From Unlaw to Law: *Swedish Reactions within the Legal Profession to the Re-establishment of Rule of Law in the Nordic Countries and Western Germany 1945 – 1955*

Kjell Å Modéer*

* Professor emeritus (Legal History) at Lund University; Guest Professor in jurisprudence at Luleå Technical University.

1 Prologue

There are few legal revolutions within development of legal history. In his famous book *Law and Revolution* professor Harold J. Berman (1918 – 2007) argues the papal revolution in Europe in the eleventh and twelfth centuries set a pattern that recurred in later revolutionary epochs. The papal revolution worked a large change in social and legal conditions in Europe and created the canon law as the first European legal system.[1] Another occurred due to the establishment of Hitler's totalitarian Third Reich in Germany and the politization of the legal culture in Germany. Hitler argued he had established a "Legal Revolution".[2] The changes within German legal culture were also noted in Sweden.[3] Hitler's thousand year's Reich, however, endured only twelve years. In May 1945 Germany was defeated and a situation called "*Stunde Null*", Zero Hour, was marked as the beginning of the denazification of the police state and the reestablishment of the *Rechtsstaat*, the rule of law-state.

The period 1945 – 1955 has been characterized as a time of natural law renaissance in West-Germany.[4] Swedish jurists trained in the theory of legal realism during the mid-war period were to a great extent sceptic to those metaphysical trends which occurred in continental Europe when totalitarian unlaw was transformed back to the rule of law.[5]

This article will describe the reactions within Sweden as a neutral state in relation to its neighbors and the Swedish rule of law, legal culture and its actors between 1945 and 1955.

2 "Stunde Null"

Interestingly enough it was the German law emigré to Sweden Gerhard Simson (1902–1991), who closely noted the new situation in Germany which occurred with the *Stunde Null.* The term was used for the period after May 8, 1945 and period of massive scale reconstruction of the rule of law and abolition, denazification, of the unlaw of the totalitarian Hitler regime.

"*Stunde Null*" within the German judicial system was presented in the Swedish Law Journal 1946 by Ivar Strahl (1899 – 1987). The system was

---

1 Harold J. Berman, *Law and Revolution.* Cambridge: Harvard University Press 1983.

2 David G Williamson, The Legal Revolution and the Consolidation of Power, 1933–34 The dissolution of the Reichstag and the election of book, in: David G. Williamson, The Third Reich, 4th ed., Routledge:2013.

3 Kjell Å Modéer, Juristernas nära förflutna: Rättskulturer i förändring, Santérus Förlag: Stockholm 2009, 220 ff.

4 Lena Foljanty, Recht oder Gesetz: Juristische Identität und Autorität in Den Naturrechtsdebatten der Nachkriegszeit, [Beiträge zur Rechtsgeschichte des 20. Jahrhunderts. 73], Mohr Siebeck: Tübingen 2013.

5 Kjell Å Modéer, "Den kulan visste var den tog!": Om svenska juristers omvärldssyn 1935-1955, Torbjörn Andersson & Bengt Lindell (eds.), Festskrift till Per Henrik Lindblom, Iustus förlag: Uppsala 2004, 443 ff.

reorganized as it was before January 30, 1933, the *Reichsgericht* in Leipzig, however, and all other national authorities were abolished.[6] A consequence was that all former members of the NSDAP, who had been active in the party, and all other persons who had participated in the criminal methods of the Hitler-regime were removed from their positions as judges, prosecutors, and they couldn't be reemployed.

The German lawyer Kurt Stillzweig (1905 – 1955) who had immigrated to Sweden in the 1930s and published several booklets regarding the Jewish minority problem and in 1945 he published a booklet on the concept of justice in National socialist Germany. Another German law emigré, Josef Fischler, published a brief review in the *Swedish Law Journal* (Svensk Juristtidning, SvJT) 1946 and noted that this concept of law was so dominant that it couldn't be abandoned with the fall of the totalitarian regime. Stillzweig argued that the foggy legal world of national-socialistic concept of law could be summarized that it "in all include the exact opposite to those time-honored principles which uphold the *Rechtsstaat*".[7]

An interesting part of the knowledge history after the war is the reestablishing of the professional contacts between jurists in Western Germany and Sweden. Already in 1947 the distinguished professor of criminal and procedural law in Freiburg Adolf Schönke (1908 – 1953) visited Swedish law faculties. Schönke was a prominent member of the NAZI party and an expert in international law. Also professor Rudolf Smend, professor of constitutional and church law, made a study visit to Stockholm in the Fall of 1947. He "used this opportunity to reestablish the scientific contacts to representatives for Swedish public law which had been broken due to war and capitulation".[8]

3 Nordic Interaction within the Legal Professions in the Post-war Years

Immediately after the war representatives of the Swedish legal profession congratulated their colleagues to the liberation. In *The Swedish Law Journal* Birger Ekeberg[9], and Karl Schlyter sent greetings to their colleagues in the Nordic countries with the same message.[10] The restoration of the classical rule of law concept became a part of how they enjoyed the liberation.

