THE DANISH OMBUDSMAN AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS

BY

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1. INTRODUCTION

In his paper "Human Rights Today—International Obligations and National Implementation",[1] Professor Torkel Opsahl, speaking of the status under domestic law in the Nordic countries of the various international legal instruments for the protection of human rights, recalled that the power of domestic courts to apply international obligations directly, not expressly provided for in any of these countries, "... at present ... is very questionable, and indeed is not clearly established in practice in any Nordic country ...".[2] Having pointed out that "national remedies are incomplete as long as no organ is expressly authorized to apply the international human rights provisions directly at the national level", he went on to say:

> It is probably not a very good idea to introduce new remedies or new organs authorized to apply the human rights provisions directly. Instead, a simple and modest, but useful reform might be to extend the mandate of the *Ombudsman*, a significant Scandinavian contribution to the world at large. It is true that recourse to the Ombudsman is not among the domestic remedies which *must* be exhausted in order to commence international proceedings ... But if the Ombudsman was generally authorized to express his opinion whenever international human rights were invoked, without necessarily making binding decisions, this in practice would probably ... be just as effective a remedy as any other.

In the view of the present author, such an extension of the terms of reference of the office of the Danish Ombudsman would give rise to delicate problems of maintaining the proper balance—essential to the authority of the office—between the functions of that office and the powers of the Legislature and the Judiciary, respectively.[3]

However, this does not by any means imply that the effective implementa-

[1] 23 *Sc.St.L.*, pp. 151 ff. (1979). The quotations in the text are from p. 176.

[2] The protection of human rights in the Nordic countries was the theme of a conference, convened at Turku, Finland, in 1974. The proceedings of that conference were published in 8 *Human Rights Journal/Revue des droits de l'homme*, pp. 89 ff. (1975), and as a separate volume by the Henrik Gabriel Porthan Institute, which organized the conference.

[3] Under sec. 55 of the Danish Constitution, 1953, the Ombudsman shall supervise "... central government administration, civil as well as military". By an amendment to the Ombudsman Act, 1954, enacted in 1961, the jurisdiction of the Ombudsman was extended so as to cover also local government authorities, albeit with certain restrictions. From the constitutional and statutory provisions governing the jurisdiction of his office follow, conversely, that the Ombudsman cannot supervise either the Judiciary or the Legislature.

tion at the national level of the developing international standards of human rights should be no concern of the Ombudsman's.

Under Danish law the Ombudsman is not, when passing on matters under his jurisdiction, debarred from taking account of and referring to Denmark's international commitments. Thus, in the *Annual Report for 1982*, in a brief survey of the legal framework governing the Ombudsman's examination of discretionary decisions of administrative authorities brought before him, specific mention is made of the "... impact of international commitments (the European Convention on Human Rights) on the exercise of discretionary powers by administrative authorities".[4]

This element in the functioning of the office of Ombudsman may warrant a somewhat closer examination, of particular topical interest against the background of the adoption recently by the Committee of Ministers of the Council of Europe of a Recommendation (No. R. (85) 13) on the institution of the Ombudsman.[5] One of the operative paragraphs (para. b.) of that Recommendation invites Governments of Member States

> to consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved;[6]

2. SOME PECULIAR FEATURES OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The Convention for the Protection of Human Rights and Fundamental Freedoms, generally known as the European Convention on Human Rights, was

[4] *Folketingets ombudsmands beretning for året 1982*, p. 9.

[5] The adoption of the Recommendation was a follow-up to a *Seminar on Non-Judicial Means for the Protection and Promotion of Human Rights*, organized by the Secretariat General of the Council of Europe and the University of Siena (Italy) in October, 1982. Within the Seminar a Round Table was conducted with Ombudsmen from Member States of the Council of Europe. The proceedings of the Seminar are available in a mimeographed edition, published by the Directorate of Human Rights (Strasbourg 1983).

"The Ombudsman and Human Rights" was subsequently inserted as an item on the agenda for the *3rd International Ombudsman Conference*, convened at Stockholm in June 1984. This paper is a revised and, in some respects, abridged version of a report presented to the Stockholm Conference. It has appeared in a somewhat different version, in Danish, as a contribution to *Skrifter tillägnade Gustaf Petrén*, Stockholm 1984.

[6] In another operative paragraph (para. c) Governments of Member States are invited "... to consider extending and strengthening the powers of the Ombudsman in other ways so as to encourage the effective observance of human rights and fundamental freedoms in the functioning of the administration". From the explanatory report accompanying the Draft Recommendation it appears that this paragraph is designed "... to draw attention to the range of proposals put

the first convention to be drawn up within the framework of the Council of Europe, and it was signed by all ten original Member States on 4 November 1950. It entered into force after the deposit of the 10th instrument of ratification on 3 September 1953. By now, all 21 Member States of the Council of Europe[7] are also Parties to the Convention.

The Convention has subsequently been supplemented and amended by eight Protocols.[8] Protocols Nos. 1, 4, 6 and 7 aim at guaranteeing certain additional rights, while Protocols Nos. 3, 5 and 8 amend some of the procedural provisions of the Convention; Protocol No. 2 confers on the European Court of Human Rights the power (not yet exercised) to give advisory opinions on the interpretation of the Convention.

The European Convention on Human Rights is an international treaty, under which the contracting states accept certain obligations towards each other. But these obligations have the peculiar feature that they consist mainly in recognizing that individuals have certain rights *vis-à-vis* governments and in an undertaking to respect them.

This is brought out in the very first Article of the Convention, where it is stipulated that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention". Section I of the Convention contains in arts. 2–18 a list of the rights and freedoms guaranteed. These provisions do not in terms impose any obligations on States; they take the form of a declaration of rights. It is art. 1 which transforms this declaration of rights of the individual into a set of obligations for the States which ratify the Convention.

This, then, is the first peculiar feature of the European Convention on Human Rights.

Particularly as regards the way they treat their own citizens on their territory, States have by tradition been jealous of their sovereignty. Yet, by ratifying the Convention, States Parties undertake a legal obligation to respect and secure "to everyone within their jurisdiction"—i.e. regardless of their nationality—a number of individual rights *vis-à-vis* the government.

In order to guarantee the effective implementation of the obligations undertaken, a special international review system is provided for in Sections II–IV of the Convention, setting up the European Commission and the European

forward at the Siena seminar and to enable States to consider which proposals might be implemented in the light of their specific traditions and practices". This would include Torkel Opsahl's suggestion, expressly referred to in the documentation submitted to the Siena Seminar, see Niels Eilschou Holm, "Notes on a suggested Agenda" in *Proceedings* (*supra* note 5), pp. 34 f.

[7] Austria, Belgium, Cyprus, Denmark, France, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom.

[8] Of which Protocols Nos. 7 and 8 as yet (Summer 1986) have not entered into force.

