

## *Human Rights and Traditional Values*

by Professor Emeritus Jacob W.F. Sundberg

### **1. The Impact of Russia**

The European Convention system is suffocating in its own success. There are more than 100.000 cases in balance. The reason for this enormous onslaught of complaints is to a large extent the inclusion of Russia and the countries of the former Socialist Camp into the system : the Great Leap Eastwards.<sup>1</sup> Among the masterminds behind the inclusion of Russia were two Swedes, Mr Anders Björck who was President of the Parliamentary Assembly, and Dr Daniel Tarschys, at that time Secretary General of the Council of Europe.<sup>2</sup> It is a strange twist of history that Russia's difficulties with digesting the Convention system to no little extent resemble the difficulties experienced in Sweden when the system first appeared. Indeed, there are more similarities between the Swedish and the Russian systems than most people believe. Not only was the Bolshevik Revolution of 1917 met with the most optimistic expectations in leftist circles in Sweden, awaiting a world revolution that would bring the Proletariat to power. A hopeful Swedish delegation did indeed in December 1917 attend the meeting of the Council of the People's Commissars presided over by Lenin himself.<sup>3</sup> After the Second World War, leading members of the Swedish Cabinet felt entitled to lecture in Parliament the mistaken Soviets about how to arrive at the Socialist Utopia, the classless society.<sup>4</sup> Also the development of the *nomenklatura* in the Soviet Union had evident counterparts in the bureaucratic organisation of Sweden. Since all the members of the *nomenklatura* had been raised in the same Marxist-Leninist belief, and remained so formed even when assuming their corresponding functions in the new Russian bureaucracy after the dissolution of the Soviet Union, this naturally coloured their attitudes towards the European Convention, that had suddenly been thrust upon them. Their attitudes were not dissimilar from the attitudes displayed by the Swedish bureaucracy when faced with the Convention in the 1960s-1980s. Let us look into the matter more closely.

### **2. The Role of the Scandinavians**

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1 Russia began taking part in the court in the late 1990s. In 2000, the court received 1.987 appeals against Russia, or 8 percent of the total. At the end of 2008, the number of cases filed against Russia had risen to 27.250, or 28 percent of the total, far more than any other country, and out of proportion to its population.

2 dr Tarschys campaigned intensely in the international press, see e.g. his contribution "Europe Can Coax Even this Russia Toward Reform", International Herald Tribune 11-12 Feb. 1995, p 4 ; *idem*, "A United and Democratic Europe", International Herald Tribune 11-12 Oct. 1997, p 6.

3 This incident is mentioned in Sundberg & Sundberg, *Lagen och Europakonventionen*, IOIR No 95, with further references.

4 For detail, see Jacob W.F. Sundberg, *The European Convention on Human Rights and the Nordic Countries*, 40 German Yearbook of International Law 180-242, at 210 n 85 (1997).

Initially, the Strasbourg system was very much dominated by the Scandinavians, due to the number and distributions of the ratifications.<sup>5</sup> Before 1954, four of the eight member States were Scandinavian. Until 1958, the Scandinavians were at least four of thirteen. Until 1966, the Scandinavians were four of nine, having made declarations under Article 25. The President of the Norwegian Supreme Court, Rolv Ryssdal who joined the Court in 1972, was elected President of the European Court in 1985 and remained so until his death in 1998.

Professor Frede Castberg was the Norwegian member of the Commission 1960-1972, and he in turn was succeeded by Professor Torkel Opsahl (1972-1984). Denmark's first member of the Court was Professor Alf Ross (1958-1967) – a heavy-weight of the Scandinavian Realist school.<sup>6</sup> Sweden's first representative on the Court was Professor Åke Holmbäck (1958-1973), a close friend of the Foreign Minister Östen Undén. He was succeeded by Mr Sture Petré (1974-1976). Generally speaking, unlike the Danes and the Norwegians, Sweden preferred to see as members of the Commission the Under-secretaries of State in the Foreign Office. This remained the practice until 1983 when, due to opposition in Strasbourg, the Swedish representative Mr Danelius was released from the post of Under-Secretary and made Ambassador to the Netherlands instead (1984)

These two first appointments made by Denmark and Norway, Ross and Castberg, were legal philosophers with widely diverging views. Ross was as already indicated an icon in Scandinavian Realism and found himself in a rather odd situation when he had been recruited as a judge in the European Court. Because there he found himself in the company of a number of natural lawyers from the post-war European school – Süsterhenn and Verdross and Castberg<sup>7</sup>. Soon Ross found himself obliged to declare in an article from 1963, somewhat surprisingly, that in no way did he see any incompatibility between Scandinavian Legal Realism and the Law of Nature School.<sup>8</sup> So he declared not only for his Scandinavian readers but also for the world at large.<sup>9</sup> However, in contrast to Castberg who was a member of the European Commission and was submerged by interesting cases, Ross sitting on the Court had almost no cases.<sup>10</sup> This made him so frustrated that he finally authored a lamentation titled "A court out of work" (1964) and he refrained from having his mandate renewed when it expired in 1971. Because of this, it became Castberg who carried the Scandinavian banner in the new European environment, not Ross.<sup>11</sup>

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5 For a more detailed account, see Jacob W.F. Sundberg, *The European Convention on Human Rights and the Nordic Countries*, 40 German Yearbook of International Law 180-242.

6 Cf Jes Bjarup : "The most influential author within the Nordic countries has been Ross" – see *Authority and Roles* in Werner Krawietz, ed. *The Reasonable as Rational*. Festschrift till Aulis Aarnio, Berlin 1997, p 1-21, at p 5.

7 Alf Ross, *Naturrett contra Retpositivism*, TfR 1963 p 497-525. Concerning Süsterhenn see p 497, Verdross p 518 ff.

8 Alf Ross, *Naturrett contra Retpositivisme*, TfR 1963 p 497-525, see p 512 f.

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

10 Cf the account in Jacob W.F. Sundberg, *A Chair in Jurisprudence*, 48 *Scandinavian Studies in Law* 430-461, not 135.

11 See Frede Castberg, *The European Convention on Human Rights* (edited by Torkel Opsahl and Thomas Ouchterlony), Sijthoff & Oceana 1974.

### 3. 'An intellectual delusion?'

When Castberg was succeeded by Opsahl, the latter had his misgivings about the notion of human rights. He admitted that he simply had not a single clear idea about them. He was surprisingly outspoken, writing i.a : 'Is this only an intellectual delusion, the Emperor's new clothes, a fashion? Have smart illusionists in all countries united behind a big bluff, the Universal Declaration of 1948?'<sup>12</sup>

This was not very far from how the matter was seen in the Socialist Camp. Andrei Vyshinsky, one of the top Soviet lawyers, put in a mild reminder of the fundamental differences in legal philosophy in one of his interventions in the U.N. General Assembly's debate on the Universal Declaration : "Human rights cannot be conceived of outside the state; the very concept of right and law [is] connected with that of the state. Human rights [mean] nothing unless they [are] guaranteed and protected by the state ; otherwise they [become] a mere abstraction, an empty illusion easily created but just as easily dispelled."<sup>13</sup> Consequently, to the Soviets, like to most Socialists, American Constitutionalism was sheer superstition. In Marxist analysis, realism could not be arrived at by building on such foundations. This view was echoed throughout the Socialist Camp as seen in this Polish testimony "According to the official ideology of those days, it reflected an alien bourgeois concept of human rights. Attempts were made at quoting the Convention as an example of hypocrisy of the West, and at creating formal paper guarantees unable to stand the test of real life. Human rights, it was argued, could only find an appropriate place in the socialist system, and only in its 'Realsozialismus' version born in Soviet Moscow"<sup>14</sup>.

### 3. Pragmatic Swedes and their Reforming

In a formal sense, thus, the Scandinavians were dominant during the Convention's first period of existence. However, one may gather from indiscretions by contemporary participants that it took place while subserviently ogling the British who belonged to a Great Power having won the war and which at that time was occupying much of Europe. The main principle followed by Sweden was therefore to prevent any interventions in Swedish matters taking place. As a result the Convention remained 'a sleeping beauty' as far as most Swedes were concerned. The political wisdom in this was however probably not well understood in all places, and with the occurrence of the Greek Case action went outside of the Swedish borders, and in a moral-political vein Swedish activists launched a major attack on the new regime of the Greek colonels, a Strasbourg proceeding that however foundered when Greece withdrew from the Council of Europe. This released a development that introduced the Convention as an active force also in Sweden, although its role largely was limited to various procedural refinements, and did not touch any essentials.

Matters changed however when the Swedish Government lost the case *Sporrong Lönnroth* in Strasbourg, since that meant an attack on a political fundament of the Social Democratic rule,

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12 Torkel Opsahl, *Idéen om menneskerettighetene*, (The Human Rights Idea), see XVI Jussens Venner 267-283, på s 267 (1981).

13 3 (1) UN GAOR 924 U.N. Doc. A/119 (1948)

14 See Andrzej Drzemczewski & Marek Antoni Nowicki, *The Impact of the ERCHR in Poland ; a Stocktaking after Three Years*, 1 European Human Rights Law Review 261-286, at s 261. Marek Nowicki became Poland's first member of the European Commission.

fortified by the Uppsala School of the lawyers, and which therefore shook, but without affecting any traditional values. The case was seen as of concern only to lawyers

To summarize, the opinion among Swedes was mostly practical, not philosophical. The Committee of Ministers was seen as the end station of the proceedings before the Commission. The interest of the Swedish government when the Convention was drafted therefore mostly focused on the powers to be given to the Committee of Ministers and 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.<sup>15</sup> From that end station it should be possible for a respondent Swedish 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. So Sweden was the first to accept this right of individual complaints and with no limit in time. Furthermore, the reduction of the rights into precise 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. Nobody seems to have realized that in this way the individuals were given a legal instrument for their protection which lawyers could handle, a by-product of the paramount consideration.

