THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN DOMESTIC SCANDINAVIAN LAW

BY

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1. INTRODUCTION

The last decade has seen discussions as to whether *Denmark*, *Norway* and *Sweden* ought to incorporate the European Convention on Human Rights (ECHR) into domestic law. So far, it has primarily been lawyers who have taken part in discussions but in 1989 the question was also put on the political agenda.

Thus in *Denmark* on 19 May 1989 Parliament passed a resolution in which it called on the Government to appoint a committee of experts who should consider the advantages and disadvantages involved in an incorporation of the ECHR into domestic *Danish* law, and to put forward proposals for such incorporation.[1] The committee submitted its report in the spring of 1991 in which it recommended that the Convention be incorporated into Danish law.[2] In *Norway* on 30 January 1989 the Government took a decision of principle; international conventions on human rights shall be incorporated into domestic *Norwegian* law. In accordance with this decision the *Norwegian* Department of Justice on 18 September 1989 appointed a committee of experts, chaired by Professor *Carsten Smith* to consider different ways of incorporating human rights conventions, and to forward proposals for such incorporation. In *Sweden* there are to the present author's knowledge, no current plans for incorporating the Convention into domestic law. However, in 1988 *Sweden* passed new legislation introducing the judicial review of administrative acts, partly as a consequence of cases in which the European Court of Human Rights found that *Sweden* had violated the Convention.[3]

One may ask why the question of passing legislation transforming the Convention into domestic law has been raised more than 35 years after its ratification.

[1] See Folketinget 1988/89, Folketingsbeslutning B 38.

[2] See *Betænkning nr. 1220/1991 om den europeiske menneskerettighedskonvention og dansk ret* (Report No. 1220/1991 on the Incorporation of the European Convention on Human Rights and Fundamental Freedoms in Danish Law).

[3] See *Prop.* 1986/87:69. For further information, see Hans Danelius, Judicial Control of Administration—a Swedish Proposal for Legislative Reform in Franz Matscher & Herbert Petzold (eds.), *Protecting Human Rights: The European Dimension, Studies in Honour of Gérard J. Wierda*, Cologne (1988), pp. 115 ff.

The proposers of the *Danish* resolution enumerated three main grounds for incorporating the Convention into domestic law: (1) The Convention cannot be applied directly by the domestic courts, and it is therefore not possible for any domestic authority to ascertain whether the Convention has been violated in concrete cases. (2) The practice of the European Commission and Court of Human Rights is dynamic; the applied domestic implementation of the Convention—termed *passive incorporation*—could hardly take this development into account. (3) Finally, the proposers pointed out that to pass legislation incorporating the Convention into domestic law would itself disseminate knowledge of the Convention.

Much has already been written and said on the questions of incorporation of the ECHR into domestic *Scandinavian* law. In this paper a survey of its application in contemporary domestic *Scandinavian* law will be presented. The exposition will concentrate on the development in the application of the Convention under the present "dualist" system rather than discussing whether or not the *Scandinavian* countries ought to incorporate the Convention. Although the Convention does not *de jure* form part of domestic law, it is, it will be argued, nevertheless *de facto* an important *source of law* in domestic law. Since the Strasbourg case law involving the *Scandinavian* countries is well-known outside the region, emphasis will here be put on the domestic application of the Convention.

In *Denmark*, *Norway* and *Sweden* the main approach to the relationship between international law and domestic law is sufficiently homogeneous for one to be able to speak of general *Scandinavian* principles. There are, however, also some important differences in the national doctrine, and court practice has developed differently.

2. THE EFFECT OF TREATIES ON DOMESTIC LAW

2.1. *General principles*

The *Scandinavian* constitutions contain no express provisions with regard to the effect of validly concluded treaties on domestic law.[4] The general legal principles governing this question are, however, quite

[4] Note should, however, be taken of Article 20 of the *Danish* Constitution, Article 93 of the *Norwegian* Constitution and Ch. 10, sec. 5 of the *Swedish* Instrument of Government which permit the transfer of powers vested in domestic authorities to supranational organisations.

clear.[5] These principles are concerned partly with the methods for the application of treaties and partly with the limits of this application.

The provisions governing the treaty-making power (Article 19 of the *Danish* Constitution, Article 26 of the *Norwegian* Constitution and Chapter 10, sections 1 and 2, of the *Swedish* Instrument of Government) all make a distinction between, on the one hand, the conclusion of treaties and, on the other hand, their incorporation. It has been deduced from these provisions that under *Danish*, *Norwegian* and *Swedish* law, provisions of a validly concluded treaty are, generally speaking, not directly enforceable by the courts or by administrative authorities. When, and if, a conflict between a treaty and an *express* provision of a domestic statute arises, the law-enforcing authorities shall apply the domestic legal rule and not the treaty provision (the *principle of the supremacy of domestic law*). Nor can a treaty provision serve as legal authority for those acts which under domestic law, according to the so-called *principle of legality*, may be carried out only when authorized by law, i.e. acts which encroach upon the rights and obligations of the individual.[6] Consequently, any treaty provision which is to have domes-

[5] A considerable body of literature on the effect of treaties in general and the ECHR in particular on domestic *Scandinavian* law is now available in English. In recent years see *inter alia*: Andrew Z. Drzemczewski, *European Human Rights Convention in Domestic Law*, Oxford, 1983, Claus Gulmann, The Position of International Law within the Domestic Danish Legal Order, 1983 *NTfIR*, pp. 77 ff., and in Francis G. Jacobs & Shelley Roberts (eds.), *The Effect of Treaties in Domestic Law*, London, 1987, pp. 29 ff., Niels Eilschou Holm, The Danish Ombudsman and the European Convention on Human Rights, 30 *Sc.St.L.* (1986), pp. 77 ff., Göran Melander, The Effect of Treaty Provisions in Swedish Law, 1984 *NtfIR*, pp. 62 ff., Niels Mikkelsen (ed.), *The Implementation in National Law of the European Convention on Human Rights*, The Proceedings of the Fourth Copenhagen Conference on Human Rights, 28 and 29. October 1988, Copenhagen, 1989, Carsten Smith, International Law in Norwegian Courts, 12 *Sc.St.L.* (1968), pp. 153 ff., Lars Adam Rehof & Claus Gulmann (eds.), *Human Rights in Domestic Law and Development Assistance Policies of the Nordic Countries*, Alphen an den Rijn, 1989, Jacob W.F. Sundberg, *Human Rights in Sweden. The Annual Reports 1982–84*, Littleton, Colorado (1985), Jacob W.F. Sundberg, *Human Rights in Sweden. The Annual Report 1985*, Littleton, Colorado, 1987, Jacob W.F. Sundberg, *Judicial Protection of Human Rights. The National Level. Scandinavian Laws*, pre-prints of the Bologna Congress on Protection of Human Rights on the International and National Level, Bologna, 1988, pp. 187 ff., Jacob W.F. Sundberg, *Laws, Rights and the European Convention on Human Rights*, Proceedings at the Colloquy in the Plenary Hall of Svea Court of Appeal, march 29, 1983 organized by the Stockholm Institute for Public and International Law, Littleton, Colorado, 1986, Jerzy Sztucki, The European Convention on Human Rights and National Law, 1986 *NtfIR*, pp. 227 ff., *The Protection of Human Rights in the Nordic Countries*, Proceedings at the Turku-Åbo Colloquy, June 1974, published in Revue des Droits de l'Homme, Vol. 8, 1, 1975.

[6] With the exception of *Sweden* the *principle of legality* is unwritten in *Scandinavian* law. In Chapter 8, section 3 of the *Swedish* Instrument of Government the principle is expressed as follows:

tic effects must be *incorporated* into domestic law by a domestic legal act (*the principle of transformation*).

If it is found that a treaty is intended to have effects in domestic law, existing domestic law will be examined to see whether it already complies with the treaty provisions or whether changes are necessary. In the latter case this will usually be achieved by Parliament passing a statute or by an administrative act being issued pursuant to legislative authority.

The traditional method of incorporating treaties into *Scandinavian* law[7]—and still the most common—is by *reformulating* them, or rather that part of a treaty which requires implementation, either in a statute or in an administrative regulation. This is also known as *transformation*. It has however, become more and more common to incorporate treaties by *adoption*. This means that the treaty (as a *whole* or in *part*) is adopted into domestic law merely by reference to its provisions either in a statute or in an administrative regulation. In this case and to the extent specified in the domestic legal instrument concerned, the provisions of the treaty are directly applicable under domestic law. The difference between the two forms of incorporation is, generally speaking, that with the *adoption* method the courts refer to international principles if interpretation, whereas in *reformulated* treaties the courts apply domestic principles. Of course, if domestic law already conforms with the provisions of a treaty, it is not necessary to implement its provisions by a specific act. In these cases fulfillment of the treaty is obtained by ascertaining that domestic law is in harmony with the treaty provisions. This is known as *passive incorporation*.

Under such a "dualist" approach to the question of the impact on domestic law of duly undertaken international obligations, the actual implementation in domestic law of treaty obligations is primarily the responsibility of the Legislature. It is for the Legislature to provide for the adjustments necessary to fulfil the international commitments.

"Provisions concerning the relation between private subjects and the community which regard obligations incumbent upon private subjects or which otherwise interfere in the personal or economic affairs of private subjects shall be laid down by law.

Such provisions are, *inter alia*: provisions regarding criminal acts and the legal consequence of such acts, provisions regarding taxes payable to the State, and provisions regarding requisition and other such dispositions."

[7] The question of the implementation of treaties in domestic *Scandinavian* law in the broadest sense was considered partly on a common basis in three national Government expert committees in the early 1970's which resulted in three national reports: *Betænkning* nr 682/1973 om Kundgørelse og opfyldelse af traktater (Report on the Proclamation and Fulfillment of Treaties) (*Denmark*); *NOU* 1972:16. Gjennomføring av lovkonvensjoner i norsk rett (Implementation of Treaties in Norwegian Law); and *SOU* 1974:100. Internationella överenskommelser och svensk rätt (International Agreements and Swedish Law).

These methods of incorporating treaties into domestic law imply the inevitable risk of accidentally producing *divergences* and, though more unlikely, *clear-cut conflicts* between domestic law and a treaty. Such divergences emerge most frequently because the Legislature, in passing new legislation, has not been aware of the potential conflict between the international obligation and domestic law, or because the scope of the international obligation has been extended, as for example is the case with the so-called *dynamic interpretation* of the ECHR. It is difficult to imagine that the *Scandinavian* Parliaments would deliberately legislate contrary to obligations under the ECHR.

However, domestic *Danish*, *Norwegian* and *Swedish* law is generally presumed to conform with undertaken international obligations (the *principle of presumption*). The practical consequence of this presumption is that the domestic law-enforcing authorities, when in doubt as to the interpretation of the domestic rule, shall prefer the interpretation that best complies with international obligations undertaken.

On the other hand, as pointed out by Professor *Carsten Smith*, it is "a comparatively elementary assumption that the courts will seek to eliminate the internationally illegitimate solutions, since otherwise the state will face the risk of reactions on the international level".[8] Such a vague principle does not give clear guidelines as to how the law-enforcing authorities shall resolve such divergences between treaties and domestic law.

2.2. *National distinctions*

In *Denmark* an attempt has been made to give the vague *principle of presumption* some substance by making a number of distinctions.

In the case of a divergence between a treaty provision and domestic *Danish* law it is generally asserted that, when in doubt about the interpretation of a domestic legal provision, the law-enforcing authorities should prefer the interpretation that will best comply with the treaty. This is known as the *rule of interpretation*. Nowadays it is further asserted that, should there be a divergence between a treaty provision which has previously been observed in *Denmark* and a provision in the domestic legislation enacted subsequently, in the absence of any specific indication to the contrary, the conflict should be solved by applying the new provision in a manner that will respect the treaty provision, even if the

[8] Cf. Carsten Smith, *op. cit.* p. 160.

wording of the new provision is clearly at variance with the treaty. This is known as the *rule of presumption*: the law-enforcing authorities should "presume" that it was not the intention of the Legislature to pass legislation contrary to *Denmark*'s international obligations.

It has been discussed whether the *rule of presumption* applies only to treaty provisions that have previously been observed or whether it has general validity. In a memorandum from the *Danish* Ministry of Justice relating to certain constitutional problems on the EEC accession it was explained that "in the Ministry's view, *Danish* law courts would in all probability prefer a more *ad hoc* application of the 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".[9] This view has subsequently been reaffirmed by *Danish* authorities on several occasions[10] and it has also been accepted in legal writing.

Moreover, it has been emphasized strongly in legal writing that administrative authorities should exercise their discretionary powers in such a way that administrative acts, whether *specific decisions or general regulations*, conform to validly undertaken international obligations. This is now known as the *rule of instruction*.

The strong emphasis in *Denmark* on administrative authorities' obligation to exercise their discretionary powers in accordance with undertaken international obligations cannot be found to the same extent in *Norway* and *Sweden*.

On the other hand, in *Norwegian* legal writing generally there has been a stronger tendency to emphasize the importance of the presumption that domestic *Norwegian* law conforms with international law. As will be seen, part of the *Norwegian* legal doctrine has, within the present constitutional framework, attempted to reformulate the general principles governing the relationship between international law and domestic *Norwegian* law.

