THE SWEDISH EXPERIENCE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS SINCE INCORPORATION

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I. INTRODUCTION

THE Swedish statute incorporating the European Convention on Human Rights (hereafter "the Convention") entered into force on 1 January 1995.[1] The present article will look at what can loosely be termed the constitutional issues raised by incorporation of the Convention into Swedish law. One of the most interesting features of the Convention, like EC law, is that it is a separate, autonomous system of law which nonetheless, with incorporation, becomes a part of the national legal system. As such it cuts across national legal categorisations. But it is also an incomplete system. Convention issues can arise under national law which have not (yet) arisen in the context of the Convention system. Thus, studying the case law of other jurisdictions dealing with the Convention can be of immediate benefit to one's own system, even leaving aside the long-term, indirect benefit to be gained by studying comparative constitutional law in general. While the main focus of the article is directed at explaining the Swedish system for English-speaking readers, I will also draw some parallels with the British legislation incorporating the Convention.[2] Many questions remain regarding the likely impact of the Convention on British law. In time, the courts and Parliament will provide an answer to these. In the meantime, British lawyers can usefully study other jurisdictions. For a variety of reasons the Swedish system is in this respect likely to be of interest to British public lawyers. While the political histories of the two States have differed considerably, both have a strong attachment to parliamentary democracy. In both States the parties which have dominated government have tended

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1. Lag (1994:1219) om den europeiska konventionen angående skydd för de mänskliga rättigheterna och de grundläggande friheterna (Act on the European Convention on Human Rights). The law (and the accompanying amendment to the Instrument of Government, *Regeringsformen*, hereafter RF) entered into force on 1 Jan. 1995. The law has been amended recently, with the incorporation of Protocol 11 (1998: 712). Possible conflicts are between the law which incorporates the Convention and another Swedish norm, not between the Convention as such and a Swedish norm. For the sake of simplicity, however, I will refer simply to the "Convention".

2. I will not attempt to look at the British bill as such. See the special issue of the E.H.L.R. 1997, devoted to the incorporation issue. See further C. Gearty, "Human Rights in Practice: Some Preliminary Reflections on the Government's Human Rights Bill", in G. Anderson, *Rights and Democracy in Canada and the UK* (1998).

to stress the "self-vaccinating" function of periodic elections as regards risks of abuse of power, and to play down the need for constitutional protection of rights. Both States steadfastly refused for many years to incorporate the Convention, mainly out of a fear that this would result in a shift of power to the courts and thus impede "strong government".

Before looking at the issues, a terminological point should be made. I am writing in English on Swedish law primarily for an English-speaking group of readers. However, there is little or no Swedish writing on the subjects dealt with in this article so it can also be assumed to be of interest for readers in the Nordic States. Translations are my own unless otherwise noted. As regards citation, references to the Swedish statute book (*Svensk författningssamling*, SFS) are by year followed by the relevant number. When I refer to the constitutional document, the Instrument of Government, I use the Swedish abbreviation, RF (*Regeringsformen*) followed by the chapter and section number (e.g. RF 11:14). Cases from the Supreme Court are cited from the semi-official series, *Nytt juridisk arkiv* (N.J.A.), cases from the courts of appeal, from the official series *Rättsfall från hovrätterna* (R.H.), cases from the Labour Court from the official series *Arbetsdomstolens domar* (A.D.) and cases from the Supreme Administrative Court from the official series *Regeringsrättens årsbok*, R.Å.[3] References to *travaux préparatoires* are either to the number of the commission responsible for investigating the law, *Statens offentliga utredningar (SOU)* and the year of its report, or the draft bill put before Parliament together with its accompanying documentation (*proposition*, prop.) or the report of the Parliamentary Committee on the Constitution on the bill (KU).

II. THE CASES

UP to the time of writing September 1998) there have been 58 published cases in which the Convention was a significant issue, although in a large number of these it was still of secondary importance and only cursorily examined.[4] The published cases can give indications of the impact the Convention is having on the ways in which judges and advocates think, but obviously cannot give more than a vague idea of the extent to which the human rights laid down in the Convention are actually being respected in Sweden. It is not possible to determine the extent of the "dark figure", namely cases in which the Convention could have been relevant, or even decisive, to the judgment, but where the parties or the court failed to take it up (notwithstanding the principle *jura novit curiae* which generally applies in Swedish procedural law). Nor, as regards comparative studies,

3. Supreme Administrative Court cases regarded as more important are found in the reference (ref.) section, others in the note section.

4. In addition to these, there were a number of cases dealing with the lack of an oral hearing.

can much be read into the fact that courts in other States might have quoted Convention case law in areas where Swedish courts have not. Obviously the extent to which a court is willing or able to rely on Convention case law will depend on a number of factors, in particular the adequacy of the national system of protection of human rights and the ease (in law and fact) with which the courts are able to engage in constitutional review. Where Swedish law already fulfils, or even goes further than, the requirements of the Convention, only Swedish law need, and probably will, be cited.[5]

The cases cover a large number of different issues, in different areas of law. In family law, the issues have arisen of standing to challenge a decision on paternity and an administrative decision fixing the place of residence of children. In criminal law, issues have arisen of anonymous or absent witnesses, use of video evidence, disqualification of judges, reopening of a trial held to be unfair and exceptional powers to investigate tax crime. In company law, issues have arisen of access to a court to challenge a decision on liquidation and the effectiveness of judicial remedies. In administrative law, issues have arisen concerning deportation, compulsory detention of mental patients, access to a court to challenge administrative decisions and payment of church tax. In addition, there has been a number of cases concerning the right to an oral hearing in administrative cases. In civil law generally issues have arisen regarding fair trial in a tort case, the proportionality of planning and expropriation decisions and regarding standing to challenge such decisions. In labour law, issues have arisen of disqualification of judges, freedom of association, the *Drittwurkung* of the Convention and denial of access to a court by means of an arbitration clause. As a survey of this case law is rather lengthy, and as my concern in the present article is what could be described as the "constitutional" issues, I will not go through all these cases, but only those relevant to the present subject.[6]

III. THE CONSTITUTIONAL STATUS OF THE CONVENTION AND THE COMPETENCE TO RULE ON CONVENTION BREACHES

I will not deal with the history of the Convention in Swedish law before incorporation, or with the incorporation debate (such as it was).[7] Nor will I deal with the general system of protection of constitutional rights in Sweden.[8] I have already dealt with these subjects elsewhere. It is, however,

5. E.g. extradition/deportation cases concerning refusal to deport because of a family connection, N.J.A. 1996, s.365 and N.J.A. 1997, s.172.

6. I make a complete survey in "Swedish Case Law on the ECHR Since Incorporation, and the Question of Remedies", in I. Cameron and A. Simoni (Eds), *Dealing with Integration*, Vol.2 (1998).

7. See I. Cameron, "Sweden", in C. Gearty (Ed.), *European Civil Rights and Civil Liberties* (1997).

8. See I. Cameron, "The Protection of Constitutional Rights in Sweden" (1997) P.L. 488.

necessary to say something about the constitutional status of the Convention in Sweden as compared to the United Kingdom.

Unlike the United Kingdom, Sweden chose to incorporate the whole Convention, and its protocols, rather than simply the substantive rights and the general limitation provisions.[9] There is little explanation for this in the *travaux préparatoires*. The main reason appears to have been that the other Nordic States had incorporated the whole treaty or were planning to do so.[10] In practice there ought to be little difference between incorporating the whole Convention or the "operative" part of it, although the former method gives rise to the interesting question as to whether the incorporation of the "just satisfaction" requirement in Article 41 (ex Article 50) provides Swedish courts with the necessary procedural competence to award damages where the plaintiff's Convention rights have been breached.[11]

The incorporation law provides that the Convention is to have the status of an ordinary statute. The problem with this was obvious: this statute could come into conflict with other statutes. Accordingly, a provision was also added to the Constitution (RF 2:23) which lays down that "a law or other regulation shall not be issued in conflict with Sweden's obligations under [the Convention]". The British discussion as to whether or not a Parliament can bind its successors, procedurally or substantively, is not relevant to Sweden, which has a written constitution and, naturally, a procedure for amendment of it. On the other hand, the rule in RF 2:23 was still regarded as controversial as it opens the way for a judicial encroachment on Parliament's freedom to manoeuvre, which is, if anything, even more jealously guarded in Sweden than in the United Kingdom. Thus, the constitutional amendment was the subject of protracted discussions between the political parties. This is evident from the *travaux préparatoires* to the act of incorporation. I should note here that, in contrast to the position in the United Kingdom, the *travaux préparatoires* to legislation are taken very seriously by the courts. This is particularly unfortunate in this case, as the *travaux préparatoires* to the act of incorporation, being political compromises, are, on occasion, positively Delphic. Every comma was the subject of debate between the political parties. By the time the bill was formally introduced to Parliament, there was no room for changing anything in it. One thing was, however, made abundantly clear, namely that the rule in RF 2:23 was to be used sparingly, as a last resort. The courts were encouraged instead to solve the problem of possible conflicts with

9. Section 1 of the Human Rights Act 1988 ("the Act") refers to Arts.2–18 and Arts.1–3 of Protocol 1 and Art.1 and 2 of Protocol 6. Unlike the UK, Sweden has ratified all the protocols to the Convention providing for additional substantive rights.

10. SOU 1993:40, p.126.

11. This is too large an issue to deal with in the present essay. See Cameron, *op. cit. supra* n.6.

other Swedish norms by the application of certain principles of interpretation. These were named as *lex specialis*, *lex posterior*, the principle of "treaty conform" construction and a rather novel variant of it proposed by the Supreme Court when commenting on the legislative proposal, namely the principle that "human rights treaties should be given special significance in the event of a conflict with other norms".

There has been some discussion in doctrine as to the scope of the duty to engage in constitutional review and the sequence and extent of the interpretative operations to be performed before resort is made to it. This will be discussed further below. One point, however, should be noted here. RF 2:23 does not, as such, give the Convention constitutional status. Nor does it create a new category of laws midway between the Constitution and ordinary laws. Instead, it means that a law or other regulation which conflicts with the Convention also conflicts with the Constitution. As with all such conflicts, the normal restrictions in RF 11:14 apply to the power of the courts to engage in constitutional review.[12] This means that the courts, and administrative agencies, must refuse to apply legislation or subordinate legislation which conflicts with the Convention, although where it is a statute or a government ordinance which allegedly breaches the Convention, then the conflict with it must be "manifest". Accordingly, statutes or ordinances which conflict with the Convention but do not manifestly conflict with it should thus be applied. No restriction applies to constitutional review of rules lower down in the hierarchy of norms, i.e. regulations promulgated by administrative agencies or local authorities.

