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23 The rule of law

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Democracy is not a guarantee for good government in a state. The power that the state has over its citizens can be used in wrongful ways. The democratic state must therefore, within its legal system, protect the individual against the state itself, i.e. against the power of the state. This is where the rule of law fits into a legal system. It concerns the restriction of power. The rule of law can be said to be an idea concerning the protection of citizens against the state.

The rule of law does not have an exact definition. My intention in this article is to give it a definition. With this definition I want to create a starting point for anyone who wants to study aspects of his own system in terms of the rule of law.

The idea of the rule of law is based on two fundamentals. One fundamental consists of human rights and the other fundamental consists of the division of power. Human rights and the division of power are the basic fundamentals of the rule of law. Within the concept of human rights as well as within the division of power lies the restrictions of power that characterise the rule of law.

The basic fundamentals are not sufficient to define the rule of law as they do not say how human rights shall be protected by the legislature and the courts or the executive. The legal rules are created by the legislature and they are applied to individual cases by the courts and the executive. It is within these bodies that the rule of law must be taken into consideration and made part of the legal system. It is within this part of the legal system that different principles that upholds the rule of law must exist. My intention is to give the rule of law a definition by describing some main principles that should be upheld in the practical daily work of the legislature, the courts and the executive. Even though the abovementioned fundamentals are the same, the rule of law must have different features when it is applied to the daily work of the legislature than when it is applied to the daily work of the courts or executive. I will describe some important principles concerning upholding the rule of law in the legislative process and some important principles that are needed to uphold the rule of law in the decision-making that takes place in the courts and in the executive bodies.

Special instruments in form of legal bodies and legal limitations are needed to check that the rule of law is taken in consideration by the legislature, the courts and the executive when these bodies make or apply laws. The existence of such instruments is very important for upholding the rule of law.

Application of the rule of law

Lars Rydén

Rule of law and democracy. States have been ruled by law since earliest times. Using the phrase “rule of law” only to point this out is trivial. In this chapter the author will thus deepen and qualify the concept far beyond the mere existence of laws.

States, where the law only serves to codify or legitimise the unlimited power of a ruler, a single person or a small group, is not considered to abide by the rule of law. For example Nazi Germany, where the Führer had unlimited power, was not considered to abide by the rule of law, even if the Nazi party came to power through a democratic election. It is thus not enough to have just any kind of law but the laws need to codify and protect a division of power. In brief the “rule of law” should follow the principles of democracy – that the representatives of the people, the electorate, decides which laws are valid in the state. In a democracy the assembly, the parliament, has as a main function to make laws.

But this is still not sufficient. The laws and the institutions that implement the laws, the courts and the sanctioning system, need to have an independence from the other power holders in the state, in particular the executive power, the government, to allow the state to qualify as a state with the rule of law. The other power holders should not have a legitimate means to influence and manipulate the application of the laws. This is not always the case even today. There are several examples in the book on how this is done even today in the Baltic Sea Region.

Individual and the state. It is only in this kind of system that the individual may defend him- or herself against the state in case of a dispute. Disputes between public authorities and individuals are common in any society. The authorities may for instance have decided to build a railway which may require a number of privately owned houses to be taken down. The house owners may not agree. More sensitive cases are decisions to remove a child from a parent that is not considered able to take care of his or her child, or the denial of a person to execute certain professions for security reasons.

There are many states where all these formal requirements are met, but one would still hesitate to call them states “ruled by law”. The rules must also be applied. The rules may not be applied properly because of traditions. Differences between theory and practice exist in all societies but in some they are certainly larger than in others. We may mention some of the main flaws in the application of the rule of law.

Flaws in applying the rule of law. The writing of laws itself may be flawed. E.g. in Latvia after independence some taxes (which are laws) were introduced and applied to the situation before they were valid. The State desperately needed money and used unlawful means. Laws may also be contradictory to basic principles. In Sweden critics have pointed out recently that certain laws are contradictory to the Convention on children’s rights that was recently passed.

During Soviet times the courts in Soviet Union were certainly politically manipulated. The verdicts of the courts were decided after consultation with a proper political body. There are countless numbers of descriptions of this situation. This can be seen in literature on the early years of the Soviet State. “Night in the middle of the Day” by Arthur Köstler on the courts from the 1930’s is one of the classics in this area. The Kafka trials express the same thing.

