Remarks on the Recent Rule of Law Debate in the Nordic States

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1 Background and Introduction

Recently, or in the last ten years, developments in the so-called rule of law crisis in Central and Eastern Europe and notably Hungary and Poland have been very much discussed and debated throughout Europe. The debate has taken into account the latest judgments from the European Court of Justice (CJEU) and the European Court of Human Rights (ECtHR), as well as more lately, the impact of the war in Ukraine. Here, we shall try to see which kind of repercussions that the debate has had within the Nordic countries, though they are rarely seen as concerned with or affected by this particular kind of crisis.[1] As a background, a few words will be said about the concept of democracy that the EU adheres to today and will be pursuing in the future. After that, a few more theoretical remarks will be made, in order to provide a theoretical context for some of the recent problems that also the Nordic countries have recently witnessed in this field.

The analysis is made against the somewhat sinister background of what the Hungarian Prime Minister Viktor Orbán in 2014 advocated as being an "illiberal democracy", that would in his view respond to contemporary challenges such as migration and terrorism in a better way than the traditional, liberal and pluralist democracy.[2] A very important part of the background is of course also the deep conflict of values that has, at least for the last ten years, characterized the whole western world.

This crisis or clash of values may actually be said to have started in Hungary in 2010, with the great or even landslide electoral victory of the *Fidesz* party, that won a majority of two thirds of the members in the Parliament and immediately began to use that huge majority in order to appoint new judges and chief executives for various public bodies. Without any doubt, Orbán's ideas have inspired authoritarian, populist right-wing leaders in other parts of the world. My view on the crisis within the EU, however, is that after the introduction into the EU Treaty, gradually since 1993, of ideals such as human rights, democracy and rule of law, the EU is bound – or has in fact bound itself – to a liberal, *material* model of democracy, based in particular on rule of law and human rights. While Orbán's so-called illiberal model is based on nothing else – and respects nothing else – than the will of the alleged sovereign "people", that is here given an almost mythical status, the liberal model of democracy currently prevailing in the EU requires that values such as human rights and rule of law are respected if democracy may be said to exist at all. The same is of course also true for the Nordic countries.

While the former "vision", emphasizing no other traditional democratic value than popular sovereignty itself, may with some good will be called a formal view of democracy, the view enshrined in Articles 2, 6 and 7 in the Treaty on

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1 A similar but somewhat more thorough study or approach was presented a few years ago by Graham Butler; see The European Rule of Law Standard, the Nordic States, and EU Law, in A. Bakardjieva Engelbrekt/A. Moberg/J. Nergelius (eds.), Rule of Law in the EU – 30 Years after the Fall of the Berlin Wall, Swedish Studies in European Law, Vol. 15, Oxford (Hart) 2021 p. 243-264.

2 The full text of Orbán's speech, held at Tusnafürdö in Romania on 26 July 2014, is available at https://budapestbeacon.com.

European Union (TEU) is definitely a material one. This clash of values within the EU itself is sooner or later likely to lead to a huge, maybe even dramatic conflict between the majority of EU Member States and the more authoritarian ones, the outcome of which is hard to predict. However, I will now focus on the debate in the Nordic states in general and Sweden in particular.

2 Theoretical Remarks

The current doctrinal debate in Sweden on what rule of law really means, in a Nordic context, may now be said to have gone on for some forty years. Thus, in order to understand this discussion, we do not need to analyze the older debate.[3] Nor is it necessary to make any distinction between the Anglo-american term "rule of law" and the German *Rechtsstaat* or *Rechtssicherheit*, since all those terms may today, in my view, be equated with the Swedish terms *rättsstat* and *rättssäkerhet*; linguistically, these terms are of course closer to their German origins, needless to say, but anyone who claims that there is any significant difference, within the Nordic countries, between these terms and rule of law faces an "uphill fight".[4]

Apart from the fact that public power has to be exercised according to the laws of the country (Chapter 1, Art. 1, sect. 3), the expression rule of law or *rättssäkerhetens krav* is mentioned in one place in the Swedish constitution (*Regeringsformen*, Instrument of Government), namely in Chapter 8, Art. 22 p. 3, concerning the role and competences of the Law Council (*Lagrådet*), that examines law bills before they enter into force.[5] One of the tasks of that body, hence, is to control how or whether draft laws will meet the requirements of rule of law (which are however nowhere specified).[6] Thus, the Swedish constitution and the EU treaty share one feature: to mention and even stress the importance of rule of law without really identifying or defining what the term means.[7]

This "modern" debate on rule of law was originally initiated in 1984 by the so-called Commission against economic criminality. In its final report[8], the Commission made a distinction between what it called a traditional and on the

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3 For an overview of this, see Åke Frändberg, Rättsordningens idé – - En antologi i allmän rättslära, Uppsala 2005 p. 375 ss.

