SANT'ANNA LEGAL STUDIES

STALS RESEARCH PAPER N. 4/2010

Carl Lebeck

Supranational Law in a Cold Climate.
European Law in Scandinavia

Sant'Anna School of Advanced Studies
Department of Law

http://stals.sssup.it

ISSN: 1974-5656

Carl Lebeck

Supranational Law in a Cold Climate. European Law in Scandinavia[*]

Abstract

The purpose of this study is to analyse and give an overview of some basic aspects of the role of European law within Scandinavian (i.e. Swedish, Danish and Norwegian) law, focusing on how the constitutional relations between the EC/EU/EEA-law and national law and ECHR and national law respectively have been conceptualised, by in particular, Scandinavian courts. The hypothesis is that there has been a certain passivity of national courts in implementation of European law, but only exceptionally domestic constitutional constraints to that implementation, as well as that the implementation has been surprisingly independent of the constitutional rank of ECHR and EC/EU/EEA-law respectively.

Key-words

European law, Scandinavian Law, Courts, European Court of Justice, supranationalism, separation of powers, international human rights law

[*] work in progress – please do not cite without permission

Supranational Law in a Cold Climate. European Law in Scandinavia

Carl Lebeck

Summary: 1. Introduction -2. Common constitutional traditions in Scandinavia- 3. International law in national law: between dualism and consistent interpretation- 4. Constitutional basis for ECHR and EEA/EU-law: integration and incorporation clauses in Scandinavian constitutions - 5. ECHR and EC/EU/EEA-law in Scandinavian courts: an analysis- 6. European Law in Legal Scholarship- 7. Conclusions: between consistent interpretation, direct application and constitutionalisation

1. Introduction

The purpose of this study is to analyse and give an overview of some basic aspects of the role of European law within Scandinavian law. In principle, supranational law in the European context has two parts, EU/EEA-law and ECHR. When it comes to analysis of the role of supranational law in national law, there seems to be two different aspects, one which concerns the application of supranational law, and partly one which concerns the rank and validity of such norms. The notion of supranational law is problematic in and of it self since there is no clear distinction between inter- and supranational law. The difference most commonly referred to when it comes to distinguishing them are direct applicability, independent international tribunals and that the supranational norms take precedence over national norms. Whereas traditional forms of public international law does not presuppose direct applicability, international law has traditionally supposed that it takes precedence over domestic law, and whereas independent international tribunals are not always connected to supranational law, that is the case in Europe. Supranational law primarily refers to the EU and ECHR, but neither legal order can be said to fulfil all criteria for supranationalism. Supranational law has evolved from international law in general, and it is also clear that international law in certain respects creates a framework for how supranational law is to be treated within domestic law. Whereas the traditional international law based assumption of supremacy of international law (an assumption shared with EU-law as well as with the ECHR) over national law has never been explicitly rejected, it has neither been clearly accepted, whereas in the precedence of European law within national law has been far more effective than for most forms of international law.

2. Common constitutional traditions in Scandinavia

If anything could be said about the common constitutional traditions of the Scandinavian states it seems to be the tradition (in particular in the Scandinavian countries) of constitutional continuity, parliamentarianism, the relative absence of constitutional judicial review, the traditionally limited constitutional protection of fundamental rights and the tradition of the rule of law.

2.1. Constitutional continuity

All the Scandinavian countries have, at least by then prevailing standards, long traditions of rule of law and most certainly long traditions of rule by law. The tradition of the rule of law, and even more so the tradition of rule by law, was a historical development which emerged at least from the late eighteenth century and which was institutionalised through a wave of institutional reforms during the nineteenth century, a development which is not dissimilar to that of many other European states.[1] The absence of revolutionary developments has also been reflected in the legal development meaning that both development of private and public law in general and development of constitutional law has been characterised by a high degree of stability and piecemeal reforms, rather than in sweeping changes. The first modern Scandinavian constitutions emerged in the 19th century and the conventional model for constitutional change has also been a reason for why the creation of constitutions which formally institutionalise parliamentarianism was a rather slow development. The Norwegian constitution of 1814 still being in force (although having been modernised at numerous points), although the Swedish constitution of 1809 was replaced in 1974 with a new constitution, which has since then been revised at central points repeatedly. The Danish constitution of 1848 was subject to extensive revisions in 1913 and replaced by a new constitution in 1953. Another side of that development is the high degree of constitutional continuity, all Scandinavian constitutions currently in force that have been adopted in the 20th

[1] Jaako Husa, "Guarding the Constitutionality of Laws in the Nordic Countries" 48 *American Journal of Comparative Law* (2000) 345-381

century have been adopted not through a revolutionary act but through the procedures for constitutional amendments prescribed in earlier constitutions.[2]

2.2. The rise of parliamentarianism and the paradox of strong executives

The rise of parliamentarianism must be said to be the defining constitutional development of the late nineteenth century, which along with the institution of general suffrage created the institutional framework for the modern democracy. The rise of parliamentary government developed in all the Scandinavian countries as a conflict with the idea of personal royal prerogative. However, it is also the case that in all the Scandinavian countries, parliamentarianism evolved as a set of constitutional conventions, rather than as a set of legal rules, the institutionalisation of parliamentarianism through formal constitutional rules is a relatively slow development. The role of parliamentarianism in the Scandinavian form is also influenced by the fact that all the Scandinavian countries have adopted relatively strict proportionality in the elections to parliaments, and since that also have relatively fragmented party-systems. The fragmented party-systems in the context of Denmark and Norway has several times led to relatively weak governments, and relatively strong parliaments, whereas in Sweden, the increasing fragmentation of the party-system has generally not affected the political strength of the executives.

2.3. The judiciary, the executive and the legislatures: mixed roles rather than separation of powers

In the same way, the Scandinavian countries may be said to be characteristic in the sense that although the judiciary has a constitutionally weaker role than in both many civil law countries and in common law countries, the practical role of the judiciary in law is often as extensive as in both civil and common law countries, but often markedly politically weaker.[3] A difference

[2] That obviously leaves out the Norwegian constitution which was set out through a constitutional convention in 1814, based on a declaration of independence (from Denmark).

[3] The organisation of the judiciary in the Scandinavian countries vary, where the Danish and Norwegian legal orders have unified judicial systems, whereas the Swedish judicial systems are divided into administrative and general courts. In Sweden, there is also, a special instance system for tax cases in the so called Tax Law Board [Skatterättsnämnden] which gives ex ante judicial review for companies and individuals wishing to determine the legality of tax solutions. The Swedish judiciary have special courts for labour matters, market courts for competition, consumer and advertising issues, and have also had special courts for housing and insurance issues. A general tendency has however been to reduce the number of special tribunals, and the use of special tribunals has become more limited in the context of Swedish law over the last decades. A certain reason for that has been

between other civil law countries and the Scandinavian legal family when it comes to the judiciary is that the strict separation between executive and judicial powers, between civil servants and judges and between administrative decisions based on legality and appropriateness and judicial decisions reviewing only the legality of decisions has traditionally had limited currency in the Scandinavian legal orders. The Scandinavian paradox when it comes to the role of the judiciary seems to be that it plays a paramount role in application and creation of legal norms, but does so from a constitutionally weaker position than in many other civil law countries. However the constitutional weakness of the judiciary seems also to have been the basis for that it has also sometimes had executive roles and more importantly also that the executives and civil servants have often fulfilled judicial tasks, in particular in relation to appeals. That reflects also a historical tradition where the separation of powers, to the extent it has existed was primarily a matter of separation between the executive power (which was at least partly understood to include judicial power) and on the other hand legislative powers and powers of taxation which were assigned to directly elected representatives of the people. It should also be mentioned that there was also a strong tradition of executive law-making within Scandinavian law, which also means that separation of powers in that traditional sense as separation between three distinct branches of government has never been a central aspect of Scandinavian constitutionalism. This constitutional tradition has been typical of the Scandinavian legal orders since the 19th century, and they should rather be seen as effects of the gradual development towards democracy characteristic of all the Scandinavian countries.

3. **International law in national law: between dualism and consistent interpretation**

The relation between international law and national law within the law of the Scandinavian countries has always been problematic.[4] The traditional approach is that all Scandinavian countries has adopted a dualistic approach to international law, meaning that norms of international law cannot be applied within national law, without legislative measures to make international law a part of national law. To some extent the view of the Scandinavian

---

the potential problems of conflicts of competency, including negative conflicts of competency. See, Patrik Södergren, *Vem dömer i gränslandet?* (Uppsala, 2009)

[4] There is not space to discuss in detail the definitions of dualism and monism, for the present purpose it suffices to say that dualism is understood as a doctrine whereby international law has to be recognised through legislation in order to have effect before domestic courts.

countries as dualist in their approach to international law is a simplification, there has been a tradition of monism in Sweden, Norway and Denmark in the late 19th century.

Whereas that has been the traditional approach, it is also clear that it has not always been an approach which has been heeded to by courts, in fact it seems in many respects more appropriate to speak of the relation between international and national law in Scandinavian law as a mix between different approaches, which has also been related to different fields. Despite that doctrinal claims have often been made to the effect that international legal norms are treated as a whole, the judicial practice when it comes to international law in the Scandinavian countries actually seems to point towards an approach where different sectors of international law are treated differently. To a great extent that is a logical outcome of the vast differentiation of kinds of international legal norms and broadening of the purposes for which international law is used as a form of regulation. What should be noted is that the Scandinavian constitutions with exceptions for certain kinds of international legal rules lack any statements on the role of rules of public international law. That means also that treatment of rules of public international law not explicitly mentioned within constitutional texts or other kinds of legislation is decided by courts. Courts have assumed that national and international law are not conflicting. Traditionally the assumption of conformity has meant that courts have not considered international law, but in recent decades the assumption has been understood as that courts are supposed to ensure such conformity between national law and international law.

3.1. International law in general

When it comes to general rules of customary international law and international treaties in general, the Scandinavian countries have as it seems adopted a quite common approach, namely that such rules of international law are not binding within the national legal orders, there is however also an aspect which modifies that, namely that here is in all Scandinavian legal systems a presumption that the national legal orders are in conformity with requirements of international law and more generally with the international legal obligations of the Scandinavian states. This mix of on one hand dualism, on the other hand the view that there is no or should be no conflicts between international and national law has also served as the basis for a judicial practice which is more open in relation to implementing international legal norms insofar they are not in obvious conflict with national law. The relevance of that in relation to customary international law has been quite limited in most countries, although

Norway implemented international humanitarian law in certain trials concerning events during the occupation during 1940-1945. However, despite such examples, it seems also clear that dualism in the sense of non-implementation of international law unless there are specific measures of implementation in national law has been a part of the Scandinavian legal family. The traditional form of dualism has however been applied slightly differently in different contexts, for instance when it comes humanitarian law, human rights and tax treaties, but in general was relatively consistent.[5]

3.2. International human rights

The role of international human rights law in the Scandinavian legal orders has changed considerably over the last decades. Sweden and Norway have constitutionalised the role of the ECHR and international human rights in general, respectively, whereas Denmark made the ECHR directly applicable in national law through an ordinary statute. The differences in this regard have concerned scope of ratification, in some contexts it has been quite specific to the rights that the countries have accepted to protect under public international law, whereas in some cases it has been rights protected under the international human rights treaties more generally. In some cases, the implementation has been limited to the ECHR specifically, in other cases it has been a part of a larger "packages" of implementation of international human rights.

3.3. Norms of inter- and supranational organisations in national law

The role of international organisations in general in the Scandinavian legal orders is also relevant when it comes to the role of the ECHR. Traditionally, the way in which international law has been conceptualised in Scandinavian law has not considered norms and decisions of international organisations. The role of the European Court of Human Rights in European human rights law, as well as the role of the ECHR as a source of EU-law, means also that the role of norms of international organisations is relevant for the application of the ECHR in Scandinavian law. The role of the ECHR in EU-law means also that in the Scandinavian countries that are members of the EU, the ECHR automatically takes precedent over national law, when it is treated as a part of EU-law, but it also means that conflicts between ECHR and

[5] For an account of the traditional dualist approach in Danish law, see, Stenderup Jensen, "Folkeretten som retskilde i dansk ret" UfR.B 1 ff. (1990)

EU-law are unresolved. The constitutional role of EU/EEA-law has never been clearly defined in the Scandinavian countries, but the case law seems to suggest that whereas the Scandinavian high court avoids distinct opinions on the constitutional rank of EU-law, it is also clear that Scandinavian high courts have let EU-law take precedent in relation to national law and (at least to some extent) in relation to ECHR.[6] When it comes to the role of inter- and supranational norms within domestic law, the role of international courts have a central role.[7] It has been pointed to that in many contexts there are domestic constitutional limitations when it comes to applicability of decisions of international courts. In the context of EU-law, the judgements of the ECJ have an erga omnes effect within the EU legal order. The role of the EctHR is for practical purposes very similar to that of the ECJ in the sense that the decisions of the ECtHR as the decisions of the ECJ are to be considered (and are considered) by national courts within national adjudication.

3.4. International law in Scandinavian law

The conclusion when it comes to the role of international law in Scandinavian law seems to be that it has played different roles at different points in time, and that the actual role of public international law, both general international law and treaties as well as various secondary norms of international organisations has largely been determined by the courts. However, for most of the time, that role has been the case under the assumption that legislatures may always amend the impact of treaties, either through denunciation or amendment of statutes implementing them. The change in more recent years has been based on a change of assumptions concerning that, meaning that judges in all the Scandinavian countries at least in relation to certain treaties, may apply them also in the face of subsequent domestic legislation. That is a change which is however not formalised and which is dependent exclusively on the acceptance of primacy of various kinds of international legal norms, an acceptance which is systematic but not systematised.

[6] It should be added that in all Scandinavian countries, the legal basis in national law of participation in the EU or EEA (in the case of Norway) is based solely on statutory norms. From a formalist perspective of national law, it means that supremacy of the EU is based on statutory norms subordinated to national constitutional law, whereas

[7] Nikolaos Lavranos, *Decisions of International Organizations in the European and domestic legal orders of selected EU Member States* (Groningen, 2004)

3.5. Beyond monism and dualism: towards consistent interpretation

The development of the role of inter- as well as supranational law components of European law within the domestic legal orders seems to a great extent to rely on practices of consistent interpretation within national law. [8] It has often been pointed that consistent interpretation is a way to manage legal uncertainty, and a way to create some kind of harmonisation which to a great extent avoids the creation of one single way of implementation of legal rules over different legal orders. The effect of that seems however to be that certain forms of uncertainties remain within the existing legal order. The tolerance for such uncertainty has, as will be discussed below varied considerably over time and over different areas of law something that in turn means that the practice of consistent interpretation has not always been consistent over time. It seems as since the practice of consistent interpretation does not alleviate all legal uncertainties, on the contrary it may even be said to preserve certain uncertainties in order to preserve autonomy of national political and judicial institutions, it is a way to integrate inter- and supranational norms into national legal orders which may raise problems in contexts of positive integration, but which are well attuned to "negative integration"[9] models of supranational law within the context of liberal constitutionalism.[10] The role of consistent interpretation therefore seems to be of central importance to the integration of national legal orders with European law in general, and it seems also to be a trend which has developed in all the Scandinavian countries.

The other aspect of consistent interpretation that is noticeable is that consistent interpretation is piecemeal and secondly that it increases the role of the judiciary. The piecemeal character of consistent interpretation seems demonstrable by the great number of quite similar cases,

[8] Anne-Marie Slaughter & William Burke-White, The *Future of International Law is Domestic (or, the European Way of Law)*, 47 HARV. INT'L L. J. 327-28 (2oo6).Gerrit Betlem & André Nollkaemper, "Giving Effect to Public International Law and European Community Law before Domestic Courts. A Comparative Analysis of the Practice of Consistent Interpretation", European Journal of International Law, vol. 14 (2003), 569-589, 569-571, Gerrit Betlem, "The Doctrine of Consistent Interpretation – Managing Legal Uncertainty", Oxford Journal of Legal Studies, vol. 22 (2002) 397-418, Thomas Cottier & Krista N. Schefer, "The Relationship Between World Trade Organization Law, National and Regional Law", Journal of International Economic Law, vol. 1 (1998) 82, 88.

[9] Negative integration for the present purposes may be defined as that it requires states to abstain from certain things, e.g. discrimination on the basis of nationality or violations of human rights, unlike positive integration that would also require further action from the states including harmonisation of national laws. In relation to the ECHR, negative integration has been the main issue of international human rights law.

[10] Liberal constitutional orders have traditionally had a sufficiently limited conception of constitutional rights so as to not create conflicts between the restrictions on governmental powers imposed by negative integration and on the other hand other rights-claims. That means obviously that the relative absence of positive rights-claims and above all that positive rights claims have not been regarded as rights of a higher legal rank seems immensely important since that would otherwise create conflicts between positive duties of states and requirements of negative integration.

relying on the same parts of the ECHR and EU-treaties in order to reinterpret various domestic legal norms, which means that consistent interpretation seems not to take place through sweeping general principles, but through successive application of inter- and supranational norms by the final instance courts. In particular that has been the case when it comes to the application of secondary norms, where national courts have been able to create distinctions between both secondary norms of international organisations/international courts, as well as distinctions between different kinds of domestic norms. The use of consistent interpretation together with reliance in particular of case law of international tribunals also suggest the possibility of national courts to interpret decisions of international courts in a more or less extensive fashion. That has had considerable importance for the implementation of both the ECHR as well as EU-law in the context of Scandinavian law. The limited aspect of consistent interpretation also means that courts to a great extent have practiced a form of "judicial minimalism" in relation to inter- and supranational law.

The other aspect that the practice of consistent interpretation leads to is a greater degree of judicial discretion when it comes to application of law. At the same time, the judicialisation is in this respect a kind of compromise between two competing interests, one related to some degree of domestic control over application of law without complete legislative implementation of every aspect of European law.[11] That seems to be especially visible in relation to the (limited) case law which concerns constitutional conflicts between national and supranational law, where consistent interpretation can be seen as a strategy to combine effectiveness of European law with avoidance of defining hierarchies between European and national law in the general terms that legislative or constitutional norms would require. The downside of that practice of consistent interpretation is however not just judicialisation but also abiding legal uncertainty, at least if read in the context of traditional forms of interpretation. It means also that traditional understandings of sources of law become far more problematic than what has traditionally been the case, and it means also that the integration of national law into supranational law to a great extent has led to a deformalisation of law. (That is not universally the same as to say that protection of fundamental rights has lessened, on the contrary it is quite clear that implementation of the ECHR in national law the protection

[11] It is however also clear that national courts are central to the development of EU law in the sense that they are always able to make prejudicial questions to the ECJ. David Edwards, *National Courts – the powerhouse of Community Law*, CYELS (2007)

substantive fundamental rights has increased in important respects, and the same may be said with regard to EC-law[12].)

4. Constitutional basis for ECHR and EEA/EU-law: integration and incorporation clauses in Scandinavian constitutions

The first aspects of European law within national law, concerns whether the special nature of European law (EC/EU/EEA and ECHR legal orders) in national law can be inferred from the from the respective national constitutions, and secondly what is the status of EC/EU/EEA-law and ECHR in the domestic hierarchy of sources. The Scandinavian countries have a common constitutional approach when it comes to the national constitutional rank of EU/EEA-law. The Scandinavian countries created in the decades after 1945 special constitutional provisions in order to deal with future international (in particular European) integration that would be more far-reaching than traditional international treaties. The "integration clauses" of Scandinavian constitutions have a common structure, they authorise, but do not prescribe international integration, they impose supermajority requirements, they allow for the decision of integration to be made through a statute (having in formal terms subconstitutional rank), and they hence formally enable the withdrawal from such organisations through a parliamentary decision with simple majority. It is uncontested that these clauses were created in order to facilitate integration into the EEC/EC/EU, but from the outset they did not distinguish between European, "supranational" integration on one hand, and on the other hand other forms of extensive international integration.

The approaches to the ECHR of the Scandinavian countries varied slightly, the Scandinavian countries, Denmark, Norway and Sweden signed and ratified the ECHR at an early stage. The ratification of the ECHR in Sweden and Norway took place in 1952 and in Denmark in 1953, with the temporary and permanent recognition of the jurisdiction of the EctHR in 1965 and 1970. However, in terms of the dualist approach to international law, the ECHR did not become directly applicable in any of the legal orders until the 1990ies.[13] It should also be said that Sweden as well as Norway and Denmark accepted the jurisdiction of the European Court

[12] Niels Fenger, *Forvaltning og Faelleskap* (2004), Jane Reichel, *God Förvaltning i EU och Sverige* (2006)
[13] Denmark incorporated the ECHR through a statute taking effect in 1992, Norway in 1992 and Sweden in 1995.

of Human Rights at a relatively early stage. The effect of the ECHR in the interpretation and application of law within the Scandinavian countries has however been slightly more varied over time. At the same time, it is clear that compared to some decades ago, all the Scandinavian countries participate to varying degrees in European and international integration more generally however clearly represents a shift of policy, a shift which also has considerable consequences for the legal systems of the Scandinavian countries. The constitutional models employed in order to implement the ECHR have varied considerably, from constitutional requirements explicitly referring to the ECHR, constitutional requirements referring to international human rights and mere statutory incorporation. Despite that, it is not as discussed below not obvious that these differences have had any dramatic effects at the level of adjudication. This could also be compared with the more scattered approach to integration within the framework of EU/EEA-law. As can be seen from the analysis below, there are major differences in the constitutional rank of EU/EEA-law and the ECHR in Scandinavia. There are also major differences concerning how national courts relate to these institutions, but it is not possible to delineate these different approaches on the basis of the different constitutional ranks of EU/EEA-law and the ECHR.

4.1. Sweden[14]

4.1.1. Constitutional basis for EU-membership in Swedish law

Sweden created an option for international delegation through constitutional amendent to the § 81 3rd section 1809 IG and the clause was then transferred to 10:5 1974 IG in the total revision of the Swedish constitution in 1974.

Within the framework of cooperation in the EU, the parliament may delegate decision-making powers which does not concern the principles of constitutional order. Such delegation presupposes that the protection of freedom and rights, in the field where the delegation occurs is equivalent to that given in this Instrument of Government and the ECHR. The parliament decides on such delegation through decision by at least three quarters majority of the voting members. The decision of the parliament may also be made in the order for

[14] In the case of Sweden, Regeringsformen [Instrument of Government] is the law that includes all features of a traditional constitution. However, the Instrument of Government is one of four Basic Laws, where the others include Tryckfrihetsförordningen [The Freedom of Press Act], Yttrandefrihetsgrundlagen [The Freedom of Expression Basic Law] and Successionsordningen [The Order of Succession [to the Throne]]. The Instrument of Government will henceforth be abbreviated, IG.

making of constitutional law. The delegation may be decided only after the approval of the parliament according to 10:2 Instrument of Government

Decision powers which according to this Instrument of Government belongs to the parliament, the executive or other institution enumerated in the Instrument of Government, may to a limited extent, be delegated to an international organisation to which the realm belongs or shall acceded, or to an international court.

Judicial or administrative tasks, which according to the Instrument of Government does not belong to the parliament, the executive or any other institution mentioned within Instrument of Government, may be delegated to another state, to an international organisation or to a foreign or international institution or cooperation, if the parliament so decided through a decision approved by three quarters of the voting members, or by the procedure that exists for adoption of constitutional statutes.

The possibility to delegate powers to the EC was the central aspect of 10:5 1st section 1974 IG, was it was formulated in connection to the EU-accession in 1995. As mentioned there was then a clear distinction between the EC and its supranational part and the various intergovernmental forms of cooperation regulated through other international treaties. It should of course also be said that this did not preclude that to the extent provided for in the EC-treaty, measures of the Treaty on the European Union could be implemented through EC-law. The reason for the very broad frame of delegations to the EC was that the aim of the new regulation was to enable not just Swedish membership but also Swedish participation in the EC.[15] In relation to EC there were never been any clear limits in scope of the delegation, and the reason for that was the functional character of EC, that per se limited the areas of integration to a predefined number. Simultaneously it was also seen as quite clear that delegation in some fields were as improbable as to be meaningless to consider, e.g. when it comes to the electoral system and similar matters. The structure of the Swedish competencies delegated to the EC/EU may never from the perspective of Swedish law be more extensive than what has been set out in the Swedish Acts of Accession. A legal act or decision from an EC/EU institution that exceeds the powers that have been delegated to the EC/EU would be ultra vires and hence not be valid law in the Swedish legal order. That is a view which was clearly expressed by the Committee for Constitutional Affairs in the Swedish Parliament, an

[15] The broad delegation that actually was introduced 1995 and to some extent broadened when it comes to subject but constrained somewhat in 2003 was however considerably more narrow than what had been proposed earlier. A parliamentary inquiry proposed in its report, *EG och våra grundlagar* in 1993 (SOU 1993:40) that a new article should be introduced in the Instrument of Government stating that a legal act of the EC/EU should always take precedence before a Swedish legal norm, regardless of the constitutional rank of the Swedish norm. That was however regarded as impossible to accept, and the Instrument of Government does not mention anything concerning the rank of EC-law in Swedish law.

opinion which was also unanimous.[16] The opinion of the Committee for Constitutional Affairs cannot be discarded as irrelevant for judicial review of EC-matters in Swedish law, but on the other hand, there is little textual support for the view in the legislative act on accession to EC/EU.

The status of EC-law in Swedish law can thus be said to have two dimensions: in the first respect it concerns the extent of the delegation of powers as set out in the accession act, the second is the limits of delegation that are defined in the 10:5 1st section 1974 IG. The actual delegation and the outer limits of delegation have to be distinguished. The fact that the accession act is only an ordinary statute makes it clearly subordinate to the IG in the Swedish constitutional order, so there is a considerable structural support for the opinion of the Committee when it comes to the basis for EC-law in Swedish law. [17]

4.1.1.1. The framework of cooperation in the EU – what does the 2003 amendment mean?

The current wording referring to "within the framework for cooperation" suggests that delegation may take place to more than the EU and the EC. It seems clear that all constituent parts of EU, i.e. both the parts regulated in the EC- and EU-treaties (in the form set out in the Nice treaty 2001) are covered by the same rules of delegation. However, it is unclear where the limits are for other forms of cooperation that Sweden participates in conjunction with the EU-membership. The regulation in 10:5 1st sction 1974 IG appears in this context to be well adapted to future treaty-revisions. At the same time, there is a clear weakness that the regulation covers such a wide area that it appears difficult to delimit what is covered by "within the framework of cooperation in the EU". It seems clear that institutions created between EU, EU-member states and third countries could be included in the formulation, as well as delegation to inter- and supranational organisations within the frame of flexible EU-

[16] 1993/94:KU21, 29

[17] The interpretation of the relation between EC-law and Swedish law that was unanimously stated by the Committee on Constitutional Affairs is certainly reasonable from a constitutional perspective, but it is also clear that it is not accepted from the perspective of EC-law. AG Werner argued in the Hauer case in 1977 along similar lines when it came to the issue of competency of the EC, that the EC could by definition not have a power which was not delegated to it, and if the member states would have delegated powers under the condition that the EC maintained a similar protection of fundamental rights as in national constitutions, then the EC could not have any power that would infringe on fundamental rights, that the member states did not have. The ECJ clearly rejected that view, and instead continued along the line of Internationale Handelsgesellschaft, claiming that there could not be any limitation on reach or supremacy of EC-law on the basis of constitutional limitations in the member states.

cooperation belong to what is covered by the provision. It seems also possible to delegate competencies within this wide frame, to ad hoc organisations created by the member states.

It has been argued that the wording ”within the framework of cooperation in the EU” only can concern EC and EU (after a future ratification and entry into force of the Lisbon Treaty). Judging from the wording, it is a too narrow interpretation. It is worth noting options for flexible integration and intergovernmental forms of decision-making where the ECJ has jurisdiction, which makes the borders of delegation of powers to the EU, more unclear than what they may appear to be at the surface. An important aspect of revisions of 10:5 1st section 1974 IG is that whereas in other regards, distinctions between different forms of international cooperation to which public powers may be delegated have became clearer, whereas in relation to the EU, the development has been the opposite. From having defined the EC as the organisation to which a more extensive delegation is possible, the distinction between the EC and EU after the 2002 revision of 10:5 1st section 1974 IG been abolished. The abolition of the distinction between EC and EU means also that there is a lack of clarity if, when and to what extent delegation of powers to the EU is possible. In the earlier versions EU was not mentioned, and in the current version, “EU” is not mentioned independently, but as a part of a framework of cooperation. From a systematic and teleological perspective it is farfetched to say that the current regulation excludes possibility of delegation of powers to the EU. The dilemma with the current regulation is that the outer limits of “EU-delegation” are very uncertain, which has important implications for forms of decision-making, fields of law and effects of delegation in national law, when it comes to distinguishing between institutions within the framework of EU-cooperation and other international organisations. This problem of delimitation has not been treated in the literature and it has so far not led to practical constitutional problems, but it is also clear that the issue has theoretical as well as practical relevance since the distinction between EU-cooperation and other international organisations provides for two quite different forms of international delegation. In Sweden the integration clause has been used in relation to certain other forms of international delegation, such as when it comes to the ratification an international railway traffic treaty (COTIF) as well as when it comes to delegation of control of rivers bordering with other countries.[18] The actual basis for application of EU-law is hence based on statutory incorporation of the EC/EU-treaties (and from the entry into force of the Lisbon treaty of the EU-treaty and the Treaty on

[18] Vilhelm Persson, *Rättslig reglering av gränsöverskridande samarbete* (Lund, 2005)

the Functioning of the EU). The exclusively statutory basis has also meant that there is no formal basis within Swedish law, except for the special character of the EU-law itself to regard it as in any way superior to other national legislation.