The chief justice in the Norwegian Supreme Court Paal Berg (1873 – 1968) became an icon of judicial autonomy, braveness and patriotism for Swedish jurists. Berg published some of his speeches on the judges' vocation, and inter alia on democracy, the history of the Norwegian Supreme Court and tributes on jurists and politicians. Sture Petrén wrote a note on the book and pictures Berg

---

6 I[var] S[trahl], Tyska domstolsväsendet, SvJT 1946, 559 f.

7 Josef Fischler, [Rev.] Kurt Stillschweig, Nationalsocialistisk rättsuppfattning, SvJT 1946, 131.

8 G[erhard] S[imson], Tyska rättslärda på studiebesök, SvJT 1948, 151.

9 Birger Ekeberg, Till Danmark och Norge, SvJT 1945, 421 ff.

10 Kjell Å Modéer, Karl J.D. Schlyter och Danmark, Per Andersen et al. (eds.), Liber Amicorum Ditlev Tamm, DJØF Publishing: Copenhagen 2011, 348 f.

"as a man deeply connected to not only his deed as a judge but also to his people and its history – in which also his name inscribed".[11]

Birger Ekeberg also published a review of Ferdinand Schelderup's book on the Norwegian Supreme Court's "struggle for the law" in 1940.[12] Ekeberg was impressed by the struggle for autonomy and patriotic freedom which was demonstrated by the Supreme Court and its president Paal Berg.[13] "For us who were spared from the curses of the war is [this book] a healthy and much-needed reading. […] It inculates in an indelibly way to those who are administrating the laws what a fundamental importance it has for the people's will of resistance not to betray its obligation in the crucial moment."[14]

Representatives from the Nordic Bar Associations met in Oslo October 6 – 7, 1947 to inform themselves of their experiences from the wartimes.[15] *The Norwegian Bar Association* (*Den Norske Sakførerforening)* had taken stand for the rule of law, and consequently affiliated them with the members of the Supreme Court, who *in pleno* had left their positions in December 1940 when Terboven had interfered in their judicial actions. The Bar Association immediately told Quisling's Ministry of Justice that they shared the opinion of the Supreme Court. In the time that followed the Association with "all with resourcefulness available means" fought for Norwegian legal opinion and for legal security. The Bar Association protested whenever the Norwegian NAZI Party (*Nasjonal Samling*) or the occupying power had given a regulation against international public law or against Norwegian legal order. All those letters became public in the Norwegian Lawyers' Journal (*Norsk Sakførerblad*) and were important for the national attitude against the NAZI-regime. In June 1941 the chairman of the Bar Association among others were arrested, and the consequence was that its board closed down its activities and within a month 95 % of the members had opted out from the Association.[16] After the war many Norwegian lawyers were active in the reconciliation with the Quisling regime – also as defenders for the accused also in treason cases.[17]

In Denmark the situation was not so severe as in Norway. Members of the Danish Bar (*Det Danske Sagførersamfund*) were arrested and their families were supported by the Bar Association. It also protested against the deportation of the Jews.[18] Also in Denmark many lawyers were active after the War in the reconciliation process (*Rettsopgjøret)* – with mixed feelings. The Chairman of the Bar Association, however, urged the members to take on such cases. "The legal idea required that the accused demanded legal defense. The Members of

---

11 S[ture] P[etrén], [Rev.] Paal Berg, For Godvilje og Rett, Oslo 1947. Gyldendal, SvJT 1948, 119.

12 Ferdinand Schelderup, Fra Norges kamp for retten 1940 i Høyesterett, Grøndahl & Søns förlag: Oslo 1945.

13 Birger Ekeberg, Norges kamp för rätten, SvJT 1946, 561 ff.

14 Ekeberg (1946), 567 f.

15 De nordiska advokatsammanslutningarna under krigsåren, Tidskrift för Sveriges Advokatsamfund (TSA) 1948, 83 ff.

16 TSA 1948, 85.

17 TSA 1948, 86.

18 TSA 1948, 87.

the Danish Bar were also loyally at the disposition for this task. It was, however, partly misunderstood by members of the Press."[19]

The Finnish Bar Association due to the consequences of the war supported activities in favor of the families of its fallen members. It had also received great donations from the Nordic fraternal organizations.[20]

The Swedish Bar Journal in the post-war years also informed its readers on the situation for the courts and lawyers in the socialistic Eastern European countries, where the intention was to abolish the "bourgeois-capitalistic Bar" and introduce a "higher form of socialism". The new Polish legislation not only lead up to, it also spiritually was a discharge of the "Marxist-Stalinistic dialectic", which then was *á la mode* in Poland.[21]

4 The Foundation of the International Bar Association 1947

The members of the Nordic national bar associations got a quite new context after the War. In February 1947 representatives of 34 national bar associations met in New York City to establish the International Bar Association (IBA). The visions of the United Nations as a global peace organization were an important context when IBA was created. Its aim was to contribute to global stability and peace through the administration of justice. The following year the second meeting was held in the Peace palace in the Hague, Netherlands, August 16 – 21, 1948.[22]

The members of IBA met for its third congress in London, July 19 – 26, 1950. This meeting was organized the week before an international conference in comparative law with some Swedish participants, e.g. the law professors Vilhelm Lundstedt and Åke Malmström from Uppsala and professor Karl Olivecrona from Lund. Lundstedt as well as Olivecrona gave noticed talks, Lundstedt on justice and equity, and Olivecrona on "The present status of legal philosophy and the science of law in different countries."[23] The IBA conference was commented in The Swedish Bar Association's Journal (TSA) 1951 by one of its representatives, jur.dr. Richard Handin (1894 – 1975), Stockholm. He was one of three Swedish representatives of about 700 participants at that conference, many of them from "exotic" Asian countries. Handin noted the sessions in international public law about the UN and human rights, crimes against humanity and war crimes, which were treated thoroughly.[24] When the female legal status was discussed he noted some of the contributions to the discussion were "temperamental"(!).[25]

---

19 TSA 1948, 88.

20 TSA 1948 91.

21 Arthur Boström, Polens advokatväsende, TSA 1948, 61 ff.

22 The Hague Conference of the International Bar Association 1948, The International Law Quarterly 1948, 635 ff.

23 Å[ke] M[almström], En rättsvetenskaplig världskongress, SvJT 1951, 151 ff.

