SOME REMARKS ON LAW, RELIGION AND JURISPRUDENCE IN SWEDEN

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From time immemorial there have been close connections between state, law and religion. The idea of the divine origin of imperial and royal power occurs in history from the earliest times until the modern period. A manifestation of this idea is the custom of emperors and kings to cause themselves to be crowned by the Pope or an archbishop. Everywhere those who claim to represent the state have believed that they can decide what are the right actions to be taken by those whom they consider to be their subjects. There also exist relations between positive law and religion. In many respects the contents of the statutes bear the imprint of religious ideas concerning what is commanded or forbidden by a superior power. However, as regards the relations between state and law, on the one hand, and religion, on the other, there exist great differences between different epochs and between different parts of the world. The following brief remarks on the status of these matters in Sweden should therefore be of interest.

The independence and the political stability of Sweden date from the sixteenth century. King Gustavus I (Gustaf Vasa) delivered Sweden not only from the Danish domination but also from the influence of the Roman Church. During his reign the religious reformation was carried out by the monarch, assisted by disciples of Martin Luther. The Swedish Church became a national church headed by the sovereign. This change was completed in the first years of the seventeenth century by the deposition of King Sigismund, who was also king of Poland. Catholicism was succeeded by Protestantism as the official religion. More important than this was the fact that the Church became, as a matter of principle, subordinate to the state. In the Great Power period of Sweden (1611–1718), civil and ecclesiastical communities constituted a unit. Over the Swedish society floated St. Augustine's idea of the society of God, *civitas Dei.* The sovereign was instituted by God, and he himself owed obedience to the commandments of God, with the important addition that he had to give an account only to God, not to the subjects.[1]

[1] Carl-E. Normann, *Prästerskapet och det karolinska enväldet,* Stockholm 1948 (English summary: "The clergy's conception of government during the final phase of the Great Power period"), p. 354: "Quite naturally the sermon literature of the time shows different degrees of glorification of the royal authority . . . . It must, however, at the same time be pointed

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Formally, the Church was subordinate to the secular power. Seemingly the state of affairs corresponded to the conditions in the ideal state of Thomas Hobbes, where an absolute sovereign determines the religious confession of the subjects.[2] Actually the Church was in some degree an independent power in society, and there was a sort of balance between ecclesiastical and secular powers.

The confession had been fixed by the Synod in Uppsala in the year 1593. The Church intervened deeply in the life of the individual. Every subject was obliged to profess the Lutheran faith ("the pure evangelical doctrine"),[3] and apostacy from this faith was severely punished. Each new-born child had to be baptized.[4] Every adult was obliged to attend morning service,[5] and his knowledge of Christianity was checked at catechetical meetings.[6] The clergy had a certain political influence. In the Riksdag it formed the second of the four Estates, the first being the nobility, the third the burgesses and the fourth the peasantry. The clergy also had special privileges, a small remnant of which is still guaranteed by the Constitution.

However, the independence of the Church in relation to the secular state was limited. The future clergymen studied for their profession at the Universities of Uppsala and Åbo (Finland was part of the Kingdom of Sweden until 1809). The University of Lund was founded in 1668 after the conquest of Scania and other Danish provinces. The universities were institutions of the state, and the professors were subject to instructions by the political power.[7] Even in plain ecclesiastical affairs the Church had no exclusive legislative power. The political influence of the clergy was considerably reduced in 1866, when the four Estates were abolished and replaced by a Riksdag of two chambers. From that time on the Church has been represented by the Synod ("kyrkomötet"), but the Synod is able to legislate only together with the Riksdag and the Government. Since 1971 the Riksdag has consisted of a single chamber.

out that in raising the king to the status of an earthly god, it is repeatedly emphasized as well that he is also a weak and sinful man like others, that he needs good counsellors, and that he may in no wise rule in accordance with the principle 'quod libet, licet'. He is bound by the laws of God and nature, and God shall demand of him the strictest account of his actions."—*Op.cit.*, p. 351: "The ruling power was described with the assistance of the Bodinian conception of sovereignty, and the possessor of supreme power was represented as responsible to God alone."