4.1.2. The legal basis for the ECHR - constitutional and statutory incorporation

For various reasons, there was less focus on the constitutional rule prohibiting legal norms incompatible with the Swedish commitments to the ECHR. Since constitutional rules have higher constitutional standing than ordinary statutory rules decided by the Parliament (Riksdagen) and since IG 2:23 has been relatively neglected in the literature, there are good reasons to analyse it in greater detail.

4.1.2.1. IG 2:23 – a textual analysis

Statute or other legislative provision [föreskrift] must not be adopted in conflict with the commitments of Sweden under the European Convention on Human Rights and Fundamental Freedoms.[19]

IG 2:23 is the constitutionally highest ranking norm concerning the status of the ECHR in Swedish law. The meaning of IG 2:23 has been analysed in various commentaries to the IG, but there is no consensus when it comes to its constitutional character and relevance.[20] The analysis of IG 2:23 does not cover all aspects of protection of ECHR in Swedish law, but only the constitutionalised aspect of the protection. A central problem with regard to IG 2:23 is to whom IG 2:23 is addressed. Traditionally constitutional norms have been addressed primarily to the legislature, the executive (as well as various executive agencies) and, albeit to a lesser extent to the judiciary. Traditionally it was relatively clear that not all constitutional norms within the Swedish constitutional order are addressed also to the judiciary. From the outset IG 2:23 was primarily addressed to the every institution adopting general legal norms [*föreskrifter*]. That means that also the executive when adopting ordinances, executive authorities providing general legal provisions as well as local public authorities as well as private subjects of law exercising delegated legislative powers are all bound by the ECHR. The addressees in that respect of IG 2:23 are defined by the character of measures they adopt not by their institutional character. The question on whether the judiciary was also an

[19] My translation: ”Lag eller annan föreskrift må ej meddelas i strid med Sveriges åtaganden under den europeiska konventionen angående skydd för de mänskliga rättigheterna och grundläggande friheterna”
[20] Erik Holmberg & Nils Stjernquist, *Vår Författning*, (13th ed., Stockholm 2003), 54-55.

addressee of IG 2:23 was never resolved when it was adopted, in the light of the case law on the role of ECHR within Swedish law, the courts at least have understood themselves as addressees of the provision in IG 2:23, but that is to some extent to be a departure from what was envisaged when IG 2:23 was instituted. The effect is that the judiciary has in an increasing but not wholly inconsistent fashion applied the IG 2:23.

4.1.2.2. Public action with and without legislative basis – the scope and limits of legislative norms

The role when it comes to protection of the constitutional status of the ECHR following the text is negative, i.e. it is *not* stated that the state or any other public authority has any duty to act to protect the human rights as set out in the convention. The absence of any positive duty to uphold the ECHR is different from the requirements on the scope of protection that ECHR sets out. When the public authorities choose to regulate any matter of social life through general norms, it may not violate the ECHR. Hence, IG 2:23 does not cover areas that are not regulated by law, and in that sense it also upholds the principles of legality and legal certainty in an even wider way than the ECHR, but it creates a general duty for the legislator when regulating something that has not been regulated through legislation before (as well as a general duty to bring existing norms in harmony with the ECHR). The practical implications of that are limited since the scope of governmental action without any legal basis, and hence beyond the scope of the constitutional requirement of conformity with the ECHR are very limited. When it comes to the delegation of public powers to private legal entities it is limited under the IG, and also such private legal entities are addressees of IG 2:23 to the extent they exercise legislative functions.[21] However also the manner in which public powers are delegated to private legal entities, is subject to requirement of conformity with ECHR. In that regard, there is an indirect constitutional requirement of conformity to the ECHR that falls both on the public entity (primarily the parliament) delegating powers as well as on the private legal entity exercising delegated powers. It is not even clear that the state must prohibit public action violating the ECHR which can be supported on grounds other than legislative norms. When it comes to administrative action, that is probably, in the light of the

[21] Ola Wiklund, ”The Reception Process in Sweden and Norway” in Helen Keller & Alec Stone Sweet (eds.) *A Europe of Rights* (Oxford, 2008) 174; Iain Cameron, ”Sweden”, in C.A. Gearty (ed.) *European Civil Liberties and the European Convention on Human Rights – A Comparative Study* (Doordrecht, 1997) 217-266; Ulf Bernitz, ”Inkorporerandet av Europakonventionen – en halvmesyr?” *Juridisk Tidskrift* (1994/95) 259 ff.

general principle of legality set out in IG 1:3[22] a limited problem since the role of non-legislative rules in the exercise of public powers are limited, however, there are cases where public action may be lawful, but where it cannot be said to be justified on the basis of legislative norms in the sense of IG 2:23.[23]. A more problematic aspect of it concerns the extent to which there is a constitutional requirement to adhere to ECHR in cases when public authorities act through private law contracts, whereas it is quite obvious that there is such a duty of public authorities under the ECHR. However, it also means that there is no – at least if IG 2:23 should be interpreted literally – no duty for courts to respect the ECHR when they apply other sources of law than legislation, i.e. when courts apply general principles of law or precedents, e.g. dispositive cases of private law. The general restriction when it comes to law and legislative norms is clear i.e. it is obvious that all kinds of general norms that are issued in advance of a particular decision, and also that all decisions by public authorities as well as decisions made under legislative delegation of public powers to private entities based on general legislative norms by definition have to be consistent with the ECHR. [24] The dilemma when it comes to definition of what laws and legislative norms consist of is obvious, also directly in relation to the ECHR since one of the central criteria for the acceptability of restrictions on relative rights under the ECHR is that they are lawful.[25]

4.1.2.3. The extent of Swedish commitments

The question on what Swedish "commitments" under the ECHR means is problematic if one should follow the textual analysis. Commitments were from the outset intended to also include additional protocols, something which seems necessary since several important guarantees of fundamental rights, e.g. the right to property are protected in a protocol.[26] However, in my view, "commitments" under the ECHR have to be understood given the structure of the ECHR and the institutions interpreting the ECHR and also providing further guidance to the application of the ECHR. The commitments under the ECHR as Sweden have accepted them include the text of the ECHR, but it also include additional protocols as well as

[22] IG 1:3, Fredrik Sterzel, "Legalitetsprincipen" in Lena Marcusson (ed.) *Offentligrättsliga Principer*, (Uppsala 2002), 45 ff.
[23] The field where exercise of public powers without support of legislative norms, although limited do exist. Obvious examples are cases of constitutional emergencies [konstitutionell nödrätt] which is per se not institutionalised, and which has generally been held to be controlled through political rather than through legal means. Henrik Jermsten, *Konstitutionell nödrätt*, (Stockholm, 1987)
[24] Anne Lagerquist Veloz Roca, *Föreskrift och föreskriftsprövning enligt 1974 års RF*, (Stockholm, 1999)
[25] Compare articles, 5, 7, 8, 9, 10, 11 of ECHR and article 1, First additional protocol to the ECHR etc.
[26] Prop 1993/94:117

the case law of the EctHR since it is the case law that provides flesh to the skeleton-like structure of rights protected under the ECHR. Many of the provisions of the ECHR (as is the case with many other instruments of human rights) would be far too vague and open textured to provide effective protection if their interpretation was left entirely to the states. The creation of a special court, EctHR whose jurisdiction Sweden has accepted, and whose jurisdictions is also limited to the ECHR all points in the direction that the case law of EctHR have to be understood as a part of the Swedish commitments under ECHR. Furthermore, the ECHR is quite commonly regarded as a "living instrument" that undergoes successive development and since such developments take place through judicial practice of the EctHR, to a great extent without corresponding revisions of the text of the ECHR, the "commitments" in the case of the ECHR have to be understood as including also the case law of the EctHR. Since the term of "Swedish commitments" under the ECHR has to refer to international law, it would seem strange that it, although transformed into a national constitutional rule could be restricted in their scope and applicability by another national constitutional rule. The question on which the answer turns is whether the notion of "commitments" refers to a category in Swedish constitutional law, or whether it refers to international law, and hence also should be interpreted as a matter of international law. The commitments of Sweden under the ECHR can by definition not be defined in national law, neither constitutional law or in any other form of national law. The reason for that is that the Swedish commitment, if meaning a legally binding commitment to the ECHR can be understood only as a commitment under *international,* not national law. If the "commitments" under ECHR should be understood as having any kind of legally binding effect, i.e. not to be seen just as a declarative statement, the reference must be understood as a matter of international law. There are strong systematic and textual reasons for this interpretation of the extent of the "commitments" under the ECHR, but it seems as if the meaning of the term was intended to be considerably more narrow. Given the discussion in the legislative bill, it was quite clear that there was no view that the "commitments" should make the issue of IG 11:14 irrelevant.

Given the wording of IG 2:23, it limits the legislative powers, general and special, inherent and delegated within the Swedish legal order. In that regard the primary addressee of IG 2:23 is the legislator, or other authorities exercising legislative functions. However, because of the reference to "Swedish commitments", it seems also problematic to claim that there would be no reference at all to courts, since the reference to "commitments" also means that the role of Swedish courts has to be understood with reference to the role of national courts as envisaged in the ECHR and its additional protocols. It does however not prescribe what the reaction of

various law-applying institutions should be if it was violated.[27] The wording of IG 2:23 does neither preclude that the control of the conformity of Swedish law with ECHR is upheld by the legislature nor that it is upheld by the courts. From a constitutional perspective, IG 2:23 provides the transformation of the ECHR into Swedish law there is also, as pointed out above, a paradox in the following sense: the effect of IG 2:23 is dependent on that it exists "Swedish commitments" to follow the ECHR. That means that in the case that Sweden reserves itself or withdraws from the ECHR entirely, the commitments would also disappear and so the constitutional protection of ECHR in Swedish law.[28] This is paradoxical from the general perspective of protection of fundamental rights, and the reasons for constitutionalization of such rights, but it is also paradoxical from the perspective of constitutional logic. According to IG 10:2 which regulates the treaty-making powers within the Swedish constitutional order, the Swedish parliament should approve or reject international treaties of greater significance or such that would require legislation to be amended, the same principle is applicable when it comes to withdrawal from treaties requiring those changes.[29] In that regard, one may actually say that the Swedish constitutional regulation of the ECHR is a regulation which is based on that the Swedish commitments exist in order for ECHR to bind the legislator. The Swedish commitments are commitments under international, rather than national law. Since Art. 59 ECHR makes effectiveness of the ECHR subject to ratification, it seems as if the reference to ratification must be seen as a matter of procedures of ratification as understood in national law and the withdrawal from the ECHR logically seems to require the same kind of procedure, i.e. that a state-party withdraws from the ECHR following the same procedure of decision that

[27] Iain Cameron, "Normkonflikter och EKMR", *SvJT* (2008), 851-862, Clarence Crafoord, "Normprövning och Europakonventionen", *SvJT* 2007, 862-881, Inger Österdahl, "Normprövning ur ett EKMR-perspektiv", *SvJT* (2007), 882 ff.

[28] The possibility to restrict the Swedish commitments through reservations is obviously also dependent on the degree to which they are acceptable to the ECHR. (Belilos v. Switzerland), so the effect of ECHR to a certain extent may not be possible to restrict otherwise than through total withdrawal, which obviously is more politically difficult. The restrictions when it comes to reservations that the EctHR has imposed, in order to not undermine the object and purpose of the ECHR, is certainly one of the most important constraints, since it means that Swedish obligations to the ECHR under international law, may be discarded, but that they in such cases will have to be discarded fully, rather than in any partial way.

[29] It should be noted that the meaning of the criterion of "greater significance" of treaties has never been contested, neither in courts nor by the parliament. The dilemma seems to be that whereas the constitutional model of the Swedish system is largely dualist when it comes to the status of international treaties within the legal order, the specific constitutional requirement of parliamentary consent seems to be made ineffective by the special status of the ECHR in 2:23 according to a textual reading of IG 2:23 as the reference is clearly made to the rules of international law. Since the ECHR does not contain any clause concerning that accession to it has to be according to the national constitutional requirements of the state parties, general rules of international law seems to be the only ones that can be applicable. IG 10:4 imposes the requirement that if a treaty has to receive parliamentary assent to be entered into, it would also require so when it comes to exiting the treaty, and that requirement of congruence seems to be the central issue in order to protect the role of the parliament when it comes human rights law.

made the state ratify the agreement. In that regard, the understanding of commitments has an important limit, they are entirely defined by the accession of Sweden to the ECHR, and it also means that a Swedish withdrawal from the ECHR would – without any change of the wording of the Swedish IG – be sufficient to eradicate the effect of IG 2:23 in Swedish law. The nature of the Swedish commitments, thus also means that the constitutionalization of the status of ECHR as an *international treaty* in Swedish law is not a constitutionalization in the sense that it binds the legislator in the way that other constitutional norms do, but only in the sense that it binds the legislator as long as the legislature accepts to be bound by it.[30] That means that the ECHR has a function similar to that of a bill of rights, but not a traditional degree of constitutional protection, since IG 2:23 can be rendered meaningless without any constitutional amendment.

4.1.2.4. IG 2:23 and constitutional law in general – the problems of coherence and interpretation

The wording of the 2:23 leads to that other constitutional legislation (e.g. the Act on Freedom of the Press) as well as other parts of the IG, has to be interpreted in conformity with the ECHR. The reason for that is simply that also constitutional rules are "general legal provisions". That also means that the scope of the ECHR in Swedish law under the IG 2:23 means that also other rules of constitutional law have to be interpreted in a manner consistent with ECHR. However, from the perspective of Swedish law, the question is not, as will also be discussed below (concerning the relation between IG 2:23 and IG 11:14) simple. The reason is that IG 2:23 and the other constitutional acts in Swedish law have the same constitutional status, so the hierarchical principle of *lex superior* is of no use. At the same time, there is a strong presumption that constitutional law should be understood as being as coherent as possible. I would also add that because of the very pronounced character of the *travaux préparatoires* as a political compromise, it is very difficult to interpret IG 2:23 with the same strong emphasise on the intentions of the legislature that is common in Swedish statutory interpretation which seems to make a case for a textual approach more reasonable. In the *travaux préparatories* of the Swedish act incorporating and the constitutional transformation act of the ECHR is stated that it is not entirely clear whether the Swedish protection of fundamental rights [grundläggande fri- och rättigheter] is in all ways compatible

[30] It is obviously possible, although it seems practically unlikely, to withdraw from the ECHR as an international treaty but let the statute incorporating the text of ECHR remain in force.

with the ECHR, but that it is a problem which is seen as to be resolved that the case of the most extensive protection of the individual will be the one which is applied. That is a view which on one hand has support in the ECHR since art. 53 ECHR explicitly states that the ECHR cannot be used to limit rights under national law, on the other hand, it is an argument which is problematic since the balancing between different rights (e.g. protection of privacy and family life under art. 8 ECHR and the right to freedom of expression under art. 10 ECHR) is problematic, in particular in the context of horizontal effect of ECHR. A more general argument against that interpretation has been presented by Cameron, claiming that it is difficult to know what "higher protection" of rights means.[31] In the relation between government and individual, the difficulty to see what provides greatest protection of individuals seems not problematic at all, the difficulty however arise in cases of horizontal effect, and that also means that it has became successively more pronounced. Following a textual interpretation, it seems clear that anything that falls under the legislative powers of the parliament, as well as all forms of ordinances set out by the executive automatically have to be consistent with ECHR. The question has not been discussed in the *travuax préparatoires*, nor in case law, but it seems as if any general provisions on human behaviour that are legally binding, have to be included in the concept of "föreskrift", and hence it seems to include various forms of provisions of local government as well as binding provisions of executive agencies of various kinds.

There are also problematic categories when it comes to the conformity of the ECHR, it is uncertain to what extent norms of international organisations that have direct effect under Swedish law are covered by the IG 2:23, despite it is quite clear that norms which are directly applicable within the realm, from the perspective of the ECHR must be seen as law.[32] The reason for that is that such organisations are not addressees of the Swedish IG, even if legal norms originating from such organisations would also have to be understood as general norms of law being parts of the Swedish legal order. It should be noted that the EctHR in case law has regarded norms of international organisations, implemented by national authorities as a part of national law. In such cases it might however be argued that the Swedish legislative act empowering the international organisation, giving effect to the norms of an international organisation, would be inconsistent with IG 2:23, if it allowed for direct applicability of international norms that violated ECHR. When it comes to the regulation of delegation of "decision-making powers" to international organisations in IG 10:5 there is an explicit

[31] Cameron (2008) 854-862.
[32] E.g. the EctHR in Cantoni v. France.

requirement of that such international organisations provide protection of fundamental rights equivalent to the IG and ECHR. In the case of IG 10:5 1 st which concerns cooperation within "the framework of European Union" there is a requirement of equivalence of protection of fundamental rights with the ECHR, although that requirement should not be seen as a matter of "identity" of the extent and scope of protection of fundamental rights, there is thus room for certain divergences. There is a conflict of norms between IG 2:23 and IG 10:5 in this regard, or whether IG 10:5 (in its present form) should be regarded as a matter of *lex posterior*, or given its limited scope of application, as *lex specialis* to IG 2:23. So the ECHR has also a certain role in Swedish law as a minimum standard for protection of fundamental rights within EU-law in order for it to be an acceptable part of Swedish law. However, given the understanding of legislative norms within the IG, it seems doubtful whether there is a constitutional duty under the IG for Swedish authorities and courts to conform to the standards of ECHR, at least insofar that such norms of international organisations are valid, *without* being authorised through Swedish legislative norms. The latter cases of organisations are very unusual, but it could be argued that the present status of decisions whose validity relies on the UN Charter could be included that could be both directly applicable within Swedish law without being subjected to the requirement of conformity with the ECHR.[33]

4.2. Denmark[34]

When it comes to the legal basis for ECHR and EU-memberships respectively in Danish law, they are based on the different constitutional grounds, as discussed below.

4.2.1. The constitutional basis for EU-law.

§20 Danish Basic Law was introduced in the total revision of the 1849 Danish Basic Law that took place in 1952. The total revision of the Danish Basic Law in 1953 included a new clause, § 20 Danish Basic Law which enables the parliament to delegate powers to international organisations. Denmark does not differentiate between international organisations to which delegation is possible. § 20 Danish Basic Law was an adjustment to membership in inter alia

[33] Whether that would lead to a substantive conflict between UN Charter and ECHR is however not at all cetrain given the recent case law of EctHR, see, Bosphorus v. Ireland, and Sarmatic v. Norway, France and Germany.
[34] The Danish law in this regard is primarily Danmarks Riges Grunlov [1953 Danish Basic Law].

the United Nations (with the treaty-based delegation of powers to the UN Security Council) and to NATO, but it was also considered in the context of various attempts to form a closer form of European integration. § 20 Danish Basic Law which has remained unchanged since 1952 reads as follows:

§ 20 1st section. Powers which, following this Basic Law belongs to the authorities of the realm may, in precise scope, be delegated through statute, to international authorities, which are created by mutual agreement with other states in order to further an international legal order and international cooperation.[35]

The Danish regulation is in some regards narrower than the Swedish model, when it comes to whom public powers may be delegated, since there is no possibility of delegating powers to other states or international organisations which do not have international legal personality. The international authorities created by mutual agreement with other states, which is a central criterion. In this regard, powers may be delegated "upwards" to international organisations, and not to other forms of legal subjects, and it may also not be delegated to other states, a central delimitation. Compared to the Swedish model it should be noted that Swedish law does allow for delegation to other states, but under the strictest limitations on what may be delegated, but what is a matter of interpretation under the Swedish IG, is not at all possible within the context of Danish law. The Danish legal regulation of international delegation seems to be slightly stricter when it comes to protection of national sovereignty than the Swedish rules. However, the analysis of § 20 Danish Basic Law came however relatively soon to focus on whether § 20 Danish Basic Law could be used for the delegations of powers that a membership in the European Economic Community/European Community would lead to. The substantive limits set out by § 20 1st section Danish Basic Law defines the purposes for which authority may be delegated as the furthering of international cooperation and an international legal order.[36]

The Danish definition of which powers which may be delegated to international organisations (without further distinctions) is quite clear, namely powers which belong to the "authorities of the realm". The minimal definition of that is that it is limited to action of public authorities in their capacities as authorities, i.e. the creation of an international organisation endowed with

[35] §20 Stk. 1. Beføjelser, som efter denne grundlov tilkommer rigets myndigheder, kan ved lov i nærmere bestemt omfang overlades til mellemfolkelige myndigheder, der er oprettet ved gensidig overenskomst med andre stater til fremme af mellemfolkelig retsorden og samarbejde.
[36] Hjalte Rasmussen, *EU-Ret i Kontekst* (4th ed., Copenhagen, 2001) 105-151. 106-113.

no other powers than to make private law contracts in some field would fall be irrelevant to § 20 Danish Basic Law. The powers of the authorities of the realm, with the exception (discussed below) are similar to the Swedish notion of powers that may be delegated to the EU, i.e. "public powers" in general. The Danish definition is specific in the sense that it means that the character of powers that may delegated are of a public legal character, i.e. they concern the exercise of unilateral authority towards individuals or groups of individuals, independent of the consent of those said individuals. The powers of the authorities of the realm obviously also means that there are limits to what the Danish government can delegate, when it comes to competencies related to Greenland and the Faroe Islands. In the same way as Sweden, as discussed above, there is no other basis for the applicability of EU-law in Danish law than the parliamentary statute which confers Danish public authority on the EU. That means also that the superiority of EU-law in many respects is a logical problem within Danish public law.

4.2.2. ECHR - incorporation solely by statute

The Danish model for incorporation of the ECHR in the national legal order is based on that the validity of the ECHR in the national legal order is stated in a statute.[37] That is a major difference from the Swedish-Norwegian model, which relies on constitutional norms. The rank of the ECHR as a mere statute is hence problematic since it makes the ECHR, from a formal perspective subordinated not just to constitutional norms but also to subsequent statutes. In Denmark there was during the late 1980ies a tendency towards application of the ECHR as a set of "background rules" for how civil liberties should be interpreted mixed with practices of consistent interpretation.[38] The exclusively statutory incorporation of the ECHR in Danish law creates, as discussed below, a dilemma when it comes to the hierarchy of norms, since it also means that the ECHR cannot from a systematic perspective make any claim to supremacy in relation to domestic Danish law. Despite that, as discussed below, Danish courts have developed a wide ranging control of Danish legislation on the basis of the ECHR.

[37] For an account of Danish law prior to incorporation, see Ole Espersen, "Den europæiske menneskerettighedskonventions forhold til dansk ret", *Juristen* 401 ff. (1966).
[38] Søren Stenderup Jensen, "Folkeretten som retskilde i dansk ret", *UfR*.1990.1B. 5-6, Jonas Christoffersen, "Folkeretskonform Grundlovsfortolkning" in *Festskrift til Ole Espersen* (Copenhagen, 2005) 241-267.

4.3. Norway[39]

4.3.1. The legal basis for EEA-membership

Norway adapted a similar clause on international delegation in § 93 Norwegian Basic Law in 1962.
in 1962 as stated above, the Norwegian parliament did amend the Norwegian Basic Law to give § 93 Norwegian Basic Law the following wording:

To ensure international peace and security and further an international legal order and [international] cooperation, the Parliament may with a three quarters (3/4) majority, assent to that an international organisation which Norway is, or will become a member of, in a limited field, will be able to exercise powers that following this Basic Law otherwise belongs to the authorities of the state, however not the power to change this Basic Law. When the Parliament shall assent to that, at least a third of its member shall be present.

The rules in this article does not apply when it comes to participation that only has effect for Norway under international law.[40]

The wording of the article when it comes to the purposes for which international delegation is allowed, are interesting and it allows for three categories of purposes; to ensure international peace and security, to further international legal order and international cooperation. The objectives for which § 93 Norwegian Basic Law may be used are very broad, in particular the furthering of an international legal order and furthering of international cooperation are however extremely broad. The wording of the objectives can be said to give a very high degree of flexibility to the legislator in using it.

However, it is also clear the wording about peace and international security also refers to the status of UN Charter within international law, and the role of the UN Security Council when it comes to the role of ensuring international peace and security, where the UN Security Council

[39] Norges Grunnlov [Norwegian Basic Law],
[40] For at sikre den internationale Fred og Sikkerhed eller fremme international Retsorden og Samarbeide kan Storthinget med tre Fjerdedeles Flertal samtykke i, at en international Sammenslutning som Norge er tilsluttet eller slutter sig til, paa et saglig begrænset Omraade, skal kunne udøve Beføielser der efter denne Grundlov ellers tilligge Statens Myndigheder, dog ikke Beføielse til at forandre denne Grundlov. Naar Storthinget skal give sit Samtykke, bør, som ved Behandling af Grundlovsforslag, mindst to Trediedele af dets Medlemmer være tilstede. Bestemmelserne i denne Paragraf gjælde ikke ved Deltagelse i en international Sammenslutning, hvis Beslutninger har alene rent folkeretslig Virkning for Norge.

following the UN Charter has a more or less unlimited authority in all fields of society, as far as the actions are related to maintenance of international peace and security. The objectives for furthering international legal order and international cooperation are very broad when it comes to subject. In this regard, the Norwegian regulation is opposite to the Swedish that distinguishes quite clearly between different forms of international integration, and also attaches different requirements for delegation to different kinds of organisations. The possibility of accession to the EC also led to a debate among Norwegian constitutional lawyers[41] whether § 93 Norwegian Basic Law provide for sufficient authority for such an accession. Smith has argued that the limitation on the scope of delegation and its unclear character also has made it into a typical standard, which allows for legislative as well as judicial discretion in interpretation.[42] In Norway, the clause has been used only on one occasion, in connection with the ratification of the EEA-agreement in 1992, likewise the Danish practice is limited to supranational organisations.[43] The Norwegian solution when it comes to international delegation is quite similar to the Danish one, namely that the powers of the authorities of the realm without further specification may be delegated. This undifferentiated power of delegation can be seen as another instance of "constitutional laxity" characteristic of many aspects of Scandinavian constitutional law. The power of the authorities of the realm means also that the formalised constraints on which powers that may be delegated to international organisations are quite limited. However, unlike Sweden (and in subsequent practice also Denmark), Norway retains the rule on that delegation can only take place to international organisations. It is not clear what international organisations mean, in the ordinary sense of the word, the most reasonable interpretation is that it includes international organisations with independent legal personality, but that it does not include organisations which do not have any powers of their own which they are able to exercise. In such case, delegation would be precluded, not just to other states, but also to the European Union as such under present circumstances. It should also be said that the only kind of powers that is concerned by § 93 Norwegian Basic Law is if international organisations are given powers to make decisions or general norms that directly affect the citizens.[44] That means also that as far as the Norwegian Parliament, the executive or other public authorities are those that

[41] Torkel Opsahl, "Limitation of Sovereignty and the Norwegian Constitution", 13 *Sc. St. L.* (1969)151; Torkel Opsahl, "Constitutional Implications in Norway of accession to the European Communities", 9 *Common Mkt L. Rev.* (1971) 271–292

[42] Carsten Smith, "Legal Issues in the Norwegian Common Market Debate", 17 *Sc. St. L.* (1973)275-310

[43] There has been a constitutional debate in Norway on whether § 93 Norwegian Basic Law is also necessary in relation to the Schengen agreement, but it has not been deemed necessary to apply.

[44] Arne Fliflet, *Kongeriket Norges grunnlov*, (Oslo, 2005), 372-373

make the norms, § 93 Norwegian Basic Law will not be applicable, despite that the Norwegian authorities may not have any legal discretion under the treaties they have entered into. It is not entirely clear where the distinction between that national authorities decide on an issue and the role of supranational authorities do so, and the notion of *dedoublement fonctionnelle,* which is a central part, for instance of EC/EU becomes problematic in that context. In a similar way, it is not clear to which extent § 93 Norwegian Basic Law treats issues of, e.g., international sanctions regimes that are decided by the UN Security Council, but which are implemented through national decisions, although it is clear that the UN Security Council from a legal perspective does not allow for divergences from its decisions, and whereas at the same time, the decisions do not leave much, if any discretion to national authorities when it comes neither to ends, nor to means for implementing the decisions and it is hence clear that it may be difficult to draw precise lines of applicability of constitutional rules for international delegation.[45] Similar issues were raised in connection with Norwegian participation in the Schengen agreement, where it was argued that it was in effect a delegation of powers to the Europol.[46] There was however no parliamentary majority for that view and the cooperation was decided without the application of § 93 Norwegian Basic Law.

