THE RELATION BETWEEN NATIONAL COURTS AND THE EUROPEAN COURTS

Olle Abrahamsson*

1. THE EUROPEAN COURT OF HUMAN RIGHTS

The first topic I want to discuss concerns the relationship between national courts and the European Convention of Human Rights, as the obligations are manifested by the European Court of Human Rights. In Sweden there was a lively debate on this issue in the early nineties, when the Convention was incorporated into Swedish law. The Parliament hesitated to go all the way, which would have meant to give the text of the Convention status of constitutional law. This had been required if one wished the Convention to be without doubt superior to national law. Instead, Parliament said: "In cases where a Swedish law provision could be considered to be contrary to the Convention, it must be a task for the courts and the administrative authorities to decide how the conflicts shall be solved".[1]

The opinion of the Parliament was clearly that Swedish law even after the incorporation could out-flank the Convention. Thus, the Swedish courts already from the beginning were faced with the somewhat schizophrenic situation that even though they realise that a national provision is contrary to the Convention, they are in some cases obliged to apply the national provision. Though it must be said that this thinking was fully in line with a traditional Swedish view on the effectiveness of international conventions. This sceptical view on the obligations of national courts to apply the European Convention has, however,

* The author is Director-General for Legal Affairs in the Ministry of Justice, Stockholm. His article brings together two speeches held at a Nordic Baltic Seminar in Saltsjöbaden on 19-20 January 2006. The latter part of the article may be seen as friendly polemic to an introduction given at the seminar by Advocate-General Miguel Poiares Pessoa Maduro. The article contains only the personal opinion of the author and does not in any way engage the standpoints of the Ministry of Justice or the Swedish Government.

[1] Bet. 1993/94:KU24, p. 20.

step by step been modified, not least as a result of an increasingly convention-friendly jurisprudence of the Supreme Court, and presumably also as a result of the influence of European Union law. I would think that a similar development has been seen in other countries. For the part of the Nordic countries, this development has been accurately expressed by Niilo Jäskinen:[2]

> At present, one has good reason to claim that the Convention in practice is given superiority to domestic legislation in the Nordic legal systems. Already a first examination of the doctrine and the case-law guides us to the conclusion that it is highly improbable that a Nordic court should establish the application of a national provision to be contrary to the Convention and despite that fact choose to apply the national provision. It's another matter that there is a considerable freedom for action when it comes to decide whether there actually is a conflict of norms between the Convention and national law.

Naturally, there are limits for what impact the Convention can have on national legal systems. For example, there is no Nordic country where a liability between individuals can be founded directly upon the Convention, without intermediary national legislation. This is however an area where some Convention States have gone more far than others. The Supreme Court of Sweden recently for the first time gave an individual the right to claim, from the state, punitive damages because of the state's reluctance to fulfil its obligations according to the Convention. At the same time, however, the Supreme Court reiterated that the state had not any "on the Convention founded obligation to exactly follow the Convention".[3]

Corresponding discussions have taken place in other countries, not least in Norway, where an intense debate and a rich case-law on the domestic courts' obligations and their "margin of appreciation" came along after 1999 when the European Convention was incorporated in national law. Sometimes, however, these discussions have been neglected in favour of the more extensive issue of the impact of European Union law on national legal systems. It's symptomatic that the European Convention has dominated the agenda in precisely Norway, a country that is not bound by Union law other than indirectly through the EEA Agreement.

1.1 The case-law of the Strasbourg Court is increasingly "upgraded" by the Luxemburg Court

I would like to focus upon three important questions that should be discussed. The first one has to do with recent case-law of the European Court of Justice in

[2] ERT 2005, p. 522.
[3] NJA 2005 s. 462. *Cf. Lysén*, ERT 2005, p. 645-661.