[2] Thomas Hobbes, *Leviathan*, ch. XVIII.

[3] The Ecclesiastical Code (*kyrkolagen*) of 1686, ch. 1, sec. 1.

[4] The Ecclesiastical Code 1686, ch. 3, sec. 2.

[5] The Ecclesiastical Code, ch. 2, sec. 5.

[6] The Ecclesiastical Code, ch. 2, sec. 10.

[7] Carl-E. Normann, *op.cit.*, p. 351: "Charles XI, in 1689, had given orders that the teaching at universities should be in accord with the existing form of government, and these instructions were duly carried out."

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Upon the reformation under Gustavus I, the limits between ecclesiastical and secular power were fixed otherwise than in Catholic countries. Martin Luther had left a wide domain to the princes, and his reformatory ideas had contributed greatly to strengthening their position in Northern Europe. However, the opinions of the Church left their imprint on the exercise of the secular power. The concept of the society as an order determined by God appeared in several domains of social life.[8] It might be noted that the Part on Crimes in the great Swedish Code of 1734 listed blasphemy as the first crime and apostacy as the second.

The ideological development from the time of Charles XII to the present time may be briefly characterized as follows. Theocratism has been replaced by the doctrine of the popular sovereignty. Religious constraint has been succeeded partly by tolerance towards other religious communities and partly by secularization. This evolution has been a continuing process. A fairly recent expression of these tendencies is the Statute on Freedom of Religion, 1951. It is true that a Swedish citizen still automatically belongs to the Swedish Church, but since 1951 he has been allowed to secede from it. Earlier, withdrawal was conditional on a declaration that the applicant intended to enter another Christian community. Today he can secede without entering any other community. The prohibition of monasteries is no longer absolute. Monasteries can be instituted subject to governmental permission.

Many years ago, when I was boarding with a family in Paris, I asked my host what he thought about the Protestant religions. He answered: "The Protestant Churches represent a step forward, of course, a progress towards the total abolition of religion." In Sweden many such steps have been taken, but the final aim has not yet been achieved. Let us glance at the statutes. Formerly, the punishment of crimes and the administration of justice in general were considered as tasks of the authorities imposed on them by God.[9] Consequently the administration of justice should be carried out under the patronage of the Church. Every session of a court should be opened by a sermon.[1] This inauguration of the judicial pro-

[8] *Op.cit.*, pp. 348 f.: "The clergy's view of government during this time is rooted in the Lutheran–Orthodox three-order doctrine. In its main lines this implies that according to God's ordainments the ministry (*ordo ecclesiasticus*) shall preach God's word, administer the Sacrament and have in its charge the power of binding and loosing. The sovereign (*ordo politicus*) shall maintain temporal peace and order, support justice and punish lawbreakers, watch over the pure doctrine and the divine service and help to disseminate the Word. By the third order, *ordo oeconomicus* or the household order, is indicated the family or the daily vocation in its different forms."

[9] See the preceding note.

[1] The Ecclesiastical Code of 1686, ch. 2, sec. 13, and the Code of 1734, procedural subsection 2 : 3.

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ceeding still exists, but it occurs only once a year. The present Swedish book of common prayer, dating from 1937, has retained an old hymn (number 493) referring to this occurrence. Another religious element in the working of the courts is the oath. When a judge is appointed, he has to take an oath on the Bible.[2] Anyone giving evidence in court also has to swear on the Bible.[3] However, the old duty to take the oath has been softened. A person who does not believe in God (and consequently has nothing to fear from the oath) can be let off with a solemn affirmation.[4]

