

Human Rights In Sweden: The Breakthrough of an Idea

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I. THE EUROPEAN SYSTEM OF HUMAN RIGHTS

A. *The American Influence*

In order to understand the American contribution to the European system of human rights,¹ it is necessary to go back to the situation at the close of the Second

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1. Among the early literature on the European Convention on Human Rights, see generally ROBERTSON, *THE LAW OF INTERNATIONAL INSTITUTIONS IN EUROPE* (1961); Coblenz & Warshaw, *European Convention for the Protection of Human*

World War. This is the time when the world saw the emergence of the two superpowers to which we have grown accustomed: the Soviet Union and the United States of America. The Soviet advance and progress was impressively manifested in February 1948, when the Communist Action Committees seized power in Czechoslovakia and seemingly irrevocably included that country in the bloc of Socialist states, known as "the Socialist Camp." With the seizure of Czechoslovakia, the Soviets were able to establish their Socialist legal system throughout Eastern Europe. In order to see the American influence on the European system of human rights, an understanding of the chief differences between the Anglo-American legal systems and the Marxist-based Socialist ones is required. These systems disagree fundamentally about the nature and source of human rights. This disagreement has formed the basis for the conflict over human rights within Europe.

"Human rights" was the notion that was to dominate the coming decades in many ways. The significance of human rights was manifested in the Universal

Rights and Fundamental Freedoms, 44 CALIF. L. REV. 94 (1956); Eustathiades, *La Convention européenne des droits de l'homme et le Statut du Conseil de l'Europe*, 52 FRIEDENSWARTE 332 (1953-1955); Golsong, *Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention*, Karlsruhe (1958); Golsong, *Die Europäische Konvention zum Schutz der Menschenrechte und Grundfreiheiten*, 10 JAHRBUCH DES ÖFFENTLICHEN RECHTS (Germany 1961); Golsong, *The European Convention for the Protection of Human Rights and Fundamental Freedoms in a German Court*, 33 BRIT. Y.B. INT'L L. 317 (1957); Green, *The European Convention on Human Rights*, 5 WORLD AFF. 432 (1951); Honig, *The European Human Rights Convention*, 105 L.J. 759 (1955); Horvath, *The European Court of Human Rights*, 5 OESTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT (Austria) 166 (1953); Lauterpacht, *The Proposed European Court of Human Rights*, 35 TRANSACTIONS OF THE GROTIUS SOC'Y 25 (1950); Modinos, *La Convention européenne des droits de l'homme, ses origines, ses objectifs, ses réalisations*, 1 EUROPEAN Y.B. 141 (1955); Mosler, *Organisation und Verfahren des Europäischen Gerichtshofs für Menschenrechte*, 20 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (Germany) 415 (1959-1960); Partsch, *Die Entstehung der Europäischen Menschenrechtskonvention*, 15 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (Germany) 631 (1954); Partsch, *Die Europäische Menschenrechtskonvention vor den nationalen Parlamenten*, 17 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (Germany) 93 (1956); Robertson, *The European Convention for the Protection of Human Rights*, 27 BRIT. Y.B. INT'L L. 145 (1950); Robertson, *The European Court of Human Rights*, 9 AM. J. COMP. L. 1 (1960); Robertson, *The European Court of Human Rights*, 8 INT'L & COMP. L.Q. 396 (1959); Robertson, *The European Convention on Human Rights*, YEARBOOK OF HUMAN RIGHTS FOR 1951 (1953); Waldo, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 34 BRIT. Y.B. INT'L L. 356 (1958); Wiebringhaus, *Die Rom-Konvention für Menschenrechte in der Praxis der Strassburger Menschenrechtskommission*, Saarbrücken (1959); Wiebringhaus, *Ein internationaler Gerichtshof zum Schutz der Menschenrechte*, 55 FRIEDENSWARTE 1 (1959-1960); Wiebringhaus, *Institution und bisherige Rechtsprechung der Strassburger Menschenrechtskommission*, 54 FRIEDENSWARTE 252 (1957-1958); Weil, *Decisions on Inadmissible Applications by the European Commission on Human Rights*, 54 AM. J. INT'L L. 874 (1960); Comment, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 49 CALIF. L. REV. 172 (1961).

For more recent, important literature on the Convention and its system, see K.J. PARTSCH, *DIE RECHTE UND FREIHEITEN DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION* (1966) (also in: NEUMANN, BETTERMANN, NIPPERDEY: *DIE GRUNDRECHTE*, Vol. 1 (1966); H. GURADZE, *DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, KOMMENTAR* (1968); J.E.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969); H. WALTER, *DIE EUROPÄISCHE MENSCHENRECHTSORDNUNG, BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT*, Vol. 53 (1970); S. TRECHSEL, *DIE EUROPÄISCHE MENSCHENRECHTSKONVENTION, IHR SCHUTZ DER PERSÖNLICHEN FREIHEIT UND DIE SCHWEIZERISCHEN STAFFPROZESSBRECHTE* (1974); F.G. JACOBS, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, (1975); U. HOFFMAN-REMY, *DIE MÖGLICHKEITEN DER GRUNDRECHTSEINSCHRÄNKUNG NACH DEN ART. 8-11 ABS. 2 DER EUROPÄISCHEN MENSCHENRECHTSKONVENTION* (1976); H. MOSLER, R. BERNHARDT AND M. HILF (EDS.), *GRUNDRECHTSSCHUTZ IN EUROPA, BEITRÄGE ZUM AUSLÄNDISCHEN ÖFFENTLICHEN RECHT UND VÖLKERRECHT* (1977); D. PONCET, *LA PROTECTION DE L'ACCUSÉ PAR LA CONVENTION EUROPÉENNE DES DROITS DE L'HOMME* (1977); D. BRAENDLE, *VORBEHALTE UND AUSLEGENDE ERKLÄRUNGEN ZUR EUROPÄISCHEN MENSCHENRECHTSKONVENTION* (1978); E. LINDE, I.I. ORTEGA AND M. SÁNCHEZ MORÓN, *EL SISTEMA EUROPEO DE PROTECCIÓN DE LOS DERECHOS HUMANOS. ESTUDIO DE LA CONVENCION Y DE LA JURISPRUDENCIA DEL TRIBUNAL EUROPEO DE DERECHOS HUMANOS* (1979); P. VAN DIJK AND G.J.H. VAN HOOF, *DE EUROPESE CONVENTIE IN THEORIE IN PRAKTIK* (1979); G. GREGORI, *LA TUTELA EUROPEA DEI DIRITTI DELL'UOMO* (1979).

See also J. ABR. FROWEIN & W. PEUKERT, *EUROPÄISCHE MENSCHENRECHTSKONVENTION. EMRK-KOMMENTAR* (1985); Z. NEDIATI, *HUMAN RIGHTS UNDER THE EUROPEAN CONVENTION* (1978); ROBERTSON, *HUMAN RIGHTS IN EUROPE* (1977); F. CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1974); J.W.S. FAWCETT, *THE APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (1969).

Declaration of Human Rights in 1948,² the very year Czechoslovakia fell. That there are "fundamental human rights" was declared an article of faith, "reaffirmed" by the peoples of the United Nations in the UN Charter.³ In spite of the fact that the Universal Declaration reflected no single comprehensive theory of the relation of the individual to society, the Soviet Union abstained from supporting the Declaration when it was adopted.

The Soviet view of human rights is rooted in Marxist-Leninist theory.⁴ Under it, law, like government, is the product of the underlying economic relationships in society. The relationship between the individual and the state in society is defined by the forces of production, and human rights is part of that relationship. Hence, human rights derive their content and nature from those forces and the class relationships manifested in the state. Because the law can never rise above a society's socio-economic system, it follows that the state must be the source of human rights. Soviet theorists, therefore, believe that individuals can have no inherent rights. Instead, the state confers rights upon its citizens. Within such a framework, the individual can hold no right against the state.

This much being said, the contrast to the American view of natural rights and of constitutionalism is most apparent.⁵ The American approach, unlike the Soviet approach, is rooted in the Enlightenment doctrine of "natural rights." Such a doctrine was first articulated clearly by John Locke, who argued that man possesses certain rights by virtue of his humanity, and not by virtue of social convention or law.⁶ In both Europe and America, Locke's views came to carry great weight. In the 1780's, both Europe and America adopted new constitutions addressing the issue of the natural rights.

On August 4, 1789, the French National Assembly resolved that a Declaration of Rights should antecede the new Constitution. It was completed by August 26, 1789. The Declaration of Rights stated in Article 2 that the purpose of all political

2. G.A. Res. 217, 3 U.N. GAOR (A/810) at 71.

3. U.N. CHARTER preamble.

4. For a recent survey of the human rights problem in the Marxist perspective, see Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 VA. J. INT'L L. 55 (1980).

5. See generally Henkin, *Constitutional Rights and Human Rights*, 13 HARV. C.R.-C.L. L. REV. 593, 602, 609 (1978) and Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 406 n.4 (1979). In R. BERGER, *GOVERNMENT BY JUDICIARY, THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT (1977)*, the argument is put forward that the Founders of the American Constitution were too "deeply committed to positivism" to confuse law with natural rights. *Id.* at 252. This argument seems to not fully take into account the natural rights' character to establish limits on the legitimate power of government (*cf.* the French Declaration of Rights of 1789) although it is reflected directly in the language of the Amendments covering rights "retained by the people" independently of the Constitution (U.S. Const. amend. IX) and powers "reserved . . . to the people." (U.S. Const. amend. X).

Retained rights and reserved powers seem to be in perfect harmony with Locke's approach, explaining that the compact out of which emerged the state must be understood so that the participants only "give up all the power, necessary to the ends for which they unite into society." The power that is not necessary for these ends is retained by the individuals.

A most expressive formulation of this point of view, completely undisturbed by positivism to which everybody claimed adherence, will be found in the committee report that was drafted by the constitutionalists in the Grand Duchy of Finland, (at that time part of Czarist Russia) after the victory of 1906. Explaining what was meant by the term, a Constitutional State, they stated: "should anybody, even be it the Monarch himself, make command in matters as to which the Law gives him no such power, no law can be created by such command and consequently can arise no corresponding duty with binding force." See J. SUNDBERG, *HÄGERSTROEM AND FINLAND'S STRUGGLE FOR LAW 21* (1983).

6. J. LOCKE, *ESSAYS ON THE LAW OF NATURE* (W. von Leyden ed. 1954).

association is the conservation of Man's natural and inalienable rights: freedom, property, security, and resistance to oppression. In the Constitution of 1791, the matter was explained even further in the opening language of Article 3: "The legislative power cannot make any laws that violate or hinder the natural and civil rights."

