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The Protection of Immunity in Danish Law

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1. Introduction

The law of immunity is rooted in international law as well as national law. The immunity of states and their representatives has been governed by international law for centuries. Since 1961 and 1963 the rules on diplomatic and consular immunity have been codified in the Vienna Convention on Diplomatic Relations (VCDR) and the Vienna Convention on Consular Relations (VCCR). Normally the interpretation and application of rules of immunity takes place within the national legal systems. Insight in domestic practice, *inter alia* court decisions, is indispensable to understand the scope of immunity.

The aim of this article is to outline the rules and case law with regard to diplomatic and consular immunity in Denmark. The article provides a historical account of immunity in Danish law. It describes the incorporation of the VCDR and VCCR in Denmark, and it examines the case law of Danish courts. Initially, the Danish constitutional system regarding the conduct of foreign affairs is introduced.

2. Foreign affairs in the Danish Constitution

2.1. The role of the government and Parliament

Provisions on Denmark's external relations can be found in section 19 and 20 of the Danish Constitution. Section 19 regulates the international affairs in general. Section 20 contains a special provision regarding the transfer of sovereignty to international organisations. In many respects, the provisions of the Danish Constitution originates in the first Constitution from 1849, but the rules regarding the state's external relations have undergone changes. The text of the present Constitution was adopted in 1953. In this connection section 19 was brought up to date and clarified, and section 20 was inserted as a new provision.

Section 19(1) of the Constitution states: *"The King shall act on behalf of the Realm in international affairs"*. The provision stipulates the prerogative of the executive branch in foreign affairs. Acts on behalf of Denmark towards other states and international organisations fall within the provision. An example is the sending and receiving of envoys on behalf of the state.[1]

The reference to the *"King"* in section 19(1) should be understood as a reference to the Danish government. From a constitutional perspective the Queen (Margrethe II) does not have the power to perform political acts independently of the Danish government. However, the Queen carries out different tasks with regard to Denmark's international affairs.[2] For example, new foreign ambassadors are presenting their credentials to the Queen.[3]

As a consequence of the prerogative of the government in section 19(1) it is normally assumed that the Danish Parliament *(Folketinget)* cannot act on behalf of Denmark in international affairs or give binding instructions to the government.[4] See also section 4.1 regarding the incorporation of VCDR and VCCR.

Members of the Danish Parliament participate in various forms of international collaboration.[5] The Parliament, for example, appoints delegation members for international parliamentary assemblies. However, the members of the Parliament never act on behalf of Denmark. They represent the Parliament,

1 This example was explicitly mentioned in the preparatory work, *betænkning* no. 66, Copenhagen, 1953, p. 117.
2 See http://kongehuset.dk/en/the-monarchy-in-denmark/the-monarchy-today.
3 A copy of the credentials is presented to the Ministry of Foreign Affairs shortly after arrival, cf. Danish Ministry of Foreign Affairs, *Guide for Diplomats in Denmark*, 2019, 4.3.1.
4 CHRISTENSEN (JP) / ALBÆK JENSEN (J) / HANSEN JENSEN (M), *Dansk Statsret* (2nd ed), Jurist- og Økonomforbundet, 2016, pp. 201-203. Partly contra ZAHLE (H), *Dansk forfatningsret 2* (3rd ed), Jurist- og Økonomforbundet, 2001, pp. 240-243.
5 See https://www.thedanishparliament.dk/en/international.

their political parties or themselves. The Parliament also appoints a number of its members to participate in the government's delegation representing Denmark at the UN General Assembly. In that capacity members of the Parliament are acting under the instruction of the government.

The prerogative of the government in foreign affairs does not mean that it can act independently of the Parliament. The consent of the Parliament is required in a number of situations listed in section 19(1). The government must obtain the consent of the Parliament to undertake any act whereby the *"territory of the Realm shall be increased or reduced"*. The government must also obtain the consent of the parliament before entering into any international obligations the fulfilment of which *"requires the concurrence"* of the Parliament. This refers to obligations the fulfilment of which requires changes to existing legislation or new legislation or involves expenditures. The government must furthermore obtain the consent of the Parliament before entering into any international obligations which *"is otherwise of major importance"*. If a treaty has been entered into with the consent of the Parliament, the government must also obtain the consent of the Parliament before terminating it. Section 19(2) stipulates that the consent of the Parliament must be obtained to the use of military force against a foreign state.