4.3.2. Statutory incorporation and constitutional prescription of respect of (international) human rights

The pre-history of the Norwegian implementation of the ECHR was based on that certain aspects of criminal procedure in Norwegian law was brought in line with requirements of the ECHR[47], whereas most other parts, notably protection of private property was not implemented in Norwegian law. That was to change in 1992 when the Norwegian Parliament adopted a statute on implementation of the ECHR and a number of other human rights treaties that Norway had signed and ratified. Aall has also pointed to that whereas dualism has traditionally, and as demonstrated above been the rule when it comes to the relation between Norwegian law and international law there has also always been tendencies of what could be

[45] Fliflet (2005) 374-375 has pointed out that, as little in Norway as in the other Scandinavian countries are such measures by the UN Security Council regarded as being a matter of international delegation. However, it is still the case that it is difficult to distinguish the decision-making, in this regard of the UN Security Council from powers that are delegated, since the difference between direct and indirect effects on citizens is a partly problematic concept.

[46] Ståle Eskeland, *Grunnloven og Schengensamarbeidet* (Oslo, 1997), Fredrik Sejersted & Erik Boe, *Schengen og Grunnloven* (Oslo, 1997) Fliflet (2005) 373.

[47] Jörgen Aall, ”EMK- og EØS-plenumsdommenes bidrag till avklaring av folkerettens stilling i norsk rett”, *Jussens Venner* (2001) 73, 80-81.

called ”sectoral monism”, most importantly when it comes to § 4 Criminal Procedure Act where it is stated that requirements of fair trials under public international law take precedent over national law. Aall also argued for that the creation of the Human Rights Act also provides a new and clearer form of democratic legitimacy for the greater role of international human rights in relation to Norwegian law than what was previously the case. The piecemeal incorporation which can be seen in § 4 Criminal Procedure Act was also typical for attempts to harmonise Norwegian law with art. 6 ECHR in the 1980ies, without including a complete incorporation of the text of the ECHR into law. The piecemeal incorporation has however not yielded any clear results in this respect. [48]

4.3.2.1. § 110c Grunnloven and Human Rights Act

The introduction of the Norwegian Human Rights Act was made in 1998 as a response to a perceived need for further harmonisation between Norwegian law, and European human rights law, but also as a response to international human rights treaties where the constitutionalization followed in 1992. § 110c of the Norwegian Basic Law [Grunnloven] states that all authorities of the state have to respect and secure the human rights. It has been claimed that there is a distinction between respect and secure, where it seems as if respect is a matter of a negative duty of the state authorities to abstain from anything that would violate the human rights, and whereas the duty to “secure” human rights is a more wide reaching positive obligation that includes a duty for the authorities of the state to act in order to ensure that human rights are respected, how far that duty extends is not per se clear from the text of the law. In that regard, it seems quite clear that § 110 c Norwegian Basic Law is closely aligned, as is also the corresponding rule in the Norwegian Human Rights Act, to the wording of ECHR as well as other international conventions on human rights.

When it comes to the scope of the §110c Norwegian Basic Law, it is defined as addressed to “authorities of the state” [Statens Myndigheter]. It is a narrower understanding than what is common under the ECHR, since it is not entirely clear whether it includes local government administrations, and it seems not entirely clear if it is a duty that extends to the courts, since it is debatable whether courts are authorities of the state in the sense of the Norwegian Basic Law. On the other hand, the courts seem obliged to review administrative action in relation to the requirement of human rights, and so with regard to the vertical relation between the

[48] Magnus Matingsdal, ”The Influence of the European Convention for the Protection of Human Rights and Fundamental Freedoms on Norwegian Criminal Procedure” 51 *Sc. St. L.* (2007) 318 ff.

individual and the various instances of public authority, the protection of human rights seem self-evident. The Human Rights Act is a mere statute in the Norwegian legal order and that is also a cause of difficulties. It has been argued that the Human Rights Act in fact is "semi-constitutional" or that it as an effect of "constitutional conventions" has higher hierarchic rank than statutes normally have. Whether that argument is correct or not has never been tested, as little as in relation to the Danish Human Rights Act or the Swedish EU-Act.

4.3.2.2. Which human rights?

The third problematic feature of §110c of the Norwegian Basic Law is that it speaks of "human rights", without particular reference to any human rights instrument, or to any other sources of law that may define them more clearly. To a certain extent, that problem has been alleviated through *Menneskerettsloven* [The Human Rights Act] in the sense that it provides for a number of international conventions on human rights which Norway has acceded to, but §110c of the Norwegian Basic Law makes a general reference to human rights. The reference to human rights is not limited to human rights conventions that Norway have acceded to or incorporated/ transformed into Norwegian law. It seems reasonable to assume, at least if reading the provision literally that it minimally must include human rights conventions that Norway has acceded to and human rights that are protected under customary international law. The dilemma when it comes to § 110c Norwegian Basic Law is thus that it is both extremely wide, but also that the wider it is, the more problematic the need for coherence in application of human rights seem to become. At a practical level, the Norwegian Human Rights Act also seems to replicate much of the problem by the very wide incorporation of human rights instrument that the Norwegian Human Rights Act provides for. Another aspect of the structure of § 110 c Norwegian Basic Law is certainly that it presupposes that there is a straight-forward distinction between human rights and other individual rights, an aspect which has not been confronted by Norwegian courts.

4.3.2.3. Towards an independent role of human rights?

The case law in Norwegian courts has relied on a mix of consistent interpretation and direct application of the ECHR, ever since the 1980ies, although there has arguably been a tendency towards direct application of human rights as protected under the ECHR. What sets the Norwegian Human Rights Act apart in the Scandinavian context is that together with

implementation of the ECHR, it also implemented other human rights treaties, notably the ICCPR, ICESR and The UN Convention on the Rights of Child whereas the issue of incorporation of CEDAW remains controversial.[49] Despite that these treaties do not have the same conceptions of what rights that are protected, there has been no conflicts between different conceptions of rights in Norwegian case law, nor any conflicts between national constitutional law and international human rights.

Aall has also pointed to that the incorporation of human rights through the Human Rights Act was the democratic legitimacy of the human rights protection under Norweigan law strengthened.[50] The argument would appear as strange unless one considered the fact that the constitutionalization of a general wish to guarantee human rights preceded the more specified declaration of which human rights that are covered by the Human Rights Act. However, the Norwegian model of constitutionalisation prior to the creation of a more concrete set of norms on human rights seems to suggest that the Human Rights Act by stating with greater precision which human rights that are involved enhanced the legitimacy within the Norwegian legal order of human rights protection under these international conventions. A more difficult problem emerges if the Norwegian legislator would leave the §110c Norwegian Basic Law intact, but at the same time amend the Human Rights Act as to come to include fewer international human rights. If that is then taken to mean that the human rights protection will be lesser in scope, the effect would be to leave §110 c Norwegian Basic Law to be a constitutional norm, the meaning of which is completely controlled by the legislator. If it on the other hand would be held that Human Rights Act cannot be restricted through normal legislative procedures, it would also amount to stating that the Human Rights Act without any formal basis for that is a kind of higher norm. Beyond the problematic character of the Human Rights Act within the Norwegian legal order, it also illustrates that the underlying assumption for the Human Rights Act is continuing expansion of human rights, and that it is doubtful whether the possibility of restricting human rights under the act were even recognised.

4.4. Conclusions

There is a debate in Danish as well as Norwegian law when it comes to the role of international treaties, which either are based on that they are seen as a “source of law” and

[49] Anne Hellum, ”Nytt fra likestillingsombudet: Hvorfor kvinnekonvensjonen bør inkorporeres gjennom menneskerettsloven” *Kritisk Juss* (2004) 54-67

[50] Jørgen Aall, ”Menneskerettsloven”, *Lov og Rett* (1999) 387, 388-389.

hence would have to be conceptualised within the constitutionally based normative hierarchy of the national legal order, or whether international law in general and treaties in particular were to be understood as "legal source factors"[51] in the light of which national norms should be interpreted, although that was not to be understood as a case of normative hierarchy. That issue has never been as strongly debate in Sweden, although the same understanding of consistent interpretation as a way to evade the conflict between monism and dualism and the potential conflicts between national and international law has been at least to some extent practiced there.[52]. This non-hierarchic understanding of the relation between national and international law avoids as said several of the features of traditional dualism, however without accepting the understanding of international law as having a binding power to constrain national legislatures, and national constitutional norms.[53] In the same way, it seems as if the legislation concerning ECHR and EC/EU/EEA-law is based on a default position of dualism, which however may reframed through consistent interpretation. This also points to that international law as a "source of law factor" becomes a kind of default position, where consistency is presumed (although that presumption may have two completely different effects on exercise of judicial powers).[54]

The Scandinavian constitutions have in common that it is not possible at all to determine the special status of EC/EU/EEA-law from any formal features of how EC/EU/EEA-law have became a part of national law. The Scandinavian constitutions only provide for authorisations that make the delegation of powers to EU possible, but it does not provide for any constitutional basis except statutory law for membership in the EU/EEA and no formal basis at all for the special status of EC/EU/EEA-law in national law. The situation is partly different with regard to the ECHR, where the Swedish and Norwegian constitutions which do provide for a special role for the ECHR in the Swedish case and for international human rights (inter alia the ECHR) under Norwegian law. In this sense, the Danish constitution where there is only statutory incorporation of both ECHR and EU-law is the least formalised one of the Scandinavian constitutions when it comes to European law. The absence of formal differences is however also visible when it comes to that there is nothing in the role of EU-law in Scandinavian law that distinguishes it from international law in general, but despite that there is also general acceptance of the special and superior character of EU-law.

[51] "Retskildefaktorer".
[52] E.g. NJA 1981 s. 1205.
[53] Ole Spiermann, "Lovgivnings tilsidesættelse og det retlige grundlag herfor: grundlov – menneskerettighedskonvention – traktat" *UfR*.2006.187.B.
[54] Stenderup Jensen (1990) 6-7.

The ultimate constitutional basis for EU-law, but not for ECHR in Scandinavian law is based on constitutional rules of international delegation. The common feature of all rules of international delegation when it comes to subject matters is clear that delegation in various forms is centred around the delegation of public authority which seems to be defined as: unilateral legally binding, non-consensual act of the government directed against citizens. That seems to be the core of the rules of international delegation as they have been set out in Scandinavian law. There are however also clear differences in the precisions of the description of the Scandinavian constitutions in how these forms of public authority are described, where Sweden is at one extreme whereas Denmark and Norway have created more general rules to regulate international delegations. When it comes to the legal effects of the new clauses of delegation within the Scandinavian constitutional orders that is to some extent difficult to ascertain. The reason for that is that already under the traditional clauses of treaty-powers, it seems as if there were few direct limits to the possibility for the Scandinavian states to enter into international organisations, also such with quite wide powers, and with tasks that for most understandings include various forms of delegation. All the Scandinavian countries entered the United Nations in the 1940ies, and in a similar way, Denmark and Norway joined NATO, under the traditional treaty-clauses. Also under the traditional treaty-clauses, quite extensive international engagements were possible, when international engagements were understood as merely other forms of legislation.

From the perspective of treaty-clauses it seems as if the creation of new specialised clauses on international delegation raises the barriers to international delegation (or the conclusion of certain specific kinds of treaties), but if one compares it with the requirements for decision-making associated with constitutional amendments, it is rather a matter of lowering the requirements. As indicated in relation to all Scandinavian countries, it is also clear that the scope of applicability of the constitutional rules of international delegation have not been set out in any very clear detail. The case law within national courts on the applicability of these rules has been limited, and with the exception of a case in the Swedish Supreme Court, it has not focused on what directly applicable public authority is. The dilemma is that to an increasing extent, international cooperation presupposes limited and piecemeal, but still important delegation of powers to a mix of foreign and supranational authorities. That is also an important difference between Sweden and the other Scandinavian countries, where there is not even envisaged under Danish and Norwegian law that delegation may take place to foreign states. That seems not, at least not in the case of Denmark to have affected practices of

delegation within the third pillar of the EU.[55] The Swedish delegation of powers to delegate stands apart when it comes to the degree of detail and the differentiated procedures for decision-making. It should also be noted that despite the differences when it comes to which kinds of powers that may be delegated, the practical differences are limited. However, it seems, as follows from the discussion of case law below, that the rules on international delegation in Scandinavian countries have primarily been used in order to delegate powers in relation to ratification of treaties, they have not, probably because of the relatively weak traditional of constitutional judicial review in the Scandinavian legal orders.[56] The linkage between different kinds of public powers and different international organisations as well as different procedures for decision-making (the latter will be discussed in greater detail below) is an interesting example of an architecture of constitutional constraints. However, it is clear that the rules have had limited impact on constraining international delegation, since most forms of international delegation have been decided if not in unanimity so at least in broad political consensus. In Denmark, the situation has been slightly different in the sense that there is a constitutional practice of use of referenda which has been a method to circumvent stringent supra-majoritarian decisions. In Norway, consultative referenda have been used as a way to strengthen legitimacy of potential forms of delegation, and it has resulted in that the electorate accepted the EEA-agreement but also rejected accession to the EEC/EC/EU at two occasions.

The structure of rules of international delegation, common to all the Scandinavian countries are that the default position remains that national sovereignty is the rule whereas international cooperation remains the exception. Regardless of one's opinion on the appropriateness of that, it seems still as if that is now far from always correct, the integration within EC/EU-law as well as within the framework of the EEA-agreement seems to point to that there is a major difference in that regard from how international delegation once was conceptualized. The understanding of international delegation as an exception to national governance presumes the understanding of functionally limited integration. Furthermore, it is clear that no one of the Scandinavian constitutions provide for limits to how delegated powers should be exercised by

[55] It should be added that Denmark participates only to a limited extent in what was formerly the third and second pillars of the EU, since there are special protocols to the EU-treaty and the Ttreaty on the functioning of the EU that regulate the relation between Denmark and CFSP and JHA cooperation in EU. Denmark has chosen to participate in some of these measures, but it has done so on the basis of international agreements that are in principle not subject to EC/EU-law requirements of supremacy over national law. The effect of that is also that ECJ does not have jurisdiction in relation to JHA in Danish law.

[56] Veli-Pekka Hautamäki, "Thanks but no thanks – arguments against constitutional judicial review in Nordic countries", *Electronic Journal of Comparative Law* (2006) http://www.ejcl.org/101/art101-1.pdf

international organizations, and it also means that to the extent that international organizations to which public powers have been delegated, that once the powers have been delegated to the organization, amendments to how the powers are exercised may take place through ordinary treaty-powers. That means also that the national parliaments may assent to amendments of powers, which may relinquish national governmental control (and indirectly national parliamentary control) in important respects, without the delegation clauses being applicable. That means also that in relation to international delegation, constitutional and subconstitutional rules interact very closely to shape the form of international delegation allowed for under the national constitutions.

5. ECHR and EC/EU/EEA-law in Scandinavian courts: an analysis

It is hardly an exaggeration to say that there has been a dramatic shift both when it comes to rank of European law as well as the scope of applicability of European law in Scandinavian law, both in terms of the legal foundations and in terms of judicial application in the recent decades. In this section the aim is to discuss in some greater detail some overlapping issues when it comes to the role of European law in national case law. The first conclusion is that the application of European law and the relative consistency that has characterised it in all the Scandinavian countries is distinct from the uncertainty of the formal position of European law. The meaning of the special role of European law is based on its claim to primacy, and the central legal issue when it comes to the relations between theh member states and the EC/EU/EEA-law and the ECHR (although in different varieties) has been whether that claim to primacy is justified.

The primacy of the EC-law has been first stated by the ECJ in C-6/64 Costa v. ENEL, and subsequently in Internationale Handelsgesellschaft where the ECJ stated that the primacy of EC-law over national law was valid irrespective of the rank of the domestic norms that it could come into conflict with.[57] The ECHR has adopted a slightly different approach, which however leads to primacy too, namely the view that the ECHR is a "constitutional instrument" which is a founding part of the European public order.[58] (E.g. Loizidou v. Turkey (merits) amd Bosphorus v. Ireland). The EEA-agreement has not been proclaimed however to have primacy in the same sense, it does not even have direct effect in the sense of EC/EU-law. However at the same time the underlying assumption of the EEA-agreement is that whereas

[57] C-6/64 Costa v. ENEL, C-11/70 Internationale Handelsgesellschaft
[58] E.g. Loizidou v. Turkey (merits)

the EFTA-court is institutionally and legally independent from the ECJ it is clear that there is a need for homogeneity between the ECJ and the EFTA-court, which has also meant that the EFTA-court in general adheres to the case law of the ECJ. That does however not mean that there is a similar requirement of primacy of the EEA. However, in practice it seems as if the Norwegian Supreme Court treats the EEA in a way which is similar to the way in which the Danish and Swedish Supreme Courts treat the EC-treaty.

5.1. The special role of European law in case law: the role of primacy

The other side when it comes to the special role of ECHR and EC/EU/EEA-law is related not their formal status within the hierarchy of domestic sources, but related to the character of judicial application. In this analysis there is a general limitation in the sense that the discussion here is limited to the case law of final instance courts. The special role of EC/EU/EEA-law in Scandinavian law is as said impossible to determine through the formal hierarchy of norms. However, all Scandinavian supreme courts have affirmed the special role of EC/EU/EEA-law within Scandinavian domestic law stemming from the special intention behind the founding treaties. Despite the differences when it comes to the formal status of ECHR, its special role is conceptualized at least to some extent in all the countries because of the special role of human rights more generally in the legal orders. The higher role of EC-law was accepted by the Danish Supreme Court in case law already in 1979[59], whereas in Sweden, it was accepted more or less clearly early on in the case law of the Swedish Supreme Court[60], as well as by the Supreme Administrative Court.[61] The Norwegian Supreme Court stated in several cases, most importantly in Finanger that the EEA-agreement and decisions of the EFTA-court could be used instead of relevant Norwegian domestic legislation.[62]

In Norway, the recognition of the special role of human rights has sometimes led to conflicts between ECHR and other international human rights treaties, whereas in Sweden, the special status of the ECHR is recognized explicitly in the catalogue of fundamental rights contained in the IG. In Denmark, where the formal basis for the application of the ECHR in national law is solely statutory, the importance of the judicial dicta on the special role of the ECHR is greater. The role of ECHR in Scandinavian law, it appears as if the

[59] E.g. U.1979.117/2H. U.1988.454H.
[60] NJA 1996 s. 668. It should be noted that the Data Delecta case was subject to considerable criticism arguing that the Swedish Supreme Court had misunderstood certain aspects of EC-law. However, the Swedish Supreme Court in this case did not hesitate to state that
[61] RÅ 1996 ref 57 (Lassagård)
[62] Rt 2005 s. 1365 (Finanger II)

incorporation/constitutionalization of the ECHR in Scandinavian law has been a part of a larger trend of "Europeanisation", which has included broader protection of human rights. The incorporation of the ECHR in the Scandinavian legal orders has unsurprisingly been seen as a turning point when it comes to application of the ECHR in Scandinavian law. However, a closer analysis of case law of Scandinavian high courts gives a slightly different picture, where it seems as if there has been a gradual development towards greater considerations of human rights norms by high courts. That development started in Norway, Sweden and Denmark before the incorporation of the ECHR by the practice of consistent interpretation. Consistent interpretation has to some extent always existed in the sense that it has been presumed that national and international law are consistent. Consistent interpretation as a practice has turned this assumption on its head by assuming that insofar as possible, courts should ensure that national law is consistent with international law. That approach has not been unlimited, in Norway, Sweden as well as Denmark, the judiciary has stated that it is an approach which is subject to interpretative limits such as the text of the statute to be construed. However, the use of consistent interpretation which has been used both prior to and after incorporation of the ECHR by the high courts, and it seems questionable whether the incorporation had any clear effect. It seems also clear from the outset that the use of consistent interpretation as a basis for application of ECHR decoupled human rights adjudication from traditional forms of constitutional judicial review. Human rights adjudication did obviously not provide for unlimited powers of judicial review, but it appears as if the scope of judicial control was broader than was the case with ordinary forms of constitutional judicial review, which remained very limited in all Scandinavian countries. The long-term effect of incorporation seems rather to have been a slow change from consistent interpretation and reliance on incorporation statutes to direct use of the ECHR as a basis for rights and in some cases also as a basis for compensation for damages. In these respects it seems clear that there have been long-term effects of the incorporation of the ECHR which has transcended traditional boundaries of effects of implementation of international treaties.[63] A second ironic conclusion is that it is difficult to see any clear differences in judicial approaches to the ECHR between countries where the ECHR has been constitutionalised and where it has merely been incorporated as a statute. It seems to suggest that although the Scandinavian countries have strengthened constitutional protection of rights both through domestic reforms of constitutional rights and through implementation of the ECHR, the Scandinavian tradition of

[63] Karin Åhman, "Skadestånd på grund av konventionsbrott – eller har HD blivit naturrättare?", *Juridisk Tidskrift* (2005/06) 424 ff.

weak constitutionalism and a limited role for constitutional norms seems to remain. That remaining weakness of domestic constitutional norms is however in stark contrast to the effectiveness of the ECHR regardless of its constitutional or subconstitutional rank in the different legal orders. The tradition of weak constitutionalism in Scandinavian countries seems however also have cleared the way for an incorporation of the ECHR, both through the ECHR as implemented in domestic law, and the ECHR as a part of EU-law.

The incorporation and in some contexts constitutionalization of ECHR has not resolved conflicts between ECHR and EU-law, and in such contexts, Scandinavian courts tend to defer to EU-law. It is also worth noting that in Denmark and Sweden, the only human rights treaty that has been implemented through national legislation with specific references and incorporation of the text of the human rights treaty has been the ECHR. In that regard, Norway provides distinctive form of incorporation of international human rights, although it is not obvious that it has led to any specific problems. The treatment of the EC/EU/EEA-law in Scandinavian law as well as the EctHR tend to be regarded as lex superior, despite that the explicit formal basis for that remains limited. The special character of European law within domestic law in Scandinavia (except for the ECHR in Norway and Sweden) tend to be expressed rather through judicial practice rather than through acknowledgment of their constitutional role. That has been the case both when it comes to the ECHR in Sweden and Norway (which is recognized through constitutional norms in Sweden and through a mix of constitutional and legislative norms in Norway) and when it comes to the EEA/EC/EU-law which are not recognized constitutionally in neither of the countries. One may thus say that the judicial practice in particular when it comes to EC/EU/EEA-law does not reflect its formal role under national constitutional law, on the contrary the integration of EC/EU/EEA-law into national law has to a very great extent relied on that the national courts have upheld EC/EU/EEA-law in the absence of a clear constitutional basis for that.

5.1.1. Different conceptions of primacy

Another issue which is relevant in comparison with other civil law systems in Europe, is also whether administrative and general courts have conceptualized the primacy of EC/EU/EEA-law differently. Whereas Norway and Denmark have unitary legal orders, where the Supreme Courts are in principle the final instance courts (in both countries, there are also special courts concerning social insurance but their role as instances of precedent are very limited) the problem of divisions between different courts generally do not emerge. In Sweden which has

a judicial system which includes a number of different final instance courts, there has however not been any considerable differences when it comes to judicial application to EC/EU-law in the sense that there is a trend towards consistent interpretation and a mix between consistent interpretation and direct application of ECHR as well as of EC/EU-law. There are no real differences between the different courts neither when it comes to conceptualizations of primacy of EC/EU-law nor when it comes to application.

5.2. European law as an impetus for legal change

Another aspect when it comes to the role of European law within national law is to which extent European law has been an impetus for constitutional and legislative change. In this regard, it appears necessary to distinguish the role of European law as an impetus for constitutional change, and in relation to legislative changes more generally.

5.2.1. European law as an impetus for constitutional change

It is worth noting that in none of the Scandinavian countries, there has not been any tendency towards constitutional amendments on the basis of European law, at least not ex post facto in relation to particular judgements of the EctHR or ECJ. The IG 2:23 added when Sweden incorporated the ECHR and joined the EU. In the same way, Norway added §110c Norwegian Basic Law in 1998, but it is also clear that neither of these amendments were made to bring the national legal order in line with amendments in relation to the ECHR. Denmark has never seen any such need for a constitutional amendment, although it is clear that there has been certain legislative amendment in order to implement the ECHR more effectively into domestic law. In protection of constitutional rights, the Scandinavian countries have historically had a very cautious approach to horizontal effect of fundamental rights. Through application of the ECHR, there has been at least a certain tendency to accept such application, at least in some cases, at least at the level of principle, although the practical effects have remained very limited.[64]

5.2.2. Legislative adaptation to European law

[64] Carl Lebeck, "Horizontal Effect of the European Convention on Human Rights in Swedish law – a quiet constitutional change?", *Public Law* (2009) 21-32. see also, Philip Mielnicki, "Europakonventionen och skadeståndsrätten – vid vägs ände?" *Juridisk Tidskrift* (2008/09) 357,364-366.

There has been however a certain development when it comes legislation in the Scandinavian countries. The first aspect of that has been the adaptation of the Scandinavian countries to the acquis communautaire required by the EC/EEA/EU-accessions respectively. When it comes to legislative change on the basis of decisions of the ECJ/EFTA-court, that is more problematic, but there have been certain amendments when it comes to regulation of national monopolies, and in some cases there has also been as in the case of Denmark, a tendency to maintain the status of law through special protocols in relation to the other member states of the EU. When it comes to adaptation to the EctHR, the generally expanded right that seems to have been implemented, not subsequently to a particular decision of the EctHR but in relation to lines of decision in different fields. The enhancement in all the Scandinavian countries of protection of property-rights and secondly the expanded judicial control of administrative actions, both domestically and in relation to administrative action under EU-law. There are also more specific cases, such as regulation of religious education in Norway, the acceptance of independent (religious) schools in Sweden and similar developments. It should however be noted that not all implementation of case law from the European courts is done through legislation, in recent years developments have rather evolved through adaptation of national law.

5.2.3. Reopening of judicial procedures following judgements of the ECJ and the EctHR?

There is no general principle of reopening of judicial procedures under neither Danish nor Swedish law in relation, neither to decisions of the ECJ nor of the EctHR. It is however clear that there are remedies primarily based on tort liability under public law, and to some extent under the ECHR itself.[65]

In Norway there has however been an amendment in 2002 that provides for a possibility to reopen both civil and criminal procedures on the basis that international obligations have been

[65] For a consideration of the general responsibility of state parties under the ECHR, see Arnfinn Bårdesen,

violated. That is a quite radical change which also means that there is an effective remedy in relation to cases when there has been a violation of human rights law. However, it goes without saying that such remedies are usually based on private law measures.[66] That seems to be a common principle and seems also to reflect the general procedural autonomy of national courts in relation to European courts. The case that European law cannot retroactively replace national law, which also means that the fact that ECJ/EFTA-court or the EctHR has found that national legislation is contrary to EU/EEA-law or ECHR does not automatically mean that national legal procedures may be reopened. That need not preclude liability on the basis of tort of the government, but it is not the case that there is any general possibility for reopening of legal procedures.

5.2.4. Torts as a remedy for breaches of EC/EU/EEA-law and the ECHR

There is a general recognition of tort liability for non-implementation of international human rights in Scandinavia. Concerning protection of individual legal expectations on EC/EU/EEA-law both the Norwegian Supreme Court in Finanger II and the Swedish Supreme Court in NJA 2004 s. 662, have held that the EEA-agreement may create a basis for individual tort claims against the state for misimplementation of EEA-law, despite that it is not formally required under the EEA (unlike what is the case in EC-law), where the argument was a combination of effectiveness of the EEA and protection of individual legitimate expectations. The recognition of tort liability for non-implementation of international human rights law is hence recognised in all the Scandinavian countries.[67] The basis for the recognition of tort liability directly on the basis of the ECHR as well as of the EU-law is partly based on the recognition of the special character of the ECHR, and in relation to EU-law, it is based on the recognition of the doctrine of liability of the member states for insufficient implementation of EC/EU-law. The same is reflected, as said when it comes to the role of EEA-law.

5.3. Application of European law as a form of constitutional judicial review?

[66] Wiklund (2008) 214-215.