In a report from a *Norwegian* Government expert committee on the implementation of international agreements in *Norwegian* law[11] it was considered whether, in relation to the domestic status of international law, there was an actual requirement for a change from a "dualist" to a

[9] Cf. The *Danish* Ministry of Justice: Redegørelse for visse statsretlige spørgsmål i forbindelse med dansk tiltrædelse af de europæiske fællesskaber (On Constitutional Problems Raised by Accession to the EEC), *NTfIR* 1971, p. 80 f.

[10] See *inter alia* The Initial Reports of *Denmark* of 29 March 1977 and 3 January 1978 under Article 40 of the international Covenant on Civil and Political Rights, UN-doc., CCPR/C/1/Add. 4 and Add. 19.

[11] See *NOU* 1972:16.

"monist" system. However, the majority of the Committee did not recommend a specific solution in this respect, since it could "...be ascertained that (international law) in many cases will be a *most weighty* means of interpretation or part of the background material" for the laying down of *Norwegian* law.[12] The Government endorsed this view and Parliament subsequently approved it.[13]

In *Sweden*, where previously it was common to consider international law as directly applicable before domestic law-enforcing authorities,[14] over the past two decades there has been a growing tendency to stress that treaties cannot be applied by domestic authorities, unless they have been incorporated into *Swedish* domestic law. This is known as the *transformation theory*. Although this tendency has not been unanimous,[15] it is probably fair to conclude that in contemporary *Swedish* constitutional theory the *transformation theory* is the prevailing approach to the question of the effect of treaties on *Swedish* domestic law. Furthermore, *Swedish* authorities have on a number of occasions presupposed that this is valid *Swedish* law.[16] However, the *principle of presumption* is, as mentioned, also considered part of *Swedish* law, although in legal writings it is expressed in somewhat guarded terms. Professor *Jerzy Sztucki* has described the state of *Swedish* law as regards the ECHR in the following ways:

> "Normally, however, the courts, though ultimately still applying *Swedish* law only, act on an ostensible presumption that it is in conformity with the Convention. Or, to be more exact, they used to take note of the Conventional provisions in order to establish that their content did not prejudice the application of *Swedish* law. Apparently, whenever more than one interpretation of domestic regulation is possible the courts will choose the interpretation which best conforms to international conventions. Yet, even if this is impossible, the courts cannot set aside the *Swedish* law in force."[17]

This use of guarded terms in describing the impact of treaties on *Swedish* domestic law seemed well-founded, since, as will be seen, *Swedish* courts have been more willing than *Danish* and *Norwegian* ones to recognize the

[12] *Ibid.*, p. 32.

[13] See Stortingsmelding No. 77 (1974.75).

[14] See *SOU* 1974: 100, p. 45 note 1.

[15] For further information on the debate of the *transformation theory* in *Sweden*, see for example Jacob W.F. Sundberg, *Judicial Protection of Human Rights. The National Level. Scandinavian Laws*, pre-prints of the Bologna Congress on Protection of human Rights on the International and National Level, Bologna, 1988, pp. 200 ff.

[16] See *inter alia* The Initial Report of *Sweden* of 7 April 1977 under Article 40 of the International Covenant of Civil and Political Rights, UN-doc. CCPR/C/1/Add. 9.

[17] Cf. Jerzy Sztucki, *op.cit.* p. 227.

existence of conflicts between treaties and domestic law, as well as maintaining strongly that *Swedish* law should prevail in such cases. However, recent *Swedish* court practice has become more open vis-à-vis the ECHR, and it is now a question whether this restricted view on the application of the Convention in domestic *Swedish* law is an appropriate one.

2.3. *Recent trends in the legal doctrine on the relationship between international law and domestic Scandinavian* law

In *Danish* and *Norwegian* legal writing there is now a tendency to agree that international law—be it incorporated or not—is one of *the sources of law* to be applied by domestic courts. Since the commonly used "*realistic*" *Scandinavian* concept of a *source of law* is a very broad one (it may be understood to cover all factors of a general nature on which the judge shall or may rely when deciding a case),[18] in itself such a statement is of

[18] It is a common feature of modern *Scandinavian* legal theory that it recognizes that a number of different factors may be regarded as sources of law.

Among *Scandinavian* legal philosophers Professor *Alf Ross* is probably the most prominent and best known outside the region. In his *On Law and Justice*, London, 1958, p. 77, the sources of law are defined in the following manner:

"'Sources of law", then, are understood to mean the aggregate of factors which exercise influence on the judge's formulation of the rule on which he bases his decision; with the qualification that this influence can vary—from those "sources" which furnish the judge with a ready rule of law which he merely has to accept, to those "sources" which offer him nothing more than ideas and inspiration from which he himself has to formulate the rule he needs."

This view has been developed further by Professor *Torstein Eckhoff* who in his book *Rettskildelære* (The Doctrine of the Sources of Law), 2nd edition, Oslo, 1987, p. 17 f., rejects use of the concept "source of law" since it lends itself to associations such as "law can be drawn directly like water from a spring". He does not give a general definition of the sources of law, but draws a distinction between *sources of law factors* and *principles of sources of law*. A *source of law factor* is an argument which one is *permitted, but not always required*, to include in legal reasoning. The *principles of sources of law* give guidance as to what is necessary and what is permitted to be taken into account when solving a legal controversy. And they indicate what weight should be ascribed to the different considerations. As regards the *sources of law factors, Eckhoff* mentions (1) legislation, (2) the *travaux préparatoires* of legislation, (3) court practice, (4) other forms of practice, (5) custom, (6) legal doctrine and (7) real considerations. However, *Eckhoff* emphasizes strongly that this list of *sources of law factors* does not claim to be complete and he also discusses international law in his exposition of the sources of law.

A largely similar view is expressed by Professor *Stig Strömholm* in *Rätt, rättskällor och rättstillämpning* (Law, Sources of Law and the Application of Law), Lund, 1981, pp. 296 ff.

It is probably fair to conclude that *Eckhoff's* and *Strömholm's* "definitions" of the sources of law express the general view in contemporary *Scandinavian* legal theory.

no great help. According to this definition international law may *per se* be regarded as a source of law in domestic law because it can be used as the basis for arguments concerning a specific interpretation of domestic law. The point is, however, that it is asserted that the courts have in fact been more willing to apply international law—be it treaties or international customary law—than implied in the aforementioned general principles governing the relationship between international law and domestic law.

In one of the most comprehensive expositions of the relationship between international law and domestic law in *Scandinavia*, Professor *Carsten Smith* concluded as regards *Norwegian* law:

> "In my opinion the *Norwegian* Courts have in fact expressed a more positive view on the *municipal* significance of international law than the above-mentioned principle suggests. A foundation has therefore now been provided for a reformulation of these maxims. I will attempt to demonstrate that it is today more accurate to draw up a principle of *municipal effectivisation* of the norms of international law, a principle of *direct application of international law*, and a more *limited* principle of supremacy of *statute law* in *certain cases* of conflict."[19]

Similarly, in a recent study on the application of international law in domestic *Danish* law, it was concluded that international law and its arguments have been applied by the courts to such an extent that the natural terminological conclusion of this is to characterize international law as a *source of law* in domestic *Danish* law.[20]

By ascertaining that international law is a source of law in domestic law it is emphasized that it is not possible to solve conflicts between international law and domestic law on the basis of simple principles. While the more traditional view focuses on clear conflicts between international law and domestic law, the source-of-law point of view focuses on the more frequent minor divergences between international law and domestic law. The approach to the question of the impact of international law on domestic law is thus being methodically changed from a *normative* point of view to a more *descriptive* one. In the words of *Carsten Smith*:

> "...it is erroneous to assume that one can arrive at clear rules as to which norms, the national or the international, shall take precedence in cases of conflict. That the discussion has for so long been carried out on such lines

[19] Cf. Carsten Smith, *op.cit.*, p. 157

[20] Cf. Søren Stenderup Jensen, Folkeretten som retskilde i Dansk ret (International Law as a Source of Law in Danish Law), *UfR* 1989 B, p. 11.

> in this field can probably be explained by the fact that the conflict has taken a particularly sharp and dramatic form because there were different legal systems which collided. But if one recognizes at the outset that international law is a part of *Norwegian* law, there is also reason to draw the consequence that this kind of norm conflict must be resolved in the same manner as are conflicts between different *municipal* legal norms."[21]

In a 1980 article, *Carsten Smith* went one step further and stressed the source-of-law perspective even more forcefully:

> "The question of the position of international law before *Norwegian* (domestic) courts is primarily one of *sources of law* and it ought not to be resolved, as has generally been the case, by laying down constitutional rules."[22]

Similar points of view with regard to *Danish* law have been put forward by Professor *Henrik Zahle*, who has maintained that nothing can be deduced from Article 19 of the *Danish* Constitution with regard to the position of international law within the *Danish* legal order. Accordingly,

> "(t)he application of international law—or rather international sources of law—must be judged in line with other types of sources of law... Hence (1) international law is *relevant* for the judgement of domestic sources of law, and (2) if international law and domestic law point in different directions, a conflict of laws is present. Thus, as the sources-of-law-doctrine appears today, such conflicts cannot be solved by referring to simple principles."[23]

Accordingly, some legal writers have concluded that the only fundamental restriction on the law-enforcing authorities' application of international law is the *principle of legality*: international law cannot substitute the requirement of statutory authorization laid down in this principle.[24]

However, this does not mean that international law, when it conflicts with domestic law, should prevail absolutely. Such a conflict must be solved on the basis of an overall evaluation of the facts of the case—including the different sources of law. As in other cases of conflict between, on the one hand, a statutory rule and on the other hand, another source of law, it is certain that the statutory rule will carry

[21] Cf. Carsten Smith, *op.cit.*, p. 192.

[22] *Cf.* Carsten Smith, Om internasjonale menneskerettigheter og nasjonale domstoler, (On International Human Rights and Domestic Courts), 15 *Jussens Venner* (1980), p. 307 f.—See also Jan Erik Helgesen, *Teorier om "Folkerettens stilling i norsk rett" (Theories on "The position of International Law in Norwegian Law"*), Oslo, 1982, p. 6 f. and pp. 113 ff.

[23] Cf. Henrik Zahle: *Dansk forfatningsret* (Danish Constitional Law), Vol. 2, Copenhagen (1989), p. 101 f.

[24] Cf Carsten Smith, *op.cit.*, p. 183; Jan Erik Helgesen, *op.cit.*, p. 85; and Søren Stenderup Jensen, *op.cit.*, p. 10.

considerable weight. But the considerations pointing in the opposite direction may carry such weight that a total evaluation makes the international rule law prevail.

Thus, the *lex specialis* and the *lex posterior principles* will give some guidance in resolving a conflict between international law and domestic law, whereas the *lex superior principle*, as pointed out by Lecturer *Jan Erik Helgesen*, provides hardly any guidance.

> "... in the conflict between arguments of international law and arguments of domestic law, because this principle presupposes a relatively clear conception of the placing in the norm-hierarchy. And this is where the misunderstanding arises: the hierarchic placing of the systems. That one has applied this principle of conflict of rules to this type of conflict is in my opinion the cardinal mistake."[25]

Moreover, it has been pointed out that the following considerations are affecting the resolution of conflicts between international law and domestic law.[26]

> a) Is the conflict of a *total* or of a *partial* nature? The more limited the conflict, the easier it is to base the application of the rule of international law on the *lex specialis principle*.
>
> b) The *political and legal problems* which might be involved in a breach of international law.
>
> c) The *strength and the clarity of the international rule*, including the degree of acceptance of the rule by the international community. This applies in particular to the ECHR.
>
> d) The *strength and the clarity of the domestic rule*. Is the area an issue covered by the *principle of legality?*
>
> e) The *domestic rules' position within the domestic norm hierarchy*.
>
> f) Is it possible to *ascertain the Legislature's intentions?* To the extent these intentions can be ascertained, they will be ascribed considerable significance.

The acceptance of international law as a source of law has been criticized because it does not help to resolve conflicts between international and domestic sources of law, and because it does not help to decide whether a non-incorporated international legal rule may or may not create directly enforceable obligations and rights for individuals.[27]

This may be so, but the guidelines provided by the source-of-law point of view nevertheless seem more adequate that the traditional general

[25] Cf. Jan Erik Helgesen, *op.cit.*, p. 105.

[26] Cf. Carsten Smith, International Law in Norwegian Courts, 12 *Sc.St.L* (1968), pp. 188 ff; and Søren Stenderup Jensen, *op.cit.*, p. 11.

[27] See Claus Gulmann, *op.cit.*, p. 34.

principles governing the application of international law in domestic law. This is undoubtedly because these guidelines are based on the available case law in the field rather than on a rigid constitutional normative point of view.

