Two Visions of Time: The Different Temporalities of the *Rättsstat* and the Rule of Law

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"When the future collapses, the past rushes in" - Torpey

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1 Introduction

The rule of law is everywhere,[1] yet at the same time there is an ongoing sense that it is threatened. It is as if something foundational, something society-defining that "has always been there," is slipping away.

That democratic values in some countries are on the decline and that this represents a challenge to the rule of law that should be addressed does not need to be questioned. However, we would like to take a closer look at some of the core elements of the concepts of the rule of law and the *rättsstat* (the latter, as will be further elaborated, we understand to be different from the rule of law), and explore how they are and have been reflected in Swedish law *in different times*. We submit that the rule of law discussion – as we are familiar with it today – expanded in Sweden as part of a larger societal transformation that occurred gradually from the 1970s until the 2020s. During this period Sweden shifted from being a welfare state shaped by law and administration – what we will refer to as the *rättsstat* paradigm – to a society molded by rights and courts – the rule of law paradigm.[2] Furthermore, we argue that the two paradigms reflect two different visions of time. And finally, we argue that considering these different visions of time when thinking about the rule of law can help us understand why the rule of law today is generally faced with so many challenges.

The article is structured around the hypothesis of two existing paradigms that have gradually – and overlappingly – been present in Scandinavian Law tradition: the *rättsstat* and the rule of law. We set out to explore the present rule of law paradigm by contrasting it to its older *rättsstat* structure. The aim of the article is twofold. We study how the two paradigms have shaped the relationship between, first, the legislature and the courts, and second, between the state and the individual. Thereafter, we argue that these two paradigms encompass two different theoretical structures of legal thought of which distinct visions of time are amongst the most striking.

The article consists of four parts. After this brief introduction, Part 2 provides some theoretical clarifications with respect to our reliance on paradigms as a historical explanatory model and the use of temporality, and visions of time, in the analysis. We also set out some core elements of the *rättsstat* and the rule of law, that provide theoretical boundaries to our discussion of the two paradigms. Thereafter, in Part 3, we describe and explore the central aspects of the older *rättsstat* paradigm in Sweden and the shift into the rule of law paradigm and its structures and components. We argue that some of the biggest differences in the separate paradigms can be observed within the areas of tort law and civil procedure. The general description of shifting paradigms is thus anchored in these two legal fields. In the closing part of the article, Part 4, we briefly discuss the different themes that the analysis has revealed.

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1 As noted by Martin Krygier, "virtually every article on the rule of law begins by noting, it has come to be invoked pretty well everywhere." Martin Krygier "What's the Point of the Rule of Law?" 67 (2019) 3 *Buffalo Law Review* 743, 744. In Scandinavia, the Helsinki Rule of Law Forum was recently established for the purpose of studying the rule of law in the European Union. The present edited volume dedicated solely to the rule of law was recently preceded by a different publication on the same topic, see Karl Djurberg Malm and Richard Sannerholm (eds) *Rättsstaten i den svenska förvaltningen* (Statskontoret 2022).

2 See also sections 2.3 and 2.4.

2 Theoretical Clarifications

2.1 Paradigms as a Historical Explanatory Model

We have chosen to call the different societal structures "paradigms." The word "paradigm" is to be understood as general societal patterns and explanatory models.[3] Needless to say, we are not working within the tradition of assessing the *rättsstat* paradigm and the rule of law as essentially the same concept. Instead, we emphasize the differences between the two. Amongst advocates that the *rättsstat* and the rule of law are the same, the Scottish legal philosopher Sir Neil MacCormick is probably the most well known.[4] Philosophically, many benefits can come from treating the *rättsstat* and the rule of law as parts of a larger democratic order.[5] However, we believe that the emphasis on the connection lacks the time-boundedness that characterizes these two paradigms. The article is based on the presumption that the two paradigms have historically existed in parallel. The emergence of the rule of law paradigm occurred at the same time as the *rättsstat* paradigm was declining. In our opinion, this shift was gradual rather than sudden.

2.2 Temporality and Visions of Time

In this article, we approach the law in part as a historical object,[6] using a partly historical method for theorizing law. Because of this, we find it necessary to clarify how this historical approach is theoretically generative and why we believe that general rule of law research would benefit from this analytical approach. When studying the *rättsstat* and the rule of law as paradigms, we implicitly argue that it is a theoretical framework that has existed in time: one can, for example, talk of a before and after the rule of law paradigm.[7] Furthermore, we emphasize the discontinuity within law and legal theory and bring to the fore what we see as significantly different in the rule of law paradigm, in comparison to the *rättsstat* paradigm. We believe that the judiciary of the 1960s had a general understanding of law's purposes and possibilities. They saw law as a mechanism that could be deployed for greater societal change, which also means that they had a different conceptualization of *time*.

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3 The concept is thus different from Thomas Kuhn's original meaning.

4 D. Neil MacCormick "Der Rechtsstaat und die rule of law" *39 Juristenzeitung* (1984) 65, referred to by Jens Meierhenrich in "*Rechtstaat* versus the Rule of Law" in Jens Meierhenrich and Martin Loughlin (eds) *The Cambridge Companion to the Rule of Law* (Cambridge University Press 2021) 39. See also Martin Krygier "Rule of Law (and Rechtsstaat)" in James R Silkenat, James E Hickey Jr., and Peter D Barenboim (eds) *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer 2014) 45.

5 See Stephan Kirste "Philosophical Foundations of the Principle of the Legal State (Rechtsstaat) and the Rule of Law" in Silkenat et al (n 4) 29.

6 See Maksymilian Del Mar "Philosophical Analysis and Historical Inquiry: Theorizing Normativity, Law, and Legal Thought" in Markus D Dubber and Christopher Tomlins (eds) *The Oxford Handbook of Legal History* (Oxford University Press 2018) 3, 5, 6.