On the American side, the same approach was taken. The American notion of rights reflects a theory applicable to all human beings in every political society. The rights of the individual are natural, not a gift from society or from the government. The individual is autonomous before he enters into society. Some of the individual's original autonomy is indeed retained as "inalienable rights" that are immune from invasion even by his own government. The American Constitution of 1787 does not create, establish, or grant rights, or even declare them. The individual rights of Americans do not derive from the Constitution; they antecede it. The Constitution contemplates only that these pre-existing rights shall be respected by government. The rights do not derive from official grant and are not enjoyed by official grace. They are above government. This is a form of *limited government*, in which authority is balanced carefully to minimize intrusiveness. The tendency is to de-emphasize the activity of the state in the lives of its citizens. The government is to be a watchman, a policeman, leaving the individuals free for the "pursuit of happiness."

It belongs to the American tradition that these rights, which first were felt as having no need of formulation since they were natural, eventually were given formal recognition in the first ten amendments which were adopted with the Constitution on June 21, 1788. Today's Americans know well the freedoms and rights here enumerated, and how they have grown during the 200 years of the history of the United States through interplay between the political branches of government and the American judiciary practicing judicial control of state action. It follows that a "right" in Soviet terms is not a "right" at all in the American sense, and vice versa.

B. *The European Approach*

The European Convention on Human Rights⁷ lacks legislative institutions and seems short on enforcement powers, but it was established as a European international system to protect fundamental rights in a judicial procedure. Thereby, it has firmly attached the European states to the American tradition of protecting fundamental rights on the basis of a court procedure. The success of the Convention system,⁸ hence, stands out as one of the great successes of an American tradition and one of the great defeats of the Socialist philosophy. How great an achievement this really is perhaps is not apparent to Americans unless they recall the situation of the late 1940s.

7. The European Convention for the Protection of Human Rights and Fundamental Freedoms, November 4, 1950, 213 U.N.T.S. 221.

8. The success of the Convention system is manifest in a history of over 30 years, the handling of almost 12,000 cases, and the right of individual complaint having spread, by declarations made under Article 25 of the Convention, to some 300 million Europeans. See EUROPEAN COMMISSION ON HUMAN RIGHTS, STOCKTAKING ON THE EUROPEAN CONVENTION ON HUMAN RIGHTS: A PERIODIC NOTE ON THE CONCRETE RESULTS ACHIEVED UNDER THE CONVENTION (1979).

Among the Europeans, on the other hand, testimony is often explicit. Polys Modinos, then Deputy Secretary General of the Council of Europe, had a keen eye for the quasi-constitutional character of the Convention system in the European political community. “[B]y listing and defining those civil and political rights on which democracy is founded the authors of the Convention have succeeded in laying down the constitutional rules without which the Political Community could not exist.”⁹

Gerard Wiarda, the former Dutch President of the European Court of Human Rights, refers to the court as “a Constitutional Court for all European nations.”¹⁰ Professor Jochen Abr. Frowein, Vice-President of the European Commission on Human Rights, likes to refer to the Convention proceedings as “a European Constitutional Complaint to the Strasbourg organs.”¹¹ Frowein has been very explicit in acknowledging the European indebtedness to the American model.

What is the Convention about? Is it not really a Convention which tries to protect what one might call a certain identity, developed in Western Europe and North America? . . . Is it not quite important that here an example should be set that by judicial procedures before the Commission and the Court something similar to this great jurisprudence . . . developed by the United States Supreme Court, on the basis of the Bill of Rights of the United States Constitution, should develop in a single European System? I submit that besides other European institutions, one specific human rights institution in Europe serves a great goal and should be developed for that end.¹²

C. The Lawyer's Approach

The European system of human rights is based on a lawyer's approach. It is a system administered by lawyers. This sets it apart from many other systems in the field. The lawyer's approach shows in the very style and form of the European Convention on Human Rights. The first section of the Convention, Articles 8 through 11,¹³ which define the rights and freedoms, follows a rather stable pattern. In each

9. Modinos, *Effects and Repercussions of the European Convention of Human Rights*, 11 INT'L & COMP. L.Q. 1097, 1107 (1962).

10. Martin, *Europe's Court of Last Resort*, READER'S DIGEST, Swedish edition, Nov. 1985.

11. Frowein, *Recent Developments Concerning the European Convention on Human Rights*, in LAWS, RIGHTS AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 14 (J. Sundberg ed. 1986).

12. *Id.* at 27.

13. ARTICLE 8

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 10

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

article, the first paragraph states the right in a more or less precise formula, and the second paragraph states what restrictions of this right are permissible. What loyalty each European state owes to the Convention may be gathered from Articles 17 and 18,¹⁴ both of which are concerned with the purpose behind the governmental—legislative or administrative—interference.

It was not so in the beginning. When the Committee of Ministers convened in November 1949, it refused to accept the draft Convention hammered out in the Parliamentary Assembly in which the rights to be guaranteed were merely enumerated; and control of the restrictions on the rights was contained in general form. The Committee of Ministers instructed the Secretary General of the Council of Europe to invite each of the governments of member states to nominate an expert to a Committee of Legal Experts to draw up a draft Convention which would serve as a basis for future discussion. This Committee was left with the task of determining whether the rights should be more precisely defined or left as general statements of principles. The Swedish Government appointed to this Committee Judge Torsten Salén who had experience from the Mixed Tribunals in Egypt. The Norwegian Government appointed Advocate Ole Roed and Counselor Einar Løchen, and the Danish Government appointed Counselor Birger Dons Møller. The Committee of Legal Experts convened in Strasbourg in February 1950.

When the legal experts met, it was their task to determine how to reduce the rights to positive law, how to make them concrete rather than abstract. Although some experts were inclined to side with the Parliamentary Assembly, others opposed this very strongly. The representative of the United Kingdom in particular felt "that since the Convention was to enforce human rights, it was essential that the rights should be defined as precisely as possible."¹⁵ This opinion was noted in the

This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11

1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

14. ARTICLE 17

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

15. BEDDARD, HUMAN RIGHTS AND EUROPE: A STUDY OF THE MACHINERY OF HUMAN RIGHTS PROTECTION OF THE COUNCIL OF EUROPE 24 (1980).

following way in the report on the drafting procedures that Judge Salén later published:

According to these people, it was a necessary condition for the adoption of a Convention that the various rights which were to be protected were strictly defined, and so should be too the restrictions allowed of these rights. Otherwise, it would be impossible for a State to know to what obligations it subjected itself by adhering to the Convention.¹⁶

This reasoning persuaded the Committee of Legal Experts to engage in rather precise formulations of the guaranteed rights. The Committee of Ministers considered the suggestions of the legal experts in April 1950. The Ministers agreed to set up a Committee of Government Experts which was charged with preparing on the political level the decisions which the Committee of Ministers would have to make. Judge Salén recalled:

During this conference, the chair was held by the Swedish delegate, Counselor Sture Petré. Under his expert guidance, it was succeeded to hammer out a uniform text that corresponded to the views of the majority. It built upon the proposal that included a closer definition of the rights set out in the draft Convention.¹⁷

Interestingly enough, it seems that the reduction of the rights into positive-law formulations served the purpose of safeguarding the interests of the state rather than the interests of the individual. The state was to enjoy legal security against other states; this was the paramount consideration. In this way the individuals were given a legal instrument for their protection which lawyers could handle, but this instrument was simply a by-product of the paramount consideration.

Having retired as Swedish Minister of Foreign Affairs, however, Professor Östen Undén had second thoughts. He now questioned whether Sweden "perhaps had gone too far in contributing to the Convention being drafted too much in detail."¹⁸ "Due to this formulation in detail, you had increased the possibilities for and the risks for different interpretations of the Convention."¹⁹ He now argued against the machinery for international protection of human rights as being too complicated and too expensive. "Those problems of a more subtle character which may be expected in practice to be referred to the Court of the Council of Europe . . . hardly require the big apparatus for which the Council of Europe's member states are responsible."²⁰

Today, more than thirty years later, the operations of the organs set up under the Convention have added even further precision to the terms of the Convention. In order to ensure that these elaborations of the meaning of the Convention language are kept alive, the Commission Secretariat began in the late 1960s to collect the case law in several memoranda, focusing on specific topics. The first compilation was

16. Salén, "Europaradets konvention om manliga rättigheter och friheter," *FORVALTNINGSRÄTTSLIG TIDSKRIFT* 2 (1951).

17. *Id.* at 3.

18. 'kanske gatt for langt i medverkan till konventiones detaljmässiga utformning': Undén, *Om FN:s och Europaradets domstolar*, Svensk Juristtidning, 661 (1963).

19. *Id.* at 659.

20. *Id.* at 661.

published in 1971 and dealt with treatment in prisons. In the preface, the Secretary, A. B. McNulty, wrote, "[T]his publication is not a legal commentary, but it is designed to indicate the impact of the Convention in various areas and thereby the standards which are beginning to emerge regarding the Convention's application."²¹

The first and second compilations of this kind centered on the delimitation of the rights, but the fourth one looked very much like an instruction for legislatures. Entitled "Human Rights and Their Limitations," the compilation stated that:

The application of restrictions provided for in the Convention is not without limits. On the one hand, such restrictions may not be applied for any purpose other than those for which they have been prescribed (Article 18); and on the other hand, their application is limited by the general protection against discriminatory treatment (Article 14). However, it seems clear by now that only such restrictions may be applied as are expressly provided for in the Convention; and that there is no new room for the adoption of additional inherent limitations applicable to certain groups of applicants, e.g., prisoners.

Finally, it should be observed that, although it is for the domestic authorities and courts of the Contracting Parties to be the first judge in the application of any restrictions on the rights and freedoms guaranteed by the Convention, it is for the Commission, and ultimately the Committee of Ministers or the Court of Human Rights to judge whether the restrictions imposed in a particular case were justified. In accomplishing this task, the competent organs under the Convention will balance the interest of the individual in the protection of his human rights against those of the State to protect its democratic institutions. In this process of determining the relationship between the individual and the State they will bear in mind

that the purpose of the High Contracting Parties in concluding the Convention was not to concede to each other reciprocal rights and obligations, in pursuance of their individual national interest, but to realize the aims and ideals of the Council of Europe, as expressed in its Statute, and to establish a *common public order* of the free democracies of Europe with the object of safeguarding their common heritage of political traditions, ideals, freedoms and the rule of law. (Applications no. 788/60, Austria against Italy, Yearbook 4, 116, 138).