Thus, as regards the constitutional status of the Convention, there are a number of obvious differences between the Swedish and British systems. In the British system the principle of parliamentary sovereignty is (fairly) intact.[13] The superior status of the Convention is instead protected in other ways. In the Swedish system there is an explicit acceptance of the *lex superior* principle. There is also an explicit difference as regards the scope of the bodies empowered to rule on the compatibility of the incorporated Convention with other national law. In Britain, as in Sweden, all "public bodies" are obliged to follow the Convention. But in Britain only the superior courts may rule that there is an incompatibility between the Convention and another national law. Whereas all legal systems recognising constitutional review have their own variants of it, it is possible to systematise these using a number of broad categories.[14] The British system could

12. See further Cameron, *op. cit. supra* n.8, at pp.502–512.

13. I make the usual reservations for EC law, post-*Factortame* and, as a Scots lawyer, for the Treaty of Union.

14. On constitutional review see e.g. E. McWhinney, *Supreme Courts and Judicial Lawmaking* (1985), C. Landfried (Ed.), *Constitutional Review and Legislation: An International Comparison* (1988), A. R. Brewer-Carías, *Judicial Review in Comparative Law* (1989) and D. M. Beatty (Ed.), *Human Rights and Judicial Review* (1994). My way of categorising constitutional review follows that of Brewer-Carías, *idem*, pp.91–92.

be said to be something of a hybrid, in that it is a diffuse, rather than concentrated, system of review (all the higher courts may rule on incompatibility). It is also "concrete" review, in that it can apply only as a result of an actual dispute regarding the application of law between two parties, not indirectly where no concrete dispute has yet arisen but someone or some institution wishes to challenge the legality of legislation or draft legislation ("abstract"). On the other hand, unlike other diffuse systems allowing only concrete review, such as the United States, Canada, Norway or, for that matter, Sweden, the ruling of the court that a breach of rights has occurred is not determinative *in casu et inter partes* but, rather, declarative.

In Sweden, unlike the United Kingdom, all courts *and administrative agencies* are in principle obliged to refuse to apply a norm which conflicts with the Convention. Thus, it is an extreme diffuse system. On the other hand, unlike in Britain, there is a major material restriction on the power of an administrative agency or court, even the highest courts, to refuse to apply a statute or ordinance, namely that it must manifestly breach the Convention. It should also be pointed out here that the effect of constitutional review of statutes or ordinances in the Swedish system—in the very rare cases where it has occurred—is that the inferior norm is set aside only in the case at issue. It does not lapse as such. As such, while the ruling determines the issue between the parties, the impugned norm continues to be formally valid. Moreover, in practice, only the higher Swedish courts have the confidence to challenge the validity of a statute or ordinance. Thus, in practice, the differences between the effects of a British and Swedish court ruling are not as large as they appear, and a declaration of incompatibility is not as weak or unsatisfactory a remedy as it might first have seemed.

Finally in this section, the point can be made that the Convention must be understood from the case law of the Commission and the Court. Section 2 of the British Act expressly recognises this in that courts and tribunals are explicitly required to have regard to the Convention *acquis*, at present over 500 court cases and (gulp) over 30,000 Commission admissibility decisions. There is no such requirement in the Swedish statute. On the other hand, such a requirement is made clear in the *travaux préparatoires* to the act of incorporation.[15] Bearing in mind the great significance accorded to the *travaux préparatoires* to legislation in Sweden, more or less the same result is achieved.

15. Prop. 1993/94: 117, s.37. See also Ds 1997:25, s.49, produced as a result of the *Holm* case (*infra* n.35) where it is stated that ECtHR cases are a source of law to be applied by the Swedish courts.

IV. COEXISTING RIGHTS CATALOGUES

ANOTHER significant difference between the United Kingdom and Sweden is that Sweden has a separate system of protection of constitutional rights. Indeed, it has two systems of protection in addition to that of the Convention. First, there is the catalogue of rights set out in Chapter 2 of the Instrument of Government and, second, there is the constitutional protection of the printed media (the Freedom of the Press Act, Tryckfrihetsförordningen, TF) and the electronic media (the Freedom of Expression Act, Yttrandefrihetsgrundlag, YGL). The latter two Acts are *lex specialis* in relation to the former. The existence of a separate system of protection of constitutional rights is obviously in line with the subsidiary nature of the Convention (Article 53, ex Article 60). Indeed, viewed from this perspective, it is rather strange to have a "fallback" or "lowest common denominator" human rights treaty as the only human rights statute in national law of general application. One of the obvious difficulties with such an approach is that there is no "appeal" to Strasbourg if the British courts in fact go beyond the requirements of the Convention.

A dual system of rights protection can have implications for the willingness of the courts to interpret the Convention dynamically. There may be less need to stretch the wording of the Convention, or "anticipate" the Strasbourg case law, a point examined further below.[16] It should also be recognised that there are bound to be problems when the same system contains different constitutional rights catalogues, overlapping with one another. These were played down in the Swedish *travaux préparatoires*, which stated simply that the highest common denominator of protection for the individual should apply.[17] But while this is obviously the correct general approach, the issue is complicated by the fact that rights often involve balancing individuals' interests against each other, not simply against State interests, e.g. the interest in freedom of expression and the interest in not being defamed. Different rights catalogues can prioritise among interests in different ways, either by formulating the rights differently or through case law. For example, the right to freedom of religion in RF Chapter 2 section 1 p.1, is absolute, meaning no restrictions to it are permissible. This in turn entails defining its content (the protected area) in a very narrow fashion. For a male Sikh, the wearing of a turban is an important part of his religion. For an orthodox Jew or Muslim, it is important to be able to eat meat from animals killed in a particular way. According to Swedish doctrine, neither of these ways of manifesting religion falls under section 1 p. 1.[18] On the other hand, they do fall in under Article 9(1)

16. See *infra* Section VIII.B.
17. Prop. 1993/94:117, s.37.
18. See e.g. H. Strömberg, "Hädiska tanker om religionsfrihet", in *Rättsfonden, Om våra rättigheter* (1980).

and so restrictions on them have to be justified under Article 9(2).[19] The methodology the courts apply to approaching rights issues can also vary. For example, the Swedish courts and the Convention organs have dealt very differently with the concept of what is a "restriction" on human rights.[20]

V. CONVENTION MONITORING AND PREVENTIVE (LEGISLATIVE) CONTROL

As already mentioned, the Swedish legislator accepted constitutional review against the Convention only very reluctantly. It was repeatedly stated in the *travaux préparatoires* that the primary responsibility for ensuring compliance with the Convention was with the legislator. It might, then, have been expected that steps would be taken to ensure that legislation, and subordinate legislation, which raises issues under the Convention is not passed without first having undergone expert scrutiny. This is not the case. On the other hand, the normal legislative process, being long and rather open, ought to identify potential breaches. Put very briefly, the legislative process usually begins with a directive to a committee, consisting either of MPs or of civil servants, to investigate the need for new legislation. Committees dealing with legal questions are often assisted by, or even led by, external experts (e.g. academic lawyers). After the committee has reported, an opportunity is usually given for a cross-section of interest groups (often including the law faculties) to comment upon the merits of proposals before these are laid before Parliament. The government then decides whether to propose legislation. If it does so, the relevant government department drafts a proposal. About 50 per cent of all proposals are sent to the Law Council, a group of prominent lawyers, mainly serving or retired judges from the highest courts. The Law Council comments on the technical aspects of the bill, although it occasionally makes (guarded) criticism of the substance of it. The proposal is then submitted to Parliament and considered by the relevant parliamentary standing committee. This committee then submits a report to Parliament. The composition of this standing committee reflects the composition of Parliament as a whole so it is seldom that the vote in Parliament goes against the proposal of the committee.

It can be seen from this very brief description of the Swedish legislative process that there are several points at which critical voices can be heard.

19. I would, however, argue that wearing a turban is a form of religious freedom of expression, and so protected by RF 2: 1 p.1. Certainly if wearing a swastika badge or armband is a means of expression (N.J.A.1996, s.577), then so too is wearing a turban.

20. I will not repeat the criticism I have made elsewhere of the narrow approach taken in the *travaux préparatoires* to the RF and in some case law. See Cameron, *op. cit. supra* n.8, at pp.504–505.

The first of these is at the investigative stage. In this context one can point out that one of the standard directions to a committee is to consider in what way, if any, the changes it may propose are compatible with the Constitution. As already mentioned, the Convention as such does not have constitutional status. There is thus no general requirement for a committee to take it into account, although naturally the specific directive it receives may require it to do so. Another important stage is the scrutiny of the law faculties. A further safeguard is the Law Council. A brief survey of the minutes of Law Council meetings during a four month period in 1997 disclosed several proposals in which the Law Council drew the attention of the government to possible difficulties relating to the Convention. In each case the Law Council contented itself with references to the Convention itself, rather than the case law of the European Court of Human Rights. It should be noted here that the Law Council has no legal assistants and its membership changes every two years. The competence of the Law Council in the field of the Convention thus depends wholly upon the knowledge the individual members have of it. Thus, it is by no means a totally reliable safeguard. A third, and last, stage at which Convention issues can be raised is in the parliamentary committee which scrutinises the bill. Proposals relating to the Constitution are sent to the Committee of the Constitution. Other committees can also refer a proposal to it for commentary. This Committee has a small legal staff which is capable of making its own investigations. Independent investigations occur relatively rarely but a recent example where it happened was regarding a legislative proposal to close a nuclear power station. The political opposition, *inter alia*, raised the issue of the compatibility of this measure with Article 1, Protocol 1, particularly whether it could be said to be "in the public interest".[21] The legal staff of the Committee on the Constitution, however, are not experts on the Convention.

One weakness of the Swedish system is that there is no mechanism for monitoring new Strasbourg case law concerning other States. All the cases are copied from the Foreign Office to the Department of Justice (and both have, in any event, access to the new cases on the internet) but there is no group, or person, in the latter given the job of checking whether a new case causes problems for Swedish law. Having said this, there is no centralised monitoring of the case law of the European Court of Justice either. The procedural law and constitutional law units of the Department of Justice have most experience of dealing with the Convention and can, hopefully, be relied upon to pick up on the important Convention cases and initiate a directive to a committee to enquire into the matter. This has occurred

21. Prop. 1996/97:22.

before, e.g. regarding the implications of the *Funcke* case for Swedish tax investigations.[22]

Lastly as regards preventive control, a few words should be said about administrative agencies' knowledge, or lack of it, regarding the Convention when they engage in rule-making and adjudication. I made a brief informal survey of some of those agencies which are most likely to come into contact with Convention issues: the National Courts Administration, the Chief State Prosecutor, the National Board of Health and Welfare, the Ombudsman and the Chancellor of Justice. The Ombudsman is responsible, *inter alia*, for monitoring the administration on behalf of the Parliament, the Chancellor of Justice, for monitoring it on behalf of the government. Of these bodies, it is the courts and the Ombudsman which have most contact with Convention issues.[23] Only the National Courts Administration had organised an internal course on the Convention. No agency had a centrally placed person, or group, with Convention monitoring as their special responsibility. None of the people I spoke to considered that the level of Convention questions their agency faced in its daily work justified a specialist person or body. The work of all the above agencies is divided into different subject areas and each has only a small centralised co-ordination body, so it would admittedly be difficult to build in a meaningful centralised Convention monitoring function.

VI. *DRITTWURKUNG*

ONE of the interesting issues in the United Kingdom is the question of *Drittwurkung*, i.e. horizontal effect of the Convention between individuals. The requirement in Section 6 of the Act that all "public bodies" have regard to the Convention can involve them in applying the Convention in adjudicating disputes between individuals. There is some Convention case law on the subject of which bodies are part of the "State", totally, or for certain defined purposes. Obviously, in the 1990s, many functions of the State have been privatised. The Convention organs appear, correctly, to have taken the view that it would be formalistic to deny the safeguards of the Convention to these bodies when they are exercising public power.[24] As with EC law, however, new difficulties arise in drawing conceptually satisfactory boundary lines between wholly private bodies and partly public bodies. Nonetheless, the question of whether the Convention should

22. *Funke* v. *France*, 25 Feb. 1993, A/256–A, SOU 1996:116.

