

A Chair in Jurisprudence

Jacob W.F. Sundberg

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1 The Chair in Jurisprudence

‘Jurisprudence’ – *allmän rättslära* - in Sweden is a rather recent creation in the Academic Zoo. In fact, it dates from the 20th century. It has a longer history in the neighbouring countries (Almen Retslære, Allgemeine Rechtslehre), Almindelig Retslære was a 19th century subject with its center in Denmark¹ In *Forordning om det juridiske studium ved Københavns universitet* of 26 January 1821 ”almindelige Retslære” is mentioned among the subjects of legal science and it covers the Law of Nature, of Nations and of Government (Natur- Folke- og Statsretten) (§ 3). In later statutory instruments, this further designation is missing. In the present ordinance about the formation of masters of law at the universities of Copenhagen and Aarhus (statute no 475 of 22 June 1987, § 3) ”almindelig retslære” is part of the law curriculum without any specification of what the subject should include.²

The creation of the subject in Sweden came about mid-century. In 1949 a governmental investigation was launched which was to scrutinize and suggest changes concerning the university subjects of law and political sciences. The experts delivered their report in 1953 and it was followed by what we now call the curriculum of 1958 (‘1958 års studieordning’). One of the results of these changes of the 1950’s is the Chair in Jurisprudence. Chairs were created at the law faculties in Uppsala, Stockholm and Lund (1961). When the bill to create the Chair was before the Parliament, the Cabinet Minister in his briefing stressed, that the studies to be covered were mainly to concern the questions of method that were common to all fields of law, e.g. statute drafting and statute interpretation. Another reason for the reform was that in the period between the end of the second world war and the implementation of the reform, the scholarly study of problems of legal theory had attracted general attention much more than before.

However, even if the Chair at the Swedish universities is no more than half a century old, its subject matter as an object of study is much older. What corresponded to it, *grosso modo*, previously, was the notion of Legal Encyclopedia (*juridisk encyklopedi*), the study of which may be taken back to the 1840s when the Law Faculty in Uppsala received professorships covering this subject.³

It is interesting to study how the subject was presented in 1994 when the Faculty of Law in Stockholm gave its reasons why the Chair should be kept and be given a new holder – which in due time happened to be Jes Bjarup. The presentation was authored by my successor in the Chair, Professor Åke Frändberg. He wrote:

In 1961 the Chairs were established at the three law faculties of the Realm. This had to do with a growing realization of the importance of the research into legal

¹ See Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, IOIR No 41, p. 214 f.

² Bjarup, Jes & Dalberg-Larsen, Jørgen, *Retsbegreb, retsanvendelse og retsvidenskab*, Århus 1994, s 1.

³ Cf Brusiin, Otto, *Legal Philosophy in 17th Century Finland*, Scandinavian Studies in Law 1974 p. 11-25.

theory both in Europe and in America during the first post-war period. Also, all over the world, during the last decades, the subject of Jurisprudence has experienced a strong upswing, and the international cooperation in the field is nowadays strongly developed, Sweden and the Nordic countries having generally performed quite an honourable role in this development... Few subjects have a greater role to play than Jurisprudence when satisfying the needs of legal education and research, something which has to do with the changes in our surrounding world, mentioned in the text remitted. At a time when, on the one hand, the endeavours towards legal integration in the world are stronger than ever before, and when, on the other hand, violations of fundamental legal values are more extensive than for a very long time, our fundamental ideas about law are of immediate interest and even in certain respects revisited. In such times it is of the utmost importance, if we want to understand what is happening and want to be able, too, to handle the development to investigate scientifically the basic ideas on which the legal orders are founded and which confer upon them their special nature. This is a task which first and foremost rests on Jurisprudence ... the importance of which derives from the fact that it deals with basic problems that are common for all lawyers, whatever their specialty.

It is true that the two professors that occupied the Chairs of Jurisprudence in Uppsala and Stockholm in the beginning of the 1970s were much inclined to search for “the basic ideas on which the legal orders are founded and which confer upon them their special nature” or, with the formula which Professor Stig Strömholm in Uppsala preferred, “to enrich the scientific debate with general concepts that are common to various subjects.”⁴ Dr Strömholm came first and hit upon the idea that the essence was the ‘isolation effect’ – that rules somehow are isolated from the person that follows and applies them.⁵ In Stockholm, I myself put it slightly differently:⁶

What is a legal order? Is every societal order a legal order? Or are there societal orders that are not legal orders, and what, in such a case, distinguishes the legal order from the other societal orders? Simple custom is not law. “A repetitive behaviour which does not form the subject of the authority’s decision is simply custom”, says Pospisil. “Custom continues to inhere in, and only in, these institutions which it governs (and which in turn govern it)” says Bohannan.

The characteristic agent that distinguishes the legal order from other societal orders is identified among anthropologists as the double institutionalisation. “Central in it is that some of the customs of some of the institutions of society are restated in such a way that they can be ‘applied’ by an institution designed (or, at very least, utilized) specifically for that purpose.” These customs then must be stated in such a way that the applying body can deal with them. “The rules must be capable of reinterpretation, and actually must be reinterpreted by one of the legal institutions of society so that conflicts within nonlegal institutions can be adjusted by an ‘authority’ outside themselves.” Kantorowicz says that they must

⁴ Strömholm, Stig, *Legal Theory in Sweden*, in Enrico Pattaro, ed., *Legal Philosophical Library – Sweden*, Bologna, p. 27-37, at p. 28.

⁵ Strömholm, Stig, *Le rôle du droit dans la société suédoise contemporaine*, Archives de philosophie du droit, tome XIX, Paris 1974. p. 357-371. Cf idem, *Har juridiken en framtid?*, SvJT 1975 p. 593-604.

⁶ Sundberg, Jacob, W.F. *fr. Eddan t. Ekelöf*, Stockholm 1978, IOIR No 41, p. 13 f.

be *justiciable*. The existence of an authority that applies the law, and which is impressed by arguments put forward within the framework of something resembling a court procedure is a central element in a legal order. Thus, the notion of legal order is centered on the existence of a court procedure. The way in which the court considers a dispute and resolves it gets to be the central element. Without a court function a legal order is not thinkable.

This approach turned out to be seen in Sweden as a very dangerous approach, and the teaching, when applied to contemporary phenomena, a very dangerous teaching. This was so because a corollary to its basic reasoning was that you might arrive at the conclusion that something in contemporary society could not be ‘legal’ under this definition – indeed, *illegal*.⁷ Dr Klami finds my teaching imply that the legal theoretician should be something like “the geese at *Capitolium*: warning society against real or imagined developing bad tendencies”.⁸ For various reasons, very few of my readers would air such fears publicly, but a slip of the tongue of a very senior and very revered colleague of mine, Professor Jan Hellner, - now deceased – brought it out into the open. In one of his last books, *Metodproblem i rättsvetenskapen* (“Problems of Method in Legal Science”), 2001, he refers to my chapter on the Socialist source-of-law theory, (p 127) and dismisses it sovereignly as authored by “people who consider that loyalty towards the legislature and the courts is unsuitable as a guide for legal scholarship” (my translation). Another colleague, Professor Margareta Bertilsson puts it directly in a contemporary political context; she confides that the “sallies against [Prime Minister Olof] Palme and the ‘Socialist source-of-law theory’ are notorious among lawyers – something that has entailed that his writings are not much read”.⁹ Certainly, dr Bertilsson is right inasmuch as my book – read or not - has been purposefully left out of most Swedish scholarly discussions. Looking at it the other way, consequently, by spotting the parallels, you may get a good insight into what has been feared by Swedish legal scholars and perhaps too an understanding why.

But let us go back to the first part of the last century, when the subject in Sweden was known as *Juridisk encyklopedi*.

1.1 The Tradition from Legal Encyclopedia

The history of jurisprudential thinking in Sweden during this period is the history of the fight between Merkel and Hägerström.

Merkel had been inherited from the German development of the 19th century. His *Juristische Enzyklopädie* stemmed from the same tree which had brought the

⁷ Strömholm, Stig, *Legal Theory in Sweden* (supra) p. 29: “perform a controlling function over other legal disciplines, as well as acting as a stimulus in relation to them.”

⁸ Klami, Hannu T., *Realister och rättskämpar. Jurister och rättsfilosofi i Sverige och Finland* (Realists and Legalists), TfR 1984 p. 65-88, at p. 69.

⁹ Bertilsson, Margareta, Introduction to *Rätten i förvandling. Jurister mellan stat och marknad*, Nerenius & Santerus, p. 35 note 79.- Incidentally, the only reference to Mr Palme in the book is to his own book *Politik är att vilja* [‘Politics is a matter of will’] which most people may find a rather harmless reference, but this only underlines the drama of her interpretation.

Allgemeiner Teil of BGB to life, *i.e.* it was attempted to unite within one and same compartment of the law all that was common for the whole legal field (the General Part), while that which was special and did not have general applicability was separated and put into a Special Part. This method was applied by Adolf Merkel to the whole legal system and what emerged was what may be called General Jurisprudence (*Allgemeine Rechtslehre*, “allmän rättslära” in Swedish).¹⁰ The same method was used in Private Law, Penal Law and in Administrative Law. In Sweden of the time, as already observed, the term “allmän rättslära” was not used. In both Sweden and Finland, the matter was known as *Juridisk encyklopedi*, but in Denmark and Norway, the term *Almindelig Retslære* was preferred.¹¹ The foremost Swedish representative of this subject was Professor Nils Stjernberg, a monster of learning.¹²

The kingdom of Sweden was however hit early by the Uppsala School which provided under the guidance of Professor Axel Hägerström a more comprehensive philosophy of science which fitted excellently the dominating political power of the day – the Social Democrats. This school taught the difference between theoretical sentences and practical sentences, but only the former could be true or false and consequently be the subject of scientific study, while the latter were only value judgments, incapable of truth-functional analysis and scientific quality. Legal propositions were almost always practical sentences and the study of law was relegated to a kind of unscientific Siberia (by today’s latecomers referred to as ‘politics’). The political sciences were as badly hit as the study of Law.

According to Hägerström value judgments, be they legal or political science-related, had no truth value and consequently it could not be the task of scientists to deal with them. Scientists should deal with what could be considered to be true or false.

The themes with which the scholars of the Uppsala School dealt, with the use of the linguistic analysis – they may be summarized as those themes regarding the nature and the meaning of legal concepts – dominated the theoretical-legal debate at least up to 1950. The concepts of “valid law” and of “legal right” were the object of close analysis in this period.¹³

“The imposing and lasting authority of Scandinavian Legal Realism”¹⁴ does however have a background. The School’s radiation should also be seen in its contemporary political context. During the 1930s, that includes what has been termed the ‘secret marriage’ between the ruling Social Democrats and the hägerströmian Uppsala School. The attraction exercised by the Uppsala School

¹⁰ Merkel, Adolf, *Juristische Enzyklopädie*, Berlin 1885, 5. Aufl. 1913. Merkel was born in 1836 and died 1896. Concerning his method, *see* the obituary notice by J. Grotenfelt in *Juridiska Föreningens I Finland Tidskrift* 1898 p. 141-150, at p. 148 f.

¹¹ *See e.g.* Goos, C., *Forelæsninger over den Alm. Retslære*, 1. Del, 1889.

¹² Nils Stjernberg advises in *Nordisk Familjebok*, 2nd ed., under the title “Merkel”, that his encyklopaedia was “a textbook often used even in Sweden”.

¹³ Strömholm, Stig, *On Legal Theory in Sweden* (supra) p. 35.

¹⁴ Strömholm, Stig, *On Legal Theory in Sweden* (supra) p. 37.

on the Social Democrats was its ability to do away with all legal objections against a desired change of the legal system – indeed down to doing away with the legal system altogether. Legal objections were unscientific.¹⁵ But the Uppsala School itself was dressed up hyperscientifically.

