

SOME ASPECTS OF THE CONSTITUTION OF DENMARK

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This article describes aspects of the Danish constitution that may be of interest to foreign lawyers (1). It does not claim to contain radical or original propositions.

By way of introduction, it is important to appreciate that many doctrines of Danish constitutional law have not been laid down by the courts but reflect rather the practice of the highest organs of state or the views of legal scholars. Statements on Danish constitutional law, therefore, cannot be regarded as being as definitive as statements that may be made about other branches of Danish law. This article will treat not only of the written constitution *stricto sensu*, but also of aspects of Danish constitutional law in general.

I. Historical survey (2)

Denmark has not been a country of great revolutions. Even if, from a strictly legal point of view (3), the former absolute monarchy was more absolute than the monarchies in most other European countries, in practice the monarchy was moderate, bureaucratic and paternal, rather than despotic. Free discussion of the philosophical, legal and political writings

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- (1) Little has been published in international languages on Danish constitutional law. See S. V. Andersson in *The Western Political Quarterly*, 1965, pp. 840-47; Castberg in *Verfassungsgerichtbarkeit in der Gegenwart*, Köln 1967, pp. 417-38; R. Fusilier in *Les monarchies parlementaires*, Paris 1960, pp. 291-341; A. Ross in *Scandinavian Studies in Law*, Stockholm 1961, pp. 111-29 and in *Mind*, 1969, pp. 1-24; H. Walter in *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1976, pp. 278-90; *Denmark: An Official Handbook*, Copenhagen 1974, pp. 117-35; H. Desfeuilles, *Le pouvoir de contrôle des parlements nordiques*, Paris 1973; Due and Gulman in *Common Market Law Review*, 1972, pp. 256-70; O. Espersen in *Rene Cassin Amicorum Discipulorumque Liber III*, Paris 1971, pp. 77-187; P. Hastari in *Israel Law Review*, 1970, pp. 513-26.

The text of the Constitution can be found in the translation of the Ministry of Foreign Affairs in A. J. Peaslee, *Constitutions of Nations*, vol. 3, 1968, pp. 250-67. Some of the constitutional provisions referred to in this article are reproduced in the appendix, below, pp. 28-31.

- (2) This section is based mainly upon a report on "Prevailing Ideas of Fundamental Rights", submitted in 1977 to the human rights seminar of the European University Institute, Florence.
- (3) The introduction of absolute monarchy in Denmark is unique, in that this respected in full legal form and theory, even if the historical background was a *coup d'état*. The Royal Act of 14 November 1665, which implemented the absolute monarchy, was formally adopted by the legislative bodies of the time, including the "national council" (Rigsrådet), which represented the nobility.

of the great eighteenth century liberal thinkers was permitted (4), and Danish writers, for their part, did not, when calling for changes in government, advocate the adoption of revolutionary methods. The prevailing liberal attitudes were to have practical consequences for government, notably in the case of the statutory enfranchisement of the peasants and of the land reform acts in the late eighteenth century. Indeed, the principal statute on enfranchisement was enacted before the French Revolution, on 20 June 1788 (5). Throughout the period, however, all legislative, executive and judicial powers were firmly held in the grasp of the king. Only in 1834 was there established a system of elected consultative assemblies.

When the European uprisings of 1830 and 1848 swept over the continent, this moderate, bureaucratic and paternal monarchy still ruled Denmark, and allegations of serious abuse of absolute power remained rare. Yet the events of both years had repercussions in the country. A national liberal movement, calling for a democratic constitution and a popularly elected legislature, grew in strength. The Constitution of 1849 was the result; it should be seen, however, as a reflection of an international movement rather than as a reaction to earlier internal grievances.

The new constitution was drawn up by a constituent assembly whose primary concern was the introduction of a democratic form of government rather than the prevention of abuses of power on the part of either the legislature or the executive. Provision was made for a Rigsdag (parliament) consisting of two houses, the Folketing (lower house) and the Landsting (upper house). The Constitution itself was based on the doctrine of the separation of powers, and special care was taken to distinguish legislative authority, exercised by the Rigsdag and the king, and executive authority, exercised by the king through the medium of the cabinet. Though the Constitution cannot be seriously regarded as a reaction against previous abuses of power, the dominance at the time of a broad spectrum of liberal views guaranteed that the opportunity was not lost to grant express constitutional recognition of a number of civil and political rights. Naturally, the constituent assembly was well aware that certain political rights, such as freedom of expression and freedom of association, were essential to ensure the proper functioning of democratic government.

The Constitution of 1849 recognised the following civil and political rights:

- (4) There were restraints, however, as in the cases of the authors, P. A. Heiberg and Conrad Malthe-Bruun, who were exiled in 1799.
- (5) Denmark-Norway was one of the very few countries to continue diplomatic relations with the French government after the Revolution, not out of sympathy with its aims, but rather because the government did not fear any spreading of the revolutionary idea in Denmark: Boye-Jacobsen in *Studenterafhandlingar til Ugeskrift for Retsvæsen*, Copenhagen 1966, p. 11.

- (i) freedom of religion (now in Articles 68 and 70 of the Constitution of 1953) (6);
- (ii) personal liberty (a basic right of *habeas corpus*) (now in Article 71, paras. 3-5 of the Constitution of 1953);
- (iii) freedom from search and seizure (now in Article 72, which extends the protection to cover the post, the telegraph and the telephone);
- (iv) right to property (now in Article 73, paras. 1-2);
- (v) freedom of expression in a formal sense, *i.e.*, abolition of censorship (now in Article 77, which extends the protection to "writing and speech");
- (vi) freedom of association (now in Article 78, paras. 1 and 3); and
- (vii) freedom of assembly (now in Article 79).

In addition, in implementation of the principle of equality, all privileges attaching to nobility, title and rank were abolished (Article 83 of the Constitution of 1953). By comparison with other liberal constitutions, this bill of rights is far from impressive.

The Danish Constitution of 1849 differed from other constitutions of the age in its recognition of a number of embryonic economic and social rights. Freedom of trade (now Article 74) reflected prevailing economic theory, and the right to education (now Article 76, the first sentence of which is slightly differently formulated) is a legacy of the age of enlightenment. The right to public assistance (now in Article 75, para. 2) was a novel idea and provoked disagreement within the constituent assembly. The principal reason for its introduction, however, would appear to have been not advanced notions of charity, but rather the fear of uprisings where people were unable to support themselves (7). In general terms, the Constitution could be characterised as democratic and liberal, but with few civil rights spelt out.

The Constitution of 1849 applied only to the kingdom of Denmark, but the king also ruled the duchies of Schleswig and Holstein (now mainly German). In 1854, accordingly, a constitutional act was passed embracing the whole realm, but in no way modifying the provisions of the Constitution of 1849. This act was amended in 1855 and again in 1863. After the Danish defeat in the war with Prussia in 1864, the immediate constitutional problem was "solved" through the annexation of Schleswig-Holstein by Prussia. The constitutional texts of 1854, 1855 and 1863 contained no provisions of a civil rights character.

A conservative government came to power in the wake of the war of 1864. The Constitution of 1849 had provided for election on a very broad basis to the second house, the Landsting. This basis the government now proceeded to restrict. The civil rights provisions in the Constitution,

(6) For the text of the salient provisions of the Constitution of 1953, see the appendix, below.

(7) Boye-Jacobsen, *op. cit.*, pp. 38-43.

however, remained unchanged. Central to the Constitution of 1849 was a system of separation of powers, most fully worked out in regard to relations between the executive and the legislature. The cabinet was appointed by the king, but appointments were made irrespective of the wishes of the majority within the democratically elected Folketing. From 1873 onwards, a struggle took place over what was called "parliamentarism", the implementation of the competing modern doctrine, under which appointments to the cabinet would be made in conformity with the wishes of the Folketing majority. The change was finally made in 1901, and since then parliamentarism has been part of Danish customary constitutional law. The principle itself was codified in the 1953 Constitution.

Changes in Danish society, dating from the latter half of the nineteenth century, were to continue to have repercussions in the twentieth. Serious unrest in the labour market in 1899 terminated in a "covenant", which established a system of collective bargaining and obligatory arbitration. This system only began to be seriously challenged in the 1970s. Around 1890 important legislation in the field of social welfare was also enacted; cumulatively, this can be regarded as the first modern social welfare code (8). The government and expert commissions were also at work during the last decades of the nineteenth century on amending the administration of justice. A basic draft was finalised in 1877, but the comprehensive Administration of Justice Act was not enacted until 1919. Other developments of significance to the present century were the inauguration of folk high schools ("folkehøjskoler"), which brought education on history and social matters to ordinary (adult) people, particularly to those living in rural areas, and the launching of the co-operative movement, which stimulated the growth of a sense of social involvement at the same time as it provided laymen with training in administration.

With the triumph of parliamentarism in 1901, the democratically elected Folketing became the dominant force in government, and the powers of the conservative Landsting were correspondingly diminished. In 1915 the Constitution was amended to broaden the basis of election to the second house. Other changes of significance were the introduction of voting rights for women and for servants. What is now paragraph 3 in Article 73 of the present Constitution was also introduced at this time: it provided for extensive judicial review of the legality of expropriations of property. Undoubtedly, however, the most important achievement in the domain of human rights in the first half of the twentieth century was the decision of parliament to approve the Social Reform Acts of the 1930s. These laid the foundations of the modern welfare state and recognised the material well-being of all citizens as the prime responsibility of govern-

(8) 1889: the Factories Act; 1891: the Old Age Pensions Act; 1892: the Approved Health Insurance Societies Act.

ment. Accompanying the legislation, there was created a complex administrative machine, to a large extent exempt from judicial review.