23. I will not go into the Ombudsman's handling of Convention issues since incorporation. For two recent examples of the Ombudsman examining the requirements of Art.8 in connection with telephone monitoring see J.O. 1995/96:29 and 97/98:115.

24. See e.g. *Finska församlingen in Stockholm and Teuro Hautaniemi* v. *Sweden*, app. no.24019/94, 85 DR 94 (1996).

apply to individuals' relations *inter se* is separate from this issue, even if related.

To begin with it should be pointed out that the Convention is a treaty regime, albeit of a special character, compliance with which functions, as with all treaties, on the basis of the rules of State responsibility.[25] On the other hand, the Convention, once it has been incorporated into national law, is a national legal instrument. As a matter of constitutional law it is the national Parliament which determines what formal status the incorporated instrument should have in the domestic legal hierarchy. And it is the national Parliament, together with the national courts, which determine whether or not the incorporated Convention is to be given any horizontal effect, direct or indirect. The scope of the Convention at national law need not be identical with its scope at international law. If, of course, it is given a narrower scope by national courts, then cases will ultimately end in defeat in Strasbourg. But this will not be the case if the Convention is given a more generous interpretation, whether as regards material rights or as regards procedural matters, e.g. the protected class of victim (standing) or the object(s) against which Convention rights are guaranteed (only the State, or in certain circumstances, individuals too).

This, of course, is in theory. The Swedish legislature did not give any indications to the courts that they are to interpret the incorporated Convention so as to give it horizontal effect. Nor is there any tradition of *Drittwurkung* to build upon as regards rights in the RF.[26] Nonetheless, even if one accepts that the Convention has no formal horizontal effect, the nature of the obligations contained in certain articles in the Convention sometimes requires the contracting parties to provide for rights for individuals which are exercisable against other individuals. The most obvious example of this is the right of access to a court to determine a dispute concerning civil rights or obligations, but even other rights can oblige States to engage in positive action. The issue is particularly interesting in Sweden because of the existence of powerful trade unions and because there are a few private companies which dominate certain branches of industry.

There have been two cases so far before the Swedish courts in which the issue of *Drittwurkung* has been raised. In A.D. 1997, nr. 57, the Labour Court rejected summarily a trade union's argument that Article 10 of the Convention conferred horizontal rights, in this case on employees

25. This is a simplification. I will not go into the relationship between the concepts of material breach and State responsibility.

26. I will not go into the debate concerning the desirability of giving provisions of the *Regeringsformen* (RF) indirect *Drittwurkung*. There are, interestingly, explicit rights for individuals exercisable *vis-à-vis* other individuals set out in the TF and YGL.

of a privately owned ambulance company who had sent a letter to the press criticising their employer and who were subsequently sacked. Admittedly, the direct issue before the court was whether there were reasonable grounds for dismissal (as, if not, damages would have to be paid) and the Convention argument was only of a subsidiary nature. Still, the court showed no awareness of the indirect *Drittwurkung* issue, i.e. by upholding the lawfulness of the dismissal, it, as a public body, was upholding a contract which restricted freedom of expression.[27]

In A.D. 1998, nr.17, the boot was on the other foot. Here it was a private employer who argued that it had a right derived from Article 11 (the right not to belong to an association) which was exercisable against a trade union. The background to this case was the judgment of the European Court of Human Rights in *Gustafsson* v. *Sweden*.[28] In Sweden many issues of employment law are regulated by collective agreement. The parties in the labour market are thus largely left free to use their economic muscle to force agreements on one another. However, it would seem to follow from the *Gustafsson* case that should trade unions try, by boycott or blockade, to force an employer to join an employers' association bound by a collective agreement, or to force him to be bound by this agreement independently, and should the trade unions not have legitimate reasons for taking this industrial action (i.e. the protection of their members' interests) then the State is obliged to provide the employer with a remedy before the courts. The courts must be entitled to review the reasonableness of the trade unions' action in the circumstances and order them to cease, or restrict, their industrial action where this is not reasonable/proportionate. An employer in the above circumstances affected by a trade union blockade or boycott is therefore entitled to bring an action against the trade union in the courts relying upon Article 11 and the Swedish courts should, if all the above (admittedly very demanding) requirements are satisfied, issue an injunction or other such measure, notwithstanding the lack of specific statutory authority to do so. In A.D. 1998, nr.18, the Labour Court made it easy for itself by reaching the conclusion that the trade union had a legitimate basis for its actions in that the employment conditions in the company were not as advantageous to the workers as those provided by the collective agreement (particularly as regards overtime, which was not paid by the company). Accordingly, the union, which had two members working for the company, was entitled to take the blockade action. One judge dissented from this finding. While the trade union thus won in this

27. It should be pointed out here that under s.36 of the Contracts Act there is a general power for the courts to set aside, or vary, an unreasonable contract term in a concrete case. The plaintiff must, however, invoke this provision. As the employees had already been dismissed it was not an issue in the present case.

28. 25 Apr. 1996.

case, the issue is by no means dead. Even the possibility that the Convention gives the courts the opportunity (indeed, duty) to intervene and determine whether or not a trade union blockade is proportionate has led to an overreaction from some trade union figures. One went so far as to call for the denunciation of the Convention, mirroring the response of some right-wing MPs in the United Kingdom following the *McCann* case.[29]

VII. THE IMPACT OF THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON SWEDISH LAW

THE most common complaints against Sweden can be divided into five broad areas: judicial review of administrative decisions, violations of property rights, taking of children into care, procedural safeguards in civil and criminal trials and matters concerning aliens. At the time of writing (September 1998) the Court has had 44 Swedish cases referred to it (including six Protocol 9 referrals). In 22 of these cases Sweden has been found in violation of one or other provision of the Convention. Four cases are pending. The Court's judgments in some of these cases, e.g. the child custody cases, did not require legislative changes. On the other hand, even cases where Sweden was not found to have violated the Convention have led to changes being made.[30] The most significant change occasioned by the Court's judgments has been regarding the lack of access of an individual to a court to determine a dispute he or she has with the administration. Attention was drawn to the inadequacies of Swedish law in this respect by the Court's judgment in *Sporrong and Lönnroth* The government of the day chose to ignore the warning, however, and Sweden paid the penalty for its legislative inaction when it lost, in quick succession, a number of cases on the issue in Strasbourg, beginning in 1987.[31] Legislation was accordingly introduced in 1988 which provides for a right of judicial review of certain administrative cases decided by an administrative agency or the government as a final instance of appeal. The law was initially passed for a trial period until 1991. It was made permanent in 1996. The law applies only to cases in which there is no other available judicial remedy and in which the administrative decision imposes a bur-

29. *McCann and others* v. *UK*, 27 Sept. 1995, A/324. For the Swedish reaction see *Svenska dagbladet*, 23 Feb. 1998.

30. The opinion of the dissenting minority in the *Leander* case (8 July 1987, A/116) concerning the inadequacies of safeguards on vetting checks by the security police was one of the factors behind the reform of the law made, eventually, in 1996. *Cruz Varas* (20 Mar. 1991, A/201) led to an amendment of the Aliens Act (Chapter 8, s.10a) allowing the government to issue a stay of execution in deportation cases where the Commission had requested this.

31. See *Pudas*, 27 Oct. 1987, A/125–A, *Boden*, 27 Oct. 1987, A/125–B, *Tre Traktörer AB*, 7 July 1989, A/159, *Allan Jacobsson*, 25 Oct. 1989, A/163, *Mats Jacobsson*, 28 June 1990, A/180A, *Skärby*, 28 June 1990, A/180B, *Zander*, 25 Nov. 1993, A/279–B.

den on an individual. The intention behind the legislation was to cover the category of "civil rights and obligations" but this term was not used because it was considered that its unfamiliarity could cause Swedish lawyers difficulties. Instead, the law refers to the areas of public activity covered by RF 8:2 and 8:3. These provide that delegation of legislative power in certain areas—particularly those involving burdens for the individual—should be approved by statute. This has the consequence that, for example, decisions to refuse permission to engage in a particular business activity are subject to review whereas decisions to withhold a benefit, e.g. a social security payment or admission to a higher educational course, are not. It has been pointed out that the exclusion of decisions involving benefits from review is not without difficulties, particularly in view of the *Deumeland* and *Feldbrugge* cases.[32] In addition to this general restriction, decisions by certain quasi-judicial tribunals and decisions concerning matters regarded as predominantly of a policy nature are excluded from review, notwithstanding the direct impact these could have in the area of "civil rights and obligations".[33] Other changes made have included reforms of the rules on pre-trial detention (*McGoff*), on oral hearings in appeal courts (*Ekbatani*) and on the disqualification of judges in special courts (*Langborger*).[34] Most recently, the issue of amendment of the Freedom of the Press Act was discussed as a result of the Court's finding of a violation of the right to trial by an impartial tribunal in the *Holm* case.[35] However, the government, and later Parliament, considered that the rare cases in which the composition of the jury was a problem could be dealt with by the courts applying the *Holm* case in conjunction with the general clause in Chapter 4, section 13 of the Code of Judicial Procedure that provides for disqualification of judges and jury members.[36]

VIII. AVOIDING CONSTITUTIONAL REVIEW

A. Generally

Before looking at the issue of constitutional review as such, it would be useful to take a closer look at the methods the legislator recommended to the courts as alternatives to their taking such an embarrassing, and undemocratic, step. As already indicated, these were the *lex posterior* and

32. *Duemeland* v. *Germany*, 29 May 1986, A/100, *Feldbrugge* v. *Netherlands*, 29 May 1986, A/99. See further the dispute between the Supreme Court and the Supreme Administrative Court noted *infra* n.89.

33. It is not by any means clear that all these tribunals would satisfy the requirements of Art.6. Certainly, not all of them are regarded as "courts" in Swedish constitutional law.

34. Respectively, 26 Oct. 1984, A/83, 26 May 1988, A/160 and 22 June 1989, A/155. For more detail on the legislative changes occasioned by these and other cases see Cameron, *op. cit. supra* n.7.

35. 25 Nov. 1993, A/279–A.

36. Prop. 97/98:43, ss.129–135.

lex specialis principles, the principle of "treaty conform construction" and the, amorphous, variant of this, that "human rights treaties should be given special significance" in the event of a conflict. I deal with these in turn. I should stress, however, that the *travaux préparatoires* give no indication of the order in which these interpretative exercises are performed. What is clear, however, is that the method which advances a treaty conform interpretation is to be preferred. The theoretical dividing line between the application of a treaty conform construction and constitutional review is that the application of the former is designed to avoid, or deny, a norm conflict, whereas the application of constitutional review accepts it. The latter begins where the scope for applying the former ceases. But as shown below, the dividing line can be assumed to be drawn differently from State to State depending on a number of factors.