Court of Human Rights, and laying down the functions of these two bodies and of the Committee of Ministers of the Council of Europe in this respect.

The most striking element in this review system is the right of individual petition provided for under the optional clause of art. 25. In special declarations under that Article, the majority of States Parties[9] have agreed that any individual claiming to be a victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention may himself, by applying to the European Commission of Human Rights, set the international review system in motion.[10]

The two features of the European Convention on Human Rights just outlined—focusing on the position of the individual under the substantive as well as the procedural provisions of the Convention—were both important, even dramatic innovations of international public law.[11] And, as is often the case with such innovations, they were met with mixed feelings. However, the experience gained over the more than 30 years since the Convention entered into force has belied the more pessimistic prophecies as to its prospects of success. From being a daring experiment in international law, the actual operation of the system has turned the Convention into a real achievement.[12]

One of the most impressive measures of its success is that these two peculiar features of the Convention are little commented on today. The extensive use made of the right of individual petition and the universal acceptance of the final decisions from the organs of the Convention have de-dramatized these two innovations to such an extent that, in the countries concerned, these elements of the Convention tend to be regarded as much more of a matter of course than they actually are.[13]

[9] All (cf. *supra* note 7) except Cyprus, Malta and Turkey.

[10] For details as regards the procedures to be followed in this respect, see "The Presentation of an Application before the European Commission of Human Rights", *Human Rights Files* No. 2.

[11] By the normal canons of international law, even art. 24 of the Convention on inter-State applications contains an innovation. A State bringing an application under art. 24 is not required to prove itself a victim, even if only through the person of one of its nationals, of the alleged breach of the Convention; or even to establish an "interest" in the proceedings. It may do so, for example, purely on humanitarian grounds. In the words of the European Court of Human Rights, "unlike international treaties of the classic kind, the Convention comprises more than mere reciprocal engagements between contracting States. It creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a 'collective enforcement' ", see *Eur. Court H.R., Case of Ireland v. the United Kingdom, Series A, No. 25* (1978) at p. 90. That the European Convention in this respect goes one step further than the classic system of State responsibility under international public law was, by contrast, brought out by the judgment of the International Court of Justice in the *South West Africa Case, Second Phase* (ICJ Reports 1966).

[12] A very comprehensive survey of the results achieved over the first 30 years (1954–84) has been published by the Secretary to the European Commission of Human Rights, *Stock-Taking on the European Convention on Human Rights*, Strasbourg 1984 (with annual supplements).

[13] See Carl Aage Nørgaard, *The Position of the Individual in International Law*, Copenhagen 1962, pp. 99 ff. See also Jan deMeyer, "International Control Machinery", in *Proceedings of the Colloquy about the European Convention on Human Rights in Relation to other International Instruments for the Protection of Human Rights, Athens, September 1978*, Strasbourg 1979, pp. 241 ff.

The focus of discussion has changed to some general trends in the jurisprudence developing within the framework of the Convention, representing yet another peculiar feature: that the obligations undertaken by States Parties are dynamic, rather than static, in character.

The European Convention on Human Rights, as a contractual instrument under international law, is subject to the principles of interpretation of international treaties in general.

In an important judgment of 21 February 1975[14] the European Court of Human Rights, when considering what was the appropriate method for interpreting the Convention, opted for the rules on the subject in Part III, Section 3, of the Vienna Convention on the Law of Treaties, 1969. These lay down, *inter alia*, the general principle that 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".

In his report to the *Fourth International Colloquy about the European Convention on Human Rights (Rome 1975)*—"Do the Rights set forth in the European Convention on Human Rights in 1950 have the same Significance in 1975?"[15]—the late Professor Max Sørensen pointed out that art. 31(1) of the Vienna Convention, just quoted, does not imply that the accepted meaning of a term at the time a treaty is concluded necessarily takes precedence over any new meaning the term may have acquired by the particular time of its application. On the contrary, in many cases the intentions of the contracting parties are that the aim and purpose of the treaty run counter to any rigid and immutable fixing of legal rules. This is particularly true in the case of treaties which, like the European Convention on Human Rights, are full of general, imprecise notions, frequently referring to non-legal standards of values, such as "inhuman treatment", "within a reasonable time", "necessary in a democratic society", etc. In the case of such treaties, to employ a method of interpretation introducing an element of flexibility and progress to keep pace with general social change is in keeping with generally accepted and recognized legal and judicial methods.

Accordingly, on more than one occasion the European Court of Human Rights has stated expressly that the Convention should be interpreted "... in the light of present-day conditions".[16]

In his report to the Rome Colloquy, Max Sørensen concluded his analysis of these matters by stating *inter alia*:

[14] *Eur. Court H.R., Golder Case, Series A, No. 18* (1975).

[15] *Proceedings*—mimeographed edition, published by the Directorate of Human Rights (Strasbourg 1976)—pp. 83 ff.

[16] *Eur. Court H.R., Tyrer Case, Series A, No. 26* (1978), pp. 15 f., and *Marckx Case, Series A, No. 31* (1979), at p. 19.

> The European Convention on Human Rights is a living legal instrument ... Its provisions are capable of being interpreted in such a way as to keep pace with social change. The positions adopted by the organs responsible for applying the Convention furnish many examples of this.
>
> Nevertheless, this change is moderate ... There is nothing startling in the decisions of the Commission and the Court. We find few bold rulings of the kind sometimes handed down by higher national courts of certain countries, which have made or even reversed the law in such a way as to go down in national political history ....[17]

These conclusions would probably still be valid as an overall stock-taking of the general trend in the jurisprudence of the Commission and the Court.

However, it would seem appropriate to add two comments.

First, that some of the examples of the application by the organs of the Convention of the method of "evolutive interpretation"—even if moderate in the long perspective—may very well appear startling in the context of a particular national legal tradition.

And secondly, that the sheer number of detailed points, where the provisions of the Convention have acquired new meanings by their actual application by the Commission and the Court, gives this dynamic element of the Convention an unprecedented dimension.[18]

It is difficult to over-estimate the practical difficulties these two factors bring about for an effective implementation in the domestic legal order of the developing European standards of human rights.

3. NATIONAL AND INTERNATIONAL LAW

The European Convention on Human Rights was ratified by Denmark on 13 April 1953. At the same time the Danish Government recognized the competence of the Commission to receive individual petitions and the jurisdiction of the Court by depositing declarations to that effect under the optional clauses of arts. 25 and 46 of the Convention. The declarations were made for specific periods of time (2 years), but they have been renewed ever since (now for 5 years at a time).[19]

[17] *Loc.cit. supra* note 15, at p. 106.

[18] See *infra* note 24.

