39.

910 See, for example, *Grönmark v. Finland*, judgment of 12 July 2012 (Appl. No. 17038/04), *Backlund v. Finland*, judgment of 6 July 2010 (Appl. no. 36498/05), *Petri Sallinen and Others v. Finland*, judgment of 27 September 2005 (Appl. No. 50882/99), and *Lindström and Mässeli v. Finland*, judgment of 14 January 2014 (Appl. No. 24630/10).

authorities. When looking into the case law of the Supreme Court, one may notice that there are much fewer precedents in cases concerning the right to private life other than those involving at the same time the protection of the freedom of expression.

4.5.1.2 Case law of the European Court of Human Rights in the Supreme Court

The case law of the Supreme Court has been looked into for the purpose of identifying to what extent the Supreme Court has referred to the case law of the European Court of Human Rights as a source of law and in which types of cases it has mainly done so, in view of those groups of cases that have constituted the majority of violations found against Finland in the European Court of Human Rights. In the published precedents of the Supreme Court, more than 140 cases with references to the case law can be found, although not in all of them it has been referred to by the Supreme Court itself⁹¹¹. However, the number of cases where it has been applied as a source of law by the Supreme Court constitutes a sufficient sample for the purpose of analysing the development of the discourse of the Supreme Court and its receptiveness to that of the European Court of Human Rights. Given the critical approach to the analysis, i.e. the approach focusing on social change, Articles 8 and 10 have been chosen as the main object of discourse analysis for the reason that they constitute important groups of cases before the European Court of Human Rights for Finland and are interesting from the perspective changes in legal culture in that they typically involve profound balancing of conflicting private and public interests, in which changes are constantly taking place in national case law. Further, those principles of interpretation of the European Court of Human Rights that typically involve assessment of evolution of the standard of protection in Europe often appear in cases concerning the protection of private life. However, as Article 6 has been the biggest problem for the Finnish legal system as a whole, the case law of the Supreme Court under that provision⁹¹² is looked into to find support for the conclusions made concerning Articles 8 and 10. Although that group of cases also provide an example of changes in the legal culture in Finland, the problems with Article 6 have been more of a procedural and technical nature, and the reasoning in national courts has not been as elaborate as in respect of Articles 8 and 10 as a whole.

911 See e.g. KKO:1999:50 (30.4.1999/1076) in which the Court of Appeal referred to the case law of the European Court of Human Rights, but the Supreme Court merely referred to Articles 5 and 8 of the Convention as well as to national legislation.

912 See KKO:1994:26, KKO:1995:7, KKO:1995:185, KKO:1996:80, KKO:1997:128, KKO:1997:194, KKO:1998:100, KKO:1999:18, KKO:2000:13, KKO:2001:69, KKO:2003:119 (concerning both Article 6 and Article 8), KKO:2007:101, KKO:2008:68, KKO:2009:80, KKO:2010:45, KKO:2010:46, KKO:2010:82, KKO:2011:27, KKO:2011:104, KKO:2012:5, KKO:2012:46, and KKO:2013:25.

As regards Articles 8 and 10, the Supreme Court has applied the case law of the European Court of Human Rights in a total of more than 30 cases. Various types of cases may arise in relation to the application of Article 8 of the Convention and the case law under it, including professional secrecy of lawyers⁹¹³, coercive means used by the police⁹¹⁴, family rights⁹¹⁵, or detention or imprisonment⁹¹⁶. The most cases concerning Article 8, however, have at the same time involved issues under Article 10, i.e. the vast majority of them have also concerned the freedom of expression⁹¹⁷. When examining the precedents of the Supreme Court as a whole, one may confirm the conclusion made by Lavapuro in that the nature of references to the case law of the European Court of Human Rights has gradually changed into more detailed ones. This trend may also be observed on the basis of the cases concerning the freedom of expression alone, in which the first references to the case law have appeared in 2004 and 2005, whereas they have changed into somewhat more profound ones as of 2009 or 2010 when the number of references has also begun to increase. It may still be too early to draw any definitive conclusions, however, in the light of freedom of expression cases alone, given also the relatively small total number of the cases involving the application and interpretation of Article 8 taken alone. The cases concerning freedom of expression are among those in which the Supreme Court has begun to carry out more profound analyses of the case law of the European Court of Human Rights, but when looking into the decisions of the Supreme Court as a whole in the past few years, one may note that there are still both rather mechanical references and more profound ones.

According to Lavapuro, a clear change in cases concerning freedom of expression in the Supreme Court has taken place after its judgment KKO:2001:96, and for ex-

913 KKO:2003:119 (5.2.2003/3010) which concerned the relationship between professional secrecy and the prohibition to give a witness statement, and KKO:2006:61 (14.8.2006/1760) which concerned the right of a legal counsel to violate his professional secrecy to protect his own rights.

914 KKO:2007:58 (19.6.2007/1336) which concerned the right of the police to use technical recordings for the investigation of a criminal offence other than the one for which the permission to use technical surveillance had been obtained.

915 KKO:2008:93 (17.10.2008/2250) which concerned the relationship between the right of the child to physical integrity and the right of the child and parents to freedom of religion, read together with Article 8, and KKO:2012:11 (30.1.2012/158) which concerned the establishment of paternity after the expiry of a time limit set by law in relation to the protection of private life under Article 8.

916 KKO:2012:81 (2.10.2012/1882) which concerned the right of prisoners to secrecy of official correspondence under Article 8, read together with Article 13.

917 KKO:2004:30 (26.3.2004/687), KKO:2005:82 (4.7.2005/1621), KKO:2005:136 (19.12.2005/3137), KKO:2006:20 (16.3.2006/608), KKO:2009:3 (22.1.2009/31), KKO:2010:39 (16.6.2010/1296), KKO:2010:88 (9.12.2010/2439), KKO:2011:71 (28.9.2011/2091), KKO:2011:72 (30.9.2011/2092), KKO:2011:101 (30.11.2011/2676), KKO:2012:58 (8.6.2012/1101), KKO:2013:15 (5.3.2013/454), KKO:2013:50 (26.6.2013/1440), KKO:2013:69 (23.9.2013/1998), KKO:2013:70 (23.9.2013/1999) and KKO:2013:100 (31.12.2013/2722).

ample in its judgment KKO:2005:136, the reasoning with regard to the case law of the European Court of Human Rights is already more profound⁹¹⁸. The same applies to judgment KKO:2005:82⁹¹⁹, in which the reasoning of the Supreme Court in the balancing of conflicting interests of protecting the freedom of expression, on the one hand, and the right to private life, on the other hand, is more detailed and profound than in judgment KKO:2004:30. This change in the Supreme Court took place after the European Court of Human Rights had issued two judgments against Finland, finding a violation of Article 10. On the other hand, during the years between 2004 and 2011, the change has not yet been that dramatic. For example, in its judgment KKO:2006:20, the reasoning of the Supreme Court with regard to the application of the case law of the European Court of Human Rights is again less detailed, although it seems that the Supreme Court has balanced the conflicting interests.

Although the judgments against Finland in which violation of Article 6 has been found constitutes the largest group of cases in the European Court of Human Rights, the number of published precedents of the Supreme Court concerning the application and interpretation of that Article is surprisingly low (slightly more than 20 judgments). It does not differ significantly from those under Articles 8 and 10. As regards the nature of the cases under Article 6, paragraph 1, the Supreme Court has most often dealt with the question of *ne bis in idem* in relation to Article 4 of Protocol No. 7, the question of impartiality of judges as well as various questions relating to taking of evidence, including the right to abstain from self-incrimination, hearing of parties and coercive measures. No judgments appear among the published precedents in respect of Article 5, paragraph 1. The discourse in the Supreme Court judgments relating to Article 6, paragraph 1, is analysed below, to support the findings under Articles 8 and 10.

As a clear change towards more detailed argumentation with regard to references to European case law has emerged rather recently, it would be correct to state that the legal culture is changing and, given the way in which the Supreme Court has developed national case law following judgments issued against Finland particularly in cases under Article 10, there appears to have developed a better understanding of the case law and argumentation of the European Court of Human Rights. Thus, in the light of the relevant decisions of the Supreme Court, the national judiciary appears to be rather receptive to its argumentation.

As regards the conceptual problems analysed in the foregoing, in section 4.2, the Supreme Court has not traditionally been faced with the concepts of civil rights or

918 Lavapuro 2011, p.474.

919 In this judgment, the Supreme Court found that the publication of information concerning private life was not necessary in democratic society, using the case law of the European Court of Human Rights both as a source of law and as a basis of its reasoning, whereas in the first mentioned case the Supreme Court gave priority to the freedom of expression despite reasoning in detail on the protection of private life.

criminal charge under Article 6, paragraph 1, of the Convention. In relation to Article 4 of Protocol No. 7, however, the Supreme Court has already taken a position to the principle of *ne bis in idem* in the light of European case law in a number of precedents⁹²⁰. In judgments KKO:2010:45 and KKO:2010:46 the Supreme Court paid attention to the independent meanings of the concepts of criminal proceedings and criminal charge under the case law of the European Court of Human Rights as well as to the criteria set out by the European Court of Human Rights in the case of *Engel and Others*. The Supreme Court carefully analysed judgments issued against Finland by the European Court of Human Rights as well as certain other judgments, particularly the judgment given in the case of *Sergey Zolotukhin v. Russia*, and expanded the interpretation traditionally given to the concept of criminal charge under national law in the light of the principle of *ne bis in idem*. Thus, the Supreme Court interpreted the concept of criminal charge in Article 6, paragraph 1, jointly with the provision of Article 4 of Protocol No. 7, which is a typical situation. By those decisions, the Supreme Court gave importance to a final decision on tax increase. In a later judgment, KKO:2013:59, the Supreme Court further expanded the interpretation as a result of the preparatory work of a legislative proposal⁹²¹ pending in Parliament, with reference to the same cases of the European Court of Human Rights, thus changing its position as to the meaning to be given to the principle of *ne bis in idem*. Under the new precedent, even a pending case of tax increase, in which a decision has already been made, may prevent the imposing of an additional criminal law sanction despite that it is not yet final. That change of position illustrates well the difficulties that the national legal system may face with the autonomous meaning given by the European Court of Human Rights to certain concepts in its case law, particularly where they differ considerably from the traditional interpretation given to them in the national legal system. Further, although the question has appeared in Finland in connection with taxation procedures, it is an indication of that there may be need to further assess the system of criminal law sanctions for the reason that there is an emerging body of EU legislation providing for administrative sanctions, and administrative sanctions are also applied under other existing Finnish legislation.

4.5.1.3 Discourse of the Supreme Court

When comparing the judicial style of the Supreme Court with that of the European Court of Human Rights, one may observe that it is considerably different. It is ob-

920 KKO:2013:59, KKO:2012:106, KKO:2012:79, KKO:2012:71, KKO:2011:80, KKO:2010:82, KKO:2010:46 and KKO:2010:45. The Supreme Court has also been faced with that principle e.g. in respect of the relationship between narcotics offences and disciplinary proceedings (KKO:2012:46) and in respect of the imposing of liability for damages to the extent that the principle prevented prosecution for tax fraud due to an imposed tax increase (KKO:2011:35).

921 PeVL 9/2012 vp.

served in the foregoing that in the same way as the judgments of the European Court of Human Rights, Finnish judgments may include dissenting opinions and those are included in the text of the judgment. Furthermore, the judgments of Finnish courts include generally a statement of law and facts, although the text may be structured somewhat differently. Furthermore, the Supreme Court advances from the statement of facts (including arguments of the parties presented before lower courts) to the statement of applicable law and judicial assessment of the situation in the same way as the European Court of Human Rights. However, the discourse used in the application of sources of law and particularly case law differs from that of the European Court of Human Rights in that the latter is traditionally more detailed particularly as regards the application of case law, and the principles of interpretation applied can be more easily identified. It may be due to the persisting way of writing judgments in Finland, based on strongly legalistic traditions, that it is often difficult to say in what manner exactly the Finnish Supreme Court has applied the case law to the concrete situation at hand, and sometimes even which principle of interpretation has been applied despite that it may be identified indirectly. Although the European Court of Human Rights has on occasion been criticised for lack of clarity in its reasoning, from the perspective of discourse analysis the reasoning in respect of the application of case law appears to be more elaborated. Another factor explaining the differences in the way in which case law is applied as a source of law may be the lack of strong traditions of precedence in Finland, although it is noted that the doctrine of precedents of the European Court of Human Rights is closer to the Finnish one than e.g. the English one, being relatively flexible. However, considering that the Finnish legal system does not apply such a strict system of precedents as the English legal system does, it has potential of adapting itself to the judicial style of the European Court of Human Rights. That is also made easier by the fact that the Supreme Court has explicitly recognised the case law of the European Court of Human Rights as a binding source of law⁹²² without drawing a distinction between national and European sources of law. The references to case law, including both national and international cases, have increased in the past few years considerably in the Finnish Supreme Court.

The legalistic traditions can also be seen in the rather strong reliance on applicable national legislation. In the earliest cases in which references to the case law of the European Court of Human Rights appear, they were brief in nature. Those cases

922 The binding nature of that case law is most often not stated explicitly, but for example in decisions KKO:1996:80, KKO:1997:194, KKO:2009:80 and KKO:2013:100, the Supreme Court uses a wording that expresses the binding nature. In judgment KKO:2009:80, paragraph 7, the Supreme Court even argues that an incorrect application of the Convention may lead to repealing of a final judgment, which makes the Convention a strongly binding source of law.

concerned Article 6 of the Convention⁹²³. Although the Supreme Court often applies the European Convention on Human Rights together with the provisions of the Finnish Constitution, and even with those of the International Covenant on Civil and Political Rights⁹²⁴, it may be observed that the argumentation appears to be largely based on the provisions of other applicable legislation such as the Criminal Code, as an element limiting the discourse. This is often at the expense of the application of case law, including that of the European Court of Human Rights. Thus, it seems that the applicable legislation is an element limiting discourse to a larger extent than case law, and the provisions of law constitute stronger justifications for the outcome of the decision. It seems, however, that there is a shift towards using the applicable case law of the European Court of Human Rights increasingly as a factor limiting discourse, although the cases in which it has a dominating role are still rare. Furthermore, one may note that the change of culture of referring to the European case law has taken place relatively fast in the Supreme Court compared with the supreme jurisdictions of the selected other States. This could be explained by the fact that at least from 2004, it appears to have been used as a stronger internal justification for the Supreme Court's conclusions⁹²⁵. For example in its decision KKO:2004:30, which concerned the freedom of expression in the context of publication of a book in relation to the right to restrict the freedom of expression to protect the rights of others for the purpose of investigating aggravated criminal offences, the Supreme Court clearly used the case law of the European Court of Human Rights as a stronger internal justification⁹²⁶. In that case, the Supreme Court argued that although in the reform of fundamental rights provisions of the Constitution, no statements were made of the protection of journalist's

923 See KKO:1994:26 relating to the question of hearing of parties, in which two cases are referred to as additional elements of argumentation. In this judgment, the case law of the European Court of Human Rights appears to be used rather as an external justification, when compared with other cases. See also KKO:1997:7 concerning cost-free trial, and KKO:1995:185, KKO:1996:80, KKO:1997:194 and KKO:1998:100 concerning the impartiality of judges. In all those decisions, the case law of the European Court of Human Rights appears to have been used already as an internal justification for the conclusions, but the argumentation is extremely brief and does not disclose in which manner the case law or principles of interpretation have been applied.

924 See for example decision KKO:2010:88 and KKO:2013:100. The practice of referring to both the Constitution and the European Convention on Human Rights is not, however, consistent.

925 In judgments KKO:2003:119 and KKO:2004:30, the reasoning of the Supreme Court is already more detailed when compared with earlier ones, for example in judgments KKO:2000:13 and KKO:2001:69 the references to the case law of the European Court of Human Rights were still not that elaborate.

926 The same applies to decisions KKO:2005:82, concerning the dissemination of sensitive information in the context of electoral campaign, KKO:2005:136 concerning the protection of the name and identity of a convicted person under Article 8 in relation to freedom of expression under Article 10, and KKO:2006:20 concerning the publication of the name and photograph of a prosecutor's wife in relation to a suspected criminal offence. In all those three decisions, the case law of the European Court of Human Rights is clearly used as an internal justification of conclusions.

sources, the European Court of Human Rights has taken a position on that question. Thus, the European case law is already clearly part of the internal context in which the Supreme Court draws its conclusions, despite that it may be often difficult to say in which manner it has been applied to the concrete situation at hand.

In most precedents concerning the freedom of expression in which the Supreme Court has given priority to the protection of private life, it has noted that the essential criteria of assessment to be applied in balancing the interests of protecting the private life and freedom of expression, as set out in the case law of the European Court of Human Rights, correspond to those principles that have been included in the provisions of the national criminal law prohibiting dissemination of information in violation of the right to privacy. In stating so, the Supreme Court has found that the freedom of expression does not prevent the application of the provisions of criminal law according to their meaning, or that the provisions of criminal law prohibiting unlawful dissemination of sensitive information are meant to protect private life within the meaning of Article 8 of the Convention, which is a rather strong internal justification and statement of the limits that the national legislation imposes on argumentation. However, although the Supreme Court has used this statement as a justification for finding a violation of private life, thus giving it stronger weight than for the freedom of expression, it is at the same time a demonstration of the interpretation of law in conformity with the constitutional law provisions on fundamental rights and the provisions of the European Convention on Human Rights. Thus, the wording used by the Supreme Court shows that today, the legalistic tradition goes hand in hand with the application of the principle of human rights friendly interpretation of law.

As regards the principles concerning the application of the Convention provisions on the freedom of expression or protection of private life, there are on the one hand relatively few examples of profound analysis of the interpretation principles set out in the case law of the European Court of Human Rights. The references to the principles of interpretation are, when compared with those in the European case law, rather mechanic in the same way as references to the case law in general. For example, in the aforementioned decision KKO:2004:30, the Supreme Court stated on which grounds the freedom of expression may be restricted on the basis of national law, referring to the margin of appreciation that the States have in this respect, but did not elaborate on the need to ensure that those restrictions are proportionate to the legitimate aim pursued. Thus, it remains unclear whether and in which manner the principle of proportionality has been applied. As noted in the foregoing, the margin of appreciation is a new concept in the judicial discourse, which has appeared as a result of the case law of the European Court of Human Rights. Also in decisions KKO:2005:82 and KKO:2005:136, the application of the principle of proportionality appears only indirectly from the Court's discourse, although the reasoning is otherwise profound. On those occasions, the Supreme Court has nevertheless underlined that there is no

hierarchy between the two competing rights, which suggests that a balancing exercise has taken place. On the other hand, there are examples of cases in which the Supreme Court has drawn attention to the exceptional nature of restrictions imposed on the freedom of expression, noting that it is one of the essential foundations of democratic society. It has thus paid attention to the underlying principle of protection of any fundamental rights or human rights, repeated in each judgment of the European Court of Human Rights, that any interference must be restricted to what is necessary in democratic society. On occasion, the Supreme Court has even more clearly referred to the applicable principle of interpretation, most often the principle of proportionality. For example, in its decision KKO:2009:3, the Supreme Court assessed whether the interference in the freedom of expression was to be considered proportionate and necessary, thus applying the principle of proportionality as a rule of interpretation, and found that there was a compelling need to protect the information. However, the approach of the Supreme Court to the principles of interpretation even in that case is less analytical than that of the European Court of Human Rights. A research into the case law of the Supreme Court also confirms the statement of Lavapuro in that the principle of proportionality is rather well established, whereas the other principles of interpretation of the Convention are less seldom referred to. It seems that in most cases before the Supreme Court, the more essential reasoning leading to the conclusions appears to be linked with the application of national law or to the facts of the case, instead of the cases of the European Court of Human Rights despite that they are used as an internal justification. Although the statement of facts and applicable law as such is a demonstration of transparency towards the addressees of the legal discourse, the drawing of conclusions could in most cases be more transparent. Thus, the general practical discourse supplementing the legal arguments is often lacking, or is very brief.

The first case in which the reasoning of the Supreme Court concerning freedom of expression appears to be more profound when compared with earlier cases is its judgment KKO:2010:39, which concerned the freedom of expression of a private individual and publishing company in a published book and which was later taken to the European Court of Human Rights. In that case, the conflicting interests were assessed in the light of the European case law already in lower court instances. Although the references to the case law by the Supreme Court were not numerous and very detailed, the Supreme Court assessed in detail the relationship between Articles 8 and 10 particularly with regard to the necessity of interfering in the freedom of expression, taking into account the meaning of the freedom of expression in democratic society in guaranteeing necessary public debate, the limits of the protection of private life of public figures and how essentially the published information concerned the core of private life. The Supreme Court also specified those parts of the book that in its view constituted a violation of the core of private life and paid attention to the proportionate nature of the criminal law sanction imposed in view of the seriousness of the violation of private life, thus

applying the principle of proportionality. The sentences (as structures of discourse) of the Supreme Administrative Court, when carrying out a balancing exercise, appear to be more complex than usual. The style of reasoning in some parts of the decision has also similarities with that of the European Court of Human Rights, using similar concepts and expressions. In this case, the national courts appear to have successfully applied the Convention provisions and the relevant case law, as the European Court of Human Rights did not later find a violation of the freedom of expression.

Although the aforementioned case presents exceptionally profound reasoning and application of principles of interpretation, it has not remained an isolated one. A similar type of profound assessment of conflicting private and public interests can be found in decision KKO:2010:88, which concerns the freedom of the press and the extent of confidentiality of journalists' sources of information. The Supreme Court paid attention to the nature of terrorism as an important subject of interest for society, raising wide public debate, but found that the right of journalists to the confidentiality of their sources did not remove them from an obligation to verify the presented allegations from other reliable sources, taking into account the serious nature of the allegations. In doing so, the Supreme Court gave priority to the need to allow for the persons concerned to defend themselves against the allegations over the freedom of expression. Thus, also in this case, the Supreme Court applied the principle of proportionality, although its application is less apparent than in the aforementioned case. Similarly, in a decision concerning the freedom of expression of journalists in television news broadcast, KKO:2013:100, the references to the case law of the European Court of Human Rights are rather detailed and the reasoning of the Supreme Court reveals which particular case it has applied when deciding the case at hand, thus bringing the references closer to internal justifications of the court's conclusions. In this particular case, the Supreme Court paid attention to the overall impression given by the news broadcast in finding a violation of the honour of the persons concerned on the basis of a breach of the presumption of innocence, despite that the news broadcast did not as such contain significant false allegations, thus applying a wider context than that of the contents of the news alone.