To begin with, as far as *lex posterior* is concerned, RF 2:23 is formulated as a duty on the legislature not to pass legislation in conflict with the Convention. This might seem to indicate that this duty applies only prospectively. There would thus be no duty to give the Convention precedence as regards conflicts with pre-1995 legislation. But the *travaux préparatoires* contradict this interpretation, as does a recent case before the Supreme Administrative Court.[37] In this case, the plaintiff was a Finn who had been resident in Sweden in 1985. He was not a member of the Swedish Church, but he had nonetheless been obliged to pay church tax for the year in question. In 1990, in *Darby* v. *Sweden*, the European Court of Human Rights had ruled that such a requirement was a breach of Article 9,[38] However, the law reform occasioned by the Commission admissibility decision in the case in 1988 had not been given retroactive effect and the tax authorities, and the lower courts, ruled that there was no basis on which the plaintiff's tax for 1985 could be adjusted. The Supreme Administrative Court, however, ruled that, as the Convention has the status of Swedish law from 1995, and as no transitional provisions were made forbidding its application to cases arising before 1995,[39] it fell to be applied in the present case. The Court thereafter referred to the *Darby* case and ruled that the plaintiff's tax for 1985 should be adjusted accordingly.[40]

37. R.Å, 1997 ref. 6.

38. 23 Oct. 1990, A/187 (1991).

39. This was not the case for the law enacting the new Instrument of Government in 1974 (1974: 152), which contained provision for the continued validity of several laws and types of law which would otherwise have been invalid. Cf. R.Å. 1996 ref. 57 (not involving the Convention) where the absence of a transitional provision meant that the court felt unable to grant retroactive effect to legislation and so it once again ruled in the individual' s favour and against the State.

40. The issue of giving retroactive effect to Convention judgments was considered by the ECtHR in *Marckx* v. *Belgium*, 13 June 1979, A/31. The Court considered in this case that

But the *lex posterior* principle, of course, means that legislation enacted after 1995 can be given precedence before the Convention. This is, however, expressly excluded by RF 2:23. Is there, however, a way of avoiding the application of constitutional review in such cases? Of course, the preventive legislative safeguards are designed to minimise the risk of such conflicts but, as indicated above, some are bound to slip through. In such cases the courts should then turn to the other principles of interpretation. In general, *lex specialis* can be a useful principle for avoiding norm conflicts, although it is rare that such norm conflicts are openly acknowledged.[41] However, there is a problem as regards *lex specialis* in relation to the Convention. The *lex specialis* principle, which is applied by the Strasbourg organs themselves,[42] is a means of identifying the most appropriate rule to be applied in a concrete dispute. However, the incorporation act is no ordinary statute but, rather, the insertion into Swedish law of a large body of law. The Convention *acquis*, like EC law, permeates large areas of national law. Unlike EC law, however, it does not explicitly take precedence in the event of a conflict with national law. Instead, it applies in *parallel* with other national law. To put it another way, the Convention, as interpreted by its case law, is largely a set of principles. As is well known, principles differ from rules in that a rule is either applicable or not, whereas several principles can apply simultaneously, all pulling in different directions. The process of applying these principles can be described as one of "concretisation" rather than "interpretation". The general application of the Convention means that for a national court it is not a question of deciding whether a rule contained in the Convention or in another statute is the most appropriate and then applying it. Instead, the latter has to be applied in the light of the former. There is nothing really new about this as, in all States with a written constitution, statutes have to be applied in the light of the general rules set out in the constitution. Having said this, for a variety of reasons, the Instrument of Government is rarely referred to by Swedish courts. There is thus no great familiarity with this means of approaching cases. Even in other States which have specialised constitutional courts, the ordinary courts may be unfamiliar with such a way of working. It may be that British judicial culture, notwithstanding

legal certainty ruled out giving retroactive effect to judgments in civil cases. On the other hand, the requirements of legal certainty are not necessarily so strong in administrative cases, at least where giving retroactive effect means the State losing.

41. As far as I am aware, there has only been one recent example of an acknowledged norm conflict between norms of the same constitutional status, concerning the deportation of a family and a consequent dispute as to whether to apply the Aliens Act (and deport the whole family) or the Care of Children Act (and deport only the mother). The Ombudsman considered that the former Act should be applied. SOU 1995:115, s.99. Thanks to Elisabeth Rynning for helpful comments on this case. For a short discussion of the *lex specialis* principle see Peczenik and Bergholz, *op. cit. infra* n.43.

42. See e.g. *Enzelin* v. *France*, 26 Apr. 1991, A/202, para.37.

its lack of a written constitution, is more at home with this way of working than Continental (and Swedish) judicial culture. Such a large issue is, however, outside the scope of the present article.[43]

In another sense, the *lex specialis* principle is inappropriate for solving conflicts as it naturally cuts both ways: both for and against the Convention. Other statutes will often be *lex specialis* in relation to the Convention. There has already been at least one attempt in the courts to argue that a statute is *lex specialis* in comparison to the Convention.[44] This was, fortunately, rejected. The *lex specialis* principle is a means of avoiding the—politically embarrassing—explicit application of the *lex superior* principle, not a means of undermining it. In other words, like the *lex posterior* principle, the *lex specialis* principle can be applied only in favour of giving precedence to the Convention.

The main problem in using both the *lex specialis* and *lex posterior* principles, however, relates to ordinances. These will often be *lex posterior* and are almost invariably likely to be *lex specialis* in relation to the Convention. As already mentioned, RF 11:14 applies to conflicts between hierarchically superior and hierarchically inferior norms. The effect of RF 11:14 is that, despite the fact that a statute is constitutionally superior to an ordinance, an ordinance which conflicts with it can be preferred as long as the conflict between it and the statute is not manifest. RF 11:14 also means that the principle of *lex specialis* (and *lex posterior*) cannot, formally speaking, be used to resolve conflicts between statutes and ordinances, whereas these principles *can* be used to avoid conflicts between norms on the same level, i.e. between statutes and statutes or between ordinances and ordinances.[45] This might seem to be a paradoxical result.[46] Constitutionally it can be explained by the fact that the government has its own primary area of legislative competence and does not simply exercise powers delegated by Parliament. This is not usually a problem as an ordinance will usually consist of detailed rules, filling out a "parent" statute. Possible conflicts between a statute and its implementing ordinance will simply be denied, "interpreted away". But, as already mentioned, the Convention is

43. For treatments of statutory interpretation in general in the UK and Sweden see the chapters in D. N. McCormick and R. S. Summers (Eds), *Interpreting Statutes, a Comparative Study* (1994) by, respectively, Z. Bankowski and N. McCormick, and A Peczenik and G. Bergholz.

44. In A.D. 1998 nr.17, the defendant argued that legislation requiring participation of the trade unions in company decision-making was *lex specialis*.

45. Express rules giving a statute precedence over another in case of conflict are very rare in Swedish law. For an example see s.1 of the Privileges and Immunities Act (1976:661) as amended, regarding the Vienna Convention on Diplomatic Immunity.

46. This point can easily be misunderstood. See e.g. U. Bernitz, "Europakonventionens införlivande med svensk rätt—en halvmesyr" ("Incorporation of the European Convention—A Half-Measure") (1994–5) 6 Juridisk tidskrift (J.T.) 259, 266, where it is stated that the Convention, by virtue of its status as a statute, has precedence over ordinances.

of general application. Its area of application overlaps with many other statutes and ordinances. And there are no "subsidiary" ordinances containing more detailed implementation rules for the Convention. The result of all this is that there is no room to use *lex posterior* and *lex specialis* to resolve conflicts between the Convention and ordinances. Instead, other principles will have to be used. It is obvious that the interplay between RF 11:14 and the Convention as far as ordinances are concerned was not thought through properly.[47]

The remaining two principles will be treated together. As already mentioned, the principle that "human rights treaties should be given special significance" in the event of a conflict was proposed by the Supreme Court in its comments on the proposal to amend the Instrument of Government. It was proposed as an alternative to what later became RF 2:23. As such, it was probably meant as a straight rule of precedence, unrestricted by the requirement of "manifest" incompatibility in RF 11:14.[48] However, this was not accepted by the legislature. Instead, the Supreme Court's proposal was simply added to the principles listed in the *travaux préparatoires* to be employed by the courts in an attempt to avoid constitutional review. No explanation was given of how this principle could be reconciled with RF 11:14. Nonetheless, the likely explanation is that the principle becomes the same thing as the principle of treaty conform construction. Alternatively, it could be a form of "turbo version" of the principle, emphasising the "especially important" character of human rights treaties as opposed to other treaties. Arguably it could allow the straining of the plain language of a statute, but not contradicting it. A mere statement in the *travaux préparatoires* cannot go against the plain wording of RF 11:14, so it is not open to the Swedish courts to rely on the principle to disregard RF 11:14 in cases of norm conflict with human rights treaties.[49]

I should stress again that the *travaux préparatoires* do not specify that the *lex specialis* and *posterior* principles should have been tried first.

47. The constitutional protection from judicial review extended to government ordinances cannot be justified by reference to the primacy of the democratic will. I consider it to be an anachronism. The problems sketched out above provide another reason for abolishing it.

48. This, in any event, is the conclusion of one prominent legal writer. H. Strömberg, "Europakonventionens genomslag i svensk rätt" ("The impact of the European Convention in Swedish Law") (1996) 59 F.T. 19, 22–23.

49. To argue so builds upon a mistaken analogy with the position of EC law in Swedish law. The area of application of RF 11:14 was diminished by membership of the EU. The provision does not apply to conflicts between EC law with direct effect and national law. Legislative competence in the area covered by the EC has been transferred (competence to do so is set out in RF 10:5). Strictly speaking then, there is no norm conflict any more. (See e.g. R.Å. 1997 ref. 65, *infra* n.91.) This is not the case here. There has been no transfer of legislative competence to the ECtHR. Here the conflict is between two national norms, the incorporated Convention and another national norm. In the circumstances, the application of RF 11:14 to such a conflict could not have been excluded by a mere statement in the *travaux préparatoires*.

Indeed, the sensible approach to the exercise is first to apply the principle of treaty conform construction, to identify what the Convention case law *prima facie* demands in the specific case. Thereafter one would determine whether or not this conflicts with the interpretation usually given to any other relevant statutes, or ordinances. If so, then the *lex specialis* and *lex posterior* principles would be applied. If these fail to achieve the desired result, the principle of treaty conform construction would be returned to, in an effort either to avoid (i.e. reconcile) the *prima facie* conflict or to confirm it.[50]

B. The Limits of the Principle of "Treaty Conform" Construction and Its Relationship to Constitutional Review

The increasing internationalisation of the legislative process means that the principle of "treaty conform" construction[51] has achieved a new importance in many States, Sweden included. In the United Kingdom Section 3 of the Human Rights Act states that "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights". The related principle of "constitution conform" construction is also topical in Sweden, as are statutory interpretative methods in general.[52] It can be said that there are a number of factors influencing the willingness of courts to resort to Convention conform construction. What follows below is an explanation of these factors as they operate in the Swedish legal system, though I draw some comparisons with the United Kingdom.