[19] When the Danish Sex Education Cases were brought before the Court by the European Commission of Human Rights, the Danish Government contested the jurisdiction of the Court to hear the cases, alleging that the Danish Declaration under art. 46 of the Convention only covered cases brought before the Court by another State Party, which itself had accepted the jurisdiction of the Court. Following a debate in the Danish Parliament, the Government withdrew this preliminary objection, thus accepting *ad hoc* the jurisdiction of the Court. Subsequently the Declaration was redrafted so as to cover expressly even cases brought before the Court by the Commission. See *Eur. Court H.R., Case of Kjeldsen, Busk Madsen and Pedersen, Series B. No. 21* (1978), pp. 109–22, and 20 *Yearbook of the European Convention on Human Rights* (1977), pp. 12–7.

The obligation incumbent upon States Parties under art. 1 of the Convention is that the rights and freedoms enumerated in Section I of the Convention and, by extension, in its substantive Protocols must be guaranteed at national level by national law and practice, and national authorities must see to it that persons within the States' respective jurisdictions effectively enjoy those rights and freedoms. Art. 27 of the Vienna Convention on the Law of Treaties, 1969, expresses a general principle of international law, namely that "a party may not invoke invoke the provisions of its internal law as justification for its failure to perform a treaty". Accordingly, States Parties have to ensure, by appropriate means, that their domestic legislation is compatible with the Convention and, if need be, to make the necessary adjustments to this end. And under art. 57 of the Convention the Secretary General of the Council of Europe may request any State Party to furnish an explanation "... of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention".[20]

The Convention does not, however, require States Parties to take specific steps in this respect.[21] In accordance with general principles of international law States are, therefore, free to choose themselves the method of implementation they deem to be the most appropriate.

The Danish Constitution, 1953, contains no express provision with regard to the effect a validly concluded treaty has in domestic law. The legal principles governing this question are, however, quite clear.

[20] In actual practice, this provision has become almost extinct as an element in the measures of implementation provided for under the Convention. The powers of the Secretary General have been exercised only 4 times—in 1964, 1970, 1975 and in 1983—and there is no established procedure for the subsequent examination of reports submitted that is remotely similar to the functions of the Human Rights Committee under art. 40 of the International Covenant on Civil and Political Rights. As to the latter, see Torkel Opsahl, *loc.cit. supra* note 1, pp. 169–73.

[21] In the *Case of Swedish Engine Drivers' Union, Eur. Court H.R., Series A, No. 20* (1976), the Court stated *inter alia* that "... neither Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention", *loc.cit.* at p. 18. This position was confirmed by the Court in its judgment in the *Case of Ireland v. the United Kingdom, Series A, No. 25* (1978), even if a preference was expressed for incorporation. In a number of subsequent cases, all of which originated in individual applications against the United Kingdom, most recently in the *Case of Abdulaziz, Cabales and Balkandali, Series A, No. 94* (1985), the Court has held that "... since the United Kingdom has not incorporated the Convention into its domestic law, there could be no 'effective remedy' as required by Article 13 ...", as regards instances, where the Court has found the applicant to be a victim of an infringement of other rights guaranteed by the Convention (in that particular case, art. 8 taken together with art. 14), and such infringement was the result of norms of domestic law that were in this respect incompatible with the Convention.

The general question as to whether the European Convention on Human Rights leaves States Parties free to decide how to give effect to the Convention in their domestic law was dealt with in a number of the papers submitted to the 2nd International Conference on the European Convention on Human Rights, held at Vienna, October 1965. The proceedings of that Conference have been published in A.H. Robertson (ed.), *Human Rights in National and International Law*, Manchester 1968. The Danish position was on that occasion stated by Max Sørensen, cf. *op.cit.*, pp. 17 ff. and at p. 46.

A recent survey of divergent legal opinions on this point is presented in Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford 1983, pp. 40 ff.

Under Danish law, provisions of a treaty relating to matters that concern the domestic legal order are, generally speaking, not directly enforceable by Danish courts of law or by Danish administrative authorities. In case a provision of a treaty lays down a rule that is inconsistent with an express provision of a domestic statute or other rule of law, the domestic rule prevails, and it is that rule, not the treaty provision, that must be applied by the authorities. Neither can a provision of a treaty serve as the legal basis for those acts of domestic authorities, which under Danish law may be carried out only when authorized by law. Consequently, in order to be applicable at the domestic level, any provision of an international treaty setting out an individual right has to be converted, transformed as it were, into domestic law by ordinary or subordinate legislation.

The method traditionally employed in Denmark for transforming international commitments is to reformulate the treaty, or rather the part of it that needs implementation, in a statute or an administrative regulation. But a treaty may also be adopted or incorporated into Danish law by statute or administrative regulation. In the latter case the text of the treaty is directly applicable in Danish law, but only to the extent specified in the domestic legal instrument concerned.[22]

Of course, the contracting of an international obligation does not always make it necessary to pass a statute or other domestic rule of law, transforming the pertinent provisions of the treaty into municipal law. That becomes necessary only to the extent the provisions of the commitment do not conform to a pre-existing legal situation.

When examining the European Convention on Human Rights with a view to its ratification, the Danish authorities found that to a large extent principles and rules similar to the provisions of the Convention were already in force in Denmark by virtue of the Constitution, of express statutory provisions, and of general principles of Danish law.[23] Following ordinary practice, special legislation was passed as regards those (actually very few) provisions, where this was considered not to be the case. But a general incorporation of (the substantive provisions of) the Convention was regarded as unnecessary—if considered at all.

[22] The latter alternative was, of course, chosen when Denmark acceded to the European Communities; see the commentary on the Bill for Denmark's Accession, in Ole Due and Claus Gulmann, "Constitutional Implications of the Danish Accession to the European Communities", 9 *Common Market Law Review*, pp. 256 ff. (1972)

[23] The same holds true as regards, e.g., the International Covenant on Civil and Political Rights. In respect of that instrument the thoroughness of the preceding examination is reflected in the explanatory memorandum submitted to Parliament with a view to obtaining the parliamentary consent for ratification, and in the initial report submitted to the Human Rights Committee under art. 40 of the Covenant (UN-doc. CCPR/C/1 Add. 4, 19 and 51).

Under such a strictly dualistic approach as regards the impact on domestic law of duly contracted international obligations, the actual implementation in the application of law at the domestic level of treaty provisions relating to matters concerning the domestic legal order is primarily the responsibility of the Legislature. It is for the Legislature to provide for the adjustments necessary in order that domestic law may allow for or authorize the implementation of the international commitments.

The practice generally followed in Denmark with a view to the discharge of this obligation, and adhered to also in respect to the European Convention on Human Rights—to reformulate the treaty in domestic legal provisions inserted in the body of statutory law according to subject matter—implies an inevitable risk of accidentally producing divergencies between the international obligation and domestic law. Nuances of meaning may get lost in the process, and subsequent amendments may inadvertently disturb what at the outset formed the legal basis for the implementation of a treaty provision in the domestic legal order. Both elements of risk are particularly noteworthy when, as was the case in respect of the European Convention on Human Rights, the process of ensuring the national implementation of the commitments undertaken consists mainly in ascertaining that, by and large, domestic law as it stands meets the requirements of the treaty, so that adjustments by implementing legislation are called for only on a few specific points.