In *Sweden* Professor *Jacob W.F. Sundberg* has touched upon similar thoughts. Thus he has asserted that the "European Convention is part of the "*Swedish sources of law doctrine*" (italics added), since

> "... those who examine the Institute's (The Stockholm Institute of Public and International Law) annual reports to Strasbourg will find that it is in no way unusual that argumentation before *Swedish* courts refer to the provisions of the European Convention and—depending on counsel's capability and engagement—also to court practice in Strasbourg. It is more difficult to find that a court in its summing-up and decision refers to the European Convention, although it is not as unusual to find such references in dissenting opinions. This should, however, not mislead concerning the Convention's legal effects. It may be useful to compare with the precedent doctrine. It was also for a long time extremely difficult to find precedent referred to in summings-up and decisions in *Swedish* judgements without anybody for that matter seriously asserting that in *Sweden* a precedent doctrine and precedent effect did not exist.[28]

So far, it seems that this point of view has not been theoretically developed as extensively in *Sweden* as in *Denmark* or in particular *Norway*; nor has it been generally accepted in contemporary *Swedish* constitutional theory: emphasis has primarily been on criticizing writers in favour of the *transformation theory* and the case law reflecting this view. It is, however, difficult for a non-Swede to understand the somewhat exaggerated and dogmatic arguments sometimes advanced both for and against giving treaties a stronger position in domestic law which one occasionally comes across in the *Swedish* debate.[29]

3. THE ATTITUDE TAKEN BY THE *SCANDINAVIAN* COUNTRIES BEFORE RATIFYING THE EUROPEAN CONVENTION ON HUMAN RIGHTS

Denmark and *Norway* were among the original signatories to the ECHR on 4 November 1950. *Sweden* signed it on 28 November 1950. After the national Parliaments had approved the ratification of the ECHR, it was

[28] Cf. Jacob W.F. Sundberg, Om mänskliga rättigheter i Sverige (On Human Rights in Sweden), *SvJT*, 1986, p. 660.

[29] See Hilding Eek, Ove Bring & Lars Hjerner: *Folkrätten* (Public International Law), 4th edition, Stockholm, 1987, p. 260.

ratified by *Denmark* on 13 April 1953, by *Norway* on 15 January 1952 and by *Sweden* on 4 February 1952.

Declarations under Article 25 of the Convention recognizing the competence of the European Commission of Human Rights to receive individual petitions were first made by *Denmark* on 13 April 1953, by *Norway* on 13 December 1955—for a limited period—and by *Sweden* on 4 March 1953 for an unspecified period. *Denmark* and *Norway* have subsequently continuously renewed these declarations.

Declarations under Article 46 of the Convention recognizing the compulsory jurisdiction of the European Court of Human Rights were made by *Denmark* on 13 April 1953, by *Norway* on 30 June 1964 and by *Sweden* on 15 June 1966, all (now) for a period of 5 years, and these declarations have been renewed ever since.

Prior to the ratification, the Governments reviewed the compatibility of domestic law with the provisions of the ECHR.

In *Denmark* this review showed that, in the Government's view, *Danish* law was consistent with the provisions of the Convention, although a few provisions in a statute on social assistance were *amended*, since these provisions were considered to be contrary to Article 5 of the Convention. This amendment abolished the right to detain a person who failed either to support his family or to pay alimony or maintenance. No reservations to the Convention have been made by *Denmark*.

Before ratifying the Convention, the *Norwegian* Government considered that Article 2 of the Constitution, which prohibited the activity of Jesuits on *Norwegian* soil, was incompatible with Article 9 of the Convention, and a reservation was made in this respect. The Constitution was subsequently amended and this reservation was withdrawn.[30] However, some members of Parliament questioned whether domestic law was compatible in all respects with the Convention; but Parliament nevertheless, on the present basis, approved the ratification.

Similarly, the *Swedish* Government reviewed the compatibility of *Swedish* law with the Convention prior to its ratification. This review showed, in the Government's view, *Swedish* law to be compatible with the Convention, although a statute laying down some restrictions on religious freedom was amended. The review, as it appears in the explanatory memorandum on the proposal to obtain the consent of Parliament to ratify the Convention, was of a rather summary character and no closer comparative analysis was attempted.[31] However, some mem-

[30] Cf. Yearbook of the European Convention on Human Rights 1955–57, pp. 41 f.
[31] See *Prop.* 1951:165. For further information, see Jerzy Sztucki, *op.cit.*, p. 221.

bers of Parliament questioned whether domestic law was compatible in all respects with the Convention; but Parliament nevertheless, on the present basis, approved the ratification.

Since a general incorporation was not regarded as necessary, the ECHR can thus be said to have been subject to *passive incorporation*. One may consider this a *laissez-faire* way of "incorporating" the Convention into domestic law. However, principles and rules similar to the provisions of the Convention were to a large extent already in force by virtue of the national Constitutions, of express statutory provisions and of general principles of law. As regards provisions of the Convention where this was not considered to be the case, special legislation was passed or a reservation was made.

This does not mean, of course, that the ECHR is without legal impact in the *Scandinavian* countries. It serves as a basis, binding upon each country under international law, for a corresponding set of domestic rules of law. Thus responsibility for the day-to-day fulfillment of the Convention lies primarily with the Legislature, yet the law-enforcing authorities also have a major responsibility in this respect.

4. THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN DOMESTIC LAW

4.1. *When do the courts establish that there is a conflict between the European Convention on Human Rights and domestic law?*

Since the ECHR does not possess the status of domestic law in Scandinavia, one might think that the number of cases of conflict between the Convention and domestic law would be overwhelming, but it has in fact been surprisingly low.[32] However, there is now an increasing tendency to invoke the Convention before national courts, while the courts themselves have become more aware of the Convention. Moreover, in several cases brought before the European Commission of Human Rights, the Convention has not previously been invoked before the domestic courts.[33]

Despite the "dualism" governing the domestic application of international law established in the *principle of supremacy of domestic law*, *Scandi-*

[32] Justice Frants Thygesen, Bestand und Bedeutung der Grundrechte, *EuGRZ* 1978, p. 440, explains this scarcity of cases involving human rights with the existence of the Ombudsmen in *Scandinavia*.

[33] Cf. Jerzy Sztucki, *op.cit.*, p. 225.

navian law contains hardly any cases in which it is clearly held that, in case of conflict between the ECHR and domestic law, precedence should be given to domestic law. However, some *Swedish* decisions from the 1970's contain statements which have subsequently been viewed as an affirmation of the *transformation theory*, or in fact constituting this theory. But even these cases, it will be argued, provide less authorization for the *transformation theory* than what is usually assumed.

It follows from this practice that a preliminary, but not less important, question in this context is under what circumstances do the courts establish that there is a conflict between the ECHR and domestic law? Are there any criteria which the courts apply when deciding whether or not there is a conflict between the ECHR and domestic law in the case at issue?

4.1.1. *Establishing a conflict between the European Convention on Human Rights and domestic law: domestic law prevails*

The only *Danish* decision containing statements in support of the *principle of the supremacy of domestic law* is 1986 UfR 898. In this case *a part* of the ECHR had actually been incorporated into domestic *Danish* law. The plaintiffs were eight bus drivers who had resigned from their trade unions. These resignations had caused extensive work stoppages and boycotts. Consequently, the Metropolitan Council dismissed the drivers, although a statute prohibiting dismissal on the basis of membership of an association was in force when the drivers were dismissed. As a consequence of the judgement of the European Convention on Human Rights in the *British Rail Case*,[34] this statute had been enacted in order to fulfil *Denmark*'s obligations under the Convention. The plaintiffs argued that the dismissals were contrary to Article 11 of the ECHR.

On the relationship to the Convention the Supreme Court stated:

> "The invoked provision in Article 11 of the Human Rights Convention *cannot be applied directly*, but the dismissals should be judged on the basis of Act No. 285 of 9 June 1982 on Protection Against Dismissal on the Grounds of Association Relations, *which was passed in order to fulfil Denmark's obligations under Article 11 of the Convention*" (italics added).[34]

Then, it was stated that the dismissals were contrary to the Act and the plaintiffs were awarded damages, since this statute did not provide for reinstatement.

[34] Eur. Court H.R., *Case of Young, James and Webster*, Series A, Vol. 44 (1981).

In an extrajudicial comment on the decision,[35] Justice *Erik Riis* discussed the application of the ECHR in the concrete case:

> "The Supreme Court did not find that the European Convention on Human Rights was directly applicable in this case. It is probably very doubtful whether significance can be ascribed to a Convention that is even older than the 1953 Constitution in laying down the contents of the Constitution. To this must be added that Act No. 285 of 9 June 1982 on Protection against Dismissals on the Grounds of Association Relations was passed in order to fulfil *Denmark*'s obligations under Article 11 of the Convention. *This statute was not found to leave any doubt* which could be clarified by reference to the European Convention on Human Rights" (italics added).[36]

Thus, it seems that the Supreme Court was of the opinion that the Act on Protection against Dismissal on the Grounds of Association Relations should be considered as a *partial* incorporation of the Convention into domestic law, and that there was no divergence between the Convention and this Act. Since the Act did not give rise to any doubt as to its interpretation, strictly speaking it is only natural that the decision should be based on the domestic legal rule, insofar as it was not assumed that this was contrary to the Convention.

Against this background, it is remarkable that the Supreme Court—as an *obiter dictum*—should refuse in such relatively strong terms to review the compatibility of the domestic rule with the Convention. The case did not give cause for any such statement.[37] The *Danish* Supreme Court has traditionally avoided making such strong statements on matters where the case at issue has not given cause. Obviously, this decision showed that the Supreme Court was seeking to avoid involvement in the political dispute raging at that time, *partly* on the passing of the Act on Protection against Dismissal on the Grounds of Association Relations, and *partly* on the very delicate question of freedom of association in the *Danish* labour market. Thus, in subsequent cases the Supreme Court again discussed the compatibility of the domestic rules with the Conven-

[35] Extrajudicial comments on Supreme Court decisions are commonly used in *Denmark*. Such comments are not official notifications from the Court, nor are they supplements to the judgement, but they can be viewed as the individual judge's remarks on the decisions, on the basis of their participation in deciding the case, *cf.* Torben Jensen, Højesterets arbejdsform, (The Supreme Court's Method of Work), *Særnummer af UfR i anledning af Højesterets 325 års jubilæum*, Copenhagen, 1986, p. 141.

[36] Cf. Erik Riis, Offentlige myndigheders afskedigelse af uorganiserede chauffører, (Public Authorities' Dismissals of Non-Unionized Drivers), *UfR* 1987 B, p. 54.

[37] In the opposite direction, see Peter Germer, *Statsforfattingsret* (Constitutional Law), Vol. 2, Copenhagen, 1989, p. 39.

tion. Accordingly, this judgement cannot be regarded as a precedent for the *principle of the supremacy of domestic law.*[38]

> The case was later brought before the European Commission of Human Rights, which declared it inadmissable because the bus drivers could not be regarded as "victims" within the meaning of the Convention. This was neither the case in relation to the claim for reinstatement, nor as regards the claim for greater damages. On the one hand, the Commission considered the possibility of obtaining damages in certain cases as an effective remedy against an infringement of the individual's right under the Convention. On the other hand, the Commission insisted that damages are not always a sufficient remedy if the Member State has not taken proper measures to fulfil its obligations under the Convention. Since the circumstances made it unlikely that it was general practice for public authorities disregard their obligations under the Act on Protection against Dismissal on the Grounds of Association Relations and solely pay damages, the Commission found that *Denmark* had adopted the proper measures to fulfil its obligations under Article 11 of the Convention.[39]

Erik Riis' statement that "it is probably very doubtful whether significance can be ascribed to a convention that is even older than the 1953 Constitution in the laying down of the contents of the Constitution" probably does not reflect the general conception of law in this field, nor is it supported by judicial practice. Thus this view seems, as the Director of the *Danish* Centre of Human Rights, *Lars Adam Rehof*, has put it

> "... to presuppose a *new* variant of the rule of interpretation, according to which this rule should not be applicable to constitutional provisions or other rules of a constitutional character".[40]

Moreover, this question is anyway of minor significance since obviously it cannot have been the aim of the amendment of the *Danish* Constitution in 1953 to derogate from the ECHR.[41] Finally, *Erik Riis'* view is in clear contrast to the *Norwegian* Supreme Court's decision in 1966 N.Rt 935 and the *Swedish* Supreme Court's decision in 1981 NJA 1205 and 1989 NJA 131 stating that the ECHR is an important means of interpretation of the national constitutions.

There exist no *Norwegian* cases in which the courts have laid down that there was a conflict between the ECHR and domestic law. Consequently the *Norwegian* courts have not ruled on this question.

[38] Cf. Henrik Zahle, *op.cit.*, Vol. 3, p. 236 f.
[39] Application No. 12719/1987.
[40] Cf. Lars Adam Rehof, Afskedigelse som menneskerettighedsproblem (Dismissal as a Human Rights Problem), *UfR* 1987 B, p. 197.
[41] *Ibid.*

In the *Case of Swedish Engine Drivers' Union,*[42] the Association claimed that the National Collective Bargaining Office, by refusing to conclude a new collective agreement with it, had violated not only certain sections of a 1936 Act regarding the right to organize and to negotiate, but also a number of international conventions including Articles 11, 13 and 14 of the ECHR. The Labour Court rejected this view. As regards the application of the invoked conventions, the Court stated:

> "With specific regard to the provisions of international agreements as touched upon earlier, it is the accepted view in *Sweden* that such provisions—insofar as they do not already have their counterparts in our legislation or customary law—do not become applicable *Swedish* law except through the medium of legislation. They can, however, clarify the meaning of laws enacted in *Sweden*, which must be assumed to be in conformity with *Sweden's* international undertakings. However, the submissions made in the case in this respect do not in any way cause the Labour Court to change its judgement of the question in dispute between the parties."[43]

It seems that the Court is simply affirming the *transformation theory*, but this reference to the theory as "the accepted view in *Sweden*" at that time is not convincing. In that period *Swedish* legal scholars were—and to some extent still are—divided on the question of whether incorporation was needed before treaties could be applied in domestic law. The *transformation theory* did not establish itself as the prevailing view in legal practice until later, *inter alia* as a consequence of the Labour Court's decision in this case, although legislative practise for a long time had presupposed that transformation is needed when a treaty is to have domestic effects.