On the political science side, of course, the problems were no less.¹⁶ Hägerström's points of departure were accepted. In order nevertheless to reserve a certain measure of science quality, the following method was adopted. Some resolved the problem by taking their point of departure in a certain number of value judgments that were supposed to be found among the Swedish people, provided that people were sufficiently elucidated and not blinded by irrational conventions and traditions. It is no surprise to find among those value judgments a good number of words of honour in frequent use in the Swedish political Party of the majority. In this way the value basis of the prevailing politics may be identified and the experts, scientifically trained, are able to provide recommendations on this basis for how to solve various identified welfare problems. The political scientists become the enlightened interpreters of the real will of the people – as they see it they represent the view of politics taken by the educated watchful as opposed to how people think in 'cultural ghettos, way out in the dark' ("kulturella avkrokar"). In this way the value basis of politics is smuggled in behind a supposed scientificness – or in other words, the words of honour of the Social Democrats are given scientific status. Among other writers the more polemic strategy will be found, giving those value judgments that proceed along other roads, than does the community-of-value which they themselves have observed, the designation 'private fancies' ("privat tyckande"), *i.e.* nothing to worry about. But behind the façade of observed value community there hides in reality the sympathies for the Social Democratic cause.

1.2 A Chair in the Philosophy of the Uppsala School?

In the extension of this self-satisfaction of the Social Democratic elite, it was also favoured to create a Professorship dedicated to this philosophy of the Social Democratic 'Movement'. What came natural then, in connection with the abovementioned changes in the curriculum of the Law studies of the 1950s, was to remake "Juridisk encyklopedi". In order to hold a Chair in the Uppsala School philosophy, evidently, no deeper insight into the Swedish legal system was called for. Lawyers no longer being able to tilt against a desired societal development towards the dreamed Socialist and Communist stage was the goal. What was in issue was to create a theoretical underpinning for that development, and the practical relevance of same was uninteresting.

For unknown reasons, never fully investigated, this did not come about. Perhaps it had to do with the fact "that Anglo-American theories of law began to

¹⁵ For a broad account, see von Baumgarten, Fredrik, *Det idéhistoriska perspektivet*, in Sundberg, Jacob, red., *Sporrong-Lönnroth. En handbook*, IOIR No 63. p. 227-261.

¹⁶ In the following I rely heavily on Sigurdson, Ola, *Den lyckliga filosofin – Etik och politik hos Hägerström, Tingsten, makarna Myrdal och Hedenius*, Symposium, 2000; as reviewed by Johan Lundberg in Svenska Dagbladet 23 June 2000, p. 16.

play an even more important role among theoretical legal scholars.”¹⁷ But it has also been suggested that the opposition against such a reform grew, when it was realized that what was planned meant in fact that the Faculty of Philosophy, rather than the Faculty of Law, was to be given an extra Professorship, and that, at the end of the day, the Faculty of Law would end up with those candidates who had had less success when competing for the real Chairs in Philosophy – that is to say, be left with a B-team. Ultimately, then, the Chair in Jurisprudence was created as a real legal Professorship that only could be recruited with candidates having a broad legal competence. By doing so, the Professorship *de facto* was created on Merkel’s image. Comparative Law was closely connected with the new subject and normally it was considered to be included in it.

1.3 Merkel’s Revenge and Ultimate Down-Fall

To start with, nothing spectacular occurred when the Chairs had been created. Those lawyers who occupied the Chairs in Stockholm and Uppsala both possessed broad legal competence (Agge, Hjernér); only in Lund as a result of the decisive influence of Professor Olivecrona and because of the ambitious input of Professor Tore Strömberg did the Professorship develop a profile more devoted to the Uppsala School.

During the period after 1970, the Chairs in “allmän rättslära” in Stockholm and Uppsala were held by two unadulterated lawyers, Jacob W.F. Sundberg in Stockholm and Stig Strömholm in Uppsala.¹⁸ Both scholars, for merits, mainly relied on achievements in Comparative Law. In his inaugural lecture 1970, dr Sundberg even presented a new personal research programme, focused on the Socialist Camp.¹⁹ Strangely enough, this programme and its later implementation²⁰ should be completely neglected by dr Strömholm although he was most pleased to appear as the Comparative Law expert.²¹ Possibly, he noticed that such a research programme tended to expose the programme of the Social Democratic Government of the time to a close and not necessarily encouraging comparison with its counterparts in the Soviet Union and the

¹⁷ Strömholm, Stig, *On Legal Theory in Sweden* (supra) p. 36.

¹⁸ It should be mentioned, however, that Strömholm also included a degree in general sciences (fil. kand.) in his baggage. Further about the competition, see Sundberg, Jacob W.F., *Uppsalaskolan och den nationella inkapslingen*, Juridiska Föreningens i Finland Tidskrift 1999 p. 170-180, at p. 170 note 1.

¹⁹ See Sundberg, Jacob W.F., *Teleologisk metod och fair play*, Institutet för offentlig och internationell rätt [herinafter IOIR] No 34, p. 3 ; (transl.) “It has long been believed that the character and place of the Swedish legal system was best identified by the reckoning being directed towards the South and the West, by the crossing between Civil Law and Common Law in order to use the best-known terminology. In today’s Swedish society, however, these places are too close to each other and too far way from us to make for a certain reckoning. Let us instead make it towards the South-East and the East.”

²⁰ As to the implementation reference is made to Note 31 below.

²¹ See e.g. Strömholm, Stig, *Har den komparativa rätten en metod* [Does Comparative Law have a Method?], *Svensk Juristtidning* 1972 p. 456-465, *idem*, *Användning av utländskt material i juridiska monografier* [Using foreign materials in legal monographs], *Svensk Juristtidning* 1971 p. 251-263.

Socialist Camp.²² At this time, dr Strömholm was working on a book on how to make a career in Sweden²³ and not unnaturally he was most touchy faced with a criticism that might be experienced as unflattering by the regime.

This meant that it was the path of Merkel that was followed in Stockholm; in Uppsala, dr Strömholm tried a more eclectic approach, taking intermediary and mediatory positions, as time went by, by distancing himself more and more from the way the subject was drawn up in Stockholm, normally by simply no mention.²⁴ Finally, he gave up the Chair and found himself a less risky existence as a Professor of Private Law and Conflicts of Law in Uppsala.

Dr Strömholm having disappeared from the stage in his own way, and me myself becoming *emeritus* in 1993, it turned out to be difficult to find Swedish lawyers competent to charge themselves with the Chairs in *allmän rättslära*. In Lund, dr Tore Strömberg was succeeded by a Polish-born lawyer, dr Aleksander Peczenik. He had in an admirable fashion learnt Swedish and absolved a Swedish law degree, but for natural reasons his familiarity with the Swedish court system was limited. The Chair in Uppsala was eventually taken by the Finnish Professor Hannu T. Klami, and – after an interlude with Professor Åke Frändberg - the Chair in Stockholm was finally taken by a Dane, our Dr Jes Bjarup.

Evidently, the less the command of Swedish law in the baggage of the new candidates, the less attractive it was for them to walk the path of Merkel. Almost automatically, consequently, the Chairs were turned into some kind of semi-philosophical appendices to the Faculty of Law, something that certainly was most welcome to those engaged in the secret marriage, mentioned above, even if this did not by necessity mean that they were adherents to the hägerströmian message.

1.4 Resurgence of the Uppsala School

In 1982, Dr Claes G. Peterson was appointed to the Chair in Legal History after a competition with Professor Hannu T. Klami. It was a strange competition because the Chair was devoted to Swedish Legal History but none of the two candidates had strictly speaking any merits in that subject. Dr Peterson had covered a shortlived reception in Czarist Russia of a Swedish administrative system in the early 18th century, and Dr Klami had written about the continued presence of the Swedish laws in the Grand Duchy of Finland after it having been incorporated into Czarist Russia in 1809. Dr Peterson harboured considerable worries about his new Chair inasmuch as, having been regarded during the late

²² Compare the section titled “The Government Shows its Hand: Ingvar Carlsson’s Manifesto” in Sundberg, Jacob W.F., *Comparative Law and The Swedish Model*, 39 Scandinavian Studies in Law 367-386, at p. 378-379.

²³ In 1976, Strömholm, Stig was to publish with the publishing company Pan a little book titled *Svensk karriärlära. Allmänna delen* (Swedish Textbook on Making a Career. The General Part).

²⁴ The full story is told in the preface to the 2nd edition of. Sundberg, Jacob W.F. *fr. Eddan t. Ekelöf*, IOIR No 41, 2nd ed. 1990.

19th century as a most important and fundamental subject,²⁵ Legal History had lost this position during the 20th century and been marginalized to be some kind of odd variant of the General History discipline.²⁶

During the last three decades of the last century [19th century] both Legal History and Jurisprudence – the so called Legal Encyklopedia – came to distance themselves from the other activities at the faculties of Law. The alienation that developed between the different legal disciplines of study probably were due to the methodological development during this period of the subjects of Legal History and Jurisprudence. It was, viz., the legal historians themselves, together with the representatives of Jurisprudence, who deliberately – in a misguided urge for independence – encouraged this dualism in the scientific study of Law. Ever since this separation became a fact, trying to find acceptance as general historians, the legal historians have lost themselves in a pretentious treatment criticizing sources in a way that only underlines their failing legal relevance of the subject.²⁷

What is problematic with legal history, submits Claes [Peterson], is the fact that it does have the character of a political-science-history subject, at the same time as it has to be a legal subject in order to manifest its existence in the line of training lawyers. The way the subject has looked until now it has mostly been a matter of improving the general command of history, he says, and that is not good.²⁸

He continues:

the only way for my subject having a right of existence in the future is, as I see it, that Legal History is developed into a subject of Method. It is important to contribute to the discussion of the position of legal scholarship in the teaching of the sources of law. In former times, the courts found it selfevident that they must look for guidance in the views of the academic lawyers. Nowadays, it is the other way round. When the legal-formative role of legal scholarship has disappeared, what remains is properly speaking only to take stock of and to systematize the materials of the courts.²⁹

With this as a background and with his past career exclusively restricted to the halls of the Stockholm university³⁰ the young professor staked on anchoring his subject in the Faculty of Law by developing a doctrine concerning the status of legal scholarship as a source –of– law, as something that the courts by necessity had to consider and even follow. His own lack of court experience was no bar as he saw it. Alternating between judgeship and professorship as a few of his colleagues had done was not a possibility that entered his mind. He did not see

²⁵ See Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, IOIR No 41, p. 169.

²⁶ See Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, IOIR No 41, p. 271-279.

²⁷ Peterson, Claes G., *Högt och lågt i rättsvetenskapen*, 10 *Juridisk Tidskrift* 1042-1045, at 1044 sq. (1998-99).

²⁸ Peterson, Claes G., as per his interview in *Iusbäraren* 1989 No 3, p. 14.

²⁹ Peterson, Claes G., as per his interview in *Iusbäraren* 1989 No 3, p. 14. – The issue is discussed in more detail in Sundberg, Jacob W.F. *fr. Eddan t. Ekelöf*, p. 216, cf 233 and 219 f.