Luxemburg. Probably it will take long time until the European Union, in its own capacity, is ready for accession to the European Convention on Human Rights. This is the evident result of the French and the Dutch no to the Constitutional Treaty last year, which means that the negative opinion on the question of accession given by the Luxemburg Court back in the early 90-ies is still valid. This setback has, however, not prevented the Luxemburg Court from delivering increasingly far-going and detailed statements on how the courts in the Member States shall interpret and apply the specific provisions in the Convention of Human Rights. Among all the judgements that illustrate this, one can chose the case *Steffensen*.[4]

In *Steffensen* the Luxemburg Court requested a German court to disregard a procedural provision in German law. The Luxemburg Court referred to the Convention's principles of adversarial procedure and fair trial and to the Strasbourg Court's findings on these principles. As a result, the Luxemburg Court did not permit the German court to consider a certain fact as evidence, if by doing so the referred convention-principles would be neglected. Despite the fact that the German procedural provision fell outside the direct applicability of Union law, the Luxemburg Court did not hesitate to order the national court to set aside that procedural provision in favour of the European Convention.

One may notice that an order like this from the Luxemburg Court becomes immediately and directly binding for all the courts in the Member States, in a way that a similar statement from the Strasbourg Court can never be. This is at least, the understanding in Denmark, Finland and Sweden. If this development continues, and it most probably will, it seems that substantial parts of the case-law of the Strasbourg Court will become directly binding in the EU Member States, through the mediation of the Luxemburg Court. But it will not be in the same way binding for Convention States that are not members of the European Union. This is indeed a striking development, which in general has not been sufficiently observed.

1.2 Increased activism from the Strasbourg Court jeopardises the balance within the Convention system

Another crucial question is to what extent it will be possible for the Court of Human Rights to uphold, in the long-range, its authority and respect vis-à-vis the national courts. In recent years we have seen an increased activism by the Strasbourg Court. The Court has made a number of so called dynamic interpretations, for example concerning the concept of "home" in article 8. In many cases this has caused irritation and aggravation in Convention States, who

[4] C-276/01 *Steffensen*, REC. 2003, p. I-3735.

would have liked the Court to behave more strictly and less expansive. For example, in Sweden and Norway there were mixed feelings, to say the least, when in summer 2004 the Court obliged Germany to pay high damages to princess Caroline of Monaco on the ground that the German legal system was not able to secure her rights against paparazzi-photographers which had offended her right to private life.[5] There were many who felt that the Court in this ruling interfered with and threatened the various legal systems of the freedom of the press and the freedom of expression in the Convention States.

There are several other rulings that have not been warmly welcomed by the Convention States. In addition the judgements of the Strasbourg Court have been criticized for not levelling the same high standard as before. For example, the Court was criticised for unconvincing reasoning in two recent German cases on the gun killings at the Berlin wall.[6] The Court held that it was legally right to sentence an East-German frontier guard, despite the fact that the guard's actions were not punishable in East Germany at the time. The Court didn't even consider that if the deadly firing actually had been punishable at the time, the period for prosecution according to East-German law would have been expired.

The great danger is that the Convention States loose their patience with the Court, and give signals that they no longer take account of its decisions. They might even take internal actions to restore what they think should be the balance between the European Court of Human Rights and their own judicial systems.

One of the problems with this kind of domestic actions taken by some Convention States is that it could excuse other, notoriously neglectful states for not taking the judgments of the Strasbourg Court seriously. A fundamental problem here is that in reality it is almost impossible for the Convention States to force the Court to change attitude. The governing instrument, *i.e.* the European Convention, is much more difficult to change than it is to change the founding Treaties of the European Union in order to set the jurisprudence of the Luxemburg Court right again. Actually, the Member States have done so a couple of times by adopting specially designed new treaty provisions.

1.3 The Court of Human Rights is near to collapse under its caseload

A third problem is that the Strasbourg Court is almost collapsing under the pressure of its own caseload. In the beginning of 2006 a study-group within the Council of Europe stated that the current system is stretched to its limit and

---

[5] von Hannover v. Germany, judgment 24 June 2004.