Being equal before the law. It is also obvious today that not everyone is equal before justice as the rule of law requires. Women are weaker than men, high officials have advantages, children have fewer rights. The norms codified in law are not the same as the norms society applies. An abused woman will have difficulty when accusing her husband and an abused child will often not even be listened to. This is noticeable in the Nordic countries and appears to be a major flaw in the societies of central and eastern Europe, although research would be needed to show exactly the extent of this situation.

In many societies the courts are influenced improperly. Bribery may be unnecessary. There are many other kinds of corruption. The service offered by a corrupt judge may also take many forms, not necessarily that the verdict is changed. Witnesses may not be asked to come, proofs may be hidden, or a court case may simply be postponed over and over again. Such manipulations are difficult to discern except for those who are directly involved. Extreme cases of bribery or corruption may be more obvious, such as in a major affair in Poland two years ago for example.

Even if the chapter on the rule of law focuses on how it should be one needs to keep in mind that the application is equally important.

This article will hence describe the basic fundamentals of the rule of law. It will also describe important principles that must be followed in order to uphold the rule of law in the work of the legislature, the courts and the administrative bodies and it will describe the different ways of controlling the legislature, the courts and the administration.

When one discusses the rule of law it has to be taken into consideration that this idea concerns the relationship between the individual and the state. Problem of consistency with the rule of law exists especially within the field of public law where the state exercises public authority over the individual. My article concerns especially such legislation and interpretation that exist within the public law.

In the article some examples will be given. They are chosen at random and taken from my country, Sweden. They are meant merely to illustrate the legal problems described and hopefully to make the article easier to read and to understand.

1. The power of the state

A state consists of a territory, people and a state organisation. Within its organisation a state must have legislative, executive and judicial bodies. The organisation of a democracy consists of the parliament, the courts and the government with its authorities, like the police authorities and an environment-protectorate. The power of the state is executed through these institutions, which fulfil the following functions:

Protecting citizens from dangers. Citizens need protection from other citizens and from different dangers. A democratic state must give the citizen protection against crime and it must give protection to the free market. Protection is given through laws and through courts that apply the laws to individual cases. Protection against crimes is given through the criminal laws. Protection for the free market is given through contract law and other civil laws. Protection must also be given in other areas such as, for example, the health of the people and the environment. This is mainly done through different administrative laws, for example food laws, alcohol laws and environment laws. Then there must, of course, also be authorities that supervise that these rules are followed.

Protecting the citizens from the state. The bodies of the state can be very powerful in relation to individuals and private enterprises. The experience of totalitarian dictatorship shows that the state can be used for very ugly purposes. The persecution of individuals because of their race, class background, ethnic origin, political or religious convictions in this century has had the support of an all-powerful state. In particular, the police can be used for such kind of repression. People have been deported to concentration camps simply because of their race or class background. For this reason, the exercise of public power must have clear limits and be circumscribed. The citizens need protection from the state.

The idea of protection against the state might seem strange for the democratic state. It is supposed to exist for the benefit of the people. Therefore some people think that in a democracy it should be enough that a majority of the people can vote against the politicians in power and have them replaced with others when they do not act for the benefit of the people.

The reality is more complicated. What is favourable for a majority can be unfavourable for a minority. People in charge of power might act in the purpose of defending their own interest and they may also be careless or ignorant. The democratic state must protect the individual against

the misuse of the legal system that might be caused by the state itself i.e., against the power of the state that is in the hands of those who make the laws and who execute the laws, such as the parliament, the courts and the government and its authorities. The important question is therefore what protection should be given to the individual.

- Are there or should there be limits as to what the legislative power is allowed to do through the legal system, in relationship to an individual? How far shall the power of the legislature reach?
- How is a correct and just procedure guaranteed in the legal system when the judicial authorities take decisions which mean interference in the life of an individual?
- How is power controlled, i.e. who can monitor that the legislative power does not go beyond its limitations and who can control that the procedures are handled in a correct way by the courts?

These questions will be commented on in this article.