The first is a very general point, the level of awareness among the legal profession that a legal problem has a "Convention dimension". This depends partly upon the space devoted to human rights in law degree courses, and the legal journals, but probably more on the extent to which ordinary lawyers and judges come into contact with recognisably human rights issues in their day-to-day work. Study of the Convention is obligatory for Swedish law students. On the other hand, it usually consists of a seminar or two only. Before incorporation, the Convention tended to be part of the international law course. International law has been rather a neglected subject in Sweden. One practical reason for this is the fact that the act of transforming a treaty (which has been the usual practice in

50. I provide a diagram for how I would go about resolving conflicts in Cameron, *op. cit. supra* n.7, at p.239.

51. I agree with van Gerven that the term "construction" is better than "interpretation" as it emphasises the active role which must be played by the judge: W. van Gerven, "The Horizontal Effect of Directive Provisions Revisited: The Reality of Catchwords", in D. Curtin and T. Heukels (Eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Vol.2 (1994), p.345.

52. See e.g. J. Nergelius, "Om grundlagstolkning, grundlagsvänlig tolkning och åsidosättande av grundlagsstridig lag" ("On Constitutional Interpretation and Constitutional

Sweden) can often, if not conceal the international origin of a statutory provision, at least reduce the significance of this. Of course, a common complaint of all international lawyers is the ignorance, timidity or even hostility their national courts show towards arguments made on the basis of international law, whether it is proving the existence of a rule of custom, interpreting an incorporated treaty or attempting to rely upon a provision of an unincorporated treaty to interpret national law. The view is often expressed that domestic courts miss highly relevant international law material when they decide cases, or if it is brought to their attention, play down its importance.[53] Be that as it may, the post-incorporation status of the Convention as a part of constitutional law, and its insertion into the public law syllabus, has improved general awareness of it (even if constitutional law has also been a neglected subject).

But whereas it is one thing to be aware of a possible "Convention dimension", it is quite another to be on top of what the exact requirements of it are in a concrete case. These requirements are made clear only through the case law of the Commission and the Court. In any specific issue, it will often be that the bulk of the case law will concern other States. It should be stressed that, under Article 46 (ex Article 53), only Court judgments are binding, and then only for the respondent State, although for the other State parties they are authoritative interpretations of their obligations under the Convention. Obviously, it is highly desirable that Swedish courts apply where possible even judgments (and, arguably, even Commission reports)[54] concerning other States. Still, the difficulties in

Review") (1996) SvJ.T. 835 and "Domstolar, grundlagen och rättighetsskyddet" ("The Courts, the Constitution and the Protection of Human Rights") (1997) SvJ.T. 426 and references therein. Swedish membership of the EU is the main reason for this resurgence of interest, although the Convention has also contributed to it. I will not attempt to deal with this general doctrinal debate in this short article.

53. The majority of international lawyers are naturally interested in anything which advances the cause of international law. Arguably, this is not so much due to a misplaced sense of the importance of our subject but, rather, a quiet desperation! The horizontal and partial nature of the international enforcement system means that one is at the mercy of national courts when it comes to implementing much international law. Precedents from other jurisdictions are occasionally cited to show how it should be done, but the fact is that most national courts show deference to their respective governments and Parliaments in interpreting and applying international law. As Benvenisti notes, this deference can be identified at three distinct stages in the application of norms, by interpreting narrowly the provisions of national constitutions which import international law into the national legal systems, by interpreting international rules so as not to upset their government's interests and by using a variety of methods and principles so as to avoid ruling on the legality of government actions under international law: E. Benvenisti, "Judicial Misgivings Regarding the Application of International Law" (1993) 4 E.J.I.L. 159, 161. For a detailed discussion of the different judicial approaches to control of executive foreign policy in the US see H. Koh, *The National Security Constitution* (1990).

54. The awkward problem of domestic legal effect to be given to Commission reports (which, unlike Court judgments are not formally binding upon the State) has not disappeared with the creation of the new Court. Under Article 46(1) only final judgments of the Court (not decisions) are binding.

doing so should not be underestimated. Courts in particular suffer from overwork and consequent lack of time. Most Swedes speak good English but it is not simply a question of understanding a foreign language. The court will have to "translate" a judgment concerning another State to the Swedish legal system. This will depend in particular on how similar the other State's laws are and whether they are accessible and relatively easy to understand. Norwegians, Danes and Swedes can read one another's languages without too much difficulty. Furthermore, the Nordic States, largely as a result of the work of the Nordic Council, have harmonised legislation in a number of areas, although by no means all. These factors will obviously make it easier for a Swedish court to understand the relevance a European Court of Human Rights judgment concerning these States might have to a concrete dispute before it. Furthermore, looking at foreign case law is no longer an exercise confined to courts grappling with issues in private international law. Membership of the European Union has enabled, and obliged, the Swedish courts to interpret European Court of Justice judgments and preliminary rulings concerning other States and apply them to the Swedish context. Still, understanding the relevance of a European Court of Human Rights judgment is easiest for a Swedish court if there has been some reference to it, and its significance, in the *travaux préparatoires* to legislation. If a commission of enquiry has investigated the possible relevance the case can have for Swedish law and recommended law reforms but for one reason or another Parliament has not yet passed amending legislation, the courts can use the conclusions reached by the enquiry in interpreting Swedish law.[55] Similarly, where legislation has already been passed and the Law Council has commented upon the most "Convention friendly" way to interpret the proposal, this can naturally also be used.[56]

As regards the practical issue of physical access to sources, Swedish courts are connected to the internet, and so have access to the recent (post-1996) European Court of Human Rights cases (and Commission reports). Swedish summaries of the collected Court case law have been published in a legal journal and are available in a database but very few, if any, are likely to have access to the full text of the collected Court reports. A brief informal survey indicates that, at best, the majority of courts will have access to only two textbooks on the Convention.[57] No court will have access to the collected Commission case law, which is, to my knowledge,

55. See R.Å. 1997 ref. 97 (concerning tax investigations and Art.6).

56. See R.Å. 1996, ref. 8 and R.Å. 1997 ref. 68 (concerning Art.5 and challenge to detention).

57. P. van Dijk and G. J. H. van Hoof, *Theory and Practice of the ECHR* (2nd edn, 1990) and the introductory textbook by H. Danelius, *Mänskliga rättigheter i europeisk praxis* (1997). It can be noted here that the Swedish courts are not averse to citing doctrine. Opinions differ on the significance of such citations, i.e. whether they tend to indicate

accessible only in four law libraries: two in Stockholm, one in Lund and one in Uppsala. The lack of access to the Commission case law is particularly regrettable. On the other hand, it will seldom work to the disadvantage of an individual litigant, as the Commission case law normally discloses what is not in breach of the Convention, rather than what is in breach of it. It is, however, undoubtedly a waste of the Swedish courts' time to wrestle with an issue which the Commission has already said is "manifestly ill-founded".[58]

Second, the constitutional procedure by which consent is given to a treaty is important, in particular, the extent to which Parliament has been involved in the procedure of ratification.[59] The courts in any State naturally do not want to come into conflict with Parliament. Sweden and the United Kingdom are both "dualist" States although too much should not be read into this, misleading, label. But unlike the UK Parliament, the Swedish Parliament has to give its consent before an instrument of ratification is deposited where the treaty in question requires implementing legislation or involves substantial expenditure or is otherwise "important" (RF 10:2). Interestingly, though, even where such consent has been given, as was the case for the ratification of the Convention in 1951, the highest courts have ruled in a series of cases that legislation is still required where a treaty grants individuals rights or imposes duties. In comparison with the United Kingdom the argument against letting a ratified but unincorporated treaty create rights for individuals appears not so much to be democracy (Parliament has already expressed its consent) but legal certainty (*rättssäkerhet*). It can, of course, be argued that legal certainty is not a good reason for denying a right to an individual exercisable *vis-à-vis* the State, as opposed to another individual. Moreover, the coherence of the Swedish position is undermined a little by the wholesale incorporation of EC law, the incorporation rather than transformation of the Convention and the fact that, being an EU member, some EC directives and a few EC treaties with third States can now have direct effect in the Swedish legal order. On the other hand, allowing unincorporated/untransformed treaties to create rights would mean that the Swedish courts would have to decide which rights in a treaty were sufficiently clear, complete, etc. to be self-executing. This would, in the Swedish legal tradition, be regarded as a usurpation of the role of

genuine influence on the court's legal reasoning or whether they instead serve as background information or simply as additional support for a conclusion which the court planned to reach anyway.

58. See *infra* text accompanying nn.80, 81 regarding "accidental anticipation".

59. The national courts are likely to be, and should be, unwilling to look at treaties which their State has not ratified, except in the special case where these can be seen as evidence of customary international law.

Parliament.[60] After all, most rights cost money, and in the end it is the taxpayer who pays. Even if arguments could be found that the Swedish courts should take such a power, it is clear that this would lead to costs to society in the form of litigation, ineffective use of scarce judicial resources, and risks of conflicting findings in the administrative and ordinary courts. So, although this "double dualist" stance has been criticised, it is unlikely to be changed in the near future.

A third factor heavily influencing treaty conform construction is the way in which a statutory provision is drafted and the conception judges have of their own role. In the most extreme situation, when dealing with a ratified, but unincorporated/ untransformed treaty, there may be no national "law" at all for the national court to construct in a treaty conform way. There is thus a natural limit on the use of the principle.[61] Where there is a statutory provision, it must obviously give the court room for different courses of action. One example of this is when it is an optional (default) rule that is capable of being displaced by the parties to a dispute. In Sweden such rules are fairly common in the area of civil procedure. Another example is where the rule explicitly gives discretion to the courts to solve problems on a case-by-case basis, e.g. the rules in the Code of Judicial Procedure providing for the holding of oral hearings or the disqualification of judges. But the drafting of a provision is only part of the issue. The "outer limit" of construction is determined not simply by the language but also by the judicial culture. Put crudely, the stronger the judicial branch is *vis-à-vis* the other branches, the more it can get away with. This is seen not simply in the extent of cases involving constitutional review, but also the "covert" review of constitutional conform construction. In Sweden, while statutes are drafted in a general way, often leaving the courts wide discretion, there is no tradition of constitutional review or "constitution conform" construction to build upon. It may be a generalisation, but construction tends not to be "top down" but "bottom up", i.e. the higher, more abstract, norm is constructed so as to fit in with the lower, more concrete norm.[62] The subjective approach to statutory interpretation—whereby the legitimate role of the courts is confined to discerning the intent of Parliament—is strong in Sweden. Judicial

60. Similar reasons are invoked for not incorporating, rather than transforming, treaties containing vague provisions. See e.g. a recent report on the legal position of the Convention on the Rights of the Child (SOU 1997:116). Cf. the position taken by a Norwegian committee investigating the incorporation of human rights treaties (NOU 1993:18).

61. These two different types of situation can be compared to the situations where a national court is faced, respectively, with an incorrectly transposed EC directive and a totally untransposed directive. For an example of the difficulties this can cause a national court see *Webb* v. *EMO Air Cargo (UK) Ltd* [1992] 4 All E.R. 929.