[67] Jonas Christoffersen, ”Det offentliges kompensationsansvar for krænkelser af internationale menneskerettigheder”, *UfR*.2005.133B; UfR.2005.533H (decision by the Danish Supreme Court that undue delay of an administrative decision may be a sufficient basis for tort liability on the part of public authorities) UfR.2005.2664H (compared together with the case decided by the EctHR *Kudla v. Poland*); Mårten Schultz, “Skadeståndsrätt och skatterätt”, *Juridisk Tidskrift*; NJA 2003 s. 217; NJA 2005 s. 162; NJA 2007 s. 584; NJA 2009 s. 463; Wiklund (2008) 211-214; Clarence Craafoord, ”Det allmännas skadeståndsansvar för kränkningar av RF”, *SvJT* (2009) 1063-1072;

The role of judicial review in Scandinavia has changed through case law, both with reference to the ECHR and EC/EU/EEA-law and with regard to "domestic" constitutional norms. However, so far that has not precipitated formal constitutional amendments when it comes to the mandate for judicial review in domestic law.[68] However, Scandinavian supreme courts have always treated judicial review on the basis of European law and constitutional judicial review on the basis of national law as two completely separate things. Whereas it is difficult to say that the role of EU/EC/EEA-law and ECHR can be directly equated to constitutional judicial review, it seems clear that the role of these legal orders, in particular when it comes to the ECHR has became akin to a higher constitutional norm. However, unlike domestic constitutional norms in many legal orders, they are also limited to the protection of human/fundamental rights. Whereas that is a vast field for judicial control of public authority, it is clearly more limited than what is the case with domestic constitutional judicial review in the sense that it also includes validity of legislative and executive decision-making in relation to procedural constraints, it is clear that judicial review on the basis of EC/EU/EEA-law and ECHR has sometimes had constitutional features. The fundamentally new role played by international courts protecting human rights is common, but in the Scandinavian countries it seems as if the role became to create a substitute for a form of constitutional judicial review which had previously been very limited.[69] One may thus say that the implementation of the ECHR played a practical role akin to constitutionalisation of fundamental rights through national constitutions. Whereas the Scandinavian countries today have constitutionalised fundamental rights, it has been a process which, at least when it comes to constitutional adjudication has been parallel to implementation of the ECHR. In this sense one may also speak of an expansion of judicial review, and also say that at least in some fields ECHR and EC/EU/EEA-law in Scandinavia has led to that restrictions on certain national powers (including judicial powers of national courts) have partly been "compensated" for through the increasing role of EC/EU/EEA-law and ECHR as a source for judicial review and protection of individual rights. The broad scope however of EC/EU/EEA-law generally makes much of the application of EC/EU/EEA-law more similar to judicial review in administrative rather than constitutional law, whereas the function of ECHR is more similar to adjudication of

[68] It should however be noted that there is presently a Swedish proposal to expand the powers of constitutional judicial review (or more specifically, judicial review on the basis of superior norms in general) which consists in that the requirement that the conflict with a higher norm in cases of statutes and executive ordinance must be "manifest" will be abolished.

[69] It should be noted that prior to the creation of a written bill of rights in the Swedish constitution there was only judicial review on that a statute or decision had been adopted on incorrect formal grounds. The situation was partly different in Norway, whereas Denmark had some degree of constitutional judicial review (although the Danish courts did not find any actual violation of fundamental rights until 1997).

constitutional rights. However because of the traditionally very weak judicial protection of constitutional rights in Scandinavia it is difficult to say that national supreme courts choose to apply European law instead of national constitutional law.

5.4. European case law as national precedents?

A central issue when it comes to whether European case law is seen as precedents and as sources of law by national courts. The decisions of the ECJ/EFTA-court and the EctHR are considered to be sources of law in the sense that the Scandinavian courts use them as a basis for interpretation of domestic law. That is not to say that they are directly understood as precedents in the sense of national law, but it seems clear that they are seen as *res interpretata* in the sense that the European courts are thought to be authoritative within their respective spheres of competency. It is quite clear that the judgements of the European courts are all considered to be sources of law within the Scandinavian legal orders. However, it is clear that in Sweden and Denmark, the EFTA-court is not considered to be sources of law in that sense although there are obviously references to the EEA-agreement since Sweden as a member of the EU is a party to the agreement. Instead Swedish[70] and Danish[71] courts tend to rely on case law both the EctHR and the ECJ, and in the same way Norwegian courts[72] tend to rely on judgements of the EFTA-court and the EctHR. A practical sign of whether EC/EU/EEA-law and ECHR are seen as sources of law is whether they are also cited by national courts. It is clear that all Scandinavian final instance courts do cite them, and it seems as if there is a trend towards increasing citation when it comes to all national courts.

National judges in all the Scandinavian countries quote both EC/EU/EEA-law and ECHR, when it comes to final instance courts, it should be said that although some of them have been subject to criticisms in relation to avoiding to rely directly on case law from the ECJ, but that citation of European courts cannot be said to be uncommon if limited. In the case of the Danish Supreme Court, citations are relatively widespread of both the ECJ and the EctHR, as is also the case of Swedish final instance courts, whereas the Norwegian Supreme Court is relatively restrictive in citing the EFTA-court whereas there is an abundance of citations of the EctHR. Another aspect is that there was considerable time-lag between the ratification of

[70] E.g. RÅ 1997 ref 56
[71] E.g. U.2006.3359H, U.2006.2551H(reliance on ECJ), U.2006.639H (relying both on ECJ and the EctHR)
[72] E.g. Rt. 2005 s. 1811

the ECHR and the more frequent citation of it by national courts, a time-law which was not visible in the same manner when it came to EC/EU/EEA-law. It should furthermore be added that whereas scattered citations have existed from the 1960ies and onwards, citations became more frequent of the ECHR only in the 1980ies. The citation of the ECJ/EFTA-court largely coincided with the respective dates of accession of the Scandinavian countries (although the process was slightly slower in Denmark than in the other Scandinavian countries) that acceded to the EEA/EU later.

5.5. National supreme courts as judges under ECHR and EU/EEA-law

Whereas the Scandinavian countries do not have constitutional courts, the national Supreme Courts and final instance courts, have submitted preliminary references to the ECJ and EFTA-courts, and in that sense they clearly do regard themselves as courts in the sense of Art. 234 EC-treaty. This has not been regarded as problematic in either of the Scandinavian countries. The acceptance of national supreme court of their role as judges under EC/EU/EEA-law is clear and there has never been any principled rejections of that view by any of the Scandinavian courts. There have however been criticisms that in particular the Swedish Supreme Court has been far too restrictive with making use of the mechanism of preliminary references to the ECJ.[73] The Swedish Supreme Court has sometimes adopted a more restrictive view of application of EC-law in particular when it comes to the duty to make preliminary references based on too extensive interpretation of the CILFIT-doctrine under EU-law. [74] The regulation of the powers of judicial review have sometimes interfered with the role of Swedish courts, in the sense that it has presupposed a more extensive power of courts than what has traditionally been envisaged in Swedish law.

In some cases, the regulation of the powers of judicial review have interfered with the role of Swedish courts, in the sense that it has presupposed a more extensive power of courts than what has traditionally been envisaged in Swedish law.[75] In the same way it may be said that

[73] Ulf Bernitz, ”Europarättens genomslag i svensk rätt: begäran om förhandsavgöranden som katalysator” in, Claes Sandgren (ed.) *Juridiska Fakulteten i Stockholm 100 år – en minnesskrift* (Stockholm, 2007) 78
Ulf Bernitz, ”Samarbetet mellan EG-domstolen och nationella domstolar”, *Europarättslig Tidskrift* (2009) 454, 456-461, Ulf Bernitz, *Förhandsavgöranden av EU-domstolen: svenska domstolars hållning och praxis*, (Stockholm, 2010) For an overview of Swedish case law when it comes to preliminary references to ECJ, see also Groussot et al (2009).
[74] NJA 2004 s. 735.
[75] At the same time it should be said that it has not been regarded as an explicit reason for disregarding the duty of applying EC-law, nor as an explicit argument for not applying the ECHR. Instead, it seems as if Swedish

the application, in particular of general principles of law under EC/EU-law has extended the powers of Swedish as well as Danish courts.

When it comes to preliminary references to the EFTA-court, it is worth noting that there is unlike what is the case under EC/EU-law no duty of national courts under the EEA-agreement to submit references to the EFTA-court.[76] The Norwegian Supreme Court has submitted a quite limited number of references to the EFTA-court, and the references have predominantly been in the context of public law and where there have been potential conflicts between national law and the EEA-treaty/secondary legislation. In what is similar to Danish and Swedish law, in relation to ECJ most preliminary references to EFTA-court are made by lower courts and not by final instance courts. [77] The role of EEA-law is also visible when it comes to judicial control exercised by the EFTA-court where the EFTA-court plays a role which is similar to the ECJ in relation to national courts.

5.6. Derogations of national judicial powers through European law?

The relation between European law and national courts seems to have two distinct element, one which concerns the role of national courts as European courts, i.e. as courts which are under international law obliged to apply European law and secondly whether European law are seen as in conflict with national law in general, and whether European law may legitimately under the constitutional mandate of courts be used as a basis for legal judgment.[78] The issue to be discussed here is to which extent the EC/EU/EEA-law and the ECHR have led to derogations of the judicial mandate under national constitutions.

It seems as if most national courts regard inter- and supranational courts as constitutionally unproblematic because they are seen to create a parallel rather than superior set of rules, and that the issues they adjudicate do not change the legal positions of individuals within the national legal orders. A successful complaint in the EctHR does not change the validity of the decision against which the complaint was brought in the national legal order nor does it in any

courts have at least in recent years avoided to mix the constitutional (domestic) mandate under the Swedish IG on one hand and on the other hand the mandate for judicial decision-making under the ECHR.

[76] Halvard Haukeland Fredriksen, ”Om mangelen på tolkningspørsmål fra norske domstoler till EFTA-domstolen”, *Jussens Venner* (2006) 372 ff., 372-373.

[77] Haukleand (2006) 386-387.

[78] Ernest A. Young, “Supranational Rulings as Judgments and Precedents”, 18 *Duke Journal of Comparative & International Law* (2008) 477-519.

other way overturn it. The dilemma is however to which extent that understanding is feasible when it comes to the relation between inter- and supranational courts in the context of European law. It is clear that the EFTA-court is not a typical supranational court, and it is also clear that it is not obvious that the impact on already made legal decisions within national law is not very big, on the contrary. However, it is also clear that in relation to the ECJ, the ECJ effectively determines the outcome of a case to which there has been made a preliminary reference by the national court, although it is still clear that the national court has to do the determination of the facts of the matter. At the same time it is often difficult to see that national courts have any more extensive discretion when it comes to applying the decisions of the ECJ. The relation between EFTA.-courts and national courts is in some respects especially delicate since the structure of the EEA-agreement although it does not carry any form of direct effect within national law, and despite that the EFTA-court is not formally bound by the rulings of the ECJ, it is still clear that for the purpose of the EEA to be possible to realise, it is necessary that national courts adhere to judgements of the EFTA-court and in the same way it is necessary that the EFTA-court adheres to the ECJ. The problem in the context is not the requirement of homogeneity and loyal cooperation but rather the space allowed for that under domestic constitutional law. There has been an indirect expansion of the judicial mandate or the traditional understanding of separation of powers in the Scandinavian countries in order to apply EU/EC/EEA-law and in particular ECHR. It seems therefore as it is justifiable to speak of a certain expansion of judicial powers on the basis of European law in all the Scandinavian countries, and in relation to EC/EU/EEA-law it has meant that national parliaments and executives have became comparably less important as law-makers whereas in particular the Council of Ministers and the European Commission in the EU have gained a much more extensive role. In some cases it may be argued that the use of ECHR as an independent source of judicial review expands the judicial mandate of courts, and that has to varying degrees been the case in all Scandinavian countries, but it may be seen as particularly problematic in Denmark due to the complete absence of constitutional rules concerning the rank of the ECHR in Danish law.

A problem in relation to national courts which has been less discussed in Denmark and Sweden compared to Norway is the issue of judicial independence of national courts in relation to ECJ and EFTA-court. The constitutional situation in the different countries varies, Denmark as well as Norway has general constitutional rules to ensure the separation of powers that speaks in terms of judicial independence, whereas Sweden does not have that

kind of rules (although the Swedish IG provides for a number of constitutional rules that are aimed to ensure actual independence of courts). Neither the ECJ, the EFTA-court nor the EctHR make any claim to be supreme courts, in general their claim is to interpret inter- and supranational law. However, at the same time, it is clear both from Swedish constitutional law and Norwegian constitutional law that national courts regard the decisions of respectively the ECJ and EFTA-court and EctHR as binding upon them, although the binding character does not in any way prevent the need for interpretation of these judgements. The higher formal rank of the ECHR in Sweden and Norway means that these issues are not as problematic there. The Scandinavian tradition has been characterised, as mentioned above by relatively limited judicial powers. Therefore it also seems as if the expansion of judicial powers that is associated with EC/EU/EEA-law should cause problems. The problems have however remained limited, and it seems as if the main cause of that is that EC/EU-law has been regarded as an exception to the constitutional mandate of national courts. The other reason seems to be that the dynamic role of ECJ and its importance for the development of EC-law was well known when all the Scandinavian countries entered into the EC/EU/EEA. That has of course not changed that fact that certain decisions have been politically controversial in national contexts, the clearest example being the Laval case under Swedish law. The mandate for the judicial power is for the Scandinavian countries as for other countries regulated under the respective national constitution.

5.6.1. Sweden

Chapter 11 of Swedish 1974 IG regulates the role of courts. Unlike what is the case in Norway and Denmark, the same sections of the constitution regulates the courts as well as administrative authorities.[79] 11:2 IG states that neither any authority nor the parliament may decide how a court should decide in particular cases or how courts should apply rules of law. In the same way disputes between individuals are to be decided by courts, except if there is statutory support for anything else and in the same way the tasks and organisations of courts

[79] Bertil Bengtsson, ”Den svenska grundlagen och domstolarna”, *Jussens Venner* (1998) 56-65; Caroline Taube, ”Domstolar och Lagprövning”, in Ingvar Mattsson & Olof Petersson (eds.) *Svensk Författningspolitik* (Stockholm, 2003) 163-182.

are decided by statute.[80] It is however important to conclude that the definition of the mandate of courts under Swedish constitutional law to a very great extent is defined without being in any way related to the role of European or international law. The Swedish IG is relatively extensive in its treatment of the mandate of courts, there are several final instance courts listed in 11:1 1974 IG. 11:14 1979 IG defines the scope of constitutional judicial review within national law in Swedish law.[81] Under the constitutional mandate, Swedish courts (as well as administrative authorities) have a duty (not a power) to review the legal basis for decisions and rules and to not apply them if they are found be in conflict with higher norms. However if the higher norms are enacted by the parliament (statutes) or the government (executive ordinances) they may only be disapplied if the disparity is "manifest". This provision is currently being amended so as the requirement for "manifest" conflicts with higher norms is to be abolished. However, it is worth noting that Swedish courts have always kept judicial review on the basis of constitutional norms and judicial review on the basis of European norms strictly separate. The Swedish Supreme Court first held that a statute violated the IG in NJA 2000 s. 132 (which concerned a retrogressive tax statute), which however did not signal any major shift in the approach, the practice of the Swedish final instance courts when it comes to constitutional judicial review remained restrictive. In this regard it seems as if the role of EC/EU/EEA-law has created a more important shift in that it has created a generally recognised basis for judicial review, although there have been several criticisms that the Swedish courts have still not been sufficiently strict in their review of Swedish law when applying EC/EU/EEA-law.[82] In the same sense, there has been a broadening indirectly of the judicial mandate through the ECHR, although it seems clear that the Swedish courts when exercising judicial review has essentially adopted a bifurcated approach where "domestic" judicial review – administrative or constitutional – to a great extent is separated from "European" judicial review, where there is also an additional division between review based on the ECHR and review based on EC/EU-law. It is therefore not obvious that one should say that the "Europeanisation" of Swedish law has led to a broadened constitutional mandate of the judiciary, it seems more correct that it has created a parallel "European" judicial mandate, following the lines of *dedoublement fonctionelle*, being a central part of the application of European law in general.

[80] IG 11:2

[81] See inter alia, Joakim Nergelius, *Konstitutionellt Rättighetsskydd: svensk rätt i ett komparativt perspektiv* (Stockholm, 1996) 670-697 (for a critical approach to the relatively limited constitutional mandate of Swedish courts when it comes to protection of fundamental rights);

[82] Ola Wiklund, "Europeiseringstendenser och domstolskritik i svensk rätt – Regeringsrättens domar i spelmålen" *Europarättslig Tidskrift* (2004) 713 ff.

5.6.2. Denmark

The basis for constitutional judicial review in Danish law as established through constitutional conventions and judicial case law in the 1920ies, and coincided in time with the introduction of parliamentarianism. The basis for constitutional judicial review as conceptualised over time, was based on the supremacy of the Danish Basic Law (as of then of 1849). However, despite the creation of a new Basic Law which entered into force in 1953 constitutional judicial review was neither introduced nor precluded. The conclusion seems rather to have been that constitutional judicial review was a constitutional matter left open. The Danish constitutional law regulates the role of courts and judicial powers through §§61-65 Danish Basic Law and indirectly through the clause on separation of powers § 3 Danish Basic Law.[83] The first rule is that judicial powers can only be exercised and regulated on the basis of statute[84], and that special courts with judicial authority cannot be established.[85] It is also maintained that judicial decisions are separate from administrative and executive tasks and that rules of that are set out under law.[86] The separation between executive and judicial powers is also defined in terms of that judges are only to decide cases on the basis of law.[87] These aspects are central, but they are at least if read in a very formalistic way problematic in the context of inter- and supranational law.

4.6.3. Norway

The constitutional mandate of the Norwegian Supreme Court is found under §§88-91 Norwegian Basic Law.[88] The most important rule concerns the fact that the Norwegian Supreme Court always is supposed to decide as the final instance court which is expressed both explicitly in that the Norwegian Supreme Court under §88 is the final instance court, and partly expressed in §90 that the judgement of the Norwegian Supreme Court can never be appealed. That raises also the issue to which extent the jurisdiction of international courts

[83] Henrik Zahle, ”Er domstolenes grundlovsprøvelse en effektiv individbeskyttelse?”, *Jussens Venner* (1998) 37-54, 51-53; for a consideration of the constitutional mandate of Danish courts, see also Henrik Palmer Olsen, *Magtfordelning* (Copenhagen, 2007)
[84] § 61 Danish Basic Law.
[85] § 61 Danish Basic Law.
[86] § 62 Danish Basic Law.
[87] § 64 Danish Basic Law.
[88] Erik Boe, ”Lovers Grundlovsmessighet”, *Jussens Venner* (1998) 4-36.

such as the EctHR and the EFTA-court in the case of Norway can be said to restrict that. In Norwegian law that has theoretically created a tension with the claims of §§ 88 and 90 Norwegian Basic Law where it is stated that the Norwegian Supreme Court is the final instance court. The understanding of the role of the constitutional mandate of courts in Norway has generally been influenced by broader political and societal tendencies which have also affected constitutional developments.[89] The development did not challenge the existence of constitutional judicial review per se, but rather challenged to a very great extent the scope of that review. The constitutional mandate of the Norwegian courts, (i.e. the Supreme Court) has traditionally been understood in a quite narrow fashion, but it seems also quite clear that the application of ECHR and EEA-law has also necessitated a more expansive understanding of the judicial mandate.[90] The judicial mandate has not increased in the sense that constitutional judicial review has been unknown in Norwegian constitutional law, but the central feature seems to be that the role (in particular the ECHR) as a basis for judicial review has broadened judicial review in relation to the kind of issues that could successfully be brought before courts.

From a formalist perspective that has not raised very extensive problems, since the EFTA-court's decisions are not directly applicable and they are prejudicial to the national court, but it seems from a more effectiveness oriented perspective problematic.[91] It should be emphasised in relation to Norwegian law that under Art. 106 EEA-agreement there is no formal hierarchy between the EFTA-court, the ECJ and the national supreme courts.[92] That also distinguishes the relations between national courts in EEA from the role of national courts in EU-law. Another issue is obviously what is today meant by that national final instance courts deliver "binding" judgements[93] and the effects of the increasing access to courts when it comes human rights related issues.[94] That has been understood as a constitutional problem in Norwegian law since it challenges the traditional role of the national judiciary.

---

[89] Francis Sejersted, "From liberal constitutionalism to corporate pluralism: the conflict over the enabling acts in Norway after the Second World War and the subsequent constitutional development" in Jon Elster & Rune Slagstad (eds.) *Constitutionalism and Democracy* (Cambridge, 1986) 275-301.
[90] Rune Slagstad, "The Breakthrough of Review in the Norwegian System" in Eivind Smith (ed.) *Constitutional Justice under Old Constitutions* (The Hague, 1998) 81-111; Eivind Smith, "Courts and Parliaments: The Norwegian System of Judicial Review in Legislation", in Eivind Smith (ed.) *The Constitution as an Instrument of Change*, (Stockholm, 2003) 171-187
[91] Hans-Petter Graver, "Dømmer Høyesterett i siste instans?" *Jussens Venner* (2002) 263 ff.
[92] Hans-Petter Graver, "Domstolene og EØS", *Lov og Rett* (2005) 577-578.
[93] Anne Robberstad, "Er Høyesteretts dommer bindende?" *TfR* (2000) 504-524
[94] Jørgen Aall, "Domstolsadgang og domstolsprøving i menneskerettighetssaker", *TfR* (1998) 1-181

5.6.4. Conclusion

When it comes to the constitutional mandate of Scandinavian courts it is worth noting that there has never been any conflict over that there is in principle a power (and duty) of constitutional judicial review based on constitutional customs, rather than on explicit constitutionalisation (except in the case of Sweden where constitutional judicial review was institutionalised in a rule prescribing its limitations in IG 11:14). That has however not generally led to constitutional conflicts which have been conceptualised as conflicts between the rights-protection role of courts under national constitutions or even as conflicts between the limited mandates of judicial review of national courts and more extensive role of courts under European law.

In a plenary decision of 2000, the Norwegian Supreme Court stated that as far as that ECHR is relevant in a Norwegian case, the Norwegian Supreme Court should interpret the ECHR in the same manner as the EctHR.[95] That means essentially that the Norwegian Supreme Court seems to a view when it comes to its role in relation to the ECHR which is quite similar to the approach of the Swedish Supreme Court as decided in the NJA 2005 s. 805. The role of ECHR seems not particularly problematic for a different reason namely that the constitutionalisation of ECHR in Norway as well as Sweden. A problem which relates to the constitutional mandate of courts in Sweden as well as in Norway and Denmark, albeit from slightly different points of view is the exercise of judicial discretion when it comes to judicial review. In the context of Swedish law, judges have the same degree of discretion as have administrative authorities when it comes to review of administrative decisions. That means that Swedish judicial review is essentially a matter of second review, not just of lawfulness but also of appropriateness of administrative action. From that approach it is clear that the exercise of judicial review under EU-law means that compared to what is the case under national law, the authority of Swedish courts will be more limited. The Norwegian and Danish problems are different since they share the understanding of separation between administrative discretion and judicial review of the EC/EU/EEA-law. Their problem is essentially methodological, namely that the form of judicial reasoning characteristic for ECJ and indirectly also for the EFTA-court is characterised by greater

[95] Rt. 2000 s. 996.

degree of discretion, proportionality and general principles than what has been the case traditionally.96 It is however clear that the issue of supranational law and the role of supranational courts has not been regulated constitutionally in any of the Scandinavian countries, except in the most minimal manner. It is also worth noting that whereas, Swedish as well as Danish and Norwegian courts have distinguished between EC/EU/EEA-law and the ECHR, there have not been any distinctions between different kinds of EC/EU/EEA-law, i.e. no distinctions have been made between treaties and secondary legislation, nor between legislation and judicial decision-making, and in relation to Denmark and Sweden, no distinction was made between EC/EU-law before the entry into force of the Lisbon-treaty. That seems to have reflected a wide understanding of the duty of loyalty, but also a relatively restrained understanding of the national constitutional mandate of courts. One may say that the effectiveness of European law in Scandinavian legal orders seem to reflect the relative constitutional weakness of the national judiciaries, which ironically have given the national legislatures considerable options to bind themselves through European law.

5.7. Conflicts between national law and European law

The issue of conflicts between national law and European law is one of the central fields when it comes to analysing the role of European law within the domestic legal orders. In this context, the analysis focuses on the interpretative strength of European law (which includes both EC/EU/EEA-law) and ECHR (as well as judicial case law from the European Court of Human Rights). The role of European law hence includes both the weight given to it by national courts, as well as how national courts resolve direct conflicts between norms of European law and various norms of national law. In this context, it seems necessary to distinguish conflicts between constitutional national law and European law, and between national law in general.

5.7.1. The interpretative strength of European law?

The issue here is whether judges acknowledge a particular interpretative strength to the EC/EU/EEA-law and ECHR law when interpreting national law? The practice of consistent interpretation, towards which there is a common tendency in all the Scandinavian countries

[96] Hans Petter Graver, *Almindlig Forvaltningsrett*, (3rd ed., Oslo, 2007)

means obviously that there is such a special role when it comes to EC/EU/EEA-law and the ECHR on the basis that consistent interpretation is used to a far greater extent than what is the case when it comes to other norms of public international law. (Despite that there is in neither of the Scandinavian countries any clear distinction between other international norms implemented through domestic statutory legislation and EC/EU/EEA-law.) The use of consistent interpretation is above all relevant when it comes to the ECHR, and when it comes to the interpretation of legislation which either is explicitly aimed at implementing directives of EC-law or framework decisions/common positions of the EU-law, or includes legislation which is seen as being consistent with such norms. The role of consistent interpretation has over time evolved from being a matter of presumption that national law is consistent with the requirements of the ECHR, to that national law as far as possible should be made to conform with the ECHR. The meaning of that consistency should be upheld "as far as possible" is not always clear, it may range from the meaning that if there is a choice of possible interpretations, the one consistent with the ECHR should be chosen to the approach that as far as the interpretation is not *contra legem*, interpretations should ensure consistency with ECHR, to the even more radical position that also interpretations contra legem may be acceptable in order to ensure consistency with the ECHR. With regard to the EC/EU/EEA-law consistent interpretation is, in accordance with the lines of reasoning of the national courts relying on that EC/EU/EEA-law normally should take precedence and that consistent interpretation is a way to ensure such precedence. In relation to the relations between ECHR and EC/EU/EEA-law it seems as if the national courts make a claim to the ECHR as a least common denominator when it comes to protection of fundamental rights and application of EC/EU/EEA-law.

5.7.1.1. Sweden

The development of consistent interpretation in relation to Swedish (judicial) implementation of European law has relied on the assumption that EC/EU-law normally should take precedence over Swedish law, and that constitutional understanding of the EC/EU/EEA-law has also guided the form of consistent interpretation. That has also been the main track along which the role of ECHR has increased over time, a development which began well before the constitutionalisation of the ECHR, and which seems not to have ended with that

constitutionalisation. In the same way, the recognition of the precedence of EC/EU-law has been largely independent of the formal constitutional status accorded to it.

5.7.1.1.1.EEA/EC/EU-law

The development of application of EC/EU-law was gradual but it was also clear that the importance of the EC/EU-law was set out quite clearly in relation to Swedish law in case law of the Swedish Supreme Court and the Supreme Administrative Court.[97] The Supreme Administrative court decided already in 1997 that whether an executive ordinance was valid was dependent on whether it was compatible with general principles of EC-law.[98] The Supreme Administrative Court found that such the requirement of fair trials under both Art. F2 (now art. 6) EU-treaty and the Art. 6 ECHR required the possibility to appeals on decisions on allocation of areal subsidies for farmers. The Lassagård case is of certain interest since it shows how application of EC-law has also underpinned the effectiveness of ECHR in Swedish law. It also shows that at least the Supreme Administrative Court clearly preferred to rely on the general principles of EC-law than on the ECHR, despite that the constitutional basis for the application of ECHR in Swedish law is far less ambiguous than the basis for application of general principles of EC-law. The relevance of the ECHR in the context was included on the basis of the status of the ECHR within EC-law. A third major development when it comes to EC-law was related to the decision to close down two nuclear power reactors in the south of Sweden. The owners made a complaint against the decision and were successful in postponing the decision (although not in having it finally annulled by the courts), and were so on the basis of RÅ 1998 not 93 which concerned control of legality of executive decisions, and where the different arguments related both to protection of property and protection of the right to fair trials were seen as a basis for inhibition of the execution of the decision. The final decision on the closing of the nuclear power reactors was made in RÅ 1999 ref 76, where the issues involved concerned both procedural rights and property rights and above all whether the restrictions on the rights of the applicant company owning the plant were proportionate to the aims. The first part of that case concerned the scope of procedural rights and the possibility of owners and indirect owners of the nuclear plants to request

[97] Swedish courts have however been subject to criticisms when it comes to insufficient adherence to EC/EU-law. It has even been argued that the precedence of EC/EU-law was not recognised by the Swedish Supreme Court until 2005, an assessment which I think is highly exaggerated. C.f. Joakim Nergelius," 2005: The Year When European Law and its Supremacy was Finally Recognised in Swedish Courts", [2007] *Swedish Yearbook of European Law* 145 ff.
[98] RÅ 1997 ref 65 ("the Lassagård case")

judicial review of the decisions of the Swedish government. In this context, the scope of such right was dependent art. 6 ECHR and on general principles of EC-law, notably the principle of effective judicial protection. In this case, the arguments based on ECHR and EC-law were overlapping with arguments based on Swedish constitutional norms. In the present case, it was however not a matter of a choice between these different forms of norms, but rather it was quite clear from the outset that the judicial review exercised by the Supreme Administrative Court included these different perspectives. That was and remains quite uncommon since Swedish courts have had a tendency to rely rather on European law than on domestic constitutional law in judicial review.[99] The combination of different sources of law, included also the Eneregy Charter Treaty as a part of EC-law, which was however not considered any more closely as the Supreme Administrtaive Court deferred to the legislature's conclusion that Swedish law was already consistent with the Energy Charter Treaty.[100] However, it also considered some of the problems related to implementation discussed in the *Hermés* case by the ECJ. [101]The most frequent application of EC/EU-law has been in the Supreme Administrative Court. In RÅ 1996 ref 57, which was the first case where the Supreme Administrative Court considered EC-law, it was held that retroactive claims against a company for environmental damages, would violate not just non-retroactivity principles under Swedish constitutional law, but also general principles under EC-law. It is worth noting that the case did not in any way concern EC-law, but despite that EC-law principles were used as an "aid" for interpretation of a Swedish statute. RÅ 1997 ref 6 concerned a Finnish citizen who had his legal residence in Sweden, who was not a member of the Swedish established church, but despite that had been levied a tax connected to membership of the church, which violated the decision of the EctHR in Darby v. Sweden[102]. Despite that the ECHR was incorporated into Swedish law at the time of the decision of the Supreme Administrative Court (although it was not when the complainant brought the case to the first instance administrative court), the Supreme Administrative Court held that the decision of the Swedish tax authorities violated the ECHR as interpreted in Darby v. Sweden. The complainant argued that following NJA 1988 s. 572, ECHR should be seen as a part of the general principles of Swedish law, the line of the Supreme Administrative Court however disregarded that, instead preferred to rely exclusively on EC-law. The RÅ 1997 ref 6 concerned the application of a fundamental freedom (freedom of movement) under the EC-treaty, which was seen as the

[99] RÅ 1999 ref 76
[100] RÅ 1999 ref 76
[101] RÅ 1999 ref 76
[102] Darby v. Sweden

basis for the decision. RÅ 1997 ref. 82 concerned whether Swedish rules on emissions of cars were compatible with art. 30 and 36 EC-treaty, and the Supreme Administrative Court did not find that to be the case. This was merely an instance of the role of direct application of treaties within domestic law, although it was one of the first cases where the Supreme Administrative Court applied the rules of the EC-treaty directly. RÅ 2000 ref 27 is an example of how consistent interpretation can be used by national courts on the basis of negative integration. In the case the effect was that the consideration of Art. 90 EC-treaty led to reduction of the customs when second-hand cars were imported into the country i order to alleviate national discrimination.[103] The applicability of ECHR through the rules of EEA- and EC-law has been a central part of the application of ECHR. That means however that when ECHR is to be applied in Swedish law in that context, the authoritative source of what ECHR means, will ultimately be the ECJ rather than the EctHR. The status of such law within the Swedish legal order is to some extent problematic since the status of EC-treaty, although being self-executing under international law and although being authorised under Swedish law is based on *statutory* authorisation. In that regard, the ultimate basis for the validity of ECHR under EC-law are constitutionally problematic. Nevertheless it seems as if the judicial practice is even stronger and more consistent when it comes to application of ECHR through EC-law than what is the case otherwise.