24 Richard Handin, International Bar Association's Londonkongress, TSA 1951, 56 f.

25 Handin (1951), 58.

Most of the talks were given in English and "the linguistic difficulties for a non-Englishman were considerable", Handin marked, especially as most of the speakers and debaters not were academics and "apparently hadn't offered a reflection on the foreign listeners' difficulties to follow the speech".[26]

Regarding legal education the topics at the congress were limited to studies in comparative law, regarded as a new field to be studied more intensely. Handin's description disclosed his ignorance in this field, not surprisingly for a Swedish lawyer trained in Swedish law during the mid-war period. In conclusion Handin also wanted to underline that the small number of Swedish participants attracted a certain degree of attention and posed many questions to him especially from English and American lawyers.[27]

5 Sweden, International Law and the UN

The Swedish legal culture during the first postwar period was very nationally oriented – even if there were international actions. In Uppsala the law professor in private law Åke Malmström (1905 – 1985) in November 1948 founded an *Institute for Comparative Law* which became an important hub for internationally oriented Swedish jurists.[28]

Swedish participation in international public law legislation after the Second World War was demonstrated by the member of the High Court Emil Sandström (1886 – 1962), who already in the mid-war period had served as judge in international legal conflicts. In 1947 the *International Law Commission* within the UN was founded and held its first meeting in Lake Success (N.Y.). Sandström became the first representative of Sweden in this commission 1948 (with Sture Petrén, 1908 – 1976, as his substitute) for the codification of international law.[29] This could be done with help of conventions, but also by publication of the commission's reports. Legislation in other forms than parliamentarian legislation, however, was met with misgivings from the Scandinavian countries.[30]

6 The Evaluations of the Nuremburg Trials

The legitimacy of the Nuremburg Trials was widely discussed among Swedish intellectuals.[31] Already when the trial still took part Ivar Strahl (1899 – 1987) commentated in *Swedish Law Journal* on the Swedish discourse on this matter and discussed if it was law or power that dictated the trial.[32]

---

[26] Handin (1951), 58.

[27] Handin (1951), 60.

[28] Å[ke] M[almström], Institut för jämförande rättsvetenskap i Uppsala. SvJT 1949, 152.

[29] Gustaf Jonasson, [Article] A Emil F Sandström, in: https://sok.riksarkivet.se/Sbl/Mobil/Artikel/6349.

[30] S[ture] P[etrén], The International Law Commission, SvJT 1949, 300 f.

[31] Kjell Å Modéer, "Den kulan visste var den tog" (2004), 455.

[32] Ivar Strahl, Från dagens diskussion, SvJT 1946, 365 f.

The chief editor of *Göteborgs Handels- och Sjöfartstidning* Torgny T. Segerstedt (1876 – 1945), one of the most public opponents in Swedish public life during the War, published a comment on "The Nuremburg Spectacle". "Justice had been administered" was a frequent comment after the executions of the war criminals. Segerstedt, however, reflected on the feelings of revenge which this trial created. Can the use of the standard of justice (*allmänt rättsmedvetande*) be used as an argument in this respect? He replied to this question with yes.[33] Also the Court of Appeal president Karl Schlyter gave a lecture on Swedish radio in October 1946 on war crimes and international penal law in relation to the Nuremburg war criminals. Schlyter had got a possibility to take visiting part in the court trial but couldn't make use of it. He stated that only war crimes made by the defeated were considered and a lot of critique had been articulated against the trial in Nuremburg, but his conclusion was that the trial was a necessity. In its implementation it had demonstrated to be "a judgement of highest international legal culture".[34]

The following year the criminal law professor at Copenhagen University Stephan Hurwitz (1901 – 1981) published the Nuremburg conviction in Danish translation. Bengt Lassen (1908 – 1974), jurist in the Department of Justice and one of the editors of *Swedish Law Journal*, wrote a review of the book in the journal. For him it was "presumptuous" to comment on this book. "Shouldn't a reader in a neutral country just only read, say thanks, and receive?" Lassen, however, made an extensive comment regarding convictions related to the prohibition of retroactive penal law. His comments were not only formal. "If you want to take care of the slender plant called the beautiful name of legal order you have to treat it very gently." The jurists are committed to do this work, he wrote in his flourishing language. He saw a difference between the political and legal part of the conviction, and was sceptic to the death penalties. "There are desert islands more lonely than S:t Helena, and where the safekeeping didn't need to be as comfortable as that of Napoleon."[35]

The Judges' trial in Nuremberg in 1947 was one of the twelve subsequent "Trials of War Criminals before the Nuremberg Military Tribunals". Sixteen German lawyers and jurists were brought to the court. Ten of the defendants were found guilty; four received sentences of lifetime imprisonment, and six received prison sentences of varying lengths. The Minister of Justice Frank Schlegelberger was sentenced to life in prison and secretary of state Curt Rothenberger to seven years in prison due to crimes against humanity. Professor Gustav Radbruch commented on the trials in a noticed article in *Süddeutsche Juristenzeitung* 1948 with the title "The End of the Ministry of Justice".[36] In this article Radbruch (1878 – 1949) concentrated on Schlegelberger's crimes but made a general comment that "the dagger of the murderer was hidden under the

---

[33] Torgny T Segerstedt, Om Nürnbergprocessen. 1. Ett brevsvar, SvJT 1946, 692 ff.