In 1938 the social democratic government brought forward a constitutional amendment designed to abolish the now obsolete Landsting. The draft text also contained a number of minor amendments covering fundamental rights. None of these changes, however, were passed at the time. Only in 1953, in fact, did the then government succeed in obtaining approval for amendments to the Constitution. The principal changes that were then made included the abolition of the Landsting, and the creation of a right in one-third of the members of the Folketing to demand a referendum on virtually any kind of parliamentary bill (Article 42). Parliamentarism was confirmed in Article 15 and Article 20 (9) was also inserted (10).

Following the Second World War, considerable interest developed in respect of human rights issues, principally by way of reaction to Nazism but also as an aspect of the Cold War. The United Nations Declaration on Human Rights and the elaboration of the draft United Nations covenants and of the European Convention on Human Rights are, of course, striking international examples of the trend. Constitutional changes, reflecting this pre-occupation with human rights, were to make their appearance in the Danish Constitution of 1953. Principally, these embraced:

- (i) the introduction of the ombudsman (Article 55);
- (ii) the strengthening of the guarantee of personal liberty (Article 71, paras. 1 and 2);
- (iii) guarantees against abuses of the power of administrative detention where criminal proceedings are not involved (Article 71, paras. 6 and 7);
- (iv) guarantees of secrecy in respect of the post, the telephone and the telegraph (Article 72);
- (v) the introduction of a right to work (Article 71, para. 1);
- (vi) the addition of *freedom* of education to the existing provision on the *right* to education (Article 76);
- (vii) the protection of the (formal) freedom of expression in writing and speech (Article 77); and
- (viii) the introduction of certain restraints on the freedom of association (Article 78, paras. 2, 4 and 5).

As will be recognised, most of the changes merely represented adjustments to the needs of a modern society. The only important innovation was the introduction of the ombudsman, but the guarantees against abuses of the power of administrative detention were also significant. Noteworthy, finally, was the decision to restrict the freedom of association (in reality, probably a consequence of the Cold War).

(9) See below under VI.

(10) There were further structural changes of minor importance.

Development of the modern welfare state has largely taken place subsequent to the enactment of the 1953 Constitution. Citizens are now entitled as of right to a certain level of social security, but the administrative machinery required to operate social affairs is extremely complex, and the adequacy of legal safeguards within it (over such matters as the use to which personal information volunteered to obtain a pension, for example, may be put) remains a topical problem. A striking example of the desire for social equality is to be seen in the contemporary demand for economic democracy, *i.e.*, worker participation in the running of businesses and in the sharing of the profits.

Public administration now covers wide areas, and the problems in fundamental rights which have surfaced as a result are not ones with which the liberal philosophy of 1848 has shown itself capable of dealing. One such problem has been access to files in the public domain. Effective control over the various agencies of administration by the public itself (whether the individual citizen or the press) has been recognised to be of increasing importance. In the 1960s and 1970s a number of statutes were enacted to make this control more effective (11). In general, demands for safeguards against abuse of power by the executive branch of government have grown with the immense increase in its power. Technological development particularly in the field of communications has increased public awareness of problems relating to fundamental rights and has, on the other hand, alerted the public to the dangers of public or private invasions of privacy, *e.g.*, through new techniques of eavesdropping. Plainly, new rules are needed to ensure that modern technology is availed of for the benefit of the public and to check possible encroachments on the private lives of citizens.

Demands for participation in public administration have increased over the last fifteen years. The structure of government at both national and local levels based, as it is, on the older concept of representation, is not, however, adequate to assure to all a realistic chance of participating in the administration of what, essentially, are their own affairs. On the other hand, a number of private organisations such as trade unions and employer's organisations have grown very powerful, making it possible for them to exercise considerable influence upon government. Two forms of extra-parliamentary activity have thus manifested themselves: demonstrations or similar actions (occasionally of a violent character) and the exertion of hidden and usually uncontrollable pressure by a few strong political lobbies. A further manifestation of the frustration with "official democracy" has been the tendency to establish unofficial citizens' groups to deal with problems of local concern.

(11) The most important of these statutes is an Act of 1970 on access of the public to documents in administrative files: Eilschou Holm, "The Protection of Civil and Political Rights in Denmark", in *Human Rights Journal*, 1975, pp. 173 and 175-76.

In sum, the major overall trend of the period has been away from the *laissez-faire* liberalism of 1848 towards the modern welfare state, not from "Rechtsstaat" to "Sozialstaat", rather from liberalism to "Rechts- und Sozialstaat", or from non-intervention to state intervention. In the context of social welfare, it has been a development from *laissez-faire* to state responsibility, realised not so much in the concession of human rights, but rather in political decisions resulting in reform legislation being introduced, which has pre-empted to a large extent the domain of private charity. Politically, the country has witnessed the development of increased popular participation in government (the theory of parliamentarism, extension of the franchise, extra-parliamentary activities), and of an accompanying demand for legal control over abuses of power by central and local government alike. These various changes, it is important to observe, have principally taken place on the "sub-constitutional level": they have not been expressed in demands for codification of additional fundamental constitutional rights. It is characteristic, too, that the Danish experience lacks the large number of leading cases on constitutional rights handed down, for instance, by the courts in the United States and Germany. One *caveat* here is significant: Article 73 on the protection of private property has been quoted extensively in a number of cases. In the absence of a constitutional court possessed of great flexibility, it has in Denmark come to be felt that the ombudsman, parliamentary control and legislation itself furnish collectively a much more efficient, flexible and precise means of securing fundamental rights than the necessarily rigid provisions of a constitutional text.

II. A brief outline of the constitutional system (12)

Montesquieu's doctrine of the separation of powers is reflected in Article 3 of the present constitution, which stipulates that the legislative power is vested jointly in the king and Folketing, the executive in the king and the judicial in the courts of justice. The doctrine, however, was never carried to extremes, and the introduction of "parliamentarism" in 1901, written into the Constitution in 1953, spelt the final end to any full separation of executive and legislative authority. In fact, the modern constitutional system is founded instead on the supremacy of the Folketing, both the judiciary and the executive being relegated to subordinate roles (13).

The Constitution is still couched in such language as to make it appear that the monarch retains considerable power. In fact, however, (s)he can act only through the government, as is clear from Articles 12 and

(12) The procedure for constitutional amendment, the bill of rights, the judiciary (and the ombudsman), and international relations will be dealt with in subsequent sections.

(13) See, in particular, Ross, *Dansk Statsforfatningsret*, Copenhagen 1966, pp. 203 ff.

14 (14). It is not the king but the ministers alone who are responsible for the affairs of government (15) ("the king can do no wrong because he cannot act alone": Article 13). The king presides over the council of state, to which all important government measures are submitted (Article 17, para. 2), but, in reality, no deliberations take place at this level, the relevant decisions having been finalised beforehand by the ministers.

According to Article 14, ministers are appointed and dismissed by the king, who also determines their number and allocates their responsibilities. Again, however, this is mere formality. In the wake of an election the king consults the leaders of the parties elected to the Folketing, and then designates the majority leader as head of the government. The latter then appoints the other ministers and allocates responsibilities. Ministers do not have to be members of the Folketing, but this is usually the case. If they are, they retain their seat in the Folketing. Though the doctrine of cabinet responsibility applies in Denmark as a political reality, each individual minister is responsible, both legally and politically, for the work of his own ministry. Even if only few problems are actually submitted to the minister for his personal attention, all decisions are made in his name. All ministerial officials are civil servants appointed without regard to political affiliation; and no officials are replaced on a change of government.

The Folketing has 179 members, two of whom are elected from Greenland and two from the Faroe Islands (16). Members are elected for a four-year term, but the prime minister may call an election at any time (Article 32) (17). All Danish citizens resident in Denmark (18) have the right to vote at the age of 18 (19). The voting age is established by the Folketing, subject to obligatory public referendum (Article 29, para. 2). Any person entitled to vote is eligible for election to the Folketing, unless he has been convicted of an offence which in terms of public opinion

(14) According to Art. 14, no legislative or governmental act is valid without the signature of the king *and* a minister.

(15) Furthermore, the king (and the royal family) is exempt from civil and criminal responsibilities (Art. 13).

(16) The Faroe Islands have always been part of the realm, but with extensive home rule: see the Faroe Islands Home Rule Act of 1948. The Faroe Islands were allowed to decide independently whether or not to join the E.E.C. together with the rest of Denmark, and the islands opted to stay out. Greenland had colonial status until 1953 when it was integrated into the realm. Since 1979 Greenland has enjoyed home rule. A referendum in Greenland in 1982 has called for withdrawal of Greenland from the E.E.C.

(17) The Folketing as such, however, is not dissolved if a new election is called. The members serve until a new election has taken place (Art. 32, para. 4), even if the four-year period has expired without a new election. If, however, the four-year period expires without an election, the prime minister incurs responsibility (Art. 32, para. 3).

(18) Aliens who have stayed legally for three consecutive years in Denmark are entitled to vote at local government elections.