Let us look at another branch of legislation, the rules on marriage. Having regard to the Lutheran conception of marriage, the influence of the Church on these rules is somewhat remarkable. According to Luther, marriage is no sacrament.[5] Nevertheless, the ecclesiastical celebration of marriage was prescribed as the principal form of marriage from 1734 to 1915, when civil marriage was introduced as an alternative equivalent to the ecclesiastical celebration. The present prescriptions on marriage were established by mutual concessions of the Parliament and of the Synod. On the one hand, the Church does not require that all marriage ceremonies shall be performed in accordance with its rites; on the other, Parliament has not made civil marriage compulsory. Thus civil marriage is accepted by the Church as valid even in religious respects, and the ecclesiastical celebration is accepted by the state as legally valid. In 1973, the Government tried to introduce a reform to the effect that the present two forms of celebration of marriage should be replaced by a simple declaration of the parties to an official,[6] but the attempt did not succeed. The acceptance of the ecclesiastical celebration by public opinion is proved by the fact that 85 per cent of engaged couples marry under the aegis of the Church—if they marry at all.

The prescriptions on matrimony thus possess the dual nature of ecclesiastical law and of private law. The rules on divorce, on the other hand, possess only the nature of private law. As might have been expected, this inequality has sometimes caused conflicts between ecclesiastical law

[2] The Code of Procedure of 1942, ch. 4, sec. 11.
[3] The Code of Procedure of 1942, ch. 36, sec. 11.
[4] The Code of Procedure of 1942, ch. 36, sec. 12.
[5] Olof Sundby, *Luthersk äktenskapsuppfattning*, Stockholm 1959 (*Zusammenfassung in Deutsch: Lutherische Eheauffassung*), p. 303: "Die Ordnung der Ehe ist von Gott in das weltliche Regiment eingeschlossen, sie ist 'ein werck odder stand, den Gott geboten und yn weltliche oberkeit gefasset hat'. Die Ehe ist ein 'weltlich Ding', sie gehört der Erde und diesem Leben an und hat nichts mit der Seligkeit zu tun. Sicherlich verbirgt sich hier eine polemische Spitze gegen die römische Auffassung von der Ehe als einem Sakrament."
[6] See *S.O.U.* 1972: 41 (English summary). In its Report the Committee recommended legislation amending the Marriage Code. The rules prescribed for entering into marriage should be made uniform in such a way that a notification procedure replaced the existing forms of wedding ceremony.

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and private law. It sometimes happens that a divorced man or woman who wishes to remarry approaches the vicar of the parish in which he lives. For the vicar—if he thinks of it at all—there arises the following question: "Is the divorced person, from the point of view of the Church, still married or not?" According to a passage in the Gospel of St. Matthew (XIX, 6) a marriage cannot be dissolved. The position taken by the ecclesiastical authorities is that the individual clergyman must reach a decision in conformity with his own conscience. Obviously, the situation of the clergyman is not satisfactory. The courts have not admitted any exception from his duty—in the capacity of civil servant—to perform the marriage ceremony.[7] The Synod long ago adopted a draft of an amendment whereby the individual clergyman, though not the Church, would be relieved from the obligation to marry divorced persons. Only quite recently the Government signified its approval of a new draft of this proposal, and so it seems that the problem will be solved in the course of 1975.

The development towards increased religious toleration certainly implies a reduced influence of the Church in social questions. Formerly the Church very often decided what should be permitted and what should be forbidden. The evaluations of the Church were reflected in the catalogues of crimes in the penal codes. The conceptions of the Church were evidently decisive in many questions about crimes and penalties. Yet the diminished influence of the Swedish Church in legislative questions cannot be explained by secularization alone. In fact, there is nowadays a great difference between the roles of the Swedish Church and of the Catholic Church in forming public opinion. In the Swedish Parliament the Church is represented by no political party,[8] in contrast to the situation in most of the countries where the Roman Church has a dominating or at least a powerful position. In political questions the Swedish Church is rather neutral. The Catholic Church usually takes up a position in reference to many burning questions of the present time, especially through the encyclicals of the Pope.[9] It has a definite and well-publicized position on almost every moral question of general importance.[1] In comparison with the Roman Church the Swedish Church is reticent. Why this apparent difference? I wonder whether it may not be explained by, on the one hand,

[7] See 1972 N.J.A. 612.

[8] A Christian political party was created in 1964, but so far it has had no representatives in the Riksdag.