[34] Karl Schlyter, Om Nürnbergprocessen. 2. Ett radioföredrag, SvJT 1946, 694 ff (698).

[35] Bengt Lassen, [Rev.] Dommen i Nürnberg- Forord af Staphan Hurwitz. København 1947, Gjellerups Forlag.376 ff, (381 f).

[36] Gustav Radbruch, Des Reichsjustizministeriums Ruhm und Ende. Zum Nürnberger Juristen-Prozess» Des Reichsjustizministeriums Ruhm und Ende. Zum Nürnberger Juristen-Prozess, in: Süddeutsche Juristenzeitung 3 (1948), 57-64; also in: G. Radbruch, Gesamtausgabe (GRGA). Bd. 8: Strafrecht II, Heidelberg 1998, 258-268.

jurists' cowl". Sture Petrén reviewed the article in the *Swedish Law Journal* 1949.[37] The topic had, so Petrén, a common interest and due to the difficulties to get access to German law journals he found a reason to give an account of Radbruch's views. Petrén referred to Radbruch's analysis and noted that three lessons were learned from Schlegelberger's case. 1. By participating in a lesser evil you can't prevent a bigger evil; 2. Nobody has the right to consider so called higher purposes or values and mute the voice of conscience. Everybody has the ultimate responsibility; 3. Don't believe that you by referring to what is objective and lawful can master the real difficult legal problems. It's bad if one serves a positivism with secondary values as the real and lawful, which has forgotten "the highest of all legal rulings, to obey more God than human beings". Petrén's review is a good example of how Radbruch's natural law inspired views are reflected in the Swedish post-war legal culture.

In 1949 there was an international discourse regarding the Nuremburg principles. The International Law Commission under the UN discussed the design of the principles within international public law which had been expressed in the statute and decision of the Nuremberg Court as well as the codification of crimes against peace and security.[38] The German lawyer Gerhard Simson, one of the several well educated immigrants who in the 1930s came to Sweden and became an established expert in German law at the Swedish Ministry of Justice. He also introduced Swedish law to German jurists.[39] Under a motto from Immanuel Kant, "If justice goes under, it has no value longer for humans to live on earth", Simson published in 1951 a book in German on five strugglers for justice,[40] six years later (1957) translated into Swedish.[41] Nils Beckman (1902 – 1972) wrote a review in *Swedish Law Journal* and presented it as a book of "historical and current interest". Even if the book more dealt with the history of the society than legal history, "it had a special interest for jurists, as it deals with that part of sociology which concern peoples postulate for law and unlaw".[42]

Simson also published a review on Hans-Heinrich Jescheck's book on the responsibility of the state institutions in international criminal law.[43]

7 Evaluation of the Norwegian Quisling Trial

Swedish Law Journal published several articles and briefs on the Quisling trial. In 1946 the well-known Swedish lawyer Axel Hemming Sjöberg (1884 – 1958)

---

37 Sture Petrén, Slutet på ett justitiedepartement, SvJT 1949, 634 ff.

38 S[ture] P[etrén], The International Law Commission, SvJT 1949, 301.

39 I[var] S[trahl], Gerhard Simson 75 år, SvJT 1977, 229 f.

40 Gerhard Simson, Fünf Kämpfer für Gerechtigkeit, Beck: München 1951.

41 Gerhard Simson, De kämpade för rätten, Natur & Kultur: Stockholm 1957.

42 Nils Beckman, [Rev.], Gerhard Simson, Fünf Kämpfer für Gerechtigkeit, SvJT 1952, 236 f.

43 Gerhard Simson, [Rev.] Hans-Heinrich Jescheck. Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht. Eine Studie zu den Nürnberger Prozessen. Bonn 1952. Ludwig Röhrscheid, SvJT 1953, 646 ff.

published a book on this trial, which he had followed in Oslo.[44] This book resulted in an extensive review-article in the journal by a friend of Quisling, the Norwegian diplomat Benjamin Vogt (1863 – 1947). He was critical to Hemming Sjöberg's description of Quisling; regarding Quisling's being "with all his good will [he had] little understood".[45] In relation to Vogt's article Quisling's legal defender Henrik Bergh (1879 – 1952) corrected wrong and misleading writings made by Vogt.[46] This discourse in a *Swedish Law Journal* brought the Oslo law professor Johs. Andenæs (1912 – 2003) to write a substantial review of Hemming Sjöberg's book and simultaneously commenting on Vogt's and Bergh's contributions. Andenæs also criticized Hemming Sjöberg and Vogt and concluded that Quisling got a fair trial, and that a Norwegian "to a much higher degree than a foreigner" had an insider's view and could observe and control Quisling's judicial actions – and also compare it with reality, which to a great extent looked otherwise.[47]