At the same time, however, the Court also affirmed the *principle of presumption* since, as stated in the judgement, international conventions "can... clarify the meaning of laws enacted in *Sweden,* which must be assumed to be in conformity with *Sweden's* international undertakings."

On the other hand, the Labour Court's statement that "the submissions made in the case in this respect do not in any way cause the Labour Court to change its judgement..." indicates that the Court had reviewed the compatibility of the invoked international conventions with domestic *Swedish* law.[44]

[42] Reported in 1973 AD No. 5.

[43] Here cited in English from Andrew Z. Drzemczewski, *op.cit.*, p. 139.

[44] Cf. Rolf Almering, Europakonventionen som lagtolkningsfaktor, (The European Convention on Human Rights as a Means of Interpretation), *SvJT* 1973, p. 786 f; and Bertil Malmlöf & Mikael Millqvist, Om statens skadeståndsansvar vid myndighetsutövning, (The State's Liability for Damages Emerging from the Exercise of Authority), in Jacob W.F. Sundberg (ed.), *Studier kring europakonventionen*, Stockholm, 1982, p. 48 note 88.

Thus, both the *transformation theory* and the *principle of presumption* were, in general statements, emphasized by the Labour Court. However, in its concrete application of the law, the Court did not act in accordance with its general statements on the *transformation theory* since it in fact reviewed the compatibility of the invoked conventions with domestic law, i.e. these general statements appear to be *obiter dicta*.

> The case was later brought before the European Court of Human Rights, which found the Labour Court's argumentation in conformity with the Convention. The Court referred to the above-cited statement from the Labour Court and declared that "... a reading of the judgement of 18 February 1972 reveals that the Labour Court carefully examined the complaints brought before it in the light of legislation in force and not without taking into account *Sweden's* international undertakings".[45]

In 1973 NJA 423 the *Swedish* Supreme Court held that a retroactive clause in a collective agreement was not improper or unfair either in itself or in its specific application to the plaintiff. This case concerned the legal validity and effect of a clause which was included in a collective agreement between the National Collective Bargaining Office and four federations of trade unions representing state employees. The clause stipulated that increased salaries were not to be given retroactively to members of trade unions who had been on strike during a part of the period of negotiations. Since the plaintiff was a member of a trade union which was not a party to the agreement, and had been on strike, he was entitled to receive retroactive benefits in spite of the retroactivity clause provided in the collective agreement. Before the courts in all instances he invoked *inter alia* Articles 11, 13 and 14 of the ECHR.

The Court of Appeal expressed itself in accordance with the Labour Court i.e. it laid down that both the *transformation theory* and the *principle of presumption* were part of *Swedish* law. The Supreme Court on the other hand, emphasized only the requirement of transformation:

> "Even if *Sweden* had assented to an international agreement, this would not be applicable for the state within the existing application of the law. To the extent that the agreement expresses principles which have not earlier prevailed in this country, corresponding legislation ("transformation") will be necessary. Such legislation had, however, not been considered necessary when *Sweden* ratified the agreements referred to by Mr. Sandström. In that respect it should be noted that these agreements cannot be considered as having the content to which Mr. Sandström refers."[46]

[45] Cf. Eur. Court H.R., *Case of Swedish Engine Drivers' Union*, Series A, Vol. 20 (1976).
[46] Here cited in English from Andrew Z. Drzemczewski, *op.cit.*, p. 140.

The argumentation in the cited passage of the judgement is, however, not consistent. On the one hand, the Court stresses that transformation is necessary if a treaty is to have binding force in domestic law. On the other hand, it asserts that the invoked international agreements do not have "the content to which Mr. Sandström refers", i.e. the Court—apparently after having reviewed the compatibility of the invoked provisions of the Convention with *Swedish* law—saw no conflict between international law and domestic *Swedish* law.[47] In that case the emphasis on the need for transformation appears to be an *obiter dictum*, having therefore little value as a precedent.

The Supreme Administrative Court's decision in 1974 RÅ 121 went one step further in its emphasis on the *transformation theory*. The question before the Court was whether a municipal authority was legally obliged to apply Article 2 of the ECHR Additional Protocol of 20 March 1952 in a case in which the parents of a child had asked the local School Board to prohibit the display of posters containing any form of violence or sex.

The Supreme Administrative Court did not assume that such a legal obligation on administrative authorities existed:

> "An international treaty to which *Sweden* has acceded is not directly applicable in the domestic application of justice in our country, but the legal principles expressed in the treaty must, if required, be included in a corresponding *Swedish* law (transformation) before they become applicable law in *Sweden*. No transformation law corresponding to Article 2 of the Additional Protocol of 20 March 1952, to the Convention of the Council of Europe for the Protection of Human Rights and Fundamental Freedoms has been enacted. Consequently no obligation has been created for the School Board to observe the rules of the Additional Protocol in its activities."[48]

The decision thus went as far as to suggest that administrative authorities should *not* be under legal obligation to exercise their powers with respect to *Sweden's* international undertakings. It should undoubtedly be viewed as a judicial affirmation of the *transformation theory*.[49] It was subsequently heavily criticized in legal writing. Thus, Professor *Jerzy Sztucki* characterized the decision as "unique in its apparent indiffer-

[47] Cf. Bertil Malmlöf & Mikael Mellqvist, *op.cit.*, p. 50.

[48] Here cited in English from Jacob W.F. Sundberg, *Judicial Protection of Human Rights. The National Level. Scandinavian Laws*, pre-prints of the Bologna Congress on Protection of Human Rights on the International and National Level, Bologna, 1988, p. 201.

[49] Cf. Rolf H. Lindholm, Mänskliga rättigheter i Sverige (Human Rights in Sweden), *SvJT* 1986, p. 16

ence to the substance of the Convention",[50] Professor *Lars Hjerner* added that "... statements of the kind made in the Råneå Case (1974 RÅ 121) are, contrariwise, only likely to cause annoyance and should therefore be avoided",[51] and Professor *Jacob W:F. Sundberg* called the decision an "error of judgement".[52]

The very sharp criticism to which this decision was subsequently subjected seems, as will be seen, to have contributed to make the *Swedish* courts rethink their attitude towards the ECHR.[53]

4.1.2. *Establishing that there is no conflict between the European Convention on Human Rights and domestic law: Following the line of least resistance or direct application of the Convention?*

In a number of cases it is stated that, in the Court's view, there was no conflict between the ECHR and the way in which domestic law was applied. However, the extent to which the courts have discussed the relationship between the Convention and domestic law varies from case to case. This is undoubtedly because in some cases the question of the compatibility of domestic law with the Convention is only one of several questions, whereas in other recent cases it has constituted the very dispute.

In 1985 UfR 1080 two accused were sentenced to 4 and 7 years imprisonment by the High Court for Eastern Denmark, sitting with a jury, for, *inter alia*, attempted robbery. They pleaded before the Supreme Court to have the sentence rescinded and remitted to re-trial because a reading of evidence before the High Court, which prior to the High Court hearing had been given in the City Court of Copenhagen, was contrary to Article 6(3)(d) of the ECHR. The evidence was read

[50] Cf. Jerzy Sztucki, *op.cit.*, p. 227.

[51] Cf. Hilding Eek, Ove Bring & Lars Hjerner, *op.cit.*, p. 261.

[52] Cf. Jacob W.F. Sundberg, Rättskällorna på 1970-talet (The Sources of Law in the 1970's), in *Svensk rätt i omvandling. Studier tilägnade Hilding Eek, Seve Ljungmann & Folke Schmidt*, Stockholm (1976), p. 506 note 44.

[53] However, in the Housing the Tenancy Court's judgement of 2 April 1984 (Case No. BD 547/83–04) postponement of a decision in the case until the European Commission and Court on Human Rights had decided whether the Convention had been violated at previous stages of the proceedings was refused.

From the European Court on Human Rights' subsequent judgement in the case it appears that the applicant invoked Articles 6, 11 and 13 of the Convention before the Housing and Tenancy Court, cf. Eur. Court H.R., *Langborger Case*, Series A, Vol. 155 (1989), para. 12. However, this does not appear from the Housing and Tenancy Court's judgement.

before the High Court because the witness had died before the hearing. The Supreme Court established that the evidence could be read before the High Court *inter alia* because counsel for the defence had been present in the City Court and had thus had the right to cross-examine the witness and that this was lawful under sec. 877(2)(3) of the *Danish* Administration of Justice Act. Then it was stated that "... *Article 6(3)(d) of the European Convention on Human Rights is not shown to have been infringed*" (italics added).

The case seems to be the first in which the *Danish* Supreme Court explicitly discussed the relationship between the ECHR and domestic law. With this reference to the Convention, it must be presumed that the Supreme Court wished to indicate that it had interpreted the Convention independently and then compared it with domestic *Danish* law. The result was that it was not assumed that domestic law was incompatible with the Convention; but this is not the decisive point as regards the application of the Convention. Against this background it is difficult to view the decision as anything other than a direct application of the Convention.[54]

The willingness to review the compatibility of domestic law with the Convention was confirmed in 1987 UfR 440, in which the Supreme Court's Appeals Committee confirmed a decision made by the President of the High Court for Eastern *Denmark*. In this case the President had assigned a counsel for the defence in a case where the accused himself had not been able to find a counsel who would plead the case within a reasonable time. Before the Supreme Court the accused pleaded to have the assignment rescinded with reference to Article 6 of the ECHR. In a statement submitted to the Supreme Court, the President of the High Court stuck to his original decision: "... *Article 6(3)(c) of the European Convention on Human Rights cannot be considered infringed...*" (italics added) since the two counsels assigned to the accused were counsels who had often been assigned to accused by the State from a list of legal aid counsels, and furthermore they were willing to take on the case. Thus, this case must also be considered as a direct application of the Convention in domestic *Danish* law.[55]

From these two judgements nothing certain can be concluded on how

[54] Cf. Nina Holst-Christensen, Gælder menneskerettighederne i Danmark? (Do the Human Rights Apply in Denmark?), *Juristen*, 1989, p. 50 and Asbjørn Jensen, Incorporation of the European Convention Seen from a Danish Point of View, in Lars Adam Rehof & Claus Gulmann (eds.), *op.cit.*, p. 169.

[55] Cf. Asbjørn Jensen, *op.cit.*, p. 169.

the Court would have decided the case if it had assumed that there was a conflict between domestic law and the Convention.

The first *Norwegian* case explicitly involving the ECHR was 1961 N.Rt. 1350, which concerned the question whether a provision of a provisional act on compulsory civilian service for dentists violated Article 4 of the Convention. In the Supreme Court, Justice *Hiorthøy*, speaking for the majority, ruled:

> "It seems hardly doubtful to me that the prohibition in the Convention against subjecting anyone to perform "forced and compulsory labour" cannot reasonably be given such a wide construction that it includes instructions to perform public service of the kind in question here. The present case concerns brief, well-paid work in one's own profession in immediate connection with completed professional training. Although such injunctions may in many cases be in conflict with the interests of the individual as he sees them at the moment, I find it manifest that they cannot with any justification be characterized as an encroachment on, still less violation of, any human right. Accordingly, as I cannot see that there is any contradiction between the Convention and the *Norwegian* act in question, I need not enter into the question as to which of these shall prevail in the event of conflict."[56]

Thus, the Supreme Court majority did not assume that there was any conflict between the Convention and domestic *Norwegian* law. Consequently, it did not need to consider how such a conflict should be solved.[57] On the other hand, it should be observed that the Supreme Court here considered the ECHR as an important source of law in domestic law.[58]

Similarly, in 1974 N.Rt. 935 both the majority and the minority were, though on different premises, of the opinion that there was no conflict between the domestic provision at issue and the Convention.[59] The case concerned the question whether a mental patient could be a litigant within the criminal procedure or whether such a status belonged exclusively to the committee. The majority did not find that Article 6 of the ECHR should be interpreted as pleaded by the plaintiff, but the minor-

[56] Here cited in English from Andre Z. Drzemczewski, *op.cit.*, p. 134.

[57] The case was later brought before the European Commission on Human Rights (Application No. 1468/62) which declared it inadmissible since it was found to be manifestly ill-founded.

[58] *Cf.* Trond Dolva, Internasjonale menneskerettighetskonvensjoner og intern norsk rett (International Human Rights Conventions and Domestic Norwegian Law), *TfR* 1990, p. 129.

[59] A commentary on the case in English by Anders Bratholm can be found in Yearbook of the European Convention on Human Rights 1974, pp. 673 ff.

ity considered that the domestic provision did not have the content which the State pleaded and that, consequently, there was no conflict with the Convention.[60]

1982 N.Rt. 241[61] concerned the legality—partly under domestic *Norwegian* law and partly under international law, *inter alia* Article 14 of ECHR and Article 1 of the First Additional Protocol of 20 March 1952—of an administrative decision on the construction of a hydroelectric power station on the Alta River in an area inhabited by Sami people. As regards its relationship to the ECHR (and the other invoked roles of international law) Justice *Christiansen*, speaking for a unanimous Supreme Court, sitting in plenum, established that there was no conflict between the domestic rules and the invoked international obligations (p. 299). However, previously in the judgement, he stated (p. 257 f):

> "What I have mentioned on the restriction of the judicial review requires a supplement. It is in the case asserted that rules of international law, binding upon *Norway*, protect the Samis against this encroachment upon Sami interests, which State regulation of the Alta river will entail. The rules on the courts' competence to exercise judicial review of administrative acts do not preclude the courts from reviewing completely whether the decision of regulation is contrary to the rules of international law."