2. The fundamentals of the rule of law

The idea that citizens need protection against the state is in the legal literature mentioned as the rule of law.” One must separate “state” and its basic functions from “state ruled by law” A state is defined as consisting of a territory, a people and state organisation. A state ruled by law is something else. Though sometimes when the rule of law is mentioned one merely means the existence of laws. From this point of view, every state is ruled by law. A legal order is a part of every state. A democratic state must definitely have laws. The people vote on delegates for the parliament and the main function of the parliament is to make laws. Society is governed through these laws. The rule of law in a more narrow sense includes that there must be support under the law for the action that the court or administrative authority takes. There may hence be no sanction without legal support for this sanction and the person or persons within the court or administration that decide must, according to the law, have that power. But this has little to do with the debate about the rule of law. The debate is partly about how this can be obtained but it is more about the limitations and the control of the power of the state in a wider sense. If one sees the role of the state just as an obligation to counteract criminality amongst the people, this point of view might seem strange. Then the criminal laws, the police force, the courts and the prosecutors are the guarantors for law and order. But even though these are important they do not necessarily protect the people from the state itself. The main idea of the rule of law is that there are limitations regarding the power of the state, i.e. limitations according to which the legislature must act and limitations according to which the courts and the administration as well as the government must act. There must also be controls so that the limitations are observed by the powerful institutions of the state. There is no clear definition of the rule of law. This article points out criteria that serve the rule of law in a state. The basic fundamentals of the idea of the rule of law are the right of freedoms, the division of power and equal treatment of the citizens, but there are also other criteria concerning the rule of law.

Respects for rights of freedom. The essence of the idea of “rule of law” is that the human being is free and has rights of freedoms against the State. The rights of freedoms are, for example, rights to property, rights surrounding family life such as raising ones children, rights surrounding opinions such as freedom of demonstration and freedom of speech. There are also freedoms

like the right to life and the right not to be tortured. Another kind of freedom is equal rights according to which different persons shall not be discriminated by the state.

The rights of freedom are considered to be an invention from the West. These individual rights have validity even in opposition to the state. They have their origin in the idea that there are natural rights that are above the law that human beings have created. This idea is firmly rooted in the Christian theology of creation; it puts the interests of the individual ahead of those of the state, in a way that is unknown to the Eastern state ideology of the Soviet era. But the idea is not only based on Christianity, it can also be explained by the fact that the opposite solution, “power is law”, means that there are no limits for the legislature. It can make any law that it desires. As is pointed out above, the idea of “the rule of law” does not only mean that the law that is written shall be followed. It stipulates that there are limits as to what the legislature can do and how the courts and the administration may act. This means that the idea of “the rule of law” and the idea of “natural rights” are closely connected.

Rights of freedoms are often included in the constitution of a democratic state. More important, though, is the European Convention on Human Rights (ECHR). It has become important to the citizens of these European States that are members of the Council of Europe. The reason why the ECHR is more important is that the citizens of these countries that have ratified the convention have the possibility of applying to the European court i.e. it is a supra-national legal system. This is not the case with the Declaration of Human Rights from the United Nations. This declaration has political importance more than legal as there is no jurisdiction connected to it. The constitutions of different democratic states generally include a possibility for the citizens to go to court with the question of whether a decision or a law is in accordance with the constitution and this possibility can be very strong in some countries, for example in Germany, but it can also be rather weak as it is in Sweden. It is a sensible thing for the politicians because the possibility of going to court with such questions can make it difficult for the politicians to govern. If the possibility does not exist it might be easier to govern the country but it might undermine democracy as the individuals might find that the state is too strong in some areas, leaving no freedom for the individual.

The ECHR is not necessarily superior – in a formal way – to the constitution of a state that has ratified it. It might, as it is in Sweden, be incorporated into the legal system through an ordinary law, which means that formally the constitution, with its rights of freedom, is superior to the ECHR. But the fact that a citizen can apply to the European Court on Human Rights when he has no more legal possibilities within his own country, makes the convention superior to the constitutions of the member-countries.

The rights of freedoms exist in relationship to the State. The legislature must be careful not to interfere too much in these freedoms. The idea is not that this is totally forbidden, but there is a limit as to how far the legislature can go. When the legislature interferes in these freedoms it can only do this through laws. In individual cases where interference in these freedoms are necessary, the courts need support from the law. This means that these freedoms are basic in a democracy and the state can, to some extent, interfere, but only through laws. The question of how far the state can go is of course very delicate; consider, for example, the laws on abortion in different European countries and the debates surrounding them. Of basic importance is that the state – when it does interfere, has to interfere in these freedoms through laws. This means that there is basically in democracies an acceptance for these rights. They do exist but they can be limited to an extent through laws from the parliament.