(19) The Danish Electoral Act is extremely complicated due to a sweeping system of proportional representation.

would disqualify him from membership (Article 30) (20). Without the consent of the Folketing, none of its members may be prosecuted or imprisoned for any offence, save where the member is caught committing the offence. Similarly, no member is answerable outside the Folketing for any statement made there, again in the absence of such consent (Article 57).

Any member of the Folketing may introduce bills and other proposals (Article 41), but, in fact, most bills are introduced by the appropriate minister, following consideration by the government. Under the terms of Article 41 each bill receives three readings in the Folketing. The first reading is usually a general debate on the bill's merits. The bill is then referred to a standing committee of the Folketing, where it is scrutinised and discussed in detail. The second reading covers both the general principles involved, the details and the proposals of the standing committee. After the second reading, the bill may be referred back to the committee or sent on directly for a third reading. The bill becomes a valid, legislative act when confirmed by the king (and a minister) (Article 22).

Next to its legislative function, the most important task of the Folketing is to supervise the activities of the government and the executive generally. Under Article 15, para. 1, no minister can remain in office if the Folketing passes a vote of no confidence in him. If such a no-confidence vote is passed against the prime minister, the government has to resign (para. 2). Since the government itself will usually here be the target, such no-confidence votes will be passed under paragraph 2 rather than paragraph 1. The Folketing also controls finance. No tax or source of revenue may be imposed, amended or abolished, nor any government loans raised, other than by means of legislation (Article 43). Public accounts are scrutinised by a number of state accountants elected by the Folketing from among its members (Article 47). The Folketing (or, indeed, the king) may prosecute any minister in respect of his official conduct before the Rigsretten ("court of the realm"). The Rigsretten consists of no more than fifteen members of the Supreme Court, chosen by seniority (21), and a corresponding number of members chosen by (but not members of) the Folketing (Articles 59 and 60). Article 53 of the Constitution also gives each member of the Folketing the right, with the latter's consent, to initiate a debate on any matter of public interest, and to demand explanations from ministers. Questioning under Article 53 usually produces an extensive political debate. The Folketing's procedures also provide for a weekly session of parliamentary questions. Here members, in submitting questions to ministers, are required to give two days notice. The consent

(20) This requirement is construed restrictively: Max Sørensen, *Statsforfatningsret*, Copenhagen 1973, pp. 81 ff. If a member of the Folketing is convicted of a crime which would disqualify him under Art. 30, he is expelled from the Folketing.

(21) At the time of writing the Supreme Court actually consists of 15 members.

of the Folketing is not required, and the minister's answer does not usually provoke detailed discussion. There are twenty-two standing committees covering all areas of governmental activity; their functions are both general and specific (22).

The legislative power possessed by the Folketing can also be viewed as a mechanism of control over the government (23) and the administration generally. Neither can ignore legislation, of course (24), but there is a more positive side to this as well. According to the well-established "principle of legality", all public acts must be based upon law, and the graver the intervention in the private sphere, the clearer the relevant legal authority has to be demonstrated. Even if such authority is not confined to legislative enactments, but includes other sources of law, *e.g.*, customary law, the rule helps to ensure the supremacy of the Folketing.

III. Constitutional conservatism

There are a number of reasons for the existence of procedures to amend a constitution different from those employed in the case of ordinary legislation. There is no point in declarations to the effect that the constitution is supreme law if it can be amended by ordinary legislation. Secondly, the fact that a constitution is designed to furnish the basis of political and social life calls especially for specific assurances as to its stability. Thirdly, a constitution is usually the outcome of profound and sometimes violent, political controversy, and there would appear to be a need to consolidate that outcome in an especially significant fashion. In the case of Denmark, an extreme example of a constitution drawn up to satisfy the third set of considerations was that which preceded the democratic constitution of 1849, the Royal Act of 1665, which stipulated that it would be valid "for all times".

The modern Danish constitution makes no claim that it is immutable. Nevertheless, as a matter of practice, it is difficult to amend it, certainly by comparison with the constitutions of other countries. Article 88 calls for a favourable vote by two consecutive Folketings, and approval by referendum by a qualified majority of at least 40% of the registered electorate between the two votes. It is the qualification of the majority required which makes constitutional amendment virtually impractical (25). The arrangement was inserted in the constitution of 1915 (though there

(22) See, *inter alia*, the discussion by Due of the Market Committee in *Common Market Law Review*, 1973, p. 355.

(23) Even if the Folketing has to share the legislative power with the government, the system of "parliamentarism" gives the lion's share of this power to the Folketing, and the fact that the Folketing can veto a bill justifies the characterization of legislative power in terms of the Folketing's control of government.

(24) Except within the field of "royal prerogatives": see, in particular, Art. 19.

(25) The Constitutional Bill of 1938 fell because the then required 45% majority was not reached, and it is generally recognised that this target was only reached in 1953 because the very popular Accession to the Throne Bill was included in the referendum.

expressed in terms of a 45% majority), as compensation for the democratisation of the franchise in regard to the Landsting: essentially, it was intended as a protection for conservative minority interests. With amendment so difficult, it has not been necessary to regard any part of the constitution as an "untouchable core", as has been done in France (1958 constitution, Article 85, para. 5) and in the Federal Republic of Germany (1949 constitution, Article 79, para. 3).

What makes it possible to live with so restrictive an amendment procedure is the extreme brevity of the Danish Constitution, only 89 short articles. Many matters which elsewhere are regulated in constitutional texts are expressly or impliedly left to ordinary legislation. Examples are the Elections to the Folketing Act of 1953 (since amended), the Responsibilities of Ministers Act of 1964 and the Ombudsman Act of 1961 (since amended). These statutes form part of the constitution in a material, if not the strict, sense.

The emergence of "constitutional customs" has also helped to mitigate the consequences of Danish constitutional conservatism. Such customs or conventions, of course, are not a Danish invention. The British constitution consists exclusively of customary law and ordinary legislation, but even written constitutions cannot, and should not, deal with all aspects of the supreme organs of state. They need to be supplemented by legislation and customary law. Furthermore, the rigidity in form of the constitution implies elasticity as to its content. There is a need to construe the constitution liberally, and this has led to the emergence of constitutional customs which not only serve as instruments to help construe, make more precise, and supplement, the provisions of the constitution, but may, in fact, so modify constitutional provisions as to justify regarding the custom itself as an amendment *ipso facto* to the constitution.

A constitutional custom is established if a certain pattern of conduct has been followed continually for a substantial length of time by all relevant organs of state (26). It is doubtful that the relevant conduct itself has to be based on some *opinio juris*; any such requirement would, it is conceded, be difficult to prove, and it is assumed that a liberal approach would be adopted. As yet, the Danish courts have had no opportunity of discussing the methodological problems associated with constitutional customs. No doubt, they would be reluctant to extend recognition to a custom that amended the constitution, and more prepared to admit one that construed it, or rendered it more precise, or could be regarded as merely supplementing it.

Naturally, it is not always a simple matter to distinguish customary

(26) The following survey of the notion of constitutional customs is based upon traditional Danish theory, in particular, Ross and Sørensen. In Norwegian law criticism of the traditional methodology has been voiced by Helgesen (see *Jussens Venner*, 1977, No. 6), but even if this criticism seems justified and may apply also to Danish law, the analysis has not been carried through to an extent where it would be possible to base a brief description, such as is here attempted, upon it.

constitutional law from other facts of political life. Undoubtedly, the king has the right, under Article 22, to veto legislation, but this right has not been exercised since 1865. Nevertheless, there appears to be general agreement that he has not lost that right by virtue of any custom based on the principle of desuetude. The general hypothesis may be tentatively advanced that desuetude alone is insufficient to bring a custom into existence. Direct action to the contrary (*consuetudo contraria*), rather, would appear to be required.

The following list of Danish “constitutional customs” (a principal emphasis among which is customs which appear to amend the written constitution) is by no means exhaustive:

(i) According to Article 17, paragraph 2, all legislation and all important government decisions are to be discussed in the council of state. It has been recognised, however, that the king may sign bills outside the council, subject to later confirmation by that body.

(ii) The most prominent of the amending customs concerns Article 46, paragraph 2, which stipulates that:

“no expenditure shall be defrayed unless provided for by the Finance Act passed by the Folketing or by a Supplementary Appropriation Act or by a Provisional Appropriation Act passed by the Folketing”.

Considerable expenditure, however, is defrayed without the authority of such legislation. That expenditure, though, must, in turn, be approved by the Folketing standing committee on finance, and is required to be included later in a Supplementary Appropriation Act.

(iii) Article 63 provides for unconditional judicial review of administrative action. The courts, however, have recognised that the legislature can limit the right to commence proceedings in court by adding to the statute concerned a clause making the terms of the statute themselves conclusive (27).

(iv) Another limitation effectuated by customary constitutional law affects the ambit of Articles 72 and 77; these articles are excluded from application within penal institutions.

(v) The most conspicuous instance of restriction of fundamental rights brought about by constitutional custom is that of censorship on films to be shown to minors under 16 years of age—despite the unconditional nature of the prohibition on censorship laid down in Article 77. Prior to 1952, the guarantee in Article 77 did not cover the words “in writing, and in speech”, and the result was a general, if lenient, theatre and film censorship. It appears from the *travaux préparatoires* of the constitutional amendment committee that it was never intended to abolish this form of limited censorship. The constitutionality of the Censorship

(27) The limitation of judicial review where the administration is given scope for the exercise of discretion in making its decision (see below V), is not truly an amendment of Art. 63, because if the statute sets no limit, there is nothing to review.