D. *Nothing Succeeds Like Success*

The first ratification of the Convention came from the United Kingdom on March 8, 1951, no doubt because the country hoped thereby to set an example. After all, it was Winston Churchill who had called for European unity and the foundation of the Council of Europe. The second ratification came from Norway, and the third from Sweden. Sweden also made the first declaration under Article 25, accepting for an unlimited period the right of individuals to petition the Commission claiming a violation of human rights by a member state.²² Thereafter, ratifications followed at

21. EUROPEAN COMMISSION OF HUMAN RIGHTS, CASE-LAW TOPICS: HUMAN RIGHTS IN PRISON (1971).

22. ARTICLE 25

1. The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognises the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

2. Such declarations may be made for a specific period.

irregular intervals, and on September 3, 1953, Luxembourg supplied the tenth ratification, which made the Convention come into force. The sixth declaration necessary under Article 25 (4) for the functioning of the individual petition system was made by the Federal Republic of Germany on July 5, 1955. The United Kingdom followed in 1966, Italy in 1973, and France and Spain in 1981. Today the right of individual petition is recognized by all member states except some in the eastern corner of the Mediterranean, notably Turkey, Cyprus, and Malta.

Altogether this has meant that the European Commission has considered a total of over 11,000 individual applications. Of these, only some 300 individual petitions have been declared admissible; but this should not deceive the observer since those petitions declared inadmissible may have involved prejudicial questions of law, the determination of which, even if the result was that the application was declared inadmissible, may have meant an important contribution to the body of case law. The Commission has borne the brunt of this enormous caseload. The cases before the Court have been few, altogether perhaps some 150 or so; and for a very long period of time, the Commission alone was the only truly functioning organ under the Convention.

The Commission was long under a strong Scandinavian influence. Its second president was Sture Petré, one of the founding fathers of the Convention who served on the Committee of Government Experts. The third president was the Danish Professor Max Sørensen. At the present time, the Commission's president is the Danish Professor Carl Aage Nørgaard.

Austria was one of the first countries to formally allow the Convention to operate in the domestic legal sphere. It did so by making the Convention in its substantive parts an annex to the Austrian Constitution. A sequence of lost cases from the late 1950s and early 1960s was followed in Austria by legislative amendments to bring Austrian statutory law into harmony with the decisions of the Commission and the Court.²³

In summary, then, the Convention system has been an immense success. More than 300 million people today enjoy the right of individual petition. The judgment of the European Court of Human Rights "carries the collective weight of Europe's democratic traditions," proclaims the present Spanish Secretary General of the Council of Europe, Marcelino Oreja.²⁴ According to Gerard Wiarda, the Dutch former President of the Court, "The Convention is the Ten Commandments for the nations of Western Europe."²⁵

3. The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

4. The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

23. See W. Pahr, *Opening Speech*, 3 *REVUE INTERNATIONALE DE DROIT PENAL* 21, 22 (1978).

24. Martin, *Europe's Court of Last Resort*, *READER'S DIGEST*, Swedish edition, Nov. 1985.

25. *Id.*

II. SWEDEN AND THE EUROPEAN CONVENTION

A. *The Period of No Complaints*

“What Government would ever hit upon the idea of e.g. summoning Sweden before the Council of Europe’s Court for an alleged violation of the fundamental rights and freedoms set out in the Convention?” wrote Professor Östen Undén in 1963, having retired as Foreign Minister.²⁶ He probably voiced the opinion of most Swedes at that time. A year later, Professor Alvar Nelson noted that the Convention “has hardly been taken seriously in our welfare society.”²⁷ Even 20 years later, an informed voice from the judiciary could tell a reporter in reference to human rights under the Convention that “you have somehow failed in clean habits, legally speaking, when talking about them.”²⁸ Some of Sweden’s ambivalence to the Court was a matter of national pride. “Since Sweden was considered to be among the most well-developed countries, it was hardly conceivable that its legal system could be below the minimum standard set by the Convention.”²⁹

Much of its ambivalence was due to the fact that the political and bureaucratic leadership of the time was simply not aware of the European Convention. At international gatherings devoted to the subject of human rights, where all other participants lectured on human rights in general and the European Convention in particular, the representative of the high Swedish bureaucracy would speak about something else, such as the role of the Ombudsman. When Dr. Hans Blix, later Foreign Minister of Sweden, took part in the Symposium on the International Law of Human Rights, which was held at the Howard University School of Law in 1965, he did not touch on the notion of “human rights” a single time.³⁰ As late as 1979, the Swiss professor Stefan Trechsel could observe at the International Congress of Penal Law in Hambourg that “no mention of international protection of human rights in criminal procedural is made at all” in the National Reports from Sweden and Turkey, although both had ratified the Convention.³¹ Or if somebody was aware of the Convention, perhaps he had not fully understood its implications. Professor Stig Strömholm wrote:

Being a member of the Committee of Experts on Human Rights for some years during the early 1970’s, I had in that capacity especially good opportunities to compare the Swedish society under the rule-of-law (det svenska rättssamhället) with the other states of the Council of Europe. Not a single time could I find a question in which the Swedish legal standard was less, or less secure than in the other countries.³²

Indeed, until 1981, there were very few complaints of a Swedish origin brought to Strasbourg, and those brought were very minor ones. The annual number remained between five and ten. Not even the application that was introduced on June 9, 1972,

26. SvJT 659 (1963).

27. A. Nelson, *Rättsvetenskap en i dagens samhälle*, in *FESTSKRIFTS TILL. KARL OLIVECRONA* 461 (1964).

28. *EXPRESSEN* 10 April 4, 1983.

29. Petré, in *LAW, RIGHTS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 41 (J. Sundberg ed. 1986).

30. Blix, *A Pattern of Effective Protection: The Ombudsman*, 11 *HOW. L.J.* 386 (1965).

31. Trechsel, *The Protection of Human Rights in Criminal Procedure*, 3 *REVUE INTERNATIONALE DE DROIT PENAL* 586 (1978); cf. Berg & Cars, *Protection of Human Rights in Criminal Proceedings*, *id.* at 340–55.

32. S. Strömholm, *Svenska Dagbladet* (January 22, 1984).

by Professor Folke Schmidt of the University of Stockholm relating to the new system of labor law in Sweden received any noteworthy attention in the media or elsewhere.³³ A "mass media wall" protected the Swedish people; the "spiral of silence" operated to suppress all disturbing news.³⁴ Indeed, on March 28, 1983, the Faculty of Law in Stockholm made history by declaring solemnly and for the record that human rights was not a matter for scholarly research.

B. *The Period of Massive Complaints*

Today, Sweden is a European sensation. This has to do with the dramatic rise in the number of complaints of human rights violations. In Strasbourg, statistically, complaints are distinguished between provisional files and registered complaints. Complaints originating in Sweden present the following picture during the first years of the 1980s:

	1981	1982	1983	1984	1985
provisional files	42	72	240	192	168
registered complaints	8	18	46	51	64

As may be discerned from these statistical figures, Sweden today has some 60 or so cases pending at different stages before the Convention organs in Strasbourg. Proportionately speaking, this is more than any other country belonging to the Convention. A sudden peak was reached in 1983 with respect to provisional files. This, it would seem, was the year in Sweden for the breakthrough of the idea imbedded in the European Convention. Apparently something great happened in 1983. This represents the success of an idea with a definite American coloring.

III. THE EXTERNAL HISTORY OF THE CONVENTION IN SWEDEN

A. *A Fit of Absentmindedness?*

Looking back at Sweden's history with the Convention, one may be surprised at the sense of ease which surrounded Sweden's making of the declaration under Article 25. It was made simultaneously with the ratification of the Convention and almost without prior discussion. Further, it was made without any limit in time. It looks indeed as if it had been done in a fit of absentmindedness.

In a way it was so. Sture Petré played an important role in the drafting of the treaty in his capacity as Chairman of the Committee of Government Experts. From

33. Schmidt and Dahlström v. Sweden, Application 5589/72, 19 ECHR YB 484 (1976), 1 EHRR 632. The case went almost unnoticed in Sweden although Folke Schmidt introduced some short references to it in his textbooks in labor law. Internationally, the case attracted more attention. See generally Forde, *The European Convention on Human Rights and Labor Law*, 31 AM. J. COMP. L. 301 (1983).

34. As to the notions of the "media wall" and the "spiral of silence," see generally Noelle-Neumann, *The Spiral of Silence: A Theory of Public Opinion*, 24 J. COMM. 43-51 (1974); and Sundberg, *The Media and the Formation of Law*, in Festschrift für Dietrich Oehler 447, 449-57 (R. Herzberg ed. 1985).

his reports it is known that the Swedish governmental interest at that time mostly focused on the powers to be given to the Committee of Ministers. The present formulations in Article 32 are in fact largely the result of a Swedish compromise suggestion put forward by Petrén under instruction from the Swedish Foreign Minister. The cardinal point was to avoid giving the Committee of Ministers the power to dictate the legislative changes a Government would have to make as a result of being found in violation of the Convention. The Committee of Ministers was seen as the end station of the proceedings before the Commission. From that end station it should be possible for a respondent government, exercising influence as a full member of the Committee, to bridle the Commission. In this light, making the declaration under Article 25 was not a risky move.

B. *Importance of the Foreign Minister, Professor Undén*

The drafting of the European Convention did not take more than a year and a half. At that time, the Swedish Minister of Foreign Affairs was Professor Östen Undén. He exercised a decisive influence not only through the drafting work through instructions to his right-hand man, Sture Petrén,³⁵ but also in shaping the general attitude in Sweden toward the Convention. This requires some explanation.

Östen Undén had a towering position in Swedish political life. He was a Cabinet Minister by 1917 and had been in turn Minister of Justice and Minister of Foreign Affairs in numerous Cabinets formed thereafter. In 1945, he became the Minister of Foreign Affairs in the Cabinet formed by Per Albin Hansson; and he remained in that position until 1962. Thereafter and until his retirement in 1965, he exercised his influence as a member of the Diet, the Swedish legislature.

Thus, Östen Undén totally dominated the period during which the Convention was drafted and came to a life of its own. The two Ministers of Justice who functioned during this period, Herman Zetterberg and Ingvar Lindell, had little or no impact. Undén unilaterally decided the position that Sweden was to take in relation to the European Convention on Human Rights. Besides being Minister of Foreign Affairs, he was a respected professor of law, and a senior leading figure in the ruling Social Democratic Party. He thus possessed rank, political power, and scholarly truth, at least insofar as Sweden was concerned. If anyone was to suggest a position on human rights different from that favored by Undén, he was committing political suicide and scholarly heresy. Very few did. Further testimony of Undén's towering position was provided when the Swedish Judge and the Swedish Commissioner in Strasbourg joined forces to publish a *Festschrift* in his honor.

Professor Undén's position, as he explained it to his subordinates and collaborators in the Foreign Ministry, remained constant throughout the years. Undén believed that the European Convention was nothing but an experiment. It was something completely new in the field of international law and consequently something *sui generis*. It was an experiment because of the right of individual

35. Undén had persuaded Sture Petrén to give up his advanced legal studies for a doctoral degree to join the Foreign Ministry instead.

petition, which made the individual a subject of international law. It was also so because the Convention concerned the member countries' domestic affairs, a subject previously altogether outside international jurisdiction. What value this experiment would have could only be told by the future. There was every reason to move very cautiously.