The high Swedish judiciary traditionally lived in splendid isolation as soon as international matters were in issue. This had to do with administrative difficulties preventing the justices of the Supreme Court to get sufficient leave of absence to be able to participate in international congresses; to find a high Swedish judge in such a gathering was a rarity and consequently the high judiciary was no privy to international debate of the new European system.<sup>16</sup> Furthermore, their command of other languages than Swedish was normally very limited. The problem was thus to no little degree to involve the judges in the debating of the Convention system.

An important step in the subsequent development was a colloquy in 1983, bringing together representatives of the high Swedish bureaucracy and organs of the Convention. The transcript of this colloquy proves to be fascinating reading<sup>17</sup>. The colloquy's great service

<sup>15</sup> See Love Kellberg, *Den svenska inställningen till Europarådskonventionen för mänskliga rättigheter* (The Swedish attitude towards the European Convention on Human Rights)", in *Festskrift till Lars Hjerner, Norstedts 1990*, p299-311, p p 302-304. Compare Sundberg & Sundberg, *Lagen och Europakonventionen*, IOIR nr 95, p 14-16.

<sup>16</sup> It generated some surprise at the AIDP world congress in Hambourg 1979, that the European Convention was not even mentioned in the Swedish Report which had been authored by Messrs Gunnar Berg and Thorsten Cars, about the protection of human rights in criminal procedure; nor was it mentioned in the corresponding Turkish Report, see Berg & Cars, *Protection of human rights in criminal procedure*, *Revue internationale de droit pénal* 1978 nr 3, pp 340-355. (XIIe Congrès International de Droit Pénal, Hambourg 1979. Deuxième Question. "La Protection des droits de l'homme dans la procédure pénal"). Cf Jacob W.F. Sundberg, *Sverige mot Österrike och vice versa*, IOIR nr 133, s 7. At that time dr Cars was chief judge in the district court of Stockholm.

<sup>17</sup> Jacob Sundberg, ed., *Laws, Rights and the European Convention on human rights*, Rothman 1986; in Swedish, *idem*, red., *Lagar, rättigheter och Europakonventionen om de mänskliga rättigheterna*, IOIR nr 50; see also the review by Christna Cerna, 81 *American Journal of International Law* 798-799 (1987) ("a model colloquy that invites imitation by all governments parties to the European Convention"); and Ronald B. Waxman, 6 *International Tax & Business Lawyer* 220-224 (1988) ("fascinating reading").

was to show members of the high Swedish bureaucracy and organs of the Convention how each of them was perceived by the other. That was a breakthrough event and broke some of the isolation.

Equally important in doing this was a semi-academic exercise with students pleading the European Convention issues in front of panels consisting of high judges from the highest courts in the five Nordic countries, all using their own Scandinavian languages.<sup>18</sup> When representatives of the high Swedish judiciary, presidents of the various supreme and appellate Swedish courts, listened to the many hours of student pleadings based on the European Convention, they also familiarized themselves with the Convention in a way that no cursory reading could match.<sup>19</sup> The European message was coming through. And when the judges retired into the panel's internal deliberations in the Scandinavian languages they were also exposed to the European debate that so long had been absent in Sweden.

Indeed, the Swedish bureaucracy had otherwise little or no ideas at all about human rights. Human rights questions were considered to be, by their nature, foreign policy questions.<sup>20</sup> That meant that the functionaries in the Ministries must refrain from criticizing publicly decisions taken by the Government and their effects. The high bureaucracy felt discouraged from making itself even visible once it sensed that the Government had taken a position. When a matter was called 'political' in nature, it was not for the bureaucrats to deal with ; it awaited 'political' decision, and called for holding back all criticism that could disturb the endeavours of the power-holders or their peace of mind.<sup>21</sup> Being a foreign affairs matter, it was furthermore of absolutely no interest in the Swedish administration of justice.<sup>22</sup> Just like in the Socialist Camp, the judge was part of the unitary administration. The former Minister of Justice, Ove Rainer noted this 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."

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18 This exercise has generated a rich literature of which the following may merit mention : Klagomål mot Kalmar Unionen, En antologi ägnad tävlingen om det Sporrang Lönnrothska Priset, IOIR nr 70, and Jacob W.F. Sundberg, ed., Jubileumsantologin Sporrang Lönnroth, IOIR nr 100 ; cf Jacob W.F. Sundberg, *An American Idea in a Nordic Setting. The Nordic Human Rights Law Moot Court Competition*, 49 *Revue hellénique de droit international* 289-299 (1996).

19 Of course it was a great help that the Nordic judges in the European Court kindly participated as presidents in the judge panels, guiding their deliberations.

20 "Konventionssystemet blev en sak för en handfull tjänstemän inom utrikesdepartementet" (The Convention system became a matter for a handful of functionaries in the Foreign Office) : Sundberg & Sundberg, *Lagen och Europakonventionen*, IOIR nr 95, p 16.

21 Reference may be made to the debate between Peter Löfmarck and Clas Nordström concerning to what extent an officer in the Ministry should abstain from criticizing a Cabinet decision and its effects, the debate is being reported in Jacob W.F.Sundberg, *Om mänskliga rättigheter i Sverige eller en stillsam betraktelse över punkt VII i Helsingfors-dekalogen*, (On human rights in Sweden or a mild reflection upon Paragraph VII in the Helsinki Decalogue), *SvJt* 1986 p 653-694, at pp 680-681. See also Jacob W.F. Sundberg, *Huntford och Europakonventionen* (Huntford and the European Convention), IOIR No 148, p 11, 17 with further references. – Incidentally, the reasoning of Mr Löfmarck closely resembles the one of the Russian judge Kovler, dissenting in the Strasbourg case *Kudeshkina vs Russia* (Appl. 29492/05, judgment 26 February 2009).

22 Compare Gustaf Petrén, *Lagrådsintryck* (Impressions from serving in the Law Council), *SvJT* 1980 p 133, 136.

And Rainer concluded, that the difference in outlook was a not unimportant reason for Swedish difficulties, e.g. in the application of the European Convention on Human Rights.<sup>23</sup>

Because of the close connections between the lawyers in the Ministries and the law faculties, this attitude rubbed off upon academic lawyers. Human rights was not a matter for scholarly research, and there was no reason for taking human rights seriously.<sup>24</sup> Here was a clear parallel to the Communist regimes under which judges were never seen as being there to protect the individual against the state but rather to execute the political will. Indeed, the Swedish view of legislation was pretty much the same as in the Socialist Camp. Statutes were working tools to be used to achieve political goals, indeed to operate as the ‘motor’ in society’s progression towards the Socialist Utopia.<sup>25</sup> Dr Lennart Geijer, a Minister of Justice, stated this in no uncertain terms : “Behind 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 the government. It is consequently a dangerous saying.”<sup>26</sup> And some twenty years later, faced with the representative of a new different government trying to advance the position of the Convention in the administration of justice, a spontaneous bureaucratic comment was “He seems to believe that the judge’s office is directly subordinate to God the Father Almighty”<sup>27</sup> .

#### 4. Taboos in Swedish Walls

This attitude had its repercussions. The silent bureaucracy did not want public debate to be less silent. The less that was known about the Convention, the better. “Most people hope to prevent any further complaints being brought before the Commission based on Article 6 by remaining silent.”<sup>28</sup> But while there exists a whole literature about Swedish problems under the Convention – indeed i.a. five annual reports<sup>29</sup> – it remains completely unknown in Sweden, the bureaucratic minded Swedish legal periodicals always refusing reviews. But the publications have found reviews outside of Sweden! Swedish journalists – and lesser mortals

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23 Ove Rainer, *Makterna* (The Powers), Sthlm 1984, p 24.

24 Juridiska fakultetsnämnden i Stockholm (The curriculum committee) 26.11.1982, see for more detail Jacob W.F. Sundberg, *Ur Juridiska fakultetens liv*, (Reporting from the life of the Law Faculty), IOIR No 93, s 25.

25 Carl Lidbom, *Pappersindustriarbetareförbundets kongresshandlingar 1974* s 191.

26 Lennart Geijer, ”Domstolarna i dagens samhälle” (The courts in today’s society), address in Juridiska föreningen i Lund 22.2.1973; cf Jacob W.F. Sundberg, fr. Eddan t. Ekelöf, IOIR No 41, p 201 not 22.

27 Anonymous article *Maktspel. Fimpa med Gun* (Power Play. Sacking in Gun’s way), 1992 nr 14. p 40-43, at p 41. (Gun Hellsvik was at that time the Minister of Justice.)

28 Gustaf Petrén, see the account in Jacob Sundberg, ed., *Laws, Rights and the European Convention on Human Rights*, Rothman 1986, p 80; in Swedish idem, ed. Lagar, rättigheter och Europakonventionen om de mänskliga rättigheterna, IOIR No 50, p 57.

29 Jacob W.F. Sundberg, *Human Rights in Sweden. The Annual Reports 1982-1984*, IOIR No 60 ; *idem*, *Human rights in Sweden. The Annual Report 1985*, IOIR No 67 ; *idem*, *Human Rights in Sweden. The Annual Report 1986*, IOIR No 72 ; *idem*, *Human Rights in Sweden. The Annual Report 1987*, IOIR No 77 ; and *idem*, *Human Rights in Sweden. The Annual Report 1988*, IOIR No 88. Jacob Sundberg, ed., *Laws, Rights and the European Convention on Human Rights*, Rothman 1986. – None of these works were ever mentioned in Swedish legal periodicals or otherwise in scholarly contributions, no reason ever given by those at home in the *nomenklatura*. In common parlance among the bureaucrats, ‘it stuck in the walls’.