Act (for films) and of the regulations governing censorship of stage performances has never been challenged. Censorship of stage performances was abolished in 1954, and film censorship was restricted to minors under 16 by Act no. 135 of 29 March 1969. Considering the uncompromising wording of Article 77, it would appear to be unconstitutional now to extend the field of censorship—even within the limits of the law in existence in 1953.

(vi) A further restriction of the ambit of Article 77 may likewise be based on customary constitutional law. The Civil Servants Act sets up an administrative disciplinary system that covers, *inter alia*, the imposition of sanctions on those who disclose information obtained while in the public service. The courts, for all practical purposes, are precluded from interfering with the operation of this system and the procedures linked to it, despite the clear words of Article 77, which envisage that any culprit “may be held answerable in a court of justice”. The argument has been advanced that this departure from Article 77 is warranted for the reason that disciplinary sanctions under the terms of the Civil Servants Act are more lenient than the relevant provisions of the penal code. This argument, however, does not take into account the fact that the rules of both the Administration of Justice Act and the penal code are designed to furnish greater procedural safeguards. In brief, the system established under the Civil Servants Act may be preferred by the civil servant who pleads guilty, but not by the one who pleads the opposite. The constitutionality of the Civil Servants Act has been questioned in the writings of scholars; it might, perhaps, be contended that the legislation is constitutional, and is made so by virtue of constitutional custom.

(vii) Another—perhaps, more typical—example is found in connection with the right of assembly guaranteed by Article 79. It is evident that this right has to be exercised without prejudice either to the rights of others or to public order. An assembly of persons may therefore be prevented, *e.g.*, from trespassing, and may even be prohibited, *e.g.*, in accordance with the provisions of the Epidemic Diseases Act.

(viii) Finally, constitutional review of legislation by the courts should also be mentioned in this respect. It will be discussed in more detail below.

There are major difficulties over the precise status of constitutional custom: specifically, over whether or not any such custom can be amended by ordinary legislation. These questions have never been discussed, let alone ruled upon, in court. Classic constitutional doctrine teaches us that a custom which establishes or amends a specific construction of a constitutional provision itself ranks as a full constitutional norm, whereas a custom which merely supplements the constitution does not, and may, accordingly, be amended by ordinary legislation. This is quite logical: if a custom can amend a constitutional provision or furnish an authoritative interpretation of it and thus fix its meaning, it must rank as high as the provision itself; if it merely supplements, or “fills in a gap” in the constitution, it only performs the function of all ordinary legislation.

Logical as it is, classic doctrine would probably not prove of great assistance to the judiciary in deciding the issue. More questions are raised than are answered. There is, in fact, a sliding-scale between construction, which may not be authoritative at all, depending on the factors underlying it, and customary law itself. The difficulties here are also connected with the special problem of the constitutional review of legislation (see below: V). If judicial review itself is not based on a custom operative at constitutional level, but may, rather, be abolished by legislation, it seems scarcely logical to permit constitutional custom which is established, or rather accepted, by the courts to be regarded as immune from the amending power of ordinary legislation; and if the custom is established by the Folketing and/or the government alone, it would seem fair to empower these organs to amend the custom. Again, the distinction between constructive (or amending) and supplementing customs is often difficult to draw. No doubt, a custom as to the interpretation to be placed upon the word "property" in Article 73 is a construction of the Constitution and applies at constitutional level, whereas a custom as to whether, in cases where property is expropriated, compensation is to be paid before or after the actual surrender of property merely supplements the Constitution. Once again, however, there is a sliding-scale between the two extremes.

Even if we know that constitutional customs exist and we realise that they may amend the content of the Constitution (undoubtedly, their most interesting feature), there remain other legal problems about them to be considered, especially in emergency situations.

Article 23 is the only provision dealing with constitutional emergencies. It gives the king power during an emergency, when the Folketing cannot be assembled, to issue provisional laws which are to be confirmed or rejected by the Folketing as soon as possible. This is merely a derogation from the established separation of powers, and it is expressly stipulated that provisional laws may not contain anything contrary to the Constitution. It is to be assumed, however, that in case of an extremely serious emergency, truly "threatening the life of the nation", or making constitutional activity impossible, the courts will accept derogations from the Constitution to the extent strictly required by the situation. Thus, the Internment of Communists Act of 1941 was accepted by the Supreme Court (28), even though three communist members of the Folketing were prevented from taking part in the deliberations and voting in the Folketing. This decision was severely criticized both during and after the war, and in 1953 paragraph 1 was inserted in Article 71 in an attempt to prevent a similar occurrence. The so-called "statutory decrees" ("lovanordninger"), issued by the (non-political) under-secretaries of state between 20 August 1943 and 5 May 1945, when the Folketing and the government were not in existence, have generally been accepted as valid (29), even though they

(28) UfR 1941/1070 H.

(29) UfR 1945/570 ØLD.

amounted to amending legislation enacted by administrative decree.

IV. The bill of rights

It is, perhaps, somewhat misleading to refer to chapter VIII of the Constitution in terms of a "bill of rights". Even if most of the human rights which the Constitution protects are to be found in chapter VIII, a number are found elsewhere; moreover, chapter VIII also contains provisions on other matters.

In chapter VII, Articles 67, 68 and 70 guarantee freedom of religion (30); every citizen thus has the right freely to practise his religion (Article 67), and may not be forced to perform specific religious observances (Article 68). Finally, his religious convictions or his origin may not place him under any disadvantage in law (Article 70).

In chapter VIII, Article 71, paragraph 1, protects personal liberty, by way of opposition to confinement. The other paragraphs of the Article set out the circumstances under which personal liberty may be restricted, and what legal protection is available. Article 72 guarantees freedom from search and seizure and the secrecy of postal and telephone communications; these may be curtailed by statute or by court order. According to Article 73, the right of property is inviolable. Under certain conditions—that requisite statutory authority is possessed, that this is demanded by the public interest and that full compensation is paid—expropriation may take place; expropriation can be challenged in the courts, as can the amount of compensation. Article 74 enjoins the legislature to abrogate restraints on the free and equal access to trade that are not founded on the public interest. Article 75 contains, in paragraph 1, a general right to work and, in paragraph 2, a right to public social assistance. Article 76 guarantees the freedom of education and the right to education. Article 77 guarantees formal freedom of expression, in the sense that censorship, *i.e.*, making prior approval a condition of legality, is forbidden. More precise guarantees in this area can be derived from elsewhere in the Constitution, either explicitly, as with Article 67 (freedom of religious expression), Article 49 (proceedings in the Folketing), Article 65 (judicial proceedings), or implicitly, as perhaps with Article 31, paragraph 2 (a limited freedom of expression on political matters) (31). Freedom of association is entrenched in Article 78; in addition, it states in what circumstances an

(30) According to Art. 4, the Evangelical Lutheran Church is the national church of Denmark, and as such it must be respected by the State, and Art. 6 requires the king to be a member of this church. Art. 66, which dates back to 1849, stipulates that the constitution of the national church shall be laid down by statute. The idea was clearly to establish a separate church structure independent of the ordinary public administration, but, despite several attempts to reach political agreement, the Danish Church still lacks its separate constitution, and the Danish Church is administered by a cabinet minister aided by a department for ecclesiastical affairs. The clergy are civil servants.

(31) Germer maintains that there is a material protection of freedom of expression in all public matters under Art. 77: *Ytringsfrihedens væsen*, 1973. This theory, however, has not won wide support. See also n. 39 below.

association may be prohibited. According to Article 79, citizens have the right to assemble unarmed without prior notice. The police nevertheless retain a right of supervision over public assemblies, and public open-air assemblies may be dispersed if they constitute a danger to public peace. Article 83 abolishes all privileges attached by legislation to nobility and rank. Article 85 restricts the applicability of Articles 71, 78 and 79 within the defence forces to the extent required by the provisions of military statutes. The Constitution also provides for a number of rights which are of a secondary nature as compared with human rights proper, for instance, the provisions in Article 29 and following on the right to vote and to be elected, and those in Article 61 and following on the privileges and immunities of the judiciary. Article 70, Article 71, paragraph 1, and Article 83 call for equality in specific fields, but it is interesting to observe that the Constitution does not establish the principle of equality itself in general terms.

By comparison with international instruments on human rights and many national constitutions (*e.g.*, the German "Grundgesetz"), the Danish "bill of rights" is unsystematic and incomplete, in regard to both the rights enumerated and their definition. It should be borne in mind, however, that the provisions in the Constitution are supplemented by ordinary statute law, in particular, by the Administration of Justice Act and the penal code, as well as by general principles of law, *e.g.*, the doctrine of equality before the law (32). Indeed, it is arguable that it is only if the rights in question form a natural and integrated part of the legal system that these will be applied effectively and, one might add, liberally. Ideally, human rights should be spelled out in detail in the appropriate legislation, for a bald statement of constitutional principle always runs the risk of being construed in a restrictive fashion. Another point to be borne in mind has been emphasised by Fawcett (33): a number of rights, such as the right of entry of citizens and the prohibition of retroactive penal legislation, are so taken for granted that it is not considered necessary to state them expressly (34).