C. The Declaration Under Article 46

Sweden made its declaration under Article 25 at the same time as it ratified the Convention. It made none under Article 46, which permits any of the member states to "at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention."³⁶ This was very much the result of Professor Undén's dislike of the judicial function.

As Chairman of the Committee of Government Experts, Sture Petréén had received Undén's personal instructions to oppose the original idea of establishing a European Court with mandatory jurisdiction over human rights violations. France and Italy in particular as well as Belgium, were strong proponents of such a Court; but the Scandinavians were opposed. Sture Petréén's position is reflected in the phrase that "it has not yet been agreed that the creation of a European Court of Human Rights at the present time corresponds to a real need." But the French pressed on, "since only a Court that had all the characteristics of an impartial tribunal would be able to ensure to the individual person (*pour les assurer aux individus*) the efficient protection of human rights." In view of this, Sture Petréén was instructed to suggest a compromise solution, making the jurisdiction of the Court non-obligatory. This compromise idea enjoyed a measure of success, but Undén could not prevent Article 46, as finally phrased due to French insistence, from committing all member states to the establishment of the Court. Thus, all member states carried responsibility for the Court's existence. But Undén saw to it that it was left to each member to decide for itself whether its government wanted to be subject to the Court's jurisdiction.³⁷

At the outset, the Swedish government certainly had no intention to accept the Court's obligatory jurisdiction by making the declaration under Article 46. It followed that the powers of the Court were not a matter of primary Swedish interest, and no objections were raised against the powers of the Court under Article 50.³⁸

36. ARTICLE 46

1. Any of the High Contracting Parties may at any time declare that it recognises as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

2. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain other High Contracting Parties or for a specified period.

3. These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

37. See Salén, *Europaradets konvention om mänskliga rättigheter och friheter*, FÖRRÄTTNINGSRÄTTSLIG TIDSKRIFT 3 (1951).

38. ARTICLE 50

If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention,

Sweden had made no declaration under Article 46 when it ratified that Convention. As long as Professor Undén ruled the Ministry of Foreign Affairs, it did not intend to make one. The Minister remained adamant in his negativism. Although pressure on the Foreign Ministry and on Sweden was building, Undén's colleagues in the government were unwilling to make a move that would disavow him. Thus, the declaration under Article 46 was not made until 1966 when Professor Undén, replaced as Minister of Foreign Affairs, had also left the Diet. As the ultimate sign of his influence, the bill proposing the making of the declaration did not come from the Ministry of Foreign Affairs but from the Ministry of Justice.³⁹ The Swedish declaration was for a period limited to five years, but it has since been continuously renewed.

D. *The Greek Case*

Making the declaration under Article 46, however, caused a fateful development in Sweden. The *coup d'état* in Greece on April 21, 1967, which brought the colonels to power, met with much hostility in the Council of Europe when the news spread to the "minisession" of the Assembly which was subsequently held. The "minisession" resulted in a recommendation that member states bring an action against Greece under Article 24 for having violated the Convention.⁴⁰ When the foreign ministers of the Nordic countries met in Helsingfors, Finland in August that same year, the ministers were briefed on the matter. On September 20, 1967, the Swedish government, joined by the Danish and Norwegian governments, submitted an interstate application against the Greek government (Applications 3323/67, cf 3321-3322), later amended; and they were also joined by the Netherlands government (Application 3344/67). This case met with much support from the Social Democratic political establishment in Sweden. Mrs. Alva Myrdal, a member of the Swedish parliament and the cabinet, declared to the Swedish public: "Now today's (Greek) regime is being made to answer for its deeds before the open forum of Europe."⁴¹

The Greek Case was terminated on April 15, 1969, by a resolution in the Committee of Ministers (since Greece had made no declaration under Article 46, the case consequently could not be brought before the European Court); but the Greek government at that time decided to withdraw from the Council of Europe in such a way that there was some doubt whether the decision of the Committee of Ministers had had any legal effect.⁴²

and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party.

39. Kungl. Proposition 1966:33.

40. Resolution 246 of June 23, 1967.

41. Utrikesfrågor 145 (1968).

42. For a summary of the Greek Case by the future President of the European Commission, see Fawcett, *The European Convention on Human Rights: Recent Trends*, 24 *CURRENT LEGAL PROBS.* 253 (1971); a more elaborate discussion is offered by Coleman, *Greece and the Council of Europe—The International Legal Protection of Human Rights by the Political Process*, 1972 *ISRAEL Y.B. OF HUM. RTS.* 121; Buergenthal, *Proceedings against Greece under the European Convention of Human Rights*, 62 *AM. J. INT'L L.* 441 (1968).

In Sweden, however, the effect was more than legal. From now on, the Convention could not be disavowed by the Swedish government in matters of human rights.

E. *The Crisis of the 1970s*

In the late 1960s a change of generations took place in the leadership of the ruling Social Democratic Party. This change was marked by the advent of Olof Palme and his men, most prominent among them being Carl Lidbom and Ingvar Carlsson (now Prime Minister). Now it was time to carry out the Socialist ideas; this was the moment for the great leap forward. The obstacles in the way were to be removed: private ownership of land (a means of production); the courts being all too independent of the political power; the family being a unit much too reactionary for a progressive society; and private schools being all too capable of spreading unhealthy ideas incapable of finding favor with the ruling party. It did not require much insight to understand that in all these sectors a major conflict with the European Convention was pending since the Convention guaranteed the right of property (Article 1 of First Additional Protocol), saw the essence of the European legal tradition in the right to a fair hearing before an independent and impartial court (Article 6), and guaranteed the right to respect for family life, as well as respect for the parents' religious and philosophical convictions in the education of their children (Article 8, and Article 2 of the First Additional Protocol).

In 1969, Lidbom was made Minister without portfolio in the Palme Cabinet and charged with the administration of human rights questions. He definitely had the insight needed and sensed the imperative to disarm the Convention as a disturbing factor in the intended development of the Swedish law.

The new ambitions required a deliberate move to integrate at least philosophically and culturally with the Socialist Camp, as indeed had been the expectation voiced by Undén and Erlander in 1950.⁴³ In foreign affairs, as is well known, Sweden engaged wholeheartedly in economic support of the Communist regimes in Cuba and Vietnam, believing, as it was put, that "work to favour Social Democratic values . . . is under way" in these countries.⁴⁴ On the cultural side too, the new parallels became apparent. In my inaugural lecture as Professor of Jurisprudence, in 1970, I saw reason to express it as follows: "[I]n the Swedish public debate of today, it is not difficult to discern those elements that predict the transition to a system parallel in essential points to the one prevailing in the people's republics of Eastern Europe."⁴⁵

43. In 1950, a formal declaration was made in the Swedish Diet to the effect that the Swedish example should show "countries under the 'dictatorship of the proletariat' . . . that the change of the economic structure of society aimed at in these countries . . . can be achieved while retaining a true political democracy." This declaration was read to the Diet on March 22, 1950 by the Prime Minister Tage Erlander and the Foreign Minister Östen Undén: see the Minutes in the two Chambers of the Diet, *Forsta Kammarens protokoll* No. 11, 13 (1950), and *Andra Kammarens protokoll* No. 11, 11 (1950).

44. Gunnar Sträng, then Minister of Finance, interviewed in the periodical *Frilhet* (SSU), No. 11/12, 3 (1972).

45. SUNDBERG, *TELEOGISK METOD OCH FAIR PLAY* (Institutet för offentlig och internationell rätt No. 24) 1 (1970).

Lidbom's activity covered several areas of interest in this connection: What respect should be shown the European Convention, in particular, when revising the expropriation law? Lidbom also worked on a dramatic *volte face* in family legislation. The attitude towards judicial office was left in the hands of Dr. Lennart Geijer; the imposition of a governmental monopoly on school education to Ingvar Carlsson.

The move to integrate began with the proposed new expropriation law which in many ways carried the imprint of Lidbom's thinking. When the Svea Court of Appeals was consulted for its opinion relating to the proposed law, it made some references to the European Convention. This caused the Human Rights Minister to express his displeasure in no uncertain terms in the parliamentary debate on December 9, 1971. The opinion of the court was referred to as "a mistake on the part of the Court of Appeals," a "stupidity," and "an opinion that the Svea Court of Appeals will prefer to forget."⁴⁶ This seems to have made Justice Bertil Bengtsson drop every reference to the Convention issue from his commentaries on the resulting expropriation law.

In connection with the *Swedish Engine Drivers Case*, however, more of Lidbom's influence surfaced. The Drivers Union suit before the Labour Court came first;⁴⁷ next came the suit of one union member, Sandstrom, who sued in his personal capacity, before the Supreme Court.⁴⁸ In both, a transformation theory was voiced from the bench but hardly carried to its logical conclusion. The European Court afterwards found in relation to the Drivers Union suit "that the Labour Court carefully examined the complaints . . . not without taking into account Sweden's international undertakings." The Supreme Court's main line of reasoning was to the effect that the plaintiff had misinterpreted the meaning of the Convention. But thereupon came the *Råneå Case*⁴⁹ in which the Supreme Administrative Court said:

An international agreement to which Sweden has adhered is not directly applicable in the domestic administration of justice: instead, those legal provisions that are to be found in the treaty must be included in a Swedish statute in order to be valid law in our country (*transformation*). There has been enacted no such statute of transformation with regard to Article 2 of the Additional Protocol of March 20, 1952, to the Council of Europe's Convention for the Protection of Human Rights and Fundamental Freedoms. Consequently, no duty has arisen for the School Board to comply with the rules of the Additional Protocol in its activities.⁵⁰

In subsequent proceedings before the Convention organs, the Swedish Government Agent referred to these decisions as "very clear statements by Swedish Courts to the effect that international treaties, including the European Convention on Human Rights, are not to be directly applied by Swedish courts."⁵¹

46. Snabbprotokoll fran riksdagsdebatterna, No. 162, 36 (1971).

47. Arbetsdomstokens Domar, No. 5 (1972).

48. Nytt Juridiskt Arkiv 423 (1973).

49. Regeringsrättens Årsbok 121 (1974).

50. *Id.*

51. *See, e.g.*, Application 7805/77, the E-Meter Case.