4 Cf M. Derlén/J. Lindholm/M. Naartijärvi, Konstitutionell rätt, Stockholm 2016 p. 36.

5 The same goes for a headline in Chap. 2 (to arts. 9-11).

6 One attempt to define this requirement of rule of law has been raised by the political scientist Karl-Göran Algotsson, who recommends the Law Council to stick to one particular aspect, namely predictability of the proposed law. See his book Medborgarrätten och regeringsformen, Stockholm 1987 ps. 267. Such an approach is likely to reduce the risk for the Law Council to enter into political controversies. At the same time, more ethical or material aspects may be considered with references to other sections of 8:22.

7 Concerning the EU, this lack of definition of rule of law in the basic treaty has been used as an argument for countries accused by the EU of violating rule of law, such as Hungary and Poland. However, this counter-argument has so far not been successful. See e.g. C-156/21 and 157/21, Hungary v. Parliament and Council as well as Poland v. Parliament and Council, Judgment 16 February 2022, ECLI:EU:C:2022:97.

8 SOU 1984:15.

other hand a more modern concept of rule of law. According to the Commission, the traditional concept consisted basically of predictability of enacted rules and equality before the law, while the modern concept was based on protecting individuals from criminal actions! This undoubtedly innovative terminology was severely criticized and the Minister of Justice later tried to moderate the Commission's statements by defending a more traditional, formal view on rule of law.[9]

The formal definition of rule of law mentioned above is now generally accepted as prevailing in Swedish law, although a certain debate on the significance of rule of law has taken place also afterwards. For instance, Peczenik has criticized the idea of a highly formal concept that would exclude material aspects such as purely ethical ones from rule of law, claiming that any definition of rule of law that excludes such aspects may lead to absurd consequences. As a drastic example, he points to the fact that under the Nazi regime, German Jews were perfectly able to foresee that they would be persecuted, which does of course not mean that the system was built on rule of law or met the requirements thereof. In fact, to claim that it did would be absurd. Therefore, Peczenik, without rejecting the formal concept of rule of law as described above, still recommended an extended and more material one.[10]

Undoubtedly, this Swedish discussion on the true meaning of rule of law in a Nordic context is interesting, not least for historical reasons. However, we shall now focus on the current legal and political discussion in Sweden, Denmark and Norway. Though this may be quite a leap from the sometimes heated but generally more sophisticated domains of legal theory and philosophy, we will actually establish that a certain connection between the very different legal spheres does exist.

3 Rule of Law During Covid and Its Aftermath

It is interesting that while Denmark and Norway have been harshly criticized for their way to handle the covid crisis, not least from a rule of law perspective – and in my view rightly so – Sweden has recently been critically observed

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9 Prop 1984/85:32 s. 24 o. 36. A survey of this debate is provided by Josef Zila, Om rättssäkerhet, Svensk Juristtidning (SvJT) 1990 s. 284–305 och Peczenik, Vad är rätt?, Stockholm 1995 avsn. 1.6.1. See also Nergelius, Den tappre soldaten Svejk i välfärdsstaten, Festskrift till Josef Zila, Uppsala 2013 s. 135–41. For a contemporary criticism of the Commission's view, see Hans-Gunnar Axberger, Eko-brott, Eko-lagar och Eko-domstolar. En rättspolitisk utvärdering av lagstiftningen mot ekonomisk brottslighet, Stockholm (Brottsförebyggande rådet) 1988 (BRÅ 1988:3). For a more general Nordic perspective, see Kaarlo Tuori, Four models of Rechtsstaat, in M. Sakslin (ed.), The Finnish Constitution in Transition, Helsinki 1991 p. 31-41. – A more specific and recent view on Finland and its debate is presented by Juha Raitio, in the article The Rule of Law in Contemporary Finland: Not Just a Rhetorical Balloon, in A. Bakardjieva Engelbrekt/X. Groussot (eds.), The Future of Europe – Political and Legal Integration beyond Brexit, Oxford (Hart) 2019, Swedish Studies in European Law vol. XIII, p. 195-208 (with extensive further references to Nordic doctrine).