[6] *K.-H. W. v. Germany*, judgment 22 March 2001, and *Streletz, Kessler and Krenz v. Germany*, judgment 22 March 2001. *Cf. Lebeck*, JT 2004/05, p. 642-652, and *Abrahamsson*, SvJT 2005, p. 1025–1038.

must therefore be changed, perhaps radically. The study-group also states that with 82,100 cases currently pending, the system is "*in crisis*". The main cause for the increased number of applications is accession by the former Soviet States to the Convention after 1990.[7]

2. THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

The co-operation between the European Court of Justice and national courts is a big and almost inexhaustible subject. Furthermore, due to the standpoint of the Luxemburg Court, Union law to a great extent includes the case-law of the Strasbourg Court. As we have seen the Luxembourg Court increasingly often makes references to the case-law of the Strasbourg Court, with the consequence that this case-law becomes upgraded and more binding than it otherwise would have been for national courts in those Member States who do not consider the Strasbourg case-law automatically superior to their own constitutional provisions.

However, in the Member States both the courts and the politicians have paid more attention the last years to the question when and how a specific part of the national judicial system is affected by Union competence or not. A correct but non-informative answer is that one can never in advance have full knowledge about that, as an authoritative answer can only be produced by the European Court of Justice in arrears. In reality, however, it earlier has been fairly easy to divide between national law and Community law. When Lord Slynn of Hadley, who has been both advocate-general and judge at the European Court, visited Sweden in the early 90-ies, he said that a national judge could handle Community law quite well if he only knew two things: That it exists a system of preliminary rulings, and that questions of Community law arise mainly on four specific areas. These areas were labour life, free trade restrictions, the regulation of the inner market and, finally, the domestic judge should be aware of that the European Union has its own competition law which directly affects national affairs.

2.1 The European Court has turned into a path of confrontation with the Member States

Those who listened to Lord Slynn at that time felt happy that it didn't seem to be too difficult to define the limits of Community Law. But the situation has

[7] In 2005, over half of the applications pending came from just four States: Russia (17%), Turkey (13%), Romania (12%) and Poland (11%).

changed and become more complex, not least through the influence of the European Court of Justice itself. After the year of 2000 we have seen a number of judgments where the Court has laid its hands upon new areas of what was before national law, or more correctly *believed* to be national law. In some circles this has been met with enthusiasm, in other with surprise and even indignation. The latter has not seldom been the case with the governments in the Member States, who have seen areas which they thought were the reserve of national competence being swallowed by Union competence. Not least has this development taken place in the field of national procedural law, where the European Court in some cases has gone surprisingly far in giving instructions on how to apply national law.[8] A former judge of the European Court, also former president of the Supreme Court in Finland, Leif Sevón, has characterized the development as a sneaking change of national procedural autonomy towards less and less such autonomy.

Furthermore, the European Court has attributed a very wide meaning to the conception of free movement of persons. A meaning so wide that the Member State's ability to carry on their own immigration policy has become considerably limited and that most likely a harmonization of family policy in the Member States will progressively become necessary.[9] Also, in several decisions the Court has attributed to the concept of European citizenship a meaning that goes far beyond the original ideas of the Member States, *i.e.* the legislators of the European Union. After the rulings in *Baumbast*[10] *2002*, *Avello*[11] *2003* and *Collins*[12] *2004*, the Member States ask themselves how they possibly could have drafted the EU-Treaty to make sure that the Court would refrain from such revolutionary interpretations of the articles regulating European citizenship.