– must have felt a direct taboo being imposed on them as to reading the Convention, and, worse, understanding and discussing it. - This resembles to some extent Stalin’s tabooing of any mention of the manmade Ukrainian famine of 1932-33. “Why does everybody keep this deadly silence. Every communist to whom you mention the hunger, glares at you as if you talk of treason.”<sup>30</sup> Stalin’s taboo did not need written directives, and had none. The Russians sensed it anyway : ‘it was in the wind’ as it was put. In Sweden, again, you sensed the taboo ‘in the walls’ of the office buildings.<sup>31</sup>

## 5. Sweden’s Opening Up To Europe

But change was coming. *Gutta cavat lapidem non vi sed saepe cadendo*. Europe has rarely experienced the immediate intellectual community that goes with a common language and which to the people of the American continents is something selfevident Swedish administration of justice being based on the Swedish language exclusively has meant a kind of comfortable relative European anonymity for Swedish bureaucracy. *Incidentally*, the same goes of course for the Russian *nomenklatura*. For Continentals and the British observing what was taking place in Sweden or Russia has meant a real effort. Most matters would go unnoticed.

This has been changed to no little degree by the European Convention. In Strasbourg, legal opinions and arguments are made available in English or French, the official languages of the Council of Europe. Thereby they become open for everybody commanding one of these world languages. The language barrier protection is gone.

Cases being taken to Strasbourg thus came to mean that the civil servants in Sweden suddenly found themselves *exposed* to the European limelight. The comfortable relative darkness gone this was quite a traumatic experience for many. This operated towards making the Swedish bureaucracy read the Convention and start taking it seriously It made them look with a great deal more apprehension to what could be expected from Strasbourg, and to create among them an awareness of the European dimension in what they were doing. A contemporary cartoon in a Swedish daily makes the point. It shows a bureaucrat at his desk. An unknown opens the door and whispers . “God sees you, and so does the Court of Europe.”

## 6. The Turning Point

”The account now given shows what a great success was the *early* European Convention. Evidently this was to a large extent the consequence of that it built on traditional values on the European Continent, or pretended to build because in fact there had been great aberrations from those values in the bloody history of the continent, most importantly the Nazi ideology in Germany with its adoration of force and violence and the extermination of Jews. The attitude was much facilitated by the Iron Curtain, which kept out of sight the Marxist-Leninist ideology of the Socialist Camp which certainly deviated on many points from what was believed to be European traditional values. Thus, to Strasbourg this did not mean a problem. And to Stockholm where the *nomenklatura* certainly felt uncomfortable with the demands of the Convention, it was a consolation that after all its main impact followed from Articles 5

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30 Anna Louise Strong, *I Change Worlds*, New York 1935, p 373.

31 Compare here the characterization of the prevailing Swedish mentality in Roland Huntford, *The New Totalitarians*, London 1971, p 293 : “they have an urge to think as everybody else does. In consequence, they have developed a kind of inhibition, what the Russians call ‘the inner censor’ , that tailors the expression of their thoughts to prevailing views.” Huntford’s mother was Russian.

and 6 which were procedural in character. They meant that there were some new ways to make technical mistakes, but they did not challenge any traditional values.

The Great Leap Eastwards brought some confusion to the ranks but it was mitigated by the willingness in the new member states to discard the previous system and adopt the ideology found in Strasbourg. That the dissonance would bring a deluge of complaints to Strasbourg was perhaps not anticipated, but now it is a fact! The avant-garde here seems to be avid learners in the countries with the Latin alphabet such as Poland and Hungary

Challenging traditional values was consequently not a great problem until the human rights people turned against the world at large, trying to impose the ideas behind the Universal Declaration and the follow-up instruments that came to light in the UN setting.

### 7. Externalization

Sweden switched to *externalization* in the late 1980s, meaning that the major task from then on was to realize human rights programmes globally. The European Convention was identified with *internalization* and was seen as a matter of secondary interest.<sup>32</sup> The European Convention had hardly meant any sensations. It stuck to traditional European values and challenging traditional values was consequently not a great problem. But turning to the world at large was something very different. The human rights people now were trying to impose outside of Europe the ideas behind the Universal Declaration and the follow-up instruments that came to light in the UN setting.

As the aftermath of the world war, Sweden felt surrounded by ‘non-existing cultures’. Germany did no longer exist, nor did the Baltic countries.<sup>33</sup> Looking around for something to do, the Swedes put their eyes on very far away countries.

By the late 1960s, most teenagers (and younger voters) supported aid to the underdeveloped countries, as they had been taught at school. The younger Swedes were uniformly and overwhelmingly in favour of overseas technical aid, with a degree of emotionalism that may surprise the outsider, wrote Roland Huntford, observing the obsession with the underdeveloped countries.<sup>34</sup>

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32 The key-word became *externalization* and this appears toward the end of the 1980s, the idea being to propagate all over the world for the domestic system of government and to maintain that by doing so the regime is advancing human rights worldwide. – See Human rights in Sweden. The Annual Report 1986, IOIR nr 72 p 143 The new work undertaken at Government level was explained at a conference in Lund 1986. It meant planning low-level school teaching, using key words such as ‘international solidarity’ and ‘understanding between the peoples’. The European Convention, with its focus on the rights of the individual as against the state, was treated so marginally that questions were raised in the audience. In reply, the participants were told that this aspect – called “internalization” of human rights – was not very much favored in the teaching plans: it was almost “taboo”. This expression brought further questions as to what might happen if one or another teacher, dealing with the children’s orientation in society, nevertheless were to touch upon the European Convention. The [144] answer given was that neither punishment, nor disciplinary measures were anticipated. However, “externalization” of the human rights teaching was clearly favored, meaning commenting upon human rights in places abroad such as, e.g., Pakistan.

33 Per Olov Enquist, Ett annat liv, Norstedts 2008, p 142. ”Det *tyska* var alls ingen självklarhet. Ännu, i krigetd mentala efterföljd, var Berlin eller Tyskland något för svenskar nästan icke existerande. Nästan som de baltiska staterna, tänkte han ibland. Sverige tycktes omringat av icke existerande kulturer.”

34 Roland Huntford, The New Totalitarians, London 1971, p 218-219.



All this happened toward the end of the 1980s. At that time the Covenant on Economic, Social and Cultural Rights (hereinafter ESC Covenant) had finally become operative and a monitoring Commission had been created and started working in 1987. As far as Sweden was concerned this coincided with the switch to *externalization*. But, what was the programme that was going to enrich the world?

It originated in the World War II Atlantic Deklaration promising "freedom from want" and this formula had been reproduced in the Articles of the Universal Declaration, followed by a cluster of subsequent Conventions focusing on social, cultural and economic rights.

They were to be realized by the Swedes, assisted by SIDA-money. Most organizations in the Swedish aid business got their money for their aid projects almost exclusively from *Sida*. Consequently, whatever policy that had been accepted by the political actors in Sweden became at the end of the day decisive for how the aid organizations should develop their ideas about government under the rule of law, in turn dominated by the Social Democratic vision of total social equality.

The Programme was enthusiastically supported by the new generations, raised in the spirit of 1968 and understanding Sweden as being the 'moral superpower' of the world.<sup>35</sup> In other words, there was a great deal of *hybris borealis* behind the 'externalization' at the same time as the importance of the European Convention was reduced.<sup>36</sup> As a matter of fact, the ESCR-work meant no little amount of social imperialism. The world was to be made new on the pattern of the Swedish model, i.e. the Social-Democratic way of government. - But since Sweden was in these days quickly turning into an *avant-garde* type of society that above all attacked the notion of family, marriage, and religious convictions, this also meant a drastic confrontation with *traditional values* in a way that hardly was understood in a country replete with *hybris borealis*, in which people lived in the belief that Sweden was guiding the world toward happiness and success

Challenging traditional values was consequently not a great problem until the human rights people turned against the world at large, trying to impose the ideas behind the Universal Declaration. The origin of these ideas has been well explained by Professor Mary Ann Glendon in her marvelous book "A World Made New"<sup>37</sup>, and the Western imprint on the ideology comes out clearly although sincere attempts had been made to include also non-Western elements. The world now became a battlefield between Western ideas – such as the rule of law and democracy - and traditional values nurtured in millenium-old cultures. The struggle did not become less acute by the UN Conference in 1983 declaring 'human rights' to be of universal character.

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35 Huntford, IOIR nr 148 p 9 : "At the time, the Social Democratic party had decided that interest in the underdeveloped countries and support through technical assistance were politically profitable."

36 Traditional values does not appear as a notion during the first Swedish period, a period dominated by disputes about criminal procedure, civil procedure and questions of ownership. Contrariwise, the notion comes to the forefront when the system has switched to cultural imperialism, which happens exactly when externalization is turned to.

37 Mary Ann Glendon, A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights, Random House, New York 2001.

When Roosevelt's promises in the Atlantic Declaration about "freedom from want" was to be made a 'human right' in the Universal Declaration, the end result was the motto that every need was turned into a human right : "Where there is a need there is a human right". If there was a need in the world, apply the Swedish solution to it!

Traditional values was not on the list during the first Swedish period ; it mainly concerned penal procedure, civil procedure and property rights. But this very notion comes to the forefront when the system has moved on to cultural imperialism. When such basic traditional values as marriage and religion are faced with drastically different cultures such as e.g. the Moslem ones, dramatic conflicts arise. The notion of 'human rights' which is the standing phrase in most intellectual exchanges then suddenly in these matters turns out to be next to meaningless or simply aggressive. - But it also becomes a weapon to turn against sceptics, who suddenly find themselves classified as 'enemies of human rights'. Human rights will become threatening uncertainties in the hands of the governmental authorities, capable of silencing anybody. The externalization thus turned into a supreme diversion silencing the criticism that the European Convention had released against the kingdom

In order to understand the situation there is reason to look at the *anti-spanking* phenomenon and at the *gay marriage* phenomenon, two areas where Sweden has attempted to have a leading position without being particularly interested in how to relate to foreign cultures dominated by *traditional values*.

## **8. The spanking ban**

An increasing destruction of the family notion in Sweden, taking marriage with it, is at the bottom of Swedish cultural imperialism. Childrearing professionals in the 1970s and 80s began using their influence to press an intensely child-centered view of the family. As a result, in this now rapidly changing area of the law that however lies the heart of our children's education and future, only one side of the story is normally being told in Sweden.