In the Socialist Camp, it should be recalled, the place left for courts is rather restricted and "the judge is part of the unitary administration."⁵² The early 1970s saw Sweden moving closer to the Socialist Camp. Dr. Lennart Geijer, the Swedish Minister of Justice, warned that "the courts do not exist outside of society, but are societal agencies that offer a service to society."⁵³ Dr. Elwin, of a Marxist persuasion, elaborates the idea further: "[I]n Sweden, the courts are seen as implementing societal policy rather than as organs set up to protect the individual against the interventions of the state."⁵⁴ Dr. Geijer adds: "[B]ehind the saying that the courts are there to protect the individual against the 'authorities' there lurks an anti-democratic criticism of the parliamentary system of government. . . . It is, therefore, a dangerous saying."⁵⁵

Not unnaturally then, an effort was made at this time to staff the courts with political appointees more aggressively loyal to the Social Democratic Party than previously customary.⁵⁶ Thus, the lay assessors representing the Party were instructed in closed party sessions, and attempts on the side of the professional judiciary to be invited to observe such indoctrination sessions were rejected with the remark that the judge in question busied himself unduly with the affairs of the Social Democrats. When the so-called *lex Timrå* was passed a few years later, it was expressly stated in the parliamentary debate that "to us, Social Democrats, it can never be a question of the responsibility for the political ideology . . . disappearing if we are elected lay assessors."⁵⁷

Also, in constitutional terms, the position of the judiciary was shaken. In a doctoral dissertation published in 1973, it was asserted that "in Sweden, there is no doubt that the judicial organs consider themselves subordinate to the highest political organs [Parliament and Cabinet] . . . although these [judicial organs] under the [1809] Constitution are equal to the former [political] organs and furthermore nowadays have a law-making function that has clearly been spelled out."⁵⁸ The new Constitution of 1974 brought the matter out into the open. "The new Constitution completely discards the separation-of-powers system that characterized, originally, the 1809 Constitution."⁵⁹

Additionally, the new Constitution also included a provision as to how the Law Council—a committee of high judges consulted for improvement of legislative proposals—should carry out its tasks. Section 18 of Chapter 8 stated that the Council should consider "how the proposed law harmonizes with the fundamental laws and the rest of the legal system," a sweeping reference that may or may not include the European Convention! A few years later the point was raised whether this council of

52. Slapnicka, *Nat. L.F.* 102, 114 (1963).

53. Public lecture in Lund, February 22, 1973.

54. Elwin, in *FESTSKRIFT TILL, PER OLOF EKELÖF* 244 (1972).

55. See *supra* note 53.

56. Cf. *Söderlund v. Sweden*, Application 5258/71, 43 ECHR CD 73.

57. Snabbprotokoll från riksdagsdebatterna 1975/76 nr 45, at 13. The Act is called *lex Timrå*; it reacted against the Socialists in Timrå who had made a point of making only Socialists lay assessors.

58. FRÄNDBERG, *OM ANALOG ANVÄNDNING AV RÄTTSNORMER* 159 (1973).

59. KProp, 1973:90, 91, 155.

judges was constitutionally competent to express an opinion relating to the European Convention, if that opinion were to deviate from the view that had been taken by the Swedish government in its capacity as the legal representative of Sweden in all Convention matters.⁶⁰

A great leap forward was also taken in family law. The new directives of 1969 for the revision of Swedish family law expressed the views of Lidbom, and included the statement that there was no reason "to relinquish the use of statutory regulation of marriage and family relations as one of several tools available" in the endeavors to create a new society.⁶¹ Indeed, as put by Professor Folke Schmidt, the directives of 1969 present "basic evaluations with an openness seldom met with in political life."⁶²

Finally, the leap was taken in the educational system. Ingvar Carlsson voiced the new attitude. Since private schools were held to the same minimum standards as the public schools, there was no reason to have different types of schools. In 1971, the National Board of Education received orders to arrange for the discontinuation of the private schools, and in Stockholm some thirty of them disappeared during the following years.

In 1974, the Human Rights Minister, Lidbom, summed up the new philosophy: we have to "get rid of and consistently so, the view of times bygone that laws are written to last for decades as expressions of some kind of immutable objective justice. Laws should not be looked upon with submissive respect. For us they are working tools to be used to achieve political goals. . . . We are pushing our positions in the direction of our own values . . . pushing the positions all the time in all fields is the only possibility to get rid of, eventually, class society."⁶³ In this way he implemented the basic Marxist philosophy that the Law should not be used to protect the inherited values, but rather should operate as the motor in society's progression towards the ultimate, the end station of history: Communist society.

F. *The Adverse Judgments of the 1980s*

A long and deceiving calm followed. It mostly reflected the efficient muzzling of dissenting voices.⁶⁴ Faced with the massive hostility of the media, controlled mostly by the unions which in their turn were part of the Socialist machine, dissenters were mainly relegated to *samizdat* activity. It went so far that in 1981 Sweden was called the country in which the public lie had arrived at dizzying proportions.

Then suddenly, the early 1980s witnessed a formidable amount of Swedish complaints in Strasbourg, shaking the Swedish political leadership which by and large, and irrespective of political persuasion, remained ignorant of the Convention and alien to its principles. The cases lost by the Swedish government, or settled by

60. G. Petré, SvJT, 136 (1980).

61. Riksdagsberättelsen Ju. 52 (1970).

62. Schmidt, *The Prospective Law of Marriage*, ScSt 213 (1971).

63. Pappersindustriarbetareförbundets kongresshandlingar, 190 (1974).

64. See Sundberg, *The Media and the Formation of Law*, in Festschrift für Dietrich Oehler 447 (R. Herzberg ed. 1985).

it, could evidently not be handled by use of the transformation theory. A new approach was necessary.

The first case lost was *Sporrong Lönnroth*⁶⁵ (although at that time already many other cases were under way through the Strasbourg system). In 1982, the European Court found the building bans and enormous delays which the applicants were subjected to at the expropriation proceedings against the applicants, to be in violation of the Convention, and in 1984 awarded an indemnity in the amount of one million Swedish crowns. In 1986, the government paid the award to the applicants and reported to the Committee of Ministers that according to a proposed new Act on building and planning, "all building bans of the kind that existed in the *Sporrong Lönnroth* case will expire on January 1, 1987; and no new bans can be issued thereafter." This made the Committee of Ministers declare that it had taken note and thereby exercised its function under Article 54. The Swedish government let it be known that this closed the case as far as the government was concerned.⁶⁶

This was hardly the whole truth. A quarter of one of the buildings affected by the proceedings was owned by somebody who had not joined the proceedings in Strasbourg. To this latecomer, however, an extra indemnity of 66,000 crowns was paid in 1985 on the theory that if he had been present in the Strasbourg proceedings, he would have been awarded this amount; but sixty-four more landowners in Stockholm had been subjected to the same treatment under the same expropriations plans during the same periods of time. Their total claim, computed along the same line, amounted to 86 million crowns. When this was rejected by the government, a new complaint was introduced before the Commission in Strasbourg. Moreover, while it was true that the building bans were abolished under the intended new system, the new system might be interpreted to mean that no land thereafter included the right to build upon the land. Land ownership had indeed been given a new meaning; but the new meaning looks pretty much like a permanent building ban on all land, and the point is that the lifting of the "ban" is now done by asking for permission to build. Whether this system is reconcilable with the holding in the *Sporrong Lönnroth* case is likely to be tested by more applications to the Convention organs in Strasbourg.

The next case lost was the *McGoff* case in October 1984;⁶⁷ but the case should be viewed in connection with the friendly settlement in the *Skoogström* case,⁶⁸ since both concerned the same issue: the length of detention proceedings before a suspect is placed before a court or an officer with judicial power under Article 5 (3). The case was lost because the period of time before a suspect came before a Swedish court had in these cases greatly exceeded the four days that had become the European minimum standard found in the case law of the European Court. By making a friendly

65. *Sporrong and Lönnroth v. Sweden*, Applications 7151/75 and 7152/75, 1983 5 EHRR 35; 7 EHRR 256.

66. For a more detailed account, see J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORT FOR 1985 (1987).

67. *McGoff v. Sweden*, Application 9017/80. The press release on the judgment, issued by the Registrar of the Court on October 26, 1984, is numbered C (84) 76. For a full account, see J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984 67-72 (1985).

68. *Skoogström v. Sweden*, Application 8582/79, 1984 7 EHRR 263; 6 EHRR 77.

settlement under Article 28 (b) in the one case while letting the other go to judgment, the Swedish government exposed itself to the double legal effect of treaty and precedent on an issue requiring changes in Swedish law and practice.⁶⁹

Under the terms of the settlement in the *Skoogström* case (besides paying Skoogström an indemnity), the Government agreed to publish a summary of the Commission's report to enable the Swedish judiciary and the prosecutors to avoid creating situations in violation of the Convention. In the resulting article, it was impressed upon the readers how important it was that the authorities make themselves familiar with what the decision of the Commission meant. "The more the police, the prosecutors and courts take into consideration the standards insisted upon by the Convention of Europe when they apply the present rules, the more supple will be the transition to a new system."⁷⁰ Moreover, sensing the impending loss in Strasbourg, the Government had already appointed in 1983 a Committee to oversee the relevant statutory rules. In 1985, this Committee proposed "a procedure according to which the prosecutor must submit to the court a request that the suspect be remanded in custody as soon as possible after factual deprivation of liberty, i.e., usually on the same day as he was apprehended or on the following day."⁷¹

Finally, in *Bramelid and Malmström*,⁷² also a case lost by Sweden, the Swedish government managed to convince the Commission, which had found the Swedish Stock Corporations Act to be in violation of the Convention, that the matter was taken care of by legislative change, and consequently there was no need for anything but the Committee of Ministers to make a decision in accordance with Article 32. In this case, the amendment of the Swedish statute—doing away with the compulsory arbitration proceeding that had been found in violation of the Convention—took place before June 7, 1984; the matter was decided by the Committee of Ministers on October 25, 1984. As a side effect of the latter decision, although nothing had been said about compensation of the applicants there, the Government indemnified them for the costs of the human rights litigation.⁷³

IV. THE INNER HISTORY OF THE CONVENTION IN SWEDEN

A. *The Philosophical Background*

In few countries was the European Convention the cause of such formidable philosophical difficulties as in Sweden. This had to do with the firmly established position which had been enjoyed by the Uppsala School in Swedish legal, political, and cultural life.

The prophet of the Uppsala School, or the Scandinavian Realists as they are often referred to, was Axel Hägerström. He entered the arena at the same time as Sweden entered the 20th century. After toiling for many years, he finally succeeded

69. See J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984 64-72 (1985).

70. J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984 70 (1985).

71. See *Gripen Anhållen Häktad: Straffprocessuella Tvångsmedel* m.m. 27 (1985).

72. *Bramelid and Malmström v. Sweden*, Applications 8588/79 and 8589/79, 5 EHRR 24 9 (1985).

73. *Id.* See further J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984 60-63 (1985).

in unseating the Boströmian school of thought, which until then had forged the ways of thinking for generations of university-educated civil servants. Thereafter, Hägerström carried the day.