7 Del Mar (n 6) 6.

One of the underlying premises for this study is that human beings can have different visions of time and that societies can construct collective visions through *inter alia*, their official agencies.[8] With visions of time we refer to the general modeling of time, e.g., whether time is linear or cyclical (spatialization), whether it moves quickly or slowly (speed), whether it expands or contracts (direction), and whether we are taking part in a long or short period of time (duration).[9]

Time, however, is not singular. Layers of time can be parallel to each other.[10] One of the great challenges with historicizing law is the justification of the delimitation of the different time periods.[11] The primary argument of our analysis is found in the view that there was structural repetition in the *rättsstat* paradigm regarding the vision of time in general. It was forward-looking, long reaching, linear, and progressive. The same applies to the rule of law paradigm, however with the opposite outcome. The judiciary in the latter paradigm understands law as reactive, restorative, controlling and short-lived. Thus, it is easy to conclude that within this paradigm, time is conceived as circular, fast, declining, and short.

2.3 What is the Rättsstat? Some Core Elements

The theoretical foundations of the *rättsstat* originates from the Germen *Rechtstaat* – but differs from the latter in some important ways. Firstly, the German *Rechtstaat* is an administrative society[12] to which a strong constitution as well as a constitutional court has been added. In Sweden and the rest of the Nordic Countries, such powerful institutions are lacking – and the constitution (or basic law) is relatively often changed by the legislature. Thus, the Supreme Court plays a minor role – compared to e.g. the German *Verfassungsgericht* – in questions of interpretation and clarification of the constitution's meaning. Further, no 'pure' constitutional judicial review is possible in Sweden. The court cannot declare legislation invalid (although it can set it aside *inter partes*) as a result of constitutional judicial review. All in all, this makes the *rättsstat* differ even more from the constitutional structure that implicitly upholds the rule of law.

Nevertheless, there are some clear similarities. The *rättsstat*, like a society working under the rule of law, is a state in which the public and the state officials are generally bound by and abide by the law. Somewhere there, however, the similarities end. The *rättsstat* has the national state as its foundation and the promotion of rules as its working method. In a *rättsstat* the democratically elected party representatives have the authority to realize the will of the people through public law making; hence the court's role as a guardian of official power

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8 Reinhart Koselleck *Futures Past: On the Semantics of Historical Time* (Columbia University Press 2004) 259–263.

9 Del Mar (n 6) 6–8.

10 Reinhart Koselleck *Sediments of Time* (Stanford University Press 2018) 3.

11 François Hartog *Regimes of History* (Columbia University Press 2015) passim.

12 Martin Loughlin *Foundations of Public Law* (Oxford University Press 2010) 317–321.

is downplayed. The individual judges' leeway in their judgment is also relatively circumscribed. When the rule of law gives great power to judges to, e.g., reject laws because they conflict with fundamental rights, a corresponding extensive interpretation could be seen as unlawful in a *rättsstat*. The courts simply lack this mandate, whereas questions of access to justice and remedies are almost non-existent. The theoretical structure is further characterized by a political effort to create authorities and agencies that could cater for 'ordinary' people at almost every aspect of their life.[13] As Jens Meierhenrich has put it: "Instead of elevating, by way of law, the status of the individuals, [the theorists of the *Rechtsstaat*] lowered the status of the state" by creating accessible state agencies and authorities. In this way, the public generally became less authoritarian.

2.4 What is the Rule of Law? Some Core Elements

According to Tamanaha, the rule of law exists in a society when the public and state officials are generally bound by and abide by the law.[14] We believe that this statement is accurate from a societal perspective. However, from a legal point of view it needs clarification. Thus, it seems only fair to inform the reader what we consider to be the core aspects of the rule of law – as a legal theoretical framework – before moving on to analyzing the impact of the theories in different paradigms and, later, the shift between them.

People break the law all the time. Legally, the question arises what consequences will follow for a lawbreaker in a rule of law society?[15] A partial answer is that a cluster of other legal theories will be introduced by anyone working in the judiciary, and some distinctive notions are further actualized if it turns out that the lawbreaker was a government official who acted as a representative of the ruling power. These concepts are *human rights*, *access to justice* and the individual's *protection from arbitrary state power*.[16] We claim that all of them are connected to the common understanding of the rule of law today. When e.g., a politician exceeds his or her powers causing harm to an individual the incident is formulated as a 'rights violation.' According to the rule of law theory, human rights are entities that exist both inside and 'above' the law, and they can be evoked by an individual against *inter alia* the state.[17] Consequently, the possibilities for the individual to claim legal remedies, such as damages or redress, are of the utmost importance for theoretical coherence. And as a result, the court becomes the *agent* appointed to protect the rights of individuals. Against this backdrop, it comes as no surprise that popular discourse tends to elevate the importance of the Supreme Courts (of every democratic

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13 Karolina Stenlund *Rättighetsargumentet i skadeståndsrätten* (Iustus 2021) 110.

14 Brian Tamanaha "Functions of Rule of Law" in Meierhenrich et al (n 4) 221.

15 In this article, we omit discussion of what constitutes a law, and the related themes of legal clarity, promulgation, and generality. See, e.g., Benjamin C Zipursky, "Torts and the Rule of Law" in Lisa M Austin and Dennis Klimchuck *Private Law and the Rule of Law* (Oxford University Press 2015) 139, 143.

16 Tamanaha (n 14) 225.

17 Duncan Kennedy, "The Critique of Rights in Critical Legal Studies" in Wendy Brown and Janet Halley (eds) *Left Legalism/Left Critique* (Duke University Press) 186.

country but especially America) and envisage the Justices as the guarantors of eternal justice. They cater to the rule of law.