The ban on spanking unruly children was addressing a way of handling children that certainly fits into the category of traditional values. Sweden's role as torch-bearer here for the ban seems to be much due to her enormous social bureaucracy and her efficient ways of silencing dissent.<sup>38</sup> Serious research into the matter has been taboo.<sup>39</sup>

The anti-smacking legislation that was adopted in Sweden in 1979 – indeed adopted by a minority Government, eager to cut a profile politically – was formulated in a rather disastrous

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<sup>38</sup> This very Swedish phenomenon is well illustrated by the experience of *Radio Free Europe* (a radio network, set up by CIA in 1949 to counter Communist propaganda). It wanted to find out what reception it got among listeners in the Socialist Camp, and it was able to organize, undisturbed, in 1981-1982 a number of listener inquiries in some of the Socialist Camp states, see e.g. "Eastern Socialism – Western Democracy and the functioning of the two systems" (November 1981); "Polish Attitudes Towards Solidarity Prior to the Military Takeover", "Czechoslovak, Hungarian and Polish Attitudes Toward a 'Serous Conflict' Between the United States and the Soviet Union" (December 1981); and "Attitudes to the United States and the Soviet Union in West and East Europe" (March 1982). However, organizing a similar inquiry among listeners in Sweden turned out to be impossible, due to counterwork and sabotage from media and political cercles in Sweden (as per an insider report to Jascob Sundberg).

<sup>39</sup> Reference may here be made to the contrasting recent very scholarly article : Jason M. Fuller, *The Science and Statistics Behind Spanking Suggest that Laws Allowing Corporal Punishment Are in the Best Interest of the Child*, 42 Akron L Rev 243-318 (2009).

way. It said “A child may not be exposed to corporal chastisement or *other insulting treatment*.”<sup>40</sup> It does not require any legal training to see that this is an oxymoron. Most small children do not have sufficient linguistic command to understand that a comment is ‘insulting’ and there is no bottom age limit set. In fact, when the matter was brought before the European Commission on Human Rights in the case *Blom and Others vs Sweden*<sup>41</sup> the Swedish Government Agent suggested that the provision was not meant to be taken seriously, and consequently nothing to complain about. However, it turned out that personnel in the schools and day-homes taught the children that it was criminal for their parents to spank them or somehow hit them, and the cases that attracted most publicity were naturally those in which children informed upon their parents and the parents were subjected to criminal proceedings. It goes without saying that the atmosphere in such a family thereafter was less than harmonious, and it was not unnatural that the social authorities thought it best to take the little informer into public care. But there were of course other informers around – neighbours, disgruntled spouses, and career-prone bureaucrats – and the governmental authorities thought it to be ‘progressive’ to drown the population in propaganda how good it was that corporal chastisement was outlawed in Sweden. They even invested resources in producing leaflets in Finnish and other foreign languages to tell passing tourists that when in Sweden spanking their kids was not permitted, whatever mischief the kid had done – as e.g. the older ones beating the younger ones, a rather frequent case. The way the boy ‘Emil’ was locked up in the wood cabin in world-famous author Astrid Lindgren’s popular books was now criminal.

The reform challenged certainly the traditional values. It undermined the family tie, with a lot of mischief following. It turned little children into informers upon their parents, and the social bureaucracy into a super-nanny with a kind of police powers as against the parents. Destruction of the family notion in Sweden is thus at the bottom of the cultural imperialism that was adopted.

#### a. **The family – a conservative tool?**

In Socialist and Communist quarters – of considerable impact in Sweden and Finland of those days -, the family notion was always met with mistrust, since it was considered to be a conservative identity that transmitted the ideas of the old generation onto the young ones -. thus obstructing governmental attempts to form the young generation in the progressive ideology of the Government. This mistrust led Socialist Sweden to become the first country to completely ban spanking, indeed allowing courts to equate criminal assault with spanking by caregivers. The anti-spanking law was proposed and passed with the hope that it would create a ‘cultural spillover’ of non-violence, and a society that does not need correction. Indeed, in 1996, Italy’s Supreme Court affirmed that ‘the very expression *correction of children* expressed a view of child-rearing that is both culturally anachronistic and historically outdated.’<sup>42</sup>

#### b. **Swedish international success**

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40 SFS 1979 No 122, adopted 22 March 1979. My italics.

41 Appl. 8811/79, inadmissible 13 May 1983, press releases B (80) 14, B (84) 21.

42 See UN Children’s Fund (UNICEF), *Children and Violence*, 7 Innocenti Digest No 2 (Sept. 1997)., at 7.

The Swedish legislation was initially greeted with derision and scorn. However, Sweden started an international trend . Many countries have felt compelled to ban spanking since 1989 when the United Nations wrote the Convention on the Rights of the Child (the Convention) – a “treaty” that has been ratified by all U.N. member nations except the U.S. and Somalia. The Convention was Communist Poland’s gift to the world. The U.N. monitors compliance with the Convention through the ten-person Committee on the Rights of the Child.<sup>43</sup> U.S. Courts have already begun using it as persuasive authority, under the doctrine of “customary international law”. The Supreme Court indeed has used the Convention when determining whether a minor may get the death penalty<sup>44</sup>. The European Committee of Social Rights currently is urging all 45 of its member nations to ban corporal punishment. In June 2008, the Council of Europe launched a campaign to eliminate corporal punishment of children, hoping to debunk “some of the myths that have sustained the existence and ‘legitimacy’ of violent discipline”.<sup>45</sup>

### c. **Muted Swedish debate and Outspoken Finns**

When this legislation was introduced in Sweden in 1979, there was very little Swedish public discussion : “Characteristically for Sweden, public debate on the issue was muted” it was said in Time Magazine.<sup>46</sup> 98 % of Parliament voted to ban all spanking in 1979. But a parallel to the Swedish legislation was introduced in neighbouring **Finland** a few years later. This piece of legislation - Act on the custody of children and visiting rights<sup>47</sup>- has a provision which is almost verbatim a copy of the Swedish provision, but in Finland it released a public discussion among the lawyers responsible for the drafting of the provision which is quite explicit - in contrast to what took place in Sweden. The main purpose of the act as discussed among Finnish lawyers was to abolish the lien of subordination between parents and children. To quote the Government’s legal draftsman, Matti Savolainen : “There is from now on no relationship of subordination, no right to force or punish a child that could be a defence against a prosecution”. “The relationship of subordination between parents and children is explicitly abolished.”<sup>48</sup> It follows that the basic purpose of the anti-spanking ban is the destruction of the traditional family, and the state is charged with the role of a ‘Super Nanny’, supposed to become the bulwark, protecting the young. It is perhaps no surprise if it does not succeed very well.

### d. **The critical discussion : US critics**

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43 G.A. Res. S-27/2, § 29, U.N. GAOR 27<sup>th</sup> Spec. Sess., U.N. Doc. A/RES/S-27/2, A, *World Fit For Children* (May 10, 2002) (urging all countries to consider , as a matter of priority, signing and ratifying or acceding to the Convention on the Rights of the Child.)

44 *Roper vs Simmons*, 543 US 551 576 (2005)

45 The Council produced a Kit – Raise your hand against smacking

46 Time Magazine, April 2, 1979, p. 24.

47 Lag ang. vårdnad om barn och umgängesrätt, FFS 1983 No 361.

48 Matti Savolainen, *Förbudet att aga och undertrycka barn*, Hufvudstadsbladet 11 Sept. 1983. Dr Savolainen was legislative counsel (lagstiftningsråd) in Finland’s Ministry of Justice.

Whereas proponents of the internationally spreading Swedish spanking ban hoped for a “cultural spillover” of nonviolent values, one has to face that the ban may have backfired. However, the critical discussion is to be found, not in Sweden but in the US, as a result of a number of initiatives to introduce a spanking ban in some of the States.

In the broader debate there has surfaced the “human rights” argument that “if you cannot spank your neighbour, you should not spank your child”. - But because there is some thinking that physical discipline violates ‘human rights’, does of course not mean that this view is correct or well reasoned. Here, one should not be deceived by the fact that spanking opponents receive most of the media coverage, and that media coverage often is unopposed.<sup>49</sup> In the opinion of e.g. Dr Larzelere, the neighbour simile makes no sense in light of the fact that parents don’t have the same responsibility for their neighbors as they do their children. He argues furthermore that spanking does not lead to abuse – as some plead - any more than credit cards lead to bankruptcy. It’s like saying credit cards lead to bankruptcy because buying on credit is on the same continuum as going bankrupt – as though the mere existence of a credit card compels a person to lose control of his sense of responsible debt.

Some American and British experts consider - with me - that the ban has backfired, arguing as follows: . Today, six out of ten Swedish children feel vulnerable at school and just as many have been victims of youth violence. This is consistent with the dramatic rise in youth violence since Sweden banned spanking. Swedish teen violence skyrocketed in the early 1990s, when children who had grown up entirely under the spanking ban first became teenagers. Most sound research suggests spanking is not harmful, and is often more helpful than other common discipline methods. In the opinion of Dr Larzelere, outcomes rarely favor mental discipline methods, whereas customary spanking typically reduces noncompliance or antisocial behavior more than mental discipline methods. All of the clinical and sequential studies found predominantly beneficial child outcomes from spanking. Spanking should – he argues - remain legal because it is valuable, efficient, and its mere existence does not compel escalation to abuse. Children in authoritative families were the most achievement oriented and the most competent. Sweden nowadays has a kind of record in the number of burned-down schools, normally the result of human activity – probably stemming from disgruntled pupils. The other day we could also read in the papers that according to a recent report from the Crime Prevention Council<sup>50</sup> thousands of children are victimized in the Swedish schools by fellow schoolmates in such a way that they are hospitalized.

It appears that the believed ‘spill-over of non-violent behaviour’ was nothing but mirage!