Rights and politics are not always in harmony with each other when it comes to human rights. It can be seen in cases where the question might seem small and without significant

importance, but behind this question lies another question concerning human rights. The human right question is not always obvious. If there is a question of whether banks that are owned by private persons shall be taken over by the state by force then it is obvious for most people that this involves the right to property. But if there is a Christian cross hanging in a class room, it might be more difficult to see that this has something to do with freedom of religion, especially for those of us who are used to seeing such crosses on walls. For non-Christians though, it might be more difficult to accept that their children can be influenced by another God than the one in which they believe. They might see the respect for their religion as a human right.

Even if a state has a constitution that includes protection for human rights, this, as is mentioned above, does not imply that it is totally forbidden to diminish the rights and the freedoms of citizens. It is possible for the legislature to do that. In many of the articles of the ECHR it is written that the state may circumscribe human rights through laws when this is necessary in a democratic society. This is where the difficulties arise. When is it necessary and when is it not? This can be answered by the European Court, but it must also be possible to have an answer within the legal system of the state.

The rights of social welfare. One must make a separation between rights of freedom and rights of social welfare. With the rights to social welfare, the situation is completely different. These rights concern social subsidies and benefits from the state. These rights can only exist in a democratic state if there is a law that gives these rights to the citizens. For example, different kinds of allowances for children and elderly people exist because the parliament has made such laws. It is also necessary – in contradiction to the rights of freedoms – that there are economic resources. Without economic resources there can be no social welfare rights.

Social welfare rights are not included in the ECHR and they are generally not included in the constitutions of democratic countries. If they exist in a country it is through normal laws. Whether such a right is a strong right in the sense that those who need it get it depends on whether the person can apply to the court and complain if he did not receive it from the social welfare authority and whether there are enough resources to give it to him.

It should also be mentioned that the right to work and the right to education have two sides. They can be both freedom rights and social welfare rights. It depends on whether the right is something that is offered from the state or whether it is something that the state cannot prevent the individual from doing. If schools are free of charge and paid for by the state, then this is a welfare right for the citizens. If a person wants to study in order to reach a profession he shall not be stopped from doing this by the state if he has the qualifications needed. This is a freedom right.

The division of power. The organisations of democratic countries are all – more or less – built on the division of powers. The basic idea is that there shall be different bodies for the making of law, the application of law and the execution of law. Through this separation power is meant to be less concentrated and this is considered to ensure transparency and hence the rule of law but above all it makes the law itself a powerful factor that is not under the influence of the other powers. The judicial system is to be protected from the other branches of the power system. The executive power may not interfere in the acting of the judicial power, i.e. the government may not control the courts or administrative authorities by telling them how an actual individual case is to be solved. The government or its administrative body shall not arrange courses for the judges on how to interpret a law. It must also be forbidden for the judges to ask persons in the

government or in the parliament how the law shall be understood. The legislative power makes laws but it may not interfere thereafter in how these laws are applied to individual cases.

Courts must be independent from other parts of the state organisation. The greater the independence, the better is the possibility of having the rule of law. Therefore the judges must be irremovable. In small countries many of the different lawyers of the courts work for the government from time to time. They help, for example, the governments in preparing new legislation. This might to some extent make them less objective and it can therefore be a factor that weakens the rule of law.

Equality before the law. This is a fundamental right that stands out as very important in the legal system. Equal treatment must be considered as a basic fundamental for the rule of law. It is something for the legislature as well as for the courts to observe. This means that there has to be, for example, consistency in how a certain law is interpreted by the courts and that the legislature may not discriminate against anybody due to, for example, language, race or sex. Objectivity and impartiality also has to do with equal treatment.

3. The rule of law in the daily work of the legislature and courts.

The rights of freedoms, the division of power and equal treatment are fundamental to the rule of law. The rights of freedoms circumscribe the legislative power and the division of power makes it possible for the law to be a powerful factor in itself, free from legislature. Equal treatment means that there has to be a consistency as to how laws are applied and that there shall be no discrimination. There are also other criteria that serve the rule of law. One can distinguish between the criteria that must be observed in the legislation of the state and the criteria that must be observed in the procedure of the courts. Other criteria concern the control of state power.

The rule of law concerns how laws are made and what laws can be made. Clear legal rules are of importance and these legal rules must be general. A stable order with few changes in the existing laws serves the rule of law. In addition to this, laws, that include obligations for the citizens and hence interfere in their rights of freedom, must be made by the parliament in a democracy and this legislative power may not be delegated to governments or authorities. Openness towards the citizens about the legal system must also be observed by those in power.