In subsequent cases in which the Supreme Court has instead given priority to the protection of the freedom of expression of journalists, KKO:2011:71, KKO:2011:72 and KKO:2011:101, the references to the case law of the European Court of Human Rights are less detailed and the argumentation is less profound. Although the Supreme Court's reasoning concerning what has to be tolerated in respect of issues of interest for society is even profound with regard to the application of national provisions of law, the judgments would have merited from more detailed analysis of the case law and principles of interpretation of the European Convention in response to the earlier judgments in which the Supreme Court found a violation of private life. Despite the references to the case law, it remains somewhat unclear in which way it has been ap-

plied. Also in later judgments, KKO:2013:69 and KKO:2013:70, the Supreme Court's argumentation concerning the application of the rules of interpretation of Articles 8 and 10, despite references to the case law and assessment of the acceptable criteria of restricting the freedom of expression, is not very profound and transparent. It seems that in those cases where the Supreme Court has given priority to the freedom of expression, it has more easily resorted to reasoning on the basis of the applicable provisions of law instead of analysing the case law of the European Court of Human Rights in detail. Thus, there appears to be a difference in the nature of argumentation depending on the outcome of the case as regards the freedom of expression of journalists. However, in all situations, the Supreme Court appears to use the case law of the European Court of Human Rights as an internal element of argumentation, although in more recent cases the argumentation has developed towards a more elaborate one. On the one hand, although there is an emerging change in the way in which the Supreme Court has analysed the case law and assessed the principles of interpretation of the European Court of Human Rights, it would be incorrect to say that the change in the legal culture in that respect is dramatic yet. On the other hand, one might also assert that when approving interference in the freedom of expression, it is more important to resort to transparent argumentation, which would increase the persuasiveness of decisions. In any case, as a whole, the changing style of argumentation towards more complex sentence structures, new concepts based on European case law and increasing case references can be observed in the decisions on freedom of expression, which conclusion is supported by a few other decisions where the freedom of expression has materialised in other types of situations.

In decision KKO:2012:58 which concerns the relationship between the freedom of expression and prohibition of incitement against an ethnic group, there are only a few specified references to the case law of the European Court of Human Rights but the argumentation of the Supreme Court is rather profound. In that case, the Supreme Court balanced the acceptable limits of criticism on immigration policy against the extent of freedom of expression and the necessary limitations thereof. The Supreme Court applied the principle of proportionality in paying attention to that the freedom of expression may not be interfered with more than what is necessary in view of its importance in democratic society, in finding a violation of the freedom of religion in respect of certain specified statements. The Supreme Court also applied the principle of proportionality to the facts of the case, including the measurement of the sentence imposed. In a case concerning the freedom of expression of private individuals, KKO:2013:15, the Supreme Court found that civil servants had to tolerate a certain degree of criticism towards their official measures, although they had the right to the protection of their honour and guarantees of protection against interference in their official duties. In this case, the Supreme Court underlined the right of the parent to effective legal remedies for the purpose of assessing the lawfulness of interference in

the physical integrity of his child. In doing so, the Supreme Court also paid attention to the need of protecting the rights of the child, thus clearly balancing conflicting interests and acknowledging that interference may be justified for the purpose of protecting the rights of others. However, in that decision, the application of the principle of proportionality is not as evident as in the aforementioned case. In its precedent KKO:2013:50, which essentially concerned the elements of unlawful threatening, the Supreme Court found it necessary to take a position on the acceptable limits of freedom of expression despite that the elements of crime were not fulfilled. The references to the case law of the European Court of Human Rights are rather brief, but the Supreme Court resorts to balancing the conflicting public and private interests and found that where the statements presented on the internet constitute threats, they do not enjoy the protection of the freedom of expression. However, the assessment of the limits of the freedom of expression is not very profound from the perspective of discourse despite that the conclusions appear to be directly drawn from the cited case law of the European Court of Human Rights, which has the potential of decreasing the persuasiveness of the decision.

Although the references to the European case law in the judgments of the Supreme Court have gradually become more detailed, with more complex sentence structures, and the Supreme Court has increasingly resorted to more elaborate balancing the conflicting rights in the light of the rules of interpretation of the European Convention provisions, the nature of argumentation particularly in respect of the analysis of the rules of interpretation would still merit from being further developed. In a couple of cases, there is already more developed reasoning particularly concerning the principle of proportionality, in which the Supreme Court deductively applies the principles stated in connection with European case law to the concrete facts of the case at hand. The Supreme Court does not very often resort to invoking the margin of appreciation of national authorities, for example, and also the other rules of interpretation applied by the European Court of Human Rights are less visible in the case law of the Supreme Court than the principle of proportionality. The application of the rules of interpretation could also be more transparent. For example, in judgment KKO:2013:70, the Supreme Court rather appears to derive its conclusions from the assessment of the correctness of the statements presented in the writing than from an assessment of the acceptable limits on restricting the freedom of expression, without explicitly referring to the need to ensure that the restrictions are proportionate to the legitimate aim pursued and to the nature of the violation upon honour.

Furthermore, even cases concerning the application of Article 8, other than those involving the freedom of expression as a conflicting interest, confirm that the argumentation in respect of the application of the European case law does not appear to be equally profound in all cases. In decisions KKO:2003:119, KKO:2006:61 and KKO:2007:58, the argumentation remains at a rather general level despite that the Su-

preme Court issues important precedents concerning the limits of protection of private life, and only in KKO:2003:119 the application of the principle of proportionality is apparent. In decision KKO:2008:93, concerning the relationship between the protection of private life and the limits on freedom of religion, the Supreme Court carries out a rather profound assessment of conflicting interests, but the analysis of the principles of interpretation of the European Convention on Human Rights under its case law is rather scarce although the Supreme Court appears to at least indirectly apply the principle of proportionality. In decision KKO:2012:81 rather applied the case law under Article 13, when assessing the limits of the protection of private life of prisoners, and without resorting to profound analysis of the principles of interpretation applied by the European Court of Human Rights. An interesting exception is the Supreme Court decision KKO:2012:11 concerning the statute of limitations on the right to require establishment of paternity. In that particular decision, the Supreme Court exceptionally applies the principle of evolutive interpretation which has been called for by Lavapuro. Decision KKO:2012:11 represents also in other respects a rare example of such decisions where the Supreme Court has taken a position on the temporal applicability of the European Convention on Human Rights, giving in strong terms priority to the interest of protecting the right to private life of the person concerned, at the expense of the principle of legal certainty which is strongly established in the Finnish legal system. Thus, in that judgment, the Supreme Court appears to follow rather closely the ideas presented by the European Court of Human Rights when expressing the core of the principle of evolutive interpretation, and the case references are clearly strong internal justifications for the Supreme Court's conclusions. The sentence structures are more complex than in most decisions with references to European case law and the Supreme Court uses similar expressions. The Supreme Court appears to resort to an assessment in a wider context, assessing the meaning of technological development (DNA) for identity, and reasons both in the light of its own prior case law and that of the European Court of Human Rights in giving priority to the right to private life. This approach might also be a result of the judgments issued against Finland by the European Court of Human Rights concerning the establishment of paternity.

The analysis made of the decisions of the Supreme Court concerning the application of Article 6 of the Convention confirms the main conclusions made concerning the application of Articles 8 and 10. That analysis discloses in the same way that the Supreme Court's discourse has begun to develop to a more elaborate one around 2010. The earliest judgments referred to in the foregoing included brief rather mechanic references to the case law of the European Court of Human Rights. Even when the references indicate the cases examined, their application to the concrete facts at hand remains less evident. In decision KKO:2001:69, for example, the Supreme Court refers to the criteria applied by the European Court of Human Rights concerning objective and subjective impartiality of judges, and the Court's discourse reveals more clearly

than earlier in which manner those criteria have been applied to the concrete facts at hand. However, the principles of interpretation of law applied by the European Court of Human Rights do not clearly appear from the discourse of the Supreme Court, which makes it difficult to assess whether its precedents have been applied in the same manner. The same applies to decision KKO:2008:68 concerning the taking of evidence, in which the Supreme Court refers in detail to the case law of the European Court of Human Rights, but the principles of interpretation are not elaborated on. Even in the light of later decisions relating to Article 6, it is most often unclear which principles of interpretation of law have been applied, although on occasion the application of the principle of proportionality appears indirectly from the Court's discourse. For example, in decision KKO:2011:104, the principle of proportionality and the margin of appreciation are explicitly referred to, whereas in judgments KKO:2009:80 and KKO:2013:25 the principle of proportionality can be detected only indirectly from the wording used by the Supreme Court. Most often, the principle applied is not mentioned at all. It seems that the application of principles of interpretation of law is even less evident in cases under Article 6 than under Articles 8 and 10. Instead, in the application of the provisions of Article 6 of the Convention and Article 4 of Protocol No. 7 the Supreme Court has already shown preparedness to relatively comprehensive analysis of the case law of the European Court of Human Rights and more developed argumentation, particularly as regards the analysis of the concept of criminal charge and the criteria under which the sentence may be classified as criminal. For example, in decisions KKO:2010:45, KKO:2010:46 and KKO:2010:82⁹²⁷, the discourse of the Supreme Court with regard to the application of the case law of the European Court of Human Rights is more profound than earlier, and the Supreme Court resorts to a wider context than in most cases. The same applies to decision KKO:2011:27 concerning undercover activities, in which the discourse clearly indicates in which manner the cases of the European Court of Human Rights have been applied to the facts at hand, and to decision, and to later decisions relating to the concept of criminal charge, including KKO:2012:46 and KKO:2013:25⁹²⁸. However, the detailed argumentation is not consistent yet, which is indicated by decision KKO:2011:104 concerning access to court by means of extraordinary appeal, despite that the principles of interpretation are mentioned, and KKO2012:5 concerning the right to non-self-incrimination in which the criteria based on the case law of the European Court of Human Rights are mentioned but it is difficult to say in which manner exactly they have been applied.

927 All three decisions concern administrative tax increase on the basis of taxation procedures in relation to criminal law sanctions based on tax offences.

928 KKO:2012:46 concerns the imposition of a disciplinary sanction as a result of the use of doping in relation to the criminal law sanction based on a narcotics offence.

In conclusion, the best examples of profound argumentation with the exception of one case under Article 8 appear in those decisions of the Supreme Court that involve the protection of the freedom of expression as a conflicting interest. This is an important step in improving the receptiveness of the national judiciary to the argumentation of the European Court of Human Rights, given the violations found against Finland, and may constitute the first step in opening a dialogue between the European Court and the Supreme Court. The European Court of Human Rights has also referred to prior cases against Finland in deciding new cases of freedom of expression concerning Finland, which confirms that some degree of dialogue has been opened, despite that the European Court of Human Rights at the same time refers to the most important precedents it has given under Article 10. However, although it appears in the light of the case law of the Supreme Court that it is already rather receptive to the argumentation of the European Court of Human Rights, and there is some form of dialogue between the two courts, the reasoning and argumentation of the Supreme Court in the light of the European case law could still be further developed so as to allow a more fruitful dialogue in the protection of the freedom of expression, in line with the decision KKO:2010:39. Although in all the aforementioned decisions of the Supreme Court it has treated the case law of the European Court of Human Rights as internal elements of argumentation, it becomes a stronger element of argumentation where the Supreme Court resorts to more elaborate analysis of the principles of interpretation or to a clearer application of those principles to the concrete facts of the case at hand. The conclusion that the case law is treated as an internal justification for the conclusions can be derived from the wording of the fragments of discourse analysed, i.e. from the fact that there is no major difference in wording when compared with those fragments of discourse in which the Supreme Court applies national law and case law. However, a counter-argument could be presented in those cases where the conclusions appear to be rather drawn on the basis of applying national law to the concrete situation at hand, despite that the European case law has been cited. Thus, a clearer application of the principles of interpretation stated on the basis of the European case law to the concrete facts, and their use as a basis of conclusions, would also make that case law to a larger extent an internal perspective of argumentation – most often, the Supreme Court still looks at the case law more as an external observer despite that the wording of the fragments of discourse suggests that the case law of the European Court of Human Rights is already clearly part of the internal context. That observation is supported by the finding that the profound argumentation appears to be limited to those decisions in which the Supreme Court has found it acceptable to interfere in the protection of the freedom of expression of journalists. Also, the change in the discourse concerning other situations involving the protection of private life under Article 8 appears to have been slower, and one would still call for more cases of profound argumentation in order to develop a real dialogue between the national courts, on the one hand, and

between the national judiciary and the European Court of Human Rights, on the other hand. The limited application of those principles of interpretation that demonstrate most clearly the transition of the legal culture in the case law of the European Court of Human Rights, might be explained by the strong legalistic traditions in which the provisions of law limit the discourse. That is also shown by the less frequent resorting to a wider context of discourse.

The conclusions made above are supported by those made concerning the application of Article 6 by the Supreme Court. In certain judgments, the Supreme Court has shown even more developed discourse in the analysis of the principles of interpretation of the Convention. On the basis of case law under two Convention articles it is already safer to state that there is a change taking place in the Supreme Court in its receptiveness to the argumentation of the European Court of Human Rights, but it is still too early to state how definitive and dramatic that change is. In those judgments, also the context of discourse is wider, encompassing further-going analysis beyond the limits of national law and case law. Apart from the concept of criminal charge in relation to the principle of *ne bis in idem* under Article 6, paragraph 1, of the Convention and Article 4 of Protocol No. 7, no similar conceptual problems seem to have been faced by the Supreme Court. Instead, it appears to have taken some efforts to develop the interpretation of concepts of national law in conformity with the Convention provisions, such as the limits of unlawful distribution of sensitive information.

4.5.2 Supreme Administrative Court

4.5.2.1 Violations found in administrative law proceedings

In the same way as in respect of the private law and criminal law proceedings, the case law of the European Court of Human Rights concerning the administrative law courts and authorities has been examined in the light of the situation in Finland as a whole. One may observe that, when compared with cases in which violations have been found in respect of general courts of law, there have been much fewer such cases in administrative court proceedings, despite that for example questions under Article 8 of the Convention are increasingly taken up in administrative court proceedings. There are also fewer cases in which delays have been found in national proceedings under Article 6. However, this does not necessarily mean that it would be a sign of better reception of the case law of the European Court of Human Rights. There may be other factors explaining it, for example reluctance of the applicants in administrative court proceedings to take their cases further, or the nature of administrative court proceedings. Furthermore, the violations found concerning the administrative law sector have only rarely been violations that could be attributed to the Supreme Administrative Court. As regards the cases in which violations have been found by the European Court of Human Rights, the problems faced in the administrative law sector have,

in the majority of cases, concerned the same Convention provisions as in other cases. Although one must remember that they are isolated cases, violations have been found in compliance with Article 6, paragraph 1, concerning both the length of proceedings and errors in the hearing of parties despite or because of the strongly written nature of administrative law proceedings.

As was observed in the foregoing, in the light of the case law of the European Court of Human Rights, Finland has not that often been faced with the problem of the scope of the concept of “civil rights”. However, on those occasions that the concept has been touched upon, it has mainly been a problem of administrative law, which is mainly due to the linguistic interpretation of the concept in Scandinavian legal systems. Although Finland has not faced problems to the same extent as Sweden, there is rather recent precedent at the European Court of Human Rights, in which the Court took position to the applicability of Article 6, paragraph 1, to civil servants (wage supplements; incorporation of a police district into another one), and found it necessary to develop the case law further from its important prior precedent *Pellegrin v. France*, by assessing the so-called functional criterion⁹²⁹. The case of *Vilho Eskelinen v. Finland* has been important for future cases in Finland as it expanded the applicability of Article 6 to civil servants. Furthermore, the concept of “criminal charge” also based on Article 6, paragraph 1, particularly in relation to the principle of *ne bis in idem* set out in Article 4 of Protocol No. 7, has produced a large number of cases at the national level in both supreme jurisdictions, two of which have also ended up to the European Court of Human Rights. The related cases dealt with by the Supreme Administrative Court are examined in more detail below. As regards the concepts of “arrest and detention” and “security and liberty of person” under Article 5, paragraph 1, which may on occasion materialise even in the administrative law sector particularly as regards the “preventive” detention of persons of unsound mind, do not appear to have produced major problems in the Supreme Administrative Court.

Furthermore, a number of violations have been found under Article 8 of the Convention, which have mainly related to the protection of minors. The enforcement of emergency care orders and related right of access by social welfare authorities appear to have created problems. Thus, for the purpose of comparison, it is interesting to analyse national case law concerning Article 8 of the Convention to see whether there are differences in the way the two supreme jurisdictions treat those cases. Furthermore, in the same way as for the Supreme Court, cases concerning Article 8 are more interesting from the perspective of discourse than cases under Article 6. The same applies to Article 10, as the cases concerning privacy have also on occasion involved questions of freedom of expression. When looking into the case law of the Supreme Administrative

929 *Vilho Eskelinen and Others v. Finland*, Grand Chamber judgment of 19 April 2007, Reports of Judgments and Decisions 2007-II, §§ 50 to 64.

Court, one may note that even in the Supreme Administrative Court the first cases in which it has referred to the European case law, have involved the applicability of Articles 6 and 8. Although balancing of conflicting interests has been done already at the national level in cases concerning the public care of children, such cases have been brought to the European Court of Human Rights and violations have been found. It demonstrates the difficult task of the national authorities balancing conflicting interests in such cases, which has also been recognised by the Supreme Administrative Court.

4.5.2.2 Case law of the European Court of Human Rights in the Supreme Administrative Court

In order to assess the receptiveness of the Supreme Administrative Court to the case law of the European Court of Human Rights, an analysis of its published case law has been made. Since the Supreme Administrative Court publishes a smaller proportion of its case law than the Supreme Court, verifications were made by carrying out a research into its other case law in the Court's database to find support for the conclusions made. The decisions of the Supreme Administrative Court published in its yearbook include more than 70 decisions with references to the case law of the European Court of Human Rights. The total number of decisions with such references in the Court's database over the same period of time (1999-2014) is considerably higher⁹³⁰. Furthermore, the decisions in the Supreme Administrative Court's database include decisions with different types of outcome, where the nature of references to European case law varies. In the light of an overall research into the case law in the database, with references to judgments of the European Court of Human Rights, various observations can be made. Not all decisions in favour of the applicant have been published, but such decisions tend to include more profound reasoning with respect to the case law of the European Court of Human Rights than others. On occasion, even negative decisions include detailed references, particularly where the Supreme Administrative Court considers them to have precedential value. Thus, those types of decisions constitute the most fruitful sources for the purpose of analysing the discourse of the Supreme Administrative Court. In those cases where the Supreme Administrative Court merely upholds the decision of the lower court on the same grounds, the Supreme Administrative Court references to the European case law are not often very detailed. Also in those cases where the Supreme Administrative Court has not agreed with the applicant, or where it rejects the appeal, the request for leave to appeal or the application, the Court's reasoning appears to be rather brief even if the Convention provisions or the case law of the European Court of Human Rights are referred to in the reasoning.

930 Situation on 20 August 2014. The total number is more than 700 decisions depending on the search criteria. However, not all of them are references made by the Supreme Administrative Court itself, but are partly references made by lower courts or parties to the proceedings.

It has not been customary to refer to international case law to the same extent before Finland's accession to the European Convention on Human Rights, and the old traditions of writing judgments are still visible in the decisions of the Supreme Administrative Court, although some of the more recent decisions include examples of very detailed and profound argumentation with reference to the case law of the European Court of Human Rights. Also in general, the style of reasoning judgments in Finland has become more detailed. It is observed in the foregoing that the first references to the case law of the European Court of Human Rights appeared in the Supreme Administrative Court around 1999. The early references were still rather brief, mainly indicating the applicable case of the European Court of Human Rights, but more detailed references can be found approximately since 2007. In a case concerning the protection of children in 2004 (KHO:2004:121), for example, the reference to the European case law was still very brief. The rather mechanic way of referring to the European case law appears to persist even in some more recent cases, such as KHO:2011:99, in which the Supreme Administrative Court refers to the margin of appreciation of national authorities as well as to the principle of best interests of the child, but does not elaborate in more detail on the justifications that the European Court of Human Rights has given for necessary and proportionate restrictions.

In the same way as district courts and courts of appeal, administrative courts have increasingly started to refer to the Convention and its case law. The research into the Supreme Administrative Court's database supports the conclusion made on the basis of the published decisions that the references to the case law of the European Court of Rights have significantly increased in the past few years, starting approximately at the same time with the more profound references. The Supreme Administrative Court may also refer to the case law of the European Court of Human Rights in its reasoning despite that the Convention provisions have not been decisive and have not as such been used as the legal basis for the Supreme Administrative Court decision⁹³¹. In some cases, the Supreme Administrative Court refers instead or at the same time to another international instrument such as the Convention on the Rights of the Child, particularly in cases involving Article 8 of the European Convention on Human Rights. In cases KHO:2013:136 and KHO:2010:53, the interests of the child are balanced against the freedom of expression under Article 10, and instead of references to the case law of the European Court of Human Rights, the Supreme Administrative Court assesses the grounds for restricting the freedom of expression in the light of different sources of law, including Article 10 of the Convention and the Convention on the Rights of the Child. The principle of the best interests of the child is long established in the legal system. Thus, it appears that the Supreme Administrative Court may arrive at similar conclusions on the basis of differing sources of law.

931 See e.g. KHO:2012:69 (27.8.2012/2221).

In the light of the statistics of the Supreme Administrative Court from the past few years, cases concerning social welfare and health care as well as immigration cases constitute the largest groups of cases. Those fall most typically under the application of Article 8 of the Convention on Human Rights. Decisions in which the case law of the European Court of Human Rights under Article 8 becomes applicable include particularly those concerning child custody⁹³², immigration⁹³³, or population register⁹³⁴, although the most relevant applicable provisions of the Convention in immigration cases are often Articles 3 and 13. The case law under Article 8 has also been touched upon in certain cases concerning national security⁹³⁵. National security and the right to privacy may also be subject to examination in cases concerning the publicity of official documents⁹³⁶. As regards cases concerning personal data protection, the Supreme Administrative Court appears to rather refer to European Union law and the case law of the ECJ instead of that of the European Court of Human Rights⁹³⁷, which is explained by the supranational nature of data protection legislation, although there are exceptions⁹³⁸. The technique of referring to those sources of law in such decisions does not disclose any major differences from that used in referring to the case law of the European Court of Human Rights. On occasion, case law under Article 8 becomes relevant in connection with conflicting interests under Article 10⁹³⁹.

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- 932 For example decision 19.09.2000/2302 which contains a rather brief reference to case law and to the balancing of different interests, particularly the rights of the child, KHO:2004:121 in which the reference to the case law of the European Court of Human Rights is very brief, KHO:2011:99 which provides for a rather detailed balancing of conflicting interests of the child and the parents, referring to the margin of appreciation, as well as decision 22.6.2010/1554. The latter decision, which has not been published, includes relatively detailed references to the case law of the European Court of Human Rights.
- 933 KHO:2008:91 and KHO:2008:90, as well as decision 23.12.2008/3445, in which the balancing of conflicting interests is rather profound.
- 934 KHO:2009:15. In this case, the analysis of the case law of the European Court of Human Rights is exceptionally detailed.
- 935 KHO:2007:49, KHO:2007:48 and KHO:2007:47. Those are among the first decisions in which the Supreme Administrative Court has resorted to relatively profound reasoning in the light of the case law of the European Court of Human Rights.
- 936 KHO:2003:77. However, in this decision, the reference to the case law is only brief. Decision 21.5.2010/1212 does not refer to Article 8 but the Supreme Administrative Court balances fair trial rights against the right of others to the protection of private life, with brief references to European case law concerning Article 6.
- 937 KHO:2012:55.
- 938 KHO:2009:82. In this decision, the Supreme Administrative Court resorts to detailed balancing of conflicting interests, combining different sources of law.
- 939 KHO:2009:82. This decision concerns the balancing of the freedom of the press and journalistic purpose with the protection of private life, and although the references to the case law of the European Court of Human Rights are brief and the cases have not been identified, the balancing of the conflicting interests is rather profound. See also decision 18.6.2012/1708, which is a repetitive case and is mainly reasoned with a reference to the first-mentioned decision.