## **9. Decline of Marriage**

### **a. Sweden**

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<sup>49</sup> Many published articles covering this issue in the U.S. are opinion-driven editorials, reviews or commentaries, devoid of any empirical findings, but a more scholarly debate has taken place at the conventions of the American Psychological Association and a conference at The Institute of Human Development (University of California, Berkeley). A prolific author in the field has been Dr Robert Larzelere, who has also covered the Swedish development of its spanking ban in critical terms in a number of contributions, see e.g. *Comparing child outcomes of physical punishment and alternative discipline tactics: A meta-analysis*.

<sup>50</sup> Brottsförebyggande rådet, se Fredrik Beckman, ”’Djungelns lag’ råder i skolorna”, Metro Stockholm 18.8.2009.

Civil unions in Scandinavia came in the wake of social developments that had already weakened marriage, but they added decisive new elements : a final sundering of the connection between “marriage” and having children, and a demoralization of the old institutional supporters of marriage. In Sweden, marriage was early radically separated from parenthood, and largely equalized with cohabitation in legal-financial terms. Modern marriage in Sweden is now essentially about *elective companionship*. The young ones ask : If that is all marriage is, why get married? They can hardly think of any compelling reason. And among lawyers, the same conclusion has been advanced : There is no longer need for any statutes on marriage and divorce.<sup>51</sup> Today’s gay marriage was therefore in Sweden more effect than cause of a changed view of traditional Christian marriage with e.g its ban on polygamous marriages. But gay unions in the Scandinavian countries have now of course – perhaps marginally - contributed to the further decline of heterosexual marriage and the rise of out-of-wedlock births.

### **b. Homosexuality**

In retrospect, it was Aids that created the critical mass for a changed view of homosexuality. That Aids would marginalise homosexuals seemed clear to virtually everyone. In the West, gays have effected a strangely quick transition from pariah status to protected status, identifying with a kind of civil rights movement. In an atmosphere of increasing sexual caution, the sexual orientation of closeted homosexuals was revealed in the cruelest way possible – through their deaths. Westerners were generally stunned to discover how prevalent homosexuality was, and how otherwise “normal” most of its practitioners were. –The special damage visited on gays at the height of the Aids era – the damage that differed from the grief that death brings to everybody -came from the interaction of sudden death with a probate law designed for heterosexuals. Health benefits, designed to protect spouses, do not transfer to partners.<sup>52</sup>

The sequence of events in this field in Sweden looks as follows. In 1944, homosexuality between adults was decriminalized in Sweden, and replaced by identifying it as a disease. In 1950, a nationwide association for giving gays and normals equal rights was formed. In 1979, the National Agency for Social Affairs did away with the classification of homosexuality as a disease. In 1987, a ban on discrimination of gays was adopted. In 1995 a statute on civil unions was adopted. In 1998 the first Pride demonstration took place in Stockholm and the year after, the office of an Ombudsman for the gays was created (Diskrimineringsmannen HomO). In 2003, gay couples were entitled to petition for adoption of children. In 2005, lesbian couples were entitled to artificial insemination. In 2009, finally, same-sex marriage were permitted.

In practice, the Swedish attitude towards encouraging homosexuals went very far. In deference to the UN Convention on the Elimination of All Discrimination, Sweden had introduced in the statute book a criminalization labeled *frenzy against a population group* (hets mot folkgrupp).<sup>53</sup> ‘Hets’ is a rather strong word, implying intense agitation towards

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51 Stefan Lindskog, *Äktenskapsbalken måste avskaffas*, DN 18.6.2005 s 6. ”Min slutsats är att om en ny lag införs genom vilket ett reglerat samlevnadsförhållande får rättsverkningar som svarar mot dem som följer av äktenskapsbalken, finns inget behov av en äktenskapsbalk.”

52 Christopher Caldwell, *How Aids gave gays marriage*, Financial Times 22-23 May 2004, p 7.

53 Chapter 16 section 8 (Penal Code, 1962, as amended by SFS 1970:224, effective 17 Feb. 1971 (SFS 1971:29) “If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for a group of a certain race, skin colour, national or ethnic origin or

violence. In Sweden, the provision came to be used against any negative comment about homosexuality, the most famous case being the *Green Case*, concerning the prosecution of a free-church pastor who read the Bible on this matter (sodomy) with some personal comments in his church to the congregation present of some fifty old ladies. By the prosecution, this was labeled ‘frenzy against a population group’ (hets mot folkgrupp) and he was indeed convicted in the first instance. The Court of Appeal refused to find reading passages from the Bible as an incitement to violence ; the Supreme Court first sided with the prosecution as an opening, but then retreated to acquittal on the theory that pastor Green, if he brought the matter before the European Court in Strasbourg, would certainly be acquitted.

It has sometimes been argued that the gay movement is a matter of ‘human rights’, indeed a question of ‘discrimination’. Discrimination is said to be inherent in the legal institution of traditional marriage. But that is a misunderstanding of the notion of discrimination as something automatic when there is similarity in some sense. A few examples. Single people are ‘discriminated against’ by the benefits granted to married couples. Those who prefer to live with multiple lovers are also ‘discriminated against’ by the institution of marriage. So too are same-sex couples ‘discriminated against’ by marriage. This reasoning defies common sense! Since most matters are similar in one sense and dissimilar in another, the issue of treating them similarly or not is a question of **justification** and not something automatic. Is the difference in treatment justified or not? It seems definitely justified in the examples given above.

Voices have also been heard in Sweden, pointing out the desirability of the gay minority being met with so much tolerance that its adherents are encouraged to display their peculiarities openly, but warning about a piece of legislation that forces all cohabiting couples – such as brothers and sisters - to publicly assert having sexual relations in order to obtain the advantages intended for gay unions <sup>54</sup>

## 10. The Encounter with Traditional Values

Going against widely held beliefs is problematic. Sometimes what is claimed to be mere prejudices are in fact the hard-earned collective wisdom of society.

Among the most resistant opponents to the imposition of Western human rights ideas one will find the continuously expanding world of Islam, a world with some core areas with very conservative tribal honor codes that define women as property and revenge as justice, and whose adherents are shocked and indignant when faced with cultures where men marry men and the young leave aging parents to suffer on their own. The Moslem notions of family and religion stand out as bastions of defence against possibly well-meaning but ignorant human rights activists in the UN crowd who drown the world with accusations of human rights violations, accusations centered in the Western media world which of course is perfectly

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religious creed, shall be sentenced for agitation against ethnic group to imprisonment for at most two years or, if the crime is petty, to pay a fine.” By SFS 1982:271, the criminalization was widened to include “contempt for an ethnic group or other such group of persons with allusion to race etc. etc. – These formulas were later used by the Russian authorities to criminalize contempt of Russian institutions and authorities, see below.

54 Agell, *Bör inte tvingas till öppenhet*, SvD 13.5.1987. ”Det är önskvärt att den homosexuella minoriteten möts av tolerans, och att man visar öppet – om man vill – att man har en homosexuell förbindelse. Man bör dock inte tvingas till denna öppenhet genom en lagstiftning som utan att tillgodose sociala skyddsbehov lyfter fram just sexualförbindelsen som grund för rättsverkningar.”

irresponsible and has left the scene when the ugly consequences appear. Western dominated international arenas such as the UN, the EU and the Council of Europe make the conflict visible.

In a Resolution of 15.6.2006 the EU-Parliament condemned intolerance and discrimination in Poland, in particular discrimination of homosexuals and banning Pride parades. The Pride-bans were brought before the Court of Europe which in 2007 arrived at finding Poland having violated Article 11 : the demonstrations could not be banned.<sup>55</sup> In January 2007 the EU-Parliament also adopted another Resolution to the effect that all member states "must protect hbt persons against homophobic violence and hateful speech". When Pride parades were allowed again in Poland, a great number of MEPs appeared in the parade in Warsaw, among them the future EU-Minister of Sweden, Ms Cecilia Malmström.

The first time the issue of decriminalizing homosexuality was raised in the United Nations General Assembly was in 2008. A declaration in favour of such decriminalization was advanced by the French and the Dutch delegations. It was supported by altogether 66 countries, but it also brought into the open the vast opposition that this assault on traditional values brought about. Homosexuality was criminalized in some 80 countries, indeed with death sentences in 7 of them, Saudi Arabia being one of them. Such penal laws may be found mainly in the Middle East, Africa and Asia. But what in the West is advocated as a question of human rights, is the object of deep indignation in many of these countries. The initiative resulted in Syria proposing a counter-declaration. In this, some 60 countries expressed their concern that the Western countries were trying to impose their own norms on the rest of the world and to reinterpret the Universal Declaration. The delegations behind the counter-declaration were not willing to see homosexuality as a genetic disease. They maintained that the Western declaration might lead to a nasty social normalization and possibly to legitimizing such horrible behaviour as paedophilia [*paederasty*]; they stated in their counter-declaration. "We note with concern the attempts to create new 'human rights' by misinterpreting the Universal Declaration and other human rights instruments in order to have included notions that never originally were intended to belong there." – The proposed Declaration also failed to win the support of the United States, Russia, China and the Vatican.<sup>56</sup>

#### **11. Russia Opens up to Europe - The Honeymoon – Burdov and Kalashnikov**

Transferring the above observations concerning Sweden to Russia, a number of similarities appear and one is perhaps inclined to anticipate similar developments. Russia's judiciary remains in splendid isolation, no less than once the Swedish, due to the language and the alphabet. Can that isolation be broken? How do you familiarize the Russian *nomenklatura* with the European thinking in these matters?

Russia ratified the European Convention in 1998. To start with, it appeared that the most optimistic expectations in Strasbourg were met. The Russian leadership expressed themselves in terms that were almost enthusiastic – far more positive than the Convention ever had received from the Swedish leadership – and this from high up dignitaries such as the President

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<sup>55</sup> Baczkowski and Others vs Poland, Appl. 1543/06, judgment 3 May 2007.