General rules. A rule is by definition general. If it is not general but particular in pointing out one case it is not a rule. If a legal text is written in such a way that it is clear that it shall be applied in only one special case, then this is not a general legal rule. The legislature is not allowed to write such a law. If it does, it is illegal because it is beyond the power of the legislature to write such a law. It may not be applied by the court or the administrative body. But if the law-text is generally applicable but applied in only one case, this is acceptable.

Clear rules. Clear legal rules serve the rule of law. The more exact the legal rules are, the higher is the rule of law but legal rules must cover many different situations and it can be necessary to write them in such a way that they need interpretation in order to be understood. There are different methods of interpretation to be used. Sometimes, though, in the field of administrative law, the parliament makes laws where an administrative authority can choose between different interpretations of the law. This means that it is a very unclear rule. An example of

this is a rule concerning the environment of work places in Sweden. According to that rule there shall be satisfactory security at the work place. In this way the parliament gives a frame and delegates to the government or to lower bodies of the government to decide the more exact content of this legal text in their statutes. But the court and the administrative bodies that are to apply the law to individual cases need to know what “satisfying security” means. Sometimes it is the courts that have to decide the more exact content when such a case comes to court, but in many cases these kinds of decisions cannot be taken to court. Instead it is an administrative regional or governmental body that decides. A citizen or a company that has a case might discover that the administrative body or the court has understood the law in a completely different way than he has i.e. it is rather difficult to foresee the application of such a law. There is also a deficiency concerning the division of power in such cases if the authorities can make statutes and at the same time be the body that applies the statute in individual cases. This certainly does not serve the rule of law.

Law-making which interferes in rights of freedoms. Laws that include obligations for the citizens must, as is mentioned above, be made by the parliament in a democracy and it may not be delegated to governments or authorities to make such laws. It is necessary to delegate the power to make statutes to government and its authorities but this may not be done with laws concerning obligations for the citizens where burdens like prohibitions, fees without equivalent return or taxes or penalties are required of the citizens. These are burdens that interfere in the rights of freedom and such freedoms can only be circumscribed by the parliament that was chosen by the people in a democratic election.

Minimal change to rules Of course changes have to be made over time when a law does not serve its purpose, but a stable order with few changes in the existing legal texts is something good in itself and it serves the rule of law. The fewer changes to a legal text the better, this is the rule of law. Unpredictable changes do not serve the rule of law. In Sweden companies complain from time to time about the frequent changes in parts of the Swedish tax laws that concern them. The changes make it difficult for them to plan their businesses.

Openness concerning legislation. The legislature may not act in secret. There may be no secret laws. They must all be published. All laws shall be published and made available to the citizens. Laws should be in the libraries and the internet is of course also a very good way to publish them. When it concerns statutes from lower administrative bodies, it can sometimes be more difficult to get hold of them, which of course is not good.

There must be openness towards the citizens and an open discussion around the changes in the legal system. Important parts of this openness are that it must be possible for the citizen to foresee the consequences of an action or non-action. Therefore there is a prohibition towards retroactive legislation at least concerning penal laws. There is also a lack of openness around laws that are not clear enough. If a law is unclear, it can be difficult to foresee the consequences of such a law.

When burdens, like taxes or different kinds of administrative sanctions, are placed upon the citizens through laws, they should be dealt with openly. Information to the citizens about legislation work that is going on is important. This promotes a free discussion, basic in a democratic society. There is especially a need for discussion in public about burdens that are put on the citizens as such legislation often interferes in the rights of freedom. The citizens shall not be taken by surprise by new laws and there should be possibilities for having an open discussion. It is good for the system if there is an open process from the side of the legislature

before a law is made, where suggestions are published and sent to different organisations and institutions for comments.

4. The procedure in the courts and in the administrative bodies

There are restrictions as to what sources may be used when interpreting the law. The demonstration and the sifting of evidence must be reliable. The possibilities for the citizen to have legal aid serve the rule of law. Proportionality regarding what sanction is given to the individual in relationship to what he has done as far as criminality is involved must be upheld. This is also true in relationship to how the state benefits when it concerns a public law case. It is also a basic tenet that the courts' decisions are founded on facts and that the courts' observe impartiality.

Legal sources. All democratic systems are built on the principle that power is limited and bound by the law. Therefore one important question is what sources one may use to solve a case. This also concerns the source of laws, which to use and how to use them: can only the written and promulgated text in the book of law be used as a source when the law is applied in a case or can other sources also be used? Everybody knows that other sources can be used, but what are those sources? The question is important because the court cannot deny solving a legal problem only because there is no clear law on how to solve it. The law and the precedents are the main legal sources but there can be others. The court ought to tell what sources have been used in the judgement.