5.7.1.2. ECHR in Swedish law

The very first case where the ECHR was mentioned in the case before a Swedish final instance court was NJA 1963 s. 284 which concerned whether an accused had committed tax fraud by not providing the tax authorities with information about salary paid out during the vacation. The question was whether the statute of limitation should be applied or not. The Supreme Court found that the statute of limitation should be applied and that defendant should be acquitted. However, unlike the Court of Appeal, the Supreme Court did not refer to the European Convention on Human Rights as a basis of interpretation of the Swedish statute. The Court of Appeal did so, but it did not justify its decision on the basis of ECHR, although referred to ECHR in its judgement. In the early 1970ies, three cases were decided which concerned the status of ECHR in Swedish law, where the Labour Court [AD], the Supreme

[103] See also RÅ 2000 ref 40 where tax exemptions for dividends were interpreted far more extensively than normally in order not to conflict with freedom of capital movements under art. 56 EC-treaty. The Supreme Administrative Court applied the principle of non-discrimination, also in contexts of social welfare benefits which was illustrated in RÅ 2001 ref 77.

Court and the Supreme Administrative Court all found against the direct applicability of the ECHR. The reasoning was not extensive but seems to have relied on a constitutional approach, where the constitutional logic of parliamentarianism precluded direct applicability of international treaties. AD 1972 no 5 concerned whether members of a trade union that organised a small minority of a special group of employers (engine drivers) had a right to bargain collectively in that trade union, or whether they would have to conform to the agreement between the employer (Swedish Public Railroads through the Collective Agreement Office) and the trade union that organised most transport workers within the Swedish Public Railroads as well as the transport sector as a whole. The Labour Court [Arbetsdomstolen] found that there was no such right to negotiation of collective agreements between such a minority trade union and the employer. The appellant claimed that it meant that the members of the Swedish Engine Drivers' Union had, had their right of freedom of association (art. 11 ECHR) violated. The Labour Court held that the international conventions that the Engine Drivers' Union appealed to did not concern the relations between the state as an employer and individuals as employees, therefore the ECHR was in the case not rejected, but at all not substantively reviewed. What was clearly rejected seems however to be any horizontal dimension of fundamental rights, including any such effect of the ECHR, which at the time was a less remarkable view than what would be the case today. NJA 1973 s. 423 was closely connected to AD 1972 no 5, and concerned whether a state official (an engine driver) was entitled to a retroactive increase in his salary, despite having participated in strikes, during the period of time which the retroactive salary-increase covered. The plaintiff argued that he was entitled to the increase *inter alia*, on the basis of art. 15 ECHR (non-discrimination) and also that he was entitled to it with references to provisions of the European Social Charter, and the right not to be discriminated against in the Universal Declaration on Human Rights, as well as with reference to the right of equal pay for equal work contained in the ICESR (at the time not ratified by Sweden). The instruments that he referred to were all, with the exception of ICESR, ratified by Sweden but not incorporated into Swedish law. (The Supreme Court did not make any strict distinction between incorporation and transformation of law, but the Court seems to have referred to what is for present purposes called "incorporation", although the court used the term "transformation".) The Supreme Court held that international treaties which had not been made a part of the internal Swedish law could not be directly applicable. The wording of the judgement was quite clear, except that it seems as if the Supreme Court held that if an international convention expressed what must be regarded as a basic principle of law, that would also be

binding on a court in application of internal law, regardless of whether the treaty was made into Swedish law or not. However, if a treaty "expresses" a fundamental legal principle, it seems as if the treaty is not constitutive for the validity of that fundamental legal principle, but only declares the existence of something which already belongs to the internal legal order. In that regard, there is a "loophole" for application of international law in conformity with Swedish law, also in the cases that most clearly reconfirmed the principle of dualism in Swedish law. In 1974, the Supreme Court of Administrative Law, decided in the so called Råneå-case that the fact that the ECHR was not implemented as a part of Swedish law also precluded application of it in Swedish law.[104] That confirmed a line of decisions from the Swedish Labour Court[105] and the Swedish Supreme Court[106] where application of the ECHR was seen as precluded by the absence of incorporation. The Supreme Administrative Court concluded that since the additional protocol of the ECHR which was relevant had not been transformed into Swedish law, and hence there was no duty of the Swedish municipal authorities to conform to the provisions of the protocol. The view of the Supreme Administrative Court was, as has often been remarked a clearly dualist approach which was not in any way a part of Swedish law and did not give rise to duties of anyone – neither private individuals nor public authorities. In that regard, it also seems as if the idea of consistency between Swedish law and public international law was not brought up. An interesting aspect of the decision was that the Supreme Administrative Court did not even consider the issue of general consistency between Swedish law and Swedish treaty-based commitments under public international law. In that regard, the Supreme Administrative Court in its decision represented what must be described as a kind of "hard" dualism where there is no differentiation between kinds of international law or the legal areas international law regulates, instead, there is a very strict distinction between national and public international law. From a historical perspective, if drawing on older developments when it comes to the treatment of international law in Swedish courts, it seems as if the consistency of the dualist position may have been exaggerated by the courts. However, after the 1972-1974 decisions of three final instance courts, it must have been said that direct applicability of the ECHR within Swedish law was precluded, although it obviously was a relatively limited extent of the case law pointing in that direction.

[104] RÅ 1974 ref 61 (the Råneå case)
[105] AD 1972 no 5 (Engine drivers' union case)
[106] NJA 1973 s. 423 (Sandström case)

During the 1980ies there was a development towards a state where the courts recognised certain fundamental rights under the ECHR, despite that the ECHR was still not incorporated into Swedish law.[107] If the position of the highest instance courts in their respective fields quite unanimously was one of hard dualism, the development over time was different, and it pointed towards a development of what could be called "soft dualism" where the central idea seemed to be that ECHR and Swedish law should in principle be put in conformity with each other, but it did not seem that any court considered the depth and extent of such a change. The case NJA 1981 s. 1205 is usually held to be important because it was the first case where the Supreme Court held that although treaties in order to be applicable within Swedish law have to have been incorporated or transformed, the presumed consistency of the Swedish RF to ECHR led to that domestic Swedish law could be interpreted in the light of the ECHR. The argument that the Supreme Court used for holding ECHR to be a relevant source was that it had been acceded to before the presently valid RF, and that the present RF thus must be presumed to aim at and be consistent with the ECHR, hence interpreting the RF as consistent with the ECHR had to be acceptable. NJA 1989 s. 131 concerned a Turkish citizen who had been ordered under the so called "terrorist provisions" in the Foreigners Act [Utlänningslagen] to remain within a given municipality, a restriction on freedom of movement so called "municipal detention" [kommunarrest] for an undefined and unlimited duration of time. The question was whether this was to be seen as a form of detention, and whether that would influence the decision on what punishment that would follow a violation of the given rules. The defendant argued that the ruling on "municipal detention" violated the Swedish RF, as well as the ECHR. In the present case, the Supreme Court argued that concerning the definition of a detention, art. 5 ECHR was a source of law. However, the Supreme Court did not regard ECHR as a *mandatory* source of law, but as an optional source that Swedish courts may use to determine the meaning of certain legal concepts.[108] In a similar way, the Supreme Court held that the reasoning of the EctHR in a case on administrative restrictions on freedom of movement.[109] NJA 1990 s. 636 concerned a similar case of administrative restrictions on freedom of movement, so called "municipal detention". However, the Court of Appeal found that the defendants had violated the Foreigners Act, but that the relevant provisions of the Foreigners Act manifestly violated the RF, and the ECHR, and hence that they could not be sentenced to any punishment. The basis for the interpretation

[107] NJA 1988 s. 572
[108] NJA 1989 s. 131, 135
[109] NJA 1989 s. 131, 135-136

of the RF was, in a way which in principle can be seen as consistent with the Supreme Court's decision in NJA 1989 s. 131; the Court of Appeal found that "municipal detention" was a form of detention in the sense of RF 2:9, and that the defendants were hence entitled to judicial review of that decision. The basis of the Court of Appeal in understanding that as a form of detention was based on the case law of the EctHR.[110] The Supreme Court however held, after making what seems to be a proportionality review of the intrusiveness of the contested measure, "the municipal detention" that it was not sufficiently intrusive to be regarded as a detention in the sense of the RF 2:9. What those cases entailed for the role of ECHR in Swedish law is not obvious, but it seems to be the case that it again established ECHR as at least an accepted source for interpretations of rules of constitutional law. (One may assume that it also established it as a basis for interpretation also of lower legal norms.). However it did not establish ECHR as a mandatory source to interpret contested constitutional concepts. If compared with case law such as NJA 1981 s. 1205 where the Supreme Court established a presumption of consistency between the RF and the ECHR, or the NJA 1988 s. 572 which regarded the ECHR should be seen as a general principle of law. In that regard, it seems as if the status of ECHR in some regards is actually lower in the present cases than in NJA 1981 s. 1205.

NJA 1984 s. 903 concerned foreign nationals had been sentenced to imprisonment for various offences without having been present at the trials in Italy and in the US, where Italy as well as the US required the defendant to be extradited to Italy and the US respectively. The defendants argued that extradition to Italy would violate art. 6(3) ECHR as he had not been able to be present during the trial and since the trial took place under conditions that were incompatible with art. 6(3) ECHR. The Supreme Court also argued that such sentences were relevant on the basis of art. 14 ICCPR which Sweden has signed and ratified but not incorporated into Swedish law. The Supreme Court argued that the ECHR was not a part of Swedish law since it had not been transformed into Swedish law, but also that it was entirely clear that the legislator when ratifying the ECHR and when subjecting Sweden to the various control mechanisms under ECHR had made clear the importance that Sweden did not accept legal proceedings incompatible with the ICCPR, ECHR as well as "fundamental principles of law recognised in Sweden"[111]. This view seems to point to that ICCPR, ECHR and Swedish "*ordre public*" limited the possibilities for extradition. (It is also interesting that the Supreme

[110] NJA 1990 s. 636, 640-643
[111] NJA 1984 s. 903, 907

Court here referred to the ICCPR, such references do occur but are infrequent.) The broader understanding of the Swedish public order, seems however to have had limited effect in subsequent judicial practice. The Supreme Court did not make any more general statement, but also argued that the fact that Sweden had ratified and adjusted national legislation accordingly, the Second additional protocol to the 1957 European Convention on Extradition that also took a very restrictive approach to sentences decided in the absence of the defendant also pointed in the direction that extradition could not proceed on the basis of the information available to the Supreme Court.

In RÅ 1988 ref 79, the case concerned the circumstances under which children taken into social care by social (local) authorities could be placed in a foster care in a place very distant from the parents of the children and whether non-voluntary care of social authorities could continue also when the decision on non-voluntary care under Care for Young People Act [Lagen om Vård av Unga] had found that the care should end. The condition for such continued non-voluntary care under the §28 Social Services Act [Socialtjänstlagen] was based on continuing danger for the health and development of the young person concerned. In the case, the Supreme Administrative Court explicitly referred to a case concerning the children in question where the EctHR had found that the geographic distance between the parents and the foster homes (as well as the distance between the foster homes as the siblings were separated) was in and of itself a violation of art. 8 ECHR. The Supreme Administrative Court noted that the judgement had been rendered, but argued that the decision concerned the non-voluntary care under the Care for Young People Act, not the equally non-voluntary continuation of the non-voluntary care under the Social Services Act. The Supreme Administrative Court did not consider that both forms of care took place under identical circumstances, including the continued separation of two siblings continued, but argued that this latter form of care was not covered by the judgement of the EctHR, a conclusion which was plainly unreasonable. In the present case, it should be added that the Supreme Administrative Court did not comment on the applicability of the ECHR where EctHR had decided a case. Since it distinguished between the case before itself and the case heard by the EctHR, it seems as if it in principle accepted that if an identical case had been decided by the EctHR, the interpretation was EctHR should be adhered to. On the other hand, the Supreme Administrative Court also showed an adherence to interpretative techniques which defined such cases in an extremely (and unreasonably) narrow way. Below I will discuss extensively the notion of “consistent interpretation” of Swedish law to the ECHR, which the Supreme

Court has used to interpret and enforce RF 2:23 as well as to apply the ECHR independently of national legal norms. In NJA 1991 s. 188,, NJA 1992 s. 363, NJA 1992 s. 512 and NJA 1993 s. 111 all concerned the right to an oral proceedings in court when it came to ascertaining "civil rights" in the sense of art. 6(1) ECHR. In those cases, the Supreme Court established a relatively clear set of precedents, meaning that the ECHR should be "taken into consideration" and that "the requirements of the ECHR [art. 6(1)] have to be afforded importance"[112] in interpretation of chapter 52 of the Code of Civil and Criminal Procedure [Rättegångsbalken]. It is a form of interpretation which seems not entirely clear, but it seems to fall within the category of "consistent interpretation" where the ECHR was seen as a basis for interpretation of a Swedish statute. NJA 1991 s. 188, concerned a plaintiff who had bought a farm, but been denied permission to keep the farm according to the Land Acquisition Act [Jordförvärvslagen]. The farm had been sold at a public auction (she had received the proceeds after deduction for costs for arranging the auction), and in her appeal of the decision to sell the farm, she requested an oral hearing in the Court of Appeal. The Court of Appeal denied that oral hearing, and she argued that it constituted a serious procedural mistake which had resulted in a wrongful decision of the Court of Appeal. Her argument mainly relied on *Håkansson and Sturesson v. Sweden*, a case which concerned the right to oral proceedings in cases concerning acquisition of land. The Supreme Court considered in a relatively detailed way the role of the ECHR and the case of *Håkansson and Sturesson v. Sweden*, but the Supreme Court did not find that there was an absolute right to an oral hearing in the Court of Appeal on the basis of case decided by the EctHR. The Supreme Court in this case however also found that the rights on an oral hearing under art. 6(1) in the "main proceedings" could not be fully satisfied under the then existing Swedish law. However, the Supreme Court did not see the lack of consistency between Swedish law and the ECHR as a basis for a different interpretation of the Swedish law, but rather it let the consistency between Swedish law and ECHR stop at that point. That seems to reflect a dualistic position quite strongly, even if it did not reject the view that – up to a point – ECHR could be seen as a basis for interpretation of Swedish legal rules. The EctHR in *Håkansson and Sturesson v. Sweden* stated that in cases where the complainants had not themselves requested oral hearing, that requirement could be disregarded. In the NJA 1991 s. 188, that was not the case, the plaintiff had requested an oral hearing in the Court of Appeal, a request which the Supreme Court however still not regarded as sufficient.

[112] NJA 1993 s. 111, 114

As mentioned above, the introduction of EC-law into the domestic Swedish legal order together with the constitutionalisation of the role of ECHR acted as a catalyst for the application of ECHR within Swedish law, but to a very great extent that relied rather on EC-law than on the ECHR itself. There was also a strong tendency to see the ECHR as an integrated part of national law. NJA 1998 s. 817 concerned the issue on whether a foreign judgement against an individual, was possible to execute, as the person concerned claimed that it violated Swedish obligations under the ECHR, since the execution of the foreign judgement would violate protection of freedom of expression under art. 10 ECHR and secondly that it would violate Swedish *ordre public*. The Swedish Supreme Court reviewed extensively whether the foreign judgement should be reviewed with regard to the material circumstances for a possible breach of the ECHR. An interesting aspect is that the Supreme Court did not refer to the case of NJA 1984 s. 903, despite that they concern the same kind of problems. At the level of principle, there was considerable consensus on that the ECHR was a part of the *ordre public*, although the effects seem actually to have been more far reaching in the pre-incorporation case related to ECHR as *ordre public*. The Supreme Court concluded that although there was a certain duty of a court deciding on execution of a foreign judgement to consider whether it would breach the ECHR, it was also clear that, in particular in relation to other parties to the ECHR, the duty was limited as it would otherwise create too big impediments to international cooperation concerning execution of judgements. The Swedish Supreme Court in those respects directly applied the ECHR, and did not consider whether there were any limits when it came to executing the foreign judgements under Swedish law. An interesting aspect is however that in the discussion of whether execution of the Norwegian judgement would violate Swedish *ordre public*, they did not refer to the ECHR. Hence in that regard, it seems as if they still maintained a distinction between the Swedish *ordre public*, mainly defined through constitutional norms on one hand, and on the other hand, the Swedish obligations under the ECHR. RÅ 1999 ref 76 concerned the validity of a statute which decided that two nuclear power plants should be closed, before that would be necessitated by economic reasons. Among a number of other grounds that the applicants (the company owning the company that owned the plants, and the company owning a substantial part of the company owning the company that owned plant) disputed the principle of proportionality as understood in art. 1 of the 1st additional protocol to the ECHR. The Supreme Administrative Court, did not discuss the constitutional status of principles under the ECHR, but sees to have

regarded them as having direct effect within the Swedish legal order, and therefore only reviewed the substantive issues of the case.[113]

In NJA 2004 s. 840 the Swedish Supreme Court sought to restate a general rule for the application of ECHR within the context of Swedish law. NJA 2004 s. 840 expressed that in cases where it was not completely clear whether a Swedish rule of law was in conflict with the ECHR, the courts should exercise "caution" in setting the Swedish rule aside in favour of the ECHR. It has never been completely clear what that requirement means, and what it was intended to mean. In the case of NJA 2005 s. 805, it is however clear that the meaning of this thesis was to some extent changed since the circumstances in NJA 2005 s. 805, although they could clearly be understood as a matter of conflict between Swedish law and the ECHR cannot necessarily be seen as an example of clear conflict since there was no particular decision of the EctHR to point to as a basis for setting aside the Swedish law.

There has been a very clear change in the justification of the principle of consistency, namely from a precedent based one in the case mentioned here, to one based on the constitutional text, namely NJA 2005 s. 805.[114] NJA 2005 s. 805 concerned a Pentecostal pastor who had been charged with violating the clause on incitement against minorities [Lagen om hets mot folkgrupp] in the Penal Code [Brottsbalken] by an inflammatory sermon on homosexuals, where he associated homosexuality with bestiality and paedophilia. According to the relevant statute in Swedish law [16:8 Brottsbalken] such statements are seen as incitement to hatred against a minority, and as such criminalised. An argument against the decision of the Supreme Court was that the EctHR had not rendered so many judgement on hate speech, and in particular not on cases sufficiently close to the one decided by the Supreme Court that any clear view from practice could be deduced, and hence the Swedish statute interpreted according to norm principles should have prevailed given that the ECHR is so vague.[115] I disagree with that, the subsidiary procedural role of the EctHR and the primary role for national courts is a part of the system of the ECHR. It means that in some cases that national courts will have more or less extensive materials to analyse in their interpretations of the

[113] RÅ 1999 ref 76, 471-473, The ECHR as a source of constitutional principles thus seems to continue the role of ECHR as stated in the pre-incorporation cases, such as NJA 1981 s. 1205 and NJA 1989 s. 131 where it was held that ECHR could be used in order to interpret the provisions of fundamental rights in RF chapter 2.
[114] Carl Lebeck, "Konventionskonformitet som rättsligt giltighetskrav? – några konstitutionella aspekter på Pastor Green domen", *Juridisk Tidskrift* (2004-2005) 661-666, Cameron (2008) 854-855. c.f. Görel Granström, "Svensk rättstradition i konflikt med europarätten? Exemplet Åke Green", in Örjan Edström (ed.) *Svensk Rätt i EU*, (Uppsala, 2007) 15-34.
[115] Granström (2007) 30-33

ECHR. The Swedish commitments under ECHR clearly include the text of the convention, the additional protocols ratified as well as the case-law of EctHR.

In NJA 2006 s. 467 where neo-Nazi youths had distributed leaflets with not dissimilar allegations against homosexuals, in particular that homosexuality is linked with paedophilia and bestiality, but did so in a political rather than religious context, the Supreme Court found that given the practice of protection of political expressions under art. 10 ECHR, the statements were criminalised. A majority of three justices in the Supreme Court held that a consistent interpretation led to that the defendants should be sentenced for incitement of hatred against a minority, whereas a minority of two justices held that given the NJA 2005 s. 805 the defendants should not be found guilty. The majority argued that the protection of such expression was not foreseen in the ECHR. However, the judgement was severely criticised by a minority of two justices that argued that the NJA 2005 s. 805 was a correct judgement but that the decision could not be distinguished from the present case, and it seems difficult to do so, unless the Supreme Court gives considerably higher protection of "religious" rather than "political" speech. Also in the NJA 2005 s. 805, consistent interpretation led to that the "normal" Swedish statutory interpretation was set aside by the Supreme Court on the basis that national courts are the courts that primarily are charged with upholding the ECHR, and that the role of EctHR should be subsidiary when it comes to enforcement (although the EctHR obviously takes precedence when it comes to interpretation of the ECHR). The wording of RF 2:23 that it does not provide for any duty, for Swedish courts to use any special method of interpretation of Swedish law in relation to ECHR and hence it cannot be claimed that consistent interpretation *must* be used. If the courts choose to disapply legislation, or use the ECHR, the attendant protocols and the case law of EctHR on the basis of RF 2:23 that would be allowed for. However, it seems to be that "consistent interpretation" is the interpretative technique that fits best with the claim to consistency between ECHR and Swedish law. The assumed relation at the time of the adoption of RF 2:23 was that as the method of incorporation was related to "consistent interpretation" which meant that it should be used to interpret legislation in conformity with the ECHR, as far as possible, but that if an interpretation to ensure conformity with the ECHR would exceed what a statutory rule could reasonably be interpreted to mean, it would the necessitate constitutional review under RF 11:14.[116] In the NJA 2001 s. 409 and NJA 2005 s. 805, it seems as if that happened, but

[116] Prop. 1993/94:117

despite that, the Supreme Court did not to apply RF 11:14. The majority of the Supreme Court held that it would not be possible to reach the same decision if only interpreting the Swedish statute, and that the interpretation of the relevant statute meant that the "ordinary meaning" of the statute as understood on the basis of the text, precedents and preparatory works, was set aside and substituted for by the conclusion that followed from the Supreme Court's understanding of the case law of the ECtHR.

In a more recent decision, the Swedish Supreme Court has again returned to the idea of "clear conflict" between Swedish law and the ECHR, however in a way where the assessment of the clarity of conflict is based on the same view of prognoses of future decisions of the ECtHR as was also heavily criticised in the NJA 2005 s. 805 case. In addition to that the Swedish Supreme Court seems also to have added another aspect when it comes to limits of setting aside of Swedish law in relation to Swedish law, namely that the Swedish Supreme Court now accepts the prognosis-based approach in relation to how the ECHR should be assessed, but also requires a clear conflict in relation between the ECHR (as constructed by the Swedish Supreme Court) and the Swedish national law. The combination however of the prognosis theory and the considerations of clear conflicts create a considerable space for Swedish courts to make choices on whether or not to accord the ECHR a special interpretative strength. The other side of this principle is related to that the Swedish Supreme Court has expressed its doctrine in terms of that in relation to large scale sweeping adjustments of national law, the legislator must be supposed, both for practical/institutional and constitutional reasons whereas when it comes to more limited issues of national law, the legitimate options for Swedish courts are supposedly more extensive. In the same way, it has been argued that in cases where the EctHR has made decisions where the legislator has not been able to respond, the national courts may also have greater role of upholding the ECHR. The dilemma is however that such national differences seems not entirely foreseen in the structure of the ECHR. However, at the same time, it is clear that the practical/institutional limits to judicial decision-making is hardly a unique Swedish reality.

5.7.1.2. Denmark

The application of ECHR and EC/EU-law in Danish law has followed a line mixing direct application and consistent interpretation when it comes to the application of EC/EU-law and ECHR which is also similar to the approach adopted in Swedish and Norwegian law.

5.7.1.2.1. EC/EU-law and Danish law

Denmark acceded (as the first of Scandinavian countries) to the then EEC in 1972. The Danish Supreme Court considered the effects of EU-treaties and treated them in a way where they were a rule (which is hardly surprising) were given direct effect. The horizontal direct effect of treaties has also been recognised by the Danish Supreme Court.[117] The direct effect of the treaties was also in one case extended that also if there was a mere possibility that a domestic rule that was potentially in violation of the EC-treaty (to the detriment of an individual), that was a basis for non-application.[118] Whereas the direct effect of treaties has been recgonised, it is not always the case that the Danish Supreme Court has accepted to give the treaties retroactive directive effect in relation to incorrect national administrative decisions.[119] Also when it comes to regulations it is clear that the regulations have been seen as guiding the interpretation of implementing legislation.[120] The direct effect of regulations has been recognised consistently by the Danish Supreme Court since 1979, and in that regard there are few novelties.The Danish Supreme Court provided at an early for stage for direct effect of directives, not discussing national implementing legislation.[121] The Danish Supreme Court also did so, well before the rulings of the ECJ concerning the rulings on "indirect direct effect" of directives. The normal effect of directives has however been based on national legislation, which has however then been interpreted in the light of the directive.[122] The Danish Supreme Court has applied for preliminary references in many cases, but did so at the first in 1981, where the issue was on legality of parallel imports which were seen as legal under Art. 30 EC-treaty by the ECJ, an approach which the Danish Supreme Court duly accepted.[123]

The Danish Supreme Court has made a number of requests for preliminary references to the ECJ.[124] However the Danish Supreme Court has not always followed the general reasoning of

[117] U.1997.856H, H.D. 15 april 1997, II 325/1991
[118] U.1994.86H. U.1994.823H.
[119] U.1994.823H, U.1994.403H, U.1994.450H
[120] U.1979.714H
[121] U.1980.504H
[122] U. 1995.282/2H
[123] U.1982.69H
[124] E.g. U.1979.117/2H. U.1988.454/H,

the ECJ in the specific cases.[125] In some cases it has refused to make the references, not even in specific questions with regard to inconsistencies between treaties and secondary legislation.[126] The Danish Supreme Court has also maintained the view that it is the national court that shall determine the need for preliminary references.[127] Preliminary references have also (unsurprisingly) been made in relation to interpretation of national legislation implementing directives.[128] The underlying principle when it comes to making of preliminary references has been whether the outcome in relation to EC-law is "sufficiently certain" in the opinion of the Danish Supreme Court.[129] In the doctrinal discussion of the practice of Danish courts, it seems quite clear that the general assumption when it comes to the application of EC/EU-law in Danish law is based on consistent interpretation as the main legal form of application of EC/EU-law. It is also quite clear that consistent interpretation in the context of EU-law has not always been limited to what is possible to decide within a textual interpretation of Danish statutes. The extra-textual approach of the Danish Supreme Court has for instance also meant that Danish statutes has not been in need to be amended because of new directives under EC-law, instead courts have given more extensive interpretations.[130] It has been argued in the doctrine that the duty of consistent interpretation (which is also a duty under EC-law, see *von Colson, Marleasing, Faccini Dori* etc.) is graduated, so as to be more extensive in cases where national implementation directly aims to implement EC/EU-law.[131] That is hardly the case from the perspective of EC/EU-law, but it seems to be a reasonable interpretation of the constitutional approach within Danish law. It is argued that from a perspective of Danish law, that there is no such absolute duty of consistent interpretation in relation to EU-criminal law which does not concern the common market but which is constrained to the JHA.[132] In relation to EU-law, the legal problem of Danish law is whether the duty of consistent interpretation is sufficiently extensive to ensure consistency with the duty of consistent interpretation under EC-law.[133] That has to some extent also been a

[125] U.1988.705/1H, for a case on administrative law (concerning repayment of subsidies for marketing purposes) where the Danish Supreme Court took a stricter view than the ECJ, see U.1988.1006H.
[126] U.1990.505/2H. The case concerned whether transitional rules in a regulation of the Council of Ministers were inconsistent with the EC-treaty, and the Danish Supreme Court did not see that as a reason for making a preliminary reference.
[127] U.1992.476H., U.1992.565H.
[128] U.1996.111H.
[129] U.1997.1047H.
[130] U.2004.1246H (where the Danish Supreme Court interpreted "foreigner" as "non-EU-citizen".
[131] Karsten Engsig Sørensen, "Pligten til EU-konform fortolkning", i Brigitte Egelund Olsen & Karsten Engsig Sørensen (eds.), *Europæseringen af Dansk Ret* (Copenhagen, 2008) 303, 322-323 see U.2003.1214H.
[132] Thomas Ellholm, "Sanktionering af EU-rätten", in Brigitte Egelund Olsen & Karsten Engsig Sørensen (eds.), *Europæseringen af Dansk Ret* (Copenhagen 2008) 251, 271-278
[133] Engsig Sørensen (2008) 327-330, 332-333

problem in relation to EC/EU-law, since the approach of the ECJ is slightly different, although the ECJ has accepted limits to consistent interpretation that is detrimental to individuals in criminal law, but less so in the context of criminal procedure.[134] There are certain obvious fields that are problematic, which include the cases where it is used to the detriment of private individuals in Danish law and it is also clear that it is not relevant when implementing "soft law" measures or otherwise non-binding elements of EU-law. In the former respect that is a difference also when compared with Swedish law.