Although the majority of cases concerning freedom of expression are dealt with by the Supreme Court, Article 10 becomes applicable in the Supreme Administrative Court in certain types of cases, particularly in cases concerning the freedom of the press⁹⁴⁰ and publicity of official documents⁹⁴¹, freedom of association⁹⁴² and the freedom of expression of civil servants⁹⁴³. On occasion, the case law of the European Court of Human Rights has become applicable in connection with the protection of the rights of the child⁹⁴⁴. For the reason that the Supreme Administrative Court increasingly applies European Union law, the freedom of expression may also materialise through that law⁹⁴⁵. Although the cases under Article 10 are more typical in the Supreme Court, those of the Supreme Administrative Court are analysed for the purposes of comparison.

The references to the case law of the European Court of Human Rights in the Supreme Administrative Court's case law as a whole, when derived from the Court's database, represent roughly the same types of cases as those published in the Court's yearbook. No significant differences in the nature of reasoning appear to exist in the published decisions when compared with the non-published ones. As regards those decisions in which the Supreme Administrative Court has concretely reasoned its decisions with reference to the relevant case law of the European Court of Human Rights, and which fall within the

940 KHO:2011:22 which concerns an administrative restriction imposed on the contents of a television programme. In this case, the Supreme Administrative Court resorts to a profound analysis of conflicting interests and weighs the freedom of expression against the prohibition of discrimination and harassment.

941 KHO:2004:25. In this decision, the reference to the freedom of expression and the case law of the European Court of Human Rights is very brief. In decision 7.11.2003/2729 (KHO:2003:77), the Supreme Administrative Court gave only little relevance to the aspects of protecting the right to private life and the freedom of expression, and the references to the case law of the European Court of Human Rights were only brief, whereas the aspects of state security played a stronger role. In cases concerning the publicity of official documents, the freedom of expression may play an indirect role without the Supreme Administrative Court explicitly referring to Article 10 or the case law under it (e.g. KHO:2013:120), or it may be invoked only by the applicant (e.g. KHO:2013:120 in which the Supreme Administrative Court gives priority to the right to private life).

942 KHO:2014:1. In this decision, the Supreme Administrative Court balances the freedom of association with the freedom of expression, including the grounds for restricting those rights in the light of the case law of the European Court of Human Rights with detailed references, although the more relevant provision is Article 11 of the Convention.

943 KHO:2011:19. The references to the case law in this decision are relatively brief, but the balancing of conflicting interests is profound.

944 KHO:2013:136 and KHO:2010:53, which concern the right of the police to prohibit links to websites with child pornographic materials. The Supreme Administrative Court does not as such refer to the case law of the European Court of Human Rights when reasoning its decision, by the analysis of grounds for restricting the freedom of expression is detailed and the Supreme Administrative Court successfully combines different sources of law.

945 KHO:2012:55. In that case, the freedom of expression is referred to through the case law of the ECJ.

scope of Articles 6, 8 and 10 subject to the present analysis, the Supreme Administrative Court's database contains some useful decisions in addition to those published in the yearbook. In general, it appears that the Supreme Administrative Court has most often given precedential value to decisions in which the case law of the European Court of Human Rights has been used as relevant a source of law, or as a strong internal element of argumentation, and in which the reasoning is detailed and profound.

As regards the other provisions referred to in the analysis of the discourse of the European Court of Human Rights, one may note that they have been subject to precedents less often (less than 20 judgments). The decisions under Article 6 have most often concerned the questions of impartiality of judges and taking of evidence (hearing of parties), in the same way as in the Supreme Court, apart from the question of *ne bis in idem* referred to in the foregoing section. In addition, the Supreme Administrative Court has on occasion taken a position on the question of effective remedies. The discourse in the judgments under Article 6 are dealt with below to support the findings under Articles 8 and 10.

As regards the autonomous concepts analysed in section 4.2 above, there are only two decisions found under Article 5, paragraph 1, concerning the involuntary mental health care of a criminal suspect⁹⁴⁶ but in those decisions there was no need to apply the principle of autonomous meaning. As regards the autonomous concepts under Article 6, paragraph 1, a research into the case law of the Supreme Administrative Court indicates that the question of the scope of application of the concept of civil rights has been at dispute at the national level, although very seldom. In its decisions KHO:2008:25 (22.4.2008/882), KHO:2011:73 (23.8.2011/2262) and KHO:2012:4 (24.1.2012/63), the Supreme Administrative Court took a position on the application of Article 6, paragraph 1, to civil servants. Furthermore, the Supreme Administrative Court has also been faced with the applicability of Article 6, paragraph 1, in relation to the principle of *ne bis in idem* under Article 4 of Protocol No. 7, in relation to taxation procedures. A corresponding interpretation was given to the concept by the Supreme Administrative Court in its judgment KHO:2011:41, as has been given by

946 Decision 4.11.2002/2802, in which the reference is very brief, and decision KHO:2012:75, in which the assessment of deprivation of liberty is profound. In that decision, the Supreme Administrative Court assessed the criterion of lawfulness of the deprivation of liberty in the light of the case law of the European Court of Human Rights, including the Court's judgment in the case of *X. v. Finland*. However, among the non-published decisions, there are further examples of the application of Article 5 § 1 and the relevant case law of the European Court of Human Rights, including decision 10.6.2014/1858. Although there is only loose reference to the case law, it has been paid attention to. On occasion, the case law has been referred to by the lower administrative court, such as in respect of decision 29.10.2013/3409 and 11.9.2013/2836. In those cases, the Supreme Administrative Court did not change the outcome of the decision of the administrative court. The total number of cases under Article 5 in which the case law of the European Court of Human Rights has been referred to, however, remains modest.

the Supreme Court. Although only one of the relevant decisions concerning taxation procedure has been given precedential value, the Supreme Administrative Court has also applied the case law of the European Court of Human Rights in a number of other decisions, by referring to the principle of *ne bis in idem* but without elaborating on its application in detail⁹⁴⁷. In the case KHO:2013:172 (31.10.2013/3424), the Supreme Administrative Court took a position on whether the withdrawal of a permit to carry firearms is a criminal charge within the meaning of Article 6, paragraph 1. The references to the case law of the European Court of Human Rights are rather brief but the decision is interesting in that the Supreme Administrative Court independently assessed the applicable national provisions of law in the light of the case law of the European Court of Human Rights and applied the criteria for the application of Article 6, paragraph 1, without identical prior precedents, by drawing conclusions from comparable situations in respect of other types of administrative authorizations, thus applying a relatively wide context of argumentation. Further, in decision KHO:2014:95 (6.6.2014/1790) the Supreme Administrative Court assessed the principle of *ne bis in idem* in respect of the withdrawal of a driver's licence⁹⁴⁸. Considering the small number of cases in which the selected autonomous concepts have been assessed in national case law, it is difficult to draw any definitive conclusions as to whether they have imposed challenges in the adaptation to the transition of the interpretation of the relevant provisions. The evolution of those concepts in the case law of the European Court of Human Rights has inevitably lead to some transition of the legal culture also at the national level, but as regards the Finnish legal system, the evolution was already underway and the most essential precedents had already been given by the European Court of Human Rights at the moment of Finland's accession to the Convention. It has had, however, some impact on the interpretation of administrative law by means of expanding it.

When assessing the development of the technique of referring to the case law of the European Court of Human Rights by the Supreme Administrative Court as a whole, one may note that there is already some degree of transition of the legal culture. That conclusion is based on the observation that there is an emerging number of decisions

947 See e.g. 25.5.2012/1384 concerning temporary withdrawal of a driver's licence based on repeated road traffic offences, in which it was found to be an administrative sanction not based on the same facts; 23.1.2013/0296, concerning taxation procedures, in which case the tax increase was not found to be based on the same procedure as the criminal law sanction; and 19.9.2011/2660 concerning value-added tax and tax increase, in which case the procedures were also found to be parallel instead of one having lead to a final judgment, which is why the prohibition of *ne bis in idem* did not apply.

948 In decision 4.4.2014/1147, the Supreme Administrative Court merely referred to the reasoning of the lower administrative court which held that the withdrawal of an authorisation to serve alcoholic drinks was not considered a criminal law sanction, on the basis of the case law of the European Court of Human Rights (with reference to the case of *Tre Traktörer v. Sweden*).

in which the references are more numerous and more detailed than earlier, although the practice is not yet fully established. There are still examples of cases in which the references are mechanic. This overall conclusion, nevertheless, indicates that the Supreme Administrative Court has undergone already a change in the general receptiveness to the European case law as a source of law, and also to the evolution of the standard of protection of fundamental rights in that case law. However, in order to assess how far reaching that change of the legal culture is, it is necessary to analyse the discourse of the Supreme Administrative Court in the relevant parts of judgments addressing the European case law. The discourse analysis also makes it possible to assess whether there exists a dialogue between the Supreme Administrative Court and the European Court of Human Rights in the field of administrative law.

4.5.2.3 Discourse of the Supreme Administrative Court

When comparing the judicial style of the Supreme Administrative Court with that of the European Court of Human Rights, the same observation is made as in respect of the Supreme Court: it is considerably different. The same observations concerning the structure of judgments also apply. Furthermore, the essential difference is also similar in that the language used in the application of sources of law and particularly case law differs from that of the European Court of Human Rights for the same reasons, i.e. the argumentation with regard to precedents is traditionally less detailed. In the same way as in the Supreme Court, however, the application of case law has considerably increased and the nature of references has gradually become more detailed, despite that there are still examples of rather mechanic references. Thus, the approach of the Supreme Administrative Court to precedents appears to be flexible in the light of its case law.

Apart from the old traditions of applying sources of law and reasoning court decisions, there may be various explanations to the rather frequent brief references to the case law of the European Court of Human Rights, such as the nature of the administrative court procedure. Furthermore, due to the strong legalistic traditions of the Finnish judiciary, the discourse of the Supreme Administrative Court is limited particularly by the provisions of national legislation. On occasion, the references in the reasoning of the Supreme Administrative Court are brief or it has not referred to the case law of the European Court of Human Rights for the reason that the lower court already has reasoned its decision, among others, by referring to the European Convention on Human Rights or even to its case law⁹⁴⁹. This may be the case even where the Supreme Administrative Court changes the outcome of the decision. In such cases, the Supreme Administrative Court may have de facto applied the principles set out

949 See e.g. KHO:2004:14/ 18.2.2004, concerning the disqualification of the president of a local committee in relation to the issue of an environmental authorisation.

in the Convention provisions, but has indirectly referred to those principles without explicitly mentioning the relevant provisions and without using the European case law as an internal justification for its conclusions but has referred to a wider context in its discourse⁹⁵⁰. In such cases, the judicial reasoning behind the decision with regard to the facts of the case may be relatively detailed despite the absence of explicit references to the case law of the European Court of Human Rights.

However, the persistent brief references to the case law of the European Court of Human Rights do not necessarily mean that the courts have not weighed the different conflicting interests, but rather that not everything has been explicitly written out in the judgment. Despite this, the more recent judgments indicate more clearly the balancing of interests. The same development has been observed in the case law of the Supreme Court. However, in the same way as the Supreme Court, resorting to profound argumentation is still rather rare and the Supreme Administrative Court has often applied the European case law as an external observer, despite that the number of judgments with detailed references to the European case law has increased. The more detailed references represent examples of using that case law as stronger internal elements of argumentation. The cases with detailed references to the case law of the European Court of Human Rights often concern the right to private life. This could be explained rather by the large amount of cases concerning social welfare and immigration or asylum, than by the nature of those cases. However, even the nature of the cases may play a role for the reason that they typically involve the balancing of conflicting private and public interests, and interferences in the enjoyment of the right to private life are strictly restricted both under the Convention and the Finnish Constitution. In the same way as the Supreme Court, the Supreme Administrative Court rather often refers to the provisions of the Constitution together with those of the European Convention on Human Rights, and nor is the practice consistent for the Supreme Administrative Court either. Furthermore, it is not that typical for questions of protection of fundamental or human rights to arise in other sectors of administrative law, although it is possible. Even if they appear, those cases do not appear that often in published precedents.

Thus, the nature of balancing of conflicting rights is rather similar to that in cases concerning freedom of expression as was explained in respect of decisions of the Supreme Court. Where interference is justified, it is important to provide sufficient reasons. The judicial style in decisions upholding the decision of a lower court does not

950 See e.g. 24.1.2014/0175. The wider context consists, among others, of the reasoning of the lower administrative court, which pays attention to the strong relevance of family ties between the child born in wedlock and the parent, which may be overridden by the public interest only in exceptional circumstances. In its reasoning with reference to the facts of the case, the Supreme Administrative Court paid attention to both the nature of family ties and the nature and occurrence of the criminal offences.

appear to significantly differ from other decisions. In those cases that have precedential value, the discourse is as detailed irrespective of whether the decision of the lower court or its outcome is changed. Thus, it appears that where the Supreme Administrative Court gives precedential value to a decision by publishing it, it more typically resorts to detailed balancing of different interests under the case law of the European Court of Human Rights, irrespective of the outcome of the decision.

For example, as regards decisions of precedential value involving the application of Protocol No. 7, Article 4, the Supreme Administrative Court appears to resort to more profound reasoning in the light of the case law of the European Court of Human Rights when compared with lower courts, including the Court's judgments in cases brought against Finland. In those decisions, the reasoning of the Supreme Administrative Court is detailed, including the applicability of Article 6, paragraph 1, and the Supreme Administrative Court resorts to a relatively wide context of argumentation in the same way as the Supreme Court. In that context, the supreme jurisdictions also take into account the case law of each other as well as EU law and the case law of the ECJ. At the same time, those decisions represent an example of good receptiveness to the argumentation of the European Court of Human Rights in that the national case law has been adapted to better conform to the principles set out in the judgments of the European Court of Human Rights. Thus, the observations made in cases relating to application of Article 6, paragraph 1, of the Convention and Article 4 of Protocol No. 7 are largely the same as those made in respect of the Supreme Court.

As regards the application of Article 8, it appears that the Supreme Administrative Court has resorted to the case law of the European Court of Human Rights for the purposes of both justifying the need for restricting the enjoyment of rights under Article 8, in which cases it has often referred to the margin of appreciation of the State, and justifying the enforcement of rights under Article 8. In the latter cases, it has on occasion referred to the proportionality of restrictions, but not always. In the case of both types of restrictions, the references have in most cases been rather mechanic although the wording as such would give reason to conclude that the case law has been used as internal justifications for the legal opinion. In the case of mechanic references to the case law of the European Court of Human Rights, it is difficult to assess whether the Supreme Administrative Court has actually used the European case law as a tool for interpretation of law, or merely as a source of law. Thus, in the same way as in respect of the Supreme Court, the development of national case law would merit from somewhat more transparent argumentation, which would make the European case law to a larger extent an internal perspective of argumentation. However, one conclusion to be made is that the Supreme Administrative Court has not found it problematic to use it as a source of law, and in the same way as the Supreme Court, it has not drawn a distinction between national and international case law as regards the manner of application. In most cases, it seems that the case law of

the European Court of Human Rights is treated as a binding source of law and an internal element of argumentation⁹⁵¹.

The fact that the case law of the European Court of Human Rights has been given such a strong status from the beginning may explain why the use of that case law has increased in Finland more rapidly than in other legal systems, over a shorter period of time. The discourse of the Finnish supreme jurisdictions, in general, also appear to be more detailed in the case references than that of the Federal Constitutional Court of Germany and that of the Conseil d'Etat of France, for example. The Swedish supreme jurisdictions appear to have come close to the Finnish ones as regards the development of discourse, but relatively recently. Another factor explaining the rather rapid development in Finland is the concurrent application of other European sources of law, particularly the law of the European Union, which supports the transition of the legal culture of protecting fundamental rights. The Supreme Administrative Court has even referred to the principle of margin of appreciation which is traditionally foreign to the Finnish legal system. However, as has also been observed by Lavapuro, the principle of margin of appreciation is not necessarily a recommended principle of interpretation, considering that it is rather a means of determining the distribution of competence between the European Court of Human Rights and national courts. It may rather be tempting for national courts to refer to it as a justification for not assessing the circumstances of the case by means of a proper balancing of conflicting interests. Thus, it is not as such a very helpful principle of interpretation for the purpose of developing the technique of referring to the Court's case law, unless it is carefully assessed particularly with the principle of proportionality. An increased explicit use of the principle of proportionality, as well as explicit balancing of conflicting interests of the different parties, might help developing the technique of referring to the European case law. That principle has also increasingly been applied by the Supreme Administrative Court, which is as such not a dramatic development for the reason that it is an established principle in the Finnish legal system. In the same way as in the Supreme Court, it is also rare to apply principles of interpretation other than the principle of proportionality, except for the margin of

951 See e.g. KHO:2007:67/ 5.10.2007, paragraph 26, in which the Supreme Administrative Court states that in the application of the national provisions, those of the European Convention on Human Rights must also be taken into account, and paragraph 27, in which it continues by stating that the case law of the European Court of Human Rights must be taken into account in that context. Thus, the Supreme Administrative Court uses a rather strong wording in confirming the binding nature of the Convention and the case law under it as sources of law. See also KHO:2008:44/12.6.2008. This conclusion is supported by an overview of the Supreme Administrative Court's database. In most cases under Article 8, in which the case law of the European Court of Human Rights has been referred to, it appears that it has been recognised as a binding source and has been treated as internal elements of argumentation. See e.g. decisions 14.6.2011/1592 and 14.6.2011/1593, decision 29.2.2012/423.

appreciation. The views presented by Lavapuro concerning the recommended approach to the interpretation of the European Convention on Human Rights by the national judiciary may be largely shared even for the purposes of developing argumentation. Apart from more frequent use of other principles of interpretation, a more frequent resorting to a wider context than mere provisions of law would together develop the court's discourse and argumentation.

As observed in the foregoing, the rather mechanic references to the case law of the European Court of Human Rights do not necessarily mean that there would not be even profound assessment behind the decision of the Supreme Administrative Court. In decision 19.9.2000/2302, which concerns the change of substitute care and family reunification, the reference to the case law of the European Court of Human Rights is general without specifying the cases. Despite this, the wording of the decision clearly indicates that the Supreme Administrative Court has weighed conflicting interests in an effort to find a fair balance between those interests. This can be concluded from that the Supreme Administrative Court has extended the principles set out in the case law of the European Court of Human Rights to apply, apart from custody orders, to substitute care and changes made therein, by underlying the utmost importance of the best interests of the child, including the child's own opinion. Although it is not explicitly stated, it reflects an evolutive approach to the application of that case law. Further, the Convention and the case law of the European Court of Human Rights are used as equal legal bases for argumentation with national legislation. In decision KHO:2003:75, the Supreme Administrative Court refers to a particular judgment of the European Court of Human Rights but the assessment made by it in the light of facts, applicable national law and the judgment of the European Court of Human Rights appears to constitute weighing of all conflicting interests. In this decision, the Supreme Administrative Court combines the case law of the European Court of Human Rights with the provisions of the Convention on the Rights of the Child. The Supreme Administrative Court uses that case law as a ground for restricting the right to private life under Article 8 in finding that the family life is not genuine and close enough to enjoy protection against interference. The weighing of conflicting interests in the light of European case law is less apparent in decision KHO:2004:121, in which the Supreme Administrative Court specifies one particular case but does not resort to profound argumentation and the principle of proportionality only appears indirectly from the Supreme Administrative Court's discourse, although that particular case is used as an internal justification for the judgment. Thus, it remains somewhat unclear in which manner the principle of proportionality has been applied. However, the particular case of the European Court of Human Rights seems to have played a role in determining that the lower administrative court had not adequately assessed the possibility of less dramatic interference in the rights protected by Article 8. Also, the

discourse of the Supreme Administrative Court clearly indicates the binding nature of the Convention⁹⁵², and apparently a balancing exercise has been done.

In decision 22.6.2010/1554, which concerns restrictions on the right of access, the references to the case law of the European Court of Human Rights are more detailed, although the style of argumentation does not significantly differ from the earlier decisions. The weighing of different interests is not in all respects transparent despite that the references to the European case law appear to be internal justifications⁹⁵³, and the principle of proportionality is reflected in the references to that case law in that the Supreme Administrative Court pays attention to the best interests of the child which may override those of the parents depending on the nature and seriousness of the situation. However, the same type of discourse is not used in the assessment of the facts of the case. Thus, also in this case, it is difficult to say whether that case law is merely a source of law or whether it has been used as a real tool for interpretation of law, although the binding nature of that case law is clearly stated. In decision KHO:2011:99, which also concerns child custody, the references to European case law are rather brief, but the weighing of conflicting interests is clearer in that the Supreme Administrative Court explicitly pays attention to the temporary nature of child custody and to the need to find an appropriate balance between the interests of the child and those of the parents, referring to the margin of appreciation but also indirectly to the principle of proportionality. Also in this decision particular weight has been given to the best interests of the child. In those cases concerning the protection of private life under Article 8, there thus appears to be a trend towards more detailed references to European case law but it seems, on the one hand, that in child custody cases such as the aforementioned one the assessment of the interests of the different parties can be clearer detected in the relatively detailed description of facts of the case than through a transparent argumentation in relation to the case law of the European Court of

952 The Supreme Administrative Court gives special weight to international human rights conventions binding on Finland, which have been incorporated into the national legal system, in stating that they must be taken into account when deciding on child custody. In some decisions, the cases of the European Court of Human Rights are not specified. See e.g. decision 10.6.2005/1428, in which it is difficult to say in which manner that case law has been applied, although it appears to be recognised as a binding source of law.

953 The Supreme Administrative Court also refers to the judgments of the European Court of Human Rights issued against Finland in child welfare cases, *R. v. Finland*, judgment of 30 May 2006, and *H.K. v. Finland*, judgment of 26 September 2006. See also decisions 30.7.2010/1754 and 30.7.2010/1755, referring to the same case law, in respect of which the same type of conclusions can be drawn.

Human Rights⁹⁵⁴. On the other hand, one must remember that a detailed description of facts is also an example of transparent writing of judgments as it clearly tells the addressees of the judgment which particular circumstances have been taken into account. Although similar detailed descriptions are also used in immigration cases, it is easier to detect the trend towards more transparent argumentation related to European case law in those decisions of the Supreme Administrative Court that concern immigration. Such decisions also appear to include more often detailed references to the case law of the European Court of Human Rights, with more complex sentence structures and similar concepts and expressions with those of the European Court of Human Rights.