Reliable demonstration and sifting of evidence. This concerns the proofs and the burden of proof. The burden of proof is of importance in unclear situations where it is difficult to say what is wrong and what is right, i.e. in cases of uncertainty. The decision of the court or of the governmental body must then be made through the burden of proof. In order to take a decision according to the burden of proof in cases of uncertainty one must know who has the burden of proof and one must also know how valuable the proofs are when considered together. In a criminal case this is not so difficult. It is always the prosecutor who has the burden of proof and he must prove that it is beyond reasonable doubt that the accused has done what he has been accused of. In administrative cases, though, this can be more complicated. First of all it does not have to be proven beyond reasonable doubt that the citizen has the right to have the allowance that he has asked for or that the state has the right to require some kind of burden as, for example, a fee from him. A lower value of proofs is acceptable. It is not always clear who has the burden of proof even if it is often said that the citizen has the burden of proof if he asks for an allowance from the state. The question, who has the burden of proof, is rarely expressed in the laws. It is something that has to be considered in practice, but it sometimes happens that the legislature decides on who has the burden of proof. An example of how the burden of proof can be used can be seen in the EU-legislation on gender equality. The difficulties for the employee in proving discrimination and the clear aim of the EU to carry the gender equality through, has led to an EU-directive (97/80) according to which it shall be for the respondent (i.e. the employer) to prove that there has been no breach of the principle of equal treatment. A woman, who considers herself wronged, must establish facts before the court from which it may be presumed that there has been discrimination, but after that the burden of proof is on the employer. He has to

show that he has not broken the principle of equal treatment. If he cannot show this, he has to pay damages to the employee.

It can be vital to the individual where the court, the governmental or the regional body places the burden of proof. Therefore this is also an important issue concerning the rule of law. The right to be heard is also a vital part of the demonstration and sifting of evidence. Every piece of information that is not in favour of a party must be told to him and he must have the right to give his opinion to the court.

Still another important question is what evidences can be brought to the court and how they shall be valued. In Sweden a party is free to bring whatever evidence he thinks might benefit his case and the court is free with regard to how to value the evidence. This means that there are no special rules concerning what evidence can be brought to the court and no legal rules as to what is good evidence. Certainly there might be laws concerning which evidence is of value but if a party cannot give such evidence he is free to try to prove his case any other way that he can. Then the court is free to value the information in the way that according to their knowledge and experience is the right way. In administrative cases there can be a tendency to value more highly information that comes from an authority than information that comes from an individual. Such a habit from the decision-maker can weaken the rule of law.

An important part of the reliable demonstration of evidence is the word-of-mouth procedure. This is considered to be much more reliable than a written demonstration and it is used in criminal and civil procedures. The procedure in administrative cases has in general been a written procedure, in the administrative bodies and in the administrative courts in Sweden. The written demonstration in administrative cases is supposed to be more efficient and cost less and this is probably true, but the rule of law is not so strong during the administrative procedure where the demonstration and sifting of evidence is not based on word of mouth. In many cases this probably does not matter. Many administrative cases are simple and without complications, but some are not and when the complication concerns a question of evidence, a written procedure can make it more difficult for the individual to prove his case. A written procedure in such a case weakens the rule of law.

Impartiality. Impartiality shall be observed by courts. That is the reason for their existence. For example if an expert has given a statement during a trial in court and also given his opinion on how the court should judge, it is important that the court declares that it is the court that decides how to judge.

This should of course also be observed when it concerns the administrative bodies. These bodies also have the obligation to give a report for the interest of the state when they make decisions in individual cases. In order to obtain impartiality the civil servants may not accept favours or gifts from persons or companies. A minister may not accept an apartment that is offered by a company who owns it, if this means that this minister gets a favour, as this might lead to impartiality in future decisions by the minister. Any conference which the bank-inspectorate holds for its employees may not be sponsored by banks for the same reason. An impartial judgement is considered as one basic human right according to the ECHR article 6.

Legal aid. As it is often difficult for the citizen to argue on legal questions in front of the court or state body, legal aid is important. Needless to say, this is expensive for the state and can hardly be paid by the taxpayers in all cases. If the state does not pay, then the individual has to pay himself, which means that in such cases there might be no possibility for a poor person to claim his or her right. This is not in accordance with the rule of law.