5.7.1.2.2. The ECHR and Danish law

The first case where the ECHR played a role in Danish Supreme Court decisions was decided in 1979 and concerned whether the isolation of a suspect criminal detained on remand was in conflict with Art. 3 ECHR. The Danish Supreme Court did not consider the role of ECHR, but decided the case exclusively on the basis Danish criminal procedural law.[135] Art. 3 ECHR was also applied in a subsequent case where the issue concerns expulsion of a non-Danish citizen to his home country, where the Danish Supreme Court did not find that Art. 3 ECHR prohibited that, whereas it seems as if it a contrario would have been possible for it to do so.136 Art. 3 ECHR has also been used in relation to extradition where the special circumstances of the person to be extradited would have given rise to cruel, inhuman and degrading treatment.

Other early cases concerned the right of suspects to choose defenders under art. 6(3) ECHR, which was seen as fulfilled through corresponding Danish legislation.[137] In the 1990, the Danish Supreme Court decided several cases where it was made clear that although the ECHR at that time was not a part of Danish law, it should be considered in relation to interpretation of Danish law (consistent interpretation), although the Supreme Court did not formulate any specific standard for how far that consideration should go.[138] In a subsequent case, which also concerned detention on remand and the requirement that judges deciding on detention were also not allotted to judge in the actual case, the Danish Supreme Court relied on the *Hauschildt* judgement to decide that it was a practice which was not compatible with Danish

[134] Compare, the approaches of *Kolpinghuis* and C-105/03 *Pupino* respectively.
[135] U.1979.1011H
[136] U.1994.617H, 621
[137] U.1987.440/2H
[138] U.1990.13H (interpretation of Danish Judicial Procedures Act §§ 64, 60 and 62)

law.[139] In U.1997.676H the issue was whether the use of accountants' reports were contrary to Art. 6 ECHR since they were said to shift the burden of proof to the defendant, the Danish Supreme Court did not consider that, since it held that nothing in that respect prevented the defendant from stating his view, to question witnesses nor to present other evidence.[140] There are however also several early cases where the Danish Supreme Court did not make any reference to the ECHR, despite that there had been such arguments made.[141] It is clear that above all has the Danish Supreme Court never explicitly repudiated the role of the ECHR in the particular context, although it has sometimes on the basis of facts of the case concerned refused the applicability of the ECHR.[142] In relation to the early case law it is not obvious that there is a general guiding principle beyond consistency between Danish law and ECHR, but the Danish Supreme Court avoided attempts to formulate that in any strict terms.[143] Similarly, the fact that a medical practitioner's misconduct had been tried in a professional body did not prevent that the punishment concerned civil rights and duties, and that it hence could be tried in court.[144] In U.1994.988H a journalist from a TV-channel had entered into the garden of a Danish politician, while reporting on a demonstration (unlawfully) taking place in the politician's garden. The issue was whether she had entered unlawfully: the Danish Supreme Court concluded that it was a matter of balancing between protection of freedom of expression and reporting of news on one hand, and on the other hand to protect privacy. In the light of the then recent decision in Jersild v. Denmark, the court found that the importance of reporting news had to be given such weight as to make the normally unlawful entrance of the journalist, lawful.

U1995.9H concerned whether an "objective" form of penalty (in money) for owners of transport companies for their staff's compliance with a EC regulation on times of rest for

[139] U.1990.181H, 187.
[140] U.1997.676H, 680.
[141] E.g. U.1991.580H, see also U.1992.879H, where use of evidence without possibility for the accused to crossexamine witnesses was seen as questionable in relation to art. 6(3) ECHR, but acceptable under Danish law. In U.1995.198H, the same problem re-emerged and the issue was then settled by the Supreme Court on the basis that there was no reason to believe that it had impaired the position of the accused, at least not sufficiently and that the Danish Code on Judicial Procedural had been observed. Furthermore the same conclusion was reached when it came to U.1996.1065H which concerned inability for a defendant to pariticpate fully and effectively in a trial where he had been sentenced to 14 years of imprisonement because of progressively developing mental illness.
[142] E.g. U.1997.1237H (in relation to art. 8 ECHR), U.1997.1505H (in relation to art. 11 ECHR)
[143] E.g. U.1991.720.H, 721, U.1992.87H, (generally when it comes to issues of Art. 6(3) ECHR, the Danish Supreme Court adopted the approach that substantive inconsistencies leading to non-negligible impairments of the procedural rights of the accused were unacceptable but not minor inconsistencies.) That same approach was also adopted with regard to Art. 2 P-7ECHR. E.g. U.1993.384H.
[144] U.1997.889H, 895

individuals engaged in road traffic was consistent with the ECHR. The Supreme Court found it to be consistent, despite that it was contested, in particular in relation to Art. 6(2) ECHR. The basis for the argument (which was developed in the Court of Appeals rather than in the Supreme Court since the Supreme Court only upheld the judgement and conclusions of the Court of Appeals was that there had bee no case of the EctHR to suggest otherwise than that such punishment was lawful.) U.1997.259H is of certain interest since it both concerned freedom of expression as protected under the ECHR in relation to libel laws, but also because it is the first casw where the Supreme Court made a direct reference in its judgement not just to the ECHR and Art. 10, but also to the Danish Human Rights Act 285/1992 that explicitly incorporates the ECHR into Danish law. That meant also that it was not in any way clear whether the role of the act changed the outcome, but it is a different legal foundation of it, than he Danish Supreme Court had used before. In U.1997.1157H the issue was related to whether decisions of the Refugee Board could be challenged in court on the basis of Art. 6(1), and secondarily whether Art. 3 ECHR would be violated in the particular case. The Supreme Court rejected the interpretation of the Court of Appeal that decisions on expulsion and granting of residence permits were generally a matter of civil rights and obligations. The Supreme Court argued that since the Refugee Board was distinct from other executive agencies and hence there was no risk for confusion on the scope of judicial powers.

In the last decade, the development towards consistent interpretation as a central feature of the application of ECHR in Danish law has continued successively, and that is also a feature which is central when it comes to application of EC/EU-law.

5.7.1.3. Norway

5.7.1.3.1. The EEA-agreement

The Norwegian Supreme Court has consistently applied the EEA-agreement, which in effect makes a very large part of the *acquis communautaire* into domestic law in the member states. However, the EEA-agreement is not ultimately interpreted by the EU Court of Justice, but by the EFTA-court. The case law concerning EEA-law in Norwegian courts is quantitatively far more limited than EU-law in Swedish or Danish courts.[145] It is not possible here to discuss all

[145] There is a total of 32 cases of the Norwegian Supreme Court concerning various aspects of the EEA-agreement.

the case law in detail. However, there are reasons to highlight some cases which discern the constitutional relations between the EEA-agreement and Norwegian law. In Norway, the first case where EEA-agreement had importance concerned the protection of employees in cases where a company had been overtaken by a mortgage-lender, and where the Norwegian Supreme Court found that there was such protection.[146] It did so on the basis that the Norwegian Statute Incorporating the EEA-agreement also provided for protection of employees in such contexts on the basis of an EC directive and on case law of the ECJ. The validity of the EEA-agreement is then also the basis for consistent interpretation of national law along with the EEA-agreement. It is not possible to review all cases, but a few of them have been chosen and they seem all to point in the direction of consistent interpretation although there are certain normative limits on what is acceptable in relation to legal consequences for individuals on the basis of consistent interpretation. Rt 1999 s. 390 concerned application of criminal sanctions against professional drivers who overstepped the compulsory periods of rest in the course of driving a motor vehicle that was used to transport goods. The Supreme Court relied on the national legislation read in the light of relevant EC Regulations and decisions of the ECJ. In this case, it seems as if the Norwegian Supreme Court did not relate to any case law of the EFTA-court. The Finanger case, was a decision by the Norwegian Supreme Court where on the basis of EEA-agreement, the Norwegian Supreme Court found that Norwegian legislation concerning compensation for damages in road traffic was in conflict with an EC-directive that Norway was obliged to implement.[147] In addition to that the Norwegian Supreme Court also found that this defect of legislation also constituted a basis for compensation of the plaintiff (i.e. continuing the Francovich doctrine) which also meant that the Norwegian Supreme Court reviewed Norwegian compliance with the EEA and which also meant that not just Norwegian executive authorities, but also the legislator could be held responsible for non-implementation of the EEA. The special role of the EEA-agreement in Norwegian law was also the basis for the special understanding of "consistent interpretation", and the view that the court may use all possible methods to avoid conflicts between EEA-law and Norwegian law.[148] That may however be read in two ways, namely either as a matter of choosing interpretations of Norwegian law as to fit the EEA when that is possible under traditional methods of legal interpretation or to regard it as to

[146] Rt. 1997 s. 1954.
[147] Rt. 2000 s. 1811.
[148] Aall, (2001) 78-79. For a more critical approach to the Rt. 2000 s. 1811, see Kai Krüger, "Finanger-dommen og den nye rettskildefaktor: frykten", *Jussens Venner* (2001) 89, Nils Nygaard "Om statens skadebotansvar overfor private for feilaktig eller manglande gjennomføring av EU/ EØS-direktiv", *Jussens Venner* (2001) 105-114.

trump traditional interpretations of law altogether. In Finanger I, the Norwegian Supreme Court declared that Norway had not implemented a directive under EC-law correctly despite the obligation under the EEA-agreement to do so, but the Norwegian Supreme Court still upheld the Norwegian statute which concerned responsibility and insurance law for car accidents.[149] In Finanger II, the Norwegian Supreme Court again extended this approach and also declared that whereas it was not possible to decide to the detriment of a private party (an insurance company), it was possible to hold the Norwegian government liable for non-implementation.[150] Rt 2008 s. 1789 is of particular interest since it concern the conflict between EEA-agreement, and the implementation of an EC-directive in relation to obligations under ILO Convention 169 on the rights of indigenous peoples. The conflict concerned conditions for slaughter of tame reindeers, and the issue was whether the prohibition of a particular, as it was held, cruel method of slaughter under the Animals Protection Act which implemented the EC directive should take precedence over the ILO Convention, which is another international obligation, that in the present case was relied on to protect the customs of an indigenous people, namely the samis. The Norwegian act provide for that in cases of conflicts between the customs of the samis (and other indigenous peoples) and the act, there should be a balancing of interests. In principle traditional customs could be upheld as far as they did not violate fundamental rights recognised in the national constitutional order. It is clear that the EC directive on animal protection did not concern any such rights, and the constitutional issue was the scope of the precedence of EEA/EC-law in relation to other competing interests. The Supreme Court concluded that since the relevant part of the Animal Protection Act is a part of complying with and international obligation and since the EEA-agreement should take precedence over Norwegian law, it is also the case that it has considerable weight when balanced against Sami customs. The effect of that is also that the relevant clauses of the Animal Protection Act takes precedence.

However, despite that, the balancing approach that the Norwegian Supreme Court uses is interesting and it is also less common in the Scandinavian countries when it comes to supranational adjudication.

The Norwegian Supreme Court in its approach to EEA-law seems generally to apply the EEA-law following principles of precedence of EEA-law over national law in a way akin to how national courts apply the EC/EU-law in national law. In the same way, it seems clear that

[149] Rt 2000 s. 1811
[150] Rt 2005 s. 1365

the Norwegian Supreme Court regards the EEA-agreement as a special form of international treaty, warranting the same higher rank in relation to national law as is the case with regard to EC-law. However, the Norwegian Supreme Court did "balance" between EEA-law and other international commitments in some cases such as Rt. 2008 s. 1789 where international commitments on indigenous peoples and EEA-law were seen as conflicting. However, the balancing which was made was substantive, which makes the precedence of the EEA-agreement in many ways relative, but which also distinguishes it from the traditional understanding of sources of law in national law in dualist legal orders, as well as from international treaty-law and its norms on conflicts of norms. Rt 2009 s. 705 concerned the extradition of Polish national following repeated crimes (in particular illicit trade with narcotic drugs). The Norwegian Supreme Court considered in some detail the specific conditions that apply when it comes to extradition of nationals from other EEA- and EU countries. There is a general duty for the state to act proportionally when it comes to expulsions, but the Supreme Court did not find that the understanding of proportionality should be different with regard to EEA-nationals than for others. The conclusion however, relying on the relevant directives as well as on judgements from the ECJ is that when it comes to extradition of criminals, and their expulsion from the territory of a state-party to the EEA, the EEA leaves considerable room for discretion insofar as the extradition is not purely penal or purely preventive. However, when it comes to expulsion of repeated criminals, that is not at all problematic and at that point the member states retain considerable discretion.

5.7.1.3.2. The ECHR

The first cases that concerned the ECHR in Norwegian law was decided in 1961[151], 1966[152] and 1974[153], and in neither of the cases, the Norwegian Supreme Court made any decision about the rank, validity and applicability of the ECHR in Norwegian law, it only concluded on the basis of the facts that there was no actual conflict between the ECHR and Norwegian law. However there are still good reason to discuss these first cases in greater detail.

Rt 1961 s. 1350 concerned the duty of dentists in Norway to do a statutorily mandatory "civil service" as dentists in certain parts of Norway where there was a shortage of dentists. The

[151] Rt. 1961 s. 1350
[152] Rt. 1966 s. 476
[153] Rt. 1974 s. 935

defendant had refused such service on the basis that the Norwegian statute had been instituted after he had taken up his education as a dentist at a German university, he maintained as his main claim that the prohibition of retroactivity under the § 97 Norwegian Basic Law prohibited the relevant legislation. However, he also argued that the statute on civil service obligations for dentists violated art. 4 ECHR and the prohibition of forced labour.[154] The argument of the referring judge of the Norwegian Supreme Court was that since the duty to conduct one's own profession for a normal pay could not be seen as a violation of human rights in any meaningful sense and hence the Supreme Court also declined to consider the issue of hierarchy between Norwegian law and the ECHR. The core of the argument in this early case however is relevant to how application of the ECHR was conceived of in Norwegian law, namely that application was at least not ruled out, but that in order for a human rights violation to be found, it would also be necessary to find that a violation had a certain gravity. Rt. 1966 s. 476 was a continuation of the case on civil service duty of dentists, it was a case brought by the Norwegian Association of Dentists that the obligation for dentists to carry out civil service concerned a form of indirect economic loss for the dentists concerned which was regulated under § 105 Norwegian Basic Law and art. 4 ECHR and ILO Conventions of 1930 and 1957.[155] The plaintiff furthermore argued that since the statute providing for the obligation of service had been prolonged for three more years, it was impossible to justify it was a temporary measure on the basis of extraordinary circumstances.[156] Between the first case and the second case, the applicant in the first case had also lodged a complaint before the European Commission on Human Rights, where the complaint had been dismissed as manifestly unfounded.[157] In the latter case it seems hence as the legal basis for the argument of the Supreme Court that the duty of the Norwegian dentists did not violate obligations under the ECHR was well founded.[158] However, the judgement also developed the principle that the Norwegian Basic Law ought to be interpreted in the light of the ECHR, and that the ECHR was seen as the normally most developed form of protection of individual rights.[159] Whereas the Supreme Court did not reject the possibility that the

[154] (Two dissenting judges wanted to find the statute unconstitutional on the basis of national prohibition of retroactivity.) Rt 1961 s. 1352-53
[155] Rt. 1965 s. 476, 478
[156] Rt. 1965 s. 476, 478
[157] Iversen v. Norway
[158] Rt. 1965 s. 476, 484
[159] Rt. 1965 s. 476, 486-487

Norwegian Basic Law would provide for more extensive protection of fundamental rights, it was also the case that it was not to be expected.[160]

Rt. 1974 s. 935 concerned whether detention in a psychiatric facility and thereafter the imposition of the obligation to live at a certain place under supervision of public authorities was to be understood as a matter of criminal charges and criminal punishment under art. 6 ECHR. The reason for the detention was that the applicant was found to have threatened to murder a judge, during a mental illness. The Norwegian Supreme Court argued that the limitations of the procedural rights had been limited for psychiatric patients only to the very minimal extent necessary for a workable legal procedure, and argued that there was no reason to find the Norwegian criminal procedural law to violate art. 6 ECHR.

The earliest case law when it comes to the ECHR in Norway has hence relied on a view that Norwegian law ought to be interpreted in the light of international law, i.e. the presumption of consistent interpretation. It is not clear that there has been any clear limits set to this when it comes to the willingness of the judiciary to adapt to requirements of international human rights law. (It should also be noted that in the early case law there is no special distinction between international law in general, and international human rights norms, a distinction which seems to be clearly in development in more recent decades, both on the basis of legislation, and on the basis of judicial practice.) That position remained the case, when until a shift in the development during the 1980ies. The development towards the breakthrough of the ECHR in Norwegian law, as in the rest of Scandinavia has been gradual when it comes to judicial review. Like what was the case in Sweden, there have been early case law where the very notion of direct application of international human rights law was rejected on dualistic grounds, and the judicial shift was largely as was also the case in Denmark, gradual. A central issue that distinguishes Norwegian law from the constitutional law of the other Scandinavian countries is, it seems that the protection of fundamental rights through constitutional law has been considerably stronger, and hence also that the substantive changes of the hierarchical level of protection with the incorporation of international human rights has been more limited.[161] In Rt 1984 s. 1175, the Norwegian Supreme Court was influenced by the ECHR in its judgement, and that was also an example of the development towards greater reliance on the ECHR as well as on the case law of the EctHR. The basis for the application or the use of

[160] Rt. 1965 s. 476, 487
[161] Eivind Smith, *Konstitutiosjonelt Demokrati* (Oslo, 2007)

the ECHR was the notion of consistent interpretation, which in turn relied on that there was a presumption that Norwegian law and international human rights law should be in conformity with each others. The case concerned the possibility for an inmate to challenged detention in a psychiatric facility which was decided not on basis of criminality but on the basis of dangers to oneself which was related to the Winterwerp case of the EctHR. In 1990, the Norwegian Supreme Court again relied not just on the text of the ECHR, but also on the judgement of the EctHR in the case of Lingens v. Austria where the EctHR struck a balance between on one hand protection of individual rights of privacy and reputation and on the other hand freedom of expression for public figures, in particular politicians.[162] The use of the case law of the EctHR has been a contentious issue in some contexts in Scandinavian law, but it seems still as if it is mainly not treated as problematic in the context of Norwegian law.[163] However it should also be said that in several contexts, when it came to detention and expulsion of asylum seekers, appeals on the basis of Art. 3 ECHR were not successful, whereas on the other hand the Norwegian Supreme Court still regarded them as being relevant as legal arguments which also meant that there was a considerable openness to this kind of arguments in the judicial process.[164]

There are few dramatic changes when it comes to the judicial application of the ECHR under Norwegian law prior and posterior to the adoption of the § 110c Norwegian Basic Law in 1994 and the subsequent adoption of the Human Rights Act in 1999. The expansive effect of human rights law in Norway has rather been based on the continuous expansion of international human rights law into Norwegian law. The incorporation of ICCPR and ICESCR has considerably expanded the normative reach, but it has still only played limited role when it comes to protection of human rights compared to the role of the ECHR, probably – at least to some extent – because of the far greater case law related to the ECHR than to the ICCPR. What has happened is rather that §110 c Norwegian Basic Law solidified the already existing application of the ECHR, and that it opened up possibilities for more expansive use of other international human rights instruments. In Rt 1994 s. 610 (Bölgepapp), the Norwegian Supreme Court again, explained the principle of consistent interpretation when it comes to criminal procedure, in particular with regard to the relation between criminal procedure and competition law where it again stated that there is a presumption not just of consistency

[162] Rt. 1990 s. 257.
[163] Thomas Frøberg, "EMDs praxis som norsk rettskildefaktor", *Jussens Venner* (2007) 176 ff.
[164] See. Rt 1985 s. 22, Rt. 1990 s. 380, 1991 s. 1256, Rt. 1993 s. 1561.

between Norwegian criminal procedure and the ECHR (and also implicitly ICCPR), but also that in cases of conflicts between Norwegian rules and the rules of ECHR and ICCPR, the latter should take precedent. However, the Norwegian Supreme Court also set out a criterion of "clear conflict", i.e. the difference between the Norwegian rule and the international should be clear and obvious, in order for the international rule to take precedence. However, the practical effects in this regard of the cases are not clear since, a case where there is no clear basis to regard a national and an international rule as being in conflict, it seems also possible for the national courts to interpret them in conformity with each others. It seems thus not as if the approach of the Norwegian Supreme Court included any view that national law should be interpreted qua national law, unaffected by the ECHR, as far as there is no manifest breach of the ECHR. The substantive issue concerned whether defendants in a criminal trial could be forced to produce certain documents, in the context of competition proceedings, or whether that was in conflict with the prohibition of self-incrimination. The requirement of a "clarity-requirement" pointed to in the literature as a new development, but it was a development which may have restricted rather than expanded the scope of application. The development of human rights protection in Norway, namely that the constitutional foundations of the protection of human rights is distinct from both other constitutional protection of fundamental rights and the protection of human rights under the Human Rights Act, has led to that the judicial application of § 110 c Norwegian Basic Law has remained very limited. One of the exceptions to that was the case of Rt 1997 s. 580, which was decided by the Norwegian Supreme Court. Rt. 1997 s. 580 was a case which concerned whether a prohibition of strikes at an oil platform in the North Sea was legal or not. The plaintiff was the Oil Platform Workers' Common Association [Oljearbeidernes Fellessammanslutning] versus the State (Department for Municipal and Labour Market Affairs).[165] The legal basis for the claims of the illegality of the strike in question was assessed on the basis of § 110 c Norwegian Basic Law, as well as § 112 Norwegian Basic Law, Norwegian obligations under art. 11 ECHR, ILO convention no 87, the ICCPR, the ICESCR, as well as the European Social Charter. These sources of law were argued to be binding on the Norwegian state (also in the context of labour market conflicts) by the trade union involved. However, it is also clear that the Norwegian government claimed that the basis for assessment of whether a strike was legal or illegal would have to be based on whether the international law, the Basic Law or other statutory norms made the strike illegal.[166] The very broad notion of human rights under the

[165] Rt. 1997 s. 580, 582-584
[166] Rt. 1997 s. 580, 584

various parts of § 110 c Norwegian Basic Law can be seen through that. The potential breadth of sources of law can thus be seen as an instance of the specific aspects of the Norwegian very general constitutional reference under § 110 c Norwegian Basic Law. The effect of that is obviously that the constitutional choice for international human rights within national law to a great extent becomes a choice for judicial implementation of various international human rights instruments that Norway has ratified. That in turn seems to lead to the constitutional change that the international treaties that the country accedes to becomes a constitutionally protected source of law in a way which would otherwise hardly be the case within the generally dualistic framework of Norwegian law. It should be noted that there was consensus on the relevance of international norms of human rights and their direct applicability in the context of Norwegian law. Rt. 1997 s. 1019 was a decision which strengthened the meaning of consistent interpretation, showing that the Norwegian Supreme Court was willing to go quite far in giving the consistency approach effect. The case concerned whether an attorney should be penalized for behaviour during a trial without having been given the right to defend himself in relation to the accusations. The Supreme Court argued that it would be contrary to Art. 6(3) ECHR. The possibility to state one's view on accusations and to defend oneself is according to the Norwegian Supreme Court a "fundamental principle of legal certainty" which also would have made problematic to ignore it. In this sense it seems as if general principles and consistent interpretation overlapped. Rt. 1997 s. 1778 concerned the use of evidence in criminal procedure which had indirectly been uncovered by breach of confidentiality (in medical care). The dilemma was that it was indirect and that the person who had made the breach in the first place could not be queried by the defendant. Instead the Court of Appeal had relied on that protocols from police inquiries had been read in the course of the trial. The Norwegian Supreme Court found that it was impossible to rely on such materials given that it would be in clear violation of Art. 6(3) ECHR. An important aspect of the development of consistent interpretation as it seems pre-Human Rights Act is that it has very often been connected either to specific fields of law or to specific circumstances, which also means that the interpretation of consistency has been very piecemeal. The development is in this regard characteristic for a view of consistency where consistency is quite limited, where the presumption can be rebutted relatively easily. Another variety of the understanding of consistent interpretation has been the so called *Karmoye* principle meaning that Norwegian courts should act as to be sure that they did not violate international human rights

obligations.[167] This understanding is different from the perspective of the *Bölgepapp* and OFS-case approach which both presupposes that departures from Norwegian law were possible it is was clear that ECHR and Norwegian law differ. The view that there should be a margin of certainty so that national law would not be made to clash with international law was explicated in the case in relation a separate opinion by Supreme Court Judge Fock.[168] The argument was that it was necessary to minimise the uncertainty on protection of rights and of application of law in general and that both of these tasks were within the jurisdictional competency of the Norwegian Supreme Court.[169] However whereas *Bølgepapp* decision meant that the Norwegian Supreme Court came to regard the ECHR as for practical purposes a lex superior in relation to Norwegian law it was a lex superior with certain limits to its applicability namely the with the requirement that in such cases, there had to be a clear contradiction between ECHR and Norwegian law.[170] That decision may be said to have meant that the Norwegian Supreme Court recognised that consistent interpretation as a way to harmonise Norwegian law with the ECHR had its limits, but that in such cases, the ECHR should take precedence. In the course of the last decade it is however clear that this approach has to some extent been relaxed.[171] However, that approach was amended by the judgment in Rt. 2000 s. 996 by the Norwegian Supreme Court. Traditionally under Norwegian law, the principle was that consistent interpretation should be used if it was clear that there was a conflict between the Norwegian rule and the international rule, otherwise the domestic legislator should be given the benefit of doubt. In a Rt. 2000 s. 996, that principle was rejected by the Norwegian Supreme Court and instead changed into that consistent interpretation should ensure complete compliance with international human rights norms. This more radical approach when it comes to implementation of the ECHR has been followed since when it comes to Norwegian law. That does not mean that there are no other considerations related to application of ECHR in Norwegian law, in particular when it comes to the need for more extensive protection in relation to of freedom of expression.[172] The possibilities for other considerations were also set out in Rt. 2000 s. 996.[173] That is however not by definition understood as a matter of conflicts between the ECHR and the Norwegian Basic Law. From a formal perspective, it is clear that the Norwegian Basic Law is, as all other national

[167] Rt. 1999 s. 1361
[168] Rt. 1999 s. 1363, 1380.
[169] Rt. 1999 s. 1363, 1380-81.
[170] Rt 1994 s. 610 (Bölgepapp),
[171] Rt. 2001 s. 85, Rt. 2001 s. 1006 (KRL-faget case),Rt. 2002 s. 509 Rt. 2002 s. 557.
[172] Rt. 1997 s. 1821 (Kjuus), Rt. 2007 s. 1807 (Vigrid – which concerned freedom of expression and cases of racial hatred))
[173] Bjørge (2010) 45-50, 49.

constitutions the highest norm within the Norwegian legal order, and also hence also *lex superior* to ECHR as well as to EEA-agreement. However, it seems clear that the approach of the Norwegian Supreme Court has been to apply a more coherentist approach where the Norwegian Basic Law is actually interpreted in the light of the ECHR as well as in light of general principles of Norwegian law.[174] The argument seems to be that in these fields the Norwegian Supreme Court seeks to harmonise wherever there are differences between the ECHR and Norwegian law as far as is possible in order to avoid conflicts. The harmonisation has taken place by interpreting Norwegian law in the light of the ECHR.