The principle of legality, referred to above (35), is also of great importance at the constitutional level, for it produces effects comparable to any coherent human rights doctrine. This was amply demonstrated in a recent case (36). The Police Activity Act, the statutory basis for the issuance of local police regulations, authorizes in Article 2 the making of regulations pertaining to public order on the highway. The police

(32) The general principle is not laid down in any statutory provision but see, for specific aspects, Act no. 100 of 4 March 1921, on prohibition of discrimination between sexes in the public service, and Act no. 289 of 9 June 1971, on prohibition of racial discrimination.

(33) *Human Rights Journal*, 1975, p. 234.

(34) A number of retroactive penal sanctions were, however, enacted just after the Second World War.

(35) Above, p. 10.

(36) UfR 1977/872 VLD.

regulations issued by administrative decree in turn contain, in Article 12, section 3, a prohibition against the distribution of leaflets, etc. of any kind within 100 metres of schools or military barracks. Four people were charged with distributing anti-military leaflets within 100 metres of a military barracks. The High Court was unanimous in finding that Article 12, section 3, did not violate Article 77 of the Constitution, because Article 77 did not exclude statutory restraints on the exercise of the freedom of expression (the article only secures formal, not material protection). The High Court went on to say, however, that there was no reason to assume that the distribution of leaflets within 100 metres of schools or military barracks would cause any greater disruption of public order than would the distribution of leaflets elsewhere (where the prohibition did not apply), and if the distribution of leaflets close to schools or barracks (or elsewhere) did, in fact, disturb public order, the police would have authority under other legal provisions to intervene. Article 12, section 3, accordingly, was not warranted by the terms of Article 2 of the Police Activity Act, and the defendants were acquitted.

The principle of legality also supplements individual human rights directly. Thus Article 72 on searches and seizures does not lay down expressly the legal requirements for either (37), but the principle of legality certainly requires statutory authority for such measures. Article 71, paragraph 2, appears to restate the normal principle of legality, by requiring that no person may be deprived of his liberty save where this is warranted by law. It is reasonable, however, to assume that this provision is designed to underpin the principle itself by requiring express statutory authorisation (38).

The human rights provisions of the Constitution apply to aliens as well as to Danish citizens, except where express provision is made to the contrary, *e.g.*, by Article 71, paragraphs 1 and 6.

Problems of "Drittwirkung" have not surfaced in Danish law, and it must be assumed that the human rights provisions are not directly applicable as between private persons or entities, and may rather only be availed of *vis-à-vis* public authorities.

Exercise of fundamental rights is usually governed by legislation. At the same time, certain provisions in the Constitution contain specific references to legislation—to ensure either that any inroads upon a right are made by statute, as with Article 73, paragraph 1, or that the exercise of a right is regulated in greater detail by statute, as with Article 71, paragraph 6. There is no rule in Danish constitutional law, however, that is comparable to Article 19 of the German Constitution, which provides that certain specific requirements must be met by any legislation that touches on the field of fundamental rights. The reason is that none of the

(37) The reference to statute only covers the specific issue of derogation from the requirement of a court warrant.

(38) This construction is not undisputed; see Sørensen, *op. cit.*, pp. 343-44.

provisions outlined above confer power upon the legislature to restrict the exercise of the fundamental rights defined in the particular articles. If any statute purports to do so, it will not be upheld by the Supreme Court.

These references envisaging further action on the part of the legislature (enactment of laws) do not *eo ipso* preclude the latter from delegating authority to make regulations by decree, provided that the statute in question strictly defines the scope of the delegated authority. Whether or not such delegation is precluded depends on other factors of interpretation, including the *travaux préparatoires*. Even if the constitutional provision in question does not contain an explicit reference to legislation, it is obvious that certain rights are virtually meaningless in the absence of implementing legislation (*e.g.*, Article 76).

A number of important provisions in the Constitution (Articles 71, 72 and 73) are so formulated that they begin with absolute statements to the effect that certain rights are inviolable. For instance, Article 71, paragraph 1, states that "Personal liberty is inviolable". The articles in question go on, however, to set out the conditions under which these rights may nevertheless be restricted. Such absolute statements of rights, despite appearances, do not therefore possess any independent legal content. A few other expressions in the Constitution are so vague as to be reckoned virtually non-justiciable by the courts. The best example is the notion of "the public weal", alluded to in Article 73. The same applies to the two provisions on social rights contained in the Constitution, Articles 74 and 75.

A distinction should be drawn between the so-called "formal" protection of a right and its "material" protection. Under "formal" protection (which amounts to very little), the only restriction on the legislature and the administration is that the exercise of the right concerned cannot be made conditional on prior consent. Nothing prevents the legislature from attaching criminal liability to the exercise of the right. Material protection, however, consists in a flat prohibition on the making of inroads into the right concerned. The most celebrated instance of formal protection is to be found in Article 77, which only abolishes censorship in the form of any requirement of prior consent to publication (or other forms of expression). The legislature remains free to impose criminal sanctions on expression, and this is the case, for instance, with certain forms of libel and slander (39). No constitutional provision expressly prevents the legislature from attaching criminal responsibility to expressions of political sentiment. As suggested above (40), however, Article 31, paragraph 2, which guarantees "equal representation of the various opinions of the electorate", may act as a constraint on

(39) A material protection is found, however, in Art. 10 of the European Convention of Human Rights, and Art. 19 of the U.N. Covenant on Civil and Political Rights, to which Denmark adheres. See also n. 31 above.

(40) Above, p. 15.

the making of inroads into the material political freedom of expression.

A different kind of distinction can be drawn between procedural and substantive protection. The rights in the Constitution may be formulated in terms of substantive prohibitions on kinds of action or legislation. Article 68 is an apt example: it directly forbids the authorities from requiring financial contributions to be made to any religious denomination other than the one to which the citizen adheres. The rights, however, may equally be formulated in terms of the establishment of specific procedures binding on the administration and legislature when contemplating the adoption of measures within the area covered by the constitutional provision in question. A good example is Article 72, which neither prohibits nor restricts searches and seizures but only requires the intervention of a judicial order, unless a particular exception is warranted by statute. Rather more common are combinations of the two forms of protection. Examples are furnished by the terms of Articles 71 and 73.

V. The judicial system and judicial review

The country is divided into a little over 100 city or county court areas. Above these courts are the Eastern High Court in Copenhagen and the Western High Court in Viborg, Jutland. The highest court is the Supreme Court, which sits in Copenhagen.

Under Article 62 the administration of justice is expressed to be strictly separated from the executive authority, and the judicial power is to be regulated by law. Article 64 further regulates the independence of the judiciary by stipulating that judges, in discharging their judicial functions, are to be guided solely by the law, and by providing that a judge can be removed from office only by court action, and not by administrative decision. Article 65 calls for public and oral judicial proceedings, and for the participation of lay judges and juries in the administration of justice without, however, establishing the extent of that participation.

The Constitution does not contain any provision for judicial review of the constitutionality of legislation. The question is deliberately left open; no provision in the Constitution appears to imply the existence of any such power. Nor does the Danish legal system provide for any constitutional court or special administrative courts. The question of the existence of the power of judicial review, however, has been relevant in a numbers of cases brought before the ordinary courts (41). In none of these have government counsel argued for dismissal of the proceedings on the grounds that the courts do not possess the power. The legislature itself, so far as I am aware, has never adopted a clear united stance on this question (42).

(41) See UfR 1912 p. 545, 1913 p. 457, 1921 p. 148, 1953 pp. 168 and 169, 1935 p. 1, 1941 p. 1076, 1967 p. 22, 1971 p. 299 and 1972 p. 903, concerning the constitutionality of the Act of Accession to the European Communities, printed in English in *Common Market Law Review*, 1973, p. 3.

(42) However, at the revision of the Administration of Justice Act in 1953, it was stated in the Folketing that all members of the Supreme Court should normally take part

The cases upon which the assumption of the existence of the right of judicial review is based are primarily concerned with constitutional provisions of a vague and indefinite character, particularly the notions of "public weal" and "full compensation" of Article 73. This indicates that the legislature is at pains not to breach the more material provisions of the Constitution (43), and certainly does not do so deliberately. The courts, for their part, show extreme caution when exercising judicial review. Only once has the High Court declared an act unconstitutional (44), but this was overruled by the Supreme Court. The courts would seem to prefer, wherever possible, to adopt a restrictive interpretation of the impugned statute so as to bring it into conformity with the Constitution. In addition, a few vague expressions, such as "the public weal" of Article 73, are considered non-justiciable. If the court discovers, for example, that personal motives lie behind an act of expropriation, it may declare the latter unconstitutional, but it is very unlikely that it will embark on a positive assessment of the demands of the public weal. The Danish Supreme Court definitely adopts a more reserved attitude than, say, either the United States Supreme Court or the German Constitutional Court.

Only a person (or body corporate) with an individual and particular interest ("legal interest") in a decision can contest the constitutionality of the relevant statute. The "popular complaint" does not exist in Danish law, and the plaintiff must be in a position to claim that his constitutional rights have, in fact, been violated. There is no provision enabling anyone or, indeed, any group such as the Folketing to ask for a preliminary ruling on the constitutionality of a legislative bill. A judgment on the constitutionality of a statute has effect, in principle, only *ex nunc* and *inter partes*. The statute in question, accordingly, is not thereby rendered null and void; but the administration and the courts generally follow judicial precedent.

Judgments exercising judicial review are founded on somewhat vague notions of the "*lex superior*". The Supreme Court has not to date decided whether the right of review is based on a constitutional custom to construe the Constitution (in which case the legislature cannot prevent the courts from exercising the review), or whether that right is merely a custom supplementing the Constitution (in which case the legislature may derogate from it): for this, see III, above.

