The European Convention on Human Rights in Domestic Law: A Comparative Study of the Convention's Position in Denmark and Spain

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1. Introduction

1.1.

Every Member State of the Council of Europe is allowed to receive the European Convention on Human Rights (referred to as the "ECHR" or "the Convention") into its domestic legal order in the way it deems fit — or even not to do so at all. This derives from the well-known fact that the European Court of Human Rights has ruled that "[n]either Article 13 nor the Convention in general lays down for the Contracting States any given manner for ensuring within their internal law the effective implementation of any of the provisions of the Convention". Although Article 1 of the Convention states that "[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention", it has been pointed out that where this Article obliges the Contracting States to give full effect to the rights guaranteed by the Convention in their domestic law, it does not specify the way in which they have to do so. In practice, the Contracting States have, according to their own legal system and tradition, chosen different methods of fulfilling the obligations under the Convention.

It is precisely this broad diversity among the legal traditions of the Contracting States that makes it very difficult to ascertain to exactly what extent the Convention has been received into domestic law in the different States. Attempts to make a classification based on this criterion have come

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up against a great number of difficulties arising out of the differences in the constitutional techniques employed.

However, the main distinction to be drawn is between countries which have, in one way or another, incorporated the Convention into domestic law and those not recognizing the Convention as domestic law in any sense. But even this distinction suffers from a number of shortcomings since, as one observer has put it, "... although the Convention is domestic law in thirteen countries, there is a great confusion in many of these states as to this instrument's exact status within the internal legal hierarchy." Further classifications can be made, although none of them gives a definitive answer.

From a strict analytical point of view, some kind of domestic status of the Convention is a sine qua non condition for its application by national courts. Accordingly, in a "dualist" system where the Convention has not been incorporated, it should have no effect at the domestic level whatsoever. Although domestic courts may feel themselves prevented from applying the Convention as internal law with binding force, in practice they may often have the tendency to apply it as a "source of law" or as "a means of interpretation" of domestic statutes in order to comply with the State's international responsibilities.

1.2.

Over the last decade it has on a number of occasions been discussed whether Denmark — one of the original signatories of the Convention and a country in which the Convention did not form part of domestic law — ought to incorporate the Convention into its domestic law.

Thus, in 1989 Parliament passed a resolution in which it called on the Government to appoint a committee of experts to consider the advantages and disadvantages involved in an incorporation of the ECHR into domestic Danish law, and to put forward proposals for such incorporation. The Committee submitted its report in the spring of 1991 in which it recommend that the Convention be incorporated into Danish law. In accordance with this recommendation the Convention was incorporated into Danish law by an ordinary statute as Act No. 285 of 29 April 1992 with effect as from 1 July 1992.

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