3 Two Paradigms: Two Visions of Time

3.1 The Rättsstat Paradigm: Future! Vision! Predictability!

The Swedish *rättsstat* was derived from the German *Rechtsstaat* tradition and was gradually developed during the 19th and 20th centuries. It expanded slowly but steadily, and with increased intensity, from the middle of the 20th century. The steadiness was to a large degree the result of the fact that Sweden never took part in WWII, and hence there was no need to rewrite the constitutional foundations of the country after the German surrender. Constitutional reform was indeed debated from the early 1940s on,[18] but constitutional law did not play a central role in the construction of the welfare state – with which the *rättsstat* was intimately connected. The 'basic law' (the Constitutional Instrument of Government) did not mention constitutional rights until the 1977 and 1979 reforms.[19] In general, the benefits conferred by legislation were not framed as 'rights' at all, but as rules.[20] To an important degree, this was a result of the profound impact that Scandinavian realism had had on legal thinking and legislation (for Olivecrona e.g., subjective individual rights existed "only in the imagination of men"[21]).[22] Nevertheless, the Swedish model could be illustratively contrasted to the 1949 German constitution. For instance, the post-war constitution of West Germany declared that the new German State should respect and protect human dignity, which is inviolable. This fundamental proclamation marked a new beginning after the fall of the Nazi regime, but also represented a fundamental theoretic notion underlying the modern German constitutional state, namely that the state regains its legitimacy through the freedom of its citizens. Constitutional judicial review emerged as a fundamental means of controlling the legislature in post-war Germany.[23]

Since no such historical atrocities haunted Swedish society after 1945, the Swedish government could focus on expanding large parts of state control and administration – creating free healthcare, public social insurances, public

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18 Stenlund (n 13) 128.

19 Prop 1975/76:209; prop 1978/79:195.

20 Kjell Å Modéer "Den svenska domarkulturen – europeiska och nationella förebilder" (Corpus Iuris 1994) 47.

21 Karl Olivecrona *Law as Fact* (Munksgaard 1939) 85.

22 See e.g. Stenlund (n 13) 100–110; Modéer (n 20) 46; Torbjörn Andersson "Axel Hägerström's Influence on Legal Thinking in Sweden: All Mod Cons in the Valley between What Is and What Ought To Be" in Sven Eliaeson, Patricia Mindus & Steven P Turner (eds) *Axel Hägerström and Modern Social Thought* (Bardwell Press 2014) 205, 206, 224.

23 Article 1, German Basic Law. In Nazi Germany, the rights of the individual were stepwise set aside for the benefit of what was considered the general good; it was only as part of the people of Germany that individuals would find their value, duty, and position in life, according to the totalitarian ideology. See Agnes Hellner, *Arguments for Access to Justice* (Uppsala University 2019) 177, 178.

education, and so on. A stable economy made these visions possible. In this *social* societal model,[24] time was perceived as linear and almost eternal.[25] Because of this, law was used as a tool to embark upon ambitious reform programs – of which many were surprisingly successful. The wording of legislation had to be adapted to last for the long periods of time that the politicians envisioned it to last.[26] In addition, political discussions were to a large extent centered around questions of how administrative agencies would best realize the social values and rights of individuals. In the welfare state of the *rättstat* paradigm, the borders between the state and civil society have accordingly been described as blurred, with the idea of the state being 'good' as dominant.[27] Preparatory works were allowed to take time, while both the result – the legislation itself – and the argumentation behind it was supposed to guide both agencies and courts in their work for at least 50, 60 or 100 years.[28] With this temporality in mind, law was understood as a vehicle for transforming society for the better.[29]

The constitutional reform in Sweden in 1974, and the gradual inclusion of a bill of rights in the second chapter of the basic law,[30] did not break with the realist tradition. Since individual rights were not regarded as shields in the *rättstat*, the intention was not primarily to protect individual citizens – but rather to strengthen the state by introducing a set of primary values in the basic law that could be considered by the government under the principle of popular sovereignty.[31] The intention was, moreover, that the rights would be given concrete content through legislation[32] and that the rights codified in the bill would only be used to limit the government's power proactively. The purpose of the bill of rights was never to strengthen the possibilities of judicial review or to empower the courts, and the *rättsstat* was never founded on the idea of

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[24] See Duncan Kennedy "Three Globalizations of Law and Legal Thought: 1850–2000" in David Trubeck and Alvo Santos (eds) *The New Law and Economic Development* (Cambridge University Press) 37.

[25] See Koselleck (n 10) 3, on linear and circular time.

[26] Kjell Å Modéer *Juristernas nära förflutna. Rättskulturer i förändring* (Santérus 2009) 317–322; Martin Scheinin in Martin Scheinin (ed) *The Welfare State and Constitutionalism in the Nordic Countries* (Nordic Council 2001) 20. Mats Kumlien points to the year 1932, in which the Social Democrats came to power (and kept it for 44 years), as the starting point for the construction of 'folkhem', and the expansion of the state through the adoption of e.g. social and municipal law. Mats Kumlien *Professorspolitik och samhällsförändring. En rättshistorisk undersökning av den svenska förvaltningsrättens uppkomst* (Institutet för rättshistorisk forskning 2019) 195.

[27] Pia Letto-Vanamo "Courts and Proceedings: Some Nordic Characteristics" in Laura Ervo, Pia Letto-Vanamo and Anna Nylund (eds) *Rethinking Nordic Courts* (Springer 2021) 90 Ius Gentium: Comparative Perspectives on Law and Justice 21, 23.

[28] See e.g. Skadeståndslagen (1972:207), Rättegångsbalken (1942:740), Avtalslagen (1915:218).

[29] Stenlund (n 13) 111; Modéer (n 20) 46.

[30] Prop. 1975/76:209; prop. 1978/79:195; prop. 1993/94:117; prop. 2009/10:80.

[31] SOU 1940:20 14; Stenlund (n 13) 130, 275.

[32] Stenlund (n 13) 131.

separation of powers or checks and balances.[33] When the legislature constitutionalized rights by enacting new ones in the bill, it was regarded as an act of codification of general societal values – values that could be taken into account in the building of an administrative welfare state. This understanding of rights was not unique to Sweden, as pointed out, for example, by Moyn: "the main remedy for the abrogation of revolutionary rights remained democratic action" during this time period.[34] It can rather be seen as one illustration of the bigger welfare paradigm of the Western hemisphere. Against this backdrop it comes as no surprise that it is stated in the preparatory work of the amendment of the bill of rights from 1975 that a "regulation of rights in the constitution [must not mean] that political power [...] may be transferred to non-political bodies, e.g. the courts."[35] Power was supposed to remain with the representatives of the people.