62. This is recognised implicitly by the *travaux préparatoires* to RF 11:14. See *infra* Part IX. It is also evident in a number of cases in which the RF is mentioned, if at all, as an afterthought.

philosophy and training discourage creativity and emphasise obedience to the will of the legislator as expressed in the *travaux préparatoires*.[63] This is changing slowly, partly as a result of the influence of EU membership. The lack of *travaux préparatoires*, and the fact that important parts of EC law are heavily case law based, tend to increase judicial discretion. The same factors apply, albeit to a lesser extent, as regards the Convention system.[64] A "spillover" effect on Swedish judicial attitudes on the lines of the British experience might therefore be expected.[65] As against this, the natural judicial predilection for concrete norms in the field of procedural law may operate against the Convention having much of an impact. The Convention, and the incorporation statute, contain rights without remedies. There are no given legal consequences (e.g. damages or an injunction) following a finding of a breach. Swedish judges are thus left with a—for them—unpleasantly large degree of discretion. They are really being asked to complete a right, not simply to interpret it. Swedish judges are unfamiliar with this.[66] Where there is no existing remedy which can be used (e.g. the issue does not concern access to a court where the obvious remedy is to grant standing) the temptation might be to find that the Convention provides no such right.

Fourth, following on from this, it is interesting to compare the scope and extent of the duty of treaty conform construction as it is expressed in EC law as compared to its scope and extent as regards national implementation of public international law. Beginning with the *von Coulson* case, the European Court of Justice has laid down a duty on member States to interpret national law in accordance with EC law, whether passed before or after the national law in question.[67] The Swedish courts have already had occasion to apply this in a number of cases.[68] The

63. See generally Cameron, *op. cit. supra* n.8, at pp.503–508.

64. Having said this, the fact that the Convention regime is a case law system is not the same thing as saying that the legal culture(s) underlying it are the same as those applying in common law countries, in particular as regards the extent of legitimate judicial norm creation. It, like EC law, is heavily influenced by Continental legal thinking.

65. See e.g. *M.* v. *Home Office* [1994] 1 A.C. 377, 422 (*per* Lord Woolf) "it would be most regrettable if an approach which is inconsistent with that which exists in community law should be allowed to persist if this is strictly necessary". I think "spillover" is a better term than "infection" (*smittoeffekt*) which has occasionally been used in Swedish doctrine. Calling EC/ECHR influence "infection" is pejorative—it presupposes that the Swedish legal system is a healthy body which is contaminated by foreign bodies. As to the effect of EU membership on judicial attitudes towards constitutional review, see text following *infra* n.100.

66. For a valuable discussion of this point from the perspective of EC law, see T. Andersson, "Effective Protection of Community Rights in Sweden", in I. Cameron and A. Simoni (Eds), *Dealing with Integration* (Vol. 1, 1996).

67. Case 14/83, *von Coulson and Kamann* v. *Land Nordrhein-Westfalen* [1984] E.C.R. 1891, at para.26.

68. See e.g. N.J.A. 1997, s.415, N.J.A. 1997, s.299, although cf. R.H. 1996:37 and N.J.A. 1996, s.668. In the latter case, the Supreme Court interpreted an Art.177 ruling extremely restrictively, some might say contrary to its spirit.

principle is, in one sense, more powerful in EC law because of the greater possibility of intervention the European Court of Justice has under the preliminary ruling procedure. There is no such procedure imposed on national courts to refer cases to the European Court of Human Rights. There is naturally a greater incentive on a national court to apply treaty conform construction when the European Court of Justice is breathing down its neck. The Court phrased this duty in *Marleasing* as requiring national courts "as far as possible" to achieve an EC conform construction.[69] The exact limits of this duty have been the cause of some discussion although it is evident that even the Court accepts that it cannot require a court to make a construction *contra legem*, something which in the long term can only undermine respect for the law and the courts.[70] It should also be noted that the principle in EC law has functioned in a different way from the principle as it can apply in assisting the implementation of international law. In EC law it has often been used as a substitute for horizontal direct effect of directives.[71] With the development of the principle of national remedies *Francovich*, the principle has accordingly diminished somewhat in significance. There is not the same need to strain the language, as an alternative is available. This alternative may well be lacking as regards a State's failure properly to implement an international law obligation. There may be a remedy in damages before the national courts in such a situation, but then again there may not. In Sweden no such possibility exists today, although a change in the law has been proposed.[72]

But while there is no strong tradition of treaty conform construction in Sweden, it is certainly not unknown. It was employed particularly in relation to the Convention, before incorporation, but in later years it has made an appearance in other areas: EC law of course, but even private international law.[73] But the mere invocation of the principle is no guarantee that it has any real significance when it comes to determining a case. If a court simply presumes that a law is in accordance with a treaty obligation ("bottom up" construction) it is not doing its job properly. Admittedly, it can be tempting to do this where Parliament at the time of ratification and/or incorporation stated its opinion that Swedish law was in accordance with the treaty in question. This was originally the case with the Convention. The *travaux préparatoires* to the decision of Parliament

69. Case C–106/89, *Marleasing SA* v. *La Commercial Internacional de Alimentacion SA* [1990] E.C.R. I–4135, at para.8.

70. See Case C–91/92, *Facine Dori* v. *Recreb Srl* [1994] E.C.R. I–3325, at para.25. For the viewpoint of the British courts see e.g. *Duke* v. *GEC Reliance* [1988] 2 W.L.R. 359.

71. Van Gerven, *op. cit. supra* n.51.

72. See Cameron, *op. cit. supra*. n.6.

73. See e.g. R.Å. 1996, ref. 52 (concerning the Hague Convention on Abduction of Children, 1980).

to ratify the treaty stated clearly the opinion of Parliament that there was "harmony" between the two bodies of law. It was no real surprise that this was later employed in a number of judgments in the 1970s by lazy and/or timid courts to avoid examining what the Convention really required.[74] There has been no such overt refusal on the part of the higher courts to look at the Convention since incorporation, although there has been at least one example of a lower court doing so. In an unreported case from a county administrative court concerning custody of children, the court ruled that, since the *travaux préparatoires* to the act incorporating the Convention had stated that the government's view was that the Care of Children Act (1990:52) was in accordance with the requirements of the Convention, it would decide the issue only on the basis of the Act.[75] A similar approach was taken in 1995 by the Aliens Board (Utlänningsnämnden) as regards the Convention on the Rights of the Child. The Board expressed the view that, as the government was of the opinion at the time of ratification that Swedish law was in accordance with the Convention, then that was the end of the matter.[76]

But these are extreme cases, and the correct approach to the scope of the principle in Swedish law is probably that which is set out in an important separate opinion to a Supreme Court case concerning the Convention in 1992, before incorporation.[77] Justice Lind stated in this case that he considered that, where a treaty provision contained an argument for a particular construction of national law, then this should be followed, notwithstanding the fact that it might conflict with leading doctrine, or the *travaux préparatoires* to the legislation in question. Bearing in mind the status of both doctrine and *travaux préparatoires* in the Swedish legal system, this is an important and bold statement, even if it may fall short of the requirement ("so far as possible") in Section 3 of the British Human Rights Act. According to Lind, the limits of the principle are the objective wording of the legislative provision being constructed. This limit also applies in the United Kingdom, but of course, as indicated above, whether or not wording is "objective" is itself a question of legal culture. To put it another way, judges know the boundaries when they see them. Interestingly, there have already been examples of post-incorporation cases in which a relatively bold approach to construction has been taken.[78]

74. See in particular N.J.A. 1974, s.423. For discussion see Cameron, *op. cit. supra* n.7, at pp.227–229.

75. LR i Skaraborg 1995–02–22, Ö 1274–94, Ö 915–94 and Ö 3059–94. To be charitable some excuse for such action can be found in lack of time.

76. Decisions in cases UN 73 and UN 274 (in H. Sandesjö and K. Björk (Eds), *Utlänningsärenden—Praxis*, supplement 1 (1995)).

77. N.J.A. 1992, s.532.

78. E.g. R.H. 1995:66 concerning access to a court to challenge an administrative decision liquidating a company.

On the other hand, there have also been cases where the principle was not applied when it could have been.[79]

One general limitation on the principle follows from its purpose: to secure compliance with international obligations. This means that it should not be employed to secure an interpretation of national law that is not actually required by the Convention, i.e. to interpret the Convention more dynamically, or progressively, than the European Court of Human Rights itself does. "Anticipation" of the Convention can, of course, be tempting for a national judge who wants to secure a given result in a case, particularly where a judge is forbidden to engage in overt constitutional review, as is the case in the Netherlands and the United Kingdom. Still, the purpose of the principle means that it is difficult to criticise a national court which refuses to go further in interpreting the Convention in the absence of a clear precedent from the European Court of Human Rights.[80] Having said this, the line between anticipating Convention case law (wrong) and applying existing case law to a new situation (right) can be very thin. There have, in any event, been at least two cases to date in which the Swedish courts have risked going beyond the requirements of the Convention not because they wish to use the Convention "offensively" but, rather, because they have been uncertain as to its requirements.[81] Where national courts are afraid of correction in Strasbourg, there will be a tendency to err on the side of caution. A "grey zone" could thus emerge which in one sense could be the mirror image of the margin of appreciation, i.e. the national court finds the State to be in violation of the Convention when this is not actually required. But this is speculation. There is insufficient evidence of such an attitude in the Swedish courts. And it is rather difficult to see in the present system how any national court could be afraid of the European Court of Human Rights.

In one substantive area at least, criminal law, Swedish legal culture places definite limits on the power of the courts to deny/avoid norm conflicts by resorting to the principle of treaty conform construction. Of course, judicial *expansion* of the criminalised area by means of referring to a treaty is unacceptable.[82] In the Swedish criminal code the application of analogy reasoning in criminal matters is, moreover, excluded. But even a

79. See the Administrative Court of Appeal case regarding Art.6, dealt with *infra* Part IX.

80. For an example of this cautious approach see an unreported decision of Gothenburg District Court (case no. B 15481–97, 19 Dec. 1997).

81. R.H. 1996:58 (concerning disqualification of a judge) and R.Å. 1996 note 302 (concerning the right to an oral hearing in appeal proceedings before a court regarding an administrative decision to revoke a driving licence. The plaintiff in the latter case, unlike the plaintiff in the *Pudas* case, was not a professional driver).

82. Cf. Case 80/86, *Officier van Justitie* v. *Kolpinghuis Nijmegen* [1987] E.C.R. 3969. I leave aside the thorny question of whether this might be justifiable in extreme situations, such as that of the East German border guards. See judgment of the BVerfG of 24 Oct. 1996 (1997) 18 H.R.L.J 65.

construction which is to the advantage of the individual can be ruled out if this involves going too far from the wording of the statute. This is illustrated by a recent case of constitutional review which concerned the Political Uniforms Act.[83] This statute, passed in the 1930s, and not really used since then, makes criminal the wearing of any uniform or emblem which displays the wearer's political views. It was designed to be aimed at undemocratic groups (and in the concrete case was against neo-Nazis) but it is framed in general terms, to cover all possible political views, democratic and undemocratic. While its use in the concrete case was not repugnant, the "ordinary meaning" of the rule was not "acceptable in a democratic society". This ordinary meaning could, technically, have been narrowed by a judicial ruling on the basis of either the *travaux préparatoires* or an independent judicial evaluative exercise based on the needs of society, etc. But there is a greater societal interest in interpreting criminal law rules in accordance with the ordinary meaning to be given to the words of the rule. Following such a course of action would also have left an unacceptably large degree of discretion to the police and prosecutor in applying the law. The courts in Sweden have, traditionally, not had the necessary prestige (or mandate) to engage in overt rule-making on such a scale (and, besides, in such a politically sensitive area). Thus, the court felt that the possibility of such a judicial narrowing of the scope of application of a criminal statute was ruled out. This was a matter for the legislature. The result was that the court invoked RF 11:14 and refused to apply the statute, acquitting the defendants.[84]

By contrast, in the United Kingdom, the greater flexibility of the common law means that the principle of treaty conform construction has the potential to be a more powerful tool in the hands of a bold judge,[85] at least when the treaty in question has been converted in some way to national law.[86] It is interesting to speculate as to whether the British rules on declarations of incompatibility will encourage more treaty conform construction or less. Only the higher courts may rule on incompatibility. Is it more reasonable to suppose that most lower-court judges, faced with the alternative of letting an issue go on appeal to a higher court or attempting to settle it, will be tempted to strain the wording of the statutory provision so as to read it to be compatible with the Convention? Is it reasonable to suppose that the higher courts, faced with the alternative of ruling that an

83. 1947:164.