Most constitutional scholars are of opinion that the right of judicial review is established at constitutional level. A bold reference to the principle of the "*lex superior*", however, scarcely suffices as a warrant for the supposition. No one (I venture to suggest) would suppose that the principle of the "*lex superior*" does not apply in French law, even if

in the decision of cases involving judicial review of the constitutionality of legislation (*Rigsdagstidende*, 1952-53, Till. A, sp. 3342).

(43) Today bills are scrutinised by the law department of the Ministry of Justice before being tabled, in order to secure their compatibility with the Constitution and to assess their relationship to other statutes.

(44) UfR 1921 p. 148.

judicial review of legislation is not recognised under the French Constitution. Max Sørensen has argued (45) that the issue of judicial review is a question of the constitutional competence of the courts. It involves, therefore, a construction of the term "judicial power" in Article 3 of the Constitution. This argument, however, approaches the circular; and, in view of the fact that judicial review was deliberately left unmentioned by the Constitution of 1849 and is not to be found adverted to in any of the deliberations of subsequent constitutional committees, the argument can by no means be regarded as conclusive. Neither is there conclusive evidence to warrant making the assumption that judicial review does not apply with "constitutional force". That question, too, is still open. On the one hand, it might be argued that judicial review is of little value if the legislature is at liberty to exempt itself from its purview "if need be". On the other hand, if the question is examined from a more practical, or political, point of view (the line of vision which is often necessary in the realm of constitutional law), the question itself may be stated in terms of power politics. Does the Supreme Court or the Folketing have the ultimate power to determine the constitutionality of legislation? As long as the democratic system works efficiently, and a Folketing, which is truly democratically elected, jealously guards its independence (46), it would probably be more consonant with democratic ideology to prefer the Folketing to possess that ultimate power.

As has previously been remarked, administrative courts have not been established in Denmark, but under Article 63 of the Constitution the courts possess the power of review of administrative acts in relation to both statute law and the Constitution. The legislature can exclude the right to bring an action in court by stipulating that the decision of the relevant executive agency is final; furthermore, if a statute leaves wide scope for the exercise of discretion, the power of judicial review is generally considered to be quite limited in character. Regulations promulgated by the administration may also be the subject of review in regard to their compatibility both with statute law and with the Constitution. All administrative acts must be authorised directly or indirectly by law, and judicial review of an administrative act will, therefore, for all practical purposes, be a question of examining the compatibility of the act with the relevant statute or with the general principles of administrative law, or one of the constitutionality of the statute authorising the particular administrative act. Accordingly, the separate question of the constitutionality of administrative acts does not usually arise.

Danish administrative law contains provision for possible extra-judicial legal protection. In a number of instances, the citizen is in a

(45) *Op. cit.*, p. 306.

(46) As opposed to, *e.g.*, a situation of occupation or domination by a foreign or domestic power, as was the case in 1940 to 1945. On the other hand, this example indicates that when the Folketing is not free, neither is the judiciary.

position to challenge administrative acts infringing on his rights, by referring the matter in the first place to the administrative authority that is immediately superior. The decision of the inferior authority is then reviewed both as to its legality and as to its appropriateness in relation to the purpose it has been intended to achieve, and, if necessary, another decision is substituted. For certain categories of case, there exist boards, which review, to some extent independently of other parts of the administration, the measures taken by the authority in question; the decisions of such boards or committees may, to a certain extent, be challenged in court.

In addition to these forms of appeal and review boards, the “ombudsman” is by far the most important of all the forms of extra-judicial protection. The ombudsman is appointed by the Folketing and is completely independent of the executive and judicial branches, and, as an institution, has its legal basis in Article 55 of the Constitution and in the Ombudsman Act 1961. The creation of such an institution was intended, on the one hand, to afford the citizen a quicker and cheaper form of legal redress against the administration and, on the other, to render subject to review such administrative action as would not normally be capable of challenge in court. On his own initiative or on the application of an individual, the ombudsman investigates the legality and the reasonableness of any administrative act. Since the decisions of the ombudsman are not legally binding—he may refer the matter for investigation and legal proceedings to the authorities competent to take such action in the case, but he cannot alter or annul the relevant decision—the administrative authority concerned is free to decide whether it will look afresh at what it has done, and thereafter adopt a different attitude. It should, however, be noted that the administration as a rule follows the recommendations of the ombudsman.

VI. International relations

Article 19 confers the capacity to conduct foreign affairs exclusively upon the government (“the king”). The consent of the Folketing is required in certain situations, most significantly, on entering into international obligations, the fulfilment of which necessitates the concurrence of the Folketing, or which otherwise are of major importance. The consent of the Folketing does not, however, imply any constitutional duty upon the Folketing, in the wake of the conclusion of any treaty, to proceed to statutory implementation. Under Article 19, paragraph 3, a foreign affairs committee is appointed by and from members of the Folketing: this is the sole standing committee of the Folketing which is required by constitutional provision.

The Constitution does not explicitly regulate the relationship between Danish law and international law, but the fact that Article 19, paragraph 1, deals with the conclusion of treaties as an issue separate from their implementation indicates a dualistic perception of the relationship

between international and national law, and Danish law is definitely based upon a dualistic approach. By popular repute, it is stated that "no one is above and no one beside the Folketing", a striking, if far from exact, description of constitutional principle. When Article 19 confers the treaty-making power upon the government, it would violate that principle were international law to enjoy a status above that of ordinary statute; however, as will be demonstrated below, Danish law goes even further in contending that international law does not even enjoy a status as high. The basic point of departure (admittedly, subject to significant modification) is that international law is not enforceable by Danish courts.

Another dimension to the Danish attitude *vis-à-vis* international law is that, with the exception of treaties explicitly stating otherwise, international law is not deemed to be violated so long as the national authorities act in accordance therewith, irrespective of whether or not national law (*i.e.*, statute law) is in conformity with the relevant treaty. It is, therefore, in principle not necessary (for purposes of the observance of international law) to incorporate international law into national law, if the authorities prefer to act in accordance with international law (and, perhaps, thereby violate national law). On the other hand, it may not be sufficient to enact or amend statute law to bring Danish law into conformity with international law, if the authorities choose to violate both. The essential question, so far as the observance of international law is concerned, is whether or not there is observance in fact, not whether or not national legal provisions may happen to be in conformity with international law.

There is no Danish case law of note which explicitly discusses the relationship between Danish law and customary international law. Scholarly writing on the subject is unanimous that where Danish law is ambiguous, law-enforcing agencies should adopt as their "rule of construction" that construction which best conforms with obligations of international law. In addition, it is suggested that even if Danish law is unambiguous, the law should be applied with the reservations and/or additions necessary to bring Danish law into compliance with international law. It seems fair to assume, for instance, that seizure of the property of a foreign state in violation of the principle of state immunity would not be recognised by the courts, even though no Danish provision limits the right of seizure of private property. On the other hand, it is unlikely that Danish courts would go so far as to accept a direct and unambiguous violation of a Danish statute in order to bring about compliance with customary international law.

As a consequence of the above-mentioned principle of the supremacy of the Folketing (which is political rather than legal), the legislature is never under a constitutional duty to amend old legislation or to enact new, in order to bring about compliance with international obligations. As a matter of practice, however, the requirement of consent to a considerable extent guarantees the subsequent enactment of measures of implementation. If a treaty obligation is entered into, the fulfilment of which clearly

cannot be obtained under existing Danish law, the cabinet minister to whose department the question appertained would probably be obliged, under the terms of Article 5 of the Responsibilities of Ministers Act, to table a bill designed to bring Danish law into conformity with the treaty.

The general principle, under which treaty provisions are not directly enforceable by Danish judicial or administrative authorities, is modified in a number of ways. Where Danish law is ambiguous, the rule of construction set out above applies, bringing Danish law into line with international law. Again, most international lawyers in Denmark maintain that, in the absence of any express indications to the contrary, conflict between a treaty provision previously observed at national level and a provision of a subsequently enacted statute should be resolved by adopting an interpretation of the statute that accords with international obligation, even at the risk of violating the text of the statute. The courts are to presume that it has not been the intention of the Folketing to pass legislation in breach of Denmark's international obligations ("the rule of presumption"). The rule therefore comes into play only if the Folketing does not deliberately breach international law. Danish law knows no remedy against deliberate violation of international law on the part of the legislature. Furthermore, the rule of presumption just adverted to only operates if the treaty provision antedates the statute in question. If, contrariwise, the statute is older in point of time, the legislature naturally would not have been in a position to take into account any treaty provision, when enacting the statute. In this case, the lacuna is brought into being by, and is the fault of, not the legislature, but rather the government, which chooses to enact a treaty obligation, without being demonstrably certain that the treaty could be effectuated under Danish law. The responsibility is thus cast on the supreme organ of government, the Folketing, to decide if it wishes to uphold, or amend, the relevant statute in the light of treaty obligation, and the courts, for obvious reasons, cannot be expected to presume the outcome of this evaluation of priorities. The rule of presumption outlined above, it should be remarked, is adhered to by the government (47); as yet, however, no case law has evolved.