<sup>56</sup> Sanna Karlsson, *Homosexualiteten*, Hbl 20.12.2008 s 14..



Yeltsin,<sup>57</sup> the two successive ministers of foreign affairs, Ivanov<sup>58</sup> and Lavrov,<sup>59</sup> and from the Prosecutor-General Skuratov.<sup>60</sup>

Submitting to the jurisdiction of the European Court of Human Rights. As put by Ivanov, “there is a growing understanding that Russia has only benefited from joining the Council of Europe.” Russia’s obligations under the Convention contributed to the pressure to pass a new Criminal Procedural Code. It came into force on 1 July 2002. The first case brought against Russia before the European Court (May 2002) seemed to confirm this view: *Burdov vs Russia*.<sup>61</sup> Since Burdov was a hero, having served in the horrible aftermath of the Chernobyl disaster, there were few who did not welcome the European decision. The second case against Russia

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57 **Boris Yeltsin** spoke to the Council’s summit meeting in the Palace of Europe in 1997, proclaiming : “We have launched a fundamental reform to resolutely consolidate the judiciary, strengthen law and order in the country, protect it from State bureaucracy corruption and from organised crime. Russia has introduced a moratorium on capital punishment and we are strictly complying with this undertaking. -.- I confirm that Russia will fulfil with all the commitments undertaken in the Council of Europe. It will do so in spite of the fact that in Europe and elsewhere there are forces seeking to isolate Russia, to put it in a position of inequality, forces which refuse to understand that Europe without Russia is not Europe at all.”

58 **Igor Sergeevich Ivanov**, on 11.9.1998 appointed Foreign Minister, (succeeding Yevgeny Primakov) expressed himself on 11.9.1998. : “There were those who doubted the expediency of our accession to the CE, fearing that we would not be able to live up to all obligations arising from our membership in this organization, ending up under pressure, criticism, and sanctions. Today [1998] we can say with satisfaction that there are practically no more such voices being heard. There is a growing understanding that Russia has only benefited from joining the CE. This is only natural since the direction of changes within our state and its foreign policy, ... corresponds to the European model. Today Russia has adopted the generally accepted European legal norms constituting the tissue of the continent’s legal area becoming party to 28 European conventions. -.- In many spheres we have placed our activity under the supervision of international oversight agencies, the supreme one among them being the European Court of Human Rights, thus raising the guarantees of our democracy to a basically new, higher level -.- On the whole, I would like to stress that while fulfilling the obligations to bring Russia in line with the high European standards that it assumed in entering the CE, we are at the same time seeking to make our own contribution to the organization’s activity. In other words, we definitely see our participation in the CE as a “two-way streets”. -.-”

59 President Vladimir V. Putin selected 10.3.2004 **Sergei Lavrov** who had represented Russia in the UN since 1994, to be Russia’s Foreign Minister. Lavrov replaced Igor Ivanov who had taken a comparatively hard-line stance toward the West.(Kosovo) but did not change the general direction. In speech in Warsaw 17.5.2005, Lavrov put forward, i.a., the following view : “The Council of Europe faces the danger of becoming a junior partner to a more dynamic, but also a compositionally narrower structure – the European Union. -.- As to the Council of Europe, we feel that ... the Council must stick to its historically justified position of a builder of a common European legal space, a strict and just zealot for uniform high standards for all Europeans in the field of democracy and human rights, including, of course, the fundamental right to life and security.” As Chairman of the Committee of Ministers, Lavrov before the Parliamentary Assembly proclaimed i.a. : “ Our first priority is to reinforce national human rights protection mechanisms, promote human rights education and improve the protection of the rights of national minorities. In fulfilling it, we reaffirm the importance of ensuring the leading role of the Convention for the Protection of Human Rights and Fundamental Freedoms. On 4 May 2006, the Russian Federation signed Protocol No. 14 to this Convention ; and the process of ratification is now under way.

60 Mr **Youri Skuratov**, General Prosecutor of the Russian Federation, in his opening speech in Moscow 8 January 1997, had the following message to the delegates from Europe : “The Russian Federation’s accession to the Council has made it part of the European political and legal area and will give Russia greater impetus to the process of legal reform in the Russian Federation. Russia will steadfastly honour its undertakings to bring its domestic legislation up to the exacting requirements and standards of the Council of Europe. Russia intends to do this thoroughly, gradually and unhurriedly, according to the country’s economic situation and its possibilities and, of course, with due regard to specific Russian characteristics and traditions.”

in the Court was *Kalashnikov vs Russia*,<sup>62</sup> concerning jail conditions in Russia - generally acknowledged to be horrible - which resulted in the European Court ruling in favour of Kalashnikov and ordering Russia to pay out 8.000 euros in costs and damages. Again, this was a welcome decision. Incompetence, delay, and malfeasance by law enforcement personnel – indeed known as a historical problem in Russia – were recurring themes in this ruling. In 1999, judges were sacked for having prolonged Kalashnikov’s case.

Using the precedent of Kalashnikov, thousands of Russian inmates can now lodge complaints with the European court and win cases”, said Karina Moskalenko, head of the nongovernmental International Protection Center, in Moscow. She was Kalashnikov’s attorney in Strasbourg.<sup>63</sup>

Most of the cases against Russia in this period however did not touch traditional values but rather concerned avowed miscarriages of justice in Russia<sup>64</sup> - what President Dmitri A. Medvedev of Russia has described as Russia’s “legal nihilism”.

## **12. Seeds of Scepticism - *Ilascu vs Russia and Moldavia***

Russia however came in for a shock when faced with the case *Ilascu and others vs Russia and Moldavia*.<sup>65</sup> The conflict arose from a Ilascu’s death sentence and prison sentences against the others, for actions described as Moldovan state-sponsored terrorism, and based on the Criminal Code of the Moldovan SSR. Russian troops stationed in the Transnistrian territory originally arrested the group as supporters of the Moldavian claims on Transnistria, but later Russia withdrew most of their troops and turned the men over to Transnistria, a *de facto* independent unit but claimed by Moldavia as part of their territory. Imprisoned in Transnistria under horrible mediaeval conditions, the men brought complaints before the European Court and won set-free orders, with sizeable compensation awards, to be paid by Russia and

<sup>61</sup> Anatoly Burdov, a pensioner owed compensation for emergency service work at the collapsed nuclear plant at Chernobyl, had been denied his pension for six years despite Russian court orders that he be paid. Too late, said the European Court. Russia was ordered to pay Burdov 3.000 euros for violating his right to a fair trial.

<sup>62</sup> Valery Kalashnikov was suffering in abominable conditions in a Magadan jail for more than 4 years. He had filed more than 15 motions for release, but each time, his petitions were rejected on the same monotonous grounds : the seriousness of his offense and the risk that he would meddle with ongoing investigations. Even after the investigation ended, leaving Kalashnikov nothing to meddle in, the Russian court refused release.

<sup>63</sup> Moscow Times 12.2.2003

<sup>64</sup> Ej verkställighet: Burdov, Poznakarina. Ingen res judicata ; Nadzor Ryabykh. Olaglig myndighetsutövning : olaglig vägran registrera Mordovian Party ; straffhot för att framtvunga affär : Gusinsky ; konfiskation av inrikespass : Smirnova ; häktning utan skäl : Panchenko, Smirnova ; långa processer utan rättsmedel : Kormacheva ; partiska nämndemän : Posokhov ; inspärning på sinnessjukhus utan domstolskontroll : Rakevich ; brott mot enskild klagorätt : Shamayev, Poleshuk.

<sup>65</sup> *Ilascu and others vs Russia and Moldavia*, Appl. 48787/99, admissible 4.7.2002, Grand Chamber judgment 8.7.2004 . 1992, Ilie Ilascu and three more ethnic Romanians were arrested by the breakaway Transnistrian government and charged with the murder of two Transnistrian officials. On December 9, 1993, the Supreme Court of Transnistria found him guilty and sentenced him to be shot ; the other three defendants were sentenced to hard labour terms between 12 and 15 years, with no right of appeal. While in Transnistrian prison, Ilascu was elected twice to the Moldovan Parliament ; in 2000, he received Romanian citizenship, renouncing his Moldovan citizenship, thereupon he was elected to the Romanian Senate and eventually made a member of the Parliamentary Assembly in Strasbourg, representing Romania. Ilascu was released from prison in 2001 after having filed a petition to the European Court, suing both Russia and Moldavia. The others were set free after having served their prison sentences.

Moldavia. But Russia refused to abide by the Court judgment by intervening in Transnistria and, indeed to pay the compensation decreed, claiming that it could not because Russia had no jurisdiction over Transnistria. The matter developed into a contest between the Committee of Ministers in Strasbourg, overseeing the missing execution of the damage payments, and Russia refusing to act in any way.<sup>66</sup>

To the Russians, this was a nasty surprise - superpower policy, affected by Strasbourg activism, and a matter of Russian prestige! They refused to budge.

### **13. The first Chechen War**

The situation also changed with the first Chechen war

The First Chechen War was a conflict between the Russian Federation and the Chechen Republic of Ichkeria, fought with Russian conscripts from December 1994 to August 1996. It was not a Russian success. The resulting widespread demoralization of federal forces, and the almost universal opposition of the Russian public to the conflict, led Boris Yeltsin's government to declare a ceasefire in 1996 and sign a peace treaty a year later.<sup>67</sup>

Western governments on the whole tolerated Russia's handling of the war.