³⁰ Bergstedt, Viveka, *Claes Petersson, professor i rättshistoria*, *Iusbäraren* 1984 No5p. 45, at 5.

the matter as an empirical problem, i.e. to study how the judges themselves looked at the matter – i.e. the method which Professor Folke Schmidt had relied upon in his major article from 1955: “The judge as interpreter of the Law”.³¹ Instead, Dr Peterson took upon himself to determine, based on his believed scientific insights, how the judge ought to, even should, look at the matter. The key formula then became the status of legal science as a ‘source of law’ and the source-of-law notion grew into something so central to Peterson’s thinking that he considered himself relieved of any obligation to look at the contributions of other authors attempting to determine the notion.³²

Armed in this way, Dr Peterson went for the stunned and unprepared world around him. His central message was hammered in with somewhat varying formulas: “Thus it is the degree of truth and the inner consistency [inre konsekvens] of the argumentation that confers its legitimacy upon legal science and its position as a source-of-law. Consequently it is the weight of the argument that gives the judge his sense of obligation.”³³ “The cornerstone of the argument is its logical and factual consistency.”³⁴ “It is obvious that a conscientious judge, or why not a legislator, when faced with difficult legal problems, will seek guidance in the literature written by legal scholars.”³⁵ “How does reasoning of legal-scientific character influence a judge if not through the persuasive character of its argument? ... *Tertium non datur*”.³⁶

Having arrived this far in his programme, it remained for Dr Peterson to determine what he himself meant by “persuasive argument”, “the weight of the argument”, “the degree of truth” of the argument, and “the logical and factual consistency of the argument”. This led him to reason as follows: “Is legal science to be considered as a source-of-law or not? If the answer to this question is positive, how then are we to legitimate the binding force of prevailing opinion?” [herrschende Meinung]. And in perhaps less than modest a vein he developed his motto: “it is the duty of all of us as legal scholars to make up our minds as to what element distinguishes our activity from the work of other lawyers. This perspective conducts to questions about the legitimacy and the mission of legal science. Is legal science to be considered as a source-of-law or not?”³⁷

³¹ Schmidt, Folke, *Domaren som lagtolkare*, Festskrift tillägnad Nils Herlitz, Stockholm 1955, p. 263-298.

³² E.g. Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, p. 24-38, a chapter titled “On sources of law and sources of law doctrines” which includes sections titled: “What is a source of law?”, “The doctrine of sources of law and the problem of law-in-force”, “To direct the sources-of-law doctrine”, “Should the sources-of-law doctrine be static or dynamic”, “On legal scholarship and case law as sources-of-law”, “How to verify”, and “the sources-of-law doctrine – travelling in time and space”.

³³ Peterson, Claes G., *book review*, *Förvaltningsrättslig Tidskrift* 1996 p. 180; *idem*, *Rättsvetenskap – finns den?* [Legal science – is there such a thing?], *Förvaltningsrättslig Tidskrift* 1997 p. 27.

³⁴ Peterson, Claes G., *book review*, *Förvaltningsrättslig Tidskrift* 1996 p. 176.

³⁵ Peterson, Claes G., *book review*, *Förvaltningsrättslig Tidskrift* 1996 p. 180.

³⁶ Peterson, Claes G., *Rättsvetenskap – finns den?* [Legal science – is there such a thing?], *Förvaltningsrättslig Tidskrift* 1997 p. 28.

³⁷ Peterson, Claes G., *Högt och lågt i rättsvetenskapen*, 10 *Juridisk Tidskrift* 1042-1045, at

Obviously, Dr Peterson requires a decisive criterion for the above ‘degree of truth’, ‘weight’, and ‘persuasive force’, for his line of reasoning to “enoble Law into Legal Science” [juridiken ... förädlas till rättsvetenskap]. He calls for clear delimitation of what is to count as scientific knowledge, lest science should be “totally unprotected against arbitrariness and pseudo-science” [godtycke och ovetenskap]. And this criterion he found in Hägerström.

“When he criticizes legal scholarship Axel Hägerström starts with a scientific notion that is absolute and close to a kantian variety” because “his aim was to delimit the scope of scientific legal analysis.”³⁸ “Hägerström requires the basic criterion for what is to count as science to be the absence of contradiction”. “Hägerström’s philosophical criticism ... establishes what cannot be, because it is a contradiction and consequently scientifically meaningless”³⁹ And here Dr Peterson allows himself a swipe at me: “Should now Sundberg be dissatisfied with the narrow limits Hägerström set for scientific standards of reasoning, therefore wants them expanded, then the burden of proof is upon Sundberg and not upon he who restricts the area for true science, i.e. Hägerström.”⁴⁰

From this Dr Peterson draws rather far-reaching conclusions: university teachers and not the least students must pay attention to and consider it their duty to maintain the scientific character of tuition. In their academic schooling students must be spared anything beyond the scope of science.⁴¹

Since Dr Peterson’s programme is grounded in the worries of Legal History, he undoubtedly breaks new ground and it is unavoidable that he comes up against much that has dominated the general approach of his elder colleagues. The most spectacular attack was directed against Professor Emeritus Jan Hellner. It reproached Professor Hellner for “being unwilling to define Legal Science” and for “knowing nothing whatsoever about theory”,⁴² even for suffering from “a fundamental contradiction” because he “does not justify the path by which he reaches his assertions”. You cannot find in Hellner’s text any “scientific legal basic approach” that could “found the draft of his exposition.”⁴³ This is the same criticism that he released against me myself: “He [Sundberg] never states any

1043 (1998-99).

³⁸ Peterson, Claes G., *Recension av en recension*, 8 Juridisk Tidskrift 1082-1087, at 1085 (1996-97).

³⁹ Peterson, Claes G., *Expert opinion of 2 January 1996 in relation to Dr Bjarup’s qualifications for the Chair in Jurisprudence*, p. 5 and 2 respectively. [Sakkunnigutlåtande vid tillsättningen av professuren i allmän rättslära: komplettering].

⁴⁰ Peterson, Claes G., Member of the Working Group Set Up to Review the Course in General Jurisprudence, Additional Memorandum [Anonymous] of 13 December 1988, reprinted in *Arbetsgruppens skrivelse och promemorior samt motpromemorior från professorerna Hannu T. Klami och Gerard Radnitzky*, IOIR No 79, p. 24. Cf 29 Minerva 330-342 with the original Memo.

⁴¹ This is the position he took in the *ius docendi* affair, 1989, in which he criticized my teaching for being “unscientific”. See further 29 Minerva 330-342.

⁴² Peterson, Claes G., *book review*, Förvaltningsrättslig Tidskrift 1996 p. 171-181, at 176, 179; “en ovilja att definiera rättsvetenskap” and “teoretisk aningslöshet”.

⁴³ Peterson, Claes G., *book review*, Förvaltningsrättslig Tidskrift 1996 p. 176, 175: “inte redogör för på vilket sätt han kommer fram till sina påståenden”, resp. ingen “egen rättsteoretisk grundsyn ... utifrån vilken framställningen koncipierats”.

explicit scientific basis” on which his assertions would be founded. From Dr Peterson’s somewhat narrow vision of things follows the paradox that there cannot exist any scientific legal disagreement between him and me.⁴⁴ What Dr Peterson requests is that every lawyer who pretends to be doing legal science must account more precisely for a scientific-legal basic approach – “grundsyn” – which evidently – although this is not always made explicit – should coincide with the hägerströmian creed. With this as a starting point lawyers must consider the ‘degree of truth’ of the legal phenomena that they want to report on. That “Marxism should not be examined using a particular scientific-legal method” is consequently a horrible heresy according to Dr Peterson.⁴⁵

On this point, however, Dr Peterson has found himself facing opposition from colleagues representing the theory of science. They have pointed out that ‘science’ appears in more forms than those identified with hägerströmianism. Professor Gerard Radnitzky has pointed out, in relation to Marxism, that “investigating the role of Marxist ideology, including its Jurisprudence, in these historical events [of the 1930s] requires using *empirical* scientific disciplines”⁴⁶ and that “Sundberg has submitted a theory about the consequences of Marxist ideology, among other things with respect to genocide. Such a theory is an empirical theory, i.e. in theory falsifiable.”⁴⁷ And in relation to the scepticism that I have demonstrated faced with hägerströmianism as a lawyers’ instrument and a fundamental criterion, Dr Radnitzky points out - with some appreciation - its empirical element, viz. that I - Sundberg – “dares to criticize the Uppsala School ... with reference to the consequences of their emotive theory and their legal positivism”.⁴⁸

It is the peculiar property of hägerströmianism that it is so narrow – “the narrow limits that Hägerström drew up for scientific standards of reasoning” as it was once put by Dr Peterson.⁴⁹ Directly entering into polemics Professor Hannu T. Klami asserts that “there is no need for any burden-of-proof rule or other evidence in order to establish that Hägerström’s understanding of reality and science was too narrow.”⁵⁰ Be that as it may, a certain freedom is left as to how to describe what lies beyond those narrow limits. What was found here was classified as ‘values’, and values were something pertaining to politics. By “showing the scope of the scientific-legal analysis, i.e. methodology,” it was possible in the eyes of Dr Peterson to “arrive at a clear dividing line between legal science and politics”.⁵¹ Dr Peterson, and many more nowadays are prone to

⁴⁴ Peterson, Claes G., Member of the Working Group Set Up to Review the Course in General Jurisprudence, Additional Memorandum [Anonymous] of 13 December 1988, reprinted in *Arbetsgruppens skrivelse och promemorior samt motpromemorior från professorerna Hannu T. Klami och Gerard Radnitzky*, IOIR No 79, p. 25. Cf 29 Minerva 330-342 with the original Memo.

⁴⁵ See op. cit. (supra), IOIR No 79, p. 14. Compare Radnitzky, Gerard, 29 Minerva 341.

⁴⁶ Radnitzky, Gerard, IOIR No 79, p. 34.

⁴⁷ Radnitzky, Gerard, IOIR No 79, p. 31 f.

⁴⁸ Radnitzky, Gerard, IOIR No 79, p. 32 f. 29 Minerva 374.

⁴⁹ See note 77 supra.

⁵⁰ Klami, Hannu T., Memo [Duplik] of 14 December 1988, in IOIR No 79 p. 26-28, at 27.

⁵¹ Peterson, Claes G., *Högt och lågt i rättsvetenskapen*, 10 Juridisk Tidskrift 1042-1045, at

refer to matters outside his notion of science as being *politics*. Some even consider this to be something established [“vedertaget”]. Ms Yrsa Stenius, the editorial political writer in the daily *Aftonbladet*, speaks e.g. about “the established borderline in Sweden between politics and law”.⁵² Mr Svante Nycander, editor-in-chief of the daily *Dagens Nyheter*, finds the “clear dividing line between knowledge and emotion, between questions of truth and questions of morals” to be “one of the new domains conquered by the Uppsala philosophy”.⁵³ And Dr Peterson believes himself to have many supporters: “We are convinced that every legal scholar has often found reason to reflect on – for example – the dividing line between law and politics.”⁵⁴

Everybody who does not accept Dr Peterson’s narrow notion of science, or perhaps does not even bother about it, now fares badly: they are some kind of *crypto-politicians*. I myself was one. As Dr Peterson puts it: “Being unable to treat the subject from a scientific and objective angle”, he makes “his own activity purely political”.⁵⁵ In Dr Peterson’s view, I had “converted the course [in Jurisprudence] into a onesided propaganda arena for his own political ideas”,⁵⁶ something packed with “arbitrary arguments drawn from the ‘battlefield’ of politics”⁵⁷ (although it is true that Radnitzky points out that the expression ‘arbitrary arguments’ is, logically speaking, somewhat deficient).⁵⁸ But others too are given a good pounding. Professor Hellner’s views are said to be “rather unreasonable when come to discussing the dividing line beteen law and politics and the important implications that the sources-of-law discipline has for the application of the law”.⁵⁹ And Dr Bjarup himself is accused of being unable to “see the difference between a politically and a scientifically founded argument”.⁶⁰

1044; also in the Working Group Memo of 22 November 1988, IOIR No 79 p. 15.

52 *Aftonbladet* 25 March 1988: editorial *Sverige stiftar sina egna lagar* [Sweden makes its own laws].

53 Nycander, Svante, *Professor Sundbergs undervisning i rättslära* [Professor Sundberg’s teaching in Jurisprudence], editorial page, *Dagens Nyheter* 27 January 1989.

54 Peterson, Claes G., *Högt och lågt i rättsvetenskapen*, 10 *Juridisk Tidskrift* 1042-1045, at 1044. It perhaps should be noted that this extensive notion of ‘politics’ is peculiar to the Swedish intellectual climate. In Finland e.g. it is definitely rejected and indeed seen with some scorn. See e.g. the discussion at Jyväskylä university in the 1970s when it was considered to create a Chair in political sciences: “Vad som helst är politik”, *Hufvudstadsbladet* 3.12.2000 p. 20; cf Lindroth, Bengt, *Olika syn på politik*, *Hufvudstadsbladet* 21.4.1998 p. 5.