Finally, it should be noted that it has been consistently maintained, and the government has accepted (48), that administrative bodies are required to exercise discretionary powers in conformity with treaty obligations. This obligation is subject to judicial review under Article 63 of the Constitution. Where an administrative decree runs counter to a treaty, and yet the relevant enabling statute envisages that a decree may be made

(47) See, in particular, the Ministry of Justice report on Danish accession to the E.E.C. (printed in *Acta Scandinavica Juris Gentium*, 1971, p. 65), pp. 80-81, and Due and Gulman in *Common Market Law Review*, 1975, pp. 265-67. The agent for the Danish government laid claim to this rule in the "Viking-Kjeldsen" case before the European Commission of Human Rights: see *Collection of Decisions*, vol. 43, pp. 44 *et seq.*

(48) The Ministry of Justice report, pp. 77-79 and 80-81.

which is in conformity with the treaty, the relevant minister is bound, under the terms of the Responsibilities of Ministers Act, to amend the decree.

A treaty can become Danish law by the enactment of legislation or the promulgation of a decree containing its substance (implementation by *rewriting*). Before this means of implementation may be availed of, the content of the treaty must be known prior to enactment or promulgation, and a normal condition is that an examination should first have demonstrated that Danish law is not already in conformity with the treaty, or does not already allow for direct or indirect application of the latter. This particular means of implementation does not require that the treaty be of a self-executing character. Its advantage lies in the fact that only the substantive provisions of the treaty relevant to national law are "transformed", not, for example, provisions in respect of settlement of disputes, ratification, reservation, entry into force, etc., or provisions already fulfilled in Danish law. Furthermore, implementation here takes place in a manner consistent with normal Danish legislative practice and through the medium of the Danish language. Its obvious disadvantage is the risk that gaps may arise, or even a contradiction between the treaty and the national law.

Another important means of implementation is to *incorporate* the treaty into Danish law by express reference to it. In this fashion, the treaty becomes applicable in its authentic form and language, and the risk of differences between national law and international law is minimised (49). On the other hand, any treaty (drawn up in a foreign language) thus incorporated is far more difficult to apply within the Danish legal system than one which has been "rewritten" into Danish law. Incorporation may take one of two forms. A statute may be enacted dealing comprehensively with the particular subject-matter, with the express proviso that the rules apply only in so far as a specific (or any) treaty obligation does not stipulate otherwise; or a special provision may be passed indicating that a particular treaty or future treaties in the relevant domain are to be applied. Here the usual procedure envisages that the treaty will be self-executing; and, as has been made apparent, incorporation may be availed of in regard to future, as well as to existing, treaties.

Ascertainment of conformity of Danish law with the treaty obligation is by far the most widely employed means of implementation. If an interpretation of national law, which has not been rejected by the courts, permits fulfilment of the obligation, or if fulfilment is possible through the exercise of discretionary administrative power, then no further steps are required. The treaty will, in fact, be implemented so long as no statute to

(49) But the risk of differences between national and international law is not necessarily abolished altogether, as may be seen in particular with treaties establishing special implementation organs, *e.g.*, the European Convention on Human Rights, where the practice of national bodies applying the convention may differ from that of the international organs.

the contrary effect is enacted. It is immaterial whether or not the treaty is self-executing.

The obvious drawback in the case of this means of implementation is the risk of mistake in the process of ascertaining the conformity of Danish law with the treaty. This process may give rise to few difficulties so far as technical treaties covering limited areas are concerned, but as regards, for example, human rights conventions, embracing vast and diverse areas of law, the exercise becomes virtually impossible (50).

The different means of implementation can, of course, be combined (51).

As will be evident, Danish law on implementing international law embodies a *laissez-faire* policy of non-incorporation, despite the fact that in recent years the attitude towards international law itself has been more receptive. The major problem, however, may not primarily be a problem of law at all, rather one of information. It is arguable that the awareness of international law possessed by Danish lawyers and judges is limited, and that it is for this reason that the ability and readiness to avail of international law (often requiring a technique very different from that of Danish law) are not very impressive.

Article 20 makes possible the statutory delegation of powers, vested under the Constitution in Danish authorities, to international authorities set up by mutual reciprocal agreement. Such powers may only be delegated to a specified extent. Bills contemplating delegation under the terms of Article 20 may be passed either by a majority of five-sixths of the members of the Folketing or by the majority needed for the passing of an ordinary bill and a subsequent referendum.

Article 3 of the Act of Accession to the European Communities (52) incorporates into Danish law directly enforceable Community law enacted prior to Denmark's accession. In Article 2 of the same Act, however, all directly enforceable Community law enacted subsequent to accession is, by a process of anticipatory incorporation, incorporated as well. Thereby, legal authority over people within Danish jurisdiction is transferred to bodies outside the framework of the Danish constitutional system. This transformation, in effect a derogation from the Constitution, is made possible through application of the procedure in Article 20 of the Constitution.

It is the prevailing theory, supported by statements of the constitutional committee, that any statute enacted under Article 20 can be revoked by ordinary statute. The procedure of Article 20 is not necessary to revoke

(50) But it is nevertheless very common even in this field.

(51) One example is Act no. 143 of 29 April 1955, implementing the N.A.T.O. treaty on the legal position of N.A.T.O. forces and the protocol on N.A.T.O. headquarters. The Act employs transformation and incorporation (in several ways) and the "travaux préparatoires" on ascertainment of conformity for certain treaty obligations.

(52) The Act of Accession and Art. 20 are dealt with in greater detail by Due and Gulman in *Common Market Law Review*, 1977, p. 256.

a statute enacted under that article. It would seem reasonable, however, to demand that the revocation be explicitly stated and not made dependent solely on the principle of the "*lex posterior*". It follows that, if the Folketing (and the government) expressly wishes, either generally or in part, to violate Community law, Danish courts cannot set aside any enacted statute by reference to Community law. If, on the other hand, a statute represents an incidental violation of Community law, the courts may confidently set that statute aside or adopt a restrictive interpretation of it. The principle of the primacy of Community law as against domestic law is preserved only so long as the legislature does not deliberately set out to breach Community law.

Article 20 only touches the system of governmental competence established by the Constitution. No derogation from the material provisions of the Constitution, including, in particular, those on civil liberties is thus allowed. It follows that, if a Community rule violates the Constitution in such regard, the courts are bound to apply the latter. With European integration at its present stage, it is not very likely that a Community rule would violate a material provision of the Danish Constitution, but with the development towards a European Union, the possibility of a conflict cannot be excluded. The European Court has suggested a solution to this problem, by including within the corpus of Community law the fundamental rights recognised in the constitutional traditions of the member states (53). Nevertheless, the German Constitutional Court, in its celebrated and controversial "*so lange*" decision (54), has maintained a right of constitutional review over Community law "as long as" Community law lacks a codified catalogue of fundamental rights. In the unlikely event that a similar problem should arise in Denmark, the Danish Supreme Court would probably have to adopt the more absolute stance of unconditionally rejecting Community law as incompatible with the Constitution.

In brief: all directly enforceable Community law (55) is immediately applicable by Danish courts, provided the Act of Accession is not expressly revoked, either in general or in part, and provided Community law does not amount to a violation of the Constitution.†

(53) CJEU 14.5.1974, *Nold v. Commission* 4/73.

(54) The judgment of the Bundesverfassungsgericht of 29/5/1974.

(55) This also applies in the case of the European Court of Justice, whose judgments are executed by the normal Danish organs for the execution of judgments, provided the Ministry of Justice has certified the authenticity of the judgment.

†The manuscript of the present article was in general completed in 1978; an attempt, however, has been made to bring the text in certain particulars up to date, viz. spring 1982. The views expressed in the article are those of the author alone, and do not purport to reflect official opinion on the part of any Danish authorities.

APPENDIX

Extracts from the Constitution of the Kingdom of Denmark

The following text is the official translation by the Ministry of Foreign Affairs.
The full text of the Constitution can be found in: Amos J. Peaslee, *Constitutions of Nations*, 3rd. ed., vol. 3, The Hague 1968, pp. 250-267.

PART I

3. The legislative power shall be vested in the King and the Folketing conjointly. The executive power shall be vested in the King. The judicial power shall be vested in the courts of justice.

PART III

15. (1) A Minister shall not remain in office after the Folketing has passed a vote of no confidence in him.

(2) Where the Folketing passes a vote of no confidence in the Prime Minister, he shall ask for the dismissal of the Ministry unless writs are to be issued for a general election. Where a vote of censure has been passed on a Ministry, or it has asked for its dismissal, it shall continue in office until a new Ministry has been appointed. Ministers who continue in office as aforesaid shall do only what is necessary for the purpose of the uninterrupted conduct of official business.

16. Ministers may be impeached by the King or the Folketing with maladministration of office. The High Court of the Realm shall try cases of impeachment brought against Ministers for maladministration of office.

19. (1) The King shall act on behalf of the Realm in international affairs. Provided that without the consent of the Folketing the King shall not undertake any act whereby the territory of the Realm will be increased or decreased, nor shall he enter into any obligation which for fulfilment requires the concurrence of the Folketing, or which otherwise is of major importance; nor shall the King, except with the consent of the Folketing, terminate any international treaty entered into with the consent of the Folketing.

(2) Except for purposes of defence against an armed attack upon the Realm or Danish forces the King shall not use military force against any foreign state without the consent of the Folketing. Any measure which the King may take in pursuance of this provision shall immediately be submitted to the Folketing. If the Folketing is not in session it shall be convoked immediately.