The role of the Parliament is not limited to the giving of consent to certain acts undertaken by the government. According to section 19(3) the Parliament shall appoint from among its members a Foreign Affairs Committee, which the government shall consult before making any decision of major importance to foreign policy. Rules applying to the Foreign Affairs Committee are laid down by a statute.[6]

2.2. The Danish Foreign Service

The Danish Constitution does not assign a special position to the Minister of Foreign Affairs or any other specific minister with regard to Denmark's international relations. As already mentioned section 19(1) just states that the King, i.e. the government, is acting on behalf of Denmark in international affairs.

It is, however, part of the Danish constitutional system as developed in practice that the Minister of Foreign Affairs is the main responsible for Denmark's foreign policy and will normally act on behalf of the state in international affairs.[7] Denmark is not alone in this regard, as it is the same situation in most other states. The special position of Ministers of Foreign Affairs is also reflected in international law.[8]

The Act on The Danish Foreign Service from 1983 describes the main objectives of the Danish Foreign Service.[9] The overall aim of the Danish Foreign Service is to handle the international affairs of Denmark. The act stipulates that the Danish Foreign Service manages and coordinates Denmark's foreign policy and foreign economic relations. This includes, *inter alia*, Denmark's participation in the European Union and other international organisations. The Danish Foreign Service assists Danish nationals (and certain other persons) abroad. It also assists Danish companies in their international business relations.

The Danish Foreign Service constitutes an integrated service and is one authority. The act stipulates that the Danish Foreign Service consists of tree branches, namely the Ministry of Foreign Affairs and the diplomatic and consular missions. Currently, Denmark has 71 embassies, 6 diplomatic missions at international organisations, 28 Consulates-

[6] Act no. 54 of 5 March 1953.
[7] ESPERSEN (O), *Indgåelse og opfyldelse af traktater,* Juristforbundets forlag, 1970, § 1.
[8] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, ICJ Reports 2002, para 53.
[9] Act no. 150 of 13 Apr. 1983, with subsequent amendments.

General and Trade Commissions, and approximately 405 Honorary Consuls.[10]

3. The effect of international law in Denmark

3.1. A dualist approach

Denmark belongs to the dualist states.[11] Traditionally, Danish law and international law has been perceived as two distinct legal spheres, and the Danish Constitution contains no provision incorporating treaties or customary international law into Danish law. The Danish Supreme Court has confirmed the dualist view.[12]

The rules of diplomatic and consular immunity codified in the VCDR and VCCR were incorporated into Danish law by acts adopted in 1968 and 1972, see section 4. General legislation on state immunity has not been adopted in Denmark, but Danish courts nevertheless respect the immunities of foreign states and their property. Diplomatic and consular immunity was also respected prior to the incorporation of the VCDR and VCCR. The question is on what legal bases Danish authorities were able to do so.

The early dualist scholars accepted that international law did not necessarily have to be formally transformed into domestic law to have an impact on the domestic level. It was assumed that national courts, when interpreting national law, would try to avoid a conflict with international law.[13] In Denmark the influential Alf Ross in 1942 formulated a *"rule of interpretation"* stating that Danish law should be interpreted in accordance with Denmark's international obligations. Alf Ross also formulated another rule, which he named the *"rule of presumption"*. This rule stated that even an unambiguous provision of a statute was presumably not intended to violate a rule of customary international law.[14]

The *"rule of presumption"* was an attempt to introduce an old common law doctrine in Denmark, namely that international law is held to be part of the law of the land. This doctrine, which emerged in the United Kingdom in the 18th century, apply to customary international law in general but was developed in the context of diplomatic immunity.[15] In support of the "rule of presumption" Alf Ross also referred to Danish case law regarding state immunity.[16] Alf Ross stressed that a doctrine of automatic incorporation like the one known in common law states did not exist in Denmark. But the "rule of presumption" could explain the practise of Danish courts with regard to, *inter alia*, immunity.