55 Peterson, Claes G., *Working Group Memo of 22 November 1988*, IOIR No 79 p. 15.

56 Peterson, Claes G., *Working Group Memo of 22 November 1988*, IOIR No 79 p. 25.

57 Peterson, Claes G., *Working Group Memo of 22 November 1988*, IOIR No 79 p. 14; 29 *Minerva* 341.

58 Radnitzky, Gerard, *Comments 3 January 1988*, IOIR No 79 p. 29-35, at 33.

59 Peterson, Claes G., *Rättsvetenskap – finns den?*, *Förvaltningsrättslig Tidskrift* 1997 p. 21-31, at 29.

60 Peterson, Claes G., *Recension av en recension*, 8 *Juridisk Tidskrift* 1082-1087, at 1086 (1996-97).

“Raising the quality of political criticism to the level of scientific-legal criticism is thus decisive for the scientific character of the activity.”⁶¹

1.5 A Dane in the Swedish Chair: Jes Bjarup

When Dr Bjarup appeared on the Swedish scene it was in the aftermath of much turmoil. The great *ius docendi* operation had miserably failed its purpose to silence an irritating voice that very much lived up to the goal to be “perform a controlling function over other legal disciplines”, as well as attempting to act as a stimulus in relation to them. The ‘geese on the *Capitolium*’ were not only gagging (Klami), but indeed they were even demonstrating that ‘loyalty towards the legislature and the courts’ was not the only possible guide for legal scholarship (Hellner). A man who could demonstrate that he was not inclined to follow that same path could hope to find a warm welcome at the Stockholm faculty, e.g. by mainly developing Anglo-American theories of law or by lacking in command of Swedish positive law, or even better by having both virtues. On the other hand, there were local aspirations as to the empty Chair which I had left behind and which my successor Professor Åke Frändberg had soon deserted, and these aspirations were soon to come forward and take concrete form along a hägerströmian pattern wellknown from the *ius docendi* battles.

Dr Jes Bjarup spoke Danish. but he was considering a Chair in Sweden. Similar cases occur from time to time. At the Law Faculty of the University of Lund the list of teachers includes one from Finland, one from Iceland and one from Lithuania.⁶² In the following I will refer to the cases of Joakim Nergelius who is Swedish by origin and who applied for a professorship in Finland, but eventually withdrew from the competition and Bill Dufwa who also was Swedish by origin and applied for a professorship in Denmark, but did not succeed. It is interesting to read the reasoning behind the outcome in these cases, and compare with the case of Dr Bjarup.

Joakim Nergelius

Dr Nergelius wanted the Swedish-language Chair in Public Law, in Helsingfors, Finland, but finally was overwhelmed by the resistance and withdrew in order to take a Chair in the kingdom of Sweden instead. The opposition in Finland had to do with the fact that he had no command of the Finnish language, Finland by law having two national languages, Finnish and Swedish. It was argued:

There are branches of the law that do not require command of the local language, such as Roman Law, International Law, and Legal Philosophy. But the stronger the subject is tied to the particular conditions of a country, the more important

⁶¹ Peterson, Claes G., *Working Group Memo of 22 November 1988*, IOIR No 79 p. 14; 29 Minerva 340 .

⁶² Bruun, Staffan, Hbl 5.12.2003 p. 3, interviewing the Finnish-born Professor of Criminal Law, Pär Ole Träskman.

will be command of both the local languages.⁶³ The future professor of Public law must be able to follow what is said and written in Finland in the Finnish language.⁶⁴ The purpose of the university formation is to train Swedish-speaking lawyers for the benefit of the Finnish society. A great deal of of the legal materials are available only in Finnish. The ability to teach consequently cannot be separated from the substance. You cannot possibly teach something that you do not command yourself. Of course, the absence of command of the Finnish language affects the ability to teach, even if Swedish is the teaching language.⁶⁵

Bill Dufwa

Professor Dufwa wanted the Danish Chair in Property Law (Formueret), in Copenhagen, but was turned down by the majority in the expert committee, set up to assess the merits. The Committee agreed that Dr Dufwa has sufficient scientific merits for the Chair, but disagreed as to his suitability in other respects. The reasoning of the majority elaborated on what was required and said:

The holder of the chair must be able to take care of such functions concerning teaching, examination, guidance etc. which come naturally together with such a chair. According to our opinion this cannot be possible without a relatively broad and deep familiarity with Danish property law, which this applicant does not have, or at least has not documented.

The professor in the minority saw it otherwise:

As to the importance of knowing Danish Law he argued that a person with such a background as the applicant cannot, from the outset, be cut off. On the force of his competence in research and his considerable teaching experience, and considering the considerable community of approach as far as property law is concerned which, after all, prevails between Danish and Swedish law, such an applicant will find a way without much ado, considering the degrees of liberty immanent in how to manage the position, which will compensate in a fully acceptable way for his shortcomings in the command of Danish law.⁶⁶

Legal Philosophy was one of the branches of the law that was generally understood not to require command of the local language (together with e.g. Roman Law and International Law). Furthermore, in the prevailing conditions,

⁶³ Bruun, Staffan, Hbl 24.10.2001 s 14.

⁶⁴ Hbl 24.19.2001 p. 14.

⁶⁵ Bruun, Staffan, Hbl 26.3.2003 p. 6.

⁶⁶ Fakultetssekretariatet 21.11.2003/Sarah Rosenkrands, Områdeleder: *de øvrige kvalifikationskrav, som er indeholdt i stillingsopslaget.* -- Bo von Eyben og Torsten Iversen -- indehaveren af stillingen skal kunne varetage sådanne funktioner vedrørende undervisning, eksamen, vejledning m.v., som normalt er forbundet med en sådan stilling. Efter vores opfattelse vil dette ikke være muligt uden et forholdsvis bredt og dybt kendskab til dansk formueret, som denne ansøger ikke kan antages at have – eller i hvert fald ikke har dokumenteret. -- Børge Dahl –en sådan ansøger i kraft af sin forskningsmæssige kompetence og betydelige undervisningserfaring samt det trods alt betydelige fælleskab inden for formueretten mellem dansk og svensk ret uden videre vil finde en måde, hvorpå der med de frihedsgrader, der ligger i måden at udfylde stillingen på, på fuldt acceptabel vis kompenseres for mangler i beherskelsen af dansk ret.

the less the subject was tied to the particular conditions of Sweden, the better: no ‘gagging geese’ were welcome. The fact that a Dane was able to follow what was said and written in Sweden in the Swedish language was not in question, and it was not feared for the reasons given. But whether the Swedish law students were able to follow what was said by a Danish professor, that was more doubtful because the difference between spoken Danish and Swedish is considerable, in contrast to the difference between written Danish and Swedish which difference is easily overcome. In a deft move, therefore, Dr Bjarup was given a test run in order to dispel the idea that the language difficulties were insurmountable.

Under the new Swedish system, whenever a Chair was left vacant due to the departure of its previous holder, a decision had to be made whether the Chair should be continued or not. Professor Åke Frändberg going to leave the Chair of Jurisprudence on July 1, 1994, the Faculty of Law Board declared itself on 22 June 1994 to be in favour of keeping the Chair and so it was eventually decided on 23 November 1994 by the University Board (universitetsstyrelsen). On 6 October 1994, Dr Bjarup was given a temporary post as Professor of Jurisprudence for a couple of months, and such a temporary post was repeated April May 1995. On 1 September 1995 Dr Bjarup received a one year temporary post. On 4 May 1996, an expert committee was created by the Faculty of Law to consider Dr Bjarup’s merits for a permanent position as Professor of Jurisprudence at the University of Stockholm.

Dr Bjarup’s appearance on the scene released an exciting development because among the appointed experts was Professor Claes G. Peterson, among other things one of the activists behind the *ius docendi* operation.

2 A Bewildering Reception

2.1 The Nordic Area as a Common Workplace

In the field of general jurisprudence it is relevant to look at the case of Hannu Tapani Klami and his itinerary.

Hannu Tapani Klami

Dr Klami was born in Finland and died in 2002. He was bilingual; and spoke fluently both Swedish and Finnish. In 1972 he became assisting professor at the Finnish-speaking university Turun Yliopisto and in 1976 he became professor of general jurisprudence and conflict of laws at that university. After having risen there to the positions of Dean and Vice-President (prorektor) he left Finland in 1987 to take the Chair in Jurisprudence at the University of Uppsala in Sweden. Having found his Swedish professorial salary insufficient he went back to Finland and was in 1992 created professor of Jurisprudence and Conflicts of Law at the University of Helsingfors – after some turmoil. The discussion is said to have been terminated by a senior professor at the Faculty of Law bringing his

fist down on the table and saying that ‘our Faculty is big enough to be able to accommodate one Klami’.⁶⁷

On 22 March 1989, Klami and I together authored a description of the purpose of studying general jurisprudence which is rendered more in detail below but which manifesto, although it is drafted as food for undergraduate students, displays an approach very much modelled on Merkel’s ideas of general jurisprudence which has thus so far remained centerstage.⁶⁸

2.2 Faculty Ideas Emerging from the *ius docendi* Affair

As noted above, Dr Peterson had used every occasion to advance two points of importance, one about the problematic legitimacy of legal scholarship as a source of law, the other about drawing a precise line between science and politics. In 1988, the Board of Line at the Faculty of Law at the University of Stockholm with Dr Peterson as its leading voice, had taken the rather unusual step to discuss whether the teaching in Jurisprudence was ‘based on a scientific basis’ and this was the origin of an extensive and heated debate,⁶⁹ i.a. about what the subject Jurisprudence really should include. In that connection some new propositions were advanced which may be worthwhile mentioning. It was said:

The task of teaching general jurisprudence may be tackled along two different lines: either in the form of a descriptive account of the main currents of legal theory that may be considered to have had some decisive influence on the development of legal science; or as a contribution to the discussion of legal theory independent of such currents. The latter approach presupposes a considerably higher ambition than the former.⁷⁰

However, when Dr Bjarup appeared, the matter became problematic. The same expertise came back, again commenting upon the Chair in Jurisprudence, at that time under recruitment. This time Professor Peterson put it slightly differently, speaking about “the Chair at the Faculty which has as its main purpose to treat those issues of method that are common to all other legal subjects” concluding that the subject of jurisprudence “is clearly linked to positive law”. “Should the doctrine of method (*metodläran*) be discarded as the mainstay of the subject, its

⁶⁷ Bruun, Staffan, Hbl 28.1.1995 s 10: en av de äldre professorerna vid juridiska fakulteten slog näven i bordet och sade: ”Vår fakultet är så stor att den nog kan svälja åtminstone en Klami.”

⁶⁸ Memorandum ang. ämneskonferensen i allmän rättslära 22.3.1989, § 2.

⁶⁹ For a broad account, see *Academic Freedom at the University of Stockholm*, 29 *Minerva*. A Review of Science, Learning and Policy 321-385 (1991).

⁷⁰ See “Memorandum concerning the course in general jurisprudence and delivered to the board of line of the faculty of law by a working group consisting of Professors Claes Peterson and Anders Victorin, Chief Justice Birger Vallgård, Director of Education, Sverker Scheutz; and student representative Patrik Isaksson”, in 29 *Minerva* 331-342, at 340 (1991). In original Swedish, see IOIR No 79 p. 13. ”en framställning av den allmänna rättsläran kan läggas upp efter i huvudsak två riktlinjer, antingen som en deskriptiv redogörelse för rättsteoretiska strömningar eller som ett i förhållande till dessa självständigt bidrag till den rättsteoretiska diskussionen Den senare uppläggningsen representerar en avsevärt högre ambitionsnivå än den förra.”

relevance for the study of positive law will be lost and the subject of general jurisprudence be marginalized”. In Professor Peterson’s view “command of Swedish law is most essential to the professorial competence in general jurisprudence”.⁷¹ The shadow of Merkel rose again!