Regarding Denmark's reconciliation with the past the president of the Danish Supreme Court Jørgen Trolle (1905 – 1985) wrote a review article in the Swedish Law Journal 1954 on the book the president of the Copenhagen City Court Svenning Rytter (1875 – 1957) had published on *Retsopgøret*, the legal settlement with the collaborators after the war. It dealt with the criticism regarding retroactive criminal legislation and several activities made by the resistance movement during and after the war.[48]

8 Enduring Legal Knowledge from Germany

Even if the jurisprudential inspiration after the war increasingly came from the west, U.K. and U.S.A., the reconciliation with the past and traditional inspiration came from Germany. An example was the presentation of professor Eberhard Schmidt's (1891 – 1977) later classical work the introduction to the German administration of criminal justice, published in 1947. Gerhard Simson presented this work in *Swedish Law Journal*. This masterwork, Simson wrote, was written during the "darkest and most confused days in German history" and he quotes Schmidt's preface in which the author declares that his book not only was written because of historical interest, but also had a special contemporary task. "From the doctrines of legal history we can find a full backing for our own position in our struggle for justice. Legal history deals permanently with the contradiction between power and law, between expedience and justice, and most of the sufferings of the humanity come from those tensions." Schmidt described in the end of his book how horribly criminal law had been devastated by the NAZI-jurists. The legal order was transformed to a torture chamber when legal security and humanity wasn't present. Simson underlined that this book also was

---

44 A. Hemming-Sjöberg, Domen över Quisling, Natur och Kultur: Stockholm 1946.

45 Benjamin Vogt, Quisling: Menneske og Forbryter, SvJT 1947, 161 ff, (174).

46 Henrik Bergh, Quisling, SvJT 1947, 359 ff.

47 Johs. Andenæs, [Rev.] A. Hemming-Sjöberg, Domen över Quisling, Stockholm 1946, Natur och Kultur, SvJT 1947, 450 ff, (455).

48 Jørgen Trolle, [Rev.] Retsopgøret under og efter Besættelsen. Kbhvn 1953. Gyldendal, SvJT 1954, 109 f.

important for Swedish readers. The criminal law had common roots in Germany and Sweden and oft the development in the two countries had been parallel and the problems had been the same. [49]

9 The Iron Curtain from a Legal Perspective

The post-war legal perspectives from the Swedish position were by the Iron Curtain divided in east and west. The constitutional problem raised by the distinguished lawyer Gunnar Bomgren was the character of the military occupation of Germany. It was not an "*occupation pacifica*" due to a peace treaty, and not an "*occupatio debellatio*", that is capture for the purpose of an annex. The only applicable form of occupation was "*occupation bellica*", that is the military occupation due to a temporal act of war. This vulnerable legal situation was discussed by Gerhard Simson in a review of Bomgren's book in *Swedish Law Journal* 1948.[50]

Regarding Eastern Europe the Soviet "Stalinist" legal system was introduced to the Swedish jurists in 1950 by an article by the former attaché at the Swedish embassy in Moscow Fredrik Lindencrona (1925 – 1985), who described its history and situation after the Stalin declaration 1939. Socialistic law was, so Lindencrona, due to the Soviet jurist Andrej Vysjinski "the customary system of behaviors regulated through legislation founded on the power of the workers and expressing their will – the will of the Soviet-people".[51]

The readers of the *Swedish Law Journal* were informed regarding the legal order after the fall of the NAZI-regime. Ivar Strahl in 1947 wrote an informative article on the legal order under the allied forces in Germany and also about the denazification at the German universities and judiciary. Only two law professors remained at the University of Berlin after the denazification. On the other hand several law professors returned from their exiles in the U.K. and the U.S.A. [52] In Austria the situation regarding the judiciary was precarious, Karl Schlyter informed. Seventy percent of the judiciary were members of the NAZI-party. Many of them were rescued as being members of the Bar. They were crushed by the disqualification, but earned money by the change of profession.[53]

When the NAZI period came to an end the Supreme Court in Leipzig after 75 years also was extinguished. Its president Erwin Bumcke committed suicide. In Western Germany in the *Stunde Null* a special Supreme Court with limited jurisdiction was temporarily established in 1948 for the British and American occupation zones located at Cologne, Gerhard Simson remarked.[54] When the

---

[49] Gerhard Simson, [Rev.] Eberhard Schmidt. Einführung in die Geschichte der deutschen Strafrechtspflege. Göttingen 1947, Verlag Vandenhoeck & Ruprecht. SvJT 1948, 271.

[50] Gerhard Simson, [Rev.] Gunnar Bomgren, Tysklands ockupation som rättsproblem. Göteborg 1947, Gumperts förlag.

[51] Fredrik Lindencrona, Det sovjetiska rättssystemets historiska och teoretiska bakgrund, SvJT 1950, 224 ff, (227).

[52] Ivar Strahl, Tysk rätt efter nazistregimens fall, SvJT 1947, 224 ff (228).

[53] Karl Schlyter, [Från främmande rätt] Från Österrike, SvJT 1947, 229.

[54] Gerhard Simson, En högsta domstol i Västtyskland, SvJT 1948, 472 f.