Explaining the effect of the rules of immunity within national legal systems has always been a challenge for dualist scholars. The founder of the dualist theory, Henrich Triepel, argued in his seminal work *"Völkerrecht und Landsrecht"* (1899) that customary international law, especially the rules regarding territorial and personal competence of the state, to a large extent was reflected in domestic customary law.[17] This could – like the *"rule of presumption"* suggested in Denmark by Alf Ross – be seen as a fictitious attempt to explain the effect of customary international law in national legal systems in general. However, it may be possible that some rules of customary

10 See http://um.dk/en/about-us/organisation/the-danish-foreign-service/.

11 On the relationship between international law and Danish law, see TERKELSEN (O), *The Ajos Case and the Danish Approach to International Law,* European Public Law 24, no. 2, 2018, pp. 183-194.

12 See e.g. *DI acting for Ajos A/S v. the estate left by A* (2016). The judgement is published in *Danish Weekly Law Reports* (UfR), UfR 2017, p. 824.

13 TRIEPEL (H), *Völkerrecht und Landesrecht,* Verlag von C.L. Hirschfeld, 1899, pp. 154, 398-400.

14 ROSS (A), *Lærebog i Folkeret* (1st ed), Ejnar Munksgaard, 1942, pp. 77-79, 82.

15 See e.g. SHAW (M), *International Law* (8th ed), Cambridge University Press, 2017, pp. 105-130.

16 In particular the case *The Successor of the Company Julius F. Schierbeck v. Enforcement Division II of the City Court of Copenhagen* (1942) published in UfR 1942, p. 1002/1.

17 TRIEPEL (H) (n 13), pp. 387-388. *"Dem umfangreichen Gewohnheitsvölkerrechte entspricht ein ebenso weitreichendes völkerrechtsgemässes Landesgewohnheitsrecht"*.

international law in some states had become part of domestic customary law. An example could be rules of immunity in Danish law.

3.2. Immunity as an integral part of Danish law

Principles of immunity have been an integral part of Danish law for a very long time. For centuries Danish courts and administrative authorities have accepted the immunity enjoyed by foreign states and their representatives. This section provides a brief outline of the historical development in Denmark.[18]

Immunity from criminal jurisdiction was clearly foreseen in the Danish Penal Code adopted in 1866, which stipulated that Danish courts should respect the relevant principles of international law with regard to, *inter alia*, envoys of foreign states. There are several earlier examples of administrative orders to the Danish police stipulating that the inviolability of diplomats should be respected. For example, in 1683 when the police commissioner of Copenhagen asked whether foreign state's envoys were bound by a Royal Order regulating the clothing of the population, he received the following laconic answer: *"With foreign Ministers the Police Commissioner has got nothing to do"*.

With regard to immunity in civil cases it is also possible to trace legislation, administrative orders etc. far back in time. Of special importance is a Royal Order from 1708 prohibiting the encroachment on foreign ministers, their domestics or goods for debt incurred in the King's realms.[19] The order has been interpreted by the Danish Ministry of Foreign Affairs as prescribing immunity from enforcement as well as jurisdictional immunity before national courts. The background of the order was – according to its preamble – that many petitions and requests from time to time had been received for authorities to levy distress on goods and effects of a foreign Minister for debts incurred in the Kingdom. There had even been incidents in which the furniture of a foreign Ministers had actually been seized for debt.

This was not a particular Danish problem. Embarrassing incidents occurred across Europe, because envoys due to an extravagant lifestyle indebted themselves.[20] The reason for the Danish Royal Order, which was issued in the autumn 1708, was most likely not a Danish case. Earlier that year the Russian ambassador in the United Kingdom was arrested and detained on request of his creditors. The incident caused a stir and resulted in the Diplomatic Privileges Act, which was in force until 1964.[21] Likewise, the Danish Royal Order was for more than 250 years stipulating a rule on diplomatic immunity in civil cases. In 1968 the Royal Order was replaced by the Act on Diplomatic Relations incorporating the VCDR.