10 See Vad är rätt? – Om demokrati, rättssäkerhet, etik och juridisk argumentation, Stockholm 1995 (Norstedts), chapter 1.6. Important aspects of rule of law in the Nordic context are also discussed by Åke Frändberg, Rättsordningens idé – En antologi i allmän rättslära, Uppsala 2005 p. 251-295.

throughout the EU for events happening after this immediate crisis, mainly related to the formation of a new government in October 2022.

During the pandemic, Sweden was initially criticized for its rather liberal policy, in particular when high death rates were noticed, notably at elderly homes. However, in hindsight, the Swedish way to handle the crisis must be described as quite successful, once the death figures became more normal or average and in particular if such aspects as economy, education and fundamental rights are taken into account. It is thus logical that the official parliamentary inquiry into Sweden's handling of the pandemic only made a few critical remarks.[11]

Globally speaking, the corona crisis meant new possibilities for authoritarian leaders such as Viktor Orbán or Benjamin Netanyahu in Israel to further strengthen their positions or postpone troubling legal proceedings. At the same time, however, some of them, such as Jair Bolsonaro and Donald Trump, were more challenged than before and eventually lost power, which makes the relationship between the corona crisis and rule of law somewhat complicated to analyze. This is even more so when we contemplate the rather unexpected authoritarian tendencies that were all of a sudden shown visible in Denmark, Finland and Norway. Borders were suddenly closed and guarded by military, all due to a not entirely rational preoccupation with the alleged serious spread of covid in Sweden. Norwegians who crossed the border to Sweden were prosecuted[12] and many other measures were enacted in vain attempts to stop the spread of the disease, of which the sudden Danish decision to kill all minks in the country is probably the most well-known.[13] A similar situation has actually never before occurred within the Nordic region in times of peace. In my view, the more relaxed Swedish attitude, compared to its neighbours, cannot only be explained by the fact that other Nordic countries share more recent experiences of war or occupation. Instead, Denmark, Finland and Norway all have some thinking to do concerning how they allowed rule of law and fundamental rights to slip away so hastily.

However, this does not mean that everything is well in Sweden, from a rule of law perspective. In the winter of 2019–20, before the corona crisis, the Swedish political debate was totally dominated by issues related to violent gangs, their criminal activities, and the connection between this criminality, migration and integration. This tendency reoccurred in the election campaign in 2022, when the main political parties once again competed with each other in launching proposals on harsher punishment for the largest possible number of crimes. They all appeared not to worry at all about the impact that such harsh

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11 See SOU 2022:10, Sverige under pandemin.

12 See judgment from Eidsivating Court of Appeal, 14 September 2022, 22-068294AST-ELAG/. – The Supreme Court of Norway, Höjesteret, granted leave for appeal on 22 December 2022 (HR-2022-2481-U, Case No 22-166232STR-HRET), but when the prosecutor later decided to drop the case it was dismissed on 8 February, 2023.

13 The official report on this matter from the Danish Parliament, *Folketinget*, came in June 2022, with the official title Granskningsudvalget (GRA) Alm. Del, Samling 2021-22, Bilag 46. For a more general view, see S. Klinge/H. Krunke/A.F. Nyborg/J.E. Rytter, COVID19 and Constitutional Law in Denmark, in J.M. Serna de la Garza (ed.), COVID19 and Constitutional Law: E-book by The International Association of Constitutional Law (IACL) and the Institute of Legal Research of Mexico's National University, 2020, p. 131-40.

policies may have on rule of law (or about economic consequences, availability of prison cells or similar practical questions, for that matter). From a rule of law perspective, let's just say that this reoccurring debate has not been a pretty sight.