Soviet zone in Germany in 1949 was reformulated in The German Democratic Republic with its Soviet-inspired Constitution it also got a Supreme Court, Obersten Gerichtshof. This jurisdiction was regulated by a law November 29, 1949, introduced for the Swedish audience 1950.[55] As a consequence of the new West German constitution 1949 a Supreme Court, *Bundesgerichtshof*, was established in Karlsruhe.[56]

10 Reestablishing of German Legal Infrastructure

In an article on German legal discourses Sture Petrén had noted the lack of information regarding German law journals appearing after *Stunde Null*. In 1951 Gerhard Simson brought a list of forty law journals in Germany and Austria, which had popped up like mushrooms during the post-war years.[57]

Due to the totalitarian war all legal literature and law journals 1942 – 1944 were discontinued. After the NAZI-regime it took some time to establish new or reestablish old law journals. "Several distinguished jurists who during the terror had to be silent or emigrate have returned to the editorial staffs", Simson wrote, and "Hitler's legal assistants and the more prominent predicators of the NAZI jurisprudence have for the time being been removed from the pitch".[58]

Most of the material in those law journals were also of interest for Swedish jurists, he noted. He hoped that those legal publications recovered what they had before the NAZI-time. "It's often the same problems which are covered in the two countries." Also the current legal conditions in Sweden were noted in the German law journals.[59]

11 International Congress in West-Berlin 1952

Post-war Germany was identified by the dichotomy of the political iron-curtain between east and west. Distrust between the representatives of capitalism and rule-of law in West-Germany and those of the socialistic police state in East-Germany was mutual. In West-Germany the new constitution, *Grundgesetz*, 1949 in its first article emphasized that human dignity is inviolable.

A Constitutional Court was erected in Karlsruhe and started its work in April 1951. This court played an important role in the post-war period, applying judicial review as an instrument to conciliate the rule of law after the years of unlaw. In the German Democratic Republic, however, one totalitarian state succeeded another.

Immediately after the war some rule of law-oriented lawyers with affiliation to the US tried to prove the socialistic unlaw which the jurists in East-Berlin both applied and encountered. They organized an international congress of jurists in

---

55 B[engt] L[assen], Justitieväsendet i tyska östzonen, SvJT 1950, 227.

56 Gerhard Simson, Västtysklands högsta domstol, SvJT 1951, 153.

57 Gerhard Simson, Tysklands och Österrikes juridiska tidskrifter, SvJT 1951, 58 ff.

58 Simson (1951), 58.

59 Simson (1951), 61.

West-Berlin in July 1952. Some hundred jurists from forty-four countries accepted the invitation. From Sweden three representatives participated, all of them law professors from Uppsala and Stockholm: Professor of legal procedure Per Olof Ekelöf (1906 – 1990) and professor of legal history Henry Munktell (1903 – 1962), both from Uppsala and professor of private law Folke Schmidt (1909 – 1980) from Stockholm. All of them were anchored in a resistance against the police-state and supported constitutional democracy.

Per Olof Ekelöf belonged to the *Uppsala School of Jurisprudence* and was one of the supporters of Scandinavian legal realism. In the *Swedish Law Journal* 1952 he conveyed his impressions from the conference. The totalitarian political system during the NAZI-regime had eliminated the autonomy of the courts. In East-Germany, the Soviet occupation zone from 1949 was identified as the German Democratic Republic, in fact a Soviet satellite state. The conference identified the excesses and recommended legal actions.

The reconciliation with the past resulted in the implementation of the "Radbruch formula", defined in 1946 by the former German social-democratic minister of law and law professor in Heidelberg Gustav Radbruch. It was, due to Radbruch, a primary task for the judges to examine that the legislation corresponded with the constitution, judicial review. If the legislation evidently was in conflict with human rights, the judge shouldn't apply the law. Thus the judges were obliged to apply natural law as highest legal standard. In West-Germany the expression "legal unlaw", *gesetzliches Unrecht*, was used for NAZI-law.

When Ekelöf mentioned this problem for one of the Norwegian participants he got the reply: "You see, we are all, more or less natural law supporters – we who participated". We who had participated in the war!" Ekelöf's commented by alluding to Sven Duva in the epic poem "*The Tales of Ensign Stål*" by Johan Ludvig Runeberg (1804 – 1877): "That bullet knew where it took". Ekelöf's comment is revealing and demonstrates how Swedish and Norwegian legal culture differ, to a great extent depending on the different approaches to and experiences of totalitarian regimes in the Scandinavian countries during the war.

Internationalization and Europeanization of the law became a clear pattern increasingly noted in the 1950s. The international meeting of lawyers in West-Berlin in 1952 is a good example. Already at this meeting was suggested to expand this German law association and the following year the *International Commission of Jurists* (ICJ) was founded as a NGO with the aim to defend human rights and the rule of law.

Professor Folke Schmidt, Stockholm, who also attended this meeting, wrote an extensive article on German family law in 1953, in which he pointed out the differences due to the different legal and political situations in East and West. Schmidt emphasized on the differences between the interpretation of the concept democracy, and the equal position between man and wife. He quoted Hilde Benjamin (1902 – 1989), the disreputable East German judge, who noted that 65 % of all females in working age had a paid work, quoting the female communist pioneer Klara Zetkin who urged all females to take on a paid work. It was this principle which had to be taken in consideration when family law was reformed. Socialistic family law contrasted to that in the Western democratic countries.[60]

---

[60] Folke Schmidt, Den tyska äktenskapsrätten under omdaning, SvJT 1953, 518 ff (522).