In both decisions on child custody and decisions issued in immigration cases, there appears a trend to invoke the margin of appreciation afforded to national authorities more often than in the decisions of the Supreme Court, but it is perhaps even more frequent in immigration cases in which it is also more common to refer to the European case law otherwise in support of restricting rights under Article 8. In respect of immigration legislation, the European Court of Human Rights also typically affords national authorities a wide margin of appreciation. In decision 7.3.2006/500, the Supreme Administrative Court applies the principle according to which Article 8 does not guarantee immigrants the right to choose place of residence for the purpose of family life. However, the Supreme Administrative Court also refers to the principle of proportionality, taking into account all the relevant facts and circumstances. Thus, although the margin of appreciation is referred to, the conflicting interests are balanced against one another. Despite that the reference to the European case law is rather brief, the decision clearly indicates that the case law has been used as a relatively strong internal element of argumentation in that it constitutes the decisive justification for the conclusions.

In a series of decisions relating to state security as a ground justifying interference in the protection of private life, the Supreme Administrative Court resorts already to a very detailed and profound assessment of acceptable grounds of interference under European case law concerning Article 8, combining it with the interpretation of section 10 of the Finnish Constitution. Decisions KHO:2007:47, KHO:2007:48 and KHO:2007:49 include a detailed analysis of the case law of the European Court of Human Rights with reference to both the principle of proportionality and the margin of appreciation, including assessment of what can be considered adequate means of ensuring that the interference in the enjoyment of private life is not arbitrary but is subject to sufficient judicial control. Those decisions are from a perspective of discourse

954 This conclusion is supported by an overview of the Supreme Administrative Court's database. See e.g. decision 29.2.2012/423 and decision 22.6.2010/1554, which clearly reveals the application of the principle of proportionality in the light of the case law of the European Court of Human Rights, and decision, but the main conclusion is made under the provisions of the Child Welfare Act.

among the first interesting ones in the Supreme Administrative Court in that they constitute a clear turn towards using European case law as a strong internal perspective of argumentation. For example, in decision KHO:2007:47, the Supreme Administrative Court notes that Article 13 of the Convention requires an effective remedy before a national authority for everyone whose rights under Article 8 have been violated, and that the fact that the Finnish Security Intelligence Service had stored information relating to the applicant's private life without the applicant having a possibility to have access to that information constituted an interference with his private life. The Supreme Administrative Court examined the criteria for whether such interference was necessary in the light of the case law of the European Court of Human Rights, in finding that despite the margin of appreciation in assessing what was necessary to protect national security the State had to ensure effective guarantees against abuse for example in the case of secret surveillance. The Supreme Administrative Court also assessed in the light of the European case law the criteria for effective remedies, paying attention to that certain justified restrictions could also be placed on those remedies in case of national security but finding that the remedy could not be entirely denied. The Supreme Administrative Court derives its conclusions directly from the principles set out in the case law of the European Court of Human Rights, stating that the storing of information in a secret police register could be considered justified and necessary to protect national security in compliance with Article 8, but that it was also necessary to ensure legal protection by means of access to an impartial and objective judicial body that has the possibility to examine the lawfulness of the measures taken by the Security Intelligence Service with a possibility for both parties to be heard. The discourse of the Supreme Administrative Court in the two other cases is largely similar.

Also in decisions 23.12.2008/3443 (KHO:2008:90), 23.12.2008/3444 (KHO:2008:91) and 23.12.2008/3445 the case law of the European Court of Human Rights is used as a strong internal element of argumentation, and the European Convention on Human Rights is given equal importance with national immigration legislation as a source of law. The Supreme Administrative Court resorts to profound argumentation in weighing the interests of protecting private life against those of restricting it under Article 3 of the Convention, seeking in explicit words to find a fair balance of protecting the conflicting rights. For example, in decision KHO:2008:90, concerning the prohibition of expulsion in violation of Article 3 and the grounds of restriction of the right to private life under Article 8, the Supreme Administrative Court seeks to find a fair balance in the conflicting interests of society and the private individual, stressing that any decision on expulsion must be based on strong reasons. Thus, in finding that the applicant could be expelled, the Supreme Administrative Court reasoned directly on the basis of the criteria set out in the case law of the European Court of Human Rights, including the principle of proportionality. The Supreme Administrative Court found that the family ties to Finland were not sufficiently strong

and there was not sufficient evidence of integration into Finnish society, in view of the repeated criminal offences and conditions in the receiving country, and that the grounds for expulsion were stronger. The principle of proportionality also appears from the Supreme Administrative Court's statement that the assessment of the danger of inhuman treatment in the receiving country must be done in the light of those facts that were or should have been known by the State party, and there is a certain minimum level of treatment that may be considered inhuman. The assessment of that minimum level is proportionate, depending on various factors⁹⁵⁵. In immigration cases, it is also typical to resort to a relatively wide context of argumentation, including for example international materials relating to the situation in the country of origin of immigrants.

Despite the aforementioned rather detailed examples of argumentation in the light of the case law of the European Court of Human Rights, the analysed immigration cases show that detailed argumentation has still not become an established practice although references to the case law have become a frequent source of law. In a number of further decisions relating to immigration (9.10.2009/2457 – KHO: 2009:86, 25.3.2010/613 – KHO:2010:17, 25.3.2010/614 – KHO:2010:18, 21.2.2012/343 and 26.6.2012/1710 – KHO:2012:47), in which the Supreme Administrative Court has weighed the best interests of the child against other conflicting interests, the argumentation is less transparent and it is again less clear in which manner the case law principles have been applied. It rather appears that the assessment of interests has been carried out by applying the principles set out in national immigration legislation. Thus, the application of the principle of proportionality rather appears from the wording of the cited provisions of national law. It is stated in the Aliens Act, for example, that where the expulsion is based on the criminal activities of the person concerned, the seriousness of the criminal act and the harm, damage or danger caused for the public safety must be taken into account. That statement of law is again reflected in the assessment of the facts of decision 21.2.2012/343, for example, as the Supreme Administrative Court pays attention to the repeated nature of the criminal offences. In those decisions, the case law of the European Court of Human Rights appears to constitute an internal element of argumentation, but a rather weak one compared with the provisions of law. These findings are supported by a number of more recent decisions (22.5.2013/1747 – KHO:2013:97⁹⁵⁶, 24.1.2014/175 and 31.1.2014/240). In decision 24.1.2014/175, for example, the Supreme Administrative Court does not elaborate on the principles set out in the case law of the European Court of Human Rights, but refers to the reasoning of the lower administrative court in which it is done. The

955 See decision 23.12.2008/3445.

956 In this decision, the Supreme Administrative Court carries out, however, a more profound analysis of the case law of the European Court of Justice, through the assessment of relevance of the Union nationality of a child. Despite this, the most relevant aspect was the assessment of the best interests of the child.

Supreme Administrative Court, however, refers to the same principles in assessing the facts of the case. The principle of proportionality is reflected indirectly in the assessment of the nature of the criminal activities of the person concerned. On the other hand, in decision 6.2.2014/289 (KHO:2014:22) the weighing of conflicting interests can be detected rather easily in the Supreme Administrative Court's argumentation, although the references to the case law of the European Court of Human Rights are rather brief. The references indicate the application of the margin of appreciation. Also decisions KHO:2014:50 and KHO:2014:51 include several references to the European case law, and the weighing of the conflicting interests can be easily seen from the discourse of the Supreme Administrative Court, and the principle of proportionality appears to have been applied to the concrete facts.

On occasion, the protection of private life under Article 8 has been weighed against the freedom of expression under Article 10 of the Convention in the light of the case law of the European Court of Human Rights, although those cases have appeared rather late, around the same time when the Supreme Administrative Court has begun to resort to more detailed references in general⁹⁵⁷. The most relevant cases relating to the freedom of expression have been published. In decision 23.9.2009/2303 (KHO:2009:82), the argumentation is rather profound and the Supreme Administrative Court – on the basis of a preliminary ruling of the European Court of Justice – carefully applied the provisions of both the Finnish Constitution and the Convention on the protection of private life in relation to the freedom of expression, taking a position explicitly on the relationship between those two conflicting rights and using the case law of the European Court of Human Rights as an additional internal context of discourse. The Supreme Administrative Court took into account the need to give a wide interpretation to the concept of journalism, in accordance with the interpretation given to it by the European Court of Justice, but also to the development of technology that made it possible to distribute private information more effectively than earlier and to the limited grounds of interference in the protection of private life. The Supreme Administrative Court also paid attention to whether the distribution of information was only carried out to satisfy the curiosity of the public, in which case the protection of the freedom of expression is narrower in scope. Thus, in an order to find a fair balance between the conflicting rights, the European Court of Justice argued that the protection of private life requires that derogations and limitations had to be strictly necessary. The argumentation is close to that of the European Court of Human Rights, although it

957 It is interesting to note that the cases under Article 10 in the Supreme Administrative Court seem to have appeared around the same time when the Supreme Court has increasingly started to reason in the light of the case law of the European Court of Human Rights in freedom of expression cases.

is done in the light of the case law of the European Court of Justice⁹⁵⁸, with relatively complex structures of discourse in the case references and using similar concepts and expressions as the European Court of Human Rights. The Supreme Administrative Court gave more weight to the protection of private life in finding that the open and public debate necessary in democratic society or the control of the use of public powers and the acceptable criticism did not require a possibility to treat individual personal data for the purposes of the Act on the use of freedom of expression (460/2003), and thus the freedom of expression did not require such a wide derogation from the protection of private life.

The cases concerning freedom of expression in the Supreme Administrative Court are not always that clearly related to the conflicting right to the protection of private life. In decision 2.9.2010/2023 (KHO:2010:53), the freedom of expression was assessed against the right to effective remedy, although the best interests of the child and the protection of private life can be observed as aspects to be taken into account, when the National Bureau of Investigation had prohibited access to websites containing child pornographic materials. However, the Supreme Administrative Court did not assess them in the light of the case law of the European Court of Human Rights although it was invoked by the applicant, and instead of applying Article 10 of the Convention, the Supreme Administrative Court referred to section 12 of the Constitution although the National Bureau of Investigation had referred to the Convention provisions. In that decision, the Supreme Administrative Court assessed rather the right of the applicant to appeal against the decision of the National Bureau of Investigation, than the right of the National Bureau of Investigation to prohibit access to certain websites and thus restrict the freedom of expression under Article 10 of the Convention. Instead, in decision 3.3.2011/516 (KHO:2011:19), the Supreme Administrative Court referred to several cases of the European Court of Human Rights. The case concerned the right of civil servants to the freedom of expression in the form of a letter criticising university directors, assessing whether that criticism was justified and not purely based on selfish motives, and the Supreme Administrative Court assessed whether the interference in that right in the form of a written warning was proportionate to the legitimate aim pursued and whether it was adequately justified in the light of the requirements of Article 10. The principle of proportionality appears from the wording

958 The Supreme Administrative Court applied the case law of both European courts. See also decision 18.6.2012/1708 relating to similar questions. In another precedent, 6.7.2012/1896 (KHO:2012:55), the case law of the European Court of Human Rights is given less relevance, mainly through the application of that of the European Court of Justice. Although the Supreme Administrative Court pays attention to the freedom of expression under Article 10 of the Convention, the decision concerns rather the publicity of wage-related information on civil servants. It nevertheless assesses the extent of the freedom of expression and its meaning in democratic society against the needs of protecting privacy.

of the references to case law, and from the assessment of the criterion of whether the interference was necessary and proportionate. This decision of the Supreme Administrative Court includes a rather analytical approach to the case law of the European Court of Human Rights, in which it analyses each criterion separately and provides thus relatively transparent reasoning, and the European case law is used as a strong internal element of argumentation.

A further example of decisions on freedom of expression, 9.3.2011/588 (KHO:2011:22), concerns alleged discrimination of the Roma as an ethnic group in a television programme and thus the relation between the freedom of the press and the prohibition of discrimination on ethnic grounds. Also in this decision, the Supreme Administrative Court, despite upholding the decision of the lower administrative court, resorts to a profound analysis of applicable legislation, including both the Constitution and relevant international conventions as well as EU legislation on discrimination, and assessment of the conflicting interests in the light of the case law of the European Court of Human Rights. The case law of the European Court of Human Rights appears to be a relatively strong internal element of argumentation as the assessment of the conflicting interests is largely based directly on the cited judgments. However, in some respects the assessment is indirect in that neither the exceptional nature of restrictions on the freedom of expression nor the applied principles of interpretation are very clearly mentioned in the light of the case law. The Supreme Administrative Court rather assesses the scope of the prohibition of discrimination and that of the freedom of expression, in stating that the freedom of expression under Article 10 does not cover only positive aspects but also information that may be shocking or disturbing, and its conclusions are rather based on the assessment of the nature of the television programme, despite recognising the responsibilities relating to the use of the freedom of expression. In line with European case law, the Supreme Administrative Court observed that satire is a form of artistic expression and social commentary and by its inherent features of exaggeration and distortion of reality naturally aims to provoke and agitate. Thus, the Supreme Administrative Court did not find the programme to be discriminative in nature, and gave priority to the freedom of expression. In decision KHO:2014:52, the reference to the case law of the European Court of Human Rights is again rather weak⁹⁵⁹. Thus, given that the number of decisions on the freedom of expression in the Supreme Administrative Court is rather low, no definite conclusions can be made on the basis of them alone, but the aforementioned decisions support

959 This case concerns the assessment of whether the Security Intelligence Service had the right to require prior authorisation for the attendance of one of its officials to the publication of a book in which criticism was presented against the Service, and whether such a requirement constituted a prohibited interference in the freedom of expression. The Supreme Administrative Court gave, however, more weight to the right of the Agency to restrict such activities of its officials as could give the wrong impression to the public.

the overall conclusions made on the trends observed in the decisions of the Supreme Administrative Court as a whole.

In two cases, the Supreme Administrative Court has already shown preparedness to even more elaborate reasoning in the application of the case law of the European Court of Human Rights. In decision 3.1.2014/1 (KHO:2014:1) concerning the right of association under Article 11 (falling as such outside the scope of the present study) which, according to the Supreme Administrative Court, had to be also interpreted in the light of case law under Article 10, the Supreme Administrative Court resorts to an exceptionally profound assessment of different interests in the assessment of whether the right to register an association the purpose of which was to promote the legalisation of cannabis, although it is a prohibited narcotic substance, and the freedom of expression in those promoting activities were protected under Articles 11 and 10 of the Convention. Thus, the balanced interests include the freedom of expression and freedom of association in the light of the case law of the European Court of Human Rights, which is used clearly as an internal justification for the legal opinion of the Supreme Administrative Court, including the acceptable grounds of interference and the need to precisely limit the acceptable restrictions, such as pressing social needs, and the need to ensure a functioning democratic society. The Supreme Administrative Court thus paid attention to the proportionate nature of the rights under Articles 10 and 11, as well as to the margin of appreciation of the national authorities in deciding on restrictions. Despite reference to the margin of appreciation, the outcome of assessment was positive for the applicant. This judgment of the Supreme Administrative Court is one of those rare cases of the Finnish judiciary in which the principle of evolutive interpretation has been applied. The Supreme Administrative Court assessed whether the legal situation in Finland had changed so essentially that it could change its interpretation of law from its earlier decision KHO 1994 A 8, taking particularly into account the development of the legal culture in the light of the case law of the European Court of Human Rights. The Supreme Administrative Court thus gave priority to the principle of human rights friendly interpretation and evolutive interpretation (expanded and more diverse debate on the policy of regulating alcohol and narcotic substances both in Finland and elsewhere in Europe) at the expense of legal certainty which is a strongly established principle in the Finnish legal culture. In this particular decision, the style of argumentation of the Supreme Administrative Court is exceptionally close to that of the European Court of Human Rights. In referring to exceptionally wide contextual argumentation, it thus shows that despite the different style of writing judgments originally, it is not impossible to adapt the style of argumentation closer to that of the European Court of Human Rights at the national level.

In an earlier case concerning the change of sex and personal identity code (KHO:2009:15), the Supreme Administrative Court has also used the case law of

the European Court of Human Rights as a strong internal element of discourse and resorted to an exceptionally profound analysis of that case law, including development of society in other European states, and the case constitutes another example of using European case law as a strong internal justification for the judgment and of resorting to an exceptionally wide context of argumentation. The Supreme Administrative Court assessed the possible existence of a positive obligation to ensure protection of Article 8. It refers to several national constitutional provisions and Convention provisions, comparing the conflicting interests to be protected under those provisions, and assesses the applicability of the European case law to the situation at hand, including the principle of proportionality and the question of whether the national legislative solution exceeds the margin of appreciation afforded to the State in the light of that case law. The Supreme Administrative Court even paid attention to that despite the margin of appreciation, it was dealing with questions that were not entirely at the discretion of national authorities. Thus, the application of the margin of appreciation is more analytical than in earlier cases, in the same way as in the aforementioned case KHO:2014:1. In these cases, the Supreme Administrative Court clearly assesses whether the national authorities have acted within their margin of appreciation when imposing restrictions on fundamental rights. It is interesting to note that upon the profound reasoning and analysis, the Supreme Administrative Court reached a conclusion that the applicant's rights had not been violated to the extent that the applicant did not have the possibility to the enjoyment of the right to private life, considering the extent of the right to marriage and the existence of the right to register the re-assigned sex, which position was upheld even by the European Court of Human Rights⁹⁶⁰. Although in the light of the relatively few cases concerning the administrative law courts it is difficult to draw any definitive conclusions, this particular case demonstrates the usefulness of applying the European case law more profoundly than by merely stating the applicable cases. It shows how the national authorities have reached their conclusion, making the reasoning more transparent, which also facilitates the task of the European Court of Human Rights and contributes to a constructive dialogue between the Court and the national judiciary. It also has the potential of increasing the persuasiveness of judicial decisions.

In the same way as for the Supreme Court, the case law of the European Court of Human Rights appears to have been mainly used as an internal element of argumentation in the decisions of the Supreme Administrative Court, but only in some of them it has been used as a strong internal justification for the conclusions. As regards judgments given concerning the application and interpretation of Article 6, paragraph 1, of the Convention, a similar trend may be observed in the reasoning of the Supreme Administrative Court as in respect of the judgments relating to the protection of private life. The more detailed references to the case law of the European Court of Human

960 *Hämäläinen v. Finland*, Grand Chamber judgment of 16 July 2014 (Appl. No. 37359/09).

Rights have appeared around the same time even in cases under Article 6. In the same way as in cases under Articles 8 and 10, a research into the database of the Supreme Administrative Court indicates that there are considerably more decisions in which Article 6 has been applied than the published cases. The non-published decisions also mainly relate to same types of questions as the published ones, including impartiality of judges and other principles of a fair trial. It appears, however, that the decisions with more profound argumentation with regard to the European case law have most often been published, whereas in other cases it is more usual to merely state the need to take the European Convention on Human Rights and the case law under it into account, in the same way as in respect of Articles 8 and 10, although there are also examples of decisions that have nearly identical argumentation with published decisions. In the non published decisions, the case law of the European Court of Human Rights is also given the status of a binding source of law.

The first published cases concern the question of impartiality of proceedings. Although the Supreme Administrative Court analyses the subjective and objective criteria of impartiality of judges in the light of the case law of the European Court of Human Rights in the same way as the Supreme Court, and the binding nature of that case law is clearly recognised, the references are rather mechanic⁹⁶¹, although for example in decision KHO:1999:49 the criteria set out in the European case law are used directly as the basis for conclusions. In decision KHO:2006:77, the argumentation of the Supreme Administrative Court in respect of the criteria of impartiality is somewhat more detailed than in the earlier ones, and it refers also to the provisions of the Constitution and the statements in the Government proposal for new legislation on the disqualification of judges⁹⁶². However, also in that decision the references to the case law of the European Court of Human Rights remain at general level, and it is not clear in which manner the criteria have been applied to the concrete facts of the case. The question of impartiality has appeared also in later decisions, such as decision 23.8.2011/2345 concerning custody and public care of children, in which the question has been assessed in the light of the same criteria as in earlier precedents, although in less detail. The question of impartiality of judges has appeared rather often in non-published decisions, in the light of the earlier precedents.

The first decisions under Article 6 of the Convention that include more profound assessment of the applicability of Article 6 and the requirements of a fair trial, in the light of the criteria set out in the case law of the European Court of Human Rights are KHO:2007:67 and KHO:2007:68, concerning taxation procedures. Those cases relate to the need of an oral hearing in the case of taxation procedures. The need for an oral hearing has also been assessed in decision 31.12.2009/ 3782 in which the Supreme

961 See judgments KHO:1999:49, KHO:2002:64, KHO:2002:91 and KHO:2003:24.

962 HE 78/2000 vp.

Administrative Court does not, however, refer to individual judgments of the European Court of Human Rights under Article 6, but reasons its conclusions on the basis of criteria under which there is need under national law and case law to arrange an oral hearing⁹⁶³. Nor is the application of principles of interpretation profound, despite that the case law is given the status of a binding source of law and an internal element of argumentation. Instead, in decision KHO:2007:67 the Supreme Administrative Court uses a rather strong wording when confirming the binding nature of that case law and uses the case law as a strong internal element of argumentation. However, the discourse of the Supreme Administrative Court does not clearly indicate which principles of interpretation of law it applies under that case law, although the criteria are relatively clearly applied to the concrete situation at hand when compared with earlier cases, including derogations. In decisions KHO:2008:25, KHO:2008:44 and KHO:2008:45 and KHO:2010:27, relating to various aspects of effective legal remedies, the nature of argumentation of the Supreme Administrative is less detailed, despite that the binding nature of the European case law is clearly recognised⁹⁶⁴. It remains unclear in which manner the principles of interpretation have been applied and the conclusions appear to be rather based on the provisions of national legislation. The same applies to decision KHO:2011:73 concerning the publicity of official documents and access of parties to the proceedings to information. Despite the relatively detailed argumentation, the conclusions rely largely on national legislation.

In decision KHO:2011:39, concerning the prohibition on appeal against certain decisions concerning civil servants, the Supreme Administrative Court assesses the relevance of Article 6 of the European Convention on Human Rights and the relevant case law in the interpretation of section 21 of the Constitution. The decision also contains detailed references to the case law of the European Court of Human Rights, on the basis of which the Supreme Administrative Court takes a position on the grounds on which a dispute concerning civil servants may be excluded from the scope of application of Article 6, paragraph 1. When refusing appeal, the Supreme Administrative Court argues by means of applying the principle of proportionality that other legal remedies provide adequate protection and Article 6 and the European Union law do not provide

963 As regards the criteria of restricting the right of access under Article 8, the Supreme Administrative Court refers to two individual judgments of the European Court of Human Rights, but even those references are rather mechanic. Also decisions 8.4.2008/ 744 and 14.12.2006/ 3445 dealing with the need for an oral hearing include only brief references to the case law without citing individual cases.