Russia's weight in world affairs meant that few countries or organizations were willing to sacrifice relations with Moscow to the distant country [Chechnya]

### **14. The Second Chechen War**

Second Chechen War was in battle phase August 1999-May 2000, and in an insurgency phase June 2000-April 2009

### **15. Russia's suspended membership**

6-10 February 2000, a joint mission from the International Federation of the Human Rights League (FIDH) and "Memorial" Human Rights Center collected testimonies from migrants from Chechnya. FIFH and Memorial appealed to the world community to apply to the Russian leaders with the demand to observe international agreements, in particular the European Convention

On April 6, 2000, Russia was by decision of the Parliamentary Assembly of the Council of Europe preliminarily suspended from its voting rights in the Assembly. The Assembly requested that Russia stop all war operations in Chechnya and begin as soon as possible negotiations with the rebel leaders with a view to a political solution to the conflict which had resulted in enormous refugee problems in the neighbouring republics, devastated cities and more than 50.000 dead if the first Chechen War 1994-96 is included. Russia then angrily withdrew from the session of the Council of Europe and in Moscow, Gennadi Seleznyov, speaker of the lower house of the Russian Parliament, said in reply that Russia would get along fine without its "European teachers". It was threatened that Russia would stop all international in site inspections.

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<sup>66</sup> For earlier cases of such obstruction, see Fredrik Sundberg, "*Om verkställigheten av Europadomstolens domar*" [On the execution of the judgments of the European Court], in *Familjeantologin* Jacob W.F. Sundberg 80 år, IOIR nr 150, pp 7-46. - The Russian obstruction has resulted in the bringing of a second *Ilascu Case* against Russia concerning the damage payments.

<sup>67</sup> Khasav-Yurt Accord, establishing the de facto independence of Chechnya.

In 2001, however there was a new period of sessions, not affected by the previous suspension.

## **16. The European Court enters the Second Chechen War**

The Strasbourg Court traditionally does not shy away from dealing with cases which pose significant questions on the use of military force. It has made relevant efforts in adapting principles arisen from decisions on incidents occurred during law enforcement operations to wide-scale armed conflicts.

The case law of the European Court of Human Rights concerning violations of human rights during armed conflict has been extended after the first decisions on cases arose from violations, committed during the war in Chechnya between 1999 and 2000. In the words of the Court, at that time the situation called for exceptional measures, in order to regain control over the Republic and suppress illegal armed insurgency. The Court was ready to admit that those measures, including the deployment of army units equipped with heavy combat weapons, military aviation and artillery, were necessary to counter the aggressiveness of the separatists, but they should be used in such a way as to avoid or minimize, to the greatest extent possible, damage to civilians.

No declaration under Article 15 had been made by Russia. Absent such a declaration the European Court decided the case as occurring in a normal legal contest. The core principles thus were fetched from the decision in *McCann vs UK*, a milestone in the jurisprudence of the Court. The principles set forth in *McCann* have been integrated by further elements resulting from subsequent decisions, arisen from incidents primarily involving IRA activists or members of the Kurdistan Workers Party (PKK).

Russia was fairly unprepared. Russia's most recent wartime experience was from the bloody and brutal war in Afghanistan where nobody thought of legalistic niceties.

A number of cases that were presented in Strasbourg on 14 October 2004 all center on the aerial *bombing of a convoy of civilian cars* fleeing in October 1999 from fighting in Grozny, the Chechen capital: *Isayeva, Yusupova and Basayeva vs Russia*,<sup>68</sup> *Isayeva vs Russia*<sup>69</sup>. Another case presented focused on the bombardment of the Katyr-Yurt village in February 2000

### *A Cause Célèbre : Bazorkina vs Russia*

The European Court of Human Rights on July 27, 2006 found Russia responsible for the disappearance and presumed death of a prisoner detained in Chechnya. The court examined the disappearance of Khadzhi-Murat Yandiyev, 25, who was detained in February 2000 in the village of Alkhan-Kala. The Court examined the actions of Russian troops and Colonel General Aleksandr Baranov. The general was recorded by two television crews, including one from CNN, accusing Yandiyev of being responsible for the deaths of Russian soldiers. Yandiyev was videotaped being led away. He was not seen since. - This decision on the complaint of Fatima Bazorkina, was the first the Court had made on a *disappearance* in Chechnya. It ruled that Russia had failed to conduct a proper investigation into complaints

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<sup>68</sup> Medka Isayeva, Zina Yusupova and Libkan Bazayeva complained about the indiscriminate bombing by Russian military planes of a column of civilians leaving Grozny on 29 October 1999

<sup>69</sup> *Isayeva vs Russia*, Appl. 57950/00, 6 European Human Rights Cases 455-459, 128 ECHR (24.2.2005).

that the man had been summarily executed on orders from the Russian general. The Court ordered Russia to pay more than \$44,000 to Fatima Bazorekina (the mother), as well as more than \$15,000 for her legal expenses.

## 17. The NGO Invasion

The naïve and usually self-serving recommendations made by the Western governments, institutions and consultants had heavily contributed to the chaos produced in the 1990s by the collapse of Soviet-era institutions, and came to be one of the principal reasons for the negative opinions expressed in Russia today.<sup>70</sup>

In 2006, Cheri Blair told her Russian listeners that British lawyers could offer assistance in appeals to the European Court of Human Rights<sup>71</sup>

Three cases concerning *massacres on civilians in Staropromyslovsky district* in Chechnya in January and February 2000 were decided by the European Court on 4 October 2004. One of them, *Goygova vs Russia*,<sup>72</sup> was brought before the Court through a cooperation project of the **Swedish Helsinki Committee** and **Russian Justice Initiative**. Russia was convicted on all counts. It was criticized for not having investigated the case properly and requested to pay \$40,000 in compensation to Fatima Goygova. The others were *Goncharuk vs Russia*<sup>73</sup> and *Makhauri vs Russia*.<sup>74</sup> The Swedish Helsinki Committee and Russian Justice Initiative claim to have been successful in nine cases of nine before the Court. 139 more cases were in the pipeline.

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70 William Pfaff, “Russia’s deep animosity”, IHT 6.3.2007 p 7

71 C.J. Chivers, “Cherie Blair offers help for Russia rights groups”, IHT 18.7.2006 p 3

72 Maryam Goygova was wounded during the Russian attack on the Staropromyslovsky area on 19 January 2000. When her son Magomed, and two other men tried to carry her to safety they were stopped at a checkpoint. Maryam was shot on the spot and the three men were taken away. On 10 February, Maryam’s daughter, Fatima, discovered the bodies of the three men, not far from the place where her mother was killed. Her brother’s ear had been cut off. – The two other men’s cases are reported as cases *Khashiyev and Akayeva vs Russia* (appl. 57 942/00 and 57 945/00, decided 24.2.2005).

73 When the Russian attack on the Staropromyslovsky area started, Elena Goncharuk and five others sought shelter in a cellar. Russian soldiers who had ordered them to leave the cellar started shooting at the six as they came out. Five of them were killed immediately. Elena was only wounded but lost consciousness. When she regained consciousness, the soldiers had left, evidently believing that she was dead as well.

74 *Makhauri vs Russia*, Appl. 58 701/00. Having returned to her house in Grozny to check it, she came across some 30-40 Russian soldiers, plundering the houses. Discovered, the soldiers detained the women, blindfolded them and took them away to a courtyard nearby, where they started shooting them. Two of the women were killed immediately, but Kheyedi Makhauri was only wounded and lost consciousness. When she woke up because of intense pain in her legs she discovered that they were covered by a mattress on fire. She managed to crawl out to the street where she eventually received help from people living nearby. After the incident being mentioned by Anna Politkovskaya in *Novaya Gazeta*, the Prosecutor’s Office in Grozny started an investigation and it was discovered that the soldiers belonged to the 205<sup>th</sup> brigade from Budennovsk, but nobody was held accountable for the mass killings.

On 23 July 2009 in the case *Mutsayeva vs Russia*<sup>75</sup> the European Court found Russia responsible for the disappearance in August 2001 of Khizir Tepsurkayev, and that Russia had failed to conduct an effective and adequate investigation into his disappearance, in violation of Art. 2 of the Convention. The applicants, Khizir's parents, were represented before the European Court by the **European Human Rights Advocacy Centre**, based in London.

The **Chechnya Justice Project** is seeking redress for human rights violations in Chechnya. The Project investigates incidents of arbitrary detention, torture, forced disappearances and extrajudicial executions, and brings these cases to the European Court. It is jointly supported by the Dutch-based organization **Stichting**<sup>76</sup> **Russian Initiative** and the Russian-based organization **Pravovaia Iniativa**.<sup>77</sup>

The **Voice of Beslan movement** in 2007 filed a case against Russia in the European Court for failing to investigate the Beslan school massacre properly.

## 18. Russian Counter-measures

Russia saw during the Yeltsin years the Council of Europe and the Convention as useful tools when modernizing Russia, not as an assault on traditional Russian values. The activism in some parts of Europe, involving circles that had domestic agendas and used the Convention apparatus to attract an attention that they could not mobilize back home, was normally coming to an end in the Committee of Ministers and did not raise questions of abdicating from Russian traditional values. But the stampede of people victimized by the Chechen War, bringing their complaints before the European Court with the help of foreign NGOs, some of them financed by Swedish-source foundations<sup>78</sup>, made Moscow start thinking of ways to rein in these intruders. The idea for the resulting NGO law originated within the Kremlin administration in 2005, and the law is said to embody the ruling elite's fears of the 'colour revolutions' in the post-Soviet space, such as those in Georgia, Ukraine and Kyrgyzstan, where NGOs took the center stage. The Kremlin was especially concerned with Western NGOs and foreign funding of Russian NGOs. President Putin repeatedly indicated that the Kremlin would not allow *financing political activities in Russia from abroad*.

In early May 2006, the Russian President signed executive orders that gave the Justice Ministry and the Federal Registration Service broad powers of control over non-governmental

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<sup>75</sup> *Mutsayeva vs Russia*, Appl. 24 297/05. – Khizir Tepsurkayev was detained by soldiers from Russian unit 6779 from Bashkortostan on the morning of 27 August 2001. The soldiers were running a mopping up operation in the center of Urus-Martan. The police officers acquainted with Khizir reported his detention to their superiors at the District Department of the Interior. Applications to various local bodies failed to establish Khizir's whereabouts or fate.