The second chapter of the basic law gradually expanded over the years – and has continued to do so ever since.[36] Due to this successive expansion, the Swedish bill of rights does not follow any traditional theory of rights and has aptly been described as a patchwork.[37] All in all, rights in the *rättsstat* paradigm were values codified for future law making, not tools to facilitate litigation against abusive government power. This general understanding, however, came to shift as Sweden entered a new paradigm.

3.1.1 Procedural Law in the *Rättsstat* Paradigm

Andersson has said that there are few disciplines of law where the ideas of the Swedish Professor of Philosophy and founder of Scandinavian legal realism, Axel Hägerström, have had a more profound impact than on procedural law.[38] As already noted, the Scandinavian realists rejected individual rights and were loyal to the law as it is. Accordingly, Ekelöf also rejected the notion that judicial protection of individual rights would be the purpose or function of civil procedure. For him, judgments should instead contribute to the realization of the purposes of substantive law and procedural rules should be adapted to enhance this overarching objective.[39] Civil procedure would then have the utilitarian purpose of contributing to the enforcement of the law as it is, which in turn would assist in the internalization among the general public of the idea that rules should be followed (*handlingsdirigering*). In this manner, legislation and judicial

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33 Stenlund (n 13) 273–277.

34 Samuel Moyn *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 27.

35 SOU 1975:75 14.

36 The latest development in the matter is that all parties in the Swedish Parliament want to investigate a constitutionally protected right to abortion. See Lova Olsson and Karin Rundblom https://sverigesradio.se/artikel/alla-partier-vill-utreda-fragan-om-grundlagsskyddad-abortratt.

37 Hans-Gunnar Axberger "Rättigheter (del I av II)" (2018) *SvJT* 759, 769.

38 T Andersson (n 22) 205.

39 Per Olof Ekelöf in Per Olof Ekelöf, Henrik Edelstam, Lars Heuman and Mikael Pauli, *Rättegång I* (Wolters Kluwer 2016) 100.

application of legislation would go hand in hand: they are vehicles for the attainment of a societal good in the future.[40] Courts are dependent on the political branch of government and must be loyal to it when it identifies the objective of substantive law in concrete cases, and applies the law in accordance with the identified objective.[41] In the words of Modéer, "political culture imprinted the field of legal culture" at this point in time.[42]

Ekelöf's ideas concerning the role of courts fit well with the *rättsstat* paradigm. Like early *Rechtstaat* theorists, the Scandinavian realists separated law and morals and favored the promotion of rules rather than rights. In making it the function of the procedure to realize the objectives of substantive law, Ekelöf depicts courts as instruments in relation to the legislature.[43] This elevates the status of the legislature, and diminishes the role of the courts. Within civil procedure, judges were passive, bound by the procedural actions of the parties. The Procedural Code, *Rättegångsbalken*, adopted in 1942, was (and is still) liberal and individualistic: the claims brought by the parties define the boundaries of the procedure and the court may only consider the evidence invoked by them.[44] *Handlingsdirigering* thus was not the same as the realization of substantive law in each individual case (rather, in commercial disputes, it was considered to benefit the general good if the judge was passive).[45]

In Ekelöf's thinking, procedural rules are not understood as neutral or as a mere formality. Adjudication is not a mechanical activity. Procedural law (like substantive law itself) has a normative content: it can either hinder or enhance the realization of the objectives of substantive law in practice.[46] From this perspective, it is not surprising that Lindblom, Ekelöf's disciple, would situate Ekelöf's thinking in a legal context where ideas on access to justice were increasingly emphasized both in Sweden and internationally.[47] The international access to justice movement of the early 1970s had as its objective to remove formal and practical barriers to access to justice that prevent the realization of rights for all.[48] The legislature was actively involved in introducing alternatives

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[40] For Per Henrik Lindblom, Ekelöf's theoretical framework, focusing on *handlingsdirigering*, is prospective, in the sense that the procedure aims at directing the behavior of the defendant, and of the general public, in the future. Per Henrik Lindblom "Tes, antites och syntes – perspektiv på processrätten" (1984) *SvJT* 785, 798. See also Henrik Bellander *Rättegångskostnader. Om kostnadsbördan i dispositiva tvistemål* (Iustus 2017) 78; T Andersson (n 22) 211.

[41] Ekelöf (n 39) 104, 105.

[42] Modéer (n 20) 47.

[43] Meierhenrich (n 4) 56

[44] Per Henrik Lindblom "Rättegångsbalken 50 år – en saga och sex sanningar" (1999) *SvJT* 496, 500, 510.

[45] Although the ideal of a judgment mirroring 'the truth' according to substantive law had been emphasized by Franz Klein, the man behind the Austrian civil procedural law, which influenced *Rättegångsbalken*.

[46] Per Henrik Lindblom *Progressive Procedure* (Iustus 2017) 19.

[47] Per Henrik Lindblom *Grupptalan i Sverige* (Norstedts Juridik 2008) 173.

[48] Mauro Cappelletti and Bryant Garth described this approach as inspired by "the desire to make the rights of ordinary people real, and not merely symbolic." Mauro Cappelletti and Bryant Garth "Access to Justice: The Newest Wave in the Worldwide Movement to Make

to litigation that would make it easier and less expensive to resolve disputes out of court, the most prominent example being the establishment of the Consumer Complaint Board (*Allmänna reklamationsnämnden*) in 1968. This too, can be understood as the use of procedural law as a normative instrument, assisting the realization of the purposes underlying substantive consumer protection law. However, Lindell instead held that dispute resolution would be the primary function of civil procedure. Lindblom took an intermediary position, arguing that the procedure could fulfil both functions (*konfliktlösning* and *handlingsdirigering*).[49]

As we will see, when the rule of law paradigm gradually became more dominant, and in particular as a result of the effects of European law on Swedish law, the functions of the procedure shifted and evolved, at least in part.