But Dr Bjarup succeeded and won the Chair. He now had to decide what to make of it. Seeking guidance in past history must have left him bewildered because the holder of the Chair in Stockholm – Sundberg - had somehow been working in a vacuum. It was evident that there had been no dialogue whatsoever between the holders of the Chairs in Jurisprudence, in spite of the *Magna Charta* of the European universities of 1988, declaring that the dialogue was the hallmark of the European universities. The strange conditions were noted by many.⁷²

The most remarkable indifference was demonstrated by the holders of the Chairs in Jurisprudence in Uppsala – Stig Strömholm and Åke Frändberg – and in Lund – Aleksander Peczenik – not only generally but even when the treatment in e.g. *fr. Eddan t. Ekelöf* was most relevant to what the others wrote. Certainly, whatever I wrote, nobody was eager to mention it, and certainly not my colleague in Uppsala, dr Stig Strömholm although his exclusions did not serve him very well. In this way – by means of exclusion – his case law exposition was rather failing,⁷³ as was his exposition of the doctrine of *travaux préparatoires*,⁷⁴ similarly, his sketch of the 200 year history of the Supreme Court⁷⁵ and his account of the 75 year history of the legal periodical “Svensk Juristtidning”.⁷⁶ And thus it came about, above all, that his overview of

⁷¹ Comments of January 22, 1996, submitted to the Faculty of Law.

⁷² Cf Hjort, Johan, *book review*, TfR 1997 p. 545-548, at 547. “In Swedish academic life, Sundberg has been a controversial man, often in a way that an outsider has difficulty understanding the reason for. He may use a polemic form, and he can express points of view that incites contradiction, but which also may be refreshing.”

⁷³ For more detail, see Sundberg, Jacob W.F., *Om mänskliga rättigheter i Sverige* Svensk Juristtidning 1986 p. 653-694, at p. 686 f.

⁷⁴ Comparing what is said about it in Strömholm, Stig, *Om rätt, rättskällor och rättstillämpning. En lärobok i allmän rättslära* (1st ed. 1981, p. 319-331) and the some 20 pages devoted to the same subject in Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, IOIR No 41, p. 232-250, the silence in the former work is definitely striking.

⁷⁵ Dr Strömholm’s report on the 19th century history of the Supreme Court and the then prevailing intellectual climate seems strangely unaware of the fact that during this epoch Sweden and Norway existed in union (1814-1905) and that there was a lively exchange and discussion of legal matters between lawyers from both sides. See Strömholm, Stig, *Efterklang, kris och genombrott – Det intellektuella klimatet i Sverige 1850-1920* [Reverberations, crisis and breakthrough – The intellectual climate in Sweden 1850-1920], in *Högsta Domstolen 200 år, Rätthistoriska studier* 16 bandet, Lund 1990, p. 131-135; and compare Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, IOIR No 41, 1978, 1990, p. 152-157, 177-182, 187-188.

⁷⁶ See Strömholm, Stig, *Svensk Juristtidning sjuttiofem år*, Svensk Juristtidning 1991 p. 81-86; and compare the account in Sundberg, Jacob W.F., *fr. Eddan t. Ekelöf*, IOIR No 41, p. 148-150, 180 f., 187-188, 254. It is surprising to find in a retrospect replete with evaluations of the period in which Svensk Juristtidning was created (p. 83) absolutely no reminder of the Swedish-language Juridiska Föreningens i Finland Tidskrift, which began publication in 1865 (and still continues publication), nor is there any reminder of Tidsskrift for Rettsvitenskap which was intended to be and functioned as the legal periodical common for

Comparative Law in Sweden consistently left out the most important contribution that had been made there during his own tenure as Professor in the field, *viz.* the comparison with the system in the Socialist Camp.⁷⁷

There had been no dialogue between the holders of the Chairs in Jurisprudence, in spite of the *Magna Charta* of the European universities. To be more precise: Three major contributions from Stockholm had almost completely been left in the wilderness: one being *fr. Eddan t. Ekelöf* and its continuation *Haegerstroem and Finland's Struggle for Law*,⁷⁸ the other the penetrating studies of Swedish *High Tax Society*⁷⁹ and the third the quite extensive literature

all Nordic lawyers, at least until the dissolution 1905 of the Swedish-Norwegian Union. Possibly, the matter has to do with the phenomenon non-person. The following quote from Huntford may here be helpful, no connection otherwise with dr Strömholm: "A professor at Uppsala University once talked very freely to me about political bias in the Swedish academic world. Before he parted, he earnestly requested me not to couple his name with his complaints. 'I'm not a very brave man', he ended up by saying, 'and my position would be seriously jeopardized if it got about that I had been criticizing the government. You see, I am only a bureaucrat – all Swedish professors are bureaucrats – and I must *not* antagonize my masters. If you want somebody to quote, go to X [mentioning a certain historian] – he's not a university man; he's free, the lucky devil.'" (p. 144).

⁷⁷ See Strömholm, Stig, *Le droit comparé en Suède au seuil du troisième millenaire*, 51 *Revue internationale de droit comparé* 1033-1040 (1999). – The philosophy in the Socialist Camp has all the time in Sweden been a systematic non-issue, *cf* Sundberg, Jacob W.F., *Den svenska vilsheten*, 13 *Juridisk Tidskrift* 858-869 (23001-02). It is a curious twist in the pervasive mentality that the famous book of Justus Wilhelm Hedemann – *Die Flucht in den Generalklauseln* (1933) – develops the subject of the title on the basis of an account of the general clauses in the Soviet Union, but when Professor Jan Hellner in his article *Generalklausulerna och avtalsrättens utveckling*, *Juridiska Föreningens i Finland Tidskrift* 1975 p. 92-109, is about to treat the subject, he leaves out any reference to the function of the clauses in the Socialist system.

⁷⁸ The treatment of the subject of *Constitutionalism* by Anders Fogelklou – incidentally one of my assistant teachers for 17 years in Stockholm – is more than remarkable. The subject is treated in an extensive chapter in *fr. Eddan*, fully familiar to Fogelklou who reviewed the book (SvJT 1981 p. 366-372), and receives another chapter in the book on *Haegerstroem*, but nevertheless every mention is omitted when Fogelklou writes his report on "Constitutionalism" (p. 205-223) to the Montreal Comparative Law Congress of 1990 (*Swedish National Reports to the XIIIth International Congress of Comparative Law* (eds Strömholm, Stig & Hemström, Carl), Uppsala 1990), and the omission is repeated in Fogelklou's contribution of a chapter on the same subject – "Konstitutionalisering" (p. 79-107) – in the book Berggren, Niclas, Karlsson, Nils, Nergelius, Joakim (eds), *Makt utan motvikt. Om demokrati och konstitutionalism*, City University Press 1999. – The *Haegerstroem* book is extensively discussed by my Finnish colleague Hannu T. Klami (*Realister och rättskämpar. Jurister och rättsfilosofi i Sverige och Finland*, TfR 1984 p. 65-88) but is scrupulously avoided by indigenous legal scholars in Sweden.

⁷⁹ See generally Sundberg, Jacob W.F., *High Tax Imperialism*, 2nd ed., IOIR No 124; and *idem*, *High Tax Society. A Pilot Study from Sweden*, *International & Comparative Law Quarterly* 1980 p. 452-472; *idem*, *Revenue-only Taxes vs. Multipurpose Taxes: Philosophy and Implementation in Swedish High Tax Society*, in Radnitzky, Gerard & Bouillon, Hardy eds., *Government: Servant or Master?*, 30 *Poznan Studies in the Philosophy of the Sciences and the Humanities*, p. 233-253. (1992). With very few exceptions, - e.g. an angry review by Lodin, Sven-Olof, SvJT 1983 p. 234-238 - none of the works in a list of some 20 entries has resulted in a discussion in Swedish legal scholarship, in spite of the fact that the whole Swedish high tax system in 1988 in the most elevated political quarters was declared to be

covering the *European Convention on Human Rights* and its repercussions in various directions.⁸⁰ All seemed to have fallen prey to Swedish taboos rather than inciting criticism and discussion. In Sweden, everyone seemed to be active in splendid isolation from Stockholm, and even if, due to Dr Bjarup's antecedentia, it was less than tempting to follow in Merkel's footsteps, to an outsider like Bjarup there was certainly a great need for an explanation. It had been offered by Roland Huntford.

2.3 *Roland Huntford*

Between 1961 and 1974 Mr Roland Huntford – a British citizen – was the Scandinavia correspondent for the British newspaper “The Observer”. He had a Swedish wife, his mother was Russian. His observations during these years eventually resulted in a book with the English title “The New Totalitarians”; it was published in England in 1971. Later it was published in translation into a number of languages⁸¹ and a translation into Swedish, published by Tema under the title “Det blinda Sverige” [Blind Sweden], appeared in 1972.

It took Huntford three years to write the book. It is based on interviews with some 80 highly placed Swedes. Huntford prepared these interviews very carefully with well thought-out questions, but he was surprised to find that he had little use of his questions because those interviewed rather more confessed to him – “they seized the opportunity to make their confession”.⁸² As is usual in comparative law studies they wanted to explain the Swedish system to the ignorant but curious foreigner and they were completely candid. – Furthermore, Huntford saw his task – certainly in those parts that concerned the legal system – as being of a comparative-law kind. Having previously lived in Switzerland he had been struck by the big difference in perspective and mentality between Sweden and the other Western states; he believed to have found much more affinity between Sweden and the societal systems in Eastern Europe of those days. In doing so he was by no means alone. I had made the corresponding observations in my inaugural lecture in *allmän rättslära* in 1970.⁸³ I wanted to analyse why it was so, and therefor I wrote the book, explained Huntford.

“rotten” and “perverse”; see Feldt, Kjell-Olof, *Alla dessa dagar... I regeringen 1982-1990*, Norstedts 1991, P. 386.

⁸⁰ Not a single work in a list of some 60 entries has resulted in a discussion in Swedish legal scholarship (see www.ioir.se).

⁸¹ *Uusi uljas Ruotsi* [New splendid Sweden], Otava, Finland, 1972; *Fagre Ny Sverige* [Beautiful New Sweden], Denmark 1972; *Formynderstaten* [The Guardianship State], Norway 1973 ; *Le Nouveau Totalitarisme* [The New Totalitarianism], France 1975. There are also German and Portuguese translations, and an American edition from 1972.

⁸² Huntford, Roland, *The New Totalitarians*, p. 191: “Certainly I have had the feeling, in talking to important Swedes, of playing confessor to their penitent.” Compare the interview with Mr Huntford, conducted by the Swedish journalist Jan Mosander and published in the newspaper “Expressen”, 24 January 1972 under the headline (translated) “Roland Huntford, the man behind ‘Blind Sweden’ – I do not chicken if there will be turmoil”.

⁸³ See Sundberg, Jacob W.F., *Teleologisk metod och fair play*, IOIR No 34. On the Swedish side this was considered particularly outrageous, even leading to threats, and to be on the safe

2.4 Huntford: Observations of *The Blindfolded Society*

Huntford makes a number of interesting observations relating to non-person and non-issue. The most interesting parts of Huntford's analysis concern the immunization against criticism that permeates the Swedish system and which has resulted in the general withering away of Swedish debate.