12 Legal Realism and Human Rights

Natural law concepts, however, were in the post-war period contrary to those of rational positivism. International documents of great importance related to natural law, e.g. the UN Declaration of Human Rights 1948 and European Council's convention on human rights 1950. In Sweden, where legal realism and positivism dominated the legal culture members of the government were opponents to this trend. The Foreign Minister Östen Undén (1886 – 1974), former professor of private law at Uppsala, was a distinct opponent to the human rights perspective which dominated legal thought after World War II. His then colleague in the cabinet, Dag Hammarskiöld (1905–1961), later Secretary General to the UN, on the other hand belonged to the Europeanization project. A then young diplomat at the Swedish embassy to France, Lennart Petri (1914 – 1996), described in his autobiography how the Swedish delegation at Paris had to cooperate with Undén, due to his scepticism to human rights, the UN and the European Convention. Together with Sture Petrén, who also served at the Paris Embassy at that time, Petri with astonishment noted Undén's unwillingness to include human rights in an international convention. Petri was informed by the ambassador that Undén's position was "as unwavering as unreasonable".[61]

13 Swedish Law and Religion in a European Perspective

From a theological perspective, there was a parallel radical modern discourse during the years after the war. In 1946, the social-democratic parliamentarian Stellan Arvidson (1902-1997) together with the bishop (and former professor of theology) Torsten Bohlin (1889-1950) published a widely read and discussed book on *Christianity – Against and pro (Kristendomen. Mot – för).* When in 1949 the Uppsala professor of philosophy Ingemar Hedenius (1908 – 1982) published his provocative work *Tro och vetande (Belief and Knowledge)*, he initiated an extensive debate on contemporary religion and a set forth critical view regarding the role of the state church in the modern and democratic Swedish *folk-home*. During his years as a student at the Law faculty at Uppsala, the Christian lawyer Göran Göransson (1925 – 1998) intensively took part in discussions around Hedenius' book.

Göran Göransson became emblematic of the legal culture of the autonomous church in the modern welfare state. His generation developed Sweden as a nation state with open borders. The younger generations of the World War II had been raised with closed borders. Even if Göran Göransson was situated in a very national Swedish legal context he became an internationally oriented and well-known jurist. This orientation started immediately after the war.

In contrast to the Swedish national legal culture during the war, the international contexts of the intellectual debates in Uppsala in the late 1940s were much more colorful, rich and engaged regarding the foundations of the law "in the ruins after a perverted legal system, which consequences had raised

[61] Lennart Petri, Sverige i stora världen. Minnen & reflexioner från 40 års diplomattjänst, Atlantis: Stockholm, 1996, 241 f.

abomination and against which one wanted to create guarantees for the future".[62] The European post-war legal and constitutional discourses were connected to the concept of *human dignity* and *natural law*, especially in the canon law of the Roman Catholic Church. The modern Swedish jurists, trained in the *Uppsala School of Jurisprudence*, were extremely reluctant to this revival of natural law.[63]

In addition, after World War II the churches became important institutions for restoring belief in human dignity. The concept of human dignity engaged theologians as well as jurists. As early as 1942, Bishop Bohlin had published an article entitled "*Kampen för människovärde*t" ("*The Struggle for Human Dignity*"), in which he formulated Christ as our incomparably best spiritual asset. "He is the only great hope for our ill-fated generation. In that sign the struggle for human dignity once in the future will be turned into victory."[64]

Immediately after the war, international Christian organizations were reorganized. In the Lutheran World Foundation as well as the World Council of the Churches the Nordic representation was remarkable. The Lutheran World Federation was founded at a conference in Lund, Sweden held from June 30 to July 6, 1947.[65] Under the theme "The Lutheran Church in the World Today," 200 delegates from 26 countries participated and elected professor Anders Nygren (1890–1978), Lund, as the first president of the Federation. It was hailed as a new start after the war, although there was no debate in the media on this event within the Swedish church.[66] From July 22 to 31, the *World Student Christian Federation* (W.S.C.F.) met in Oslo. The 22-year-old law student Göransson participated at the Oslo conference, together with about fifty internationally engaged Swedish students, among them Olof Sundby (1917–1996), later Archbishop of Sweden. For many of them, including Göransson, this meeting with young Christians from all over the World became of "vital importance" for them.[67]

Göransson also participated in the foundation of the ecumenical organization World Councils of Churches in Amsterdam 1948 and in the Lutheran ecumenical work in the post-war time. He became a European expert in Church law from the mid 1950s and during the latter part of the 20th century the leading representative in church law in Sweden, who to a great extent participated in the establishment of the new Swedish Church law 1992 and to the changed relation between Church and State in 2000.

---

62 Göran Göransson, "Om rätten och rättsteologin, Svensk Teologisk Kvartalsskrift" 1995:3, 112.

63 Kjell Å Modéer, "'Den kulan visste var den tog!'" (2004), 443 ff.

64 Torsten Bohlin, "Kampen för människovärdet," in *En bok om människan: Av tjugofem författare*, ed. Natanael Beskow (Norstedt: Stockholm 1942), 25. This article was given as an off-print from the author to Göran Göransson.