3.1.2 Tort Law in the *Rättsstat* Paradigm

When describing the role of tort law in the *rättsstat* paradigm, it is important to make a distinction between a) tort law as it was adjudicated and generally understood amongst judges and attorneys and b) the legislature's (and a couple of prominent scholars') *visions* of tort law. The former understanding can be described as traditional. According to this view, tort law was described as a pure private law field, slowly developed by adjudication. The concepts of negligence, strict liability, and causation were applied by judges to settle cases between private parties; the outcome was not important for society as a whole. During large parts of the 20th century, tort law was a field that was almost purely based on case law – something quite unique in a civil law country like Sweden. The reasons for this are historical – and beyond the scope of this article. However, it is of importance to clarify that the Tort Law Act of 1972, *Skadeståndslagen*, consisted of a codification of Supreme Court case law. The Act was expressly written in vague and open language, since the purpose was to give the court leeway to clarify its meaning. The clarifications that came to be made by the courts were nevertheless not anchored in theories of individual *rights* and it completely lacked a human rights-based theoretical connection. *Negligence* and *damage requirements* were the formative words used in the Tort Law Act. As a result of this, adjudication was mainly developed from the perspective of the tortfeasor with questions such as how to clarify negligence in the foreground.

The judge-made law was, however, separate from the ongoing political discussions both before and after the Tort Law Act was enacted. The ruling Social Democratic government of that time had no interest in clarifying the

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Rights Effective" (1978) 27 *Buffalo Law Review* 181, 182. On the international Access to Justice movement, see e.g. Anna Wallerman and Sebastian Wejerdal "Introduction" in Anna Wallerman and Sebastian Wejedal (eds) *Access to Justice i Skandinavien* (Santérus 2022), 17, 19–24.

[49] For a discussion of different views and critique of Ekelöf's teleological method of interpretation, see e.g. Bengt Lindell *Civilprocessen. Rättegång samt skiljeförfarande och medling* (Iustus 2021) 34–35; Henrik Edelstam in Ekelöf et al (n 39) 26–30; Lars Heuman in Ekelöf et al (n 39) 97. Whereas *handlingsdirigering* has been argued to have a prospective focus, *konfliktlösning* is rather retrospective, focusing on the rights and duties of the parties prior to the dispute.

somewhat abstract tort law concepts through new legislation – that task was given to the courts. Instead, the political focus lay on questions of how to guarantee social security and remedies – for a long time the aspiration was to include large parts of the 'private right to damages' into the public insurance system.[50] Especially the injured party's right to remedies for personal injuries was stressed and large-scale health insurance systems were accordingly planned.[51] The insurances were seen as tools through which political power could realize its welfare goals – guaranteeing everyone decent healthcare, medication, and sickness benefit. These ambitions existed in parallel with an urgent need for a new 'pure' Tort Law Act. Ultimately, the state ended up doing both – the above-mentioned new Tort Law Act was crafted by special tort law committees while comprehensive social welfare programs were launched by politicians. Different types of state agencies were created to facilitate disbursements without the need for litigation.

In a *rättsstat* of that time, the overarching idea was that everybody should have the same right to remedies, notwithstanding the injured individual's inclination to sue, or the tortfeasor's ability to pay. Furthermore, human rights, access to justice, and court control had no role to play in these public insurance programs. Through the creation of central agencies and a large administrative apparatus the core concept of the *rättsstat* – to make the community and the state officials abide by the law – could be realized. The crafting of a detailed policy made the work at the agencies easy and the outcome of their decisions predictable (at least that was the focus). By centralizing administration into nationwide agencies, a nondiscriminatory rule application was made possible (at least that was the vision). As opposed to a rule of law society, one of the main goals of the *rättsstat* was to make sure that everyone was awarded the same damages through the administrative agencies – without using the courts and ordinary private litigation. All in all, it could also be noticed that the foundation of the *rättsstat* was in many senses nationalistic – since the laws promulgated regarding *inter alia* public insurance only covered the national Swedish health care system. Seeking healthcare outside the borders of the nation was not even considered possible.

It is also worth noticing that the legislature – through the social welfare programs – issued laws to ensure future change (for the better) of society. Naturally, 'ordinary' tort law cases still existed – but the overarching idea was that the only tort law disputes settled in court would deal with issues of retribution or recourse.[52] The Supreme Court's role was definitely not considered to be 'the guardian' of the individual's rights against an excessive legislatures' will.[53] Instead, the government was seen as the social authority with the right to govern the community and translate the rights into practical results. State liability did, however, exist after 1972, but only at a very narrow level.[54]

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50 Håkan Andersson "The Tort Law Culture(s) of Scandinavia" (2012) 3 *Journal of European Tort Law* 210, 217–218.

51 See e.g. SOU 1950:16.

52 SOU 1950:16 100.

53 Stenlund (n 13).

54 Håkan Andersson *Ansvarsproblem i skadeståndsrätten* (Iustus 2013) 348–355.

For the above reasons, a rule of law criteria for measuring the tort law during this time seems almost comical. The Tort Law Act that was enacted to deal with only a very small number of private disputes. The question of how to guarantee remedies for ordinary citizens was solved collectively through social security models.

This way of understanding tort law differs to a great extent from the general picture of the field today. Due to Europeanization, a complicated shift regarding the general view of the national tort law has occurred, with a greater emphasis on its state controlling function as a result. We claim that tort law has increasingly become a tool used to solve public law matters since tort law litigation of the second paradigm is considered to be an important working method for individuals' rights claims and access to justice. This function is very far from the one described above.

3.2 The Rule of Law Paradigm: Past! Control! Restitution!

Regardless of the factors behind it – economic, technical or political – it is clear today that the general faith in the welfare state gradually came to be questioned during the 1970s, and after that it was rapidly dismantled in Sweden.[55] Simultaneously with this societal shift, another transition took place in Swedish society – the overall paradigmatic shift between the *rättsstat* and the rule of law.

In the rule of law paradigm, the Swedish legislature and courts had to start adapting to a legal landscape modeled by numerous law-making actors at different levels of government. The 'internationalization' of the law affected the relationship between the two constitutional actors: in the rule of law paradigm courts had increasingly come to function as a controlling instance, and the scope for judicial law-making had expanded.