964 In decision KHO:2008:25, however, the Supreme Administrative Court refers to both the European Convention on Human Rights and the Covenant on Civil and Political Rights, despite not including detailed references to case law. The Supreme Administrative Court observes that the scope of Article 21 of the Constitution is wider than that of Article 6 of the Convention, thus expanding the scope of application of the principles set out in that case law and recognizing the evolutive interpretation of the European Court of Human Rights under Article 6.

further going rights. In that decision, the case law of the European Court of Human Rights constitutes a strong internal element of argumentation. The same applies to decision KHO:2011:41 on taxation procedures in which the argumentation becomes even more detailed. In that decision, the Supreme Administrative Court uses a similar type of argumentation as the Supreme Court with reference to Article 6, paragraph 1, and Protocol No. 7, Article 4, the Constitution and the European Union law. The references to the case law of the European Court of Human Rights are exceptionally detailed when compared with earlier ones, analysing the changing national practice and direct application of that case law to the concrete facts. The Supreme Administrative Court argues that the case law of the European Court of Justice does not provide reason to a wider interpretation than that of the European Court of Human rights, thus resorting to comparison as a method of interpretation. However, despite the strong role given to the European case law, nor does this decision disclose which principles of interpretation have otherwise been applied, but the Supreme Administrative Court analyses the criteria of applicability of Article 6, paragraph 1. The question of *ne bis in idem* has also been assessed with regard to the prohibition of driving in relation to a road traffic offence⁹⁶⁵, in which case the Supreme Administrative Court reasoned in the light of the European case law that it was not considered a sanction based on the offence but was an administrative measure based on high speed, and thus based on different facts, and in relation to the withdrawal of an authorisation to possess weapons⁹⁶⁶. In the same way as in the Supreme Court, the assessment of the criteria under the case law of the European Court of Human Rights is rather detailed, and the Supreme Administrative Court refers to the principle of autonomous interpretation. In decision KHO:2012:4 concerning the effective legal remedies of state civil servants, the conclusions of the Supreme Administrative Court appear to rely again more on the assessment of facts in the light of national legislation than on the principles set out in the European case law, but the Supreme Administrative Court applies the principle of human rights friendly interpretation of law and the application of the principle of effectiveness is apparent in that the court clearly points out that the Convention is not meant to guarantee rights that are theoretical and illusionary, but practical and effective, in finding that instituting action before a district court was not a sufficiently effective legal remedy, but that the civil servant concerned had the right to appeal before a disciplinary board. Thus, the European case law appears to play a role despite the stronger reliance on national law.

965 KHO:2014:95. The case concerned aggravated drunken driving and driving without a valid driver's licence.

966 See KHO:2013:172. In that case, the Supreme Administrative Court argued that the withdrawal was not a sanction based on a criminal offence but a preventive measure the purpose of which was to ensure public safety.

One may note that in the light of the aforementioned two judgments (KHO:2009:15 and KHO:2014:1), in particular, the Supreme Administrative Court appears to be on the right track towards a more receptive approach to the argumentation of the European Court of Human Rights, although there may still be room for improvement in national case law as a whole. Those two judgments also appear to be closer to the discourse of the European Court of Human Rights than others, including both those of the Supreme Administrative Court and the Supreme Court. Furthermore, the case law of the Supreme Administrative Court supports the conclusions made in the light of the case law of the Supreme Court. There appears to be a change of legal culture taking place as regards the application and interpretation of the case law of the European Court of Human Rights, but there is still room for improvement as the quality of references to that case law is not that developed in all decisions of the Supreme Administrative Court in which such references have been made. In general, the Supreme Administrative Court does refer to the Convention provisions or the case law of the European Court of Human Rights in those cases where they are of relevance for deciding the case but the nature of the references vary from rather brief and mechanic ones to more elaborate ones in which the principles and criteria set out in the European case law are carefully assessed. However, the Supreme Administrative Court seems to have taken a step further towards more elaborate discourse and towards wider contextual argumentation which is closer to that of the European Court of Human Rights, and which would make it possible to enter into a real dialogue between the national judiciary and the European Court of Human Rights. Further, in some respects it appears that the Supreme Administrative Court more easily than the Supreme Court resorts to a profound application of the principle of proportionality, which appears to be also the principle which is most often applied by the Supreme Court but the latter applies it more in an indirect manner. It could, on the one hand, be explained by the fact that the majority of cases in the Supreme Administrative Court relate to Article 8, which necessarily involves the balancing of the protection of private against the needs of democratic society to impose restrictions needed to protect the rights of others, but on the other hand, the same concerns cases under Article 10. Nevertheless, the cases in the Supreme Court under Article 10 most often relate to the application of criminal law, and the provisions of criminal law necessarily have to be very precise and perhaps leave less room for value judgments, whereas the protection of private life allows more subjective reasoning to fill in the rationality gap.

As regards both Article 8 and Article 10, one may detect some degree of transition of the legal culture of protecting those rights. In both situations, it appears that the supreme jurisdictions have, through national case law, come closer to the approach of the European Court of Human Rights in asserting that the restrictions imposed must be strictly justified under law. The observations made in respect of judgments relating

to Article 6, paragraph 1, support the general findings concerning the development of the application of European case law. The trends appear to be similar irrespective of whether the application of one of the three articles is analysed in isolation or whether all the three are analysed as a whole. One may note that the transition in both supreme jurisdictions has been rather rapid over a relatively short period of time. That may be explained by the fact that in both jurisdictions, the case law of the European Court of Human Rights has been afforded the status of a binding source of law, together with the European Convention on Human Rights, from the beginning despite that the Finnish legal system traditionally has relied on legislation. In that respect, the change in the legal culture should not be overemphasised. Instead, the technique of referring to that case law has changed over a period of ten years considerably and particularly some of the most recent judgments appear to mark a turn towards a dialogue. Thus, there appears to be an ongoing transition of the legal culture of protecting fundamental rights taking place. That change can be detected through the foregoing micro-comparison through discourse analysis, which indicates that in some decisions the European case law has been used as a stronger internal element of argumentation than in others. In those cases in which it has been given a particularly strong role, the style of reasoning is more elaborate and there are visible signs of transition even within the fragments of discourse. When compared with the earliest decisions with references to European case law, the more recent ones include more complex sentence structures, concepts, expressions and principles of interpretation borrowed from that case law⁹⁶⁷, and more elaborate application of principles of interpretation, particularly the principle of proportionality. Such signs can be detected in judgments under all the analysed provisions, Articles 6, 8 and 10, and the fact that these have gradually increased demonstrate a changing discourse. It is argued in this thesis that the changes in discourse reflect a strengthened protection of fundamental rights and human rights. Given the variation that there still is in the discourse of the supreme jurisdictions, one cannot exclude the fact that the stronger cases are largely dependent on the persons handling them. Nevertheless, the change in Finland is rapid and the numbers of national judgments with detailed reasoning by applying directly the human rights provisions have increased considerably, when compared with the period of time twenty years ago. Therefore, it is further argued that the transition in discourse reflects a transition of the legal culture. However, it seems that signs of constructive dialogue can mainly be seen in such decisions that involve the application of the principle of evolutive interpretation and a particularly wide context of argumentation. Those two linked together appear to bring the argumentation closer

967 Those include, in particular, autonomous concepts, expressions such as "necessary in democratic society", "pressing social need", "proportionate to the aim pursued" and "whether the interference was justified", as well as the principles of "evolutive interpretation" and "margin of appreciation".

to that of the European Court of Human Rights, and they also show preparedness of the Supreme Administrative Court towards a stronger transition of the legal culture of protecting fundamental rights and human rights.

5. Conclusions and recommendations

5.1 *Three phases of transition of the legal culture – existence of a third phase*

The present study is based on an assertion that there are three phases of transition of the legal culture of protecting fundamental rights and human rights, where the European Convention on Human Rights and the case law of the European Court of Human Rights constitutes the key elements. The first phase of transition of the legal culture of States parties to the European Convention on Human Rights emerged through the drafting of the Convention under the influence of negotiating States having their own traditions and cultures which have been brought under a common umbrella. Finland did not take part in the negotiations, but became part of this phase of transition later upon acceding to the Convention in 1990. A large part of the Convention was not foreign to the Finnish legal system, given that Finland had already earlier implemented the United Nations instruments protecting the same types of rights and some fundamental rights were included in the Finnish Constitution. However, the European Convention on Human Rights can be said to have influenced the drafting of the new provisions of the Constitution on fundamental rights considerably, although the debate had been launched somewhat earlier. The international developments in the field of protection of human rights created pressure to amend the rather outdated fundamental rights provisions. Furthermore, the implementation of the Convention together with the revised constitutional provisions increased the direct applicability of international human rights and thus strengthened their protection. That is part of the transition of the legal culture.

The second phase of transition of the legal culture of the States parties to the European Convention on Human Rights has taken place through the development of the language of the Convention in a wide sense, i.e. under the case law of the European Court of Human Rights. The States parties have transferred, by the Convention provisions, competence to interpret the Convention rights to this unique control mechanism, and the European Court of Human Rights has since its early years gradually developed the meaning given to those rights rather independently. That transition has not, however, taken place in isolation but the Court has treated the Convention as a living instrument, deriving also influence from the legal traditions of the States parties. Thus, the second phase of transition of the legal culture is based on some form of interaction between different legal cultures through the case law of the European Court of Human Rights.

The underlying presumption that the transition of the meaning of the Convention provisions through the Court's discourse has taken place rather independently, and has changed considerably from what the negotiating States perhaps had originally in mind, has been confirmed through the analysis of the Court's case law and principles of interpretation of the Convention.

The third and last phase of transition of the legal culture is, however, what takes place at the national level, under the impact of the case law of the European Court of Human Rights on national case law and legal culture. First, the case law of the European Court of Human Rights has the potential of affecting national legislation through its recommendations and, second, it has an impact on the way in which national jurisdictions use and interpret of sources of law. The real meaning of the Convention provisions and the case law of the European Court of Human Rights are determined by the extent to which they are *de facto* applied by the national courts. The underlying presumption of this thesis is that the third phase of transition of the national legal culture in Finland did not begin with the implementation of the Convention, but somewhat later as the national courts began to apply the European case law as a real source of law. However, the core argument is that the third phase of transition of the legal culture has begun as the Finnish supreme jurisdictions have begun to apply the European case law, and it has had a significant impact on the interpretation of sources of law by national courts, but it is far from having ended.

However, the transition of the legal culture is affected by various elements. It would be incorrect to assert that the transition of the Finnish legal culture in national courts under the impact of the case law of the European Court of Human Rights has taken place independently. Instead, there is an interplay of other factors, particularly other international human rights conventions, internationalisation of the legal system in general, Finland's membership of the European Union together with EU legislation and the case law of the European Court of Justice, necessary changes in national legislation and changes in the general attitude towards international sources of law *i.e.* increased receptiveness to their application and interpretation. In the following, an assessment is made of the interplay of those factors, in an effort to analyse the type of impact that the case law of the European Court of Human Rights has had compared with other factors. That analysis is made on the basis of the discourse of the national supreme jurisdictions, as analysed in the foregoing chapter. In the present thesis, the transition of the legal culture of protecting fundamental rights and human rights has only been addressed insofar as the legal framework and case law are concerned. Further research would be called for to draw conclusions of the change of legal culture as a whole. The transition of the legal culture cannot be complete unless the meaning of fundamental rights and human rights is understood by society as a whole, including all government authorities and legislative bodies.

5.1.1 First phase of transition of the legal culture

The assessment of the first phase of transition of the legal culture of protecting fundamental rights and human rights begins with an analysis of the constitutional traditions of four selected legal systems and elements that they share with the text of the European Convention on Human Rights. When analysing the developments of national constitutions in the United Kingdom, France, Germany and Sweden, and the international developments of protecting human rights, one may note that the impact of the Universal Declaration of Human Rights and the draft International Covenant on Human Rights on the European Convention on Human Rights has been the greatest. Those two international instruments were used as a model, and a large part of the provisions in the draft European Convention on Human Rights were directly taken from those instruments although they were subject to modifications based on amendments proposed by the negotiating States. The modifications made appear from the preparatory work of the Convention. Nor should the impact of individual states be over-emphasised for the reason that a large part was based on international examples, and compromises were made as regards the final result for the reason that the signing of the Convention was found urgent. Nevertheless, some elements can be traced back to the historical developments of constitutional rights in certain States parties, particularly France.

Although written constitutional texts appeared first in the English-speaking world, their contents in respect of the protection of human rights and fundamental freedoms were rather limited, serving mainly the purpose of guaranteeing the classical basic liberties of the man. Although the English delegation contributed actively to the discussions leading to the adoption of the European Convention on Human Rights, there are no significant English constitutional traditions that would have shaped the text. However, at least some indirect influence of those traditions can be identified, particularly as regards the fair trial elements – partly through the influence of the United States legal system, despite that the most clearly American elements were dropped out from the draft Convention. Also, the ideas of the equality and freedoms of thought, association and expression as well as the protection of property are all shared values of European states, which are visible in the text of the Convention. The French constitutional ideas share more in common with those of the modern ideas of protecting human rights, and are visible in both the Universal Declaration of Human Rights and the International Covenant on Human Rights as well as in the European Convention on Human Rights. The French constitutional traditions have also played a role in the form of indirect influence through other legal systems in general. Particularly the provisions of the French Declaration of Human Rights and citizen's rights which can be considered equivalents of modern ones on the prohibition of forced labour, the liberty and security of person, the principle of no punishment without law, the freedom of religion and thought, the

freedom of expression and the freedom of assembly, are among the elements visible in the text of the Convention. Some indirect influence of the French system can also be said to exist through the participation of other States that have followed the French traditions. For example, the constitutions of France and Belgium have considerable similarities. One can assert that the impact of the French constitutional traditions on the development of the text of the Convention has been considerably stronger than those of the other selected States subject to the present study, although not all elements of the French Declaration ended up in the Convention. One must remember, however, to also put the influence exercised by the English and French constitutional traditions and legal systems in a historical context. Both the United Kingdom and France were among the victors of World War II, and it can be said that in a way, the contents of the first international human rights instruments that emerged as a result of the atrocities of the war were imposed by the victors of war. A specific international convention was also drafted shortly after the European Convention on Human Rights to prevent genocide. Thus, the historical developments and particularly the aggravated crimes against humanity and other human rights violations during the war made it necessary to prevent them from happening again, which is reflected in the texts of all the relevant instruments, including the European Convention on Human Rights.

There are, however, some elements in common between the Convention and the constitutional traditions of the other selected legal systems. When looking at the text of the Convention, one may see clear similarities with the text of the German Basic Law, which was drafted during the same era. This can also be explained with the role played by the victors of war. The purpose of both was also to prevent the atrocities of the World War II from taking place again in Europe and the German actions during the war were a particular reason for it. The German history between the world wars is clearly the strongest reason explaining the efforts to reinforce the protection of human rights through international and European instruments but despite that, even the German constitutional traditions have had some influence as part of the common traditions and values. Those values were left aside during the wars. As was explained in the foregoing, the existing provisions of the German Basic Law are largely based on the basic rights provisions of the Weimar Constitution, which in turn had derived influence from the French and American constitutional traditions. Thus, the German constitutional traditions can also be said to have an indirect influence on the contents of the European Convention on Human Rights, as part of the common western constitutional ideas of protecting human rights. Those ideas have been brought elsewhere in Europe through religion and legal science. Furthermore, the German traditions of protecting property rights are visible in the first additional protocol to the Convention. When looked at from a historical perspective, the Swedish constitutional traditions do not appear to have that much in common with the Convention, but the Swedish legal system can rather be seen as a great beneficiary of the impact of the Convention.

Although there are no significant constitutional traditions in Sweden to the same extent as there are in France and Germany, the Swedish ideas and values are visible in the text of the Convention. The strongest Nordic traditions include the freedom of expression and the relatively strong protection of property rights, which tradition is also shared with Germany. Finland shares those traditions.

In connection with the presentation of the first phase of transition of the legal culture, it is concluded that the Finnish legal system has undergone significant changes as a result of the accession of Finland to the European Convention on Human Rights, although the legal culture began to evolve already somewhat earlier upon ratification of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Some of the legislative changes were made in connection with the ratification of the Convention, but it was necessary to introduce reservations to the Convention upon ratification. Thus, the transition of the legal culture as regards the technical requirements in the form of legislation took place gradually, continuing after the ratification. Also, it was considered necessary to also amend the constitutional law provisions on fundamental rights. That reform entered into force a few years after ratification of the Convention, making most of the provisions consistent with those of the Convention. As the provisions of the constitution on fundamental rights were harmonised with those of international human rights conventions, the language of international human rights law and that of the Constitution have considerable similarities, which has facilitated the transition. The fact that the Convention has explicitly been made part of the applicable law in Finland means that the first and foremost criterion for the receptiveness of the judiciary to the Convention principles and to the case law and argumentation of the European Court of Human Rights is met. The receptiveness of national jurisdictions to the new source of law was made stronger by the reform of the constitutional law provisions, and that impact was further strengthened through an overall reform of the Constitution a few years later. The debate on the need to reform the Constitution began, however, already prior to accession to the Convention, and the national courts had already gradually started to apply other international human rights conventions. At the outset, the Finnish legal system should, particularly upon the amendments, be well prepared to adapt itself to the new European elements. It also appears that the first phase of transition of the legal culture of protecting human rights in the Finnish legal system through the European Convention on Human Rights took place without major problems in the general attitudes, although the change has taken place gradually. At any rate, the simultaneous amendments to the Constitution removed potential problems of conflict with the Convention.

Although the traditional division into dualistic and monistic legal systems, as regards their relationship with international treaties, may be somewhat outdated, it does play a role in the direct applicability and real meaning of human rights provisions. When

compared with the English, French and Swedish legal systems, particularly the adoption of the practice of applying the European Convention on Human Rights has perhaps been even easier, considering also the relatively short period of time over which it has taken place. It is explained by the fact that the text of the Convention was made as such applicable law in Finland according to the implementing practice applied in Finland, whereas those three legal systems did not enact specific implementing legislation. The French legal system does not require one, but France ratified the Convention relatively late. It appears that the French courts have, even after ratification, been somewhat slower in applying the Convention and the case law of the European Court of Human Rights as sources of law. A deep-going analysis is, however, made difficult by the relatively brief style of judgments. In the absence of implementing legislation, the English and Swedish courts were for a long time reluctant to apply the provisions of the Convention as such. In the light of the study of source materials, it appears that there has been a clear change upon the enactment of specific legislation providing for the status of the Convention in the legal system. As a result, the English and Swedish supreme jurisdictions have gradually begun to apply the Convention and the case law of the European Court of Human Rights as sources of law.

As regards the German legal system, the situation is different as the enactment of the new Basic Law with profound provisions on fundamental rights took place at the same time with the drafting of the Convention, and the reasons behind both two are largely the same. Thus, the impact of the Convention on the German legal system is different in nature. In the light of source materials, it can be concluded that the German judiciary, particularly the Federal Constitutional Court, has been more active in applying the provisions of the national Constitution which in fact provides for at least an equivalent level of protection. The German legal system has faced less problems with compliance with the Convention, despite that the Federal Constitutional Court has begun to refer to the Convention and European case law in more detailed and refined manner relatively late. The Convention system has had an impact in Germany too, but it is particularly as a result of the second phase of transition of the legal culture i.e. through the case law of the European Court of Human Rights, which has also resulted in legislative amendments. Thus, strong constitutional traditions also play an important role in the legal culture of protecting fundamental rights and human rights.

In Finland, it appears that the national jurisdictions have been faster in adopting themselves to the practice of applying international human rights conventions as a source of law. That in turn means that the transition of the legal culture upon accession to international human rights conventions in Finland is clearer than in the selected other legal systems. The first phase of transition of the legal culture was slowed down to some extent by the reservation made by Finland upon acceding to the Convention. However, even the pressure to withdraw the reservation by means of amending procedural laws was an element influencing the transition of the legal culture of protecting

human rights and fundamental rights. The impact of the European Convention on Human Rights and the first phase of transition of the legal system can be considered dramatic, although the overall impact must be analysed in the light of all three phases of transition. Particularly impact of the Convention on the new constitutional provisions on fundamental rights and the amendments made to procedural laws, together with the impact of the judgments of the European Court of Human Rights finding a violation under Article 6 of the Convention, have resulted in a considerable change not only in formal protection but also in the general attitudes. In that respect, there is some overlap between the first and second phases of transition of the legal culture, as it is a continuous process from the accession to the Convention with reservations and amendments to national legislation to the enactment of a national remedy for delayed proceedings. Also, an explicit statement by the Constitutional Law Committee of Parliament to the effect that the provisions of the Constitution should be interpreted in a similar manner with those of the Convention is a strong element which has affected the national case law.

Thus, the first phase of transition of the legal culture is rather an interplay of the impact of the constitutional provisions and that of the Convention provisions. Those are difficult to assess separately, even in the light of national case law. It has also been an ongoing process starting with the influence of the United Nations instruments on the protection of human rights, which had already been applied for a while before Finland's accession to the European Convention on Human Rights. However, the constitutional rights reform and the European Convention increased the direct applicability of fundamental rights and human rights provisions in the national judiciary. Therefore, the impact of the European Convention on Human Rights on the first phase of transition of the legal culture of protecting fundamental rights and human rights can be said to be considerably stronger than that of other international instruments. Its impact is even stronger during the second and third phases of transition. The transition of the legal culture is not complete through amending the national legislation, but the Convention and other human rights instruments also need to be applied by the courts, including the European case law relating to them. The application of the European Convention and the relevant case law has increased gradually, and through the second and third phases of transition of the legal culture, it has become more detailed and refined.

5.1.2 Second phase of transition of the legal culture

The underlying presumption concerning the second phase of transition of the legal culture is confirmed through the analysis of the discourse of the European Court of Human Rights. The meaning of the Convention provisions has developed considerably through the Court's case law. In general, the European Court of Human Rights has developed the meaning of the provisions independently, although the influence of common legal traditions of the States parties to the Convention is visible in the

Court's discourse. The Court does not always consistently refer to the common traditions, e.g. by means of comparison, but that influence is evident through the numerous complaints against States parties, which lead to a judgment finding a violation of the Convention provisions. Judgments finding a violation have perhaps stronger influence on the development of the Convention provisions in that they potentially have a stronger impact on the way in which national jurisdictions apply and interpret the Convention, as the national authorities are forced to react on the judgment. That does not, however, remove the impact that positive judgments have in that they reaffirm the intended meaning or provide guidance for unclear situations. Apart from the impact of the complaints on the case law and discourse of the European Court of Human Rights, there are other factors affecting them, particularly the principles of interpretation of international conventions and various sources of law. Furthermore, the style of the Court's discourse derives elements from the legal traditions and legal systems that its judges represent. The personal capacities and backgrounds of judges play a role in the shaping of the case law. Further, it is determined by the national cases that the applicants take to the Court. The fact that the transition of legal culture in some groups of cases is stronger than in others is largely dependent on the nature of national problems behind them.

As regards the further development of the Convention provisions under the case law of the European Court of Human Rights, one may note that there is a particularly extensive case law from the English and French legal systems, when compared with Germany, Sweden and Finland. Given the considerably larger numbers of cases from the United Kingdom and France, the judgments issued against those countries can be said to have a stronger impact on the development of the interpretation of the Convention. In some fields, particularly in the field of liberty and security of person and freedom of expression, the English cases have served as important precedents. The French case law has significantly contributed to the development of case law under other articles, particularly to the development of the concept of civil rights under Article 6, paragraph 1. The Finnish legal system can be said to have benefited from that case law as the same types of problems would have probably been faced without the major issues being resolved in prior case law. Although individual applications address particular problems of interference with the rights guaranteed by the Convention, the judgments of the European Court of Human Rights may later have more general importance at the national level. The number of cases from Germany and Sweden has been relatively low, although there have been repetitive cases under some of the Convention provisions. The Swedish cases have, in particular, contributed to the development of the concept of civil rights under Article 6, paragraph 1, and the German cases to the concepts of the security and liberty of person under Article 5, paragraph 1. Compared with the United Kingdom and France, the share of Finnish cases is not huge, but it is large compared with Sweden and Germany, taking into ac-

count the size of the population. Nevertheless, there are some significant judgments issued by the Grand Chamber of the European Court of Human Rights that can be classified among important precedents contributing to the interpretation, particularly under Articles 8 and 10, but also Article 6.