(3) The Folketing shall appoint from among its Members a Foreign Affairs Committee, which the Government shall consult prior to the making of any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee shall be laid down by Statute.

20. (1) Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation.

(2) For the passing of a Bill dealing with the above a majority of five sixths of the Members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection in accordance with the rules for Referenda laid down in section 42.

23. In any emergency the King may when the Folketing cannot assemble, issue provisional laws, provided that they shall not be at variance with the Constitution Act, and that they shall always immediately on the assembling of the Folketing be submitted to it for approval or rejection.

PART IV

29. (1) Any Danish subject whose permanent residence is in the Realm, and who has the age qualification for suffrage provided for in subsection (2) of this section shall have the right to vote at Folketing elections, provided that he has not been declared incapable of conducting his own affairs. It shall be laid down by Statute to what extent conviction and public assistance amounting to poor relief within the meaning of the law shall entail disfranchisement.

(2) The age qualification for suffrage shall be such as has resulted from the Referendum held under the Act dated the 25th March, 1953. Such age qualification for suffrage may be altered at any time by Statute. A Bill passed by the Folketing for the purpose of such enactment shall receive the Royal Assent only when the provision on the alteration in the age qualification for suffrage has been put to a Referendum in accordance with subsection (5) of section 42, which has not resulted in the rejection of the provision.

30. (1) Any person who has a right to vote at Folketing elections shall be eligible for membership of the Folketing, unless he has been convicted of an act which in the eyes of the public makes him unworthy of being a Member of the Folketing.

(2) Civil servants who are elected Members of the Folketing shall not require permission from the Government to accept their election.

31. (1) The Members of the Folketing shall be elected by general and direct ballot.

(2) Rules for the exercise of the suffrage shall be laid down by the Elections Act, which, to secure equal representation of the various opinions of the Electorate, shall prescribe the manner of election and decide whether proportional representation shall be adopted with or without elections in single-member constituencies.

(3) In determining the number of seats to be allotted to each area regard shall be paid to the number of inhabitants, the number of electors, and the density of population.

(4) The Elections Act shall provide rules governing the election of substitutes and their admission to the Folketing, and also rules for the procedure to be adopted where a new election is required.

(5) Special rules for the representation of Greenland in the Folketing may be laid down by Statute.

PART V

43. No taxes shall be imposed, altered, or repealed except by Statute: nor shall any man be conscripted or any public loan be raised except by Statute.

49. The sittings of the Folketing shall be public. Provided that the President, or such number of Members as may be provided for by the Rules of Procedure, or a Minister shall be entitled to demand the removal of all unauthorised persons, whereupon it shall be decided without a debate whether the matter shall be debated at a public or a secret sitting.

57. No Member of the Folketing shall be prosecuted or imprisoned in any manner whatsoever without the consent of the Folketing, unless he is caught in *flagrante delicto*. Outside the Folketing no Member shall be held liable for his utterances in the Folketing save by the consent of the Folketing.

PART VI

61. The exercise of the judiciary power shall be governed only by Statute. Extraordinary courts of justice with judicial power shall not be established.

62. The administration of justice shall always remain independent of the executive power. Rules to this effect shall be laid down by Statute.

63. (1) The courts of justice shall be entitled to decide any question bearing upon the scope of the authority of the executive power. However, a person who wants to query such authority shall not, by bringing the case before the courts of justice, avoid temporary compliance with orders given by the executive power.

(2) Questions bearing upon the scope of the authority of the executive power may be referred by Statute for decision to one or more administrative courts. Provided that an appeal from the decision of the administrative courts shall lie to the highest court of the Realm. Rules governing this procedure shall be laid down by Statute.

64. In the performance of their duties the judges shall be directed solely by the law. Judges shall not be dismissed except by judgment, nor shall they be transferred against their will, except in the instances where a rearrangement of the courts of justice is made. However, a judge who has completed his sixty-fifth year may be retired, but without loss of income up to the time when he is due for retirement on account of age.

65. (1) In the administration of justice all proceedings shall be public and oral to the widest possible extent.

(2) Laymen shall take part in criminal procedure. The cases and the form in which such participation shall take place, including what cases are to be tried by jury, shall be provided for by Statute.

PART VII

67. The citizens shall be entitled to form congregations for the worship of God in a manner consistent with their convictions, provided that nothing at variance with good morals or public order shall be taught or done.

68. No one shall be liable to make personal contributions to any denomination other than the one to which he adheres.

69. Rules for religious bodies dissenting from the Established Church shall be laid down by Statute.

70. No person shall for reasons of his creed or descent be deprived of access to complete enjoyment of his civic and political rights, nor shall he for such reasons evade compliance with any common civic duty.

PART VIII

71. (1) Personal liberty shall be inviolable. No Danish subject shall in any manner whatever be deprived of his liberty because of his political or religious convictions or because of his descent.

(2) A person shall be deprived of his liberty only where this is warranted by law.

(3) Any person who is taken into custody shall be brought before a judge within twenty-four hours. Where the person taken into custody cannot be released immediately, the judge shall decide, stating the grounds in an order to be given as soon as possible and at the latest within three days, whether the person taken into custody shall be committed to prison, and in cases where he can be released on bail, the judge shall determine the nature and amount of such bail. This provision may be departed from by Statute as far as Greenland is concerned, if for local considerations such departure may be deemed necessary.

(4) The finding given by the judge may at once be separately appealed against by the person concerned to a higher court of justice.

(5) No person shall be remanded for an offence that can involve only punishment consisting of a fine or mitigated imprisonment (*haefte*).

(6) Outside criminal procedure the legality of deprivation of liberty which is not by order of a judicial authority, and which is not warranted by the legislation dealing with aliens, shall at the request of the person who has been deprived of his liberty, or at the request of any person acting on his behalf, be brought before the ordinary courts of justice or other judicial authority for decision. Rules governing this procedure shall be provided by Statute.

(7) The persons mentioned in subsection (6) shall be under supervision by a board set up by the Folketing, to which board the persons concerned shall be permitted to apply.

72. The dwelling shall be inviolable. House searching, seizure, and examination of letters and other papers as well as any breach of the secrecy to be observed in postal, telegraph, and telephone matters shall take place only under a judicial order unless particular exception is warranted by Statute.

73. (1) The right of property shall be inviolable. No person shall be ordered to cede his property except where required by the public weal. It can be done only as provided by Statute and against full compensation.

(2) Where a Bill relating to the expropriation of property has been passed, one-third of the Members of the Folketing may within three weekdays from the final passing of such Bill demand that it shall not be presented for the Royal Assent until new elections to the Folketing have been held and the Bill has again been passed by the Folketing assembling thereupon.

(3) Any question of the legality of an act of expropriation and the amount of compensation may be brought before the courts of justice. The hearing of issues relating to the compensation may by Statute be referred to courts of justice established for such purpose.

74. Any restraint of the free and equal access to trade which is not based on the public weal, shall be abolished by Statute.

75. (1) In order to advance the public weal efforts should be made to afford work to every able-bodied citizen on terms that will secure his existence.

(2) Any person unable to support himself or his dependants shall, where no other person is responsible for his or their maintenance, be entitled to receive public assistance, provided that he shall comply with the obligations imposed by Statute in such respect.

76. All children of school age shall be entitled to free instruction in the elementary schools. Parents or guardians who themselves arrange for their children or wards receiving instruction equal to the general elementary school standard, shall not be obliged to have their children or wards taught in an elementary school.

77. Any person shall be entitled to publish his thoughts in printing, in writing, and in speech, provided that he may be held answerable in a court of justice. Censorship and other preventive measures shall never again be introduced.

78. (1) The citizens shall be entitled without previous permission to form associations for any lawful purpose.

(2) Associations employing violence, or aiming at attaining their object by violence, by instigation to violence, or by similar punishable influence on people of other views, shall be dissolved by judgment.

(3) No association shall be dissolved by any government measure. However, an association may be temporarily prohibited, provided that proceedings be immediately taken against it for its dissolution.

(4) Cases relating to the dissolution of political associations may without special permission be brought before the highest court of justice of the Realm.

(5) The legal effects of the dissolution shall be determined by Statute.

79. The citizens shall without previous permission be entitled to assemble unarmed. The police shall be entitled to be present at public meetings. Open-air meetings may be prohibited when it is feared that they may constitute a danger to the public peace.

80. In case of riots the armed forces, unless attacked, may take action only after the crowd in the name of the King and the Law has three times been called upon to disperse, and such warning has been unheeded.

82. The right of the municipalities to manage their own affairs independently under the supervision of the State shall be laid down by Statute.

83. All privileges by legislation attached to nobility, title, and rank shall be abolished.

84. In future no fiefs, estates tail in hand or estates tail in personal property shall be created.

85. The provisions of sections 71, 78, and 79 shall only be applicable to the defence forces subject to such limitations as are consequential to the provisions of military laws.

PART X

88. When the Folketing passes a Bill for the purposes of a new constitutional provision, and the Government wishes to proceed with the matter, writs shall be issued for the election of Members of a new Folketing. If the Bill is passed unamended by the Folketing assembling after the election, the Bill shall within six months after its final passing be submitted to the Electors for approval or rejection by direct voting. Rules for this voting shall be laid down by Statute. If a majority of the persons taking part in the voting, and at least 40 per centum of the Electorate has voted in favour of the Bill as passed by the Folketing, and if the Bill receives the Royal Assent it shall form an integral part of the Constitution Act.