[9] E.g. *Encyclica Humanae vitae* of July 25, 1968.

[1] See, for instance, Glanville Williams, *The Sanctity of Life and the Criminal Law*, London 1958.

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the Catholic belief in the importance of good works, of *satisfactio operis,* and by, on the other, the Lutheran doctrine of justification by faith alone.

As regards criminal policy, the situation is similar. The Catholic view on crimes and penalties is relatively precise. It was developed by Pope Pius XII in 1953 in a speech to a congress on penal law in Rome.[2] The Norwegian professor Johannes Andenaes (born 1912) has described the situation in Norway as follows: "The Protestant Church has no authorized philosophy of penal law, and therefore you can find even theologians who firmly oppose retributive punishment."[3] This statement applies to Sweden as well. It has to be admitted that it is not easy to deduce a certain theory of punishment from the evangelical commandment to love one's neighbour.

A parallel phenomenon to the secularization and to the reduction of the political power of the Church is the transition from theocratism to the doctrine of the sovereignty of the general will. In the 16th and 17th centuries the idea of theocracy was regarded as self-evident. It was inherited from the society of the Middle Ages. But the medieval ideas had been modified. It was held that the monarch had received his power directly from God and not from the Pope as an intermediary agent. This view was held by, for instance, James I of England and by Louis XIV. The custom of coronation was adopted by the Swedish kings.[4] The archbishop assisted, but he played only a secondary role. It is symbolic that Charles XII, who was crowned in 1697 at the age of 15, placed the crown upon his head himself, just as Napoleon I did about a century later. One might have thought that theocratism would have disappeared definitely in Sweden with the absolute power of the king, i.e. with the death of Charles XII (1718). But it did not. It is true that the following period, called the Age of Freedom (1718–72), was not favourable to the ideas of theocracy. But later, after the removal (1809) of King Gustavus IV Adolphus (Gustaf IV Adolf), when Sweden had become a constitutional monarchy, this idea was revived by a great philosopher, Christofer Jacob Boström (1797–1866), called the Plato of Sweden. As teacher of the young princes, he had a special opportunity to carry out the theocratic views in practical life. The belief in the special position of the king may have survived longest among the kings themselves. In a famous speech to the Swedish farmers assembled in Stockholm in 1914, a few months before the outbreak of the first world war, King Gustavus V used the expressions "my army" and "my

[2] The speech was published in *L'osservatore romano* of October 4, 1953 (Swedish translation in *Nordisk Tidsskrift for Kriminalvidenskab* 1953, pp. 349–54).

[3] Translation from Johs. Andenaes, *Alminnelig strafferett* (Criminal Law, The General Part), Oslo 1956, p. 59.

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[4] Since the coronation of King Oscar II in 1873, no coronation has taken place in Sweden.

navy".[5] The evolution towards democracy during the last sixty years has put an end to theocratism in Sweden. The new Constitution, which was adopted in 1974 and came into force in 1975, begins with the declaration that in Sweden all public power comes from the people.

It remains for me to say a few words about Swedish legal philosophy in general. What was and what is its attitude to religious questions? In order to treat this matter adequately we must note that the legal philosophy of the 17th century and the legal philosophy of today are not comparable entities. The objects of legal philosophy of today are different from those of the philosophy of the 17th century. I therefore prefer to ask what were formerly and what are today the attitudes of legal philosophers concerning religion.

The Protestant Church took over, in the main, the legal ideology of the Catholic Church. The society of the four Estates was regarded as a part of the world system. Legal science was conservative and turned to the past. The true law was the commandments of God. The scriptures were recognized as a source of law. Such was the state of affairs during the 17th century. On the Continent, natural law was at this time orientated towards rationalism and religious toleration. The great Dutchman Hugo Grotius should be mentioned in particular. The doctrines of the new school of natural law spread to Sweden. The Saxon Samuel Pufendorf was the first professor of natural and international law at the University of Lund. Pufendorf was the object of many violent attacks from Lutheran circles, but he was protected by the Government. From that time onwards there has not existed in Sweden any school of legal philosophy having a confessional character such as is typical of the Catholic countries. Yet legal science retained its general idealistic and religious character up to the end of the 19th century. To a certain degree this is attributable to the philosophy of the above-mentioned Boström and probably also to the influence of the German universities, where many Swedish lawyers had carried out their studies.