Since it was found that there was no conflict between the invoked conventions and domestic law, this statement is an *obiter dictum*. However, this may be interpreted as meaning that the Supreme Court, without actually having to do so, felt a stronger need to express its view on the relationship between human rights conventions and domestic *Norwegian* law than it had on earlier occasions. In this respect, one should note the very clear formulation "... do not preclude the courts from reviewing *completely* whether the decision of regulation is contrary to the rules of international law (italics added). Normally, however, it is assumed that *Norwegian* courts are not entitled to review the administration's exercise of so-called "free discretion". Thus the rules of international law do not form part of the "free discretion" which the administration itself exercises. Consequently, *Norwegian* administrative authorities should be considered under a legal obligation to exercise their discretionary pow-

[60] See also 1977 N.Rt. 1207, 1978 N.Rt. 667 and 1981 N.Rt. 1770 in which the compatibility of domestic law with a number of Articles of the International Covenant on Civil and Political Rights was discussed explicitly by the Supreme Court.

[61] In Supreme Court's Appeals Committee's decisions in 1985 N.Rt 1444 and 1987 N.Rt 1285 the Committee, without entering into any discussion, stated that the provisions of the *Norwegian* Criminal procedures act on detention on remand were compatible with Article 5(1)(c) of the ECHR.

ers in such a way that their decisions conform with undertaken international human rights obligations.

One may wonder whether this decision contains further implications than the above-mentioned as to the domestic status of human rights conventions. Professor *Carsten Smith* has viewed "this decision as the definitive breakthrough for the principle of the precedence of international law in *Norwegian* courts".[62] It is, however, hardly possible to draw such a far-reaching conclusion from the decision, since no conflict between the conventions and domestic law was actually recognized.[63] But the decision certainly lays down, though not in the traditional form of a precedent, that the courts are entitled to review whether administrative decisions are lawful under human rights conventions.[64]

So far, the *Norwegian* courts have managed to avoid taking a stand in a (clear-cut) conflict between the ECHR and domestic *Norwegian* law. How the courts would resolve such a conflict has been touched upon by the President of the European Court on Human Rights and former Chief Justice of the *Norwegian* Supreme Court, *Rolv Ryssdal*:

> "I would like to mention that some important human rights, which are not contained in the *Norwegian* Constitution, are now included in international binding conventions on human rights (International Covenant on Civil and Political Rights of 16 December 1966 and the ECHR). I am not aware of conflicts between existing national legislation and the provisions of the international conventions. If, however, such a conflict should arise, it would be for the courts to decide the conflict, and I think it could be argued that precedence should be given to the convention."[65]

As mentioned, the very sharp criticism to which the *Swedish* Supreme Administrative Court's decision in 1974 RÅ 121 was subsequently subjected seems to have contributed to make the *Swedish* courts rethink their attitude towards the ECHR.

A first step in that direction is probably the Supreme Administrative Court's decision in 1981 RÅ 2:14 in which the Court seems to have dissociated itself from its previous strong statements on the *transforma-*

[62] Cf. Carsten Smith & Lucy Smith, *Norsk rett og folkeretten* (Norwegian Law and Public International Law), Oslo, 1982, p. 229.

[63] Cf. Rainer Hofmann in *EuGRZ* 1985, p. 120, who concludes: "Sicherlich ist in dieser Aussage, die ohnehin eher als obiter dictum zu werten ist, kein Präjudiz für den Vorrang des Völkrechts gegenüber nationalem Recht zu sehen. Dies gilt schon deshalb, weil das Gericht letzlich keine solche Verletzung annahm."

[64] Cf. Jan Erik Helgesen, *op.cit.*, p. 51.

[65] Cf. Rolf Ryssdal, The Relation between the Judiciary and the Legislative and Executive Branches of the Government in Norway, *North Dakota Law Review* 1981, p. 534 f.

tion theory in 1974 RÅ 121. In this case some parents lodged a complaint that the Stockholm School Board had decided that the primary school pupils in Stockholm were obliged to stay in school in addition to the normal teaching hours in order to participate in other activities. This was, according to the parents, not lawful under the Instrument of Government nor under Articles 8 and 14 of the ECHR. On the impact of the Convention of *Swedish* law, the County Government Board of Stockholm, which decided the case in the first instance, repeated literally the Supreme Administrative Court's statements in 1974 RÅ 121. The Supreme Administrative Court discussed, on the other hand, whether domestic law and its applications in the case at issue was compatible with the Convention and concluded that there was no conflict between domestic law and the Convention. However, no general statements on the *transformation theory on the principle of presumption* were made.[66]

In the Stockholm Administrative Court of Appeal decision of 31 October 1988,[67] in the third set of proceedings challenging the injunction against transfer of a child from her foster parents to the biological mother in the *Eriksson Case*,[69] it was held that there was no violation of either the mother's or the child's right to family life under Article 8 of the ECHR. This interpretation later proved incorrect since the European Court on Human Rights established that there had been a violation of Article 8 of the Convention.

4.1.3. *Tentative conclusions*

No reported *Danish* or *Norwegian* case-law has established a conflict between the ECHR and domestic law. Consequently, *Danish* and *Norwegian* courts have avoided taking a stand on how a conflict between the Convention and domestic law should be resolved.

The three *Swedish* cases discussed in section 4.1.1. have subsequently been viewed as a judicial affirmation of the *transformation theory*.[81] However, only 1974 RÅ 121 could be viewed as a clear precedent for the *transformation theory*. Although the decisions in the Swedish Engine Drivers' Union Case and 1973 NJA 423 contain *obiter dicta* statements in

[66] See also RÅ 1978:2 in which one of the judges, in his concurring opinion, considered whether domestic law conformed with Article 6 of the International Convention on the Elimination of all Forms of Racial Discrimination.

[67] Case No. 4050/4051-1988.

[68] Cf. Eur. Court H.R., *Eriksson Case*, Series A, Vol. 156(1989).

[69] See e.g. Hans Danelius, *Mänskliga rättigheter* (Human Rights), 3rd edition, Stockholm, 1984, p. 56; and Jerzy Sztucki, *op.cit.*, p. 227.

favour of the *transformation theory*, these statements cannot under the generally accepted *Scandinavian* sources-of-law doctrine be considered as having much, if any, value as precedents.

Consequently, in *Scandinavian* law there exists only *one* case in which the courts, in a case of conflict between the ECHR and domestic law, have made domestic law prevail over the ECHR. This is quite surprising and can certainly not be regarded as a proper judicial affirmation of the traditional "dualist" approach to the question of the relationship between international law and domestic law embodied in the *principle of the supremacy of domestic law*.

On the contrary, in a number of cases it is held that there is no conflict between domestic law and the ECHR as interpreted by the Court. Such a conclusion presupposes that the Court has interpreted the ECHR independently and then compared this interpretation with domestic law. Under a "dualist" system, strictly speaking, such laying down that in the case at issue there is no conflict between the ECHR and domestic law should seem unnecessary. Analytically, this establishment of conformity of domestic law with the Convention may undoubtedly be regarded as a direct application of the Convention because the Convention in such cases has formed an integrated part of the Court's reasoning. In other words, the convention has been applied as a *source of law*. However, this does not prevent the courts from basing their decisions on an interpretation of the Convention which subsequently proves to have been erroneous and is overruled by the European Commission and Court of Human Rights.

4.2. *Direct application of the European Convention on Human Rights*

4.2.1. *General application of the Convention*

In an unreported *Danish* case[70] in which an Algerian citizen had been convicted of a penal traffic offence, the City Court of Copenhagen held that "the cost of the interpreter must be borne by the State, *cf. Article 6(3)(e) of the Convention on the Protection of Human Rights and Fundamental Freedoms, which has been ratified by Denmark*, Regulation No. 20 of 11 January 1953" (italics added). The decision should be seen in connection with section 1008 of the *Danish* Administration of Justice Act,

[70] Judgement of 25 April 1966, Case No. 21472/1965, I.

which stipulated that "if the accused is convicted... he shall be required to pay the State the necessary expenses of the trial". The case is now considered a leading case in the application of the ECHR,[71] it was followed by a circular from the Ministry of Justice to public prosecutors and courts stating that the costs of interpretation were to be borne by the State.[72]

The case is remarkable on two points. First, references to the ECHR were made in judgement. This is in itself noteworthy since there was at that time no tradition for making references to unincorporated treaties in *Danish* decisions. Secondly, the decision is based on an original interpretation of Article 6 of the Convention. The question of the interpretation of this article in relation to the costs of interpreters in criminal trials was first decided by the European Court on Human Rights in 1978.[73]

In this case, as in 1985 UfR 1080 and 1987 UfR 440, the *Danish* courts have proved willing to discuss explicitly whether a *Danish* provision is compatible with the Convention.[74] The *Danish* Attorney General and former head of the Law Department in the Ministry of Justice, Asbjørn Jensen, has recently characterized the situation as follows:

> "In such cases, the courts will often apply the direct test: whether the step or decision taken is contrary to any provision of the Convention. In other words, the courts apply the European Convention on Human Rights as a *true source of law* when they determine the concrete legal contents of their decisions" (italics added).[75]

A series of decisions from both the Supreme Court and the High Court for Eastern *Denmark* in 1989 seems to have gone one step further in the application of the Convention. These decisions manifestly presuppose

[71] Cf. Carl Aage Nørgaard, Den europæiske menneskerettighedskonvention og dansk ret (The European Convention on Human Rights and Danish Law), *UfR* 1987 B, p. 75.

[72] Circular No. 77 of 9 May 1967, which repealed the older circular No. 299 of 23 november 1922.

The 1967 circular has now been replaced by the Ministry of Justice's circular of 7 July 1989 on the Application for Payment of the Costs of Interpretation. This change was necessitated by the European Court on Human Rights judgement in the *Öztürk Case* (cf. Eur. Court H.R., *Öztürk Case*, Series A, Vol. 73 (1984), cf. The Ministry of Justice's letter of 7 July 1989 (j.nr. 1989-1001-51) to the courts.

[73] See Eur. Court H.R., *Case of Luedicke, Belkacem, and Koc*, Series A, Vol. 29 (1978).

[74] Nina Holst-Christensen, *op.cit.*, pp. 55 ff, mentions a case from the High Court for Western Denmark (Judgement of 20 September 1988, Case No. V.L. S1249/1988, 8. afdeling) concerning the smuggling of large quantities of hashish into *Denmark* in which the ECHR should have had a considerable impact on a procedural question, although this does not appear from the Court's ruling.

[75] Cf. Asbjørn Jensen, *op.cit.*, p. 169.

that the ECHR is a *source of law* in domestic *Danish* law and that *the courts are entitled to review the compatibility of the Convention with domestic law.*

The first case in this series was 1989 UfR 302,[76] which concerned the question of whether the detention for asylum of an applicant whose identity was not adequately established, was in accordance with Article 5 of the ECHR. After ruling that the detention was authorized under *Danish* law, the City Court of Copenhagen stated in its order:

> "... that such a detention under section 37, cf. section 36, of the Aliens Act *lies within the framework laid down by Article 5(1)(f) of the European Convention on Human Rights*" (italics added).

The High Court subsequently upheld this order with reference to its grounds—after having cited extensive parts of the parties' submission to it as regards the compatibility of domestic law with the Convention,

Whereas the question of compatibility of domestic law with the Convention in the cases mentioned earlier was one of several questions which the Court had to decide, in this case it was, in effect, the only question at issue.

In 1984 N.Rt. 1175 the question was whether a person who had been committed to mental hospital under section 39(1)(e) of the *Norwegian* Criminal Code could also invoke the provision in section 9a of the Mentally Ill Persons Act and, on this basis claim judicial review of the compulsory means employed. The City Court and subsequently the High Court were to reject the case since, in their view, the courts had no subject-matter jurisdiction in the case because the compulsory means was also authorized under the Criminal Code, not solely under the Mentally Ill Persons Act. Before the Supreme Court the appellant (in the interlocutory proceedings) invoked Article 5 of the ECHR and made specific reference to the *Winterwerp Case,*[77] the *Case of X v. the United Kingdom*[78] and the *Case of B v. the United Kingdom.*[79] As regards the general application of the law in the case, Justice *Røstad,* speaking for a unanimous Court, explained:

> "Neither the wording in the Act of 1961—such as this reads after the 1969 amendment—nor the *travaux préparatoires* give direct guidance as to wheth-

[76] See also the Supreme Court's judgements in 1989 UfR928, in 1990 UfR13 and in 1990 UfR .181 and the High Court for Eastern Denmark judgement in 1989 UfR 775 which are discussed below.

[77] Cf. Eur. Court H.R., *Winterwerp Case,* Series A, Vol. 33 (1980).

[78] Cf. Eur. Court H.R., *Case of X v. the United Kingdom,* Series A, Vol. 46 (1982).

[79] Cf. Application No. 6870/75. European Commission of Human Rights. Decisions and Reports.