A functional immunity of consular officers was stipulated in an administrative order from 1821. The order stated that consular officers were exempted from Danish jurisdiction with regard to consular affairs. The order explicitly stated that consular officers were subject to Danish jurisdiction with regard to contracts concluded in Denmark, their house or other immovable property situated in Denmark and their private business activity. They were also subject to Danish jurisdiction in criminal cases.

18 For a for more detailed analysis, see TERKELSEN (O), *Folkeret og dansk ret,* Karnov, 2017, ch. 7 (also containing more detailed references to the below legislation, administrative orders etc.).

19 An English translation of the Royal Order can be found in United Nations Legislative Series, Vol. VIII, Laws and Regulations regarding Diplomatic and Consular Privileges and Immunities (1958), p. 224 (under Norway). Certain ambiguities in the Danish text are not reflected in the translation.

20 DENZA (E), *Diplomatic Law* (4th ed), Oxford University Press, 2016, pp. 233-234.

21 The Royal Order from 1708 was, apparently, not directly inspired by the British Diplomatic Immunity Act. In the British correspondence with the Russian ambassador the proposal for the Diplomatic Immunity Act was not mentioned until January 1709, see MARTENS (C), *Causes Célèbres du Droit des Gens,* Tome I, F.A. Brockhaus & Ponthieu & Co., 1827, p. 62 and also p. 67.

Other examples could be mentioned, but the above outline illustrates how respect for immunity of foreign states and their representatives rest on a legal tradition dating far back in time. It may even be argued that basic rules of immunity have become a part of Danish customary law. With regard to diplomatic and consular immunity the question of the historical legal bases is not of practical importance today, because the immunity rules in the VCDR and VCCR are incorporated into Danish law.

4. The incorporation of the Vienna Conventions

4.1. The Vienna Convention on Diplomatic Relations

The VCDR and the two Optional Protocols were signed by Denmark on 18 April 1961 and ratified on 2 October 1968. The Convention and the Optional Protocol concerning Acquisition of Nationality were – partly – incorporated into Danish law by Act no. 252 of 18 June 1968 on Diplomatic Relations. Section 1 of the Act states: *"Foreign state's diplomatic missions and the persons attached to such missions enjoy the immunity and the rights"* stipulated in the VCDR and the Optional Protocol.

In Denmark international law is normally implemented by adapting Danish legislation to the obligations imposed by international law (unless Danish law already conform to them). But international rules may also as such be incorporated. In the past incorporation rarely happened, and the idea of incorporating the VCDR by a special legislative act was not fostered until late in the Danish ratification process.[22] The reason for incorporating the VCDR was that it touched upon very different areas of law such as rules of administration of justice, criminal law, social security law, post and telecommunication law etc. There was a concern that legislation that needed to be adapted to the Convention was overlooked. Incorporating the VCDR meant that it could supersede or replace Danish statutory law.

Only the *"immunities and the rights"* enjoyed by diplomatic missions and the persons attached to them were incorporated. An early proposal for a provision stating that the VCDR and the Optional Protocol as a whole were having the force of law in Denmark was abandoned.[23] The legislature would hereby legislate on issues covered by section 19(1) of the Danish Constitution stipulating the prerogative of the executive branch in foreign affairs. In particular, VCDR art. 2-19 are regulating questions which are clearly falling within the prerogative of the executive such as e.g. the question of diplomatic accreditation.

According to section 2 of the Act on Diplomatic Relations, the Minister of Foreign Affairs is empowered to decide on deviations from the VCDR if justified under art. 47(2)(a) (on restrictive application). The Minister of Foreign Affairs is also empowered to decide on deviations with regard to states not being parties to the VCDR. However, since almost all states (today 192 states) of the world are parties to the VCDR the provision is of no practical relevance.