According to the Hägerströmians, moral ideas are only value judgments; consequently, they are only expressions of emotions. To speak of the truth or non-truth of a moral idea was meaningless. Hägerström's thinking here finally carried into value nihilism. There were no objective ethical duties, only feelings of duty. Consequently, there could exist neither legal duties nor any corresponding rights. To know what was right, to feel what was right, to believe in justice or being righteous, all this was nothing but emotion.

It may seem as if Hägerström thus wanted to reduce concepts like legal rights and duties to absolute zero. His conclusion, writes Olivecrona, is however:

What we have in our minds when talking about rights is a power. But it is a power raised above the facts of social life. He, therefore, calls it a "supernatural" power. Since it is impossible to grasp this power with the mind, he also calls it "mystical," or "metaphysical."⁷⁴

But there he stopped. The actual use of the notion of a right in social life was a matter he left to others to discuss.

Others did discuss it, in particular legal scholars who were driven by Hägerström into a kind of academic Siberia, since they no longer could claim to be dealing with scientific truths. In fact, the better part of the first half of the 20th century was dominated by the lawyers' attempts to reestablish themselves in the academic community that dealt with scientific truth. Hägerström's pupil, Anders Vilhelm Lundstedt, was a leading figure in this; but there were many others. Addressing the notion of rights, he found them to be nothing but advantageous positions which have followed as a corollary to a consequence of maintaining statutory rules.

In this atmosphere, which lasted for more than half a century, the worst insult one could make was to suggest that one's adversary believed in natural law. None in the present generation of Swedish civil servants who received their legal training at the universities will be able to recall a kind word ever being said about natural law. Consequently, it is a sensational reminder, much called for, which is put forward by Professor Strahl in his university textbook *Makt och rätt* (Power and Law), where he says that "natural law ideas are in fact quite common abroad" (i.e., outside Sweden).

In such a context, the introduction of the notion of *human rights* meant a revolution. Are there limits to what the powerholders can lawfully will, to what the government can legitimately decree? The Swedish response was to try to distinguish the notion of "right" in the declaration of rights as different from the notion of "right" in statute law.

In statute law, the notion of right operates as a name for certain premises that must exist in order to make the specific, carefully specified, legal effects take place. The rights in the

74. K. OLIVECRONA, *THE THEORIES OF HÄGERSTRÖM AND LUNDSTEDT* 130 (1959).

declaration of rights should be understood as something different, namely as ideals, of necessity vaguely phrased, for the legal regulation of the coexistence of human beings.⁷⁵

Anticipating difficulties for his students, who had been fed the Hägerströmian message for so long, he suggests that in order to understand the new notion of human rights one should “conceive of the U.N. Declaration of Human Rights as a proclamation of ideals that the legislatures are exhorted to realize.”⁷⁶ But generally speaking, the Scandinavian Realists preferred to look the other way. The question whether the legal system is legitimate has no intelligible meaning, maintained Alf Ross.⁷⁷ “Nobody is interested in pursuing the search for criteria of validity” at this level, wrote Per Olof Ekelöf.⁷⁸ Having this for a background, it is perhaps not so surprising to hear that a favorite line of one of the Scandinavian Presidents of the European Commission, Max Sørensen (who succeeded Sture Petrén), was that “if the Continentals had not invented this human rights business, we Scandinavians needed never to bother about it.”

Scandinavian Realism did not make for bad lawyers. Excellent legal minds were to be found quite irrespective of the school: Sørensen himself is good evidence. But the outlook of the bureaucrats was affected, certainly in Sweden. Most who were exposed to the teaching of Lundstedt that rights do not exist have passed away now. For many it was a shocking experience. All that they had been told about right and wrong was only superstition? All legal discussion of the limits to the power of the state was only superstition? What remained found no outlet but by the worship of power, because power was no superstition. Thus, there developed a bureaucratic profile. The adoration of the state that had characterized the Boströmian school was gladly inherited, but it combined with the submissiveness faced with power which came from the Uppsala School. United in the person of the civil servant, the message of the two philosophical schools was that the state was God and state power was right. Scholarly discussion was barely tolerated. But servility, when associating with political power, became fashionable.

Bureaucrats taught in the Scandinavian Realist tradition were sure to find the Socialist tradition easier to understand than the Western human rights rhetoric. The Socialist collectivist philosophy, after all, subordinated rights to some overriding goal (making society develop towards Communism); and that meant that human rights could be no more than the mirror image of whatever legislation the powerholders enacted. The Scandinavian Realist felt at home.

B. *The Secret Marriage*

Sweden, furthermore, is faced with an important background factor in the form of the so-called “secret marriage” between the Social Democratic movement and the Uppsala School of Scandinavian Realism. There is a close relationship between the

75. I. STRAHL, *MAKT OCH RÄTT* 124 (8th ed. 1979).

76. *Id.*

77. A. ROSS, *DANSK STATSFORFATNINGSRÆT, Bd I*, 133 (1959).

78. P.O. Ekelöf, *Uttrycket gällande rättsregel. En studie i juridisk terminologi*, in *NORDISK GJENKLANG. FESTSKRIFT TIL CARL JACOB ARNHOLM* 117 (1969) —The passage is missing in the English version, see *ScSt* 71 ff (1971).

Swedish political leadership and the philosophy inaugurated by Hägerström: "Big Brother's Grandpa"⁷⁹ as he has been labeled. When, during the first decades of this century, Hägerström developed the philosophy that was to evolve into the Uppsala School, the benches in the hall were filled by the future leadership of the Social Democratic Party. A. V. Lundstedt made the school renowned for the manifesto that "rights do not exist." The usefulness of this philosophy to a political party which wanted to socialize the means of production in society became evident among the Socialists during the 1920s; and it was put to extensive use in their political campaigns, in particular in 1928 when their opponents chose the protection of property for their political platform. "You must understand, that the talk about a new statute being capable of violating the right of property is as meaningless as a parrot's babble" was a famous line of Lundstedt, coined for the fight.⁸⁰

Armed with this notion, the Social Democratic Party, which beginning in 1933 came to rule Sweden for almost half a century, set out to achieve socialization by legislatively voiding the contents of the notion of property. This policy, called "the socialization of functions" (*funktionsocialism*), only took away the functions of ownership and left the empty notion where it lay, the point being that no compensation was necessary. One of the masterminds behind this secret marriage was indeed Professor Östen Undén, who succeeded in redefining the right of ownership in such a way that the bureaucrats could handle it unhampered by the fact that philosophically it was meaningless.

To the bureaucrats too, the secret marriage was most beneficial. In the West, the notion of a right was coupled with the individual, not with the state; and rights emphasized personal initiative, not public organization. The Socialist view emphasized the latter, presupposing a positive role for government. A massive governmental involvement in all areas of society was required if one were to turn employment, health care, housing, old age, and disability pensions into some kind of "rights." The bureaucracy was given a vital role in representing the interests of the collective in society and in coordinating community activity. The bureaucracy saw little reason to regret joining a political movement intent upon expanding their base and enhancing the role of the bureaucrats.

This syndrome is well illustrated by the case of Dag Hammarskjöld, later the Secretary General of the United Nations. He had been Under-Secretary in the Ministry of Finance in 1936, after having completed a doctoral thesis written in a very Hägerströmian climate. He is reputed even to have coined the Swedish word for a planned economy: *planhushållning*,⁸¹ and he was the one who drafted the Swedish currency legislation in 1939 along such totalitarian lines that even today, a Swedish student in the United States with some kind of American grant cannot take the money out of his savings account in order to pay his way locally (rent, tuition, etc.) without

79. *EXPRESSEN* April 8, 1985. The "Big Brother" is, of course, taken from George Orwell's *1984*.

80. Compare Lundstedt, *The Responsibility of Legal Science for the Fate of Man and Nations*, 10 N.Y.U. L.Q.R. 326 (1933).

81. Von Baumgarten, *Det idehistoriska perspektivet*, in J. SUNDBERG, *SPORRÖNG LÖNNROTH, EN HANDBOK* 249 n. 92 (1985).

first cabling the National Bank of Sweden for permission. Otherwise, he commits a grave crime. In a letter written in 1958, Hammarskjöld indeed confessed that “meeting Axel Hägerström—as an individual and as a scholar—was not only one of the greatest experiences of my study years: but it has retained its importance throughout the years.”⁸² After ten years in the Ministry of Finance, Hammarskjöld received the corresponding post in the Foreign Ministry. Trying to find a potential successor to Undén, Dr. Tage Erlander, the Prime Minister at that time, insisted on making Hammarskjöld a member of his Cabinet. Hammarskjöld was hard to persuade—he confided that he always voted with other parties—but finally accepted and became Minister without portfolio in the Socialist Cabinet in 1951, from which post he was called in 1953 to become Secretary-General of the United Nations.⁸³ In the latter capacity, he then surprised his Western collaborators by being completely unconcerned with human rights.⁸⁴

C. Professor Undén and Human Rights

Knowing the outstanding importance of Dr. Undén in the field, his towering position generally, and his role as a link between the political leadership and the scholarly community, his analysis of the human rights issues should be noted.

While aloof to the rather exaggerated ways in which his colleague, Professor Lundstedt, pressed the message (a blend of pro-Socialist and anti-metaphysist statements), Undén definitely worried about the ban on all legal thinking that was implicit in the Hägerströmian message. Trying to come to grips with it in his contribution to a *Festschrift* for Hägerström in 1928 (*Några synpunkter på begrepps-bildningen inom juridiken*), he eventually put a textbook definition of the right of ownership into the 1946 edition of his book on movable property. He wrote:

Once the determination by the organs of the State what the interests of society and the individuals demand has yielded legal rules on how far the right of ownership extends or is restricted, then the Law will adapt its notions accordingly. The right of ownership is consequently a relative notion and a “functional notion.” It is built on the statutory rules in force and is used as a mere formula or unit of meaning.⁸⁵

This approach to the rights notion was thereupon made sacrosanct and finally, in 1962, introduced into the elementary textbook for law students, which meant that the generations of lawyers who have left the universities since the 1960s all carry the deep imprint of this type of definition.⁸⁶

Being asked on March 20, 1952, to sign for Sweden the First Additional Protocol to the European Convention, including the protection of property found in Article 1, Undén certainly felt the burden of his past. One cannot take the guarantee of human rights as a mere reference to what the statutes of specific municipal systems guarantee as a right, because should one do that, one would open up the possibility

82. M. WALLER, AXEL HÄGERSTRÖM - MÄNNISKAN SOM FÅ KÄNDE 207 (1961).

83. Y. MÖLLER, ÖSTEN UNDÉN. EN BIOGRAFI 399 (1986).

84. J. HUMPHREY, HUMAN RIGHTS AND THE UNITED NATIONS: A GREAT ADVENTURE 270 (1984).

85. Ö. UNDÉN, SVENSK SAKRÄTT. LÖS EGENDOM 84 (1946).