> er the possibility of claiming judicial review is also open to a person committed to mental hospital on the basis of a judgement. The decision must be made on the real considerations here manifest, including the consideration that *Norwegian* law as far as possible should be *presupposed* to accord with treaties by which *Norway* is bound – in this case the European Convention on Human Rights of 4 November 1950" (italics added).[93]

The judge then discussed quite extensively the invoked case-law from the European Commission and Court of Human Rights and concluded that the Mentally Ill Persons Act should be interpreted in such a way as to reflect the Strasbourg view. Accordingly, he found that the courts had subjectmatter jurisdiction in such cases, and the committal was rescinded and remitted to re-trial

With this decision, the *Norwegian* Supreme Court has probably gone considerably futher in its application of the Convention than implied in the *principle of presumption.*[80] First, it was generally stated that domestic *Norwegian* law should be *presupposed* to comply with international law; the legal doctrine has traditionally expressed itself in somewhat more guarded terms and laid down that domestic law should be *presumed* to be compatible with international law. Thus, the *principle of presumption* seems to have been sharpened in this case. Second, the extensive discussion of the interpretation of the Strasbourg case law, to which *Norway* had not been a party, seems to be the first example of such in-depth discussion of Strasbourg case law in Scandinavia; but it also reflects how seriously the Convention is taken in the *Norwegian* Supreme Court. Third, in its concrete application of the law, the Supreme Court paid so much attention to the Convention that it seems to be more appropriate to view the decision as one in which the provision in section 39 of the Criminal Code, in effect, was set aside as a result of the conflict with the ECHR.[81]

In his partly concurring opinion in 1989 N.Rt. 1327, Professor

[80] The Norwegian Criminal Procedures Act, section 4 (before 1 January 1986, section 5) contains a provision that the Act should be interpreted with the reservations deriving from international law.

However, neither the Supreme Court nor the parties seem to have been aware of this fact. Thus the Supreme Court's argumentation in this case should be viewed as regarding a "non-incorporated" treaty although, strictly speaking, this is not the case. See Eivind Smith, Domstolskontroll med lovgivning i Norge etter ca. 1970 (Judicial Control with Legislation in Norway after Approximately 1970), *TfR* 1990, p. 106 note 17.

[81] Cf. Jørgen Aall, Menneskerettighetskonvensjonene som rettskildefaktor i intern norsk rett (The Human Rights Convention as a Source of Law Factor in Domestic Norwegian Law), *TfR* 1989, p. 635; Torstein Eckhoff, *op.cit.*, p. 268; and Eivind Smith, *op.cit.*, p. 106.

Carsten Smith, acting as temporarily appointed judge in the Supreme Court, stated as an *obiter dictum* that the right to judicial review of the commitment to mental hospitals under section 39(1)(e) of the *Norwegian* Criminal Code established in 1984 N.Rt. 1175 should also apply to the deprivation of liberty in institutions other than mental hospitals. The majority of the Supreme Court did not find, however, that the case gave cause to rule on this point.

In 1963 NJA 284 the Svea Court of Appeal acquitted a person convicted by the District Court for violating tax laws, referring to the prescription limit which was in force at the time of the alleged violation, although it had been extended at the moment of indictment. The Court based its decision on domestic law, but found it nevertheless appropriate to refer in passing to Article 7 of the ECHR. The Supreme Court subsequently upheld the decision, but solely on the basis of domestic *Swedish* law, and made no reference to the Convention.

In 1962 three men were convicted by the District Court for disorderly conduct (förargelsesväckande beteende) for having displayed balloons with the text "*Algérie française*" during a demonstration organized by people of other political convictions.[82] In 1964 the three were acquitted by the Svea Court of Appeal, which stated that under *Swedish* law their behaviour was no crime without further specification. However, in his concurring opinion, one of the judges (now Professor) *Jacob W.F. Sundberg*, explained that, by ratifying the ECHR, *Sweden* "let it be understood that *Swedish* criminal law was not an obstacle to the validity within the Realm of the principles on freedom of expression set out in Article 10, among which is to be found the freedom to disseminate information and ideas without interference by public authority.[83]

1981 NJA 1205 concerned *inter alia* the validity of an arbitration clause which was part of the terms of a group life insurance based on a collective agreement. The plaintiff claimed that, due to the arbitration clause, she was prevented from having her case tried by a court. In this respect she invoked *inter alia* Chapter 11, section 3, of the Instrument of Government, which lays down that legal disputes between individuals shall not be decided by any other authority than the courts except if laid down by law, and Article 6 of the ECHR. The Supreme Court main-

[82] Reported in *SvJT* 1964, p. 19.

[83] Here cited in English from Jacob W.F. Sundberg, *Judicial Protection of Human Rights. The National Level. Scandinavian Laws*, pre-prints of the Bologna Congress on Protection of Human Rights on the International and National Level, Bologna, 1988, p. 197.

tained that transformation is required if concluded treaties are to have direct domestic effect, and it continued:

> "It should, however, be presupposed that the provisions of the instrument of Government, which was passed after *Sweden's* ratification of the European Convention, are in accordance with its requirements and, besides, the latter can illustrate the content of the provisions of the Instrument of Government."

Then, it was stated that Chapter 11, section 3, of the Instrument of Government, interpreted in the light of the ECHR, did not prevent individuals from making arbitration agreements such as the one in question.

The interesting aspect of the judgement is that the Supreme Court states, as the *Norwegian* Supreme Court did in 1966 N.Rt. 935, that the *principle of presumption* applies also to the Constitution and not only to ordinary legislation. The consequence of this view is that, in relation to the impact of the ECHR on the interpretation of the Instrument of Government, it makes no difference whether or not the Convention is incorporated into domestic law by a statute. In all events the Convention will be regarded as a means of interpretation of the Constitution. This view has been affirmed and developed further by the Supreme Court in 1981 NJA 131.

4.2.2. *"Ex officio" references to the European Convention on Human Rights*

Although the cases discussed in section 4.2.1 have gone quite far in their application of the ECHR in domestic law, this has usually taken place on the basis of the parties' submissions. However, in some recent cases it appears that the Court *ex officio* has made references to the Convention. Since in criminal cases the courts are not bound by the parties' submissions as to the law of the case, it is disputable whether the courts' *ex officio* application of the Convention should be regarded as the expression of an even greater willingness to apply the Convention than what follows from cases in which a party has invoked one or more of its provisions. On the other hand, such *ex officio* reference to the ECHR shows at any rate how aware of the Convention the courts have become.

1981 UfR 928 concerned the question of whether the courts had subject-matter jurisdiction to review certain legal questions, related to the social authorities' decisions to remove children from their homes

without the consent of the holders(s) of parental rights.[84] The majority of the High Court had, on the basis of an interpretation of the Social Assistance Act (Act No. 333 of 19 June 1974), established that it had subject-matter jurisdiction to review the questions raised in the case. A unanimous Supreme Court upheld this decision with reference to its grounds but added that, apparently *ex officio*, the provisions in Chapter VII of the Social Assistance Act should be interpreted in accordance with the European Court of Human Rights' decisions on similar questions.

In 1984 NJA 903 the *Swedish* Supreme Court seems definitely to have dissociated itself from *inter alia* its own previously strong *obiter dicta* statements on the *transformation theory*.[85] The question was a request from the Italian authorities for the extradition of a Canadian citizen who had been convicted *in absentia* in Italy. The Court had *ex officio* discussed whether the trial in Italy was in accordance with the guarantees stipulated in Article 6(3) of the ECHR. On the relationship between the Convention and domestic *Swedish* law, the Court stated:

> "Although the Conventions thus have not been incorporated into domestic law, *Sweden's* affiliation to them should... be assumed to underline the importance of *Sweden* not accepting, in the course of applying *Swedish* law concerning extradition, a judgement in absentia which was produced under conditions that are irreconcilable with fundamental principles of the legal order in the Realm, and *furthermore irreconcilable with Sweden's obligations under the said provision*" (italics added).[101]

This attitude seems to have been the first major step in the return to a more open attitude towards the ECHR in domestic *Swedish* law. The Supreme Court has in two subsequent decisions affirmed and elaborated this view further.

In 1989 NJA 131 the crucial question was what should be understood by "deprivation of liberty" under Chapter 2, section 9, of the Instrument of Government. To answer this question the Supreme Court had considerable guidance from the ECHR:

"In this connection also, certain provisions of the European Convention are of interest; even though the Convention does not form part of *Swedish* law, it is natural that its position in questions of rights *influences the interpretation of the Instrument of Government*...

Some guidance for the judgement could be derived from the European Court's practice regarding the meaning of the concept deprivation of liberty,

[84] The High Court's decision is reported separately in 1988 UfR 404.
[85] Cf. Jacob W.F. Sundberg, *op.cit.*, p. 202.

something which has decisive significance also for the application of the Convention in a case like the present one" (italics added).

The Court then went on to discuss the case-law from the European Court of Human Rights, in particular the *Guzzardi Case*,[86] and concluded on this basis that there was no "deprivation of liberty" in the meaning of Chapter 2, section 9 of the Instrument of Government in the present case. Thus it follows from the Court's reasoning that the ECHR was ascribed considerable, possibly decisive, significance in the interpretation of the relevant domestic constitutional provision.

4.2.3. *Judgements from the European Convention on Human Rights as precedents in domestic law*

When the European Commission or Court of Human Rights has decided a case to which the *Danish*, *Norwegian* or *Swedish* State has been a party, the question of what significance should be ascribed to the decision in the domestic application of law arises. This question becomes of interest primarily when the State is found to have violated the Convention. *Scandinavian* case-law is not particularly rich in cases which may illustrate the impact of a judgement from the European Convention on Human Rights on domestic law, but a few very recent decisions are certainly interesting in this respect.

After prolongation of the operation of the Provisional Act on compulsory civilian service for dentists in *Norway* mentioned in 1961 N.Rt. 1350, the *Norwegian* Association of Dentists brought a (new) case on the constitutionality of the Act and its compatibility with Article 4 of the ECHR. In the Supreme Court's decision in 1966 N.Rt. 935, Justice *Heiberg*, speaking for a unanimous court, held:

> "The Provisional Act of 21 June 1956 relating to compulsory public service by dentists is contrary neither to section 105 of the Constitution, nor to Article 4 of the Convention, which prohibits forced or compulsory labour. In this connection, the Court refers to the grounds on which on 17 December 1963, a majority of the European Convention on Human Rights declared inadmissible, as manifestly ill-founded, application no. 1468/62 by *Iversen against Norway*. Since the Acts of 29 June 1962 and 25 June 1965, which are complementary to the Provisional Act of 1956 (relating to compulsory public service for dentists) do not differ from it in this respect, but merely prolong its operation for successive three-year periods, they cannot be regarded as constituting a violation of the aforesaid Article 4 of

[86] Cf. Eur. Court H.R., *Guzzardi Case*, Series A, Vol. 39 (1981).

> the Convention... There is no reason then, for me to deal with the question whether the Convention would take precedence over the Act if a conflict between these existed."[87]

Thus the Court made strong efforts to establish that there was no conflict between domestic law and the Convention. The comprehensive discussion of the Convention shows that it was considered a domestic source of law, even though the domestic statute left no doubt as to its interpretation.

Moreover, it was stated that the Convention should also be considered as a means for interpreting the Constitution. This is an interesting statement; in particular if compared with the general statements in the subsequent case, 1976 N.Rt. 1. In this case, concerning the constitutionality of an act on compensation for expropriation, both the majority and the minority in the Supreme Court stated that the exercise of judicial review of legislation should vary in intensity depending on what kind of rights the case at issue concerns. Thus the impact of individual and political rights was considered to be stronger on the legislature's margin of appreciation than the impact of economic rights. This case is regarded as reflecting the so-called *preferred position principle*.

In 1988 NJA 572 The Supreme Court's line of reasoning was largely founded on the European Convention on Human Rights' judgement in the *Ekbatani Case*[88] in which *Sweden* was found to have violated the ECHR. The circumstances were as follows.

Under Chapter 51, section 21, of the *Swedish* Code of Judicial Procedure, the Court of Appeal may, under certain conditions, dismiss an appeal without a hearing.

In the *Ekbatani Case* the European Convention on Human Rights held:

> "31. The Court has on a number of occasions held that, provided there has been a public hearing at first instance, the absence of "public hearings" before a second or third instance may be justified by the special features of the proceedings at issue...
>
> 32. Here, the Court of Appeal was called upon to examine the case as to the facts and the law. In particular, it had to make a full assessment of the question of the applicant's guilt or innocence... The only limitation on its jurisdiction was that it did not have the power to increase the sentence imposed by the City Court.
>
> However, the above-mentioned question was the main issue for determi-

[87] Here cited in English from Andrew Z. Drzemczewski, *op.cit.*, p. 310.
[88] Cf. Eur. Court H.R., *Ekbatani Case*, Series A, Vol. 134 (1988).