To these two elements of risk should be added a third, of particular relevance as regards the European Convention on Human Rights. It stems from one of the peculiar features of the Convention, alluded to before: that the obligations undertaken are dynamic rather than static in character.

The European Convention on Human Rights is a living instrument of law. The substantive provisions of the Convention evolve through their actual application and interpretation. This implies *inter alia* that the implementation of this instrument is not a once and for all exercise. It is a continuing process, the aim being to ensure that at any given time the evolving European standards of human rights are duly reflected in domestic law.[24]

In order to illustrate the demands this process makes on the domestic legal order, it may be useful to quote an example from the jurisprudence of the

[24] Of course, this peculiarity is not a specific feature of the European Convention. All treaties setting forth human rights are living instruments which evolve through their interpretation and application, either by getting more precise contours or by taking on nuances of meaning which at the outset may not have been envisaged by the drafters, see e.g. the Background Paper prepared by Professor Christian Tomuschat for the *United Nations Seminar on the Experiences of Different Countries in the Implementation of International Standards on Human Rights* (Geneva 1983), UN-doc. HR/GENEVA/1983/BP.3, in particular at pp. 5 ff. However, the machinery of implementation provided for under the European Convention on Human Rights, and the very wide coverage, in depth as well as in breadth of the jurisprudence developing within that framework, make the element of dynamism particularly conspicuous as regards the European Convention.

European Commission of Human Rights, *the cases of Nielsen and Holgersen against Denmark*.[25]

Both cases concerned the custody of children born out of wedlock but in stable relations, where the parties in each case had lived together as husband and wife for a number of years (*papirløst ægteskab*). When they separated the woman in each case took the child with her, and the applicants complained to the Commission that under Danish law the father of a child born out of wedlock had no possibility of obtaining parental authority over the child unless the mother consented (or the social authorities *propriu motu*, out of consideration for the welfare of the child, removed the child from the mother and placed it with the father). The Commission considered the applications under arts. 6, 8 and 14 of the Convention.

When asked for their observations on the admissibility of the applications, the Government informed the Commission that a Committee was already considering whether the relevant statutory provisions should be amended so as to give fathers a greater possibility of obtaining the custody of illegitimate children. They therefore requested that the examination of the applications should be suspended for twelve months. The Commission refused this request after having heard the applicants, but shortly afterwards, in May 1978, the Government informed the Commission that a Bill had been laid before Parliament with a view to amending the relevant domestic legislation, so as to grant fathers the right to petition the courts for a decision as to whether they should have the custody of their children born out of wedlock. The amendments were passed by an Act of 8 June 1978, which entered into force on 1 October of that year. It provided that custody of a child born out of wedlock may be granted to the father by order of the court, where it is deemed necessary, having special regard to the welfare of the child, and that the court, in making the order, shall attach special weight to the father's previous relations with the child. The Act left unchanged previously existing possibilities of transfer of custody to the father, mainly where the mother wants the child to be adopted by a person other than the father, where the mother dies, or where she consents, provided always that such transfer is consistent with the welfare of the child.[26]

In the light of this development the Commission dismissed both applications.

As it turned out, the Commission did not have to express an opinion on the scope of, primarily, art. 8 of the Convention in a situation like that presented by the applications. But with this reservation in mind, the cases may serve as

[25] *Stock-Taking, supra* note 12, pp. 156 f. The cases are reported in 15 *Decisions and Reports*, pp. 128 ff. (1979).

[26] The provisions in question have been further amended by an Act of 1985.

merely one of many examples[27] illustrating, not only how the minimum standards embedded in the Convention are being refined in the jurisprudence of the organs of the Convention, but also that these refinements every now and then do take States Parties by surprise; partly because the substantive clauses of the Convention, drafted in rather broad and loose terms, rarely give an immediate warning that the particular point is covered by the Convention; and partly because a specific result may present itself as an alien element in a particular national setting of legislative reform.

The evolutional method of interpretation, discernible particularly (but certainly not exclusively[28]) in the jurisprudence of the Commission, may add to the elements of risk, mentioned before and inherent in the method generally employed by Denmark when seeking to ensure the implementation of international obligations. But above all, the element of dynamism confronts the national authorities answerable for the implementation of the Convention at the domestic level, with the problem—also illustrated by the cases just quoted—that even domestic provisions that at the outset were considered clearly to conform to the commitments undertaken may, as time goes by, be challenged as incompatible with the developing European standards of human rights evolving from the jurisprudence of the organs of the Convention.

It would be natural to dismiss this difficulty as just another result of the very dualistic approach of Danish law to the implementation of international obligations.

It may, therefore, be appropriate to point out that potential conflicts between domestic legal provisions, on the one hand, and the developing European law of human rights on the other, are not solved merely by incorporating the international commitments as part and parcel of domestic law. An incorporation as such that is not accompanied by some sort of entrenchment device provides nothing but a change of forum for the solution of such conflicts; it turns them into problems to be solved primarily by the domestic authorities concerned with the application of law.

Under the method of implementation generally employed by Denmark, the responsibility for the actual implementation of an international obligation in the domestic legal order rests with the Legislature. This has been considered to be most consistent with the constitutional principles on the separation of powers. And, however that may be, the traditional approach offers obvious advantages when adjustments are called for in order to bring express provisions of domestic law into line with the developing jurisprudence of the organs

[27] Another example, also concerning Denmark, is the *Rasmussen Case, Eur. Court H.R., Series A, No. 87* (1984).

[28] Cf. *supra* note 16.

of the Convention; potential conflicts of law may be eliminated before they have ripened into actual cases, and the solutions found may go even further than is required by the Convention.

But, of course, the traditional approach has its disadvantages as well.

There is no denying that the legislative process is rather cumbersome. And, particularly as regards the more remote areas covered by the Convention, it is becoming increasingly difficult for the national authorities responsible for the preparation of legislation to keep abreast of developments in the international jurisprudence—and to form an opinion as to what follow-up—if any—should be given to recent decisions from the Commission and the Court.[29]

Even if the disadvantages of the traditional Danish approach are not confined to this area, the European Convention on Human Rights has made it particularly pertinent to consider ways and means of diminishing the inherent elements of risk in respect of the occurrence of unintentional infringements of the Convention in the application of law at the domestic level.

4. THE "RULE OF INTERPRETATION", PARTICULARLY IN THE CONTEXT OF ADMINISTRATIVE LAW

As has already been emphasized, Danish law does not provide for the provisions of a treaty relating to matters concerning the domestic legal order to be regarded automatically, e.g. merely by virtue of its ratification, as part of domestic law. Such provisions are not directly applicable by Danish courts of law or by other national law-enforcement authorities. To obtain the desired effect, the international provisions have to be transformed into domestic Danish law.