4.1. The Vienna Convention on Consular Relations

The VCCR and the two Optional Protocols were signed by Denmark on 24 April 1963 and ratified on 15 November 1972. It was implemented in the same way as the VCDR. Section 1 of Act no. 67 of 8 March 1972 on Consular Relations states: *"Foreign state's consular posts and the persons attached to such posts enjoy the immunity and the rights"* stipulated in the VCCR and the Optional Protocol concerning Acquisition of Nationality.

Section 2 of the Act on Consular Relations, which correspond to section 2 of the Act on

22 See TERKELSEN (O) (n. 18), pp. 112-113 with n. 59.

23 ESPERSEN (O) (n. 7), pp. 245-246, and TERKELSEN (O) (n. 18), pp. 228-229.

Diplomatic Relations, empowers the Minister of Foreign Affairs to deviate from the VCCR.

5. Diplomatic and consular immunity in Danish case law

5.1. Delimitation

The published case law on diplomatic and consular immunity is sparse. Danish courts are, however, from to time faced with pleas of immunity. Only court decisions are considered in this section. A considerable number of criminal cases, especially traffic offences, involving persons enjoying immunity are dropped and never reach the courts.[24] Danish administrative authorities also apply rules of immunity within other areas, see e.g. *H v. M* (1963) below where the consent of the ambassador was obtained before deciding a matrimonial dispute involving a member of the staff of a foreign mission.

Unpublished case law of Danish courts is not included. Judgements of the district courts (also called city courts) are normally not published.[25] Even though the higher court's interpretation and application of the VCDR and VCCR are of particular interest, their rulings do not necessarily reflect the types of cases in which immunity is most often invoked. For example, there has been more unpublished cases where creditors have requested the Enforcement Division of Copenhagen City Court to help enforce claims against foreign states' embassies. This raises questions with regard to VCDR art. 22(1) and 22(3).[26]

5.2. *Ex officio* application of immunity rules: *M. v. H*

In *H v. M* (1963)[27] a Danish enforcement court (the Enforcement Division of the City Court of Copenhagen) was requested to provide assistance to hand over two children from their father to their mother. The father of the children was a member of the staff of a foreign state's embassy in Denmark.[28]

The couple was granted separation in 1960 by a decision of an administrative authority, the Upper Presidium of Copenhagen. The separation was granted on the condition that the custody of the children was given to the mother. The father was granted a right to contact with the children. Prior to the decision of the Upper Presidium of Copenhagen the immunity of the father had been renounced as he had decided – with the consent of the ambassador – to submit himself to the decision of the Danish authorities.

Following the decision on separation the mother moved back to the sending State with the children. In 1962, while the children were visiting their father in Denmark, he asked Danish authorities to make a new decision and transfer the custody to him. The ambassador stated that he had no objections to Danish authorities deciding the dispute between the parents regarding the custody of the children. However, the case was dismissed by the authorities for reasons not related to the immunity of the father.

As the father refused to hand over the children, the mother requested the enforcement court for assistance. The father did not invoke immunity, but this did not prevent the enforcement court from considering the question. The court stated that irrespective of whether he wished to invoke immunity, the court must *ex officio* ensure that

[24] In articles dated 18 and 20 November 2014 the newspaper *Metroxpress* reported that 279 speeding offences and more than 19 cases involving violence, sexual harassment etc. had been committed between 2012 and 2014 by persons enjoying immunity.

[25] There are also unpublished High Court cases, see e.g. Eastern High Court decision of 19 May 1993 (no. B-0417-93) in which the Court with reference to VCDR art. 22(1) (cf. art. 30(1)) refused to enforce an order to pull down a garage belonging to the Italian ambassador's residence.

[26] See e.g. Copenhagen City Court decision of 5 January 2018 (no. FS M4-16299/2017). A discussion of the practice of the City Court in these cases falls outside the scope of this outline.

[27] UfR 1963, p. 617/1.