5.8.1.4. Conclusion

When it comes to the consistent interpretation of ECHR, the same phenomena may be seen in that national courts often prefer to interpret national legislation in a manner consistent with the ECHR, in particular when it does not restrict the right of any party involved. The particular strength accorded to the ECHR can be explained by constitutional provisions when it comes to Norway and Denmark, but neither of that can be the basis for the explanation of the role of EC/EU/EEA-law in the Scandinavian countries. In relation to the EC/EU/EEA-law, it seems clear, as will also be discussed further below when it comes to conflicts between domestic constitutional norms and EC/EU/EEA-law, that European law, despite not having any formal rank of constitutional norms have acquired essentially that status within the case law of the Scandinavian courts. In the case of Norway that was illustrated with great clarity Rt. 2008 s.1789 where the interest in compliance with the EEA-agreement was put at the same hierarchical level as protection of constitutional rights. There has not been identically the same situations in the other Scandinavian countries, but also there it seems clear that there are no constitutional constraints on implementation of EC/EU-law.

5.8.2. Conflicts between domestic law and EC/EU/EEA-law

The issue of conflicts between national law and EC/EU/EEA-law is generally problematic and the issue here is to analyse the conflicts and how judges resolve them. Two kinds of conflicts

[174] Benedikte Moltumyr Høgberg, "EØS-rettens betydning for norsk statsrett", Jussens Venner (2008) 159, 177 has argued that the approximation when it comes to the relation between ECHR, EEA and Norwegian Basic Law is different in contexts of freedom of speech (see, Rt. 1997 s. 1821 (Kjuus), Rt. 2002 s. 1618 (Boot Boys) Rt. 2007 s. 1807 (Vigrid)) and other fields of law (see Rt 2004 s. 357, Rt 2006 s. 293, Rt. 2007 s. 1281 (Ullern Terasse)

between EC/EU/EEA-law can be seen, the first concerns conflicts in relation to domestic non-constitutional norms and in relation to domestic constitutional norms. In relation to both of these conflicts, it seems fair to say that consistent interpretation has been the preferred method of judges to resolve the conflicts. However, the use of consistent interpretation is not as discussed without certain limits. The practice of consistent interpretation is generally done with considerable respect for the principle of legal certainty when it comes to relations between individuals, but with considerably less respect for legal certainty when it comes to relations between public authorities and individuals. The limits when it comes to imposing EC/EU/EEA-law in relation to protection of legal certainty of individuals in relation to other individuals. That has meant that tort claims for non-implementation of EC/EU/EEA-law have been less problematic than the claims when it comes to claims against individuals.

There have been cases of conflicts between national law and EC/EU/EEA-law, and they have above all concerned the role of national monopolies, restrictions on freedom of movement of capital and related issues under EC/EU-law. In all these cases, there is a tendency as it seems to uphold national law, in particular in politically sensitive areas. The fact that Scandinavian courts have also been more restrictive when it comes to requests for preliminary references, and the restrictions on the application of EC/EU-law (whether creating conflicts with national law or not) is rather based on that there is a more restrictive view on the scope of European law, than the view that there are constitutional limits to European law.

5.8.3. Conflicts between ECHR and national law

The issue of the role of ECHR within national law is also related to the role of conflicts between ECHR and national law and how judges manage such conflicts. In relation to the ECHR, the distinction between conflicts of constitutional and non-constitutional norms seems less relevant since the conflict between constitutional rights and the ECHR has never been a problem within Scandinavian law, possibly to some extent because of the relatively weak tradition of “domestic” constitutional protection, which also means that conflicts between constitutional rights under national constitutional law and the ECHR become less likely. The usage of the method of consistent interpretation is central when it comes to resolving conflicts between ECHR and domestic law. From a constitutional perspective that has seldome been regarded as problematic since the application of the ECHR has generally expanded human rights protection. There has however obviously been conflicts between national law and the

ECHR. Since there has also been a sizeable number of cases where Scandinavian countries have been found to have violated the ECHR, it is also clear that there are conflicts between national law and ECHR. The general approach to the ECHR based on consistent interpretation means also that it sometimes is difficult to ascertain what should be considered as a matter of consistent interpretation within the "normal" range of options of interpretation of national la which also to some extent makes it difficult to determine what a conflict between the ECHR and national law consists of.

5.8.3.1. Sweden

In cases where there is a conflict between national law and the ECHR, the approach of the Swedish courts has evolved from ignoring the ECHR on the basis that it was not implemented, to attempt to avoid conflicts with the ECHR through consistent interpretation. However, Swedish courts have had a tendency to go to greater lengths to avoid conflicts over time, meaning that consistent interpretation is now poised to result in an ECHR-consistent outcome in most cases. In Swedish law there is also explicit support under IG 2:23 for consistent interpretation of the ECHR and that such interpretations are also based on constitutional authority.

5.8.3.2. Denmark

In Danish law, the general assumption is that ECHR should take precedence over Danish law perceived to be in conflict with the ECHR, since it is normally presumed that the Danish legislator has not intended to depart from the ECHR.[175] That does not exclude the possibility that the legislator has intended to depart from the ECHR, but in such cases there is also a requirement of that it should be clearly stated by the legislator. When it comes to relations between the ECHR and the Danish Basic Law, a clue to that potential conflict may be found in UfR1999.800H where the Danish Supreme Court considered the relation between EC/EU-law and Danish law, and obiter dictum, the Supreme Court also concluded that if there was a clear conflict between the Danish Basic Law and the ECHR, the Danish Basic Law supposedly should take precedent. However such a conflict has been wholly hypothetical so far.[176] The "normal" presumption when it comes to the relation between Danish law and the

[175] Betænking 1407/2001, pp. 308 ff.
[176] Jens Elo Rytter, *Den Europæiske Menneskerettskonvention i Dansk Ret*, (2nd ed. Copenhagen, 2006), 36-37

ECHR is hence that judges should apply national legislation in a manner with the ECHR to ensure compliance with the ECHR. That has also been the approach developed by the Danish Supreme Court in a number of cases during the 1990ies.[177]

5.8.3.3. Norway

In Norwegian law, the assumption is, as it the case also in the other Scandinavian countries that in cases of conflicts national law should be interpreted as to conform with the ECHR. The assumption of the use of consistent interpretation is also based on that as far as the ECHR requires national law can be interpreted in a way which is different from the "normal" interpretative approach. In Sweden as n Norway there is a constitutional basis for this approach, in the case of Norway under §110c Norwegian Basic Law.[178] In the same way as in Sweden and Denmark, there has never been any case of conflicts between the ECHR and the Norwegian Basic Law, although it is not completely clear which norm that would take precedence since the duty to enforce and protect human rights, including the ECHR is also a constitutional duty on the public authorities.

5.8.4. Do judges disapply national law in case of conflict between national law and ECHR law?

National courts in Scandinavia tend to set aside national law in cases of conflicts between national law and ECHR. Because of the traditionally limited role of national constitutions, constitutional conflicts between national and European law have been limited. The acceptance of European law when it comes to conflicts between European law and non-constitutional norms in the Scandinavian countries partly reflects a general change from dualism to a practice of consistent interpretation and acceptance of the supranational character of EC/EU/EEA-law but also a general tendency towards avoidance of conflicts between national and European law. As discussed in the section on the interpretative strength of ECHR within domestic law, it is clear in relation to all Scandinavian legal orders that ECHR may be used as a basis for setting aside national law, and it is also clear that there are instances when national courts have also set national law aside in favour of the ECHR.

[177] E.g. UfR.1994.536H and UfR1996.234H.
[178] Fliflet (2005) 467-469.

5.8.4.1. Sweden

In Swedish case law there has been an increasing tendency to disapply national law in favor of the ECHR in cases of conflicts. In Sweden the clearest and first example of the setting aside of national law on the basis of consistent interpretation has been the NJA 2005 s. 805, where through consistent interpretation, the Swedish Supreme Court found that a statute that criminalized incitement to hatred against ethnic minorities should not be applied when it came to religiously based expressions against a sexual minority (homosexuals).

It is of interest since the Swedish Supreme Court in order to disapply the national law argued that Swedish legislation would not withstand scrutiny of the EctHR. The court did not refer to any particular cases of the EctHR but argued that it was likely that the legislation would be found to violate the ECHR, based on a general assessment of previous case law. The decision reflected a wide notion of loyal application of ECHR by the Swedish Supreme Court being an effect of general duties under public international law. However Swedish courts are reluctant to apply consistent interpretation in other cases, most importantly in relation to taxation[179] despite earlier case law of the EctHR.[180] The Swedish Supreme Administrative Court has also tended to interpret Swedish law consistently with the ECHR in cases that concern matters as diverse as property rights[181], appeals of planning decisions[182], right to fair trial[183] (including the right to oral hearings[184] as well as the meaning and scope of civil rights and obligations[185]) but been more restrictive in cases on the *ne bis idem* principle[186] (concerning combination of administrative sanctions and criminal punishments). In the latter kind of cases, the Supreme Administrative Court as well as the Swedish Supreme Court has accepted to come into conflict with the ECHR.[187] Likewise, Swedish courts have had a more restrictive view on

[179] RÅ 2000 ref 66,
[180] *Janosevic v. Sweden, Västberga Taxi AB v. Sweden, Roseqneuist v. Sweden, Synnelius och Edsbergs Taxi AB v. Sweden, Carlberg v. Sweden etc.* These have not led to any rejection of the Swedish model, but raised questions about certain aspects of it.
[181] RÅ 2001 ref 56.
[182] RÅ 2009 ref 90, RÅ 2009 not 167
[183] RÅ 1997 ref. 65
[184] RÅ 1995 not 184.
[185] RÅ 1995 ref 58, RÅ 2004 ref 122, RÅ 2006 not 141.
[186] RÅ 2000 ref 65, RÅ 2002 ref 79, RÅ 2009 ref. 94.
[187] Decision by the Supreme Court, 31st of March 2010, number B 5498-09. (To some extent the development is caused by the developments of the case law of the EctHR when it comes to rules on double punishments, since the EctHR also found in Rosenquist v. Sweden (in 2004) that the present regime did not create conflicts with the ECHR. However, the problems have their origins in that the EctHR has expanded protection against double punishment in subsequent cases, inter alia Zolotuhkin v. Russia) although the Supreme Court relied on NJA 2004 s. 840 to uphold the Swedish law.

which conflicts of interests that may lead to that judges fail to fulfil the requirement of impartiality.[188] RÅ 2000 ref 66 concerned the penalty fees imposed by the Swedish Tax Authority on taxpayers that had made incorrect statements about incomes or attempt to make unlawful deductions or in other ways sought to unlawfully evade paying tax. The problem with the use of penalty fees was that although they could be reviewed in court they are imposed by the Tax Authority that also has a prosecutorial role and they are also ultimately enforced and collected by the authority. In such cases, the Supreme Administrative Court has been very reluctant when it comes to avoiding conflicts with the ECHR.

5.8.4.2. Denmark

The replacing of not applying national law on the basis of conflicts with national law is not new in Denmark. There has been several cases, including early cases discussed above which concerned the qualification of temporary judges and their role when it comes to the protection of impartiality of courts and the right to a fair trial. An interesting case is that the Danish Supreme Court overturned a conviction and sent the case back to a lower court on the basis that an acting district court judge had in his ordinary employment been a civil servant in the Office for Criminal Law at the Danish Ministry of Justice. That was seen as an unacceptable limitation on the independence of the judge and also as a threat to the fairness of the the trial since the acting judge had not been independent in relation to her main employer.[189] In a subsequent case where the acting judge was also an official in the Ministry of Justice but in the Office for Legislation, that was not found to endanger the independence of the judge.[190]

5.8.4.3. Norway

As is the case also in Sweden and Denmark, there has been a considerable development in the case of Norway when it comes to setting aside Norwegian law when it comes into conflict with domestic law in various forms. The issue of conflicts with ECHR and whether to set aside Norwegian law is problematic in the context of Norwegian law. A recent example is the

[188] RÅ 2005 ref 1. RÅ 2009 ref. 8.
[189] U.1994.536H, 541-544.
[190] U.1995.529H, 529-530.

so called Folergø case (Folgerø v. Norway) which concerned the legality of religious education in Norwegian public schools, where the Norwegian Supreme Court had sought to reconcile the Norwegian legislation with the ECHR, but whereas it was nevertheless held to be contrary to the ECHR in that it provided for mandatory education in what was seen as education in a religious belief which could be contrary to the philosophical convictions of the parents.[191] The conclusion seems to be that judges sometimes set aside law if they find it to violate human rights standards, but it is also clear that there may be issues based on assessments of facts that cause divergences in relations between national and European law.[192]

5.8.4.4. Conclusions

When it comes to ensure compliance with ECHR of national law, there is in all the Scandinavian countries a primary responsibility for that with the legislator. That means also that whereas national courts are involved in the implementation of ECHR within national law, it is also clear that

Although there is certainly possible to find examples where national courts have not disapplied national law in relation to the ECHR, it appears to be the case that ECHR has been comparatively effective when it comes to implementation by national courts. In the case of conflicts there is a strong tendency of national courts to adapt their case law to the ECHR. However, it is also clear that when it comes to cases where there is a strong opinion of the national legislator, the adaptation

5.9. The dog that did not bark: constitutional conflicts between national and European law

When it comes to the constitutional limits for the application of EC/EU/EEA-law in Scandinavia they have been limited. What limits have the supreme courts imposed and have they opposed to the primacy of EC law (as understood by the Court of Justice) and the more activist approach shown in the last period by the ECtHR? As discussed here, it is also clear

[191] Rt. 2001 s. 1006
[192] Wiklund (2008) 203-205.

that the Scandinavian supreme courts have never considered any clear constitutional limits to the applicability of EC/EU/EEA-law within national law on constitutional grounds. There is no consistent doctrine in that regard and whereas the national supreme courts have considered the constitutionality of legal rules under the EC/EU/EEA-treaties, they have not imposed any clear rule-based constitutional limits on applicability of EC/EU/EEA-law. The Swedish Supreme Court has expressed that as far as the EC/EU complies with the ECHR, there is no constitutional reason to not apply EC/EU-law and the Danish Supreme Court has, as referred to above set out a similar presumption in case relating to competition law. When it comes to human rights protection the tendency towards European integration has also created a system of three levels of human rights protection, through national constitutions, EU-law and through the ECHR. The hierarchical relations between these forms of human rights protection are not obvious, neither the way in which the formal grounds for them have been appreciated by national courts. It seems as if human rights are now treated by national courts as an independent source of norms with its own form of political legitimacy. However, the relation between the ECHR and national constitutional law in the case of a conflict is uncertain, as is the case in a conflict between ECHR and EU-law. In the same way, the role of EU-law in the hierarchy of norms within national law remains difficult in the context of Scandinavian law whereas the matter is settled in practice, but left undecided at the level of principle.[193] It should be added that this approach is not unique since the recognition of the precedence of EU-law and the ECHR has been less of a problem in practice than in principle in many member states of the EC/EU. The distinctive aspect of the Scandinavian approach seems to be that the issue of rank of supranational law is neither rejected at the level of principle on the basis of the national constitution as the supreme legal norm, nor that supranational law is clearly accepted. The approach of the courts in that respect seems to reflect the fundamental uncertainty of the hierarchies of norms seems to be a central feature of the interaction between supranational and national law.

5.8.2.1. Sweden

5.8.2.1.1. Freedom of expression

[193] Cass R. Sunstein, *Designing Democracy* (Oxford, 2001) 53-58.

NJA 2001 s 409 concerned a criminal prosecution on the basis of a statute (The Data Act, subsequently replaced by the Personal Data Act) implementing a directive on protection of personal data for individuals. The defendant was run a webpage, called Stiftelsen mot Nordbanken [Foundation against Nordbanken], which claimed that a major Swedish bank, and executives of that banks had committed various criminal acts against customers of the bank. The defendant was charged with creating, on purpose or negligently, a computerized register of personal data, where it was also clear that he had published this on the internet. The implementation fo the directive could theoretically at least have became a clash between EC-law and protection of freedom of expression under Swedish law. However, that was not the case since the directive which was implemented through the act also referred to the ECHR, both when it comes to the aim of protecting the reputation of individuals on the internet (and more generally when it comes to storage of large quantities of information. The acquittal of the defendant was based on that he had used his website for "journalistic" purposes, i.e. debate and information on an important issue of public interest (the appropriate role of banks and the relations between banks and customers) and that the information he provided on various managers and executives in the bank was hence not covered. The basis for that was the references to art. 8 and 10 ECHR, as well as the specific references of ECHR in the Danish statute implementing the same directive, as well as the general role of ECHR under EC/EU-law. The Swedish Supreme Court referred to then article F2 EU-treaty (now art. 6(2) EU-treaty) and the implementation of ECHR in Swedish law through 2:23 1974 Instrument of Government, as well as the statutory incorporation of the ECHR. NJA 2001 s. 409 cannot be regarded as a very serious clash between EC-law and Swedish law, especially since it was clear that both Swedish law and EC-law (in the directive) as well as the EU-treaty provided for recognition of fundamental rights. However, the Supreme Court rejected the possibility of asking for a preliminary reference from the ECJ and argued that interpreting EC-law in the light of ECHR, for which the EU- (but not the EC-treaty) provided a basis can be seen as a relatively independent approach to legal interpretation. However, it is not appropriate to speak of a clash, it is rather that the Swedish Supreme Court avoided a case where an interpretation of the directive by the ECJ may have led to a conflict between Swedish freedom of expression and EC-law. One may thus say that the case was an instance of avoidance of a potential conflict, and was so through the use of means of interpretation. In that regard, it is different from some of the other cases of Swedish law discussed here.

In relation to freedom of expression, the Swedish Supreme Court has however also at one occasion upheld a more traditional national based approach to protection of freedom of expression, despite that it was prima facie contrary to EC-law. An issue of national discrimination arose also in NJA 2002 s. 314 where the issue was whether a TV-programme in a channel that broadcasted from London was protected by the Swedish Basic Law on Freedom of expression. The protection of that Basic Law was confined to programmes broadcasted in Sweden, and the issue was whether it was seen as a matter of national discrimination. The conclusion was that it was not a matter of discrimination on the basis of nationality, on the contrary, the precondition for the Swedish form of protection of freedom of expression was based on exclusive responsibility of a so called "responsible publisher" who has the final say as well as the ultimate control over what is broadcasted. The precondition for that form of protection of freedom of expression was that it was territorially limited to publishers active in Sweden and that it was not seen as a disproportionate form of discrimination on the basis of, not nationality in the strict sense, but rather of domicile. The justification of this was hence based on the need to maintain a coherent protection of freedom of expression, which was seen as otherwise being diluted through the extension of the specific Swedish model of holding publishers rather than authors in periodicals or broadcasters in radio- and tv-channels responsible for their acts. That approach was however deemed to not be feasible when it came to freedom of expression for public media that was broadcasted from abroad. In this connection, it is however clear that the Swedish "discrimination" of foreign broadcasters was done in order to maintain national protection of freedom of expression. In this case, the basis for maintaining the Swedish legislation was not even a matter of an in concreto conflict between Swedish and EC/EU law, but rather the perceived future effects of giving EC/EU law supremacy in this regard.

5.8.2.1.2. Access to public documents

If anything it seems also as if the case reflects the generally important role that Swedish law ascribes to freedom of expression as a constitutional right, but the way the Swedish Supreme Court handled it reflects an avoidance of conflicts rather than any tendency to limit the applicability of EC/EU-law as such in Swedish law. Also the Swedish Supreme Administrative Court has had to discuss the issue on interpretation of EC-law in light of Swedish constitutional rules. In RÅ 2005 ref 87, the issue concerned the implementation of a regulation. The problem of the directive was that required national authorities for agriculture

to maintain a principle of confidentiality (in order to protect business secrets), which were at least at the face of it contrary to the Swedish law concerning confidentiality of public records. The Swedish law when it comes to access to public records is very extensive and regulated in the constitutional Freedom of the Press Ordinance (which despite its name is a constitutional law). The Freedom of the Press Ordinance 2:11 prescribes that only in cases where there is a clear support in statutory law, documents with public authorities that have are being seen as public documents shall not be, at request given out to the public. The problem was that denial of access by the public on the sole basis of the EC-treaty (and required confidentiality in secondary EC-law) would then not be compatible with the Freedom of the Press Ordinance, since the act also requires the statutory basis for such an act, within Swedish law. The case hence illustrates a potential conflict between a substantive constitutional norm in Swedish law and EC-law. In order to fully understand the problem, it is important to note that when Sweden acceded o the EC/EU, the statutory regulation of confidentiality of public documents was amended, however the Swedish regulation had not been amended to adapt to subsequent changes in secondary law of the EC. The way that the Supreme Administrative Court "solved" the problem was by making an extensive interpretation of the Swedish statute on official confidentiality. In this regard, one may say that the Supreme Administrative Court avoided a direct clash between a fundamental right under Swedish law, and EC-law, by a quite special form of legal interpretation. In this regard, one may say that the Supreme Administrative Court avoided a conflict with EC-law, by restricting effect of national constitutional rules. It is notable that in the RÅ 2005 ref 87, there is no possibility to interpret EC-law in the light of ECHR to avoid conflicts with national constitutional law, and thus the Supreme Administrative Court made a choice between EC-consistent interpretation and normal interpretation in light of constitutional requirement. The access to public document is obviously not a right protected under ECHR, nor as a fundamental right, under EC-law, and it seems hence that the Supreme Administrative Court at least restricted the reach of the principle of access to public documents.

5.8.2.1.3. Principle of legality in criminal law

In this case, the issue before the Supreme Court concerned publicity and legality in criminal law. The case in NJA 2007 s. 227 concerned a crime against a law on penalties for smuggling of goods. § 8 of that statute prescribed that avoidance (or action that risked to lead to avoidance) of payment of customs and taxes in relation to international commerce should be punished according to a number of other forms of legal norms, including anti-dumping regulations of the EC. The case concerned whether an anti-dumping regulation of the European Community, violation of was punishable under the national statute fulfilled the requirements of Swedish Instrument of Government of non-retroactivity and publicity (2:10 1st section Instrument of Government) and the monopoly of the parliament in making of criminal law. The case highlights two problems, one concern to which extent powers of criminal law should be, ipso facto delegated to a supranational body as a matter of fundamental rights (predictability and publicity of criminal law), and on the other hand, the issue also touches on political accountability, where the monopoly of directly elected legislatures and non-delegability of powers of criminal law, are central in democratic constitutionalism.

5.8.2.1.4. Principle of non-retroactivity in criminal procedure

The case NJA 2007 s. 168 concerned a Swedish national of Polish origin that were to be extradited under the European Arrest Warrant, to Poland for crimes which had passed the Swedish, but not the Polish statute of limitation, and where EAW hence retroactively changed the applicable statutory limitations (where the Swedish statutory limitation that had barred extradition to Poland became did not bar the enforcement of a EAW). It should first be noted that the EAW is not a measure under EC-, but under EU-law. It is also the case that the EAW delegates only powers to the ECJ to interpret it, since it is a part of the intergovernmental cooperation in the EU (the third pillar), but it is still the case that the EAW is decided by unanimity under the framework of the EU-treaty, and the EAW is ultimately interpreted by the ECJ. Framework decisions such as the EAW establishes hybrid form of delegation of powers to an international organization, in the particular case to a supranational judicial authority, whereas the EAW in and of itself also establishes a generalized mutual recognition between different member states of the EU.

Framework decisions under the EU-treaty thus clearly belongs “within the framework of cooperation” of the EU, and they delegate powers, but the way in which the EAW is used, is

based on the willingness of national authorities in other member states to use it, but it is also clear that the limits for how extensively the EAW may be used will be set by the ECJ. The Swedish Supreme Court reviewed the case, and the basis of the claims of the plaintiff, firstly that the application of EAW in the present context violated Swedish commitments under ECHR, secondly that it violated Swedish commitments under the UN Convention on the Rights of Child (which is ratified but not implemented as national law in Sweden) and thirdly the principle of non-retroactivity of criminal procedure. The Swedish Supreme Court decided against the plaintiff, holding that the Sweidhs commitment under EU-law in general (i.e. not the supranational pillars) precluded the application of the EAW. The EAW was obviously incorporated into Swedish law, and it is not necessarily the case that it would have raised any constitutional issues, it is likewise reasonable to think that the issue at stake, the retroactive change of statutes of limitations, would have passed review of the EctHR, and hence been consistent with Swedish international obligations as well as Swedish constitutional law as set out in 2:23 1974 Instrument of Government. However, the basis for the decision of the Supreme Court was the precedent which the EU-law takes within Swedish law.

5.8.2.1.5. Criminal procedural rights and the European Arrest Warrant

NJA 2009 s. 350 concerned the application of guarantees of legal certainty in relation to the EAW, more specifically the right in certain cases of suspects to be surrendered to other member states of the EU, to have the decision reviewed at a second occasion. In this case, the Supreme Court did not consider the constitutional protection of fundamental rights in the context of application of EAw, but limited itself to consider the procedural rights under Art. 6 ECHR as the relevant standard when it comes to application of the EAW. This approach is consistent with the general approach of Swedish final instance courts when it comes to constitutional protection in relation to application of EU-law. The issue of procedural protection as reduced to Art. 6 ECHR is not inconsistent with constitutional protection but it seems also clear that the approach of the Supreme Court in this context is quite reductionist.

5.8.2.1.6. The right to strike: fundamental freedoms versus fundamental rights

One of the recurrent problems related to protection of fundamental rights in relation to EC/EU-law in Swedish law has been the protection of the right to strike. 2:17 1974 Instrument of Government provided for protection of the right to strike, although it is

completely clear that the right is not absolute and that it may be restricted through statutory legislation or collective or individual agreements on the labour market.[194] The problem that has emerged in the context of EC/EU-law is that whereas the ECJ has recognised the right to strike, it is also clear that it is not a right which is strongly protected under EC/EU-law either. The conflict between national and EC/EU-law thus emerged on the issue of where the precise lines for the different lawful strikes (and the precise lines for the limitations of the right to strike should be drawn). The right to strike within the Swedish constitutional legal order is seen as a matter of a right in relation between the state and the striking, meaning that unless there are no other illegal acts involved, third-parties cannot have their rights violated by the mere existence of a strike as long as no agreement is in force. The central problem is versus the fundamental freedoms of EU-law are also said to have horizontal effect, i.e. if they are to provide for general restrictions for interaction between private individuals. The recurrent issue has been that various Swedish trade unions have systematically picketed employers in these cases, curtailing their access to goods, services and very basic things. In AD 99/2004 it was held that the trade unions were not prohibited from initiating picketing since many foreign employers refused to sign Swedish collective agreements.

In subsequent cases concerning the Latvian building company, Laval un Partneri the issue was whether the Labour Court could provide for an interim decision before the ECJ had replied to the request for a preliminary ruling.[195] The issue concerned whether there was a basis under EC-law ton restrict the right for trade unions to picket employers who did not enter into collective agreements with them. The Labour Court found that there was an interest in clarifying the legal issue but also that it would necessitate a request for preliminary ruling by the ECJ. The substantive issue was decided after preliminary reference to the ECJ in the case AD 89/2009. The company argued that there was a duty for the trade unions to abstain from picketing since there was no contract and there had not been any contract and that there was hence no basis for why the trade union should involve itself with the company in the first place. The trade union argued that despite that Latvian collective agreements had been signed, and despite that certain minimum conditions for remuneration, insurance etc were met, it was under no obligation to enter into such an agreement. The plaintiff company also argued that picketing actions which were legal in the absence of statutory prohibition and collective agreements violated Art. 43 and 49 EC-treaty. The Labour Court in its dictum concluded that

[194] Birgitta Nyström,
[195] AD 111/2004

the horizontal effect of Art. 43 and 49 EC-treaty was legally uncontested, and also expressed clearly by the ECJ in the case of Laval case (as well as in Viking Line case). Another issue was whether the plaintiff company had right to tort compensation for unlawful picketing. The Labour Court argued that the basis for such a tort claim would have to be founded on Art. 49 EC and found that there was such a liability on the part of the trade union on the basis of an analogy to national labour law.[196] Since this is partly a matter of private law, it may be argued that such analogies are not unknown in the field of private law. The trade union argued that whereas tort liability existed, it was a matter of liability of the Swedish government for not implementing EC/EU-law in a sufficiently effective way, whereas it would be unreasonable to impose tort liability on individuals. The Labour Court considered the issue from the standpoint of whether the regulation of EC/EU-law was sufficiently clear to make tort liability seen as sufficiently predictable to be imposed without preceding legislative support or without (national) judicial precedent. The formal requirement, namely that the right to strike can only be limited through legislation is also problematic in the context of EC/EU-law since the meaning of the decisions of ECJ in the Viking Line and Laval cases suggest that the limitations on the right to strike does not follow from legislation aimed at restricting the right to strike, but instead from the EC-treaty itself. As the ECJ noted in its dictum in the case of Viking Line, it is not contested that the right to strike is a part of the fundamental rights of the EU (inter alia protected under the EU Charter of Fundamental Rights as well as protected under the common constitutional traditions of the member states) but that the protection of fundamental freedoms under EC/EU-law, including the freedom of movement of workers should be balanced against that. The ECJ employed its traditional approach when it comes to conflicts between national and EC/EU law making a claim to supremacy of EC/EU-law over national law. It is worth noting that the Labour Court did not consider any national constitutional objections at all to the limitations on the right to strike set out by the ECJ. On the contrary, the legal issue of the legality of picketing was based solely on EC/EU-law and the issue which concerned the interpretation of the EC-treaty. The non-constitutional approach seems to be characteristic for how Swedish courts have, with certain exceptions acted quite consistently in the course of Swedish membership in the EU.