As regards the principles of interpretation, one may note that the general principles of interpretation of treaties under the Vienna Convention on the Law of Treaties have clearly been the basis for the interpretation of the European Convention on Human Rights by the European Court of Human Rights. Of those principles, the Court has consistently relied on both the ordinary meaning to be given to the terms of the treaty and the objective and purpose of the Convention. The latter, that entails the idea of effective implementation of the rights included in the Convention, is a principle of interpretation that has perhaps been the most clearly visible one in the case law, and in practice affects all interpretation of the Convention. However, as regards the development of the meaning of individual Convention rights, certain principles of interpretation can be identified as having stronger influence than others. Various signs of change of the legal culture of protecting fundamental rights and human rights can be identified in the Court's discourse through the application of those principles, but the clearest ones relate to the principles of effective interpretation, dynamic or evolutive interpretation and autonomous interpretation. The principle of effectiveness is closely related to that of positive obligations. Those principles are, in the light of the Court's discourse, clearly among those that provide most potential for strengthening the protection of fundamental rights and human rights to the extent of constituting a transition of legal culture. This is visible e.g. in cases concerning the obligation of national authorities to protect the health and life through active measures and in cases concerning the obligation of the state to actively prevent torture.

As regards the principles of effectiveness and dynamic interpretation, the Court has consistently held that the Convention is a living instrument that needs to be interpreted according to the prevailing conditions at a given moment. The influence of those principles can be clearly identified in the interpretation of such provisions that typically involve the balancing of conflicting interests or protection of morals in changing society. The analysis of the Court's discourse also indicates that in such cases, the Court often explicitly refers to the Convention as a living instrument and this may be done by means of different linguistic expressions. The development of interpretation can be seen particularly clearly in the case law concerning the rights of homosexuals and transsexuals, which has been analysed as an example in the present thesis. On the one hand, the Court has afforded the national authorities a certain margin of appreciation to decide on the issue of marriage. On the other hand, the Court has gone rather far in recognising the changes in society, particularly through development of medicine and technology, and the need to ensure the enjoyment of private and family life. The principle of dynamic or evolutive interpretation is perhaps the clearest example of

principles of interpretation that provide signs of transition of the legal culture, given the explicit discourse of the Court. Such signs consist of various linguistic expressions. The principle of dynamic or evolutive interpretation has had a rather modest impact on the Finnish legal system, although in a number of rather recent cases the supreme jurisdictions have referred to it, and have recognised the fact that there is a transition of legal situation.

However, in most cases the Finnish judiciary appears to apply the principle of proportionality which is not as such a very good example of situations involving a transition of legal culture. Instead, the legal protection appears to be rather static. In the case of the freedom of expression, which has proved to be particularly challenging for the Finnish legal system, the balancing of conflicting interests appears to be made particularly clearly through the application of the principle of proportionality both in European case law and in the national case law. This perhaps explains why the argumentation of the national supreme jurisdictions has begun to develop particularly through this group of cases. Although at the European level the principle of proportionality alone does not as such very clearly indicate transition of the legal culture, an increasing resorting to that principle with careful balancing of interests is already a sign of such change at the national level. Apart from freedom of expression cases, other examples could be identified from a Finnish perspective where the protection of rights has been strengthened as a result of case law, particularly child protection cases. Those cases also represent situations where the national courts frequently resort to the balancing of conflicting interests. The elements of discourse of the European Court of Human Rights appear to be rather consistent when applying the principle of proportionality, which perhaps makes it easier for national courts to adopt.

Signs of changes of the legal culture may also be attached to individual terms or concepts used in the text of the Convention. In that case, the transition of the legal culture is rather seen through the expanding scope of application of the relevant provision. The specific concepts analysed include those of civil rights and obligations and criminal charge under Article 6, paragraph 1, and those of liberty and security of person and lawful arrest or detention under Article 5, paragraph 1. The meaning of those concepts has developed through the case law of the European Court of Human Rights to a considerable extent, and the Court has given them an autonomous meaning that differs considerably from what the States parties have perhaps had in mind. The expression “autonomous meaning” is also as such an element indicating transition of the legal culture. It is also concluded that particularly those provisions and concepts have the potential of creating challenges for the national legal systems in the application and interpretation of the Convention. It was also concluded that problems have been faced with one or more of them by all the five States covered by the present study. As regards the Finnish legal systems, the concept of civil rights would have potentially been problematic, but due to the late moment of accession to the Convention it was

known and bigger problems were avoided. However, challenges have been later faced with the concept of criminal charge. This is a problem shared by all the five legal systems compared in the present thesis, albeit for differing reasons. In Finland, those problems have been related particularly to the possibility of imposing both a criminal law sanction and an administrative sanction under taxation procedures. Otherwise, no major conceptual problems have emerged although in the light of the problems faced by the other legal systems, there could have been potential for similar problems in the application of Article 5. Furthermore, not all the principles and rules of interpretation developed by the Court are traditionally part of national legal systems or cultures but have introduced new perspectives of argumentation. The overall conclusion is that the influence of the principles of interpretation of treaties on the development of the Court's discourse and the transition of the legal culture of protecting fundamental rights and human rights has been strong, perhaps equally strong as that of the problems presented in the complaints against States parties. It is clearly stronger than that of national traditions on the interpretation of law.

As regards the influence of national legal languages and judicial styles, one may note that the judicial style of the European Court of Human Rights has also developed rather independently from the national ones. The influence of the French judicial style could be clearly seen in the first judgments issued by the European Court of Human Rights for the reason that they were written in French, but after a few judgments the Court's style of writing judgments changed dramatically as English gradually became the most usual original language of judgments. The style of those subsequent judgments cannot be clearly attached to a single legal system, but the Court has rather developed its own style of discourse. The system of precedents applied by the European Court of Human Rights is perhaps closer to the Nordic and German ones than the English one despite that at the national level, precedents as a source of law have the strongest status in the English one. Thus, such systems have potentially a stronger impact particularly on the use of sources of law and principles of interpretation by the Court, also as regards the elements limiting discourse.

The English legal language naturally affects the discourse of the European Court of Human Rights by both setting limits as regards the structure and terminology, but also giving considerable liberties that are peculiar to the flexible nature of the English legal language when compared with the French one. However, the structure of English judgments is considerably different from that of the European Court of Human Rights. Further, given that the European Convention on Human Rights is authentic in both English and French, the Court has on occasion resorted to comparing them and thereby both languages have an impact on the interpretation of the Convention. Also, both legal languages have common roots in the Latin language, before they started to develop to their own directions. The influence of Roman law and Latin can also be seen in the German, Swedish and Finnish legal systems, which is a unifying

factor that facilitates the receptiveness to the case law of the European Court of Human Rights. It is also a factor facilitating a uniform interpretation of key concepts used in the Convention and case law. However, receptiveness to judicial discourse is largely affected by how convincing it is. The more convincing supporting arguments a court uses, the better is its reception by the audience. One may note that in general, the discourse of the European Court of Human Rights is convincing, and its case law has had a significant impact in various legal systems.

The case law of the European Court of Human Rights and its impact on national jurisdictions, particularly where the case law has led to legislative amendments, gives reason to conclude that a significant transition of the legal culture has taken place through the interpretation of law. Finland's accession to the European Convention on Human Rights has led to significant changes in procedural laws and thus to a rather dramatic change also in the culture of protecting fair trial rights. Upon those amendments, it was possible to withdraw the original reservations made to the Convention. Although there were still no violations found against Finland in cases concerning impartiality of judges, the Supreme Court paid attention to the lack of national provisions of law on that particular aspect of a fair trial. It has been recognised, in particular, in early judgments of the Supreme Court in which the Supreme Court assessed the question of impartiality directly in the light of the case law of the European Court of Human Rights. The need to provide for explicit rules in national legislation, to supplement the provisions of the Constitution, was addressed by means of enacting new provisions of law⁹⁶⁸. It was recognised in the proposal to amend the legislation that the outdated provisions of law had become even more problematic for the reason that the impartiality of judges is assessed also in the light of the European Convention on Human Rights, and it was therefore necessary to amend them to make them better meet present-day requirements.

Thus, the transition of the legal culture in the form of strengthened fair trial rights has continued on the basis of the case law of the European Court of Human Rights, and in the Finnish legal system that transition began already in the light of case law concerning other States parties to the Convention. Furthermore, the repeated judgments against Finland concerning delays in national proceedings finally resulted in the enactment of a national act providing for remedies in the case of delays⁹⁶⁹. That enactment is to a

968 HE 78/2000 vp. The Government proposal takes into account the requirements of the European Convention on Human Rights and the case law of the European Court of Human Rights in detail in the assessment of the situation.

969 HE 233/2008 vp, introducing amendments to four acts of Parliament, including the Administrative Court Proceedings Act, and enacting a new Act on remedying delays in court proceedings. The latter applies to civil and criminal law proceedings. The case law of the European Court of Human Rights, particularly the repeated judgments against Finland were extensively taken into account.

large extent based on the recommendation of the European Court of Human Rights, which repeatedly has held that the remedies existing under the earlier provisions, e.g. in the form of less strict punishment in criminal proceedings, were not sufficient. The purpose of the amendments was to provide more effective legal remedies in the form of a possibility to require urgent handling or financial compensation, without having to take the case to the European Court of Human Rights. The new remedies were also considered to have a preventive effect against delays in proceedings.

There are also other legislative changes based on the recommendations of the European Court of Human Rights, as referred to in section 4.3 above, although some of them are partly due to the recommendations made by other international monitoring bodies. In particular, the need to carry out an overall revision of the Child Welfare Act was assessed largely on the basis of international developments, including the International Convention on the Rights of the Child and the European Convention on Human Rights as well as the case law of the European Court of Human Rights. Further, a later amendment to mental health legislation is directly based on a judgment against Finland. Furthermore, the more recent debate on the need to amend the Marriage Act, which finally lead to a proposal by the people to that effect, as well as an ongoing debate on the rights of transsexuals are an example of how the constant case law of the European Court of Human Rights may have an indirect effect on the transition of the legal culture despite that the Court does not impose any changes. In that particular case, also other changes in society and general attitudes have played a role, although it is difficult to assess the proportion of the population in favour. Thus, the case law of the European Court of Human Rights may have both a direct and indirect effect on the national legal culture, on occasion together with other international developments or development of society in general. In Finland, the case law of the European Court of Human Rights has had a significant impact on strengthened protection of fundamental rights and human rights, and thus a transition of the legal culture under that case law clearly exists. As regards the transition of the legal culture through national case law, however, it has continued through the third phase of transition suggested in this thesis.

5.1.3 Third phase of transition of the legal culture

Apart from changes to legislation on the recommendation of the European Court of Human Rights, it is possible that the national supreme jurisdictions issue recommendations to Parliament on amending national legislation in the light of the requirements of the European Convention on Human Rights. Such a change has taken place as regards the aforementioned question of impartiality of judges in the light of the case law of the European Court of Human Rights under Article 6 of the Convention. Both supreme jurisdictions have drawn attention to the lack of national provisions in the Constitution or other legislation, when applying directly the criteria set out in the

case law of the European Court of Human Rights. That provides the clearest example of a change in the legal culture of protecting fair trial rights on the basis of national case law, but it is also an established practice that the supreme jurisdictions provide opinions on legislative proposals affecting the judiciary. However, strongest impact of the Convention through national judgments is the effects of the case law of the European Court of Human Rights on the discourse of supreme jurisdictions, i.e. on the way in which they apply and interpret the said case law, as well as further impact on the protection of the rights of the parties to individual cases.

For the change in the discourse of the national judiciary it is necessary that the national courts are receptive to the argumentation and discourse of the European Court of Human Rights. It is concluded that such receptiveness requires, first, that certain general criteria are met. As technical criteria, it is necessary that the Convention is part of applicable law at the national level and that the courts are able to apply the case law of the European Court of Human Rights as a source of law. It is also necessary that international case law is accepted as a binding source of law in the national legal system, for the national courts to be receptive to the language of the Convention, particularly for the reason that the European Court of Human Rights has constantly developed the meaning of the Convention provisions through the case law. However, those two criteria alone are not sufficient, but an efficient application of that case law also involves understanding and application of the principles of interpretation used by the Court and a general acceptance and internalisation of the Court's discourse, i.e. it must be found authoritative and legitimate. For that to be possible, the language used in the Convention and the Court's case law should not be too foreign, including individual concepts, and a certain degree of convincingness is also required from the Court's discourse. Further, even knowledge and skills of individual judges play a role.

It is concluded that the Finnish legal system meets the basic criteria for receiving and applying international law, including the European Convention on Human Rights. Particularly the practice of separately implementing international treaties by means of making them directly applicable national law allows the national judiciary to apply the Convention provisions in the same way as any other provisions of law. Until the 1990s, there were hardly any traditions of applying fundamental rights and human rights provisions directly by the courts, but their direct applicability has been improved by the reform of the provisions of the Constitution. Although the Finnish legal system has traditionally relied on written legislation, it appears from the analysis of judgments of the supreme jurisdictions that there are no problems of using precedents as a source of law. The supreme jurisdictions also refer to their own prior case law and it appears that in case there is reason to deviate from prior precedents, the reasons are explicitly stated. It is worth noting that in strictly formal terms, the judgments of the supreme jurisdictions have not traditionally been considered precedents in the same sense as in the English legal system. However, the supreme jurisdictions

have themselves given certain judgments precedential value, in which case they have been published. Even today, not all judgments are published. As regards judgments relating to the application of the case law of European Court of Human Rights, the Supreme Court tends to publish most judgments. The situation is somewhat different in the Supreme Administrative Court for the reason that the numbers of judgments are greater. Despite that, it seems that those judgments that include new types of a legal situation or exceptionally profound reasoning with regard to the European case law are published.

Traditionally, the references to case law have been rather brief and mechanical, and the conclusions of judgments are still rather based on the provisions of national legislation more often than on prior case law. This strongly legalistic tradition is still visible in the majority of judgments with references to the case law of the European Court of Human Rights, and also explains that the numbers of such references began to increase gradually. The same concerns explicit references to the principles of interpretation applied by the European Court of Human Rights in national judgments. It seems that at the same time as the references have increased in number, the national supreme jurisdictions have also in general begun to apply a wider range of sources of law, including international and national sources as well as principles of interpretation of law. Today the supreme jurisdictions and also lower ones apply both national case law and international case law. However, the case law of the European Court of Human Rights has clearly been given the status of a binding source of law as of the first cases with such references and it is often applied on an equal standing with legislation. This might be a factor behind the relatively rapid change of legal culture within a rather short time when compared with the other states covered by the present thesis, although a general acceptance of the legitimacy of that case law also plays a role. However, the application of international case law has become frequent and systematic rather late, which is explained by the aforementioned fact that the Finnish judiciary has not traditionally applied a practice of precedents. Thus, although the possibility of applying case law as a source of law has existed for a long time, international case law has become a systematic source of law rather recently. That appears to coincide with the emergence of the case law of the European Court of Human Rights as a source of law. Nevertheless, the fact that the Supreme Court and the Supreme Administrative Court frequently apply it means that in principle, the national judiciary is receptive to the case law of the European Court of Human Rights. In general, the case law of the European Court of Human Rights has been recognised as a binding source of law and consequently as a clearly internal element of argumentation from the beginning.

There is no major difference in the technique of referring to national precedents and the case law of the European Court of Human Rights. That recognition may be the strongest reason explaining why the change in the transition of the legal culture with regard to the European case law has taken place more rapidly in Finland than in

the selected other legal systems. One should also note that the system of precedents applied by the Finnish judiciary is a flexible one, which makes it easier to adapt to new sources of law. The general attitude of judges and their knowledge of the Convention and the relevant case law play a role. As regards the nature of the references to the European case law in general, one may note that there is a rather dramatic change between the early rather mechanic references and the more recent references with detailed argumentation. A more detailed, profound and refined argumentation is as such a sign of a changing legal culture. However, as given account of in section 4.1.3, the Court's discourse i.e. the surface structure of law does not necessarily tell the whole truth about the prevailing conditions of society, as it may change more rapidly than the deep structures of law i.e. the common ideas of how the law should be understood. In such a case, there is still no profound change in the legal culture. On occasion, the contrary is possible and the general ideas change more rapidly than the discourse (legislation or judgments). That entails a risk that the judgments are not foreseeable.

Furthermore, there do not appear any major conceptual problems with regard to the Convention provisions despite the autonomous meaning given to certain concepts used in the text of the Convention. The Finnish supreme jurisdictions have on occasion referred to those concepts in their judgments, although it is rather rare. In those cases where they have been referred to, the judgments include rather detailed references to criteria set out in the European case law. However, the autonomous concepts of the Convention have had an impact on the Finnish legal culture particularly as regards the protection of the rights of civil servants and the principle of *ne bis in idem* in taxation procedures. That transition of culture is still ongoing. The transition started already on the basis of prior case law upon accession to the Convention, particularly concerning Sweden, which was taken into account even in the Finnish translation of the European Convention on Human Rights, which helped avoid major problems with the civil law sphere of Article 6, paragraph 1. However, new concepts have emerged in the judgments of the supreme jurisdictions as a result of the European case law, such as "autonomous meaning".

The overall presumption concerning the third phase of transition of the legal culture can be confirmed. The transition of the legal culture of protecting fundamental rights and human rights in the Finnish legal system has continued through the application of the case law of the European Court of Human Rights by the national supreme jurisdictions. The references made by the Supreme Court and the Supreme Administrative Court to the case law of the European Court of Human Rights have considerably increased in the past ten years and in the past few years they have become more detailed and analytical. However, it is still not an established practice to systematically resort to profound analysis of the case law, but there are still a large number or recent examples of rather mechanical or brief references. Furthermore, it is extremely rare to resort to such analytical discourse that would be close to that of the European

Court of Human Rights. Thus, one may conclude that as regards the recognition of the European case law as a binding source of law, the change in the national practice was almost immediate. Therefore, the overall impact of that case law on the change of legal culture should not be overemphasised in view of the simultaneous appearance of more constant references to the constitutional provisions on fundamental rights, and considering the impact of other forms of internationalisation of the legal system. It also seems that the development of the application of the case law of the European Court of Justice has taken place at the same time, and approximately at the same pace. That case law, particularly due to the system of binding preliminary rulings, can be assessed to have had an important impact on the general attitudes of the judiciary. Instead, although the more profound change has taken place more slowly, the increasing analytical references to the case law and preparedness to develop national application and interpretation of law through the discourse of the European Court of Human Rights represents an ongoing transition of the legal culture of protecting fundamental rights and human rights.

The impact of the case law of the European Court of Human Rights, and perhaps the most influential element of transition of the legal culture, is the change it has brought about in the general attitudes of the judiciary towards European sources of law and international sources in general. The increased references to the case law of the European Court of Human Rights, and other international sources of law, imposes requirements on the judges themselves, including knowledge and profound understanding of those sources of law and personal skills to apply them, as well as willingness to apply them in a detailed manner. The purpose of this study has also been to carry out the analysis further by examining in which way the national courts apply the case law of the European Court of Human Rights, to assess how receptive they are in reality to the argumentation of the European Court of Human Rights and to see at what stage of transition of the legal culture the Finnish judiciary is. Mere implementation and application is not sufficient for a complete transition. It is concluded in the foregoing that not all the principles of interpretation of the Convention used by the European Court of Human Rights are traditionally used by the Finnish judiciary. However, principles of law are an acceptable source of law and they have gradually become an inherent part of the interpretation of law. Particularly the principle of proportionality, which is widely established in the Nordic legal systems, and the so-called principle of human rights friendly interpretation of law have made it possible for the national courts to adapt to the new elements in the legal system. However, as has been pointed out by numerous scholars, some of the principles or rules of interpretation of the European Court of Human Rights, particularly the principle of autonomous meaning and the principle of evolutive or dynamic interpretation have the potential of posing problems for national legal systems. An analysis of the case law of the Supreme Court and the Supreme Administrative Court proves that this is the case also in the Finnish legal system.

The Finnish supreme jurisdictions do not frequently resort to applying the principles of interpretation used by the European Court of Human Rights, and when they do so, the relevant principle is most often the principle of proportionality which has existed in the Finnish legal system already earlier. Thus, the traditional methods of interpretation as explained in section 4.1.4.2 are still visible in the way the supreme jurisdictions apply the law. Particularly the Supreme Administrative Court occasionally applies the principle of proportionality, often together with the margin of appreciation which is foreign to most States parties to the Convention, but it is not necessarily a recommended practice or it should be applied with caution. There are extremely rare examples of cases where other principles of interpretation have been explicitly applied. Even the principle of object and purpose of the Convention (teleological interpretation) is only seldom, even less often than in Sweden. Furthermore, the approach of the Finnish supreme jurisdictions to the application of the principles of interpretation of the Convention is, generally, not very analytical. Thus, one conclusion drawn in the present thesis is that there is still improvement to be made in the receptiveness of the national judiciary to the argumentation of the European Court of Human Rights. There are no major problems of interpretation identified in the judgments of the supreme jurisdictions, but rather numerous violations found against Finland in cases concerning the freedom of expression prove that the balancing of conflicting interests under the Convention provisions has been a challenge for national jurisdictions. Those judgments finding a violation have had a rather strong impact on the culture of protecting the freedom of expression, and in the more recent decisions of the Supreme Court a more detailed balancing of interests can already be seen. Those judgments appear to have also had a deeper going impact on the nature of discourse of the Finnish supreme jurisdictions. Equally detailed judgments can be found in other situations involving the protection of private life particularly in the Supreme Administrative Court. A similar trend can be seen in the decisions of the two supreme jurisdictions on the application of the principle of *ne bis in idem* in the field of taxation procedures. Although the judgments against Finland under that principle are rare, they appear to have been well received and they have also been applied *ex analogi* to other similar situations in other fields of law.

Another observation to support the aforementioned conclusion is that the discourse of the Finnish supreme jurisdictions, when compared with that of the European Court of Human Rights, shows that the treatment of the case law of the European Court of Human Rights is also in other respects less detailed and analytical. It is sometimes difficult to see in which way it has been applied to the concrete situation at hand. Thus, an overall conclusion is that the Supreme Court and the Supreme Administrative Court have clearly improved their receptiveness to the argumentation of the European Court of Human Rights through more frequent resorting to detailed references, but the approach to the analysis of that case law is not very transparent. Therefore, it is often difficult to state whether it is applied in a coherent manner and by using the

same principles as are used by the European Court of Human Rights. The assertion made in this thesis is that the national courts are receptive, and there do not appear to be major problems in the application of the case law, but the national judiciary is still in the process of internalising the style of argumentation or discourse of the European Court of Human Rights. It is, nevertheless, found authoritative and legitimate. Thus, the third phase of transition of the legal culture in respect of the principles of interpretation of the Convention is still pending.