This general principle is, however, subject to certain modifications.

In many legal systems that refrain from the incorporation of international treaties there is a device for bridging the gap when domestic law on a particular point at issue appears to be at variance with an international provision. That is the maxim of interpretation under which the provisions of

[29] Strictly speaking, States Parties have undertaken to abide by the decision of the Court only "... in any case to which they are parties" (art. 53); and even if not expressly stated in art. 32 as regards decisions of the Committee of Ministers, the same would hold true in that respect. However, the doctrine of precedent, adhered to by the Commission and the Court, makes it inadvisable for national authorities to rely on such a legalistic approach. See, in general, "The European Convention on Human Rights and States Parties: "The Effect of the Judgments of the European Court of Human Rights on the Internal Law and before Domestic Courts of the Contracting States", a report by Professor Georg Ress submitted to the *Fifth International Colloquy about the European Convention on Human Rights*, Frankfurt, April 1980. The proceedings of that colloquy have been published in Irene Maier (ed.), *Protection of Human Rights in Europe: Limits and Effects*, Heidelberg 1982, and Professor Ress' report appears in that volume at pp. 209 ff. See also Andrew Z. Drzemczewski, *op.cit. supra* note 21, pp. 260 ff.

domestic law, at least in the event of ambiguity, should be construed and applied so as best to conform to the duly ratified international commitments of the State concerned.

This maxim is also recognized in Danish law, and its contents and scope under Danish law were greatly clarified in the course of a debate on constitutional problems related to Denmark's accession to the European Communities.[30] During that debate the Danish Ministry of Justice prepared a memorandum on those problems, which was submitted to Parliament in the summer of 1972.[31] The first part of this memorandum contains a general survey of Danish law on the implementation of treaties.

In the survey reference is made to recent Danish legal writing, notably the writings of Professors Ole Espersen, Alf Ross and Max Sørensen, all of whom maintain that when in doubt about the interpretation of a domestic legal provision the law-enforcement authorities should prefer the interpretation that will best comply with existing treaty obligations. This is known as the *rule of interpretation.* In those writings it is further maintained that in the event of a divergency between a treaty provision, which has previously been observed in Denmark, and a provision in domestic legislation enacted subsequently, the conflict of law should, in the absence of any special indication to the contrary, be solved by applying the new provision in a manner that will respect the treaty provision, even if the tenor of the new provision is clearly at variance with the treaty. This is known as the *rule of presumption*: The courts should "presume" that it has not been the intention of Parliament to enact legislation contrary to Denmark's international obligations.

These views were fully upheld in the memorandum from the Ministry of Justice where the conclusion of the survey on this point reads as follows:

> In the Ministry's view, Danish law courts would in all probability prefer a more *ad hoc* application of law to a literal interpretation if the latter were to make the State of Denmark responsible under international law for an unintentional violation of a treaty.[32]

There is no need to go further into these general propositions.[33] However, it should be pointed out that the maxim of interpretation, outlined above, is of relevance also as regards administrative authorities.

[30] The general background is outlined in the paper quoted *supra* note 22.

[31] The memorandum has been reprinted in 41 *Nordisk Tidsskrift for International Ret (Acta scandinavica juris gentium)*, pp. 65 ff. (1971).

[32] *Loc.cit.*, pp. 80 f.

[33] In a paper presented to an information meeting on the European Convention on Human Rights, convened at Copenhagen by the Directorate of Human Rights in cooperation with the Danish Bar Association and the Danish Lawyers' Union, the present author has dealt more fully with these matters against the background *inter alia* of recent Danish jurisprudence. The proceedings of that meeting were published in 50 *Nordisk Tidsskrift for International Ret*, pp. 99 ff. (1981), and the paper appears at pp. 118 ff.

Under sec. 63 of the Danish Constitution, the power of judicial review is vested in the ordinary courts of law—just as is the case in the common-law world. This provision implies *inter alia* that, in effect, even the methods of interpretation employed by the Judiciary are normative *vis-à-vis* the executive branch of government. As a result, under Danish law an administrative authority would be legally debarred from applying a piece of implementing domestic legislation in a manner which did not conform to the underlying international commitment, and from deviating from a previous reading of domestic law, which at the relevant time was considered sufficiently certain so as to render superfluous the passing of implementing legislation on that particular point. This is a legal limitation on the powers of administrative authorities, and is enforceable by the courts of law when called upon to exercise their power of judicial review.

By way of illustration, it may be useful to quote a Supreme Court decision of 1975.[34] In that case the Danish Radio Corporation had applied a provision in the Danish Copyright Act in a manner at variance with the underlying provisions of the Berne Convention. It appeared that at the outset the Radio Corporation had applied the domestic provision so as fully to comply with the Convention, but that for various reasons it had subsequently been decided to depart from that interpretation on the particular point at issue. This change of practice had taken place some years earlier. In its judgment, the Supreme Court overruled the Radio Corporation and directed it to apply the domestic provision in accordance with previous practice and thus in the manner envisaged when the Convention was ratified.

Of recent years, Danish law has taken the maxim of interpretation several steps further, namely as regards its impact on the exercise of their discretionary powers by administrative authorities.

In actual practice the *rule-making power* of administrative authorities is frequently employed with a view to ensuring the implementation of an international commitment. It is quite normal for the Legislature expressly to authorize the appropriate Minister to enact by administrative regulation the domestic provisions necessary to ensure the implementation of duly contracted treaty obligations. In addition, generally speaking, any statutory provision authorizing the issuing of administrative regulations may be—and is—employed to this end, regardless of whether that is expressly provided for or not.

When the implementation of an international obligation requires that domestic law be amended and/or supplemented no problems arise, of course, when the existing statutory law authorizes the necessary adjustments to be carried out by administrative regulation—and appropriate regulations are

[34] The judgment is reported in 1975 UfR 30.

enacted accordingly. The query is, whether the exercise of such statutory authority is left entirely to the discretion of the Minister concerned.

A reply in the negative to this query is particularly natural in cases where the empowering Act expressly provides for the transformation of international commitments into domestic law by administrative regulation; but the negative reply should be maintained also in other cases.