[196] The imposition of such a tort for violation of directly effective norms of the EC-treaty on the basis of analogy with Swedish law was not unknown in the case law of the Labour Court, it had been applied in AD 2002/45 as a basis for

5.8.2.1.2. Conclusions

If one should attempt to summarise, the very limited case-law when Swedish courts have found EC/EU-law (and national law implementing EC/EU-law) to violate fundamental rights, it seems clear that Swedish courts above all seek to reinterpret such rules in order to make them conform to protection of fundamental rights as expressed, in particular under ECHR, and if that is not possible, which is not always the case, they will generally accept the supremacy of EC-law, also in relation to protection of the fundamental rights in Swedish law. An important aspect is that the ECHR, rather than the Swedish IG is a minimum standard in relation to EC-law with regard fundamental rights. That is an approach which is interesting, since the ECHR has been regarded as one of the common constitutional traditions of the member states, and hence the focus on interpreting EC-law consistently with the ECHR, also provides a basis for upholding national rights in cases where a formalist approach to EC-law would have led to a different outcome. It is worth noting that whereas there have been cases, as discussed in this section where there have been conflicts between national (constitutional) law and EC/EU-law, it is clear that the Swedish courts have avoided in most cases to frame the conflict in such terms, and the basis for the judgements based on adaptation to EC/EU-law have either been direct application of EC-treaty, in particular where it has direct effect, and secondly, it has been using the technique of consistent interpretation to delimit the effects of such “prima facie” conflicts of norms. The use of consistent interpretation as the judicial technique par preferénce in order to harmonise Swedish law and EC/EU-law means also that the issue of hierarchy of norms has been avoided. It is clear that the avoidance of this “ultimate” question of hierarchy of norms is common too all Swedish final instance courts. The conclusion in that regard points to that the application of EC/EU-law (which is the international organisation to which powers have been delegated and where the Swedish final instance courts have had to apply secondary norms from that organisation) has not been under any particular constitutional limits. That does not change the fact that there has been considerable “passive” resistance of Swedish courts when it comes to application of European law in Sweden, in particular when it comes to the application of EC/EU-law. More generally, it seems to be a Swedish (and as discussed below, Scandinavian) bifurcation between judicial review on the basis of European law on one hand (including both the ECHR and the EC/EU/EEA-law) and on the other hand judicial review on the basis of national constitutional law. This means essentially that application of EC/EU-law in Swedish law has been independent of constitutional considerations.

5.8.2.2. Denmark

Despite that the Danish Supreme Court has reviewed certain in concreto claims of violations of constitutional rights and rights under the ECHR, it is also clear that the role of such in concreto review has remained limited.[197]

5.8.2.2.1. H.D. 2 April 1981, sag II 190/1980

This case concerned milk quotas of a dairy produces cooperative. The issue was whether restrictions on the quotas for dairy production should be understood as a matter of expropriation of a property right. The cases concerned regulations for dairy productions which were introduced due to risks of war and economic crises in order to ensure sufficient supply of dairy products. These regulations were in the process of being abolished, when Denmark joined the European Communities. The common agricultural policy of the EC made the transitional rules that were aimed at providing certain economic relief to farmer became illegal under EC-law. The changes were in this regard seen as The Danish Supreme Court did just uphold the decision of the Eastern Court of Appeal's judgment on the issue, and the central argument of the Court of Appeal was that it ultimately was a matter of balancing between individual property rights on one hand and on the other hand the legislative discretion of "general regulation of business/commercial activities" which, the court found to be more important. In this regard, the judgment reflected the traditionally limited role of protection of property rights as compared to regulatory powers.

5.8.2.2.2. UfR 1982 H.109

In December 1981, the Danish Supreme Court rejected an application which concerned an alleged expropriation without compensation. The plaintiff was a fishery and ship owning company which alleged that the reduction of quotas for fisheries in the North Sea, which were based on a directly applicable EC regulation of 18 February 1977, constituted an

[197] UfR 1982 H.109 (concerning restrictions on acquired rights of milk quotas in connection with transitional rules in connection with Danish accession to the EC) and UfR 2003 H.1328 (concerning alleged violations of the right to privacy under Danish law and the ECHR on the basis of EC competition norms). In neither case, the Danish Supreme Court found any violation of Danish constitutional norms, which seems to be characteristic for the role of EU-law in domestic Scandinavian law.

expropriation of property without compensation and which was hence also in violation of the clause protecting private property under the Danish Basic Law. The argument was not per se based on that the quotas constituted private property, but that the reduction of the quotas also rendered the ship, designed for commercial fishery, useless and without economic value. The case ultimately concerned the relation between individual rights and international delegation at two different levels, one which was related to whether a sufficient authorisation of international authorities (the European Commission) and the other whether the regulatory measures that it had adopted could be regarded as a matter of expropriation that could be a basis for compensation under Danish Basic Law. The Supreme Court found (with a far more cursory reasoning than the Eastern Court of Appeal that had decided the case firstly) that the measures were not expropriation and that the authorisation of the EC and international authorities following statute 210 of 19 May 1971 were sufficient. The conclusion was hardly surprising since it fell within the scope of what could be called ”regulatory takings” which has never enjoyed high protection in Scandinavian law. The Danish Supreme Court considered the issue in relation to earlier decisions relating to e.g. restrictions on use of land and zoning legislation and price control regulations must be said to fall within the regulatory powers of the legislator and hence it did not create a right for compensation for takings of property.[198] It should be noted that despite that it was a matter of an EC-regulation, the Danish Supreme Court in this case did not reject a substantive review of the issue. The view that the central issue for the Danish Supreme Court (as well as for the Court of Appeal) was a matter of balancing between protection of fundamental rights on one hand and on the other hand legislative discretion in choosing international cooperation.

5.8.2.2.3. UfR 2003 H.1328

The UfR 2003 H.1329 concerned – the not unfamiliar situation – of alleged violations of privacy of competition authorities, searching the premises of a company as well as private premises of the executives of that company. The argument was based on that it violated rights of privacy under the Danish Basic Law and the ECHR. The Danish Supreme Court rejected the argument and did not find any violation of neither the Basic Law nor the ECHR. The Danish Supreme Court limited itself to that Danish courts must ensure that there are sufficient reasons for the investigation, but that the assessment of whether the reasons are sufficient will

[198] U.1918.953 og U.1962.276

be based on EC-law. The Danish Supreme Court argued that the ECJ had already taken the ECHR sufficiently into account, and remarked only cursory that "there were no reasons to believe that the balancing between the competencies of the EC Commission and the right to not incriminate oneself, were contrary to national legal rules with the rank of basic law".[199] That approach of the Danish Supreme Court meant in effect that as far as there was sufficient legal protection of human rights under EC/EU-law, there would be no reason for Danish courts to consider the problems of human rights protection in relation to EC-law. It meant that, in a way which meant that human rights protection in relation to supranational law is dependent on a "global" review of the human rights protection of the EC/EU, rather than review on the basis of case by case basis. Christensen has argued that instead, the decision of the Danish Supreme Court must be understood as to include a possibility of review of secondary EC-law on the basis of protection of fundamental rights. Whereas that is not an unreasonable interpretation of the decision, it is still important to note that the Danish Supreme Court did not review the case itself, it argued that there was no basis to believe that the balancing between competing interests violated a fundamental rights, i.e. what it reviewed was the balancing of the EC authorities, not the particular case. [200] It should be noted that in most cases, the central problems have been related to regulation of business activities, which in most constitutional democracies has meant that legislators, whether national or supranational have been given wide discretion, and where the protection of fundamental rights to a great extent has been less extensive than what is otherwise usually the case. The Danish Supreme Court has not so far considered the European Arrest Warrant, but it has been reviewed by the Western Court of Appeals.[201] The Western Court of Appeals concluded is that since Lithuania the country to which the extradition/surrender should take place, had acceded to the ECHR. That was also the basis for why it, in the eyes of the Western Court of Appeals was no reason to believe that there was any reason to believe that violations of human rights would occur as a consequence of the extradition. The Western Court of Appeals did not find any such problems, on the contrary it concluded that there were neither problems from the perspective of legality in the particular case nor from the perspective of human rights protection more generally. This acceptance of implementation of EU-law seems to be relatively typical of the approach developed by the Western Court of Appeals, as has been discussed above been very open to the implementation of EC/EU-law in Danish law. Like the

[199] UfR 2003 H.1331.
[200] Ane Marie Røddick Christensen, *Judicial Accommodation of Human Rights* (Copenhagen, 2007) 96-97, 100.
[201] U.2006.7V (application of the European Arrest Warrant)

Swedish Supreme it did not make any distinction between the intergovernmental and supranational pillars under EC/EU-law (which at the time, prior to the entry of the Lisbon treaty were still relevant from the perspective of EC/EU-law).

4.8.2.3. Norway

There has never been any explicit constitutional conflict between EEA-law and Norwegian law, and in the case of non-constitutional conflicts, there has been a far-reaching acceptance of the role of EEA-law by Norwegian courts. There has been a case of Rt 2008 s. 1789 where the Norwegian Supreme Court explicitly equated considerations of the EEA-law with constitutional considerations in cases where other interests could be upheld insofar they did not conflict with constitutionally protected interests. That is however obviously the complete opposite of the conflict between national constitutional law and EC/EU or EEA-law.

5.8.2.4. Conclusions

The primacy of European law, also in relation to national constitutional norms, seems to be accepted if not explicitly theorized in the context of Scandinavian law. The technique to resolve the problems of conflicts is the use of consistent interpretation, where the least common normative denominator seems to be the ECHR. Hence means the role of national constitutional constraints which are not related to fundamental rights remains very limited in Scandinavian law. The focus on conflicts related to fundamental rights when it comes to constitutional conflicts between EC/EU/EEA-law in Scandinavia seems also to be characteristic for the relations between EC/EU/EEA-law and Scandinavian law. This also illustrates that despite criticisms of Scandinavian courts for insufficient implementation of European law, it is clear that whatever the merits of such criticisms, the limitations to implementation of EC/EU/EEA-law have not (with one exception mentioned above in Swedish law) been based on constitutional considerations within Scandinavian law, which also seems to be a major difference compared to the approach of national constitutional courts[202] as well as in relation to other final instance courts in Europe.[203]

[202] Carl Lebeck, "National constitutionalism, openness to international law and the pragmatic limits of European integration –European law from EEC to the PJCC in the German Constitutional Court" 7 *German Law Journal* 907-945 (2006)
[203] Monica Claes, Constitutionalizing Europe at its Source, YEL (2005)

5.9.1. Review of secondary European norms in national courts

The other aspect concerning constitutional conflicts which does not always concern primacy in the strict sense is whether national courts have claimed the power to invalidate secondary legislation, either directly or in relation to national measures of implementation. The issue of review of national measures of implementation has sometimes been a way to review EC/EU/EEA-measures indirectly (there are fewer options for that in relation to the ECHR since there is no secondary legislation in the strict sense to the ECHR). The Swedish final instance courts as well as the Danish Supreme Court have held that they are in principle able to declare secondary law (as well as EC/EU treaties) invalid, but that has never actually occurred. In relation to the ECHR, there has never been any such constitutional conflicts since the Scandinavian courts tend to accept the most extensive forms of human rights protection available, and since the ECHR on most points is more extensive when it comes to protection of human rights than are the Scandinavian constitutions the problem has not been very common. The common approach it seems of the Swedish final instance courts as well as of the Danish Supreme Court (the Norwegian Supreme Court has never actually had to review such a case) is either to determine in the light of national constitutional law whether there is a conflict prima facie and secondly whether there is a conflict in the light of consistent interpretation. Both Danish and Swedish courts have when it comes to the EC/EU-law tended to avoid finding actual conflicts. That has mainly been done on the basis that the ECHR has been regarded as a least common denominator when it comes to the degree of protection of fundamental rights required for EC/EU-law to be constitutionally acceptable. Another side of Danish and Swedish law seems to be that national courts understand national constitutional law in relation to EC/EU-law in a bifurcated way, where one matter concerns fundamental rights and another aspect concerns structural constitutional issues, and that constitutional conflicts effectively are seen to exist only in relation to the former. The primacy of EC/EU-law has never been formulated in any absolute terms, on the contrary it underlies the understanding of the role of EC/EU-law in Danish as well as Swedish law that EC/EU-law does not have any absolute primacy, and that is also the basis for the constitutional regulation, as well as for the judicial practice. However, that does not mean that national courts actually set aside EC/EU-law, but rather that both national legislation implementing EC/EU-law and judicial practices relies on the assumption that such derogations would be possible. It is worth noting that no Scandinavia court has regarded constitutional distinctions between different norms of EC/EU/EEA-law as constitutionally relevant from a domestic perspective, i.e. the

threshold is not per se different for reviewing or disapplying a judicial decision, an administrative decision, a regulation or directive or a treaty-provision.

5.9.2. Which national courts may strike down European law?

Another issue in relation to judicial review concerns whether lower national courts may review and disapply national law, or whether that kind of legal issues are centralised to supreme courts. Since neither of the Scandinavian countries have constitutional courts, constitutional conflicts between EC/EU/EEA-law and national law could in principle be settled by first instance courts. However, since constitutional conflicts between EC/EU/EEA-law are considered to be questions of law which are almost by definition without clear precedents, it is also the case that they are normally resolved by national supreme courts. In principle national judges are able to set aside national provisions, and in fields of law where there are precedents, lower court judges do so, but national courts tend to be more cautious when it comes to new cases of conflicts between national law and EC/EU-law.

5.10. Convergence between ECHR and EU-law in national law?

In national law there ahs traditionally been a relatively strict separation between the application of ECHR and the application of EC/EU/EEA-law, especially in terms of their formal rank. Is there then a trend of convergence between ECHR and EU-law in Scandinavian law? The question is difficult to answer, when it comes to the constitutional rank, there are abiding differences in Norway and Sweden but not in Denmark. At the level of judicial application, it is quite clear that in all the Scandinavian countries, both ECHR and EU/EEA-law has a position which is effectively superior to national statutory law, and as it seems, also to national constitutional law. In that regard one may say that there is a convergence in terms of normative rank, but it seems also to be the case that national court in cases of potential or actual conflicts between EU-law and ECHR tend to give priority to EU-law. There is convergence in the sense that both ECHR and EU-law tend to take precedence over national law and that both work as a substitute for constitutional judicial review. Formally there is no convergence, but practically there is certain convergence, and in both cases it seems possible

only because of the long tradition of "pragmatism" in relation to constitutional issues that is characteristic for the Scandinavian countries.[204]

There is a certain convergence also in the sense that the models of judicial reasoning when it comes to application of ECHR and EU-law in Scandinavia where the common denominator is to avoid the traditional monistic and dualistic approaches to international law to also concern European law. Instead, the national supreme courts have oscillated between an approach based on direct application and one based on "consistent interpretation". There are no clear principles for when to apply which approach, and the difference between them seems to be that consistent interpretation allows for some potential limits to applicability of European law on the basis of national legislation, but that it is also clear that these limits are left broadly undefined when consistent interpretation is used. A common feature of all the Scandinavian countries when it comes to consistent interpretation is that the meaning of the principle of presumption of consistency has transformed from being seen as a reason for judges to not exercise judicial review on the basis of international human rights law (or other treaty-based norms) it has now changed into an argument for why international human rights as interpreted under international law should be applied independently by judges to *ensure* such consistency. One may say that the presumed consistency has shifted character from being something that is actually there to something which is presumed as a norm that must be upheld by courts. The moves between direct applicability and consistent interpretation are however confined to ECHR and EC/EU/EEA-law, which also distinguish them from international law in general. The increasing distance in this regard between international law in general and European law is hardly atypical for countries involved in the process of European integration. However, in Scandinavian law is relies on the paradox that all countries regard EU/EEA-law from a formal perspective as only a matter of international law, which is clearly not the case insofar as one looks to the case law involving these legal orders.

6. European Law in Legal Scholarship

The treatment of the ECHR and EC/EU/EEA-law and their respective roles in national law in academic writings has shifted over time. It seems quite clear that there is a general assumption that the role of the ECHR is different from EC/EU/EEA-law when it comes to direct effect

[204] Jaako Huusa, "Nordic Constitutionalism and Human Rights – Mixing Oil and Water?", 55 *Sc.St.L.* (2010) 101-214, 120-122.

and applicability, since there is no view that the ECHR in and of itself has direct applicability, whereas that is the assumption when it comes to EC/EU-law, and "indirectly" a form of direct effect based on the need for homogeneity between EEA-law and EC/EU-law.

The transfer of sovereignty is generally regarded as more problematic in relation to the EC/EU/EEA than in relation to the ECHR, since the ECHR is seen as a far more limited form of transfer of sovereignty. The basis of that view has mainly been that the ECtHR (and the Council of Europe) does not possess independent law-making powers and that the judicial powers granted to the EctHR are more limited than what is the case in relation to the EC/EU/EEA-law where it is clear that the ECJ and EFTA-courts possess more extensive powers, and where it is also clear that the EEA-committee, although formally independent and possessing veto-powers against the EU, still is largely dependent on the EU for further legislation, and that its powers are essentially restricted to veto-powers in relation to EC/EU-law.

It is worth noting that despite that Scandinavian legislation as well as Scandinavian constitutional law presuppose that EC/EU/EEA-law is essentially at the same level as other norms of public international law, it is also clear that both judicial practice, as discussed above, and legal scholarship regards the EC/EU/EEA-law as distinct legal orders which have directly or indirectly direct effect within the national legal orders whereas the role of the ECHR is often seen as slightly more relative, and less immediately binding on national courts and national legislators. However, it is also the case that academic scholarship tend to regard the relation between national and international law in the Scandinavian countries from a dualist perspective, and regard the ECHR and EC/EU/EEA-law, essentially as exceptions to that. However, they are also seen as different in the sense that their primacy is generally recognized, despite the potential conflicts of that. It is worth noting that the relation between EC/EU/EEA-law has been regarded as relatively unproblematic in terms of constitutional judicial review and calls for national judicial control of EC/EU/EEA-law has been very limited. Instead, the focus has been almost exclusively on the need for effective judicial implementation of the EC/EU/EEA-law, and the focus on the effectiveness of the ECHR. To some extent that may be said to reflect the weak national constitutional culture within Scandinavian law.

7. Conclusions: between consistent interpretation, direct application and constitutionalisation

The "Europeanisation" of Scandinavian law and the increasing role of international organisations, the harmonisation of human rights protection through the ECHR and the harmonisation of economic regulation in the EU (either through membership or through the EEA), the increasing role of international courts, both the EctHR, the ECJ and the EFTA-court has affected all the Scandinavian countries. It has meant that the very strong role of national legislators has became more relative and that national courts take into account what is effectively precedents from international tribunals and legislation from international organisations more generally. However, it is also clear that the role of European law in this broad sense within Scandinavian countries relies less on formal features than on a substantive assumptions of legitimacy within the domestic legal orders, and that these understandings of legitimacy also are necessary to conceptualise the role of European law in domestic law in the Scandinavian countries.

7.1. Between consistent interpretation and direct application

As can be seen from the case law of the final instance courts of the Scandinavian legal orders, it is clear that the approach to European law can be characterised as a mix of direct application and consistent interpretation, whereas the practical effects of constitutionalisation within the context of Scandinavian law seems to have had limited effects in relation to the application of European law. When it comes to the approaxches both to EC/EU/EEA-law and ECHR there has been a mix of consistent interpretation and cases where national courts have directly substituted national law with the ECHR (although that is less common since it is for practical reasons often very difficult as the ECHR does usually not provide for practical solutions to all legal problems involved, as it is rather designed to create "side-constraints" to the exercise of public authority. It has been pointed to that there are slightly varying approaches between the Scandinavian countries, where it has been argued that Swedish courts are more attuned to effective implementation of European law whereas Norwegian and Danish supreme courts are more focused on retaining national judicial supremacy as a mean to uphold the integrity and normative hierarchy of the national legal orders. As discussed above that appears to be an exaggeration, it seems rather as if the relation between national law and European law in all the Scandinavian countries is marked by a relatively extensive,

but not unlimited practice of consistent interpretation, and relatively few constitutional constraints when it comes to giving effect to both EC/EU/EEA-law and the ECHR. The tendency towards convergence of application of ECHR and EC/EU/EEA-law seems also to point to a kind of domestic constitutional change, where European law becomes an increasingly integrated part of the national legal orders.[205] That means also that EC/EU/EEA-law becomes increasingly regarded not as "foreign" or "international" legal orders but as a part of the domestic legal order.[206] The increasingly central role of both the ECHR and EC/EU/EEA-law means also that traditional notions about the appropriate reach of international law within domestic law either may become unworkable, or generate legal uncertainty rather than legal certainty. That is an effect, not just of changing hierarchies of norms within national legal orders, but rather as it seems responses to changing practices of legislation where an increasing part of legislation which regulates central fields in society are made within the framework of EC/EU/EEA-law.[207] To some extent that may also be described as a more general tendency of "transnationalisation" of law, where consistent interpretation and other forms of mutual adaptation between legal orders which are mutually dependent for their functional effectiveness but independence for their internal processes of law-making, adjudication, executive action and for their different mechanisms of accountability. The dilemma in that regard seems to be that the acceptance of the mutual need for normative homogeneity and effective regulation seems to be the "constitutional" principle that underlies the mutual adaptations between national courts and the European courts. The limits to that mutual adaptation, as discussed seem to be certain considerations of *ordre public* and protection of fundamental rights as expressed in the ECHR. The standard of human rights protection as stated in the ECHR is also as mentioned above a least common denominator both for national legal orders and for EC/EU/EEA-law, although there are sometimes divergent interpretations of what that standard entails, between national courts, the EctHR, the ECJ and the EFTA-court.

7.2.Deformalisation

[205] Andreas Føllesdal, "Why International Human Rights Judicial Review might be Democratically Legitimate", 52 *Sc. St. L.* (2007) 103
[206] Inger-Johanne Sand, "From National Sovereignty to International and Global Cooperation: The Changing Context and Challenges of Constitutional Law in a Global Society", 52 *Sc. St. L.* (2007) 273, 276-278.
[207] Sand (2007) 287-289.

A common part of the legal development associated with the Europeanisation of law, is also a certain degree of deformalisation of sources of law, as well as an increasing role of different international organisations having legislative as well as adjudicative competencies.[208] The deformalisation is not the same as that law in all respects becomes less predictable, on the contrary it seems clear that predictability in the sense that it should be possible for individuals to determine the legal effects of her acts should in principle not be lowered. However, it is clear that the formalisation of sources of law as well as the formalisation of practices of law-making within the framework of national constitutionalism has changed the conditions for legislation as well as adjudication within national law.

7.3. Fundamental rights as a least common denominator

The kind of constraints that are relevant when it comes to consistent interpretation are primarily related to normative criteria related to legal certainty for individuals (in a broad sense) although it is also clear that they may have greater or lesser weight, where it seems clear that considerations of individual legal certainty are greater in relation to implementation of the ECHR than in relation to EC/EU/EEA-law.[209] To some extent that must however be said to reflect the different approaches of the European Court of Human Rights and the ECJ/EFTA-court respectively. However, the increasing legal integration also creates tensions within the traditional "liberal" solution to consistent interpretation which is reflected in adjudication of national law, where national supreme courts have extended the role of state liability but limited private liability in relation to international law. The development within both EC/EU/EEA-law and the increasing tendency of intervening within private legal relationships of the EctHR however will probably put increasing strains upon this solution. The role of fundamental rights protection in the view of the deformalisation means also that it is above all the substantive protection of fundamental rights that appears to be the least common denominator of national constitutionalism, European law and European human rights law.

[208] Fenger (2004), Reichel (2006)

[209] When it comes to protection of individual legal expectations, both the Norwegian Supreme Court in Finanger II and the Swedish Supreme Court in NJA 2004 s. 662, has held that the EEA-agreement may create a basis for individual tort claims against the state for misimplementation of EEA-law, despite that it is not formally required under the EEA (unlike what is the case in EC-law), where the argument was a combination of effectiveness of the EEA and protection of individual legitimate expectations.

74. Protection of rights and judicial deference: limits to effects and limits to limits of effect of supranational law

A common problem which seems to be illustrated in relation to the role of implementation of European law is the way the joint responsibility of implementation of European law within national legal orders also challenge the traditional understanding of separation of powers. A common problem which may be found in the case law in all the Scandinavian legal orders is the balancing of national courts between effective implementation of European law on one hand, and on the other hand, the need to maintain domestic principles of separation of powers and judicial deference. In all the Scandinavian countries, it si clear that the ECHR has a special role within the domestic legal orders although with varying constitutional ranks), and it is also clear that the main part of the responsibility for implementing the ECHR within the national legal order lies with the legislator. The dilemma in that regard is that in cases where national legislators are reluctant to implement EC/EU-law or the ECHR in an effective manner within the domestic legal order, it also becomes difficult to uphold European law within domestic law. There are as it seems from Scandinavian practice in this regard, two major constraints, one which concerns the role of the courts in relation to the legislators and on the other hand the limit that courts cannot apply the ECHR in ways which would limit the rights and freedoms of others (in particular they cannot impose criminal sanctions which is sometimes required under the ECHR because of the requirement of the principle of legality under Art. 7 ECHR).[210] This limitation is central, but it also means that there are certain limitations on the effectiveness of the ECHR which are imposed by national constitutional principles of separation of powers and other human rights jointly. There are hence also European law and constitutional limits to the effects of European law within national law. To some extent that is also determined by that there are institutional limits to the capacities of courts in terms of agenda-setting, scope of decision-making powers, the kind of decisions that may be adopted within the scope of a particular decision. These limitations are obviously also relevant for national courts within Scandinavian law, although it is not obvious that they are to be understood as outcomes of any particular constitutional vision of the role of courts, national or transnational law. As stated above, it is also clear that the view of national courts that the main responsibility to ensure the implementation of ECHR within domestic law falls

[210] NJA 2008 s 946

on the courts may have quite different effects in different fields of law, and it seems as if that to some extent is also reflected in policy-considerations of national courts.

The situation is however partly different with regard to EC-law since it is clear that the EC/EU/EEA-law, unlike what is the case of the ECHR are all linked to institutions that include legislative bodies and which hence are also able to develop legislation in a way which is not dependent on that national legislators enforce all aspects of supranational law within the domestic legal orders themselves. That is also a major difference which is central when it comes to analysing the different kinds of European supranational law and their different roles within domestic law.

7.5. New hierarchies – after all?

To a certain extent it is a truism to state that there are new hierarchies of norms in thecontext of implementation of European law within national law, the creation of the EU-law (and indirectly also EEA-law) and the ECHR was after all aimed at creating new institutional structures, which would also have legislative, adjudicative and (albeit to a lesser extent) executive institutions. However, since the formal rank and the role of these norms in the domestic legal orders was never harmonised their application was to a great extent left to national authorities and ultimately to national courts, which also meant that the development was less straightforward than what could be expected.

Whereas as stated above there is a trend of deformalisation in the sense that the trasitional distinctions between different kinds of sources of law, as well as between different kinds of norms and the different roles of national and international law-making, in all these regards it is clear that the deformalisation thesis when it comes to the integration of European norms within national legal orders appear to be correct. However, it seems also as if, for practical reasons, there is also an emergence of new hierarchies of norms, where EC/EU/EEA-law becomes the for practical purposes, if not necessarily in formal terms, the highest ranking norms that courts are supposed to interpret, whereas the precedence of EC/EU/EEA-law is central in most of the case law of all the national courts discussed. That means also that the practical meaning of primacy of European law becomes less uncertain: the primacy seems to mean that in relation to conflicts with national law, EC/EU/EEA-law normally takes precedence within Scandinavian law, also in cases of conflicts with constitutional norms, in

relation to the ECHR, it seems to be the case that the ECHR normally takes precedence in conflicts with other norms at least if the ECHR is sufficiently clear, and it seems to be that in cases between ECHR and EC/EU/EEA-law, courts usually defer to the interpretation of the obligations of the ECHR as developed by the ECJ. The deformalisation of sources of law that seems to be an integrated part of the application of EC/EU/EEA-law (as well as to some extent ECHR) within domestic law, seems however not to led to much of uncertainty in the sense that national courts tend to treat (with certain exceptions), EC/EU/EEA-law as on par with domestic constitutional norms, and in cases where EC/EU/EEA-law does not violate the ECHR, it appears normally to be considered as above the constitutional rank of domestic norms. The effect of this seems to be that the Europeanisation of national law, although upsetting traditional normative and institutional hierarchies, still tend to recreate hierarchies of norms, that substitute the hierarchies of norms of traditional national legal orders. This does not eliminate all forms of uncertainties, but it seems to be the case that when there is a sufficient degree of certainty of the meaning of European and national norms, European norms will take precedent in a situation of conflicts.