5.2 Impact of methods of interpretation

Insofar as the methods of interpretation of law are concerned, it is observed in the foregoing that all the five legal systems place considerable weight on the principle of literal interpretation. The literal interpretation is also clearly visible in the judgments of the Finnish supreme jurisdictions. This has the potential of creating problems with regard to the receptiveness of the national judiciary to the argumentation of the European Court of Human Rights. It also makes the transition of the legal culture of protecting human rights and fundamental rights slower. Alexy & Dreier identify three types of problems related to literal interpretation. First, the interplay of technical and colloquial terminology may provide problems. Technical terminology means the legal language itself, and its use is strictest in the field of criminal law. The use of colloquial terminology refers to the ordinary meaning of words. It is interesting to note that particular emphasis on the ordinary meaning of words is given in the interpretation of fundamental rights provisions. Second, Alexy & Dreier recognise that there may be a difference in meaning of terms between their use at the time of enactment and their use at the moment of interpretation. Third, the most important problem of semiotic interpretation is the problem of recognising the limits of the meaning of a word.⁹⁷⁰ Kommers correctly points out that the plain meaning of words is not the same as literal meaning.⁹⁷¹ When compared with the European Court of Human Rights, it may be noted that it has also repeatedly referred to the ordinary meaning of words, but as explained in the foregoing, the text of the Convention contains several terms in respect of which it does not apply but the Court has given them an autonomous meaning. Furthermore, the European Court of Human Rights treats the Convention as a living instrument, which makes the rather static literal interpretation in some situations problematic.

Thus, the receptiveness of a national legal system to the argumentation of the European Court of Human Rights would appear to be dependent on to what extent

970 For details, see Alexy & Dreier 1991 (1998), p. 83-85.

971 Kommers 2006, p. 197.

the national legal system is prepared to apply a flexible approach and a teleological, or dynamic, interpretation of law. However, it is observed in section 4.1.4.3 that the courts appear to have a more open approach to the interpretation of constitutional rights. Despite the differences between private law systems and common law systems given account of in the foregoing, they both seem to recognise the possibility of teleological interpretation of law i.e. the principle of the object and purpose of the law in cases of unclear wording, albeit the techniques may be different. In the classical sense, the purpose of the teleological interpretation of law is to establish the intention of the legislator⁹⁷². In the case of treaties, it is the intention of the drafters i.e. the parties to the treaty that is to be established. The European Court of Human Rights has gone further than this. Furthermore, as explained by Peczenik among others, according to the classical view on the methods of interpretation of law, teleological interpretation would be the last resort when no answer is given by the priority methods⁹⁷³. This approach seems to have been the dominating one in the Finnish and Swedish legal systems as well as in the French one, whereas the German legal system has been more receptive to teleological interpretation. According to Strömholm, the traditionally careful approach to the teleological method is largely due to the awareness of risks that subjective and value-oriented methods entail as in the absence of clear provisions, some subjective interpretation is always called for. Thus, priority is rather given to additional means of interpretation such as preparatory work.⁹⁷⁴ The careful approach with regard to teleological interpretation may also be explained by the difficulties that there are involved in the establishment of the purpose of the provision of law, as explained in more detail by Klami. For that reason, in the view of Klami, for example precedents would constitute stronger grounds for a certain decision.⁹⁷⁵

In the case of the European Court of Human Rights, to the contrary, the object and purpose of the Convention has been perhaps the most influential principle of interpretation and it is particularly the teleological method that appears to play the most significant role, although the Court constantly refers back to its own prior case law. The European Court of Human Rights techniques that essentially differ from those of common law traditions as well as from the Scandinavian ones, despite that the English legal system has long traditions of applying case law which is a feature in common with the European Court of Human Rights. The other legal systems covered by the present study have only gradually increased the application of case law as a source of law. The application of the teleological method by the European Court of Human Rights imposes a challenge to the judiciaries of the States parties to the Convention.

972 Peczenik 1990, p. 201.

973 Peczenik 1990, p. 202. See also Strömholm 1996, p. 493, who refers to the teleological method as a radical one.

974 For details, see Strömholm 1996, p. 493-497.

975 Klami 1997, p. 153 and 154.

The German Constitutional Court appears to have applied the most flexible approach to the principles of interpretation of law of the national supreme jurisdictions, and it may be one factor together with the effective national control mechanism in explaining the relatively low number of violations found against Germany by the European Court of Human Rights. Both the English and Finnish courts, particularly the United Kingdom Supreme Court and the Supreme Court of Finland, appear to be moving towards a more flexible approach to the methods of interpretation. In both cases, it appears to be the presence of international elements and particularly the European Convention on Human Rights that has paved the way for such a move, although the process in the two legal systems has been different. In Finland, there is no clear impact on situations other than those parts of judgments where the Convention or European case law is referred to. In judgments involving the interpretation of fundamental rights and human rights, even examples of changing style of discourse may be detected. Thus, the present national case law is in a way a combination of traditional legalistic style and more open style of constitutional rights argumentation.

The receptiveness of a legal system to the argumentation of the Court is also dependent on factors other than the application of similar methods of interpretation of law, going deeper in the roots of the legal system. The discourse analysis of judgments of the supreme jurisdictions of Finland indicates, in the same way as in the case law of the European Court of Human Rights, that there are clearer signs of a transition of the legal culture in those judgments where they resort to the principle of evolutive or dynamic interpretation instead of the principle of proportionality. In other judgments, it is rather difficult to identify except over a longer period of time. They rather represent a clear demonstration of understanding of the provisions of the Convention as they are interpreted by the European Court of Human Rights at the moment of issuing the national judgment. Thus, it is concluded that there is an ongoing transition of the legal culture but given the limited number of advanced application of a larger variety of principles of interpretation, it is still not extremely profound despite the rather strong status given to the case law of the European Court of Human Rights. This could also be partly explained by the personal capacities of individual judges.

5.3 Impact of other factors

The aim of the present study has been, first, to assess how the meaning of the provisions of the European Convention on Human Rights has been expanded under the case law of the European Court of Human Rights. Second, the impact of the Convention and the legal argumentation of the European Court of Human Rights on the legal culture and legal discourse of the supreme jurisdictions in Finland has been assessed, as well as its conceptualisation and understanding by the judiciary, in comparison

with certain reference states. It has been found that the impact is dramatic and there is an ongoing transition of the legal culture, albeit it is still not extremely profound if looked at in the light of judicial discourse. However, this has not happened in isolation from the other elements. Another factor to be kept in mind, apart from the legal and linguistic factors, is the impact of changes in political and social views. The present study is limited to the assessment of a transition of the legal culture of protecting fundamental rights and human rights within the legal framework and case law, but the legal culture as a whole is a wider concept. For the transition of a legal culture to be complete, it is necessary that the importance and real meaning of fundamental rights and human rights is understood and recognised by other actors of society. Those include, in particular, the government authorities applying the provisions of the Constitution and international conventions as well as the legislature and the government bodies preparing the legislation and official policies. Correct understanding of fundamental rights and human rights does not mean that interferences are not possible, but that in the preparation of measures constituting lawful interferences, a proper balancing of conflicting interests must be made by the authorities responsible for those measures. The measures of authorities are, however, subject to judicial control. Thus, the decisions of the supreme jurisdictions reflect the nature of problems that there are in the understanding of fundamental rights and human rights in society. Therefore, it is of importance to pay attention to the quality of judicial control to ensure legal remedies in those situations where the interferences with the enjoyment of protection of rights have exceeded the acceptable limits.

For the transition in the human rights culture in Finland to be possible in the first place, it was necessary that certain changes took place in political settings – the development started as early as with Finland's accession to the European Free Trade Area and European Economic Area. Those changes in the general political atmosphere lead to the Europeanisation of the legal system in general, which has been made even stronger by Finland's accession to the European Union. This took place only a few years later after the accession to the European Convention on Human Rights. It is observed in the foregoing that the application of EU law and of the case law of the European Court of Justice as sources of law has appeared approximately at the same time with the European Convention on Human Rights and the case law of the European Court of Human Rights. When assessing the way in which they have been applied, and in some judgments both have been applied simultaneously even to the same legal questions, it is difficult to say which case law has had the strongest impact on the legal culture in general. In the light of judicial discourse, there is some degree of interplay identifiable in the application of the case law of the two European courts. However, both sets of case law have relevance in different fields of law, and as regards the culture of protecting fundamental rights, it is the case law of the European Court of Human Rights that has had a dramatic impact despite that there are provisions

on fundamental rights in EU law and the European Court of Justice has developed their interpretation through its own case law too. Thus, the assertion made by most scholars, in all States covered by the present study, is that the increased application of the case law of the European Court of Justice goes hand in hand with that of the European Court of Human Rights. That is confirmed by the case law of the Finnish judiciary. However, in some respects the impact of the case law of the European Court of Human Rights can be said to be more impressive, although the law of the European Union and the case law of the European Court of Justice are more binding with their supranational aspects. There are some challenges ahead as the European Union accedes to the European Convention on Human Rights, as the two bodies of case law need to be reconciled and it is necessary for national courts to be receptive to the argumentation of both European Courts. However, both European courts already refer to the case law of one another, and both sets of case law are applied by the Finnish supreme jurisdictions without major problems. That should make the adaptation easier. It is presumed that there will be a further transition of legal culture at the European level, which should further affect the national one at least to some extent. Some further analysis is presented in the following section.

The increased application of the case law of the European Court of Human Rights is also linked with the increased attention paid to human rights and fundamental rights in general, including ratification of a good number of international human rights instruments and the reform of the Constitution. The transition of the legal culture began already with the ratification and increased application of those instruments and particularly the International Covenant on Civil and Political Rights. Already prior to Finland's accession to the European Convention on Human Rights there were examples of references to that Covenant. However, the references to the human rights instruments have become more numerous along with the emergence of the case law of the European Court of Human Rights as a source of law. Despite that, considering that the fundamental rights provisions of the Constitution were reformed a few years after accession to the European Convention on Human Rights, and that the application of the European case law began to increase around that time, it would on the one hand be correct to assert that the new constitutional provisions on fundamental rights, providing for the same types of rights largely with the same contents, gave a strong impetus to apply the European case law. The decisions of the Finnish supreme jurisdictions clearly indicate that it is an established practice to refer to both the Constitution and the Convention. On the other hand, the references to human rights and fundamental rights provisions have become more detailed and analytical in general through the increased references to the case law of the European Court of Human Rights. One must also bear in mind that certain legislative changes have been made in Finland to make the protection of fundamental rights stronger, particularly as regards fair trial rights.

It is also necessary for the transition of the legal culture of fundamental rights and human rights that there is a change in the general attitudes towards the rules and principles set out in the relevant instruments. Considering the developments in Finland, one may conclude that there has been a general willingness to apply the new sources of law, including the case law of the European Court of Human Rights and a dramatic change in that respect has also taken place. However, critical views have on occasion been presented and one could also assert that to some extent, that change has been forced by the judgments of the European Court of Human Rights finding a violation of a certain Convention provision. In some fields of law, that is partly true. As regards the violations found under Article 6, paragraph 1, concerning fair trial rights and particularly those concerning length of proceedings, important legislative changes have been forced. However, the problems were recognised and in order to be able to accede to the Convention more rapidly, reservations were entered to avoid unnecessary violations. Reservations are naturally not recommended, and it proved to be necessary to make further legislative changes. Despite that, fair trial rights under the Convention were also recognised in some situations even without explicit national provisions of law and a number of national precedents exist in which the Convention provisions and the case law of the European Court of Human Rights have been applied directly. Also, studies made earlier concerning the problems under Article 6 indicate that the problems were rather systemic and hard to avoid. Thus, it would be more correct to conclude that the change in the general attitude is only partly a result of judgments finding a violation against Finland. The judgments have perhaps urged the judiciary to exercise a more careful scrutiny over the measures of national authorities, and one could say that the increased references to the fundamental rights and human rights provisions and the European case law mean that the problems are identified at an earlier stage. The fact that they are identified requires greater awareness in general, which has been achieved by means of training, as well as willingness among policy-makers to ensure the necessary legal framework for redressing violations at the national level.

When assessing changes in the general attitude towards the protection of fundamental rights and human rights, it is more useful to study those cases that represent the balancing of conflicting rights against one another, such as decisions concerning the interpretation of Articles 8 and 10 of the Convention. In the field of the rights of transsexuals and homosexuals, in particular, it should be observed that although the Supreme Administrative Court successfully applied and interpreted certain principles set out in the case law of the European Court of Human Rights, there appears to have been an ongoing change in the legal culture of protecting those rights. That can be explained by both an emerging change of the legal culture in other countries and an ongoing change in the moral conceptions of the general public. This is demonstrated by the recently adopted amendment to the Marriage Act as explained in the foregoing. Thus, even recently adopted judgments do not always reflect the changing moral

conceptions of society as the supreme jurisdictions are bound by the law, including the case law of the European Court of Human Rights. However, once adopted, the new provisions of law may later result in different interpretations of the European Convention on Human Rights, through the principle of evolutive interpretation of conflicting or competing rights. This may even have an impact on later case law of the European Court of Human Rights.

It appears in the light of the analysis of case law that the supreme jurisdictions have constantly strengthened the judicial control of violations of fundamental rights and human rights, by means of developing the balancing of interests and argumentation. The discourse analysis made of such national decisions as involve a profound balancing of conflicting rights indicates that there is a deeper going change in the willingness to develop the protection of fundamental rights through national case law. Thus, it is a sign of receptiveness to dynamic or evolutive interpretation of law compared with the traditional reliance on literal interpretation of law and the understanding of law as it is written in legislation. So far, the supreme jurisdictions have been criticised for not having had recourse to principles of interpretation other than the principle of proportionality. That observation is correct as such, but I would assert that even in the absence of explicit references to those principles of interpretation, the increased analytical references have brought about a change in the attitude to a more flexible approach to the development of human rights law. That change of attitude may lead to an increasing number of references to even other principles of interpretation, particularly the principle of dynamic or evolutive interpretation and the principle of effectiveness. There are already signs of such references, although those cases still remain isolated ones. The few cases, however, demonstrated already preparedness for skilful use of a same type of discourse as that of the European Court of Human Rights. In conclusion, it appears that the interplay of other factors is an element enhancing the transition of the legal culture, whereas an inadequate application of a variety of principles of interpretation seems to make the transition slower.

5.4 Future prospects – case law of the European Court of Justice

A further challenge of transition of the legal culture will be faced by both the national courts and the European Court of Human Rights upon the accession of the European Union to the Convention, although the moment of accession is still uncertain and the accession treaty will require ratification not only by the Member States of the Union but also by all the parties to the Convention. Although this issue is not addressed in this study, there are some questions of interest from the perspective of interpretation of law, particularly the role of the Strasbourg Court with regard to the application and interpretation of Union law, including the case law of the European Court of Justice,

in the interpretation of the Convention rights.⁹⁷⁶ It is a question of reconciling two systems of international law but upon the accession of the Union to the Convention, the proceedings that have taken place before the European Court of Justice and become subject to a complaint should rather be treated as domestic proceedings in a case brought before the European Court of Human Rights.⁹⁷⁷ As for the substantive rights of the Convention, particularly from the point of view of the Union legal order, there should be no major conflict between the two systems as the Union's primary law and the European Court of Justice have given significance to the Convention already today. The Convention has been taken into account in the drafting of the European Charter of Fundamental Rights although there are also some differences between the Convention and the Charter of Fundamental Rights of the European Union. The European Court of Human Rights has touched upon the European Union law already in existing case law, for the reason that it constitutes an essential part of the legislations of the States parties to the Convention today for those States that are Member States of the EU, for example, in the case of *Matthews v. the United Kingdom*⁹⁷⁸

In the case of *Bosphorus*, the European Court of Human Rights resorted to an even more profound study of EU legislation, analysing the state of protection of fundamental rights under that legislation and noting that the Convention provisions are increasingly referred to, even extensively, by the European Court of Justice⁹⁷⁹ That assessment is followed by an extensive analysis of the case law of the European Court of Justice⁹⁸⁰. It is presumed that upon accession of the EU to the Convention, the European Court of Human Rights even increasingly will resort to the case law of the European Court of Justice (ECJ) as a source of law, at least in those fields of law where the EU law plays a significant role for States parties, which creates potential for future transition of the

976 For a detailed analysis of the problems, see Lock 2010, p. 781-784. Nevertheless, the accession should clarify the current legal situation. The European Court of Human Rights has already needed to take a position on the relationship between the different legal orders at stake. In the case of *Matthews v. United Kingdom*, judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, § 32, the Court observed that Community acts as such could not be challenged before it and that the Convention did not exclude the transfer of competence to an international organisation provided that the Convention rights continued to be secured. The Court further noted that the Member States' responsibility would continue even after such a transfer. This principle was reiterated by the Court in the case of *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, Reports of Judgments and Decisions 2005-VI, §§ 155 and 156.

977 Lock 2010, p. 788.

978 *Matthews v. United Kingdom*, judgment of 18 February 1999, Reports of Judgments and Decisions 1999-I, §§ 34 and 35.

979 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, Reports of Judgments and Decisions 2005-VI, § 73.

980 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v Ireland*, judgment of 30 June 2005, Reports of Judgments and Decisions 2005-VI, § 74 and seq.

legal culture of protection of fundamental rights and human rights. Challenges may, however, emerge in case there are differences in the approaches of the two courts to the application of sources of law and principles of interpretation of law. Although the objectives of the European Convention on Human Rights and those of the founding treaties of the EU are different, the European Court of Justice (ECJ) has chosen a somewhat similar approach with the European Court of Human Rights to the Vienna Convention, noting that the objectives of the Community (Union) and the context in which they were pursued differed from those of the Convention, which merely created rights and obligations between the Contracting parties and did not provide for the transfer of sovereign rights.⁹⁸¹ As regards the application of the European Convention on Human Rights by the European Court of Justice, there are already examples of cases in which the ECJ pays attention to the provisions of the Convention and the Protocols thereto⁹⁸²

The ECJ has thus created a link between the constitutional traditions and the European Convention on Human Rights, making it applicable as a source of law. In later case law, the technique of the ECJ in referring to the European Convention on Human Rights has slightly changed when interpreting fundamental rights as it has increasingly started to refer also to the case law of the European Court of Human Rights, for example, in joined cases C-465/00, C-138/01 and C-139/01⁹⁸³. In those cases, the ECJ already demonstrates an elaborated technique of referring to the case law of the European Court of Human Rights, in order to seek guidance for the interpretation of the fundamental rights provisions of EU legislation. The technique used also suggests that the way of reasoning is rather similar as the ECJ advances from the existence of an interference to its justification, and from general principles to the concrete situation at hand. It demonstrates that there is a transition of the legal culture of protecting fundamental rights taking place in the European Union too, in that a larger variety of sources of law is used to interpret them. Those observations are confirmed by later case law⁹⁸⁴.

However, since 1 December 2009, the Charter of Fundamental Rights is a binding source of law for the ECJ and the ECJ today combines the Convention and the Charter in the interpretation of fundamental rights. Before that, to apply binding provisions, it was necessary to resort to the European Convention on Human Rights, which was existing law between the Member States of the European Union despite that it was

981 Opinion 1/91 [1991] ECR I-6079, para. 22. See also Arnulf 1998, p. 120.

982 Case 44/79 - *Hauer v. Land Rheinland-Pfalz* [1979] ECR 3727, §§ 15 and 17. See also C-5/88 - *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, § 17, which reaffirms those principles.

983 Joined cases C-465/00, C-138/01 and C-139/01, §§ 73, 74, 76, 77 and 82 to 84.

984 See e.g. joined cases C-92/09 and C-93/09, §§ 59 and 87. In those cases, the ECJ appears to put the main emphasis on the provisions of the Charter of Fundamental Rights as a primary source of law, but seeks also guidance for its interpretation from the case law of the European Court of Human Rights as an additional source of law.

not formally part of EU law. It will be interesting to see whether accession to the Convention will again change the emphasis in case law. In any case, in the light of the existing case law of both European courts, there should not be any major problems as regards the application of the Convention, EU law and the case law of the two Courts as sources of law upon accession of the EU to the Convention. However, the degree to which the case law of the two Courts can be integrated, to allow transition of the legal culture, will also depend on the techniques of interpreting law and the preparedness of one Court to adapt to the discourse of the other, in the same way as in national jurisdictions. The techniques of interpretation of the ECJ are not analysed in detail here but it is interesting to compare briefly the principles and rules of interpretation used by the two European courts, particularly in order to assess whether there is potential of further transition of argumentation at the national level.

It has been concluded in respect of the European Court of Human Rights that the principles of interpretation indicating most signs of transition of the legal culture of protecting human rights and fundamental rights include, in particular, those of autonomous meaning and dynamic or evolutive interpretation. The idea of “Community law terminology” is more or less the same as that of the principle of autonomous meaning developed by the European Court of Human Rights. Furthermore, the European Court of Human Rights has also justified this principle largely in a similar manner as the ECJ has done, namely with reference to the need to ensure uniform interpretation and application of the Convention throughout the States parties to the Convention. The European Court of Human Rights also has its equivalent for the principle of dynamic or evolutive interpretation. For example, in the *CILFIT* judgment, in which the Court developed the so-called “*acte clair*” doctrine⁹⁸⁵, the Court underlined that “every provision of Community law must be placed in its context and interpreted

985 C-283/81 - *Srl CILFIT and Lanificio di Gavardo Sa v. Ministry of Health*, judgment of 6 October 1982, paragraphs 13 to 17. In essence, the doctrine means that where the Court has earlier provided an opinion on the same question of interpretation in an earlier judgment, or where the Community law is so clear that there is no doubt as to what its interpretation is to be, the national court is under no obligation to refer the case to the European Court of Justice for preliminary ruling. Sharpston points out that in respect of the case law of the European Court of Justice, it has been recognised within the Court itself that not all the judgments are perfectly clear as to what is meant. She identifies five main reasons of potential in clarity: 1) the fact that the judgments constitute single texts without a possibility for expressing dissenting opinions, 2) despite that there is one reporting judge responsible for the drafting of a judgment, it is nevertheless to some extent a product of committee drafting, 3) the judgments are drafted, commented upon, deliberated and amended in French that may create problems for non-native speakers of the language, 4) in today’s situation, the Grand Chamber is composed of 13 judges out of 27, which constitutes a minority that often adopts a cautious approach to the exposition of reasons as there may be need to revert to the issue in later judgments with different compositions of the Court, and 5) the time pressure caused by the time-limits and expectations of speedy proceedings. (Sharpston 2010, p. 416-418)

in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied".⁹⁸⁶ Such an evolutive and dynamic interpretation makes it possible to adapt Union law (particularly primary law) to new values, needs and situations.⁹⁸⁷ Senden, on the other hand, considers that the European Court of Human Rights refers to evolutive interpretation on a much larger scale than the ECJ.⁹⁸⁸ This may be perhaps explained by that case law on human rights is more value-bound than the vast majority of case law of the ECJ, considering the variety of spheres of legislation it needs to address. The supranational and binding nature of EU law is also a characteristic that may be seen as an element limiting discourse. It remains to be seen what the impact on the interpretation of the European Convention on Human Rights will be, i.e. whether it will be more of a limiting or expanding nature, but it is particularly through the principle of evolutive interpretation that there is potential for changes in interpretation and thus for a transition of the legal culture of protecting fundamental rights and human rights. The application of the principle evolutive interpretation is also a challenge for national jurisdictions, even today. However, the coexistence of two legal systems in the case law of the two courts may have the potential of further increasing the application of evolutive interpretation in the case law of the Finnish supreme jurisdictions which have, already today, shown preparedness for even profound argumentation towards that direction.