In the first half of the twentieth century a radical change took place in Swedish philosophy. This change must be attributed particularly to the Uppsala school of law represented by Axel Hägerström (1868–1939), professor of practical philosophy in the University of Uppsala, and his followers. One of the main features of the philosophy of Hägerström is that it turns against the subjectivism of Immanuel Kant. It is anti-idealistic and—to use a modern term—antimetaphysical. It takes into consideration

[5] The speech ("borggårdstalet") was not written by the King but by the explorer Sven Hedin and another person.

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only those phenomena which exist in time and space. Among Hägerström's followers should be mentioned in particular Vilhelm Lundstedt (1882–1955), professor of law at Uppsala, and Karl Olivecrona (born 1897), professor of law at Lund. The Uppsala School has exercised a great influence upon legal science in Sweden and its effects have also been felt outside Sweden.[6] It may be added that there are links between modern Swedish legal thinking, English empiricism and American realism. The Uppsala School opposes the ideas of natural law both in its religious and in its rationalist form. It also attacks all varieties of legal positivism, idealistic or sociological.[7] The School's basic assumption that nothing can be acknowledged as real unless it can be determined in time and space and its criticism of all kinds of metaphysical conceptions do not, I think, necessarily imply that it generally rejects any attempt to seek a transcendental foundation for our ideas about law and justice. If I am not mistaken, the School merely holds that metaphysics does not belong to the sphere of proper scientific reasoning. I do not feel able to assess the final consequences of Hägerström's theories with regard to religion. But I know that it is in practice possible to be at the same time a supporter of this philosophy and an atheist from conviction.

I find it difficult to present a clear image of the fundamental philosophical and religious attitude of Swedish legal scholars in general. In practice, law and religion are as a rule separated. The fundamental principles of Swedish law are scarcely contested, except by political extremists. Further, legislation and administration of justice by the courts often move in the domain where, according to St. Thomas and also according to the Protestant reformer Philip Melanchton, society has a great liberty to form the law in conformity with human desires. There can be no doubt that the ideas of natural law still exert great influence, although this is not openly admitted. However, the old tradition of religious natural law is no longer cultivated, except by theologians.

Among Swedish scholars of law, the utilitarian approach to law prevails. Positive law is conceived of as an instrument for satisfying human wants. There is no longer any discussion of the old question why I as a utilitarian ought to pursue the happiness of my neighbour and not solely my own happiness. The Swedish professor Ivar Strahl (born 1899), who is one of the authors of modern Swedish criminal policy, has characterized law as a work of men.[8] The Danish professor Alf Ross (born 1899) has expressed

[6] About Hägerström and Lundstedt, see Karl Olivecrona, "The Legal Theories of Axel Hägerström and Vilhelm Lundstedt", 3 *Sc.St.L.*, pp. 125–50 (1959).

[7] See Karl Olivecrona, *Law as Fact*, 2nd ed. London 1971.

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[8] Ivar Strahl, *Makt och rätt* (Power and Law), 6th ed. Stockholm 1973, p. 116.

himself in a similar way: "Let us begin by establishing the cold truth that law is a work of men. Even religious persons no longer believe that law consists of divine commandments or that its evolution is governed by a divine Providence. In one way or another we have produced the law ourselves and we are ourselves responsible for the result."[9]

I should have liked to explain the exact meaning of this declaration by Ross, but I do not feel that I can do so. I am not certain whether anyone could. There are some questions that can be answered scientifically, and others that cannot.

[9] Alf Ross in Iuul, Ross and Trolle, *Indledning til retsstudiet* (Introduction to the Study of Law), 3rd ed. Copenhagen 1965, p. 66 (author's translation).

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