86. Å. MALMSTRÖM, CIVILRÄTT JÄMTE NÅ GRA GRUNDDRAG AV DEN ALLMÄNNA RÄTTSLÄRAN 24–26 (1st ed. 1962).

for any municipal system to decide for itself what kind of problems should be left out of the guarantee. That cannot be the idea behind a guarantee of human rights: it would not be meaningful. Sensing this, and with his background in the Uppsala School, Undén must have disliked intensely this First Additional Protocol protecting, *inter alia*, the right of property against statutory encroachment. The conflict burdened him, and he addressed it in an article after he stepped down as Minister of Foreign Affairs. He asserted there that human rights are nothing but a way to “stress the importance of certain democratic principles” so that they are “likely to be imprinted in a nation’s mind as self-evident and important values.”⁸⁷

Undén was known as “a Marxist lawyer who benevolently followed the great Socialist experiment to the East.”⁸⁸ He absolutely refused to equate Hitler’s and Stalin’s regimes.⁸⁹ He came to share increasingly the negative view of judicial independence that prevailed in the Socialist Camp. To him, judicial review was unacceptable.⁹⁰ The European system disgusted him in its judicial aspects, and he focused his interest on the working of the Committee of Ministers in the system. His approach was mirrored in the first Cyprus Case.⁹¹ The Greek application was declared admissible, and the Commission made its report and filed it with the Committee of Ministers. In the meantime, however, the British suspended some of the measures which were the subject of complaint. In the correspondence between Sture Petré, as a member of the Commission, and his Foreign Minister, Undén, the latter developed what he considered to be the role of the Committee of Ministers:

When the Committee of Ministers has been empowered to express its opinion as to whether a violation of the Convention has taken place, and to impose sanctions, the thinking has no doubt been, that the members should have a freer position than, for instance, members of a court. Not in the sense that the Committee of Ministers should be able to base itself on reasons of opportunity rather than on legal reasons; but in that way that the Committee of Ministers may for instance ignore a literal interpretation, if such an interpretation appears to be exaggeratedly rigorous. The Committee of Ministers may on the whole see more to the spirit than to the letter and need not stamp as a violation measures of minor importance. . . . The Committee of Ministers has to establish whether there has been a violation of the Convention or not. Reasonably, it should be possible to have a debate in which other members participate; but if the accusations are trifling or otherwise spurious, it would seem that the Committee of Ministers may refrain from taking action.

In the matter at issue, Undén held it to be correct, as Petré had done, to establish—in spite of the new British measure—whether there had been a violation in the past, “but as a rule, it should be better in view of the more extensive discretionary

87. Ö. UNDÉN, *TANKAR OM UTRIKESPOLITIK* 12 (1963).

88. F. PALMSTIERNA, *FRÄDERN I MIN HAND, MINNEN, 1945–73* 193 (1976).

89. Y. MÖLLER, *ÖSTEN UNDÉN. EN BIOGRAFI* 541 (1986).

90. Undén, *SvJT*, 260–63 (1956).

91. *Greece v. United Kingdom*, Application 176/56 (cf. Application 299/57). The most informative published account of these proceedings seems to be Bement, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 24 *Pitt. L. Rev.* 563, 570 (1963). Compare also the account given by the Secretary-General of the Commission, Anthony B. McNulty, *The Operation and Effectiveness of the European Convention on Human Rights*, 3 *U.S.F. L. Rev.* 231 (1969).

powers of the Committee of Ministers, that it declines to consider such an accusation.”

Towards the end of his rule, in the early 1960s, so many states had made declarations under Article 46 that a sense of uneasiness spread in the Foreign Ministry; questions in parliament were repeatedly addressed to the issue, and Undén became involved in public debate over the matter with the Norwegian Chief Justice Terje Wold. Undén, perhaps defensively, refrained from intervening in the debate over the implications in Swedish law of a hypothetical adversary judgment of the Hague Court, which debate had been initiated by Sture Petrén when reporting on his success as Government Agent in the case *Netherlands v. Sweden*, the so-called Boll Case;⁹² but when the matter of the European Court's jurisdiction was brought up, the Undén “Wall” was unbreakable. “I don't think so,” (Jag töcker inte det!) was his only reply.

D. *The Swedish Silence*

Faced with the combined might of political resolution and scholarly reputation, the bureaucracy at large lost interest in the European Convention. It was seen as a matter for a couple of experts in the Foreign Ministry and perhaps one or two professors. Being a foreign affairs matter, it was of absolutely no interest in the Swedish administration of justice.

The bureaucracy was all the happier to take this approach since the sense after the Lidbom intervention in the Diet in 1971 was that the Convention was a “political” matter. Ever since the advent of the “new teaching” in the late 1960s, the bureaucracy was aware that when a matter was called “political” in nature, it was not for them to deal with. It awaited political decision. Increasingly, this made the civil servants unwilling, or unable, to ask questions of principle. Just as the computer commits no errors, so the bureaucracy was committing none. Errors are committed only by the programmer, that is to say, the legislature.

This inability was certainly appreciated by the holders of power. The former Minister of Justice, Ove Rainer, says in his book, *The Powers*:

Work for the Government to a great extent being based on using judges for various tasks is something unique. Excepting that the system to some extent is used in Denmark and Finland, it is practically unknown abroad.

In many other European countries, it is customary instead that lawyers are employed and recruited from the law faculties or the academies to do legislative and treaty work. Theirs is a more theoretical and formal view of the law than the one we have. This difference in outlook is not an unimportant reason why we are in difficulties, e.g., in the application of the European Convention on Human Rights.⁹³

Among the bureaucrats, he was supported by their silence. Few people have an interest in making the situation under the Convention better known, it was said after

92. See J. Sundberg, *Implementing the European Convention on Human Rights in Sweden: The Boll Case Discussion*, in *LAW, RIGHTS, AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 69–82 (J. Sundberg ed. 1986).

93. RAINER, *MAKTERNA* 19 (1984).

the 1982 judgment in *Sporrong Lönnroth*. "Most people hope to prevent any further complaints being brought before the Commission based on the rule in Article 6 by remaining silent."⁹⁴

"Human rights" is an issue so charged that in the minds of ordinary people it is not easily dismissed as merely a matter of foreign affairs. The silence of the bureaucracy was resented. It was increasingly interpreted in terms of "the Swedish fear," the "lawyers' silence," or the "society of trembling knees" (*knäskälvesamhället*), a term coined by a Norwegian author and not kindly meant.

To this should be added the strange media situation. The Convention was a non-issue to most of the media because it was a legal matter and because so much of the thinking took place on the abstract European level, totally beyond the reach of the almost without exception legally untrained Swedish journalists. Time and again it would be discovered that the media had deliberately suppressed news forthcoming from Strasbourg. Perhaps the most sensational illustration of this occurred when the Swedish media had nothing to say about the friendly settlement between Sweden and four other countries on the one side, and Turkey on the other, while this news was reported the following day by most other European media. To the Swedish media, it was not news fit for print.⁹⁵

It remains for future historians to look at the avalanche of Swedish complaints sent to Strasbourg in the early 1980s and analyze what factors brought them about. My own impression from the period is, however, that a wave of indignation had been building up during the 1970s, waiting to be released by simple "bread-and-butter" information about the Convention. Feeling that they were abused in a highly taxed society, people increasingly focused their fears on the agencies that meant most to their lives and holding unchecked power: the social welfare board and the tax board. Feeling unable to receive a hearing either with the bureaucracy or in the mass media, people looked around in despair. Then, on September 29, 1983, the European Convention system profited from a completely unplanned marketing device. This was the careless remark of the Prime Minister, Olof Palme, mercilessly published by a major daily, *Svenska Dagbladet*, in which the Prime Minister referred to the European Court as the "kindergarten" of Justice Gustaf Petrén.⁹⁶ This type of childish comment was important in Sweden. The "Petrén's Kindergarten" image spread like wildfire and reappeared in numerous references in the press and elsewhere. It is thought provoking to find it mirrored in an editorial titled, "What the Kindergarten Can Do," which in fact reviewed an article in an American legal periodical by Professor Frowein.⁹⁷ Once information was forthcoming on how to use its instrumentalities, people's hopes turned to this "Kindergarten." In 1983 and 1984 some 10,000 copies of an instruction about the Convention machinery were released

94. Petrén, *Consequences of the Ratification of the European Convention on Human Rights in Swedish Law*, in *LAW, RIGHTS AND THE EUROPEAN CONVENTION* 50 (J. Sundberg ed. 1986).

95. See further the chapter on *The Friendly Settlement with Turkey*, in J. SUNDBERG, *HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORT FOR 1985* (1987).

96. For a full account, see J. SUNDBERG, *HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORTS 1982-1984* 36 (1985).

97. Frowein, *European Integration Through Fundamental Rights*, 18 *MICH. J.L. REF.* 5 (1984); comments in the editorial *Lekstugans möjligheter*, *Svenska Dagbladet*, June 16, 1985.

among the general public, followed by an edition of the Swedish translation of the Convention. This would seem to be a major element in the 1983 breakthrough of the idea.⁹⁸

V. THE SUCCESS OF AN IDEA

A. *The Change Summarized*

Let me summarize the changes now described. Here is Sweden, a country that succeeded longer than most to stay removed from the Convention. Behind the barrier of a different language, and faced with an uninterested bureaucracy, deeply impressed by the "secret marriage"; arrogant and ignorant mass media, massively hostile to the European idea; and a sleepy academic community, sometimes awakening to hope for a speedy transfer to the ranks of the bureaucracy, the European Convention remained almost unknown to the Swedish people for decades. Apathy and distance were not reduced by the fact that the Convention reflected an American constitutional tradition.

Then, out of nothing, came this sudden breakthrough of the early 1980s. Without any change worthy of mention in the basic legal structure in Sweden, the Convention was put to more use in Sweden than in any other European country, perhaps even a better use. This was a crisis of a fundamental kind. Evidently, traditional beliefs, attitudes, and values no longer commanded virtually automatic assent from most members of the Swedish society. That should drive thoughtful men once more to examine some of the bases of the legal order, and perhaps suggest new answers to old questions.

What has happened, of course, is a reminder of the force inherent in the human rights idea, turning the legal system upside down. It is also true that the change has much to do with the peculiar properties of the European Convention itself, that it was drafted as lawyers' law, making it an instrument that lawyers can handle. This makes us believe that the impact of the European Convention will go progressively deeper. It will do so because it also creates an American-type situation, characterized by a (relative) unity of language and a multiplicity of states. This makes it likely that factors that can be seen at work in the American environment also may be expected to make an impact in the European one.

Let us take a closer look.

B. *Irresistibility of the Lawyer's Approach*

The formulation in detail of the "rights" section of the European Convention made room for lawyers' universal quest for systematization and legal certainty. This was a major factor when the 11,000 cases were processed. Whenever a case was decided, the precedent of the action provided guidance for the Commission in similar cases. That precedents are followed means that announced doctrines are repeated.