Even greater shockwaves emerged in June last year when the Court of Justice in *Pupino*[13] neglected the differences between the EC- and the EU-treaties. The Court did not consider, as it seems, the special character of the EU-Treaty, such as the absence of an explicit principle of loyalty and the limitations of the competence of the Court. It should be remembered that these characteristics of the EU Treaty are not the results of something that accidentally happened, but the outcome of hard and complicated negotiations between the Member States. If the Court does away with the differences between the treatises, what does it then, for example, actually mean that a council framework decision, according to the EU-treaty, has not direct effect? Will a third pillar framework decision become equivalent to an EC-directive? The one thing that is clear is that the

[8] See *e.g.* C-240/98 *Oceano Grupo*, REC. 2000, p. I-4941, and C-276/01, note 4 above.
[9] See *e.g.* C-60/00, *Carpenter*, REC. 2002, p. I-6279.
[10] C-413/99, REC. 2002, p. I-7091.
[11] C-148/02, REC. 2003, p. I-11613.
[12] C-138/02, REC. 2004, p. I-2703.
[13] C-105/03, REC. 2005, p. I-5285.

judgment in *Pupino* has generated considerable uncertainty and destabilised the agreed balance of power between the Member States and the EU Institutions.

The move to other radical findings does not seem to be long after *Pupino*. Maybe we saw one example in September last year, in the case *Commission v. Council (Environmental Crimes)*,[14] where the Court for the first time, and in face of opposition from eleven governments, ruled that the Union have competence to demand from the Member States that they introduce criminal sanctions. The Court's judgment in this case seems to make it very difficult to set out the relationship between Article 308 EC and the third pillar in the future.

I don't say this in order to criticize the Court, though I must admit that I am not very impressed by its legal reasoning in the two last cases. I presume that the Court, from its point of view, has good reasons for its standpoints. My main point is another, namely that it has come to a tension between the Court and the Member States, a tension that also causes considerable hesitation and confusion among the national courts.

My concern is not a specific Swedish one. The very first pronouncement that the new Council President Mr Schüssel made this year was that he would launch a debate on the division of powers between the EU and its Member States and on how the principle of subsidiarity works. He criticised the Court that, he felt, "has over the years been systematically extending its powers, even into areas where Community law does not apply". In that context he quoted the examples of the Court's judgments on women in the army and on the admission of foreign students to Austrian universities. This criticism he also reiterated before the European Parliament. The Danish Prime Minister Fogh Rasmussen has echoed the same criticism of over-powerful Court of Justice. Rasmussen promised that he should raise the issue during upcoming debate on the Constitution and the future of Europe. We should ensure European cooperation is built on democratic decisions, he said, rather than Court of Justice rulings.

However, the European Court has also brought about other kind of changes, which the national courts are not probably not will complain about. The Court has in some respect attributed more power to the national courts, at the expense of the national legislative bodies. An illustrative example is the Swedish case *Gourmet*[15] 2001, where the Stockholm District Court had asked for a preliminary ruling on the permissibility of the Swedish ban on advertisement for alcoholic beverages. In this case the European Court sent back to the District Court the whole question of proportionality for its consideration and decision. By doing so, in reality a Swedish court was entrusted with the task of reviewing the

[14] C-176/03, not yet published. *Cf. Asp*, JT 2005/06, p. 396 and *Bergström,* ERT 2006, p. 135.
[15] C-405/98, REC. 2001, p. I-1795.

alcoholic policy adopted by the Parliament and thus had to decide whether the Parliaments position on this issue was appropriate or not.

The idea that a Swedish court, in addition a court of first instance, in this way should have power to interfere in the decisions of the national legislator was something completely unthinkable in Sweden until a few years ago. Thus one can say that through the intervention of the European Court of Justice, Sweden has became more alike the majority of countries in the West that since long have established a division between legislative, governing and judicial powers. Of course, this increases the responsibilities of the Swedish courts, but it also brings more prestige to them. The important thing is that they themselves are aware of their new status.

2.2 Are the Swedish Supreme Courts ignorant of Article 234 EC?

A specific problem that have engaged national courts is the complex issue of when they shall rightly ask for preliminary rulings. Newly this question got a sharp relief when the Commission in October 2004 delivered a reasoned opinion according to which the two Supreme Courts in Sweden too seldom ask for preliminary rulings and too often fail to explain their decisions not to ask for a preliminary ruling.