As regards the Finnish supreme jurisdictions, the principle of proportionality appears to be the easiest one of the principles applied by the European Court of Human Rights, whereas the more challenging principles have appeared in their case law only recently. The principle of proportionality has also been applied by the ECJ in its case law since the 1950s⁹⁸⁹. In the view of Raitio, the approach of the ECJ and that of the European Court of Human Rights to the principle of proportionality are largely similar.⁹⁹⁰ The views of Raitio find support on the basis of an examination of the case law of the ECJ⁹⁹¹. Considering the similarity of approaches, the application of the principle of proportionality should not cause major problems in the future for national supreme jurisdictions to reconcile the case law of the two European courts.

986 C-283-81, *Srl CILFIT and Lanificio di Gavardo Sa v. Ministry of Health*, judgment of 6 October 1982, paragraph 20. See also Arnulf 2006, p. 607-611. For a detailed analysis of the CILFIT judgment, see Derlén 2007, p. 109-122, and Hummert 2006, p. 34-40.

987 Hummert 2006, p. 112.

988 Senden 2011, p. 399.

989 Raitio 2005, p. 359.

990 Raitio 2005, p. 364.

991 For example C-280/93 - *Germany v. Council*, paragraphs 78, 89 and 90. This can be seen even more clearly in later case law.

Although the two courts may put a different emphasis on the principles of interpretation they apply, there is reason to suggest that there should not be any major difficulties in reconciling the two legal systems upon accession of the European Union to the Convention, considering also that the ECJ has increasingly resorted to the Convention and the case law of the European Court of Human Rights in the interpretation of fundamental rights, and the European Court of Human Rights has already on occasion looked into European Union law to seek guidance for the legal situation in the States parties, and even concerning evolution of law, which should make the reconciliation of the two systems easier. There are also examples of case law of the Finnish supreme jurisdictions in which the case law of both European courts have been referred to, which indicates that there are already signs of further transition at the national level. The fact that both European courts consistently refer to the principles of dynamic or evolutive interpretation, it is important that also the national jurisdictions are receptive to those principles.

5.5 Recommendations – towards a real dialogue

The analysis of the discourse of the Supreme Court and the Supreme Administrative Court shows that there are both similarities and differences in their approach to the application and interpretation of the case law of the European Court of Human Rights. Both have increasingly begun to resort to more detailed references to the case law, but in neither court is a profound analysis of the principles of interpretation still an established practice. In the decisions of both supreme jurisdictions, the discourse is still, due to the strong legalistic traditions, largely limited by the applicable national legislation particularly as regards legal argumentation in general, despite that the principle of human rights friendly application of legislation is also today a strong element in the legal discourse. In both courts, it seems to be rather frequent that the conclusions are drawn more on the basis of the national legislation or facts of the case, as elements limiting discourse, than through a profound analysis of the European case law and the references to that case law often remain rather weak internal justifications for the judgment. However, the increasing detailed references to the case law of the European Court of Human Rights are already as such a sign of a change in the legal culture towards using case law increasingly as a stronger internal perspective of argumentation, although the varying nature of those references shows that this change is still taking place and is far from definite. It is interesting to note that the impact of European case law can clearly be seen in those parts of judgments that contain references to it, whereas in other parts of judgments the style of reasoning is closer to a traditional one. In any case, the underlying presumption of a third phase of transition of the legal culture in relation to the language of the European Convention on Human Rights can

be confirmed and the case law of the European Court of Human Rights has become social reality for the Finnish judiciary.

In both supreme jurisdictions, there are some examples of judgments in which the court has resorted to a more profound analysis of the applicable principles of interpretation of the European Convention on Human Rights and the references to case law already constitute strong internal justifications for the judgment, but the way in which those principles, particularly the principle of proportionality, are applied is not uniform in the light of the legal discourse used in the judgments as a whole. On the one hand, there is linguistic incoherence both when comparing the judgments of an individual court against one another and when comparing the judgments of the two courts. The development of the legal culture towards improved reception of the argumentation of the European Court of Human Rights would benefit from more coherent application and analysis of the principles of interpretation of the European Convention on Human Rights. This would contribute to a more harmonised interpretation between legal systems, provided it also takes place in other States parties to the Convention. At the European level, the application of principles of effective interpretation, dynamic or evolutive interpretation and autonomous meaning typically involve stronger signs of transition of the legal culture. The same appears to be true of national judgments, although there are exceptions particularly as regards the application of the principle of *ne bis in idem*. On the other hand, it is also important that the judiciary and the style of judgments is flexible, as it makes it more capable to adapt to changes in social reality, and certain differences must be allowed between the judgments of a general court of law and those of an administrative court. In principle, the style of writing of judgments in Finland is rather flexible despite the coherent structure of judgments and the strong legalistic traditions. Both supreme jurisdictions have also demonstrated this in their case law. Despite the flexible approach to the application of European case law in general, it is rare to apply the principle of evolutive interpretation, which has been called for by Lavapuro – there are only isolated examples.

Furthermore, although there is clear development towards better receptiveness to the argumentation of the European Court of Human Rights, there is still no real dialogue between the national judiciary and the European Court of Human Rights but rather a looser form of interaction. However, there are already cases in which the European Court of Human Rights has looked into national precedents and the supreme jurisdictions have looked each others' precedents, as well as repeated examples of cases where national case law has been adapted to judgments issued by the European Court of Human Rights. The same type of development appears to be taking place to some extent in the other legal systems analysed for the purposes of the present study, although the case law and principles of interpretation of the European Court of Human Rights are applied to a varying extent. However, it is important to note that there does not seem to exist any way of defining what is meant by dialogue in this context. In the present

study, it is understood as meaning stronger form of interaction and application of the cases of the other court than mere references to the case law.

As observed in the foregoing, the European Court of Human Rights has on occasion been criticised for obscurity in reaching its conclusions. That could be seen even as a factor weakening the receptiveness of the national legal systems to its argumentation, as obscurity diminishes applicability. It is also difficult to say whether an even more transparent judicial reasoning would really help, for example, Finnish courts for adopting the same type of argumentation. It could even be counter-productive and even result in resistance towards the legitimacy of the judgments of the European Court of Human Rights. The purpose of this thesis is not to present recommendations to the European Court of Human Rights. However, for the existence of a dialogue between national courts and the European Court of Human Rights, it is important that they apply the same principles to the application and interpretation of the Convention. This is also enhanced by the application of the same principles of interpretation to both the Convention rights and constitutional rights. A further challenge will be brought about by the accession of the European Union to the European Convention on Human Rights. The foregoing comparison of the judicial styles of the European Court of Human Rights and the European Court of Justice indicates that there should be, however, no major problems in adapting to the new situations. Both European courts have also begun to refer to each other's case law. Thus, there is already an ongoing transition of the legal culture in both courts. It is also an established practice in Finland to refer to both sets of case law, and no problems seem to have appeared so far in applying both simultaneously. That should help also Finnish courts to adapt to the involvement of both European courts in the protection of fundamental rights in certain fields of law where the European Union has competence. However, challenges will be posed for the dialogue between the European courts and the national jurisdictions.

The national courts are better placed to put the Convention rights in a national context and for a real protection of human rights, it is crucial that the protection takes place at the national level so as to avoid further violations. Therefore, national courts should perhaps adopt a more active approach to the application of the Convention as has been called for by Lavapuro. Such an active approach might be easier to adopt where the courts indeed aimed at following the argumentation of the European Court of Human Rights more closely. The style of argumentation of the European Court of Human Rights is considerably different from the traditional style of argumentation in Finland, which is largely explained by the rather dynamic approach of the Court to the interpretation of the Convention. The Finnish judiciary, having largely focused on legislation as in force at the time of issuing the judgment, find such a style of argumentation foreign. As observed in the foregoing in section 3.4.9, in the application of the dynamic approach to the interpretation of the Convention, the Court takes into account the development of society and changes in legal thinking in the States parties.

Even at the national level, such a dynamic approach to the interpretation of provisions on fundamental rights could be applied, despite that they are often included in a rather static instrument, i.e. the Constitution. It has been explicitly recognised in Finland that even the constitutional rights should be interpreted in accordance with the same principles as the rights protected by the European Convention on Human Rights, as set out in the case law of the European Court of Human Rights. Some signs of change in attitude to a more evolutive approach can be already seen in some decisions of the supreme jurisdictions.

In conclusion, the legal thinking in the Finnish judiciary appears to be at a phase of transformation as indicated by a series of national judgments issued in the past few years, and there appears to be preparedness in the Finnish judiciary to adapt to the changes brought about the European Convention on Human Rights and to apply the case law under it as a source of law. In particular, their strong effect on the interpretation of law seems to be already widely recognised. However, there are relatively few judgments in which the national courts appear to have carried out a profound analysis of Strasbourg case law and the argumentation in those judgments, albeit it may be rather detailed already, is still not comparable to that of the European Court of Human Rights.

Insofar as the dialogue between national courts and the European Court of Human Rights is concerned, it seems that it does exist to some extent, but the interaction is rather slow. However, the analysis of the case law of the Finnish supreme jurisdictions show that they are receptive to the argumentation of the European Court of Human Rights and they have shown that this receptiveness can be further improved. There are already isolated cases in which the supreme jurisdictions have made an effort to apply the principle of evolutive interpretation, and they have done so successfully. These include, in particular, two judgments of the Supreme Administrative Court concerning the protection of private life and freedom of association but also a judgment of the Supreme Court concerning the establishment of paternity in which the ideas of evolutive interpretation have been followed rather closely. It is recommended that this approach be expanded. However, it should be applied in line with that of the European Court of Human Rights. For the effective protection of human rights and fundamental rights, it is also important that consistency is aimed at. The argumentation with regard to the application of the principles could also be made more profound and analytical, so as to allow other courts and the European Court of Human Rights to detect in which way it has been applied to the concrete case at hand. Although a detailed analysis of applicable law is necessary and it is customary to the Finnish judiciary, the relatively strong reliance on reasoning conclusions with reference to the applicable national legislation even when applying the Convention principles could be abandoned to some degree, which would help in the path towards a more active dialogue. In addition, a more profound and elaborate reasoning in general – as can be seen in the aforementioned

three judgments of the supreme jurisdictions – would make the national judgments more transparent and easier for the European Court of Human Rights to apply in its own judgments, which in turn would allow a real dialogue.

Tiivistelmä

Tämä väitöskirja tarkastelee Suomen oikeuskulttuurin muuttumista siitä lähtien, kun Suomi liittyi Euroopan ihmisoikeussopimukseen (ihmisoikeuksien ja perusvapauksien suojaamiseksi tehty eurooppalainen yleissopimus). Ihmis- ja perusoikeuksien suojaamiseen liittyvä oikeuskulttuuri on laaja käsite ja tutkimuksen rajaamiseksi sillä tarkoitetaan tässä tutkimuksessa ihmisoikeussopimuksiin ja perustuslakiin sisältyvien oikeuksien soveltamista ja tulkintaa sekä niihin perustuvaa oikeuskäytäntöä. Tutkimus on myös rajattu koskemaan Euroopan ihmisoikeussopimusta ja siihen liittyvää Euroopan ihmisoikeustuomioistuimen oikeuskäytäntöä ja niiden vaikutusta Suomen kansalliseen oikeuskäytäntöön. Kansallinen oikeuskäytäntö on rajattu koskemaan korkeimman oikeuden ja korkeimman hallinto-oikeuden päätöksiä. Suomen valtiosäännön kehitystä ja perusoikeussäntelyä verrataan Euroopan ihmisoikeussopimukseen, ja ihmisoikeustuomioistuimen oikeuskäytäntöä tarkastellaan ja verrataan suomalaisen oikeuskäytäntöön. Tutkimus perustuu laajaan oikeusvertailevaan lähestymistapaan, jossa on huomioitu muiden ihmisoikeussopimusten vaikutus ja käytetty vertailukohtina tietyin kriteerein valittujen ihmisoikeussopimuksen osapuolten kansallisia valtiosääntöperinteitä, perusoikeussäntelyä ja tuomioiden tyyliä sekä laintulkinnan periaatteita. Näitä on tarkasteltu erityisesti sen varmistamiseksi, että johtopäätöksissä huomioidaan muiden Suomen oikeusjärjestelmän ulkopuolisten tekijöiden vaikutus korkeimpien oikeuksien diskurssiin. Oikeuskäytännön tutkimuksessa on käytetty yksityiskohtaisempaa vertailua diskurssianalyysin avulla.

Tutkimus perustuu olettamukseen, että oikeuskulttuuri on muuttunut kolmessa vaiheessa siitä lukien, kun Suomi liittyi Euroopan ihmisoikeussopimukseen. Ensimmäisessä vaiheessa oikeuskulttuuri on muuttunut sekä Suomessa että koko Euroopassa ihmisoikeussopimuksen tekemisen seurauksena, kun neuvotteluihin osallistuneiden valtioiden valtiosääntö- ja perusoikeusperinteet saivat rinnalleen yhteisen eurooppalaisen oikeusperustan ihmisoikeuksien ja perusoikeuksien suojaamiseksi sekä tähän liittyvän valvontamekanismin. Suomi oli jo aiemmin ratifoinut Yhdistyneiden Kansakuntien kansalaisoikeuksia ja poliittisia oikeuksia koskevan yleissopimuksen, jonka sisältö muistuttaa monilta osin Euroopan ihmisoikeussopimuksen määräyksiä, joten sisällöltään Euroopan ihmisoikeussopimus ei ollut kovinkaan vieras. Yhdistyneiden Kansakuntien yleissopimusta ei kuitenkaan juurikaan sovellettu oikeuskäytännössä. Euroopan ihmisoikeussopimuksen vaikutusta Suomen oikeuskulttuuriin on pidetty merkittävämpänä siitä huolimatta, että kehitys alkoi pari vuosikymmentä aiemmin. Euroopan ihmisoikeussopimukseen liittymisen aikoihin muutettiin myös Suomen

perustuslain perusoikeussäännökset, perustuslain ja ihmisoikeussopimuksen yhtenäisen tulkinnan ja perusoikeussäännösten suoran sovellettavuuden varmistamiseksi. Tämä on osaltaan vahvistanut ihmisoikeuksien ja perusoikeuksien suojaa Suomessa.

Euroopan ihmisoikeussopimus kuitenkin saa osan merkityksestään Euroopan ihmisoikeustuomioistuimen oikeuskäytännön kautta. Toisessa vaiheessa Suomen ihmis- ja perusoikeuksien suojaan liittyvä oikeuskulttuuri on muuttunut sen seurauksena, että Euroopan ihmisoikeustuomioistuin on tulkinnut ihmisoikeussopimuksen määräyksiä yksittäisissä tapauksissa. Näistä on ajan myötä muodostunut yhtenäinen tulkintakäytäntö, jonka myötä ihmisoikeustuomioistuin on eräiden sopimusmääräysten osalta laajentanut niiden merkitystä tai soveltamisalaa huomattavastikin siitä, mitä sopimusmääräyksistä niiden kirjaimellisen tulkinnan valossa ilmeni. Tuomioistuin on toistuvasti käsitellyt sopimusta elävänä instrumenttina ja on antanut osalle siinä käytetyistä käsitteistä itsenäisen merkityksen, joka voi poiketa kansallisen oikeusjärjestelmän mukaisesta merkityksestä, siitä huolimatta, että kansallisilla oikeusjärjestelmillä ja niitä edustavien tuomareiden henkilökohtaisilla taustoilla ja kokemuksella on vaikutusta oikeuskäytännön kehittymiseen. Ihmisoikeustuomioistuimen käytäntöä ja tuomioistuimen diskurssia tarkastellaan sen soveltamien tulkintaperiaatteiden valossa siitä näkökulmasta, minkälaisia merkkejä oikeuskulttuurin muuttumisesta niihin liittyviin esimerkkitapauksiin sisältyy. Toista oikeuskulttuurin muuttumisvaihetta koskeva tutkimus perustuu olettamukseen, että ihmisoikeustuomioistuin tulkitsee sopimusta itsenäisesti, mikä aiheuttaa haasteen omaksua sen tulkinnat kansallisissa oikeusjärjestelmissä, joissa sopimusta myös sovelletaan. Ihmisoikeustuomioistuimen oikeuskäytäntö on huomattavasti vahvistanut ihmis- ja perusoikeuksien suojaa, ottaen huomioon, että tuomiot ovat sitovia valtiolle, ja niitä myös Suomessa pidetään vahvana oikeuslähteenä.

Kolmannessa vaiheessa oikeuskulttuuri on muuttunut kansallisissa tuomioistuimissa ihmisoikeustuomioistuimen oikeuskäytännön seurauksena. Ensinnäkin tuomioistuimen oikeuskäytännöllä voi olla vaikutusta kansalliseen lainsäädäntöön siinä tapauksessa, että lainsäädäntöä pidetään ihmisoikeussopimuksen määräysten vastaisena. Toiseksi sen oikeuskäytännöllä on vaikutusta siihen, millä tavalla kansalliset tuomioistuimet soveltavat ja tulkitsevat oikeuslähteitä. Euroopan ihmisoikeussopimus ja ihmisoikeustuomioistuimen oikeuskäytäntö saavat todellisen merkityksensä sen perusteella, missä määrin kansalliset tuomioistuimet soveltavat niitä. Tämän kolmannen oikeuskulttuurin muuttumisen vaiheen tutkimus perustuu olettamukseen, että kolmas vaihe Suomessa ei alkanut välittömästi ihmisoikeussopimukseen liittymisen ajankohtana, vaan vasta muutamaa vuotta myöhemmin, kun tuomioistuimet alkoivat soveltaa ihmisoikeustuomioistuimen oikeuskäytäntöä todellisena oikeuslähteenä. Korkeimpien oikeuksien oikeuskäytäntöä tarkastellaan muutaman Suomen näkökulmasta merkittävimmän sopimusartiklan valossa. Kolmas vaihe on ikään kuin tutkimuksen huipennus, jonka tarkoituksena on osoittaa kahden ensimmäisen muutosvaiheen tutkimuksen avulla, mistä syystä ihmisoikeustuomioistuimen oikeuskäytännön syvälinen soveltaminen ja sisäis-

täminen on haaste suomalaisille tuomioistuimille. Ydinargumentti kolmannen tutkimusvaiheen osalta on, että Suomen ylimmät tuomioistuimet ovat yhä enenevässä määrin alkaneet soveltaa ihmisoikeustuomioistuimen oikeuskäytäntöä ja ovat muuttaneet vähitellen tapaa, jolla sen tuomioihin viitataan. Tämä muutos ei ole vielä päätynyt, mutta ihmis- ja perusoikeuksien suojaan liittyvä oikeuskulttuuri on vahvistunut.

Ihmis- ja perusoikeuksien suojaan liittyvän oikeuskulttuurin muuttumiseen vaikuttavat kuitenkin useat tekijät. Olisi virheellistä väittää, että kansallisten tuomioistuinten oikeuskäytäntö on muuttunut pelkästään Euroopan ihmisoikeustuomioistuimen oikeuskäytännön seurauksena. Tähän ovat Suomessa vaikuttaneet erityisesti muut kansainväliset ihmisoikeussopimukset, oikeusjärjestelmän kansainvälistyminen, Suomen jäsenyys Euroopan unionissa sekä EU:n lainsäädäntö ja EU:n tuomioistuimen oikeuskäytäntö, tarvittavat muutokset kansalliseen lainsäädäntöön, mukaan lukien perustuslain muutokset, ja muutokset yleisessä suhtautumisessa kansainvälisiin oikeuslähteisiin. Lisäksi on muistettava, että oikeuskulttuuri ei voi muuttua täydellisesti ilman perustavaa laatua olevaa ihmisoikeuksien ja perusoikeuksien ymmärtämistä koko yhteiskunnassa, mukaan lukien lainsäätäjä, poliittiset päätöksentekijät ja tuomioistuinlaitos. Tämä tutkimus on rajattu tarkastelemaan pelkästään ylimpiä kansallisia tuomioistuimia, mutta peruslähdekohtana on, että ylimpien tuomioistuimen tuomioiden diskurssi heijastaa oikeuskulttuurin muuttumista. Verrattuna aiemmin ihmisoikeussopimuksesta ja sen vaikutuksista tehtyihin tutkimuksiin Suomessa, tämä väitöskirja poikkeaa valitun lähestymistavan osalta ja tutkimuksen viimeisessä vaiheessa keskittyy syvällisempään oikeuskäytännön vertailevaan tutkimukseen diskurssin kautta, mikä jossain määrin tarkentaa aiempia havaintoja. Tällä on myös vaikutusta tutkimuksen johtopäätöksiin.

Annex

European Convention for the Protection of Human Rights and Fundamental Freedoms (ETS 5)

Article 5 – Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
 - a. the lawful detention of a person after conviction by a competent court;
 - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
 - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
 - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
 - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
 - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

Article 6 – Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - b. to have adequate time and facilities for the preparation of his defence;
 - c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 8 – Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 10 – Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The Constitution of Finland

11 June 1999

(731/1999, amendments up to 1112 / 2011 included)

(Unofficial translation, Ministry of Justice)

Section 7 – The right to life, personal liberty and integrity

Everyone has the right to life, personal liberty, integrity and security.

No one shall be sentenced to death, tortured or otherwise treated in a manner violating human dignity.

The personal integrity of the individual shall not be violated, nor shall anyone be deprived of liberty arbitrarily or without a reason prescribed by an Act. A penalty involving deprivation of liberty may be imposed only by a court of law. The lawfulness of other cases of deprivation of liberty may be submitted for review by a court of law. The rights of individuals deprived of their liberty shall be guaranteed by an Act.

Section 10 – The right to privacy

Everyone's private life, honour and the sanctity of the home are guaranteed. More detailed provisions on the protection of personal data are laid down by an Act.

The secrecy of correspondence, telephony and other confidential communications is inviolable.

Measures encroaching on the sanctity of the home, and which are necessary for the purpose of guaranteeing basic rights and liberties or for the investigation of crime, may be laid down by an Act. In addition, provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act.

Section 12 – Freedom of expression and right of access to information

Everyone has the freedom of expression. Freedom of expression entails the right to express, disseminate and receive information, opinions and other communications without prior prevention by anyone. More detailed provisions on the exercise of the freedom of expression are laid down by an Act. Provisions on restrictions relating to pictorial programmes that are necessary for the protection of children may be laid down by an Act.

Documents and recordings in the possession of the authorities are public, unless their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents and recordings.

Section 21 – Protection under the law

Everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of law or other independent organ for the administration of justice.

Provisions concerning the publicity of proceedings, the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of a fair trial and good governance shall be laid down by an Act.