[28] His title was "*cancellist"* (clerk).

no enforcement measures were taking in violation of his immunity. The enforcement court ruled that it could take enforcement measures. It hereby referred to the ambassador's previous consent to the processing of the case by Danish authorities. This conclusion is debatable, cf. VCDR art. 32(4) (the case was decided after the adoption of the VCDR in 1961 but prior to the Danish ratification), but the case illustrates how Danish courts will apply immunity rules *ex officio.*

5.3. Notification of appointment: *Public Prosecutor v. Gunnar Bjørnsson*

The case *Public Prosecutor v. Gunnar Bjørnsson* (1956) [29] is included in this outline even though it predates the VCDR. First, it is one of the few Supreme Court cases regarding immunity in Denmark. Secondly, it is illustrative of the uncertainty that existed prior to the VCDR as to the requirement of notification of appointment of diplomatic staff and the effect of notification, cf. today VCDR art. 7, 10 and 39(1).

The case concerned the attachment of private letters belonging to an Icelandic citizen during a search of his private residence on suspicion of offences against the Danish Exchanges Control Act. The Icelandic citizen had been domiciled in Denmark for years. Since 1952, he had been attached to the Icelandic Legation in Copenhagen where he performed consular functions. The same year he was appointed Icelandic Consul in Copenhagen, but the Danish Ministry of Foreign Affairs refused to issue an exequatur to him on the ground that he in 1951 had been fined for contravention of the Danish Tariff Act.

The defendant contented that he was entitled to diplomatic immunity as a member of the staff of the Icelandic Legation. The public prosecutor disputed this contention, *inter alia*, referring to a letter from the Danish Ministry of Foreign Affairs stating that notification to the Ministry of appointment of diplomatic staff was a prerequisite for immunity according to firm Danish practice. The Ministry was not notified of the appointment of the defendant as a member of the staff of the Icelandic Legation.

The defendant's claim of immunity was rejected. The district court and the Eastern High Court pointed to the lack of notification, and added that the defendant, who had been refused an exequatur as Consul of Iceland, could not rely on tacit consent. The Supreme Court did not express an opinion on the effect of notification in general but concluded that notification had been a prerequisite for immunity in the concrete case:

"Considering that the appellant has been refused an exequatur as a Consul, and having regard to his situation in other respects, it appears in any event to be an obvious possibility that the Danish Ministry of Foreign Affairs, had the question been submitted to it, would likewise have refused to confer diplomatic immunity on the appellant. In these circumstances the status of the appellant ought to have been established by a notification to the Ministry of Foreign Affairs. This not having been done, the appellant is not warranted in claiming exemption from the jurisdiction".

5.4. Termination of immunity: *Jean-Michel Lacombe v. Jørgen Ilfeldt*

Jean-Michel Lacombe v. Jørgen Ilfeldt (1989)[30] concerned a dispute between a lessor and a lessee. Jean-Michel Lacombe was a member of the diplomatic staff of the French Embassy.[31] During most of his employment at the French Embassy, from 1984 to 1988, the French diplomat leased a house situated in an ordinary Danish residential neighbourhood. After his employment at the French Embassy had come to an end, and he had left Denmark, his former landlord initiated legal proceedings against him. The landlord claimed payment of unpaid rent (the last three months of the lease) and also

[29] UfR 1957, p. 126. See *International Law Report* 24, 1960, pp. 448-449.

[30] UfR 1989, p. 873.

[31] His title was Councillor of Embassy.

payment of renovation costs.

The French Embassy delivered a statement according to which the lease of the house had been necessary for the diplomatic agent to carry out his functions in Denmark. The French Ministry of Foreign Affairs also delivered a statement. The Ministry stated that the diplomatic agent was using the house as private residence and for representative tasks. His diplomatic tasks included receiving Danish and foreign guests, and he had to find a residence making this possible. Like all French envoys he received a remuneration *("indemnité de residence")* intended to help him to pay the cost related to representation.[32]

Before the Danish courts the former member of the French mission claimed that, even though he had left Denmark, he still enjoyed immunity from jurisdiction under VCCDR art. 39(2) according to which immunity continue to subsist with regard to acts performed *"in the exercise of his functions as a member of the mission"*. He hereby pointed to the above statements of the French government. The city court and the Eastern High Court rejected that his immunity continued to subsist. The above rule in VCDR art. 39(2) did not apply to the lease in question of a residence for the defendant with his family.