The first road to follow relates to "the deep-rooted Swedish aversion to controversy". He develops his argument as follows:

In the words of a quasi-proverbial saying, 'It is *ugly* to oppose'. To argue is to break the consensus, to rock the boat, and hence to jeopardize the balance of things. More than that, it is generally taken as a threat to feelings of security. Consensus, on the other hand, is worshipped as a guarantee of security, and confrontation is therefore regarded as suspect.⁸⁴

One is left with the impression that intellectual independence is not quite understood.⁸⁵

Academic freedom was never known in Sweden; the independence of the universities was unwanted, because it would have impeded the control of thought.⁸⁶

Criticism of the government there may be, but it is almost exclusively confined to administrative trivialities, ...: Almost never is there questioning of political fundamentals, or critical examination of the institutions of the State.⁸⁷

The second path concerns the *individual being identified with the State*. Huntford recounts his interviews with the Cabinet Minister Carl Lidbom and the Ombudsman, Mr Alfred Bexelius as evidence that "Swedes on the whole *do* identify themselves with the State".⁸⁸ Huntford goes on digging into the

side my colleague, dr Strömholm always suppressed any mention of this my programme and its implementation, when he published in Comparative Law, and this he did often. - The suppression of every attempt at analysis of the Communist world view and its relation to the legal system has been fateful. This suppression leads to total blindness as to how others, who have penetrated into the matter have reacted to it and riposted. Also such an investigation of conditions in the Soviet Union during the 1930s as my Ukrainian inquiry – "*International Commission of Inquiry Into the 1932-33 Famine in Ukraine. The Final Report*" (IOIR No 109) – must then be sacrificed to the same syndrom, because an insight into what was discovered there should have made intelligible how the situation was viewed in the German leadership during the 1930s and how it conditioned their response. Wellinformed authors discussing these matters are Allard, Sven, *Stalin och Hitler. En studie i sovjetrysk utrikespolitik 1939-1941*, Norstedts 1970, and Dorsey, Gray *Beyond the United Nations*, University Press of America, 1986. Had this insight been more widespread, it is unlikely that the recent rediscovery in Sweden of the Holocaust would have been considered such a worldwide sensation, or that support had been extended to the recent EU mobbing of Austria.

⁸⁴ Huntford, Roland, *The New Totalitarians*, p. 178-179.

⁸⁵ Huntford, Roland, *The New Totalitarians*, p. 246.

⁸⁶ Huntford, Roland, *The New Totalitarians*, p. 206.

⁸⁷ Huntford, Roland, *The New Totalitarians*, p. 285

⁸⁸ Huntford, Roland, *The New Totalitarians*, p. 125.

mentality: “He [the Swede] therefore associates himself with the bureaucrat, instead of nursing a sense of estrangement and, in consequence, treats official rescripts, however uncomfortable, not with suspicion, but with a kind of intimate acceptance, as if they were personal resolutions.”⁸⁹ “The instinctive presumption is that, in conflict with the state (or the collective), the citizen (or the individual) must be in the wrong.”⁹⁰

Furthermore, Huntford points out how difficult the Swedes find working with general principles of law.

While Swedish debates leave no corner of material progress unilluminated, other values are almost completely ignored. The question of the liberty of the individual is rarely touched on, mainly because it is vaguely suspected as disturbance of a properly functioning social machine and hence a threat to economic security. Discussion of the advance of the administrative juggernaut is actually taboo, for the same reason.⁹¹

The third path concerns a deliberate *semantic manipulation* of the kind associated with the Communist regime ever since Orwell and Huxley, and which in Sweden made criticism of the Social Democratic regime impossible. Huntford asserted that:

The Swedes have demonstrated the power of that form of semantic manipulation Orwell called Newspeak; the changing of words to mean something else. In this way, thought can be directed, and undesirable concepts eliminated, because the means of expressing them have been removed.⁹²

The political vocabulary of Sweden has been so manipulated that only the terminology of the Social Democrats exists. This means that even those who do not agree with their politics are nevertheless forced to speak their language. As a result, it is not only difficult to articulate deviationist thoughts, but it not infrequently happens that a man will say the opposite of what he means... the words of dissent are being successively removed from the language. There is no resistance to linguistic conjuring of this nature, because there is no opposition among the communicators. .. Thought control becomes a distinct possibility, and opposition can be disarmed gently and naturally.⁹³

To summarize, while the description may be oversimplified in its generalizations, it is not untrue⁹⁴ and all this set the conditions for the non-implementation of the Merkel line of thinking. That line was dangerous and to be avoided.

⁸⁹ Huntford, Roland, *The New Totalitarians*, p. 118.

⁹⁰ Huntford, Roland, *The New Totalitarians*, p. 129.

⁹¹ Huntford, Roland, *The New Totalitarians*, p. 181.

⁹² Huntford, Roland, *The New Totalitarians*, p. 11.

⁹³ Huntford, Roland, *The New Totalitarians*, p. 303-304

⁹⁴ Compare Hellner, Jan, *Metodproblem i rättsvetenskapen*, p. 127: dismissing “people who consider that loyalty towards the legislature and the courts is unsuitable as a guide for legal scholarship.”

⁹⁵ Huntford, Roland, *The New Totalitarians*, p. 323.

2.5 *The System of Suppression*

Roland Huntford was the first to point out the role of the non-person in the Social Democratic structure: “in Sweden the outsider is denied the right to exist.”⁹⁵ This he wrote in 1971, as it appears, having experienced my inaugural lecture and the total silence that followed.⁹⁶

Huntford makes also another observation relating to the Swedish mentality which concerns what I call ‘non-issues’.⁹⁷ According to Huntford, this is something that also has its application among Swedish lawyers: “Even the most obvious issues are denied the Swedish opposition”;⁹⁸ “matters of substance are removed from the political arena and turned over to the bureaucrats.”⁹⁹

The ‘non-person’ travelled together with the ‘non-issue’, although it is hard to know whether the ‘non-issues’ did not come naturally in a competitive situation, making the ‘non-person’ a welcome practical disguise for attitudes that were favoured for quite other reasons.

2.6 *Was Huntford Right?*

Almost 30 years have passed since Huntford published his book and today we have an insight into much which at that time was only known to Huntford through the confessions of the talkative lawyers when they were interviewed. Today we know that Huntford was surprisingly well-informed.¹⁰⁰ The famous interview given by Carl Lidbom turned out a few years later to correspond well as to contents with Lidbom’s renowned speech at the Congress of the Paper Industry Workers in 1974. Huntford’s remarks about the Swedish expropriation law practices evidently are based on the complaint to Strasbourg that at that time was introduced in the European Commission on Human Rights.¹⁰¹ What Huntford had to say about the Swedish taking of children into compulsory care was illuminated some ten years later by a stream of complaints to Strasbourg concerning such practices.¹⁰² What Huntford said about Swedish medias’ role of

⁹⁶ The journalist who covered the lecture in Svenska Dagbladet was made to disappear from the paper.

⁹⁷ This is not the terminology of Mr Huntford, he speaks instead of *taboos*, but the non-issue is a terminology that is widely in use when studying Soviet society and the Communist mentality.

⁹⁸ Huntford, Roland, *The New Totalitarians*, p. 174.

⁹⁹ Huntford, Roland, *The New Totalitarians*, p. 109.

¹⁰⁰ One of those interviewed, the journalist Leif Carlsson, found himself forced to deny immediately what Huntford asserted that he should have said: “So, even though I work on a nominally Conservative newspaper [Svenska Dagbladet], I can’t write what I think. Everybody believes in equality now – of course, but Heaven help me if I try to take the opposite view. There’s no chance that direct attack would get into print, so I have to camouflage my thoughts.” (p. 297).

¹⁰¹ The case is covered in Sundberg, Jacob W.F., *Tystnadsspiralen* [The Spiral of Silence], IOIR No 96, på. 119 with further references.

¹⁰² They are indeed referred to by Strömholm, Stig, *Grundlagen, folket och etablissemangen*, 1973, p. 108, and perhaps it may be assumed that Huntford and Strömholm took their

system agents has indeed been confirmed in Swedish mass media research.¹⁰³ And in support of Huntford's characterization of the symbiosis between citizens and the bureaucrazy in Sweden has risen Emily von Sydow. In a pathetic little confession from the late 1970s, she has announced exactly the same kinds of attitudes as did Huntford, although in her case seen from beneath.¹⁰⁴

3 The European Convention

3.1 Introduction

The great event that hit Swedish lawyers at the end of the 1960s was, it may be surmized, *the internationalization of the world view*. Until then, perspectives among Swedish lawyers were markedly limited. There was only one legislature and it was Swedish; what the foreigners were doing did not concern us.¹⁰⁵ My article "Lagen på gärningsorten" [One Place, One Time, One Law] illustrates rather well the attitude cultivated.¹⁰⁶ It concerned the question whether foreigners were subject to Swedish criminal law or not, thus a matter coming under Ch.- 2, Sec. 2, paragraph 2 of the Swedish Penal Code. It was considered progressive that as many as possible were subjected to Swedish criminal law and to Swedish tax law. The latter was supposed to contribute to Swedish state finances,¹⁰⁷ the former was supposed to contribute, vaguely, to better morals. It was a foreign policy for the betterment of the world that was carried out, and it was considered natural that Swedish lawyers should contribute to the success of the policy.¹⁰⁸ – In the past, Swedish Law had been characterized by a hägerströmian incapsulation.¹⁰⁹ Everything was seen in a domestic perspective. What happened abroad was a matter for the Department of Foreign Affairs and nothing that concerned lawyers in general. The attitude was consequently generally parochial. Stig Strömholm provides good illustrations of how parochial the attitude was in relation to the world abroad, even in such a field as Comparative Law.¹¹⁰

wisdom from the same source.

103 Compare Sundberg, Jacob W.F., *The Media and the Formation of Law*, in R. D. Hertzberg, hrgb, *Festschrift für Dietrich Oehler*, Carl Heymann 1985, p. 447-469.

104 von Sydow, Emily, *När Luther kom till Bryssel. Sveriges första år i EU* [When Sweden arrived in Brussels. Sweden's first year in EU], Arena 1999, p. 201, 202, 205.

105 Cf Sundberg, Jacob W.F., *Tre kapare och deras bidrag till den allmänna rättsläran*, Tidskrift for Rettsvitenskap 1973 p. 395-427, at p. 406.

106 Sundberg, Jacob W.F., *Lagen på gärningsorten. Några reflexioner kring allmänna rättsläran i brottsbalken 2:2 2 st.*, Svensk Juristtidning 1973 p. 361-378.

107 Perhaps even to more equality in the world.

108 See Sundberg, Jacob W.F., *Tre kapare och deras bidrag till den allmänna rättsläran*, TfR 1973 p. 395-427, at p. 395-397.

109 Sundberg, Jacob W.F., *Uppsalaskolan och den nationella inkapslingen*, Juridiska Föreningens i Finland Tidskrift 1999 p. 170-180.

110 Strömholm, Stig, *Har den komparativa rätten en metod?* Svensk Juristtidning 1972 p. 456-465.

Mr Palme's foreign policy put an end to this harmony. Suddenly the realm was thrown into a current of measures designed to change things abroad, and consequently by necessity they made the kingdom encourage illegalities abroad and welcome to Sweden people who had made themselves guilty of illegalities back home.¹¹¹ Aircraft hijackings was the occurrence that first made the problems acute, later terrorism. Swedish courts were rather bewildered. The issue was illustrated by the Greek hijacker, the nurse Vassilios Tsironis; arriving in Sweden he was first seen as a kind of mini-Papandreou and given all sorts of luxurious hero comforts, until suddenly it was realized that he had made himself guilty of serious criminal offences abroad, requiring prosecution in Sweden.¹¹² In the parallel case of Giorgios Flamourides, Chief Appellate Judge Gösta Graffman made a serious attempt to apply to the Swedish case what he knew about the European law practice in the matter, but that was an isolated instance.¹¹³

Whatever - in any case it became evident that Swedish moralizing did not always harmonize with the goals of Swedish foreign policy.

The European Convention on Human Rights brought confusion to the ranks. The European Convention was built on the *opposition* between the State power and the individual, and by this already it meant a revolution in the ways of thinking of many Swedes. Furthermore, the European Convention was built on the existence of European autonomous legal concepts, which were immune to the semantic manipulation that was such an important ingredience in the Swedish system of Government. Finally, the European Convention protected a freedom of thought and a freedom of expression that had been considered in Swedish quarters to be next to subversive, and which continued to be regarded so if one may judge from the silence by which the authorship concerning the European Convention was covered.

Inasmuch as the Convention made it possible that Swedish legislation and Swedish court practice could be held unlawful, collapse threatened many of the earlier principles of interpretation, built upon Swedish statutes and Swedish precedents and applied by Swedish courts. It was by no means certain that they would hold water when confronted with those principles that were asserted in Strasbourg. This was a challenge to Swedish parochialism, to the hägerströmian school, and to all doctrines of interpretation that had been developed since the turn of the century. Definitely, the court should be loyal, but now people did not quite know against whom they should be loyal.