84. Court of Appeal for Western Sweden, judgment of 9 Apr. 1996 (not rep.). The fact that this case was not reported in itself reveals the embarrassment with which the majority of the legal establishment view constitutional review.

85. See e.g. *Derbyshire County Council* v. *Times Newspapers* [1992] Q.B. 770.

86. The absence of such a "go ahead" from Parliament was cited as the main reason for not taking more judicial notice of the Convention in, *inter alia*, *R.* v. *SSHD, ex p. Brind* [1991] 1 A.C. 696 and *R.* v. *Ministry of Defence, ex p. Smith* [1996] 2 W.L.R. 305.

open conflict exists between the incorporated Convention and another statute or avoiding that conflict, will choose the latter option? This would mean concealing a norm conflict, which is arguably more of a judicial usurpation of power. Nor will it necessarily solve the problem for future litigants. On the other hand it will have the benefit of allowing the court to do what it thinks is justice in the concrete case before it, i.e. rule in favour of a litigant whose Convention rights have been violated.

IX. CONSTITUTIONAL REVIEW

I have elsewhere dealt with the subject of constitutional review in general in Sweden, so I will not deal with it here. I will instead focus upon review on the basis of the Convention, although as RF 2:23 must be read together with RF 11:14, a few remarks about the latter provision are unavoidable. I will first examine the few cases so far on the subject and then look at the little doctrine and the *travaux préparatoires* say about the function of constitutional review in the Swedish system and its permissible scope. Finally, I will make a number of concluding remarks. To begin with, a terminological point: by "constitutional review" a British lawyer thinks about review of statutes. But as already mentioned, RF 11:14 provides a partial protection for both statutes and government ordinances from review in the courts. By contrast, there is no limit on the powers of the British courts, even the lower courts, to engage in judicial review of subordinate legislation, even though the test as regards substantive faults ("manifestly unreasonable") is set very high.

The first case in which the courts considered it necessary to invoke the *lex superior* rule in RF 2:23/RF 11:14 was R.H. 1995:85 concerning standing in paternity matters. The plaintiff wished to be recognised as the father of a child who had died in infancy. Chapter 3, section 5 of the Family Code states that applications to establish paternity may only be made in the name of the child by its guardian (usually the mother) or the social authorities. But the mother was dead and the social authorities chose not to bring a paternity action. The Court of Appeal considered whether the right to family life under Article 8 could nonetheless grant the plaintiff standing to bring a paternity action. It concluded that, while there was Commission case law indicating that the putative father should have the possibility of establishing legal relations with his alleged child, in the absence of a clear authority from the European Court of Human Rights on the issue, it could not find that the exclusive right of standing bestowed by Chapter 3, section 5 was "manifestly" in breach of the Convention.

In a case in 1996 an administrative court of appeal found invalid on the basis of Article 6 an ordinance on EC regulations relating to agricultural produce[87] which provided for no right of appeal to a court from an admin-

87. 1994:1715.

istrative decision to pay or not to pay an agricultural subsidy.[88] The ordinance postdated the law on incorporation. The court also found—controversially and in indirect conflict with an earlier decision of the Supreme Administrative Court[89]—that the administrative courts, rather than the general courts, were competent to hear the appeal. In doing so the court felt that it also had to set aside—or, rather, rewrite—section 14 of the Administrative Courts Act.[90] The interesting question here is whether it had to do so. Arguably there was no "conflict" between the rule in section 14 of the Administrative Courts Act and Article 6. The former rule is an internal rule of competence designed to clarify the appeal instances, certain decisions of administrative agencies having previously gone on appeal, confusingly, to the administrative courts of appeal at first instance, and others having gone to the administrative district courts first (and, indeed, certain cases having been heard by the Supreme Administrative Court as first and only judicial instance). The rule in section 14 states literally that *when* there is a statute or statutory instrument prescribing that the administrative courts are competent, then it is the district administrative courts which are to hear the case first. It does not deal with the situation when there is no such instrument. It is doctrine and the *travaux préparatoires* which have held that this rule implies that there must be a statute or statutory instrument bestowing competence on the administrative courts before they are competent to hear cases. Thus, the principle of treaty conform construction could have been used to avoid this apparent conflict. The use of constitutional review is also surprising in that it is difficult to employ Article 6 directly to set aside section 14. Article 6 demands only that one has access to *a* court, not an administrative court.

The case was appealed to the Supreme Administrative Court. This Court ruled that the right of access to a court, *as this is expressed in the general principles of EC law*, required the courts to provide a judicial remedy.[91] The Court also ruled that it was "most appropriate" that the administrative courts took jurisdiction. As the conflict, then, was between EC law and national law, the restriction on constitutional review in RF 11:14 did not apply. In fact, there was no conflict any more. The Court's duty was to apply EC law. While the judgment was correct, it sheds no light on the

88. Decisions of 15 Aug. and 17 Sept. 1996 (not rep.).

89. R.Å. 1995, ref. 58. It was careful to distinguish the two cases, although in substance the two issues are the same. R.Å. 1995 ref. 58 went against an earlier judgment of the Supreme Court (N.J.A. 1994, s.657). For a discussion of the conflict between the two supreme courts, see Cameron, *op. cit. supra* n.7, at pp.254–255.

90. 1971:289.

91. R.Å. 1997 ref. 65. For the application of the principle of judicial remedies see Case C-97/91, *Borelli Spa* v. *Commission* [1993] E.C.R. I-6313. For a discussion see Andersson, *op. cit. supra* n.66.

issue of constitutional review on the basis of the incorporated Convention as such (as opposed to the Convention as a source of EC law).[92]

To turn now to the function constitutional review serves in the overall system of constitutional control, as mentioned the *travaux préparatoires* to RF 11:14 stress that constitutional review is a "long stop", to be used, if at all, only in extreme situations. What little doctrine there is tends to support this. The absence of constitutional review is treated as an indication of the health (and proper functioning) of the political system.[93] The *travaux préparatoires* to the incorporation law also stress, repeatedly, that the primary responsibility for maintaining compliance with the Convention remains with the legislature. There is some doubt as to what this means. It naturally cannot mean that the legislature has the *sole* responsibility, as then one can legitimately ask the question, what purpose is served by RF 2:23? Sweden in any event already has a duty under international law to amend legislation in breach of the Convention. The whole point of the Convention, RF 2:23 and, indeed, of RF 11:14 is that they are aimed *against* the legislator.[94] The above statement in the *travaux préparatoires* should be read as simply asking the courts to refrain from engaging in *major* exercises of constitutional review, something which goes to the scope of the power, rather than its existence.[95]

What, then, is a "manifest" conflict in the context of the Convention? I have earlier expressed the view that a conflict which cannot be reconciled by means of the principles of *lex posterior*, *lex specialis* and treaty conform construction must, logically, be "manifest".[96] Still, as Holmes said, the life of the law is not logic but experience. The *travaux préparatoires* to RF 11:14 and RF 2:23, doctrine and case law give few clues as to what is a manifest conflict. The *travaux préparatoires* to RF 11:14 state that, in general, the more vaguely the superior rule is formulated, the less likely the

92. For a discussion of the case see J. Nergelius, "The impact of EC law in Swedish National Law—A Cultural Revolution", in Cameron and Simoni, *op. cit. supra* n.6.

93. See J. Nergelius, *Konstitutionellt rättighetsskydd* (*Constitutional Protection of Rights*) (1996), pp.701–703.

94. Nergelius, however, expresses the view, *idem*, p.685, that the effect of RF 11:14 is to emasculate RF 2:23 to the extent that it becomes a simple interpretative rule, giving only a weak precedence to the Convention in the event of an apparent conflict between it and another Swedish norm. I do not agree with this. In the event of a conflict, the interest in giving the Convention precedence should not be balanced against other interests. RF 2:23 clearly allows, indeed obliges, the courts to set aside statutes in concrete cases.

95. Cf. Danelius, *op. cit. supra* n.57, at p.46: "The debate in the travaux préparatoires hardly gives answers to this question [of how to handle conflicts] and the courts must therefore be considered to have considerable freedom in this respect to develop their case law in a way they consider appropriate." Strömberg, *op. cit. supra* n.48, at p.23, argues that the lack of guidelines in the *travaux préparatoires* as regards the interpretative exercises which are to be performed means that constitutional review will be the dominant means of judging the compatibility with the Convention and other Swedish law, but this underestimates the Swedish judge's reluctance to engage in overt constitutional review.

96. Cameron, *op. cit. supra* n.7, at p.240.

conflict with an inferior rule will be manifest.[97] If applied this would allow review on the basis of such relatively clear provisions as those dealing with delegation of legislative competence (RF Chapter 8) but not those dealing with the majority of rights set out in RF Chapter 2, and by extension, the Convention. The majority of rights in these two documents could be described as qualified rights, as opposed to absolute rights, i.e. they are capable of being limited by a statute, albeit a statute which must satisfy certain procedural and substantive conditions. Similar views have been expressed in doctrine as to the inappropriateness of review on the basis of the general requirement (in RF 2:12, paragraph 3) that a restriction in a qualified right be "necessary in a democratic society" and proportional to the end to be achieved.[98]

The "necessity" and proportionality requirements are expressed in the same way in, *inter alia*, Articles 8–11. The reason for this restrictive approach appears to be that it is inappropriate, in moral and social questions, that the democratic will of the people expressed through their representatives can be overruled by the courts. Obviously any constitutional review on the basis of rights involves "trumping" the democratic will but where the constitution allows the legislature a choice of means, and it has fully debated the necessity and proportionality of a particular restriction, then this argument holds that there is little, or no, room for reaching a different conclusion from that drawn by the legislature. To use the Convention terminology, the national courts should allow the legislature a margin of appreciation. Such an attempted distinction between the permissible scope of review of different types of rights can be criticised. The very idea of national courts applying the margin of appreciation doctrine can also be criticised on the basis that it is an international doctrine, to be used by an international court, whose job is to apply a form of European low common denominator test.[99] The national courts should arguably apply a tougher test. This would undoubtedly be in line with the underlying idea of the Convention as a subsidiary system (Article 53, ex Article 60). Moreover, if the Swedish courts fail to look at the substance of an issue, it will be more difficult for the Swedish government to argue non-exhaustion of domestic remedies, or otherwise convince the European Court of Human Rights that an issue has been properly aired before it went to Strasbourg. On the other hand, the Convention in general, and Article 13 in particular, does not require contracting parties to create the institution of constitutional review, or, where this exists, to expand (or

97. See SOU 1978:34, s.109.

98. See Nergelius, *loc. cit. supra* n.93, E. Holmberg, "På spaning efter rättigheter" ("Looking for Rights") (1987) SvJ.T. 653, 662–664, B. Bengtsson, "Om domstolarnas lagprövning" ("On Constitutional Review by the Courts") (1987) SvJ.T. 229.