Proportionality. According to the rule of law there must also be some proportionality regarding what punishment is given to the individual in relationship to what he has done. In the administrative field where the interest of the state is always involved when there is a burden put on an individual, the burden must be in proportion to what benefits there are for the state. Proportionality is a basic principle in the practice of the European court and it is also a basic principle in EU-legislation.

Openness concerning the procedure. The judgements must be public as well as the court procedure so that there can be a free discussion if needed. The need for this openness in a democratic country of course makes it important that the court gives the reason for the judgement and accounts for it in a satisfactory way – how the legal sources have been used and how the evidence has been valued. A written administrative procedure is less open than the oral procedure of the ordinary courts.

5. Different ways of controlling the legislature and the courts

Institutional control of power also serves the rule of law. There must be legal remedies so that it is possible for an individual to complain about a decision or a judgement. But it must also be possible to punish a civil servant who commits a malfeasance and to pay damages from the state when an individual loses money due to a wrongful decision from the state. There should also be possibilities for checking whether laws from the parliament are in accordance with the constitution. Still another special way of checking is the monitoring from an ombudsman.

Control by higher courts. The most fundamental control is that which the citizen is entitled to when he applies to a higher court. In Sweden many administrative cases where the interest of the state (which can be in the interest of the majority of the citizen) is at stake can only be taken to higher administrative bodies. Some administrative cases cannot be taken to any higher authorities at all. This has been an old Swedish tradition where there is little division of power in the field of administrative law. Such a tradition does not serve the rule of law and the Swedish state has been taken to the European court for this reason. Such a case was the Sporröng-Lönnroth case where the owners of two houses received decisions from an administrative body that their houses should be taken over by the state because the land was needed for public use (for example roads and hospitals). But the state did not fulfil this decision to expropriate the houses, so the owners were still owners but with very restricted access to their properties since they could not sell or let it to people and there was no possibility for the owners to appeal to a higher court within the Swedish system. The European court found that this was not in accordance with the ECHR. Sweden has changed its system due to this judgement and now there is a special possibility in which one can take all administrative cases concerning civil rights to a Swedish court when one has exhausted the possibilities within the administrative bodies. Sweden has also restricted the time during which a decision of expropriation may last. Before this judgement from the European court there was no time limit.

Constitutional control over the legislation. Constitutional courts oversee that the legislation on lower levels is in accordance with the constitution. This means that they can monitor whether the law from the government is in accordance with the constitution, but they can also check whether statutes from lower administrative bodies are in accordance with the constitution. A constitutional court is not really necessary for this. Another way to do this monitoring is, for

example, to make it an obligation for the ordinary courts to check whether it is in accordance with the constitution. Still another way of checking the legislature is to have a special body that assesses the laws before they are promulgated.

Many countries in Europe have constitutional control. The constitutional court of Germany is very strong. There are also constitutional courts in the Baltic countries but Sweden does not have a constitutional court. The constitutional control in Sweden can be made by the ordinary courts during a process of an individual case but only if it is “obvious” that a law from the parliament is not in accordance with the constitution. This is almost never obvious when it concerns questions on rights of freedoms. Such things are hard to see and these questions are rather complicated. Therefore it is difficult for the citizens to obtain such a control in Sweden. Control is a sensitive issue. The parliaments and the governments are not too enthusiastic to be controlled by courts. They can feel that it makes their task difficult. Uncertainty can, of course, arise about the legal situation and this might also be bad for the system. This happens from time to time in Germany when the constitutional court in Karlsruhe takes decisions.

It should also be mentioned that in the United States the constitutional control is very strong as it is the duty of every lawyer to check whether a case has been handled in accordance with the constitution.

The European Court on Human Rights is a kind of constitutional court. It is within the jurisdiction of this court to decide whether a judgement from a court, a law from the parliament, a statute from the government or from an administrative body, in a country belonging to the European council, is in accordance with human rights.

Economic responsibility for the state. In those cases where the citizen suffers an economic loss due to a wrongful decision by a court or from a governmental or regional body, the state should take the responsibility for paying damages. Such damages must be decided by court and the procedure, that precedes such a decision, can be an important way of telling the bodies mentioned how they must fulfil their tasks.