It should be added that the landlord claimed that the French diplomat also while residing in Denmark did not enjoy immunity from civil jurisdiction. He considered that the dispute in question was falling under art. 31(1)(a) according to which a diplomatic agent does not enjoy immunity from civil jurisdiction in the case of *"a real action"* relating to private immovable property situated in the territory of the receiving state, unless he holds it on behalf of the sending state for the purposes of the mission.

The official Danish translation of art. 31(1)(a) does not refer to *"a real action"* but more broadly to *"cases relating to"* private immovable property. Danish courts would, however, be obliged to apply the authentic language texts. The city court and the High Court did not find it necessary to consider the question of art. 31(1)(a) in the light of their conclusion on the termination of immunity under art. 39(2).

5.5. Immunity of service staff: *Public Prosecutor v. E*

In January 2000 a member of the service staff *(chauffeur)* at the Spanish Embassy was detained by the Danish Police for three hours on suspicion of drunk-driving. A blood sample was taken, and his driver license was temporarily confiscated (this decision was later repealed by the City Court of Copenhagen). In July 2000 the Prosecution Service dropped the case against the chauffeur who had left Denmark, but that was not the end of the matter. In *Public Prosecutor v. E*[33] the former chauffeur at the Spanish Embassy submitted a claim for compensation. There was no doubt that he had been driving drunk. The case centred upon the question whether he enjoyed immunity at the time when he was detained.

Before the Eastern High Court the former chauffeur claimed that he was protected by VCDR art. 37(2) regarding administrative and technical staff, i.e. that he was enjoying absolute immunity from Danish criminal jurisdiction. The Eastern High Court – based on the evidence produced during the case – concluded that he was not enjoying immunity under art. 37(2). The Spanish Embassy had notified the Danish Ministry of Foreign Affairs that the employee was a servant / chauffeur, and he did not produce evidence proving that he was actually a member of the administrative and technical staff.

The former chauffeur also claimed that he enjoyed immunity under art. 37(3) regarding members of the service staff. Members of the

32 The French statements were translated into Danish in the judgment.

33 UfR 2003, p. 2472.

service staff only enjoy immunity from criminal jurisdiction *"in respect of acts performed in the course of their duties"*. A majority of the Eastern High Court consisting of five judges stated that drunk-driving cannot be considered as an act performed in the course of a person's duties. A single dissenting judge held that the chauffeur was driving the car as part of his official business and was, therefore, protected by art. 37(3). The ruling of the majority of the Eastern High Court does not seem to be in line with the practice of, for example, Netherlands' Supreme Court.[34]

5.6. Waiver of immunity: *Embassy of the Socialist Republic of Czechoslovakia v. Jens Nielsen Bygge-Entrepriser A/S*

The case *Embassy of the Socialist Republic of Czechoslovakia v. Jens Nielsen Bygge-Entrepriser A/S* (1982)[35] concerned a dispute between the Embassy and a contractor. In 1980 the ambassador of the Embassy, on behalf of the Embassy, entered into a contract with the contractor in connection with the construction of a new embassy premises in Copenhagen. The contract provided that any disputes which might arise should be settled by Danish courts. After completion of the work the contractor claimed payment for additional work. As the Embassy refused to pay, the contractor initiated proceedings.

The Embassy claimed that either it was protected against suits in the same way as the ambassador in accordance with VCDR art. 31(1), or it was protected by the rules of state immunity. The Embassy argued that the forum clause in the contract did not constitute a waiver of immunity. The contractor on the other hand claimed that the Embassy could only claim immunity to the same extent as the sending state, and that this immunity, according to firm international practice and custom, did not cover a dispute such as the present one. The contractor, in the alternative, claimed that the Embassy immunity must be regarded as having been renounced either explicitly or tacitly by the conclusion of the contract.