The factors behind the paradigmatic shift are numerous and complex; but it is uncontroversial to say that Swedish law is increasingly interlaced in law created, litigated, and interpreted beyond the nation state. The content of legal norms is no longer in the hands of the national legislature: national legislation's power to steer societal development is weakened *inter alia* due to EU membership. EU law and international conventions are often open-ended and in need of interpretation for their concretization. The influence of international courts, such as the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR), on Swedish legislation is growing accordingly. At times, the implementation of European and international law almost appears to become just an overcomplicated task for the legislature to cope with, and the responsibility for defining what law means is explicitly delegated to the judiciary. Preparatory works are criticized for missing the opportunity to explain how legislation is to be understood and applied in practice in the future.[56] In the rule of law paradigm, the legislature increasingly looks to the courts for guidance with respect to how the law it adopts is to be understood, rather than

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[55] Moyn (n 34) passim; Stenlund (n 13) 60–70.

[56] The phenomenon has been referred to as "dumping political problems on the courts"' ('politisk problemdumpning'). Pernilla Leviner "Barnkonventionen som svensk lag – En diskussion om utmaningar och möjligheter för att förverkliga barns rättigheter" (2018) 2 *Förvaltningsrättslig tidskrift* 287, 308.

the other way around.[57] It is clear that courts increasingly take on the role of controlling the legislature and of shielding the individual litigant from the wrongdoing of public administration.[58] This is a slip that has involved judicial law-making – a point to which we will return. It is nevertheless clear that general temporality of the paradigm thus involves a retrospective and circular structure. In this sense one can talk of a visionary U-turn.

The overall structure of the EU legal order and its emphasis on the core concepts of the rule of law – human rights, access to justice, and judicial protection – arguably leaves little room for the sustainment of the *rättsstat* paradigm in EU member states. Today, the rule of law is generally seen as an "unqualified human good" as E.P Thomson once called it. The founding treaties, however, did not mention the rule of law: it was in *Les Verts* that the CJEU first declared that the (then) European Economic Community is a Community based on the rule of law.[59] Today, under EU law, the principle of effective judicial protection (codified in Article 47 of the Charter of Fundamental Rights of the EU) has acquired a constitutional function by being inextricably linked to the rule of law (codified in Article 2 of the Treaty on European Union.).[60] In the EU's decentralized constitutional structure, national courts were early on tasked with ensuring that rights conferred by EU law were respected.[61] To enable national courts to take on this function, national procedural law had to be adapted, and obstacles to access to justice be removed, by the introduction of limitations to (what used to be referred to as) the procedural autonomy of member states.[62]

Once litigants can invoke their rights before the national courts, the courts can review national legislation and administrative action in light of EU law.

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57 See prop 2021/22:229 for a recent example.

58 See Lindblom (n 44) 496, 505.

59 C-294/83 Parti écologiste "Les Verts" EU:C:1986:166 para 23.

60 Sacha Prechal "Article 19 TEU and National Courts: A New Role for the Principle of Effective Judicial Protection?" in Matteo Bonelli et al (eds) *Article 47 of the EU Charter and Effective Judicial Protection* (Bloomsbury 2022) 11, 12. For Prechal, the "core of the principle is that it aims at protecting the rights of legal subjects which they derive from EU law and, at the same time, at controlling the exercise of the powers by public authorities." The CJEU has held that "the very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law." C-64/16 Associação Sindical dos Juízes Portugueses EU:C:2018:117 para 36.

61 Koen Lenaerts, "The Rule of Law and the Coherence of the Judicial System of the European Union" (2007) 44 *Common Market Law Review* 1625, 1625. In the "complete system of legal remedies and procedures designed to ensure judicial review of the legality of Union acts," the possibility of bringing direct actions before the CJEU is limited by strict conditions for legal standing.

62 Initially, national courts were required to ensure that substantive EU law was effective applying national procedural laws and remedies. Cases brought before the CJEU, however, successively showed that national procedural law itself could endanger effectiveness. The Court's response was the elaboration, first, of the principles of equivalence and effectiveness (C-45/76 Comet EU:C:1976:191 and C-33/76 Rewe EU:C:1976:188), and later, the elaboration of the principle of effective judicial protection (C-222/84 Johnston EU:C:1986:206), which resulted in a more intense scrutiny of national procedural law. See further, Prechal (n 60) 13, 14; Eva Storskrubb *Civil Procedure and EU Law: A Policy Area Uncovered* (Oxford University Press 2008) 14, 26.

Where needed, the courts can refer the case to the CJEU for a preliminary ruling; the courts are thereby enabled to ensure the uniform application of EU law throughout the Union. In this scheme, national courts together with the litigants and lawyers appearing before them have been described as "agents of EU law."[63]

3.2.1 Procedural Law in the Rule of Law Paradigm

In the rule of law paradigm, national procedural law is perforated by procedural law requirements derived from the ECHR and EU law. The body of EU civil procedural law is piecemeal and fragmented to the extent that it has emerged in the form of sectoral legislation (the EU holds no general legislative competence with respect to procedural law).[64] Whether EU procedural legislation has or has not been adopted, the case law of the CJEU directs how national procedural law can be applied in cases where the substantive content of the case is governed by EU law. As a result, depending on the substance matter of the case brought before the national court, the impact of EU procedural law on national civil procedure can take a very different shape. Although it is piecemeal, fragmented, and arguably difficult to overlook and sometimes also to predict, EU procedural law is closely connected to the enforcement of substantive EU law, and is tied to the right to a fair trial and judicial protection according to Article 47 of the Charter of Fundamental Rights.[65]

The impact of EU procedural law on Swedish civil procedural law has been argued to be more limited than one might expect, considering the body of EU legislation. At times, Sweden has been criticized for its minimalistic implementation. In other cases, EU law leaves such a wide scope for implementation that sticking to previously established procedures appears less problematic.[66] However, even if the impact on specific procedural rules may be limited, the function of the procedure is impacted by the rule of law paradigm. An increased focus on the right to a fair trial and judicial protection, stemming from ECtHR jurisprudence as well as EU law, emphasizes the procedure as an instrument for guaranteeing the respect of (human) rights, and for judicially reviewing state action.