98. For a more elaborate discussion, see J. SUNDBERG, HUMAN RIGHTS IN SWEDEN, THE ANNUAL REPORT FOR 1985 (1987).

The existence of a record of prior cases, combined with the Commission's desire to follow precedent, is a factor providing for the certainty of the law.

This effect, which perhaps may be identified with lawyers' instinct, received added momentum by the very nature of the Convention calling for an independent European systematization whenever national legal systems were challenged. The Convention extends a guarantee to the individual against the state. This guarantee cannot be made dependent upon that state and what it commands as its legal order, because otherwise the guarantee would be meaningless; it must rely on something that may be called the *autonomous European legal notion*. This has been firmly established in relation to the concept of "civil right" in Article 6, but it seems indeed called for in relation to almost any legal term used in the Convention. In this way, a nationally conceived positivism is swept aside, not by natural law (although perhaps there is room for that), but by the very European nature of the Convention.

C. *The European Limelight*

Europe is divided by the multiplicity of its languages. Not since cosmopolitan medieval times, when Latin was the language of daily communication throughout Europe's higher social levels, has Europe experienced the immediate intellectual community that goes with a common language. What this means may not be immediately understood in English-speaking countries, such as the United States, where everything written in English is readily accessible to any reader from any of the other countries.

In Europe, this multiplicity has meant a comfortable relative anonymity. For French- and German-speaking Continentals, observing what was taking place in one of the Scandinavian countries meant a real effort. Conversely, much would go unnoticed behind this language barrier.

This has been changed in no little degree by the European Convention. In Strasbourg, legal opinions and arguments stemming from the odd-language-speaking countries are (after proper release of the documents) made available in translation to English or French, the official languages of the Council of Europe, and thus available for all to read. Within the framework of the Convention, decision makers in Europe now have no more protection than they would have in the United States.

With the comfortable relative darkness gone, the civil servants in Sweden found themselves in the European limelight when their cases were taken to Strasbourg. For many, this was quite a traumatic experience.⁹⁹ It made them look with a great deal more apprehension to what could be expected from Strasbourg, and created among them an awareness of the European dimension in which they were acting. A recent cartoon in a Swedish daily makes the point convincingly. It shows a bureaucrat at his

99. Compare the excited reaction of my Norwegian colleague, Professor Atle Grahl Madsen (University of Bergen, Norway) when the international spotlight hit the strange Swedish practice to appoint NATO legal scholars to assist Swedish military commissions. Sweden adheres to such a prohibitive notion of "neutrality" that even joining the Common Market was supposed to be beyond reach: Norway is part of the military alliance known as NATO. See Madsen, *Sweden and Humanitarian Law*, 18 AKRON L. REV. 469 (1985).

desk. An unknown opens the doors and whispers: "God sees you, and so does the Court of Europe."

D. Room for a Pluralist Doctrine of Precedent

It is the American law under the jurisdiction of the several states that most resembles in character the situation under the European Convention. What lawyers have contributed in this field in the United States, therefore, also has a message for the Europeans. An important part of this message has to do with the doctrine of precedent.

In the United States, precedent has come to mean something very different from what is found in the British (now deserted) doctrine of *stare decisis*. It is a doctrine of precedent pluralist in character. The hierarchy of courts is not a matter of great importance. In every case argued, counsel on both sides will urge upon the court a whole flood of cases. Counsel and judges alike, when they quote cases, are likely to quote cases from other jurisdictions or even from inferior courts. For example, the seven volumes reporting the decisions of the New York Court of Appeals between January 1919, and October 1921, indicate that this New York court had cited 238 Massachusetts cases, 207 English cases, and 74 Illinois cases. Precedents are dealt with largely as illustrations. Lawyers cull from them phrases that seem to them well expressed. Precedent of this kind exercises no compulsion; it is evidently at most persuasive in various degrees.¹⁰⁰ It has been suggested that this tendency which the American Law Institute addresses as the *instinct of lawyers* ("our instinct to regard as authority the prior decision of any court on a matter pertinent to the case under consideration") is really the result of the use of the *case method* at the American law schools, the essence of which is the aim of finding the best solution to a problem on the bases of examples from many jurisdictions.¹⁰¹ Whatever this tendency does, it certainly creates an awareness of a common heritage among those who practice it.

To Europeans, it is then noteworthy that this American way of working also made room for national ambitions to overcome the multiplicity of jurisdictions and kept the system together as an identifiable (North) American legal system. It may suffice here to point to the more ambitious, so-called national law schools (in turn, influencing the writing of textbooks for their students) and to the American Law Institute. Its traditions of restatements that try to keep a national perspective of the legal development in spite of the multiplicity of jurisdictions lead eventually to the drafting of uniform laws to be adopted by the various states. The stunning success of the Uniform Commercial Code shows the viability of the idea.

Looking at Europe from this American perspective, it is soon discovered that things are under way which perhaps otherwise would go unnoticed. That the present European human rights system means a focus being set on the European cases is, of course, a commonplace; but it means more than that. Alessandra Luini del Russo puts

100. Report of Committee on Establishment, in *THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 67* (1973); cf. Radin, *The Trail of the Calf*, 32 *CORNELL L.Q.* 137, 158 (1946).

101. CROSS, *THE ENGLISH LAW OF PRECEDENT* 18 (3d ed. 1977).

it very perceptively: “[T]hrough the adjudication of these cases, a rich international jurisprudence of human rights has been developed by the two major institutions of the European Convention, laying the foundations for a *European common law of fundamental freedoms*.”¹⁰²

Polys Modinos puts it slightly differently: “[T]he case-law of the Commission and court is in [the] process of creating uniform law in the highly important field of man’s basic personal and civic rights.”¹⁰³

The European Court of Human Rights is no “fourth instance.” It lacks the power either to reverse or to annul the determination of the national courts. Consequently, one finds nowhere the hierarchical tie which is essential to many versions of the doctrine of precedent; but the American pluralist doctrine does not require that tie. The European legal systems, normally professing very lax versions of the doctrine of precedent, if indeed any at all, find no difficulty in making room for a pluralist doctrine. Such a doctrine is equally natural under the aegis of the European Convention as it is commonplace in the field of uniform law. Testimony to this may be obtained from the case reporting system published by Unidroit in Rome, covering the interpretations in national case law of the various Conventions establishing uniform law.¹⁰⁴ In the Nordic countries, the same phenomenon will be found in the field of the many and important Nordic uniform laws (the Sale of Goods Act, the Instruments of Indebtedness Act, etc.),¹⁰⁵ served by the case reporter series *Nordisk Domssamling*, and in particular in maritime law, since 1900 and to date served by the series *Nordiske Domme i Sjøfartsanliggender*.

The avenue is thus wide open to a development along the American lines, reinforcing the awareness of the European heritage; and the avenue is also open to a further development of European ambitions to overcome the multiplicity of jurisdictions and keep the system together as an identifiable European legal system.

E. Does It Pay to Argue the Convention?

Room for the pluralist doctrine is widened by adding the risk of reversal to the thinking. Judges do not as a rule care to risk reversals that can be predicted. The threat of censure by Convention organs today hangs over every national judiciary and administration. That threat evidently becomes more vivid and immediate when argument before the national court is developed by means of European precedents. Counsel is increasingly aware of this. The European Commission has also discreetly made its presence more felt in the national administration of justice by insisting, as a matter of exhausting domestic remedies under Article 26, that during such procedures the litigant should be able to put exactly the same questions and to raise exactly the same issues before the national court as may be dealt with by the

102. del Russo, *Prisoners' Right of Access to the Courts: A Comparative Analysis of Human Rights Jurisprudence in Europe and the United States*, 13 J. INT'L L. & ECON. 1, 4 (1978) (emphasis added).

103. Modinos, *Effects and Repercussions of the European Convention on Human Rights*, 11 INT'L & COMP. L.Q. 1097, 1107 (1962).

104. Uniform Law Cases.

105. See, e.g., Hellner, *Unification of Law in Scandinavia*, 16 AM. J. COMP. L. 88 (1968).

Commission and the Court later. Litigants desirous of exhausting their domestic remedies presumably impress the European dimension by such argument. What they say also may be interpreted as more pitfalls now being created for the career official: there are now more ways to commit a mistake which may speed the ascent of one's rivals to more elevated positions in the judiciary.

How effective is this? Studies focusing on the relevance of the Strasbourg practice in the several European states have tried to find the extent to which national courts have referred to and relied on that practice. If the results have been meager, this may be explained by the fact that these studies were undertaken long ago, and that they seem to use an unsatisfactory method. A judgment consists on closer analysis of three separate parts: the order, the opinion, and the argument of the parties, often but not always, summarized in the recital (or descriptive) part of the judgment. One cannot conclude from the fact that the Convention was not referred to in the order or the opinion that it was not relevant, if in fact counsel used it in his argument. A better approach (which also has been tried)¹⁰⁶ would seem to be to explore to what extent counsel includes the element of the Convention in his argument. A simpler approach, less wasteful in time and effort, is to ask counsel whether he thinks it pays to argue the Convention before the national court.

Among experienced practitioners in Sweden today the answer to the latter question is undoubtedly "Yes" (although with some reservations, mainly based on the diplomacy of the art). It is today—since the early 1980s—by no means unusual to find the Convention or Strasbourg cases referred to in argument, in particular written argument; and the judgment, while seldom mentioning this argument, will often be so drafted as to align itself with the position which seems desirable in view of the Convention arguments.

F. *Conclusions*

The European Convention's sudden breakthrough in Swedish legal life means a crisis for those who took the Swedish legal order as a self-evident and "given" entity and who never thought at all about fundamental legal problems, or if they did, they soon arrived at tolerably satisfactory answers, couched in terms of the values and beliefs widely accepted as unquestionably true. Suddenly they are forced to reassess some of the fundamentals of the situations and wake up to the Europeanization of the government and affairs of the Kingdom of Sweden.

This Europeanization of Sweden is in turn, as I believe to have shown, a result of the development of ideas with a definite American coloring and conducive to situations in which the Americans have the most extensive experience. The awakening will, no doubt, be traumatic. In a relative sense, the Americans have been much more aware of what is taking place in Europe than the Swedes. It is no coincidence that the discussions of these very European affairs which may be found in American legal periodicals vastly surpasses in volume, expertise, and insight

106. Cf. Lockwood, *The United Nations Charter and United States Civil Rights Litigation: 1946-55*, 69 IOWA L. REV. 900 (1984), see in particular Appendix.

everything that has been published about the European Convention in Sweden—in spite of the fact that Sweden itself is part of the Convention system. The Europeanization of Swedish legal life thus being progressively under way, it seems proper to pay tribute to the American Law for its role as a cornerstone in the European building.

