Rule of Law and Public Administration in Sweden. Law, Politics, Culture

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1 Introduction

This is an essay on the rule of law in Sweden. The subject matter, more specifically, is rule of law in public administration. While arguing that the rule of law is of fundamental value to the public administration, the purpose is to examine challenges and risks in relation to administrative authorities. How the rule of law is typically defined, and the limits of definitional exercises for understanding administrative authorities, is examined first. This is followed by three specific examples illustrating the need for a better understanding of rule of law, and the risks to it, in public administration.

The rule of law requires some unpacking, which will follow shortly, but suffice it for now to say that the purpose of the rule of law is to deal with the perennial problem of *arbitrary power*. Approaching the rule of law from what it aspires to do instead of what it must look like makes sense since there is not one example of the rule of law, just a problem that has: "preoccupied us for 2,500 years: how can we make law rule?".[1] Speaking at the start of the 2,500 years, Aristotle framed the challenge thus: "[E]ven if it be better for certain individuals to govern, they should be made only guardians and ministers of the law…for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire."[2] Today we don't frame the challenge as one between the wild beast of desire and rational law, but the kernel of the colourful description is still relevant. How can it be made sure that those who have power over us, use the power in ways that follows established rules rather than hidden political motivations or personal ideals?

Rule of law is rarely thought of in relation to public administration and other evaluative standards are employed; effectiveness, legal certainty, efficiency, or accessibility.[3] Politicians, legal professionals and legal scholars mainly concentrate on future cataclysmic threats to the rule of law - i.e., repressive criminal laws or executive interference with judicial independence, while other risks are overlooked in relation to public administrative agencies. In the Swedish legal and political landscape, the rule of law is seen as a rather technical concept for criminal law, or something mostly relevant to judges and judicial authorities and not to the mundane affairs of administrative authorities. However, it is in the everyday life of administrative authorities where constitutional public law principles are tested, and where thousands of decisions are made, affecting the rights and interests of individuals. Benjamin Franklin's idiom, that there are few things more certain in life than death and taxes describe a system of governance where administrative authorities occupy a strong position of power. [4] From the beginning to the end of an individual's life, interactions with administrative authorities are a constant and unavoidable factor. The sheer empiricism of the

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1 Waldron, J. (2002). "Is the Rule of Law an Essentially Contested Concept" (in Florida?). 21 *Law & Philosophy* 137, p. 158.

2 Aristotle, *The Politics*. Everson, S. (1998) ed. Cambridge University Press, p. 78.

3 Djurberg Malm, K. & Sannerholm, R. (2022) "Rättsstaten i den svenska förvaltningen" p. 6. In Djurberg Malm & Sannerholm, *Rättsstaten i den svenska förvaltningen. En forskningsantologi*. Statskontoret.

4 Smyth, A. H. (1907) *The writings of Benjamin Franklin Vol X (1789-1790)*. MacMillan. p. 69.

matter warrants a closer look at how public administration is governed and how authorities use their powers.

2 In Search of the Rule of Law in Sweden

Sweden is ranked among the top five rule of law countries in the annual Rule of Law Index from the World Justice Project. In the EU commission's rule of law reports, Sweden is assessed as a strong rule of law system.[5] In other global indexes, from corruption to civil rights and liberties, Sweden together with the Scandinavian countries rank high too.[6]

There is no doubt that Sweden's position in different indexes is accurate, but it is not always clear why? Is the position as a global rule of law leader due to the strength of the legal institutions and the ingenuity of Swedish laws? It goes without saying that something else besides law plays an important part too; but what, more precisely? Since it goes without saying it is rarely made explicit, at least not by legal professionals and legal scholars (who are more interested in laws and legal institutions). I will return to this topic later but suffice it for now to say that the "something" or "other" beyond laws concerns politics and culture (in the widest sense of the words). Bringing attention to non-legal issues is important since how we understand the rule of law influences how we care about and try to insulate it from threats. Maslow's point that if the only tool you have is a hammer it is tempting to see every problem as a nail, describes the limits of only thinking about the rule of law in terms of law.

Rule of law is a recent thing in Swedish political and public debates.[7] However hard you try, you will not find the rule of law expressed in the foremost of Swedish constitutional documents, the Instrument of Government. The long-running commission of inquiry leading to the Instrument of Government in 1974, and the preparatory works, neglect to mention the concept. Many important public law principles, including legality and objectivity, are of course in the constitution but not expressed in such a way that they are linked to a coherent framework of rule of law with the design to minimise arbitrary power.

The disregard is not all that surprising. In the balance between politics and law, the former has always enjoyed a more prominent place of legitimacy in Sweden. The dominance of politics is expressed in the first paragraph of the Instrument of Government in terms of popular sovereignty, but it has also come to be understood as the capacity to rule and to rule effectively without too many obstacles between political thought and policy implementation. The Instrument of Government reads as a textbook for how to govern through rules of law rather than an expression of rule of law as a check and balance on the exercise of

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5 European Commission. (2022) *Rule of Law Report. Country Chapter on the Rule of law situation in Sweden*.

6 See, i.e., ratings from Transparency International, Corruption Perception Index, and the democracy index from Freedomhouse.