99. T. H. Jones, "The Devaluation of Human Rights under the European Convention" (1995) P.L. 430.

contract) its scope. Moreover, the fact is that even national constitutional courts tend to apply similar doctrines of judicial restraint, at least in social and economic areas.[100] It cannot, thus, be said that the Swedish limitation is either contrary to the Convention or particularly unusual, comparatively speaking.

One other point can be mentioned here, even if it does not fit easily into the category of either *travaux préparatoires* or doctrine. This is the psychological impact of EU membership on judicial attitudes. I have mentioned the "spillover" effect earlier in the context of encouraging more treaty conform construction. EU membership can also, albeit more gradually, encourage more "ordinary" constitutional review on the basis that it is easier for Swedish judges both to grasp, and openly acknowledge, that norms can be in conflict with one another. It is fair to say that when Swedish courts (possibly even all courts) find an applicable norm, they apply it. They do not normally go looking for other applicable, and conflicting, norms. But with EU membership there is no longer a single omnipotent source for all norms applicable in the domestic legal order. It becomes easier to accept that norms can, and do, conflict.

Bearing in mind the lack of guidelines, I consider that the likelihood of constitutional review is dependent on four factors. The first of these is the nature of the Convention right at issue and the clarity of its breach. As already mentioned, some rules in the Convention (e.g. Article 3) are framed in unconditional terms, although even here there will be areas of lack of clarity. The requirements of other articles, such as Articles 5 and 6, are relatively clear and have furthermore been concretised by case law. But the prohibited restrictions which follow from Articles 8–11 and Protocol 1, Article 1 are much less clear and can be understood only from the case law, and sometimes not even then. Admittedly, where the European Court of Human Rights says that Swedish legislation as such is in breach of the Convention, then even the most cautious Swedish court will be able, indeed obliged, to apply constitutional review in a subsequent case which is in substance identical to the earlier Strasbourg case. But it should be remembered that the European Court only rarely finds legislation as such in breach of the Convention. It is more often a practice which is found to be in breach, e.g. the Swedish violations of Article 8 as regards child custody cases. The courts ought usually to be able to handle the latter case by reference to the principle of treaty conform construction. A problem here, in terms of clarity of breach, is cases involving other States. As already mentioned, such cases have to be "translated" to the national context. In any event, if "anticipation" is unlikely as regards the principle of treaty conform construction, it is even more unlikely here.

100. See e.g. A. von Brünneck, "Constitutional Review and Legislation in Western Democracies", in Landfried, *op. cit. supra* n.14.

The second factor is the relationship in time between the Convention case law relied upon and the date of enactment of the Swedish statute or ordinance. Here one can speak of three different situations: existing legislation conflicts with old case law, new legislation conflicts with old case law and existing legislation conflicts with new case law. As regards the first situation, bearing in mind the superficial nature of the work done, little trust can be put in the views expressed in the *travaux préparatoires* that existing Swedish legislation was in conformity with the Convention.[101] Instead, conflicts with older legislation should be accepted and not explained away. As regards the second situation, where the legislator has considered the Convention case law and reached a conclusion that new legislation is not in breach of the Convention, the Swedish courts should be, and will be, very reluctant indeed to reach a different conclusion. But where the legislator has not considered the issue at all, then the conflict with the legislator disappears.There is no "second guessing" the legislator when the legislator has not even "guessed first".[102] There is admittedly a problem where the legislator might have considered the issue, but not done so fully, or properly, but the quality of most Swedish legislation and the openness of the legislative process ought, hopefully, to reduce such situations to a minimum.[103] The third situation is where new Strasbourg case law comes into conflict with existing Swedish legislation. Here one must again distinguish between cases concerning Sweden and cases concerning foreign States. As regards the former, the problem will usually be that the legislator will not have had time to act. As time does not stand still, the Swedish courts cannot stay an action or refuse to give judgment pending legislation. Here the risk of a conflict between the courts and the legislator is obvious.[104] It should also be noted that Sweden has no "fast track" legislative amendment procedure similar to that provided for in Section 10 of the Human Rights Act. If, on the other hand, the legislator has had time to consider the matter and has deliberately refrained from acting then the Swedish courts should be very cautious about reaching a different conclusion. As regards the latter, the likelihood is either that the implications of the case for Swedish law are not apparent, or that, bearing in mind the constraints on parliamentary time, the legislator has not

101. SOU 1993:40. Although to be fair, doubts were expressed regarding the lack of a general right to an oral hearing (p.58) and the limited possibilities of obtaining damages from the State when a breach of the Convention is committed (p.78).

102. As Smith writes, "when the judge discovers constitutional problems of which the legislator was not aware, it is not easy to see why the judge should not prefer the constitutional norm over the legislative one": E. Smith, *Constitutional Justice under Old Constitutions* (1996), p.374.

103. The "proper consideration" test is most used in countries which emphasise the importance of *travaux préparatoires* in discerning the legislator's will—which suggests that it could be appropriate for Sweden: *idem*, p.375.

104. See e.g. *Vermeire* v. *Belgium*, 29 Nov. 1991, A/214–C.

yet had time to act.[105] In both these situations, constitutional review can be legitimate. Where, on the other hand, the legislator has had an opportunity to look at the case but has refrained from acting the Swedish courts should again be very careful about reaching a conclusion about the need for amendment of Swedish law other than that of the legislator.

The third factor is the type of norm reviewed. Despite the fact that the same ("manifest") protection against review is extended to both statutes and ordinances, review of the latter will in practice often be less controversial. Even though, in the Swedish parliamentary system, the government (almost invariably) has the same political composition as the Parliament, a distinction in treatment can be justified by the lack of democratic scrutiny an ordinance receives and the fact that it is usually passed much faster than a statute.[106]

The fourth factor is the area of law concerned and the degree of political controversy surrounding the issue. As already pointed out, the room for using the principle of treaty conform construction is less as regards criminal law. It should be noted that the Danish legislator was prepared to accept a greater degree of constitutional review by the courts in criminal matters.[107] To some it may seem wrong for a judge to take into account the degree of political controversy involved in a case, but it is foolish to be blind to the political dimension of constitutional review.[108] On the other hand, the practical significance of the conflict between those who argue for parliamentary supremacy and those who consider that the courts' power to engage in constitutional review should be strengthened should not be exaggerated. Normally, the situations in which the courts will be engaging in constitutional review will be, politically speaking, rather trivial (although for the individual plaintiff they will, of course, be important).[109] In Sweden the issue of access to a court as regards review of administrative decisions is still problematic and there is clearly scope for (more) constitutional review here. The impartiality of certain courts containing lay judges representing special interests can also be questioned on occasion. The political repercussions of constitutional review in such cases would be

105. An example of this is R.Å. 1996 ref. 97, *supra* n.55.

106. Thanks to Thomas Bull for useful comments on this point.

107. For a brief discussion of the approaches taken by the Danish and Norwegian legislators see Cameron, *op. cit. supra* n.7, at p.238.

108. Of course, the interest in shielding the ordinary courts is one of the main arguments for establishing a specialist constitutional court.

109. See the comments of F. Sterzel, in *Rättsfonden, Författningsdomstolen och lagprövning* (1991), p.88. A good example here is R.H. 1995:85, *supra* text accompanying n.87.

small or, in any event, much less than the political repercussions of review in the area of trade union or property rights.[110]

X. CONCLUDING REMARKS

THE significance of incorporation of the Convention in Sweden should not be overestimated. It does, after all, provide for a minimum system of protection. There has been relatively little discussion in doctrine about the value or otherwise of incorporation. What discussion there has been has tended to focus on the issue of access to a court to determine civil rights and obligations and to treat the issue together with the principle of judicial remedies under EC law.[111] Two controversial issues which have arisen recently and caused some discussion are the implications of the *Gustafsson* case for trade union law[112] and the question of the compatibility of the government policy to close all nuclear power stations with Article 1, Protocol 1.[113]

The legislative process ensures that, in most cases, the Swedish legislator will adequately take account of the Convention. More could perhaps be done as regards ensuring that administrative agencies, especially those in the "front line" of possible Convention violations, are aware of the requirements of the Convention. As regards the case law since incorporation, this indicates that the Swedish courts are faithfully attempting to take the Convention into account. The few deficiencies which have been revealed can probably be put down to lack of time, rather than hostility or indifference towards the Convention. A development towards slightly greater independence in interpretation can be expected from the Swedish

110. An interesting example of a recent judicial decision on property rights that was partly based on the Convention was the interim decision of the Supreme Administrative Court ordering a stay of execution of the government's decision to close a nuclear power station (R.Å. 1998 not 93). This decision had major political implications for the ruling Social Democratic Party.

111. In addition to Nergelius, *op. cit. supra* n.93, see W. Warnling-Nerep, "Rättsprovning: ett möte mellan civilrätt och offentligrätt samt tillika ett uttryck för rättsväsendets europisering" ("Judicial Review: A Meeting Between Civil Law and Public Law and an Expression of the 'Europisation' of the Legal System") (1997/8) 9 J.T. 904, R. Lavin, "Domstolskompetens enligt artikel 6 i Europakonventionen" ("The Competence of the Courts under Article 6 ECHR") (1994/5) 6 J.T. 731, H. Strömberg, "Delade meningar om allmän förvaltningsdomstols kompetens" ("Differing Views on the Competence of the Administrative Courts") (1995) F.T. 211, H. Danelius, "Svensk konventionsbrott" ("Swedish Breach of the Convention") (1995) SvJ.T. 63, J. Hane, "Europarättsintegrationen och fallet Stallknecht" ("European Integration Law and the Stallknecht Case") (1995–96) 7 J.T. 934, W. Warnling-Nerep and H. Vogel, "Allmän domstol eller förvaltningsdomstol, och vilken förvaltningsdomstol?" ("Ordinary Court or Adminstrative Court and which Administrative Court?") (1996) F.T. 213.

112. *Gustafsson* v. *Sweden*, 25 Apr. 1996. See F. Schmidt, R. Eklund, H. Göransson, K. Källström and T. Sigemann, *Facklig arbetsrätt* (*Trade Union Employment Law*) (1997), pp.236–238.

113. E. Ullenhag, "Kärnkraftsavvecklingen och Europakonventionen" ("Closure of Nuclear Power Stations and the European Convention") (1998) SvJ.T. 315.

courts, mainly, however, under the influence of EC law than under the Convention as such. This development is likely to manifest itself, at least initially, in certain areas of the law: particularly in administrative procedural law (access to courts) rather than the more controversial field of civil liberties (Articles 8–11). The respect which Swedish judges accord the legislator means that the main way the Convention will be used is in the form of treaty conform construction rather than constitutional review. Nonetheless, the constitutional difficulties involved in avoiding review of ordinances mean that a small increase in constitutional review can also be expected.