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Finnish Courts and the Trouble with Human Rights

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Abstract

The ECtHR found recently that Finland violated article 10 of the ECHR because the Finnish Supreme Court had failed to provide sufficient reasons to justify the interference with the applicants' right to freedom of expression (Case of Eerikäinen and others v. Finland, no. 3514/02). In my paper, I will argue that reasons for the Supreme Court's failure are in fact systemic and related to fundamental differences between basic mentalités behind the civil law and human rights law. In this sense, similar failures are bound to reoccur.

I will provide two line of reasons to support this substantive argument: one general and more or less obvious, and another particular and perhaps not so apparent. The general argument follows the *sui generis* line of reasoning available in the European and international human rights doctrine. According to this view, human rights indeed *are*

special, and require, among others, distinct styles of interpretation and reasoning without which rights rhetoric is either empty or incoherent. However, the significance of this first argument owes to the fact that *what makes human rights special is actually incompatible with the ideal type of civil law*. Within this picture, the normative structure of human rights represent human rights treaties as law-making instruments and rights (for the most part) as generally applicable legal principles that ought to be contextually interpreted according to their reasoned weight. At the same time, the logic - mentalité - of a civil law system is systematically inclined to translate these norms into a set of autonomous system of previously enacted, area- specifically applicable and authoritatively specified abstract rules. The trouble with human rights refers to the conflict between these two normative worlds.

The paper will analyse the normative significance of this trouble by drawing analogies from the decade-old discussion on the convergence of European law in the framework of irreducible epistemological differences (*Legrande* 1996) between civil law and common law cultures (see also *Teubner* 1998). However, as recent studies in comparative constitutional law have described, different legal cultures seem to produce internal discontinuities between analyses of rights claims on the one hand and all other legal claims on the other (*Gardbaum* 2008) and that they actually reverse the standard characterization of civil law and common law styles of thinking and reasoning. With support of these findings, I will conclude by arguing that these kind of discontinuities also provide the appropriate basis for the methodological criticism of Finnish court practice from the perspective of human rights. Hence, the trouble with human rights - as it currently stands - exists only as long as the courts continue to apply human rights without acknowledging their sui generis nature as generally applicable "human rights law". Or, to put it shortly, there is no iron logic that dictates the Finnish courts to apply international human rights as if they were like any other domestically applicable law - that is, *as if they were presumptively just rules*.

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