> nation also before the Court of Appeal. In the circumstances of the present case that question could not, as a matter of fair trial, have been properly determined without a direct assessment of the evidence given in person by the applicant—who claimed that he had not committed the act alleged to constitute the criminal offence...—and by the complainant. Accordingly, the Court of Appeal's re-examination of Mr. Ekbatani's conviction at first instance ought to have comprised a full rehearing of the applicant and the complainant.
>
> The limitations on the Court of Appeal's powers as a result of the prohibition of *reformatio in pejus* related only to sentencing. They cannot be considered to be relevant to the principal issue before the Court of Appeal, namely the question of guilt or innocence; neither can the fact that the case-file was available to the public.
>
> 33. Having regard to the entirety of the proceedings before the *Swedish* courts, to the role of the Court of Appeal, and to the nature of the issue submitted to it, the Court reaches the conclusion that there were no special features to justify a denial of a public hearing and of the applicant's right to be heard in person. Accordingly, there has been a violation of Article 6 § 1."

In 1988 NJA 572 the appellant, who was not present at the hearing in the City Court, was sentenced to 30 day fines. He appealed against this judgement and requested "to have a public defence counsel from legal aid appointed for the hearing before the Göta Court of Appeal": The Court of Appeal rejected this request and decided the case without a hearing. The Supreme Court subsequently overruled the Court of Appeal's ruling as to not granting a hearing and, consequently, remitted the case to re-trial before the Court of Appeal on the following grounds:

> "The mentioned rule (Chapter 51, section 21 of the *Swedish* Code of Judicial Procedure) is founded on the view that a party's wish for a hearing should, in principle, be respected. Therefore, strong reasons ought to be required for considering it manifestly unnecessary to hold a hearing when requested. Hence a particular restraint in the interpretation of the rule is required with regard to the fact that in its judgement of 26 May 1988 in a case against the *Swedish* State the European Court (of Human Rights) considered it contrary to Article 6 of the European Convention on Human Rights that in its application of Chapter 51, section 21, of the Code of Judicial Procedure, in its wording applicable until 1 July 1984, a Court of Appeal has decided a criminal case without a hearing, despite the fact that the accused had requested such a hearing (Ekbatani case...)."

The fact that *Sweden* was found guilty of violating the ECHR in the *Ekbatani Case* seems to have had such impact on the Supreme Court that it was willing to revise its previous practice; in the *Ekbatani case* the Supreme Court had refused to grant leave to bring the case to the Supreme Court. Accordingly, the Court treated the *Ekbatani* judgement

as a true precedent, even superior to its own previous judgement in the case. Thus, the judgement, and consequently the ECHR, were given direct effect in domestic *Swedish* law.

In the recent 1990 UfR 13 the *Danish* Supreme Court has followed its previous line of paying increasing attention to the ECHR. The circumstances were as follows:

Under section 762(2) of the *Danish* Administration of Justice Act

> "(2) (a) suspect may furthermore be detained on remand when there is a *particularly confirmed suspicion* (særlig bestyrket mistanke) that he has committed
> 1. an offence which is subject to public prosecution and which may under the law result in imprisonment for 6 years or more and when respect for the public interest according to the information received about the gravity of the case is judged to require that the suspect should not be at liberty, or ..." (italics added).[89]

The challenge of a judge is *inter alia* governed by section 60 of the Administration of Justice Act. This provision stipulates in sub-sections 2 and 3:

> "(2) No one shall act as judge in the trial if, at an earlier stage of the proceedings, he has ordered the person concerned to be remanded into custody *solely* under section 762(2), unless the case is tried under section 925 or section 925a (as a case in which the accused pleads guilty).
>
> (3) The fact that the judge may previously have had to deal with a case as a result of his holding several official functions shall not disqualify him, when there is no ground, in the circumstances of the case, for presuming that he has any special interest in the outcome." (italics added).[90]

Moreover, the Administration of Justice Act contains in section 62(1) a general clause as to the disqualification of judges.

The provision in section 60(2) was introduced by an amendment to the Administration of Justice Act,[91] passed as a consequence of the European Court of Human Rights decision on the admissibility of the application of 9 October 1986 in the *Hauschildt Case* in order to fulfil the obligations under Article 6(1) of the Convention.[92] The question was whether the fact that a trial judge has taken decisions concerning detention on remand in itself justifies fears as to his impartiality. How-

[89] Here cited in English from Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989), para. 33.
[90] *Ibid.*, para. 28.
[91] Act No. 386 of 10 June 1987.
[92] Application No. 10486/83.

ever, in its decision on the merits, the Commission did not find that *Denmark* had violated Article 6(1) of the Convention. On the contrary, in its judgement of 24 May 1989 the European Court of Human Rights found that *Denmark* had violated Article 6(1) of the Convention..[93]

> "50(3). In the Court's view, therefore, the mere fact that a trial judge or an appeal judge, in a system like the *Danish* one, has also made pre-trial decisions in the case, including those concerning detention on remand, cannot be held as in itself justifying fears as to his impartiality.
>
> 51. Nevertheless, special circumstances may warrant a different conclusion. In the present case, the Court cannot but attach particular importance to the fact that in nine of the decisions continuing Mr Hauschildt's detention on remand, Judge Larsen relied specifically on section 762(2) of the Act... Similarly, when deciding, before the opening of the trial on appeal, to prolong the applicant's detention on remand, the judges who eventually took part in deciding the case on appeal relied specifically on the same provision on a number of occasions...
>
> 52. The application of section 762(2) of the Act requires, *inter alia*, that the judge be satisfied that there is a *particularly confirmed suspicion* that the accused has committed the crime(s) with which he is charged. This wording has been officially explained as meaning that the judge has to be convinced that there is "a very high degree of clarity" as to the question of guilt... Thus the difference between the issue the judge has to settle when applying this section and the issue he will have to settle when giving judgement at the trial becomes *tenuous*.
>
> The Court is therefore of the view that in the circumstances of the case the impartiality of the said tribunals was capable of appearing to be open to doubt and that the applicant's fears in this respect could be considered objectively justified" (italics added).

In 1990 UfR 13 the question was whether the fact that a judge had taken decisions concerning detention on remand, under sub-sections 1 and 2 of section 762 of the Administration of Justice Act, disqualified him from hearing the case as trial judge. As mentioned, section 60(2) of the Administration of Justice Act provides that if a judge has ordered detention on remand *solely* under section 762(2) of the Act, he cannot hear the case as trial judge. The majority in the High Court for Western Denmark, and a unanimous Supreme Court, were of the opinion that the European Court of Human Rights judgement in the *Hauschildt Case* should be construed in such a way that in general it would be incompatible with Article 6(1) of the ECHR for the trial judge to have taken decisions concerning detention on remand at a pre-trial stage of the

[93] Cf. Eur. Court H.R., *Hauschildt Case*, Series A, Vol. 154 (1989).

case, irrespective of whether the decision has been taken solely under sub-section (2) or in connection with sub-section (1). The crucial question was then what weight should be accorded to the European Court of Human Rights judgement in the *Hauschildt Case* compared to the provision in section 60(2) of the Administration of Justice Act.

The High Court majority found that the judge who had taken pre-trial decisions concerning detention on remand was disqualified from hearing the case as trial judge.

A unanimous Supreme Court upheld this ruling:

> "According to the *travaux préparatoires* of the provision (section 60(2) of the Administration of Justice Act) the *Folketing* was aware that the European Commission of Human Rights in its decision of 9 October 1986 in the *Hauschildt Case* had unanimously indicated that the present *Danish* system posed serious questions as to the interpretation and application of Article 6 of the Convention.
>
> Hence there is no basis for establishing that section 60(2) of the Administration of Justice Act aims at an exhaustive regulation of the question of a judge's disqualification because during the preparation of the case he has taken decisions concerning detention on remand under section 762(2) of the Administration of Justice Act.
>
> Sections 60(2) and 62(1) of the Act should be interpreted in accordance with the principles laid down in the Court of Human Rights' judgement. Although the judgement is based on concrete grounds and particularly refers to the number of detentions that the City Court judge, during the investigation, ordered under section 762 (2), the judgement must be interpreted in such a way that it will generally not be consistent with Article 6(1) of the Convention for a judge, who prior to the trial has ordered detention under section 762(2), either solely or in connection with other grounds for detention to take part in the hearing of the case. In orders of 21 January, 22 January and 4 February 1988, Judge Henrik Stamp based the detentions on reference *inter alia* to this provision, and should therefore be regarded as disqualified under section 62(1) of the Administration of Justice Act."

Thus the Supreme Court discussed the relationship to the ECHR and the *Hauschildt Case* in more explicit terms than it had done previously. What is particularly interesting is that the Court discussed in detail how the European Court of Human Rights judgement in the *Hauschildt Case* should be interpreted. This is in itself remarkable since the *Danish* Supreme Court very rarely enters into such discussions. Moreover, the Court paid considerable attention to the ECHR, as interpreted in the *Hauschildt Case* when interpreting domestic law. The provision in section 60(2) of the Administration of Justice Act has a very clear wording, but the Court was nevertheless willing to disregard this clear domestic provision in order to apply the Convention properly.

It appears from the decision that the Supreme Court, on the one hand, emphasized in general terms the *principle of presumption* very strongly and, on the other hand, in its application of the ECHR went considerably further than implied in this principle, in effect disregarding a clear domestic provision. Thus this case should undoubtedly be regarded as the Supreme Court's dissociation not only from its statements in 1986 UfR 898 but also from its decision in 1987 UfR 307, where it concluded that a trial judge who at a previous stage of the proceedings had ordered detention on remand was not disqualified from hearing the case as trial judge.

Against this background it is probably fair to view this decision as the definitive breakthrough for the application of the ECHR in domestic *Danish* law.

Only a few months later, in 1990 UfR 181, the Supreme Court was again faced with the question of the impact of the *Hauschildt Case* on domestic *Danish* law. Here the problem was whether the fact that, in a complex of criminal cases concerning the same group of persons, a judge who had heard the case as a trial judge against one of the accused was subsequently disqualified from hearing the case against another accused (on the same counts). In addition, before the Supreme Court it was further submitted that, since the judge who heard the case had previously taken decisions on detention on remand under sub-sections 1 and 2 of section 762 of the Administration of Justice Act, she was disqualified from hearing the case as a trial judge. However, it should be observed that both the City Court's and the High Court's rulings that they were not disqualified from hearing the case were given before the European Court of Human Rights judgement in the *Hauschildt Case*.

In its unanimous judgement the Supreme Court first laid down that in *Denmark* it had so far been considered most adequate for the same judge to deal with a case at all stages of the proceedings. In this way the judge obtains sufficient knowledge of the case to pass a correct judgement. In addition, this arrangement is both time-saving and work-saving, particularly in cases concerning a large number of crimes and/or accused. Insofar as such cases are not joined into one case, it may happen that facts established in the first case adjudicated are reassessed in a subsequent case. The fact that a judge who heard the first case as a trial judge subsequently hears a case against another accused in the complex of cases has in *Danish* law not been considered a circumstance which in itself could raise doubts as to the judge's impartiality and thus disqualify him from hearing the case, cf. section 62 of the Administration of Justice Act. The Court then went on:

> "In the light of the European Court on Human Right's judgement of 24 May 1989 in the *Hauschildt Case* it may be questionable whether this practice is in accordance with Article 6 of the European Convention on Human Rights. In consideration of the very far-reaching consequences of such interpretation for the judiciary in this country, notably for single-judge courts, the Supreme Court considers, however, that the Legislature ought to take a position on this question. It should hereby be observed that there seems to be no decision from the Human Rights Commission or Court regarding competence to act in a case like the present one, and that the doubts raised in any case, under the present circumstances, cannot bring about the annulment of the judgements, where, before the High Court, a complete new hearing has taken place, cf. section 965a of the Administration of Justice Act, with the participation of judges as to whose impartiality no objections have been raised" (italics added).

Although the Supreme Court expressed doubts as to the general compatibility of domestic procedural law with Article 6 of the Convention, it follows from the last sentence that in this case the Supreme Court did not find any conflict between the ECHR and the way in which domestic law was applied. Seeing that the trial judge had previously heard cases against other accused in the complex of cases and that she had relied on sub-sections 1 and 2 of section 762 of the Administration of Justice Act when ordering detention on remand, the Supreme Court held that any possible violation of Article 6(2) of the Convention in the first instance should be considered "repaired" by the complete new hearing before the High Court. This is probably a valid interpretation of Article 6(2) of the Convention and of the *Hauschildt Case*. Nevertheless, the Court chose to refer the question of the compatibility of domestic law with Article 6(2) of the Convention to the Legislature. Although the Supreme Court has on a few occasions explicitly referred questions to the Legislature, this is very rare.[94] Thus it seems that the Court, on the basis of its own interpretation of the Convention and the *Hauschildt Case*, predicts that the European Court of Human Rights may pass judgements which call into question whether the *Danish* procedural system is compatible with the Convention. The Supreme Court has therefore recommended that due to "the far-reaching consequences for the judiciary", the question of judges' competence to act be considered by the Legislature before *Denmark* actually becomes party to a case involving the question.

The fact that the Supreme Court chose to refer this question of

[94] Another example of a case in which the Supreme Court explicitly referred a question to the legislature is 1975 UfR 763 concerning open files in the case of medical journals.

judges' competence to the Legislature did not prevent the Court from applying the Convention directly in the *Hauschildt Case*. Strictly speaking, the Court's doubts as to the compatibility of *Danish* law with the Convention in general as regards judges' competence to act in complexes of cases then seems to be an *obiter dictum*. This *obiter dictum* appears both wise and relevant here. In a legal system such as the *Danish*, with a large number of single-judge courts, it would require a fundamental change of the judiciary if judges were considered competent to act only in one case within a complex.