65 Jens Holger Schjørring et al., eds., *From Federation to Communion: The History of the Lutheran World Federation* (Minneapolis: Fortress Press, 1997).

66 Jens Holger Schjørring (ed.), Nordiske folkekirker i opbrud. National identitet og internationell nyorientering efter 1945, Aarhus Universitetsforlag: Århus 2001, 417.

67 Göran Göransson, Kristna världsungdomsmötet i Oslo – ett femtioårsminne. *Svensk Kyrkotidning* (1991).

In 1946, the social-democratic parliamentarian Stellan Arvidson (1902 – 1997) together with the bishop Torsten Bohlin published a widely read and discussed book on *Christianity – Against and pro (Kristendomen. Mot – för).* When in 1949 the Uppsala professor of philosophy Ingemar Hedenius (1908 – 1982) published his provocative work *Tro och vetande (Belief and Knowledge)*, he initiated an extensive debate on contemporary religion and a set forth critical view regarding the role of the state church in the modern and democratic Swedish *folk-home*.

14 Sweden and the UN Law Commission

The League of Nations was in August 1945 succeeded by the United Nations, founded in San Francisco and with its headquarters in New York. As mentioned, the visions for the UN as a global peace organization were important for the International Bar Association when it was founded at the University Club in New York 1947.

In the Ministry of Foreign Affairs several employees were active in the legal work for the reestablishing of human rights and the rule of law – even if the Swedish position was skeptical.

In November the same year the General Assembly of the UN erected a permanent commission for international law, *International Law Commission*, the first Swedish representative was the diplomat Erik Sjöborg (1878 – 1959) and his deputy, the court of appeal judge Sture Petrén, later Swedish judge on the European Court of Human Rights.

European Council and its commission created the European Convention of Human Rights 1950, ratified by Sweden 1952. The first member of the commission was Sture Petrén.

The European Court of Human Rights got jurisdiction regarding the applicability of the convention. The first Swedish member of the court 1959 – 1971 was the law professor (private international law) Åke Holmbäck, who also served as vice chancellor at Uppsala University 1952 – 1955.

Sture Petrén was as Swedish representative involved in several European legal projects after the war. He was a member of the European Commission for Human Rights 1954 – 69 and was its president 1962 – 67. He also served as a member of the Permanent Court of Arbitration in The Hague from 1955 and of the International Court of Justice from 1966. Petrén succeeded Holmbäck as Swedish member of the European Court of Human Rights in Strasbourg. For many years he also served as an expert in international law for the Swedish UN-delegation. In between Petrén acted as President of the Svea Court of Appeal in Stockholm 1963 – 67 and was also a member of the Swedish Academy 1969 – 1976.

15 Epilogue

This survey has demonstrated how some clusters of Swedish – and German – jurists during the first decade after the Second World war actively took part in the internationalization of Swedish legal culture. It became an important context to the national and patriotic position the war had created, and was the first step

in the internationalization and duality of this culture which has resulted in the current globalization process.

Swedish jurisprudence at this time experienced a dynamic process between traditional legal idealism and progressive realism and pragmatism.[68] The dominant Uppsala school of jurisprudence had a contra force in more metaphysical approaches, like that of the Norwegian law professor Frede Castberg (1893 – 1977), who spent time in exile in Uppsala during the war.[69] Castberg became a European front figure for constitutional law and international public law, and also for the implementation of human rights after the war.

Stunde Null in neutral Sweden meant that the jurists from Denmark and Norway who had lived in exile in Sweden during the war returned home. Otherwise several of the German law emigrés like Gerhard Simson and Josef Fischler who stayed on in Sweden and took active part in the reestablishing of the rule of law in Western Germany the decades after the war. They published articles in this field in *Swedish Law Journal.*

The main sources for this article have been the *Swedish Law Journal* and *The Journal of the Swedish Bar Association*. In *Swedish Law Journal* several jurists contributed with information on how democracy and rule of law were reintroduced in Germany, among them Birger Ekeberg, Sture Petrén, Ivar Strahl, Bengt Lassen and Karl Schlyter. Jurists as employees at the Foreign Ministry also played significant roles when several international commissions and organizations were established after the war.

A special interest was expressed in how the judicial actions against the war criminals were handled in Germany as well as in Norway and Denmark.

All the references to justice and human rights referred to external international discourses. Even the internationally oriented Swedish jurists were confused regarding the natural law renaissance which became a part of the German jurisprudence the decade after 1955.

In Norway the jurists and their jurisprudence to a great extent turned their interest towards the west, towards U.K. and the U.S.A., *Vestvendingen*. Also in Sweden this trend was expressed.[70] In this article, however, has on the one hand demonstrated how the transformation from Hitler's totalitarian state into a modern democratic rule of law-state was implemented in Western Germany – but also on the other hand how the *occupation bellica*-doctrine for forty years could establish a socialistic regime in the Eastern part of Germany.

---

[68] Ivar Strahl, Idealism och realism i rättsvetenskapen, SvJT 1941, 302 ff.

[69] Frede Castberg, Rett og metafysikk, SvJT 1945, 19 ff.

[70] Kjell Å Modéer, "Young men go west! Nordiska jurister, deras studieresor till efterkrigstidens U.S.A. och den rättskultur de mötte", Boel Flodgren (ed.), Vänbok till Axel Adlercreutz, Juristförlaget i Lund: Lund 2007, 309 ff.