The system of rules of the European Convention was, moreover, not structured like statute law, rather it was structured on the basis of general

¹¹¹ For more detail, see the section "Foreign Policy for the Betterment of the World" which introduces the article *Tre kapare och deras bidrag till den allmänna rättsläran* (note 105 above).

¹¹² Concerning the Tsironis Case, see Sundberg, Jacob W.F., *Thinking the Unthinkable or the Case of Dr Tsironis*, Ch. V, sec. 4 in Cherif Bassiouni, ed., *International Terrorism and Political Crimes*, Springfield, Illinois 1975, p. 448-459.

¹¹³ See Sundberg, Jacob W.F., *Lawful and Unlawful Seizure of Aircraft*, 1 *Terrorism: An International Journal* 423-440, at p. 430-431 (1978).

principles of law, a figure of legal thinking that was difficult for the Swedes as had been pointed out by Huntford.¹¹⁴

According to Huntford, consequently, the Swedes lacked the ability or the will to make principled considerations. Exactly this defect came to light in the legal difficulties that were brought about by the new foreign policy.

The same question was put in an even clearer way with the entry into the EU in 1995. The regulatory system of the EU resembles much statute law, and statute law was something making the Swedes feel at home, as opposed to the mass of case law that was the legacy of the European Court of Human Rights of the Council of Europe. Therefore, EU norms were met with a lot less skepticism than what emerged from the Court in Strasbourg.¹¹⁵

3.2 *Impact on the Legal System*

The European Convention made a deep impact. The presence of the autonomous conceptual apparatus of the European Convention results in a realistic analysis of the legal system that is very far from the narrow view of the system taken by legal positivism. Incidentally, it is this conceptual apparatus that makes possible the Comparative Law dialogue.¹¹⁶ The dialogue has thus reappeared under the aegis of the European Convention. The dialogue is cultivated particularly within the framework of the Sporrang Lönnroth Moot Court Competition,¹¹⁷ although this pedagogical tool has been rather unsuccessful in attracting the attention of institutions such as Svensk Juristtidning and Nordiska Juristmötet.¹¹⁸ It may be said that with the advent of the autonomous concepts, Comparative Law has even found a place in the center of the Law.

Further along the line, the autonomous concepts also impose judicial review. This was understood by Mr Carl Lidbom already during the 1960s, although he felt impeded by his political mandate to pass his insight on to others.¹¹⁹ Often it is necessary to ask what is the legislative intent and there is a possibility to find illegitimate intent.¹²⁰

¹¹⁴ Huntford, Roland, *The New Totalitarians*, p. 181.

¹¹⁵ Cf Danelius, Hans, *Europakonventionens inkorporering med svensk rätt*, in *Afmælisrit Gaukur Jörundsson*, Reykjavik 1994, p. 151-161, at p. 154.

¹¹⁶ One should note that it was indeed the Comparative Law dialogue that was excluded by dr Strömholm when accounting for Comparative Law ; see for detail Sundberg, Jacob W.F., *Comparative Law and The Swedish Model*, 39 *Scandinavian Studies in Law* 367-386, at p. 370, 376-378.

¹¹⁷ Cf Sundberg, Jacob W.F., *An American Idea in a Nordic Setting. The Nordic Human Rights Law Moot Court Competition*, 49 *Revue hellénique de droit international* 289-299 (1996) (Athens); *idem*, "Comparative Note. Moot Court: An American Idea in a Nordic Setting", 19 *The Justice System Journal* 229-233 (1997) (Newark, New Jersey). In Swedish, see *idem*, ed., *Jubileumsantologin Sporrang Lönnroth*, IOIR No 100, 1994.

¹¹⁸ See e.g. *Förhandlingarna vid det 34:e nordiska juristmötet*, Del I, p. 128-129, one session of these deliberations being devoted to 'legal education in a changing world'.

¹¹⁹ Lidbom, Carl, *Lagstifningsmaktens gränser* [The limits of legislation], 5 *Juridisk Tidskrift* 283-299, at p. 285 (1993-94).

¹²⁰ Cf Sundberg, Jacob W.F., *Intent or Effect – A Look at Legislative Intent*, in *Presence du*

The room allotted to unfettered legislative intent is furthermore restricted by the requirement of proportionality between what the public wins and the individual sacrifices due to a certain legislative intervention. The principle of proportionality was read into the European Convention by the old Court, sometimes the breakthrough case is said to have been *Sporrong Lönnroth vs Sweden*, and anyway the principle is today understood to be fundamental to the application of the Convention.

Questions relating to damage payments also bring to attention the relationship between the Convention and the domestic legal system. Articles 5 (5) and 41 illuminate what is in issue. In Swedish law, there has until recently been almost no discussion of this kind of problems.¹²¹

4 The Chair of Today

4.1 Among the Slow Thinkers

When he took over the Chair in Jurisprudence Dr Bjarup found himself in the horns of a dilemma. His predecessor, Professor Frändberg, had done little more during his short stay in the Chair than removing the Merkel's mark on the subject imposed by the previous holder and Frändberg introduced as new compulsory reading the book by Nigel Simmonds¹²² that, a few years before, the City University had ordered translated into Swedish¹²³ and introduced for use at their human rights courses, set up in competition with my own corresponding courses¹²⁴ To the organizers, the main advantage of the book seems to have been that it nowhere even mentioned the European Convention.¹²⁵ But apart from Simmonds there was not much to inherit from Frändberg. It would not seem to have been unnatural if Dr Bjarup would have sought some guidance in the - perhaps rather abstract - description of the subject, which had been authored by me and Professor Klami together on 22 March 1989.¹²⁶

The study of Jurisprudence purports to give the lawyer his self-understanding by a good general overview of the discussion of the theory of Law and State in the development of Western ideas. The student should have a reasonable insight into

droit public et des droits de l'homme – Mélanges offerts à Jacques Velu, tome II, Bruxelles 1992, p. 1235-1252 .

121 Some of these problems, analysed as seen at the European level, have been dealt with in Bårdsen, Arnfinn, *Oppreisningserstatning ved Den europeiske menneskerettighetsdomstolen*, Tidsskrift for Rettsvitenskap 2000 p. 211-250.

122 Simmonds, Nigel E., *Central Issues in Jurisprudence. Justice, Law and Rights*.

123 Simmonds, Nigel E., *Juridiska principfrågor. Rättvisa, gällande rätt och rättigheter*, övers. av Lars Lindahl, Norstedts 1988.

124 Courses at the University of Stockholm in European Procedure (Theoretical and Practical). – It was announced in 1990 by the City University that Professor Aleksander Peczenik of the University of Lund had been made member of the City University's board of examiners.

125 Incidentally, this was also a characteristic of Dr Simmond's lectures in Stockholm.

126 Memorandum ang. ämneskonferensen i allmän rättslära 22.3.1989, § 2.

the historical, theoretical and social relations in which a certain legal theoretical view has come to light and become important. The student should know the various schools and their foremost protagonists and foremost expressions in codes and doctrines, the major arguments that have been advanced in favour of different positions and the more important counter-arguments which they have met. The student should be able to account for arguments and occurrences, and be able to discern to what extent such reasoning as appears in modern debate has had its counterpart in ancient times, and what consequences such reasoning has entailed. The self-understanding of the lawyer should be developed by an insight into the notion of a legal order, and how its identity may vary under the pressure of technical evolution and international integration; and by insights into comparative law research, its basis and its problems.

In addition to this, the same year, a full programme was announced in my book *En liten bok om allmän rättslära*¹²⁷ pleading for the acceptance of the European Convention of Human Rights as a matter of Jurisprudence in itself. The frontlines had changed in Jurisprudence I recalled. That had taken place during the 1980s when the Swedes became aware of the possibilities to take legal questions before the European organs in Strasbourg. The procedure before the European Commission and the European Court, I wrote,

offered an extraordinarily rich illumination of central legal problems that went with the notion “rule of law”. By ‘general jurisprudence’ is understood a jurisprudence that is general, thus applicable also outside of Sweden, in times bygone and in times coming. Since the European system by necessity has involved the development of autonomous European legal notions of the kind: Law, Court, Impartiality, Crime, Confiscation, Tax, Life etc., all of this deposited in a Case Law involving some 14.000 cases decided by the Commission and perhaps 200 cases decided by the Court. This meant altogether that Jurisprudence as a teaching subject had to face this system, incorporating the more general propositions thereof into the teaching.

If the purpose [of the *ius docendi* operation] has been to expel the European Convention from the subject, I do believe that this idea was a failure. I will allow myself to recall that the Supreme Court in its decision on 4 November 1988 did include directly the case law of the European Court among the elements of our sources of law by declaring

that an extra restrictivity when interpreting the rule [Code of Procedure Ch. 51, sec. 21] is now called for because of the fact that the European Court by its judgment on 26 May 1988 in a case against the Swedish State has found it contrary to Article 6 in the European Convention on Human Rights that a Court of Appeal, applying Ch. 51, Sec. 21 of the Code of Procedure such as it read before 1 July 1974, had decided a criminal case without a main hearing, in spite of the fact that the defendant had requested such a hearing (Ekbatani Case, 23/1986/121/170).¹²⁸

¹²⁷ Sundberg, Jacob W.F., *En liten bok om allmän rättslära*, IOIR No 80, (1989) (A Little Book on Jurisprudence).

¹²⁸ Sundberg, Jacob W.F., *En liten bok om allmän rättslära*, IOIR No 80 (1989), p. 33-34. Compare. Klami, Hannu T., *Rättshistorisk metod contra metoden för allmän rättslära*, (The

In the above-mentioned description given in 1994 as a reason for continuing the Chair,¹²⁹ Professor Frändberg mentions the ‘notion of a legal order’, ‘endeavours towards legal integration’, ‘violations of fundamental legal values’, ‘fundamental ideas about law’, and ‘the basic ideas on which the legal orders are founded’ – evidently pointing towards the contributions of the European Convention on Human Rights to the subject of Jurisprudence. Was Dr Bjarup discouraged from adopting this same perspective by the *ius docendi* operation and the turmoil in its wake (perhaps as illuminated by Huntford’s less than encouraging observations)? If so, however, there is now time for a second look at the potential of the suggested approach in this tribute to Dr Bjarup’s capacity.

Dr Bjarup has been fascinated by his fellow-countryman Ross.¹³⁰ In Bjarup’s lectures in 1991 a chapter was indeed devoted to comparing Ross and the Norwegian Frede Castberg. Unfortunately, the comparison is very abstract and conceptualistic, difficult to digest for ordinary lawyers. I think it was a pity that Bjarup did not go further in his study of Ross. I will here develop one good reason for doing so.

Ross found himself in the odd situation that he had been recruited as a judge in the European Court.¹³¹ There he found himself in the company of a number of natural lawyers from the post-war European school – Süsterhenn and Verdross

method of legal history versus the method of general jurisprudence) JFFT 1985 p. 411-427, at p. 412: If you approach the notion of “general jurisprudence” seriously, it means that you are referring to something that applies to *all legal orders* – at least to those that have existed *so far*. If this is the case, the method of general jurisprudence will be, in principle, both *historical and comparative*, that is to say that legal history – both the Swedish one and the general one – simply form a part-domain of the general jurisprudence. In Swedish: “Om man tar begreppet ”allmän rättslära” på allvar, innebär det att man talar om något som gäller för *alla rättsordningar* – åtminstone för dem som *hittills* har existerat. Om så är fallet, blir den allmänna rättslärans metod i princip *både historisk och komparativ*, d.v.s. rättshistorien – både den svenska och den allmänna – är endast ett delområde av den allmänna rättsläran.”

¹²⁹ Supra p. 1-2. Professor Åke Frändberg has recently given a new presentation of the subject in his article *Den allmänna rättsläran – tidlös och ständigt aktuell*, SvJT 2002 p. 564-575.