4.2.4. *Tentative conclusion*

Scandinavian courts have on a number of occasions applied the ECHR directly. The very fact that the courts embark upon discussing the relationship between domestic law and the Convention law shows that it is regarded a *source of law* in domestic law. That the courts have sometimes in the case of a conflict between the ECHR and domestic law, in effect let the Convention prevail over domestic law is not only a further proof that they regard the Convention as a source of law in domestic law, but also indicates the significance of the Convention in the domestic norm hierarchy.

Recently the courts have made *ex officio* references to the ECHR when dealing with questions of domestic law. This shows how aware of the Convention the courts have become, as they have of the European Court of Human Rights judgements involving particular countries. Thus the courts have discussed and interpreted Strasbourg case-law more explicitly than they have ever done with domestic precedents. Therefore, there can be no doubt that the courts feel very bound by these judgements, the *Danish* and the *Swedish* Supreme Courts having been willing to revise their own case-law as a consequence of judgements from Strasbourg.

4.3. *The position of the European Convention on Human Rights in relation to the exercise of discretionary powers by administrative authorities*

In the memorandum mentioned above from the *Danish* Ministry of Justice on constitutional problems raised by *Denmark's* accession to the EEC it was stated, though in vague terms, that administrative authorities should exercise their discretionary powers in such a way that administrative acts, whether *specific decisions or general regulations*, conform to

validly contracted international obligations.[85] This is now known as the *rule of instruction*.

Until recently the courts had no chance to decide once and for all whether and, if so, to what extent, ministers and administrative authorities under *Danish* law are limited in the exercise of their discretionary powers by concluded, but not incorporated, treaties. However, the available case-law contained statements indicating that the courts would accept this view.

Now the decision from the High Court for Eastern Denmark in 1989 UfR 775 seems finally to have established that administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with undertaken international obligations.

Under section 9(3) of the present Act on Aliens' Entry into and Residence in Denmark the Directorate of Aliens is, when considering a residence permit for a relative of a person living in *Denmark* with refugee status, entitled to require as a condition for granting the permit that the person in *Denmark* undertake the maintenance of the relative. However, under the said provision, this can only be required on the basis of discretion in each individual case.

In the case at issue, the Directorate of Aliens had found that an Iranian family consisting of a mother and two grown-up sons being educated in *Denmark*, all of whom were living on supplementary benefits and student grants, would not be able to support the applicant who was the mother of the woman in *Denmark*. Accordingly, the Directorate refused to grant her a residence permit. This decision was subsequently upheld by the Ministry of Justice against which the applicant had recourse. However, while the applicant had been in *Denmark*, the family had actually maintained her, and were willing to continue to do so. In both instances the applicant pleaded that the Directorate of Aliens was under legal obligation to exercise its discretionary powers with respect to *Denmark's* international obligations, *in casu* Article 8 of the ECHR and a number of recommendations from the UNCHR.

The City Court of Korsør expressed itself very clearly regarding the Directorate of Aliens' obligation to exercise its discretionary powers in accordance with undertaken international obligations:

> "... (B)ut it cannot be assumed that the rule should be administrated in such way that refugees living here should be prevented solely on the

[95] Cf. the Ministry of Justice (1971), p. 78. This view was originally introduced by Ole Espersen: *Indgåelse og opfyldelse af traktater* (Conclusion and Fulfilment of Treaties), Copenhagen (1970), p. 380 ff.

> grounds of lack of economic means from being reunited with their parents, since this would be inconsistent with humanitarian considerations recommended by the UN, and the respect of individual rights embodied in Article 8 of the European Convention on Human Rights, since refugees have no other countries than the country of residence in which they can enjoy these rights".

Then, it was laid down that requiring the family in *Denmark* to undertake the applicant's maintenance was unwarranted. Thus the City Court considered that there existed a conflict between the ECHR and *Danish* law as interpreted by the Directorate of Aliens.

The High Court for Eastern Denmark upheld the City Court's ruling, but on different grounds. Unlike the City Court, the High Court did not find that the international obligation invoked, generally speaking, should hinder a demand that refugees in *Denmark* undertake the maintenance of their relatives. Since it was a firm practice of the Directorate of Aliens to demand that refugees undertake the support of relatives applying for a residence permit in *Denmark*, no individual discretion had been exercised in the case. Consequently, the Directorate's decision was unlawful under *Danish* law.

The High Court seems to have decided the case on the basis of domestic law. On the other hand, it did not dissociate itself from the City Court's statements of the Directorate's duties as to the administration of section 9(3) of the Aliens Act. Thus this case appears, in effect, to be a judicial affirmation of the view that *Danish* administrative authorities are under legal obligation to exercise their discretionary powers in conformity with undertaken international obligations.

In 1982 N.Rt. 241 it is established that *Norwegian* administrative authorities have to exercise their discretionary powers in accordance with undertaken human rights conventions. Furthermore, the Supreme Court here stated in very clear terms that the courts are entitled to review the lawfulness of administrative actions under international human rights instruments. It is probably realistic to view this statement as implying that *Norwegian* administrative authorities are under a legal duty to exercise discretion in accordance not only with undertaken international obligations in the field of human rights, but also with international law in general.

Accordingly, Professor *Carl August Fleischer* has suggested that in an administrative situation in which lower authorities need an order from a superior authority as the basis for their actions, the very information from the superior authority that a specific treaty has been entered into

is a command within the chain-of-command equivalent of a more formal order.[96]

The *Swedish* Supreme Administrative Court's decision in 1974 RÅ 121 laid down that administrative authorities were under no legal obligation to exercise their discretionary powers in accordance with undertaken, but not incorporated, international obligations. As mentioned, this decision was criticized heavily by legal scholars. However, Professor *Hilding Eek* commented upon the decision more indirectly; in a new edition of a book on the sources of law he wrote:

> "From the point of view of both international and national interests, it is of course important that it be made clear to the authorities which apply the law *that* the rules of law which are to be valid within the country pursuant to a treaty binding upon the State, are to be applied by them on the same level and under the same conditions as "domestic law" as well as *what* these rules contain. A successful handling of this information activity is, of course, not only of great practical value, but may also help to remove a possible misapprehension among these authorities that they should be *under a duty* not to apply a treaty which has been ratified by *Sweden* and which has entered into force, but which has not been "transformed", thereby exposing the Realm as such to responsibility for a breach of international law."[97]

In the *Skoogström-Settlement* it was *inter alia* laid down that

> "... the Government has seen to it that the National Board of the Judiciary (domstolsverket) and the Chief Prosecutor (riksåklagaren) will publish a summary of the Commission's report so as to enable the judiciary and the prosecutors to avoid repeating in the daily performance of their duties situations which have been found by the Commission to constitute a violation of the said Article."[98]

To implement the undertaking that the National Board of the Judiciary and the Chief Prosecutor would publish a summary of the European Commission's report for the purpose of avoiding future similar violations. Mr. *Peter Löfmarck* from the Department of Justice wrote and article under his own name about the Skoogström proceedings in Strasbourg and the *Swedish* rules on arrest and detention.[99] This article, *inter*

[96] *Cf.* Carl August Fleischer, *Folkerett* (Public International Law), 5th edition, Oslo, 1984, p. 256.

[97] *Cf.* Hilding Eek et alia, *Juridikens källmaterial* (The Sources of Law Material), 8th edition, Stockholm (1975), p. 56.

[98] Cf. Eur. Court H.R., *Case of Skoogström & Case of McCoff*, Series A, Vol. 83 (1984), para. 22.

[99] For further information, see Hans Corell, Incorporation of the European Convention on Human Rights from a Swedish Point of View, in Rehof & Gulmann, *op.cit.* (1989), p. 156 f.

alia published in the official publications of the National Board of the Judiciary and the Chief Prosecutor,[100] states:

> "The decision by the European Commission only addresses the question of whether in an individual case of violation of the Convention, there is not any determination whether the legislation in a country is reconcilable with the Convention. One will have to conclude, however, from the cases now reported, that the *Swedish* rules, at least as they are often applied in practice, cannot be reconciled with the Convention. Consequently, the rules have to be changed.
>
> The work of the (*Swedish*) commission carried on with a view to regulating of the coercive measures against persons in a way that satisfies the requirements of the Convention
>
> In the meantime it is desirable that the authorities apply the present rules, as far as possible, in such way that there will be no conflict with the European Convention... As matters now stand, however, one will nevertheless, within the framework of the present rules, have to try to arrive at an adaptation as close as possible to the requirements of the Convention...
>
> It is important, however, that the authorities charged with the application make themselves familiar, as soon as possible, with what the decision of the European Commission means in their case. It may then be useful that the authorities consult each other at a local level to arrive at a common system that will work in practice. The more the police, the prosecutors and the courts take into consideration the standards insisted upon by the European Convention when they apply the present rules, the more supple will be the transition to a new system".[101]

Since the article was part of a friendly settlement between the applicant and the State of *Sweden*, supervised by the European Court of Human Rights and thus undoubtedly expressive of the Governments's view, though strictly related to the case at issue, it is probably fair to view the cited statements as having a more general validity. It is, on the one hand, laid down that treaties, as a general rule, must be incorporated into domestic *Swedish* law in order to have domestic effects. To the extent that such incorporation has not taken place, administrative authorities are, on the other hand, under a legal obligation to exercise their discretionary powers in accordance with undertaken international obligations.

Thus Professor *Jacob W.F. Sundberg* has concluded that,

> "... in summary, should a governmental authority deviate from the European Convention in the exercise of its discretion, the decision may well suffer revision by being taken up to the Government by appeal, but the

[100] Cf. *Domstolsverket informerar*, 1984:4, and *RÅ-nytt*, 1984:4 respectively.

[101] Here cited in English from Jacob W.F. Sundberg, *Human Rights in Sweden. The Annual Reports 1982–84*, Littleton, Colorado, 1985, p. 74.

> Government will not criticize the lower authorities, it will simply change the decision."[102]

Compared to the legal position in *Denmark* and *Norway* the position in *Sweden* in this respect is less clear. However, the tendency is, as in the other *Swedish* cases concerning the ECHR, to pay more attention to the Convention now than previously. On the other hand, it is not possible to state clearly that under *Swedish* law administrative authorities are under a legal obligation to exercise their discretionary powers in accordance with the ECHR.

5. GENERAL CONCLUSIONS

One common feature is manifest in the case-law concerning the ECHR in *Denmark* and Norway: *the courts do not recognize conflicts between the Convention, as interpreted by them, and domestic law*. Consequently, they have managed to avoid taking a stand on how a (clear-cut) conflict between the Convention and domestic law should be resolved. In spite of this, the courts have in substance, if not in form or explicit terms, applied the Convention directly in a number of cases, and there can be no doubt that the Convention is an international instrument with considerable and substantial force. The *Norwegian* courts appeared, until recently, to have been more willing than the *Danish* courts to apply the Convention but the *Danish* courts now tend to show a similar, if not stronger, willingness to do so.

In *Sweden* the situation was somewhat different; the *Swedish* courts have been more willing to state in general terms, though often as *obiter dicta*, that domestic law should prevail in a case of conflict with the Convention. In one case, the Supreme Administrative Court went so far as to suggest that the Convention has no impact on domestic *Swedish* law. However, it seems that the courts are now becoming more open towards granting the Convention a stronger domestic position.

In *Denmark* and *Norway* it is clearly established that administrative authorities are under legal obligation to exercise their discretionary powers in accordance with undertaken international obligations—whether incorporated or not—whereas in contemporary *Swedish* law there now seems to be a tendency to recognize such obligations.

[102] *Cf.* Jacob W.F. Sundberg, *Judicial Protection of Human Rights. The National Level. Scandinavian Laws*, pre-prints of the Bologna Congress on Protection of Human Rights on the International and National Level, Bologna, 1988, p. 206.

Thus the Convention has not, as Judge *Pierre Pescatore* has put it, "remained a dead letter, at least judicially", in the *Scandinavian* countries.[103]

One could, however, wish that considerations as to the relationship between the Convention and domestic law, which in individual cases undoubtedly underlie the assumption that domestic law conforms with the Convention, were expressed more clearly in the judgements. This lack of explicit discussion of the position of the ECHR in domestic law seems to have caused some doubt as to the domestic fulfilment of the obligations under the Convention. However, the most recent case-law indicates an emerging change in the courts' position in this respect.

Finally, one may ask whether it would really make any difference in the domestic application of the ECHR if it is incorporated into domestic law. From a strictly legal point of view the answer is probably a qualified *no*: it would not have significant practical consequences. Under the existing "dualist" system it is already very largely possible for the courts to ascertain whether the Convention has been violated in concrete cases. Moreover, if the Convention is incorporated into domestic *Scandinavian* law it is still up to the Legislature to amend existing legislation whenever developments in Strasbourg case-law give cause for doing so. However, as pointed out by Professor *Claus Gulmann* and the Director of the *Danish* Centre for Human Rights, *Lars Adam Rehof*, incorporation of the Convention

> "... will have important psychological consequences. It will open the eyes of legal practitioners to the importance of the Convention, and for this reason, if for no other, the legal protection of the individual will be enhanced."[104]

[103] Cf. Pierre Pescatore: *Conclusion*, in Francis G. Jacobs & Shelley Roberts (eds.), *op.cit.*, p. 278.
[104] Cf. Claus Gulmann & Lars Adam Rehof (eds.), *op.cit.*, p. 3.