In order to understand the worries that have been voiced from different countries in Europe since a new, right-wing government came to power in the fall of 2022, we may distinguish between a general worry about the fact that the center-right minority government now depends on support from a more populist, partly – at least historically – xenophobic and nationalist right-wing party (*Sverigedemokraterna*, SD) and a more concrete, specific preoccupation in Swedish debate about certain aspects of the agreement from October 2022 upon which the power of the new government rests. That agreement (*Tidöavtalet*, named after the place where it was negotiated) is a long political programme (62 pages), divided into seven sections, among which the ones on criminality and migration are the most controversial, not least from a legal point of view.[14]

Among the possible problems foreseen in the agreement are not only generally problematic or somewhat surprising aspects such as a reduction in UN-granted quota refugees that Sweden will accept each year from 6, 000 to 900, but also specific legal matters such as extended coercive measures against suspected criminals, even before specific criminal suspicions have arisen, more frequent extraditions and even double penalties for such persons, introduction of anonymous witnesses in criminal proceedings, classification of special zones with high criminal rates as "visitation zones", where police may search for weapons and explosives without a warrant or any other permission, full criminal responsibility also for minors and, in general, longer prison sentences for all criminals (although Swedish prisons are already overcrowded). All of those suggestions will of course need to be further analyzed and evaluated by expert committees before they can become real and enter into force. Although most of them must be seen in light of the previously mentioned debate on the alleged increased criminality (which does in fact seem to boil down to a sharp increase in fatal gang fights between juvenile gangs, mainly over sale of drugs, rather than increased violence in general), it goes without saying that a simultaneous enactment of a majority of them could be detrimental to the traditional Swedish concept of rule of law. It is also doubtful if most of them are constitutional and/or compatible with the European Convention on Human Rights (ECHR), or in some cases with EU law. Also the underlying connection between the new wave of criminality and (allegedly exaggerated) migration may be problematic. A clear example is the intention to examine whether a national, all-encompassing prohibition against begging may be introduced, although ECtHR made clear in early 2021 that such a measure violates ECHR.[15]

Furthermore, in the area of migration, border controls and identity controls will be increased, in a manner that may be contrary to the free movement of persons, one of the famous Four Freedoms within EU law.[16] Refugees who have not been granted asylum shall be made to leave and civil servants in schools,

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[14] The document may be found at www.tidoavtalet.se.

[15] See the case Lacatus v. Switzerland, 14065/15, Judgment 19 January 2021.

[16] See e.g. the case NW v. Landespolizeidirektion Steiermark, C-368/20, and 369/20, NW v. Bezirkshauptmannschaft Leibnitz, 26 April 2022, ECLI:EU:C:2022:298, where the EU Court of Justice (CJEU) found that similar measures in Austria were contrary to EU law.

hospitals and other public authorities shall have to report to the police when they learn about pupils or patients who do not have the right to stay within the country (in order to have them quickly sent away). Unsurprisingly, teachers and medical staff have protested against these suggestions and their future is unclear, but the very fact that such ideas have been proposed by a new Swedish government seems quite alarming as such, in itself so to speak.

4 Personal Reflections

When reading the Tidö agreement and taking into account that it forms the political programme for a new Swedish government, that is likely to stay in power at least until September 2026, it is easy to get the impression that the new government reverts to the programs and ideas launched in 1984 by the Commission against economic criminality, who said that the right of the citizens not to be victims of crimes was the key element of rule of law. In fact, the only difference seems to be that migration and gang wars allegedly following in its path have now taken the place that used to belong, under a left-wing government, to economic, "white-collar" criminals. And should that be the case, which seems likely, the public and political Swedish debate on rule of law has now in fact moved around with 360 degrees in forty years.

Within legal science and jurisprudence, reactions have so far been less vivid. This is due to many reasons, one of which is undoubtedly that legal scholars do normally not participate in political debates. They need more time to contemplate sensitive issues and their work is normally not published in newspapers or on the internet, but in books or legal journals with a somewhat lengthy publication schedule. Undoubtedly, many law scholars also want to wait until elaborated, concrete law proposals on the issues mentioned above will eventually arrive, believing that only then may they be properly analyzed and judged.

Be that true or not, law science and not least legal theory is likely to discuss at least some of the issues mentioned here quite lively in the forthcoming years. And then, some of the arguments raised in the 1980's and 1990's on the strengths and advantages both of the traditional, formalistic and the more material concept of rule of law, stressing not least the importance of fundamental rights, might perhaps face a revival.

The Actors