On the face of it, the understanding of the function of the procedure is similar in the *rättsstat* and in rule of law paradigms. In EU law, the function of the procedure before the national courts is framed as a matter of ensuring the protection of the rights of individuals, enshrined in EU law. Judicial protection of rights, in turn, goes hand in hand with the rule of law. As seen above, Ekelöf has also argued that courts should rule in such a manner that the purposes of

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63 R Daniel Kelemen *Eurolegalism: The Transformation of Law and Regulation in the European Union* (Harvard University Press 2011) 146.

64 Consumer law, competition law, and intellectual property law are examples of areas in which sectoral procedural legislation has been adopted. For an overview of EU civil procedural law, see Eva Storskrubb "Civil Justice Extending its Tentacles" in Paul Craig and Graínne de Búrca (eds) *The Evolution of EU Law* (Oxford University Press 2021) 770.

65 Storskrubb (n 64) 784.

66 Eva Storskrubb "EU-rätten, access to justice-vågorna och de svaga skandinaviska böljorna" in Anna Wallerman Ghavanini and Sebastian Wejedal (eds) *Access to Justice i Skandinavien* (Santérus 2022) 337, 358–359.

legislation would be realized. This would promote rule obedience, and respect for the *rättsstat*. Accordingly, both within the *rättsstat* and the rule of law paradigms, ensuring respect for legislation remains the primary task of the courts. In both paradigms, it has furthermore been considered that procedural rules must be adapted to facilitate, or at least not hinder, the realization of substantive law.

As noted by Lindblom in 2004, however, there are differences between these two types of realization of the objectives underlying substantive law.[67] The most obvious difference is the strengthening of the controlling function of the courts in relation to the legislature and to public authorities – which reflects a disruption with the linear vision of time of the *rättsstat* paradigm. The role assigned to Swedish courts under EU law is clearly different from that of the *rättsstat* paradigm: rather than being loyal to the Swedish legislature, and its political vision, Swedish courts are now supposed to control it by judicially reviewing its actions in light of EU law. The case law of the ECtHR too, has resulted in strengthening the controlling function of courts in relation to the legislature.[68]

In addition, the courts' law-making function is strengthened in the rule of law paradigm. Ekelöf's teleological method of interpretation required the judge to consider the extent to which the application of a norm in a particular case – as well as over time – would enhance the realization of the purposes underlying it. Thus, the preparatory work was by default considered by the court in the *rättstat* paradigm – and if the preparatory work e.g. discussed possible outcomes of future 'hard cases' the court was inclined to follow the same argumentation. If no discussions about the case were uncovered in the preparatory works, the method of analogy was advantageously used, even in tax law or criminal law cases.[69] Judgments therefore openly considered both the purposes of the norm *and* the effects of the outcome, but anchored them in argumentation that drew on the "realization of the legislature's will." In this manner, courts worked together with the legislature in the creation of a strong (welfare) *rättsstat.* As already mentioned, it is a forward-looking method – obviously still in use. However, it differs in several important ways from the methods of interpretation that Swedish courts may rely on in the rule of law paradigm, in cases governed by European or international law.

To the extent that substantive law derives from European or international law, it may be more open ended and in need of concretization, and the purposes underlying it may be more loosely defined. Accordingly, the method of interpretation is by nature more open and flexible. In such situations, judicial argumentation might be more vulnerable to the criticism that it is "ideologically driven."

The EU legal order is explicitly designed from a circular conception of time – by repetition of litigation, a uniform application of legislation is secured throughout the Union. The premise is that occurring and ongoing court cases can rid a structure of its internal flaws. This understanding of the law's role in society lies at the very heart of the rule of law paradigm. Visions of future legal

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[67] Per Henrik Lindblom "Domstolarnas växande samhällsroll och processens förändrade funktioner – floskler eller fakta?" (2004) *SvJT* 229, 241–242.

[68] Lindblom (n 44) 496, 505.

[69] Ekelöf (n 39) 104, 105.

landscapes – canalized through detailed law making – are absent. Restitution, reparation, and compensation for (human) rights violations work ex post. The relationship between the individual and the state is characterized as hostile, and hence it is considered that government power needs to be checked. Here tort law enters.

3.2.2 Tort Law in the Rule of Law Paradigm

If rights in the rule of law paradigm are regarded as shields for the individual against state repression, in Sweden tort litigation has emerged as a major means by which this protection can be realized. From the beginning of 2000, the Latin maxim *ubi jus ibi remedium* seemed to be on everyone's lips – and the reason for this was the wide-ranging case law delivered by the Swedish Supreme Court.

Looking further back, however, the rights-based Swedish tort law can be connected to the gradual expansion of state liability, and the relational shift that gradually occurred between the state and individuals during the latter part of the 20th century. As has been pointed out by prominent human rights historians, the human rights paradigm can be seen as a response to the faith in the welfare (*rättsstat*) paradigm that had reigned in the Western hemisphere until the end of the 20th century having been lost.[70] The rule of law paradigm coincided with the gradual expansion of Swedish state liability. For example, the so-called standard rule (*standardregeln*) which limited government liability was terminated in 1989[71] – opening up the real possibility of suing the state for damages. The state's and its official agencies' earlier liability only applied "if a standard has been breached which – taking into account the nature and purpose of the authority's activity – can reasonably be placed on [the state's and the agency's] service."[72]

However, it was not until the incorporation of the ECHR that tort law was married to the rights-based paradigm. A number of Convention-based cases were brought to court. NJA 2005 s. 462 *Genombrottsdomen*, was the landmark case in which the Supreme Court adjudicated a new form of remedy – constructing a right to compensation for human rights violations. In this case the Supreme Court held the Swedish state liable for overstepping Article 6 of the Convention. The case concerned a certain Lundgren, who suffered *inter alia* non-pecuniary damages as a result of slow court procedures. He had been waiting several years for the verdict on a criminal trial that was held against him – only to be acquitted from all charges in the end. Thus, he claimed compensation for the violation of Article 6 of the Convention. By relying on Article 13 of the Convention he used private tort law to challenge state procedure in criminal law cases and pushed for shorter times of court administration.

This case is thus a clear example of how private tort law – through creative litigation – began to affect the behavior of Swedish public authorities. Rights-based tort law was successfully used in areas of society traditionally governed by public law. Furthermore, this was done from a perception of law as a

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70 Stenlund (n 13) 60–70.