The previous history was the European Court's decision 2002 in the *Lyckeskog*[16] case, where the Court came to the conclusion that a national court is not a court in last instance if there is a possibility for a leave to appeal. For my part, I had not expected that decision, because I thought that it was out of touch with realities to claim that a case can be tried in another instance when it is clear from the beginning that the possibility to get a new trial is extremely small.

From a general point of view the Commission's criticism may seem surprising, as it is difficult to say that it would be desirable to make the Court's burden of applications for preliminary rulings more heavy. The contrary is rather the case. I would believe that it is a general experience that the courts in all the Member States too often ask for preliminary rulings from the Court of Justice, *i.e.* when it is not necessary to do so. In some cases the legal issue concerned could have been easily resolved by the national court itself. In other cases the national court has overlooked the fact that the Court of Justice has already answered a similar question. Or the national court has noted the existence of a previous decision but has not dared to trust the relevance of that decision. It also occurs that the request by the national court concerns the applicability of Community law only to a limited extent or not at all.[17]

---

[16] C-99/00, REC. 2002, p. I-4839.

[17] Similar thoughts were expressed in the author's article in ERT 2000, p. 30-44.

The Swedish government has rejected the criticism of the Commission. At the same time, however, the government has proposed a new law on preliminary rulings.[18] The new law prescribes that courts of last instance shall give reasoning when they decide not to ask for a preliminary ruling. This obligation shall apply in any leave-for-appeal case where a party has pointed at the importance of a EU-law issue. Hence if a party is shrewd enough to wave with the EU-card he will force the court to give a reasoned decision, which is not normal practice.

The government's law-proposal has caused great annoyance within the Supreme Court and the Supreme Administrative Court. The Supreme Court referred to a specific decision in December 2004 where some unclear points in the Supreme Court's earlier case-law concerning Article 234 are explained.[19] The Supreme Administrative Court was even more sarcastic in its criticism of the government's proposal. It meant that a mandatory obligation to reason its decisions would spread an air of ridicule over its jurisprudence and said that "the proposal is appropriate only in so far that it to some extent satisfies the unfounded criticism of the Commission".

At about the same time, throughout the European Union, the European Court's decision autumn 2003 in the *Köbler*[20] Case has been met with considerable concern and criticism. In this case the Court established that the principle of state liability applies also in cases of wrongful interpretation of Union law by the highest judicial instances in the Member States. It seems to me that the Court's decision is a very logic further elaboration of the *Francovic* principles, but it has been criticized for undermining the principle of *res judicata*, thereby jeopardizing legal certainty and legal peace within the Member States. It has even been claimed that the *Köbler* decision forces the Member States to introduce national legal systems where the judgments of their supreme courts can be scrutinized by civil courts of first instance, within the framework of damage liability procedures. Evidently, here we see a conflict between on the one hand the demands of the Union law system on homogeneity and effective implementation and on the other hand the Member States' need to upheld hierarchic judicial systems and their right to maintain a division between the legal substance dealt with by national courts and by national administrative courts respectively. At the same time it should be fair to say that the *Köbler*-judgment seems to be of a mainly theoretical importance, as the criteria for state damage liability laid down by the Court can be expected to be met only in a very limited number of cases.

[18] Ds 2005:25, prop. 2005/06:157.
[19] NJA 2004 s. 735.
[20] C-224/01, REC. 2003, p. I-10239.

However, the outcome of *Köbler* together with the Commission's actions against Sweden for not fulfilling its obligations prescribed for in article 234, raises the question whether the present system of cooperation between the courts of the Member States and the European Court of Justice is still appropriate. In addition, the latest enlargement of the Union may in itself be a reason for reconsidering what the desirable cooperation between the courts should be. For example, it seems that the *CILFIT* criteria and the connecting *Acte Claire*-doctrine is very difficult to apply literally after the enlargement. If it was to be applied literally, the European Court of Justice very soon should be buried under a mountain of requests for preliminary rulings. After all, it is not often possible for a national court to judge that, for example, a directive provision unavoidably would have been interpreted uniformly in 24 other Member States.