In support of this proposition, the aforementioned memorandum from the Danish Ministry of Justice makes a reference to sec. 5(1) of the Act on Legal Responsibility of Ministers of the Crown, 1964. Under that provision it is an offence for a Minister (indictable only in impeachment proceedings before a special court, composed of all the Justices of the Supreme Court and an equal number (15) of lay assessors, the latter elected by Parliament for 6 years at a time) "... if he willfully or by gross negligence disregards the obligations incumbent upon him under the Constitution, under statutory law, or by virtue of his office". The carrying out of appropriate measures, aimed at preventing the contracting of State liability under international law arising out of infringements of treaty obligations in the application of law at the domestic level, would normally seem to be an obligation incumbent upon any Minister of the Crown "by virtue of his office", provided that the measures concerned are authorized by law, and that the risk of infringements occurring as a result of an omission to make the necessary adjustments could not be dismissed as remote.[35]

On a similar basis, any Minister should equally be held to be under a legal obligation to refrain from employing his rule-making powers, including his power to amend existing administrative regulations, in a manner that, in effect, would make impossible the continuous implementation of an international commitment in the domestic legal order. This obligation should be considered enforceable also by the ordinary courts of law in their exercise of judicial review under sec. 63 of the Constitution, setting aside, if necessary, the domestic provision found to be incompatible with a duly contracted international obligation.[36]

From a practical point of view it is, however, infinitely more important to consider what the position is, when the exercise of a discretionary power relates to *the making of decisions in individual cases*. Should the margin of appreciation afforded the appropriate administrative authorities by the empowering Act, even in such cases be held subject to limitations aimed at ensuring the implementation of international commitments?

This problem has not either been finally settled by the Danish courts. But

[35] *Loc.cit. supra* note 31, pp. 75–7.
[36] *Ibid.* at p. 81 note 39.

even so, it is now generally agreed that administrative authorities—to quote, once more from the memorandum of the Ministry of Justice—should be considered legally bound to exercise their discretionary powers in such a way that the individual decisions conform to existing international commitments, and that this obligation is enforceable by the ordinary courts under the doctrine of *ultra vires* implied in the general clause on judicial review in sec. 63 of the Danish Constitution.[37]

It may be useful to quote an example, frequently employed to illustrate this point.

Under sec. 5 of the Act of 1952 (now repealed) on Aliens' Entry into and Residence in Denmark, an alien might be expelled by administrative order under conditions specified in items (1) to (5) and also "... when his circumstances otherwise justify it". This provision delegated to the Danish Ministry of Justice a fairly wide discretionary power to take decisions on the expulsion of aliens. However, an unrestricted exercise of that power might in certain circumstances be held to be in conflict with Denmark's obligations under art. 8 of the European Convention on Human Rights, which provides that "everyone has the right to respect for his private and family life, his home and his correspondence". At any rate, the European Commission of Human Rights has examined several cases in order to decide whether the expulsion of an alien married to a national of a specific country which results in a separation of the spouses, was justified by consideration of *ordre public* and national security, which under art. 8(2) may justify interferences with family life.[38] Under the doctrine outlined above, the Danish Ministry of Justice should be held legally bound under domestic law to exercise its discretionary power of expulsion with respect *inter alia* to any limitations inherent in art. 8 of the European Convention.

The Danish Government has propounded and maintained this view on a number of occasions.[39] In this context it may be of interest to quote from the

[37] *Ibid.* at p. 78.

[38] Cf. Andrew Drzemczewski, "The Right to Respect for Private and Family Life, Home and Correspondence", *Human Rights Files* No. 7 (Strasbourg 1984), pp. 12 f. In its recent judgment in the *Case of Abdulaziz, Cabales and Balkandali, Eur. Court H.R., Series A, No. 94* (1985), the Court agreed that measures in the field of immigration may affect the right to respect for family life under art. 8 of the Convention, but at the same time held that the duty imposed by that article cannot be considered as extending to a general obligation on the part of a Contracting State to respect married couples' choice of country of residence and to accept non-national spouses for settlement. However, the Court found that in the cases before it there had been a violation of art. 8, read together with art. 14, by virtue of the fact that under the Immigration Rules it was easier for a man settled in the United Kingdom than for a woman so settled to obtain permission for a non-national spouse to enter or remain in the country.

[39] See e.g. the report of the Danish Government in *Implementation of Article 57 of the European Convention on Human Rights*—Replies of Governments to the Secretary General's enquiry relating to the implementation of Articles 8, 9, 10 and 11 of the European Convention on Human Rights—

third part of the initial report of the Danish Government under art. 40 of the International Covenant on Civil and Political Rights, 1966, where—in a comment on art. 26 of the Covenant ("All people are equal before the law and are entitled without any discrimination to the equal protection of the law")—the following statement is made:

> The principle of equality before the law though expressly embodied in its general form in neither the Constitutional Act nor in any other enactment, is regarded as a general principle of Danish law. It serves, in particular, to restrict the exercise of discretionary powers by administrative authorities, central and local. However, Danish law on the effect in general on domestic law of a validly concluded treaty implies *inter alia* that administrative authorities in their exercise of discretionary powers shall ensure that administrative acts—whether in the form of decisions or general regulations—conform to validly contracted international commitments. That is deemed to be a legal obligation enforceable by judicial review under Section 63 of the Constitutional Act, according to which the courts of justice are entitled to decide any question bearing upon the scope of the Executive. To that extent Article 26 of the Covenant can be regarded as having been 'incorporated' into domestic Danish law.[40]

At a first glance, this doctrine may seem somewhat far-fetched. But in effect it is not. The underlying philosophy is simply this: The exercise of an administrative discretion normally implies an overall assessment of the public and private interests involved; in this process the desirability of preventing the contracting of State liability under international law by administrative infringements of binding international commitments should be regarded as an overriding factor of public policy constituting, at least as far as obligations in the field of human rights are concerned, an implied limitation inherent in any delegation of discretionary powers to administrative authorities.

Where the relationship between international and national law is concerned the developing Danish law on this point is in itself of some interest, since it represents a certain middle position between the traditionally divergent views of the common-law and Scandinavian countries on the one hand and the legal systems of Continental Europe on the other.

But of course, the maxim of interpretation—even if conceived as indicated above—does not solve all potential conficts of law between national and international law. Indeed, it neither could nor should.

Countries refraining from incorporating treaties as such as part and parcel of domestic law rely principally on the Legislature for any adjustments necessary

Council of Europe doc. H (76) 15, pp. 53 ff., and reports to the Committee set up under the International Convention for the Elimination of All Forms of Racial Discrimination, UN-doc. CERD/C/R 77/Add. 2 and CERD/C 48 Add. 2. See also the reports referred to *supra* note 23.

[40] UN-doc. CCPR/C/1 Add. 51.

to ensure that the domestic legal order complies with duly ratified international obligations. And in the actual application of domestic law national authorities, in the absence of indications to the contrary, may act more or less on the assumption that the intention of the Legislature was, indeed, to ensure such compliance. While this assumption in countries incorporating international treaties has a firm basis in the domestic legal order, making it more or less irrebuttable, there are, in countries refraining from incorporation, limits as to how far the assumption can be stretched without the functions of the Legislature being usurped. It may serve as a legal basis for averting certain potential infringements of international commitments by supplying, as it were, an omission of the Legislature; but it will usually only provide a solution of such conflicts where the relevant provision of domestic law leaves open some margin of interpretation and/or appreciation.