The Eastern High Court considered that the dispute related to state immunity. The High Court stressed that VCDR art. 32 does not concern state immunity and stated: *"By his signature of the building contract the ambassador is found to have renounced, in relation to the matter covered by the contract, any right to extraterritoriality to which the Czechoslovakia state would normally be entitled"*.

The Supreme Court reached the same result but with the following arguments: *"Neither according to the Vienna Convention nor according to the rules of international law can an embassy be held to be exempt from proceedings based on a civil law contract concluded by the embassy which provides that disputes are to be settled by the courts of the receiving state"*.

The ruling most likely reflects a compromise. The Supreme Court did not clearly state whether the ruling was based on the VCDR or rules of state immunity.[36] The ruling could indicate that immunity must be regarded as having been renounced by the conclusion of a contract providing that disputes should be settled by Danish courts. The ruling could also indicate that the contract was regarded as an *acta jure gestionis*, and that the Socialist Republic of Czechoslovakia did not enjoy immunity according to the rules of state immunity.[37]

5.7. The case *M. v. H*

In the cases outlined above Danish courts have

[34] DENZA (E) (n. 20), p. 335.
[35] UfR 1982, p. 1128. See *International Law Report* 78, 1988, pp. 81-84.
[36] In *Embassy of Pakistan v. Shah Travel* (1999), UfR 1999, p. 939, the Supreme Court considered that a suit against the Embassy of Pakistan should be understood as if the state of Pakistan was the defendant.
[37] Ten years later in *The French Republic v. Intra ApS* (1992), UfR 1992, p. 453, the Supreme Court delivered a judgment with regard to state immunity in which the Supreme Court clearly applied the distinction *acta jure gestionis* and *acta jure imperii*.

for different reasons concluded that the persons in question did not enjoy immunity. The case *M v. H* (2003)[38] illustrates how immunity can also be successfully invoked. The case was a divorcement proceeding between a Danish husband and his wife, a diplomat of a foreign state. The couple married in 1988. The husband was living in Denmark, and since 1993 and 1996 their two children also lived in Denmark. Since 1999, the wife had been a member of a foreign state's embassy in Sweden, but she was also accredited to Denmark. The husband, who initiated the proceedings, asked the court to rule on the dissolution of the marriage and grant to him full custody of their children. In the initial phase the wife herself lodged a claim for custody of the children. Later, she primarily claimed that the case was inadmissible due to her diplomatic immunity.

The Eastern High Court declared the case inadmissible with reference to VCDR art. 31. It added that the right to a fair trial as protected in the European Convention of Human Rights could not lead to another result. The district court, which had reached the same result, also mentioned that there was no express waiver of immunity by the sending state. The wife's initial counterclaim made no difference.

6. Concluding remarks

Denmark belong to the dualist states, but Danish courts and other authorities have always accepted that foreign states and their representatives enjoy immunity. Respect for immunity rests on a legal tradition dating far back in time, and rules of immunity may have become part of Danish customary law.

With regard to diplomatic and consular immunity the question of the historical legal bases is not of practical importance today. Since 1968 and 1972 the VCDR and the VCCR have been incorporated into Danish law. Two statutes incorporated *"the immunities and the rights"* enjoyed by diplomatic missions and consular posts and the persons attached to them. These rules are, therefore, having the force of law in Denmark. Other provisions of the VCDR and the VCCR were not incorporated to avoid legislating on issues falling within the constitutional prerogative of the executive branch in foreign affairs.

From time to time there are pleas of immunity before Danish courts, and the courts will also apply immunity rules *ex officio*. The published case law on diplomatic and consular immunity is, however, sparse. The article examines different cases touching upon different questions. In, for example, *Public Prosecutor v. E* (2003) a majority of the Eastern High Court ruled that drunk-driving cannot be considered as an act performed in the course of a person's duties.

Only the published case law regarding diplomatic and consular immunity is outlined. An examination of unpublished decisions of district courts would reveal more cases involving pleas of immunity. Rules of immunity and inviolability also play a role in administrative practice, e.g. a considerable number of cases concerning traffic offences by persons enjoying immunity has been dropped over the years.

[38] UfR 2003, p. 1136.