<sup>76</sup> The Stichting INGKA Foundation is a Dutch foundation, founded in 1982 by Ingvar Kamprad. In the Netherlands it is classified as an institution for general benefit.

<sup>77</sup> Mette Risa, *Missnöjda ryssar söker rättvisa i Europadomstolen*, DN 13.8.2007 p 20.

<sup>78</sup> Here may be mentioned the foundations set up with what was originally Tetrapak money, and with IKEA money, not to forget the Swedish Helsinki Commission.

organizations. The NGO law came into effect in April 2006.<sup>79</sup> It was clearly mostly aimed at preventing foreign efforts to support political opposition movements, like the one that swept to power in Ukraine's "Orange Revolution".

The disputes with the European Court – evidenced in e.g. Ilascu and the Chechen cases – underscored a growing Kremlin antipathy to international organizations. The Court appears to have particularly and increasingly rankled the Kremlin by issuing rulings highlighting *corruption, torture and other misconduct in Russia*, including the pervasive practice of what was known as 'telephone justice': a politician calling and instructing a judge how to rule.<sup>80</sup> The Kremlin has responded by questioning the credibility of the Court. "Unfortunately, the decisions of recent months and even the last year [2008] give grounds for doubting the full objectivity, the impartiality, of the European Court", said Russia's new justice minister, Aleksandr Kononov in February 2009. President Medvedev announced in December 2008 that he respected the European Court, but that it "cannot and should not replace the Russian justice system".<sup>81</sup>

New amendments to the law "on combating extremist activities", enacted in June 2006, designated "inciting racial, national, or religious differences associated with violence or calls to violence" as being "extremist activity". This meant that those blaming Putin's regime for the 2004 Beslan massacre could be charged with 'extremism' and that campaigners who had lost their relatives in the Beslan school siege could be put on trial under this regime.<sup>82</sup> In 2007, Moscow broadened the definition of 'extremist activity' to include "slander of public officials" and "humiliating national pride", and the new definition allowed Russian officials to launch investigations into journalists, human rights activists and opposition leaders.

## 20. Swedish Parallels

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79 On January 10, 2006, the Russian Federation had passed a law titled: "On Introducing Amendments into Certain Legislative Acts of the Russian Federation"; it entered into effect 15.4.2006. The law introduced new documentation requirements for NGOs. In order to register under the law, organizations must fill out roughly 100 pages of documents, listing detailed personal information about each founder and each member (i.a. personal address and tax identification number). Foreign NGOs working in Russia all had to obtain registration by 18.10.2006. Furthermore, NGOs must complete annual reports, listing all foreign donations received and the ways in which those funds were used.

80 Concerning similar practices in Sweden, see dr Kjell Åke Modeer's discussion, reported in Jacob W.F. Sundberg, *Den plågade rättshistorien*, 17 Juridisk Tidskrift 89-107, at 104 (2005). - The President of the Russian-Chechen Friendship Society was indeed convicted under this regime, and the conviction of the President forced the Society – a group funded from America and Europe – to close and move its legal identity to Finland. It had come under attack in 2005 already when the Nizhni-Novgorod tax inspectorate attempted to shut it down on charges that it did not pay taxes on a grant.

81 As reported by Clifford J. Levy, *European court aggravates the Kremlin*, IHT 20.3.2009, p 4.

82 Catherine Belton, *Russia puts Beslan activists on trial*, Financial Times 14.1.2008 p 3.

At this point it may be interesting to focus on a Swedish technical parallel.<sup>83</sup> In deference to the UN Convention on the Elimination of All Discrimination, Sweden for her part had introduced in the statute book a criminalization, labelled *frenzy against a population group* (hets mot folkgrupp).<sup>84</sup> If not a model, a close parallel was to be found in the DDR which criminalized anti-State frenzy (*Staatsfeindliche Hetze*) in its Criminal Code (Art. 106). That penal provision was applied to all cases of criticism of the DDR regime, then in power, and the criminalization was in the West at that time generally derided as a ridiculous instrument of political repression.<sup>85</sup>

## 21. Russian Parallels

Transferring the above observations to the European human rights development in Russia, many similarities are found, but also major background differences. Russia's judiciary lives in splendid isolation, no less than once the Swedish did. The following observations by some Russian human rights lawyers could just as well once have been made in relation to the Swedish judges: "Russian judges still do not care how their verdicts will be seen through the prism of European legal standards, mainly because they are not aware that these standards must be taken into consideration when issuing verdicts."<sup>86</sup> "Still, very few Russian judges understand that now people can complain to an international body with ultimate power that acts on the basis of European standards of human rights. Most Russian judges were and still are taught by Soviet-era professors, and their professional qualifications are poor."<sup>87</sup> But there are also important differences.

Most importantly, while the Swedish *nomenklatura* has problems with its identity, under the impact of the so-called 'multi-ethnic society' which scorns traditional values also in the legal sphere and believes in its own 'moral superiority', Russia increasingly glorifies its Russian identity and the Russian 'traditional values', and is sceptical when faced with such 'modernities' as gay rights, same-sex marriages, undisciplined children, feminist claims, etc. With a Marxist-Leninist formation at bottom, the remaining Russian *nomenklatura* is hard to

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83 Reactions in Swedish media to Strasbourg interventions are less shocking, but do exist. When the President of the European Commission on Human Rights, Professor Stephan Trechsel, intervened in the *ius docendi* affair at the University of Stockholm, by private letter of 28 December 1988, sent to the Rector of the University, Swedish media – with copy of the letter on their desk – decided to omit every mention of the intervention, see Mats Knutson, article in Svenska Dagbladet 31.12.1988, reported in full in *Academic Freedom at the University of Stockholm*, 29 Minerva. A Review of Science, Learning and Policy 321-385, at 350 f.; in Swedish, see Jacob W.F. Sundberg, Tystnadsspiralen, IOIR No 96. Pp 57, 80 with further references.

84 Chapter 16 section 8 (Penal Code, 1962, as amended by SFS 1970:224, effective 1.2.1971 (SFS 1971:29)): "If a person publicly or otherwise in a statement or other communication which is spread among the public threatens or expresses contempt for a group of a certain race, skin colour, national or ethnic origin or religious creed, shall be sentenced for agitation against ethnic group to imprisonment for at most two years or, if the crime is petty, to pay a fine." By SFS 1982:271, the criminalization was widened to include "contempt for an ethnic group or other such group of persons with allusion to race etc. etc."

85 In Sweden, the corresponding provision came to be used against any negative comment about homosexuality, the most famous case being the *Green Case* (NJA 2005 p 805) concerning the prosecution of a free-church pastor, who read the Bible on this matter (sodomy) adding some personal comments in the presence of his congregation of some fifty old ladies. See further above No. 9.

86 Karinna Moskalenko, head of the nongovernmental protection center in Moscow, as per Moscow Times 12.2.2003.

87 Maria Polyakova, head of the Moscow-based Independent Council of Legal Experts, as per Moscow Times 12.2.2003.



convince that such things come from a better source than a crowd of do-gooders in Brussels, Geneva and New York.

It was pointed out above that Russia refused to align itself in the UN with the French and Dutch initiative on decriminalizing homosexuality. There were reasons for this aloofness. Russia was sensitive when matters of traditional values were touched, in particular those traditional values going with the notion of *family*. In the early days of the Bolshevik Revolution, a free-wheeling family law was the order of the day.<sup>88</sup> The family was seen as a conservative impediment in the advance toward the Socialist Utopia. Similarly, the regime had a very lax attitude toward homosexuals. The Revolution had done away with the entire Czarist Criminal Code, and in the new codes of 1923 and 1926, all criminalization of homosexuality had been eliminated. But the sexual liberation was shortlived. The egalitarian and pro-women policies that had liberalized divorce and marriage laws and promoted abortion gave way by the early 1930s to Stalinist pro-family policies, and in a 1933 decree homosexuality was again criminalized in Art. 121. Pro-family thinking was further strengthened with the Soviet entering World War II. The very notion of a stable family was considered essential for the morale among the troops in the trenches, hoping once in the future to be reunited with wife and children. In the 1944 family law, divorce was made very difficult. The fighting man should be able to rely on his family while he was away.<sup>89</sup> The Stalinist criminalization of homosexuality lasted until the days of Boris Yeltsin as President of Russia. A new Russian Criminal Code, without this criminalization, was adopted in 1993, but that did not mean that homosexuality was in any way encouraged, as it was in the Swedish setting. When faced with the initiative in the UN, the Russian attitude was indeed one of rejection, and in the Council of Europe the Russians were quite explicit, making reference to the sanctity of the family, as manifested in CCPR.<sup>90</sup> In the same vein, the Russians refused to participate in any work concerning measures to combat discrimination based on sexual inclinations or gender.<sup>91</sup>

Traditional values carried the day.

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88 See e.g. Jacob W.F. Sundberg, *Recent Changes in Swedish Family Law. Experiment Repeated*, 23 *American Journal of Comparative Law* 34-49 (1975); idem, *On Marxism as a Legal Practice*, 65 *Washington U. L.Q.* 823-838, at 836 (1987).

89 Pursuant to Art. 19 in the Family Law of 8.10.1944, "only registered marriage produces the rights and obligations of husband and wife laid down in the Code of Laws on Marriage, Family and Guardianship of the Union Republics."

90 *Déclaration écrite du représentant de la Fédération de Russie* (Strasbourg 18-20 février 2009) : "les **questions liées à la famille** sont soumises à la législation nationale -.- J'aimerais me référer au Pacte international des Nations Unies relatives aux droits civils et politiques et à la Convention européenne de sauvegarde des Droits de l'homme et des libertés fondamentales qui prévoient explicitement que les questions liées à la famille sont soumises à la législation nationale" – my italics.

91 "Sans participer à l'élaboration d'un projet de recommandation sur les mesures pour lutter contre la discrimination fondée sur l'orientation sexuelles ou l'identité de genre."