However, in the context presented by the European Convention on Human Rights, the impact of this reservation should not be exaggerated. In this particular area the practical problem confronting domestic authorities is to find means of preventing accidental infringements of the developing European standards of human rights evolving from the dynamic element of the commitments undertaken. The maxim of interpretation is a useful tool to that end.

5. THE ROLE OF THE OMBUDSMAN

Over the last decade or so the question of incorporating the substantive provisions of the European Convention on Human Rights into domestic law has occasionally been a topical issue in public debate in the United Kingdom.[41] In his contribution to the proceedings of a conference some years ago, Lord Scarman argued in favour of an affirmative reply and *inter alia* referred to the fact that

> ... the Convention now has the benefit of a distinguished jurisprudence developed by the European Court of Human Rights. It would be invidious in a short paper to single out decisions for special mention. But ... [citations] illustrate in their different ways the tremendous assistance our judges could derive from the Convention case law. Significantly, this case law covers the 'grey areas' of English law, notably the rights of prisoners, privacy, family life, the right to be informed as well

[41] See the recent survey in Anthony Lester, "Fundamental Rights: The United Kingdom isolated?", *Public Law* 1984, pp. 46 ff., and Joseph Jaconelli, *Enacting a Bill of Rights*, Oxford 1980, in particular pp. 258 ff. See also Roger Kerridge, "Incorporation of the European Convention on Human Rights into United Kingdom domestic law", in M. P. Furmston *et al.* (eds.), *The Effect on English Domestic Law of Membership of the European Communities and of Ratification of the European Convention on Human Rights*, Martinus Nijhoff 1983, pp. 247 ff.

> as the right to speak and to impart information. I will say no more than that there is here a quarry, from which I would expect United Kingdom judges to mine pure gold.[42]

Now, to what extent should the Ombudsman, even more frequently confronted by matters pertaining to the "grey areas" of domestic law, go ahead and exploit that quarry?

In considering this question it should be emphasized that, as far as Danish law is concerned, the Ombudsman and the courts of law to a considerable extent cover the same ground.

Under the Act and the regulations governing the conduct of his office the Ombudsman shall investigate whether anyone under his jurisdiction "... pursues illegal purposes, makes arbitrary or inequitable decisions, or otherwise commits errors or negligence in the discharge of his duties". Even if these terms of reference are rather loosely drafted, it has been clear from the outset that the Ombudsman in the exercise of his functions is not confined, as are the courts, by the doctrine of *ultra vires* that, broadly speaking, governs judicial review under sec. 63 of the Danish Constitution; but at the same time, it has also been clear that the Ombudsman is free to look into the same kind of matters as do the courts. As a result, the distinction between judicial review and supervision by the Ombudsman does not really depend on the subject matters of complaint, but rather on differences as regards the procedures followed by and, in particular, the remedies available under either of these machineries of control. As is well known, the Ombudsman may only express his opinion on complaints brought before him and make recommendations to the authorities concerned. Such recommendations are not necessarily confined to the merits of the individual case before him but are also, if appropriate, aimed at making those amendments to statutory law, administrative regulations or administrative practices that in his view would be useful in promoting the rule of law or improving the public service. However, the Ombudsman's opinions and recommendations are not binding in law. The Ombudsman cannot quash or amend the administrative decisions at issue.[43]

As appears from section 4 above, in spite of the strictly dualistic approach of Danish law to the implementation of international commitments in the domestic legal order, it is open to the courts of law in many instances, when called upon to exercise judicial review of administrative action, to refer to and apply directly the substantive provisions of the European Convention on Human Rights, even if the Convention has not been incorporated into domestic Danish law. This would certainly hold true also as regards the Ombudsman. But that

[42] Colin Campbell (ed.), *Do We Need a Bill of Rights?*, London 1980, at p. 8.

[43] See in general Lars Nordskov Nielsen, "The Danish Ombudsman", 3 *The Ombudsman Journal*, pp. 119 ff. (1983).

office might go even further, seeing that the Ombudsman in the exercise of his functions is not bound to follow those strictly legal considerations that govern and restrain the Judiciary in this respect.

Even so, it may be queried whether the office of Ombudsman is an appropriate forum for the determination of disputed or otherwise controversial questions as to the contents and scope in detail of the substantive provisions of the European Convention on Human Rights.

Shortly after the present author took office as Ombudsman, by now almost 5 years ago, a somewhat similar problem arose, albeit in a different legal framework.

The complaint concerned an alien, a national of another Member State of the European Communities, who had been granted permission to take up residence in Denmark for a limited period of time. When that period lapsed, the Danish authorities declined to renew his permit. That decision was taken under a domestic administrative regulation, implementing in part a directly applicable EEC regulation, and the applicant contended that under the provisions of the EEC regulation he had been entitled at the outset to a regular permit, running for a period of 5 years. In the course of the examination of his complaint the Ombudsman was informed that the applicant had also approached the Commission of the European Communities, and that the Commission had submitted his complaint to the Danish Government requesting their observations on the matter. When replying to the Ombudsman's request for information the Ministry of Justice forwarded a copy of the statement made by the Danish Government to the Commission of the European Communities and, as regards the legal issues raised by the complaint, in the main merely referred to that statement. Against this background, the investigation of the matter was discontinued.

In a letter from the Ombudsman to the applicant, informing him of this decision, it was stated, on the one hand, that under the Danish Ombudsman Act the Ombudsman is competent to deal with a matter, regardless of whether it is governed exclusively by domestic legal provisions or—directly or indirectly, in whole or in part—by Community law (provided, of course, that the complaint is aimed at a decision taken by a domestic administrative authority). On the other hand, it seemed that in most cases the office of Ombudsman would not be an appropriate forum for the determination of controversial questions as to the interpretation of provisions of Community law and that, for that reason, in dealing with matters raising such questions a certain measure of self-restraint on the part of the Ombudsman was called for.[44] In this context it

[44] Under sec. 6(4) of the Ombudsman Act, it is always for the Ombudsman himself to decide whether or not to act on a complaint brought before him.

was noted that while under art. 177 of the EEC Treaty it is open to (in some cases an obligation for) domestic courts to refer such questions to the Court of Justice of the European Communities for a preliminary ruling, that course of action is not open to the Danish Ombudsman. And with particular reference to the circumstances of the case concerned, the Ombudsman recalled that it has been the consistent practice of the Danish Ombudsman to refrain from acting on a complaint (or to discontinue an investigation), when at the same time the matter is pending (or is brought) before the courts of law; it would be consistent with that practice for the Ombudsman to be particularly reserved when, parallel to his investigation of a matter, proceedings are initiated with the appropriate institution of the Communities, which may result in a binding determination of the legal points at issue.[45]

The Ombudsman did not on that occasion express any views on the related problem as regards matters raising questions under the European Convention on Human Rights. However, the present author does not mind putting on record that he would not necessarily take the same stand in that respect.