Criminal responsibility for the civil servant in charge. It must be possible to condemn a person who has committed an intentional malfeasance when in his work he used the power of the state that was in his hand. This can also be an important way to tell the administrative bodies how they must fulfil their tasks. For example, there was a case where a German boy was beaten to death by his parents while they stayed in Sweden. Neighbours and a nurse made the child abuse known to the social services of the region. The woman in charge did nothing about it. She was condemned for having committed malfeasance as it was her duty to investigate such a case with priority. The court trial has pointed out that such an investigation must be handled with priority.

The Ombudsman. The ombudsman can be another form of monitoring but the ombudsman cannot change a court’s decision. This institution can, in most cases that come to its knowledge, only inform the parliament about the wrongdoing. The ombudsman is an institution under the parliament and its role is to monitor how the laws that are made by the parliament are applied. The ombudsman makes statements that are published and they can be very important as they tell the administration how to act in the future. Especially important is the control by the ombudsman over the actions of the administration.

The role of the ombudsman is sometimes misunderstood by people in the Baltic states and in other east European countries. Some people believe that they can go to the ombudsman if they do not have enough money for housing or for support of their families. This is only partly

true. If there is a law that says that the state has to give a person a certain sum of money, for example, for housing and the government or its administrative body does not fulfil its obligation according to this law, then the person can turn to the ombudsman. The ombudsman must then investigate whether the administrative body has not fulfilled its legal obligations. But if there is no legal obligation the ombudsman cannot help the person.

In some east European countries there is also a Human Rights Office. Its role is also often misunderstood. The official who works there can in cases concerning social aid only tell a person the telephone number and the address of the administration or the voluntary organisation that can help the person if there is such help. But they cannot take such a case to the European Court on Human Rights, as there are no rights of social welfare in the ECHR.

6. A legitimate legal system

The above has concerned the protection of citizens against the power of the state. I have described situations where the power is executed through a decision concerning individual citizens. Especially the decisions that come from the governmental and the regional administrations and the administrative courts are of interest when the rule of law is discussed. It is especially within the administrative bodies that a conflict between the interest of the state and the interest of the individual citizen can lead to wrongful use of power.

In a way, one can say that if you want the citizen to accept the law it is necessary that the state – in respect for the individual – accepts the limitation of its power and acts according to the rule of law. If the citizens feel that the state has respect for them they will in turn have respect for the state. Legitimacy for the legal system exists if the citizens find the legal system acceptable. The rule of law means that the legislature has limited power, that the courts must follow certain rules of procedure and that there must exist a division of power and people must be treated equally. There must also be openness from the legislature and the courts according to the rule of law. An important step in reaching legitimacy is that the legislature, the courts and the administrative bodies act according to the rule of law. The rule of law is not something static that exists or does not exist. It is a complex idea that has to be kept in mind. This is an aim that has to be strived for over and over again in the daily work of the parliament, the courts, the government and the administrative bodies.

7. Protecting the democracy from the people

Though this article is about the protection of citizens against the state it must also be said that the state needs protection against the people in order to protect democracy. All violence from individuals can of course be punished by the state, but when citizens act with violence in order to disturb or destroy the upholding of democracy, there can be a need for special protection for the state and its organisation. It should be pointed out that this protection can be of such importance that during certain circumstances it might be important for the state to take such actions that the citizens are not as protected against the state as they normally are in a state ruled by law. This issue raises delicate questions because a democracy is by definition committed to such values as liberty, equality and freedom of speech. But it might be necessary for the state to interfere in such freedoms in such a way that they disappear. The reason why the state might have this power in certain circumstances is that, if it does not have it, the



Figure 97. Stockholm. The crown is a salient symbol of the Swedish state. Photo: Katarzyna Skalska

base for democracy disappears. It is complicated due to the contradiction between these two interests. One could see this complicated question raised during the meeting of the leaders of the European Union in Gothenburg in June 2001 during the Swedish presidency. Many people demonstrated against the European Union. Some of them threw stones at policemen who had to withdraw. They damaged property heavily in the centre of Gothenburg. Their aim was to destroy the meeting of the EU-leaders. The policemen could not handle the situation. Many of the people who took part in the demonstrations were masked, which meant that those who were not caught could not be identified when they later started to damage property and commit violence towards the policemen. Such demonstrations can lead to EU-leaders having difficulties in meeting each other, which is a threat to open democracy. It was discussed in the media whether it might be possible to unmask and to arrest these people before the violence started. If this could be possible it would be in conflict with the basic fundamentals of a democracy: the freedom of opinion and hence to demonstrate. However if it is not possible, we may lose the type of democracy where the meetings of politicians are open and can be discussed.

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