Returning to the contested skilfulness of the Swedish Supreme Courts, I do not agree with those prominent critics, who recently in common with the Commission have claimed that the Supreme Court does not yet know how to apply Union law. The latest proof to the contrary is an interesting request for a preliminary ruling that the Supreme Court made 24 November 2005.[21] The underlying issue in the case is the state monopoly on lotteries, but the questions put to the European Court are generalized and are dealing with the signification of the concept of efficient legal protection. Incidentally, the Supreme Administrative Court in October 2004 defended the state monopoly without asking for a preliminary ruling, a decision that has been severely criticized. Some observers even claim that it was a scandal and a genuine case of reluctance to apply EU law.[22] But on the whole, I don't hesitate to say that the malicious portrait of Swedish judges as charlatans on the field of European law is completely unfair.

On one point only I want to make a question-mark concerning the Supreme Court's of Sweden decision 24 November last year. In the decision the Supreme Court finally asks which community criteria, if any, should be applied. I am not certain that the European Court is very fond of such unprejudiced and vague questions concerning the European norms to be applied. Rather I think that the European Court appreciate that the national courts present at least some kind

[21] Ö 4474-04 and Ö 752-05 (not yet published).

[22] RÅ 2004, Ref. 95. *Cf. Wiklund* and *Bergman*, ERT 2005, p. 713-728. – Likewise, it has been claimed that the opinion of the dissenting judges in the Supreme Court's Judgment 26 November 2004 in one of the *Anderssons* cases (NJA 2004 s. 662) reveals reluctance to apply Community Law (see i.a. *Johansson*, ERT 2005 p. 507). Here the dissenting judges found that the EEA Agreement does not constitute an independent basis for the state's liability for breach of its obligations under the Agreement. In the author's opinion this finding was fully justified by the fact that Protocol 35 to the EEA Agreement, according to which the Agreement does not require any transfer of national legislative powers, was a truly *sine qua non* during the negotations for an agreement. The affirmation given in Protocol 35 was crucial for the political support to the EEA Agreement in the EFTA-states.

of hypothesis as to the EU-norms possibly involved. Though it must be said that in *Fixtures*[23] the European Court proved to be surprisingly willing to answer in detail questions referred to it by the Swedish Supreme Court.

Finally, a reflection I made when I read the Swedish Supreme Court's request for a preliminary ruling concerning legal protection in its just mentioned decision 24 November 2005 is the following. Union law and Union bodies must not have unreasonable or unrealistic demands on the national courts concerning what the latter can or shall do to repair imperfections in national law. For example, if national law not supplies a legal remedy that would have been necessary to fulfil EU law requirements, it cannot be for the national court to *construct* such a legal remedy. This is rather a mission for the national legislator, and for the party concerned it remains only to be satisfied with damages. Likewise, it is not for the national court to set aside national legislation that runs contrary to non-implemented or wrongfully implemented directive provisions. All of this kind is in principle a matter for the national legislator, and in turn the original reason for the *Francovic* doctrine.

In the middle of the nineties the European Court, in for example the case *Arcaro,*[24] admitted that Community Law does not contain a mechanism which enables national courts to set aside national provisions contrary to such EU directives that the Member States have failed to implement. In later years, however, it seems that the Court has increased the pressure on the national courts to repair what the national legislator has neglected. We have seen this development already in *Centrosteel*[25] 2000 and more clearly in *Muñoz*[26] 2002. Unfortunately, this development adds to the institutional disorder and to the regrettable uncertainty that national courts and others have to live with in coming years. We have to wait and see if the initiatives promised by *inter alia* the President of the EU-Council can help to reduce that uncertainty later on.

[23] C-338/02, REC. 2004, p. I-10497. *Cf.* NJA 2002 s. 398.
[24] C-168/95, REC. 1996, p. I-4705.
[25] C-456/98, REC. 2000, p. I-6007.
[26] C-253/00, REC. 2002, p. I-7289.