Even if they raise the same general problem, the two situations are rather different.

The European Convention on Human Rights contains no provision equivalent to art. 177 of the EEC Treaty. Protocol No. 2 to the European Convention on the power of the European Court of Human Rights to give advisory opinions is extremely limited in scope. The Court may only give advisory opinions at the request of the Committee of Ministers of the Council of Europe, and such opinions shall not deal with questions relating to the content or scope of the rights and freedoms defined in Section I of the Convention and in the Protocols thereto.[46]

Moreover, the aim of the European Convention on Human Rights is to lay down, in the form of minimum standards, some general limitations restricting the exercise by national authorities—legislative, judicial and administrative—of their powers under domestic law *vis-à-vis* the individual. And these limitations are closely akin to the philosophy underlying the creation of the office of Ombudsman and, hopefully, permeating the actual functioning of that office. This kinship is no mere coincidence. There was, indeed there had to be, an intrinsic interaction between, on the one hand, the quests for reform of

[45] *Annual Report* 1981, at p. 12.—In actual practice, complaints relating to matters governed by Community law have been few and far between. One such case of general interest is reported in *Annual Report* 1983, pp. 235 ff.

[46] Andrew Z. Drzemczewski, *op.cit. supra* note 21, pp. 330 ff., suggests that serious consideration be given yet again to the idea of instituting some form of "preliminary ruling" procedure which could permit a more harmonious and uniform application of "Convention law" by domestic courts and tribunals.

administrative and/or constitutional law at the national level, and on the other, the human rights movement at the international level. As a child of the former, it would seem perfectly legitimate for the Ombudsman to render the assistance of his office to an effective implementation of the achievements of the latter.

Nevertheless, no matter how much for these reasons it would seem to be legitimate, even required, for the Ombudsman to refer to and apply the substantive provisions of the European Convention on Human Rights, whenever appropriate, a number of considerations may warrant a certain reserve on his part in this area as well. In this context it will suffice to point out that the Ombudsman should be careful not to encroach upon the functions of the Executive in the field of international relations, including the handling of litigious matters before international tribunals.[47]

This reservation implies that the present author perceives the function of the Ombudsman in this area as being primarily that of ascertaining, whenever appropriate, whether the European provisions on human rights have been taken sufficiently into consideration in the decision-making process of the administrative authorities concerned. If the Ombudsman finds the process deficient in that respect, he should certainly not hesitate to recommend a reconsideration of the matter; and if, in the course of his investigation of a matter, the Ombudsman finds shortcomings in the applicable domestic law, he should feel equally free to make recommendations aimed at bringing the provisions of ordinary or subordinate legislation more firmly in line with the international commitments undertaken.[48]

In other words, the function of the Ombudsman should be that of assisting the domestic legal order in preventing accidental infringements of the European Convention on Human Rights.

That is no mean task—even if the underlying approach, as indicated before, is really rather modest.

But the present author believes that the Ombudsman should take it on, not only in order to support the efforts of ensuring an effective implementation at the national level of the developing European law on human rights—in itself a noble objective—but simply because it is an appropriate function for the Ombudsman to perform.

[47] See also *supra* note 3.

[48] Until recently, the right of parents to visit their child(ren), when the child(ren) had been removed from the family under the legislation on Child Welfare, was governed, not by express statutory provisions, but by various administrative regulations. Calling attention *inter alia* to the requirements in this respect of art. 8 of the Convention, the Ombudsman recommended to the Minister for Social Affairs that express statutory authority for restricting the right of parents be inserted in the Act. The Minister and Parliament immediately acted upon this recommendation. See *Annual Report* 1983, pp. 205 ff.

Art. 26 of the Convention provides that the European Commission of Human Rights may only deal with a matter brought before it "... after all domestic remedies have been exhausted according to the generally recognized rules of international law ...", and under art. 27(3) the Commission shall reject any petition referred to it which it considers inadmissible under art. 26. These provisions, requiring the exhaustion of domestic remedies as a condition of the presentation of an international claim, are founded upon the principle that the respondent State must first have an opportunity, by its own means within the framework of its own domestic legal system, to redress the wrong alleged to have been done to the individual.

Recourse to the Ombudsman could not be considered a "domestic remedy" within the meaning of art. 26 of the Convention.[49] But it is perfectly consistent with the underlying principle of international law to aim at ensuring that the national authorities are given every opportunity afforded by the domestic legal order to consider and, if need be, to correct alleged infringements of an international commitment.

In this context it is also appropriate to point out that, in the final analysis, the international instruments for the protection of human rights are designed to determine national behaviour in this field. The national level is the grass-roots level, where the individual is actually confronted by public power; it is the domestic authorities that at one and the same time have the potential to secure and to infringe the rights of the individual. Therefore, the national level remains the area where the fundamental rights and freedoms of the individual must primarily be protected.

Accordingly, it was—and remains—the principal aim of the European Convention on Human Rights and of the machinery of implementation provided for by that Convention, that the domestic legal orders of States Parties be imbued with the philosophy—the "common heritage of political traditions, ideals, freedom and the rule of law", to quote from the Preamble to the Convention—reflected in the substantive provisions of the Convention as well as in the developing jurisprudence of the Convention organs.

This ambition draws heavily on all sectors of the domestic legal order, but especially on ministerial departments in their dual capacities as responsible both for the drafting of legislative and quasi-legislative enactments and, if not themselves making decisions in individual cases, also for the management of administrative adjudication and law enforcement.

[49] Cf. *Proceedings of the Siena Seminar, supra* note 5, at p. 39. See also, particularly as regards the Parliamentary Commissioner for Administration (GB), *Eur. Court H.R., Case of Silver and Others, Series A, No. 61* (1983), and *Case of Campbell and Fell, Series A, No. 80* (1984), both, however, relating to art. 13 of the Convention.

It is a particularly appropriate function for the Ombudsman, within the framework of his ordinary jurisdiction, to render the assistance of his office to holding domestic authorities to their responsibilities in this field.[50]

[50] In this context it is appropriate to recall what Walter Gellhorn pointed out as a "final word" in his well known treatise *Ombudsmen and Others*, Harvard 1966, pp. 438 f.: "... Recommendations by ombudsmen and similar critics are significant precisely because (and, really, little beyond the extent that) officialdom has already committed itself to sound principles. The critic can isolate aberrations; he can suggest better ways of reaching agreed ends; he can point out new applications of previously accepted concepts. Like the United States Supreme Court he can sometimes articulate society's previously incoherent 'intuitions of public policy'. What he cannot do is force resistant officials to embrace a philosophy newly created by him. Rather, he shares tenets whose validity the great mass of officials already acknowledge. If administrators' objectives and his, their conceptions of honorable service and his, fundamentally conflicted, the external critic could achieve little."