¹³⁰ Bjarup, Jes, *Authority and Roles*, in Krawietz, Werner ed., *The Reasonable as Rational*. Festschrift till Aulis Aarnio, Berlin 1997, p. 1-21, at p. 5: “The most influential author within the Nordic countries has been Ross.” Cf Tamm, Ditlev ed., *Retfærdighedens mange ansigter*, Nyt Nordisk Forlag Arnold Busck 2003.

¹³¹ The European Court of Human Rights was created 3.9.1958, after having received 8 ratifications of its jurisdiction (Art. 46). The first election of judges took place 21.1.1959. It then turned out that the European Convention had become the battlefield for philosophical disputes among the post-war European generation. When the European Convention organs in Strasbourg were being recruited, it was preferred to take the candidates from the ranks of theoretical legal scholars. The Commission started the process, indeed 18.5.1954 when Adolf Süsterhenn was appointed German member, and with supplementing elections i.a. 28.4.1960 when Frede Castberg was appointed Norwegian member. At the election of judges 1959 Alf Ross was appointed Danish judge, and his mandate was renewed 26.9.1961 for nine more years. At the same time as Ross Alfred Verdross was appointed Austrian judge in the European Court. The opinion of Süsterhenn that “there is a law that is inborn and which resides in the stars, an unwritten law, a permanent original law, a *lex aeterna* that is rooted not in the varying wills of men but in the transcendental and absolute, in the Will of the Supreme Being, in God”, is referred to by Ross at TFR 1963 s 497-525, p. 497. Verdross is referred to *ibidem* p. 518 ff.

and Castberg. Soon he found himself obliged to declare, in an article from 1963, that in no way did he see any incompatibility between Scandinavian Legal Realism and the Law of Nature school. So he declared not only for his Scandinavian readers¹³² but also for the world at large.¹³³ However, in contrast to Castberg who was a member of the European Commission and was submerged by interesting cases, Ross sitting on the Court had almost no cases. This made him so frustrated that he authored a lamentation titled “A court out of work” (1964)¹³⁴ and he refrained from having his mandate renewed when it expired in 1971.¹³⁵ Because of this, it became Castberg who carried the Scandinavian banner in the new European environment, not Ross. This left plenty of food for thought because Castberg felt that he had to relate his natural law approach to his daily court-related activities in Strasbourg, taking place within the framework of the European Convention on Human Rights. In the article of 1965,¹³⁶ Castberg ventured bravely to couple the Law of Nature with the human rights in the European Convention.¹³⁷

132 Ross, Alf, *Naturrett contra Retspositivisme*, Tfr 1963 p. 497-525, at 512 f. “Grundtanken i denne afhandling er at hævde, at en sådan logisk implikation ikke foreligger, altså at troen på naturrettens eksistens ikke implicerer at den positive ret er konstitueret i den naturlige. Dette vil altså sige, at modstridende opfattelse i det moralfilosofiske spørgsmål (tese nr 1) ikke behøver at medføre divergerende opfattelse af den positive rets og retsvidenskabens karakter (tese nr 2). Eller: naturrett og retspositivisme er kun uforenelige som moralfilosofiske, ikke som retsfilosofiske doktriner i snævrere forstand.”

133 Ross, Alf, *Validity and the conflict between legal positivism and natural law*, *Revista Juridica de Buenos Aires* 1961 p. 46-93.

134 Ross, Alf, *En arbejdsløs Domstol* (1964).

135 Judge Ross came to sit in judgment of three cases only during his time on the Bench, dissenting in all of them but his opinions only concerned procedural rather than philosophical issues. The first case with dr Ross on the Bench was *De Becker vs Belgium* (1 EHRR 43) (Appl. 214/56 before the Commission) The Commission declared it partly admissible on 9 June 1958 (2 ECHR YB 214), and on 29 April 1960 the Commission referred it to the Court. A Chamber of seven judges convened, one of them being dr Ross. Eventually, on 27 March 1962, the Court arrived at a judgment, with dr Ross alone dissenting (p. 50-54). The basic issue before the Court was whether the case could be struck from the list after Belgium having adopted on 30 June 1961 an Act doing away with the legislation that De Becker claimed had violated his human rights under Art. 10 of the European Convention. – Next case was *Belgian Linguistic Case (No 2)*, 1 EHRR 252 (1968), with a Collective Dissenting Opinion of Judges Holmback, Rodenbourg, Ross, Wiarda and Mast (p. 336-342). The last case was the one about the Belgian vagabonds, several times before the Court: *De Wilde, Ooms and Versyp vs Belgium*, 1 EHRR 373 (1970) with Joint Separate Opinion of Judges Ross and Sigurjónsson (p. 414-416), and *De Wilde, Ooms and Versyp vs Belgium*, 1 EHRR 438 (1972), with Joint Separate Opinion of Judges Holmbäck, Ross and Wold (p. 445-447).

136 Castberg, Frede, *Menneskerettighetene, Grunnloven og Domstolene*, Tfr 1965 p. 385-399. - It so happened that Ross accused Castberg of having there misunderstood certain passages in the abovementioned Ross’ article from 1963 and Ross published an article so saying in 1966, causing a Castberg reply same year, see Ross, Alf, *I egen sag*, Tfr 1966 p. 90-94 ; and Castberg, Frede, *Svar til Professor Ross*, Tfr 1966 p. 240-242. However, this had nothing to do with the European Convention.

137 Castberg, Tfr 1965 s 387.

Here it is not the notion of right in contemporary positive law that is in issue. It is about a notion of right on another level. Believing in 'human rights' includes the persuasion that the state is obliged to respect these rights in all areas of the life of the State and at all levels of the State apparatus. In this sense, the human rights have a 'super-positive' validity. So what are the norms to which this general notion of 'human rights' is referring? -.- In my opinion it cannot be anything else than the norms that traditionally are summarized under the old, and multi-meaning connotation of 'natural law'. It is 'the law of nature' in the sense of higher norms that apply above and independent of the positive law that we are referring to when we speak of "human rights".

In 1968, Castberg published an article in English dealing with the same issue, repeatedly advocating the identification of the human rights issues with natural law. Here he wrote i.a.:¹³⁸

Let us presume that a legal system is effective as a means of realising what is *per se* a rational and reasonable aim. It may be that at the same time it respects the principle of equality, and that for this reason it cannot be described as "unjust". But nevertheless it is possible for a legal system of this kind to be objectively unwarrantable; it may nevertheless be a violation of the natural law we are bound to respect. For it may be that it conflicts with inviolable human rights.

In considering human rights as something the positive legal system ought to respect, we are adopting a purely "natural law" attitude. -.- We are thus presented here with a "positivisation" of human rights in one form or another. -.- The very desire to raise these rights above the conflicts of the day, and protect them against all ruling powers, indicates the conviction that human rights are anchored in higher norms than the provisions of positive law.

It is the concept of human rights versus the State that inspires constitutional legislation and the policy of treaties in this sector... a human right, which exists precisely as an independent demand in relation to positive law, has its basis in natural law. -There is only a minimum of norms, of a highly general character, which we can assume to possess validity everywhere and at all times.

Among the adherents to the Uppsala School, Professor Per Olof Ekelöf, tried to look the other way. He said:

As I have suggested it is my utilitarianism that entails that I do not want to build anything on natural law reasoning. ... What I fear is however that, if the relevant rules [in the European Convention] are considered to have a natural law character, when they are applied, their practical effect in societal life will be less considered.¹³⁹

138 Castberg, Frede, *Natural Law and Human Rights*, Human Rights Journal of International and Comparative Law 1968 s 14-39, at p. 29, 30, 31 and 32 respectively.

139 Ekelöf, Per Olof, *Om rätt och moral*, i Process och exekution. Vänbok till Robert Boman, p. 71-83, at p. 82: "Som jag antytt är det min utilitarism som medför att jag inte vill bygga på några naturrättsliga resonemang. ... Vad jag befarar är emellertid att om bestämmelserna härom [i Europakonventionen] anses ha naturrättslig karaktär, så kommer man vid deras tillämpning fästa mindre avseende vid deras praktiska effekt ute i samhällslivet."

In an attempt to avoid quarrelling with the Uppsala School, his younger colleague, Professor Håkan Strömberg preferred to put the matter instead very superficially:

The government under the rule of law and the respect for human rights does not need any theoretical underpinning. It suffices ... that you are endowed with a normal emotional life.¹⁴⁰

This reasoning may look less than impressive. Before the philosophical challenge, however, Torkel Opsahl, Castberg's successor in the European Human Rights Commission, has given vent almost to despair.¹⁴¹

Now that the issue has been raised [about the basic assumption that we are to live with] I have regrettably discovered that as far as I am concerned, in spite of being preoccupied for years with human rights in theory and practice, I have simply no clear idea about them. Much of the confusion is possibly inherited. But that is of little comfort if for that reason it means that our meeting is doomed to run ashore, like a rudderless vessel, having lost the guiding idea.

The discovery could work almost disabling: What does it help to believe, as I do, that I can give answers anytime about much else relating to human rights, their contents, their distribution, interpretation and practice, obstructions and violations? What does it help to have a library in the matter, to be able to give years and names and to know thousands of cases, and hundreds of people all the world over working with human rights questions, dutifully or voluntarily? What is the use of seminars, periodicals and research, teaching, information and propaganda, PR and lobbying in the name of human rights, if intellectually the whole thing is a colossus on clay feet? Is it only a delusion, the emperor's new clothes, a fashion? Has smart illusionists in all countries united behind a grand bluff, the Universal Declaration of 1948? Thus, the doubts may crop up for the ingenuous believer in human rights.

140 Strömberg, Håkan, *Är Uppsalafilosofin död* (Is the philosophy of the Uppsala School dead?) TfR 1986 p. 209-214, at p. 213: "Rättsstatsidealet och respekten för de mänskliga rättigheterna behöver inget teoretiskt stöd. Det är tillräckligt ... att man är utrustad med ett normalt känsloliv."

141 Opsahl, Torkel, *Ideen om menneskerettighetene, Menneskerettighetene i velferdssamfunnet*, Jussens Venner 1981, p. 267-283. at p. 267 Nå som det er blitt spørsmål om det [selve den grunnforestillingen vi skal leve med], har jeg for min del dessverre oppdaget at tross årelang beskjeftigelse med menneskerettighetene i teori og praksis, har jeg simpelthen ikke noen enkelt klar idé om dem. Mye av uklarheten er nok nedarvet. Men det er til liten trøst hvis vårt stevne av denne grunn er dømt il å strande, som et skip uten ror, i mangel av den styrende idé. Opdagelsen kunne virke nesten lammende: Hva hjelper det å tro, som jeg gjør, at en nårsomhelst kan svare på mye annet om menneskerettighetene, deres innhold, utbredelse, tolkning og praksis, hindringer og krenkelser? Hva hjelper det å ha et bibliotek om emnet, å kunne slå om seg med årstall og navn og kjenne tusenvis av saker, samt hundrevis av personer som verden over arbeider med menneskerettslig spørsmål, pliktmessig eller frivillig? Hva nytter seminarer, tidsskrifter og forskning, undervisning, informasjon og propaganda, PR og lobby virksomhet i menneskerettighetenes navn, hvis det hele tankemessig er en koloss på leirføtter? Er det bare et blendverk, keiserens nye klær, en motesak? Har smarte illusjonsmakere i alle land forent seg bak en stor bløff, Verdenserklæringen av 1948? Slik kan tvilen melde seg for den troskyldige tilhenger av menneskerettighetene. Her får man besinne seg. Min utvei blir å unngå "idéen" i bestemt form entall, til fordel for "idéer" i flertall:

But here you have to control yourself. My way out is to avoid the 'idea' in the single definite form, preferring 'ideas' in the plural.

This is, no doubt, a very dramatic sequence of events, cutting deep into the subject of Jurisprudence. It is to be hoped that Dr Bjarup will come back on the issue after his retirement, because I think he is the one with the forceful voice which could help us towards better positions in the matter than so far evidenced by e.g. Opsahl and Håkan Strömberg.