71 See SOU 2020:44 43; H Andersson (n 54) 349–350.

72 See 3 chapter 4 § in the old Tort Law Act.

retrospective entity – used for correction and retribution. With this shift, time suddenly became circular rather than linear and progressive. It sparked new visions of temporality in the mainstream judiciary. This corrective[73] vision of law was further cross-fertilized with a newfound interest in human rights.[74]

After Lundgren had won the case, several similar cases were brought to court. Claimants sought damages due to alleged breaches of other articles in the Convention. Eventually, the legal argumentation shifted from using the ECHR as the foundation of the claim, toward the Second Chapter of the Swedish Basic Law (the bill of rights). The next landmark case was NJA 2014 s. 323 *Medborgarskapsdomen I*. The facts of the case were as follows: A certain (Pettersson) was born in 1984 as the first child in the marriage between a Swedish man and a British woman. In accordance with current Swedish law, he gained Swedish citizenship at birth on account of his father's Swedish citizenship. After a time, the parents divorced and in a judgment from 2000, the divorced parent was declared not to be the father of Pettersson. As the citizenship had been recognized on the premise that Pettersson's father was Swedish, the Swedish Tax Authority decided to deregister him as a Swedish citizen. Pettersson then brought a lawsuit before the Administrative Court, reclaiming his Swedish citizenship. The Administrative Supreme Court considered the decision by the Tax Authority to be a violation of Chapter 2, Section 7, of the Swedish Basic Law (the bill of rights). As a result, Pettersson was re-registered as a Swedish citizen. However, for a period of about 4.5 years, when the case was pending before the administrative court he did not have Swedish citizenship. Pettersson thus demanded that the state pay him a non-pecuniary compensation of 150,000 Swedish kronor for the 'lost' years. Pettersson filed a new lawsuit against the state on private law grounds claiming a right to compensation for the unconstitutional denouncement of his citizenship. Pettersson eventually won the process against the state in the Swedish Supreme Court, and received a 100,000 kronor compensation.

Since the bill of rights lacks an equivalent to Article 13 in the European Convention, the judgment has been considered radical. It has also resulted in major changes within the constitutional division of power within the country since his case paved the way for a new constitutional control mechanism. To a large extent, tort law was used as a tool for limiting state power – and it was purely developed by adjudication. From a former *rättsstat* paradigm view, the court clearly lacks the power to create a remedy like this – it is purely a judge-made law. From a rule of law perspective, however, the outcome is sound, since the main focus of the court is to control governmental power and protect the individual from arbitrary state intervention. Rights are shields to be used in courts. According to this explanatory model, the court can ameliorate a societal structure by granting the individual a monetary compensation.

Against this backdrop, it is easy to conclude that rights-based tort law is a purely retroactive tool, working ex post the actual damage. By continuously raising small claims in court, the idea is to change public policy – however, the perspective is rather short, and retrospective. Visions of predictability and

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[73] Mårten Schultz *Kausalitet: Studier i skadeståndsrättslig argumentation* (Jure 2007); Ernest Weinrib *Corrective Justice* (Oxford University Press 2016).

[74] Stenlund (n 13) 225–241.

sustainable outcomes are completely lacking. The future is of little interest and the model of time is circular.

This is even more evident when turning to the legislature's behavior in relation to adjudicated rights-based tort compensation. The latest change in the Tort Law Act (Chapter 3, Section 4) was an adjustment to the constitutional law praxis that started with NJA 2014 s. 323 *Medborgarskapsdomen I*. The legislature retroactively adjusts the Act to fit with the Supreme Court's case law. This is adjustment without vision, but also without vice.

4 From *Rättsstat* to the Rule of Law: When the Time is Out of Joint, Lawyers Were Born to Set It Right!

It matters how politicians think of time. It matters because it reflects how they decide to govern society. The conception of time defines the kinds of laws that are made, how they are formulated, and how long they are expected to last. If time is seen as a straight road, an ever-evolving line of progress, as a politician you are not only allowed to make bold future plans – you are expected to do so. Equal in importance, however, is the general understanding of time within the judiciary. If procedural law's general aim is to facilitate material legislation – the will of the ruling party – adjudication must be forward-looking, taking into consideration the aims articulated in the preparatory work. If tort law is a minimalistic field – only used for dealing with different forms of economic loss or recourse – the majority of questions relating to ensuring sick pay and damages are naturally handled collectively. Both the tort and the procedural law of the *Rättsstat* were tools for the government to use in their visionary social welfare building. It worked as long as 'the future' was considered to be near and tangible. When this narrative came to be questioned and the end of history was mooted, the general understanding of the function of law and the role of the judiciary changed. Lawyers became rights litigants and judges developed into government checkers. Hand in hand with this came the visionary shift of temporality.

Nowadays, time moves fast – there is hardly a possibility for the legislature to 'catch up' with e.g., European law, that develops at fast pace and to an important degree in the ECtHR and the CJEU respectively. Law is ever-changing and discontinuity is emphasized both by legal academia and the legislature. New legislation is not crafted for long duration, for who knows what the future may hold? Let us instead make it the task of courts to look back and correct what went wrong! The starting point in the rule of law paradigm is that something *will* go wrong, therefore we need rights litigants and strong courts to fix it quickly. The picture can be contrasted with the temporality of the *rättsstat*, where duration was unquestioned and progression considered natural. In a *rättsstat*, time is continuous and linear and looking back is pointless. The future is a vast and open horizon and the past a dark nightmare that we cope with by forgetting.

All in all, the temporality of the above-described paradigms is essentially different. The *rättssstat* paradigm consists of ambitious social programs with a long-range perspective, whereas the rule of law paradigm is retrospective, corrective, and almost circular. This raises the question: How is the rule of law supposed to deal with the future?

We argue that the current rule of law paradigm is faced with challenges that directly correspond to its fugitive relationship to the future and its inability to see time as something vast, linear, and progressive. How can we think of future generations and e.g. climate change if the mainstream understanding of rights is a reactive and controlling one? How do we see beyond the current time horizon to overcome the limits it imposes? One answer could be to start with a new conception of time.