7 This is also reflected in journalistic work and when the rankings above were launched news media reported Sweden ranked high in *rättssäkerhet* (legal security): *Dagens Nyheter*, 14 October 2010; *Svenska Dagbladet*, 28 November 2012.

power.[8] Fredrik Sterzel refers to the period between the first general elections in Sweden and the new 1974 constitution as a half a century lacking in constitutionalism.[9] The limited part played by law continued to influence Swedish political life after the new constitution was in place, best described in the difference between a constitution and constitutionalism.[10] For want of better words there has not been a strong tradition in Sweden of speaking about rule of law in relation to fundamental questions of governance. In a recent survey among 500 high school students on their knowledge on the rule of law, more than 86 percent would fail if the survey was instead a social science test[11]. In short, rule of law has not only lived in the shadows of discussion on how the state should be organised, but the ephemeral existence has also influenced how we think, understand, and teach the concept.

It is not until the latest major revision of the Instrument of Government, in 2011 that rule of law is explicitly mentioned in the preparatory works, and several reforms are introduced to enhance its existence beyond mere references – for instance, a clearer function of legal preview and a stronger judicial review, a specific heading in the chapter on fundamental rights and liberties entitled "Legal security", with a clearer expression of access to justice, and a symbolic yet significant separation of the judiciary and administrative authorities which had up until then shared the same chapter.

Public and political discussion on the rule of law have since accelerated. The surge of organised crime and the appropriateness of policy suggestions to tackle it is one reason for this. Another is the policy of the Polish and Hungarian governments in recent years putting the independence of the judiciary and the security of judges at risk (coinciding with a worldwide deterioration of democracy and rule of law)

In recent times different commissions of inquiries have been formed with the purpose of strengthening the rule of law in Sweden. One inquiry is specifically tasked with examining how to strengthen democracy and the independence of the judiciary.[12] The inquiry is motivated by the developments in Poland and Hungary and is tasked to review the legal framework on judicial independence and to suggest necessary legislative changes to further insulate the judiciary from executive interference, specifically in relation to retirement ages of judges and the number of justices in the supreme and supreme administrative courts. There is currently no known threat towards the judiciary in Sweden from the executive, and there does not seem to be any real risk of a threat of this kind any time soon,

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8 See, Smith, E. (2004). "Politikernas konstitution - eller folkets?" *SvJT* 676-705, p. 679.

9 Sterzel, F. (2009). *Författning i utveckling: tjugo studier kring Sveriges författning*. Iustus p. 17.

10 Sterzel, F. (2002) "Ett kvartssekel efter det 'författningslösa halvseklet'. Har Sverige nu en författning? In Smith, E. (ed.) *Grundlagens makt. Konstitutionen som politiskt redskap och som rättslig norm*. SNS.

11 Rättsfonden (2022). *"Aldrig hört ordet…- vaddå rättsstat?" Vad vet svenska gymnasister om rättsstatens roll i en demokrati?*

12 Dir 2020:11. The commission of inquiry will report in February 2023. The question of judicial independence was examined by a commission of inquiry in SOU 2008:124. (*Grundlagsutredningen*).

which is also acknowledged in the instructions to the commission of inquiry, which begs the question why the inquiry was formed.

The argument here is not against measures aimed at strengthening judicial independence, but that the risks noted in the instruction to the commission mimics developments elsewhere. It is a response to a situation in other countries, transplanting a worst-case scenario to a Swedish setting. A situation where judicial independence is undermined by the executive would clearly be a threat to the rule of law, but it would also be an obvious threat following a breakdown of the democratic process. Thinking about the rule of law in this way is not uncommon to lawyers, judges, and legal scholars. They readily recognise great harms done to the rule of law in the most apparent ways, but also often fail to notice smaller and less measurable harms taking their toll on the rule of law. This raises the issue of how to handle other threats to the rule of law, perhaps smaller and more difficult to identify, that lie outside of the judiciary and similar apparent institutions, brought on by other factors than law.

3 The Limits of Rule of Law Lists

From Dicey to more modern interpretations, the standard formula for defining the rule of law is through lists of public law principles. Lord Bingham, Otto Kirchheimer, Lon Fuller, Joseph Raz, Ronald Dworkin, and Jeremy Waldron have all put forward lists of principles. The descriptions differ from one another in some small ways: Fuller is more interested in the making of law and Raz in the implementation, Dicey did not particularly care for administrative law and courts etc. However, it is not only legal theorists that talk about rule of law in this way. The Venice Commission, the EU, UN, and many other organisations depart from lists of public law principles, making lists into a very practical business of advising countries on how to get to the rule of law or to sanction a country that is diverting from the right path.

Lists are good for focus, for getting to the point and identifying the essential - in everything from bucket lists to grocery lists. But lists are exclusionary since their purpose is to sharpen the focus by excluding the non-essential. Though some lists are longer than a Leonard Cohen song[13], they can't be too long or else it would not be list. An obvious limit of lists is therefore that whenever either principles or institutions are listed, a lot else is discarded for reasons of space.

Moreover, learning every syllable of Fuller's eight classic principles on the inner morality of law[14], which has become the gold standard for defining the rule of law, helps perhaps in criticising Raz's shorter but more procedural list[15], or in

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13 "I've got a to-do-list longer than a Leonard Cohen song" is said by Malcolm Tucker in the BBC comedy *The thick of it*.

14 Fuller, L. (2004) *The Morality of Law*. University Law Publishing, pp. 46f. Fuller's list: prospective rules; laws should be publicly promulgated; they should be of a general character; they should be sufficiently clear; they should maintain reasonable constancy over time; they should not contradict other laws and must maintain a sensible consistency; they should not seek or require the impossible; there should be congruence between the conduct of officials and a declared rule".

15 Raz, J. (1979) *The Authority of Law: Essays on Law and Morality*. Oxford University Press, pp. 225-226.

accepting how the World Justice Project has chosen to measure rule of law globally. But it does little to further our understanding of the rule of law in the empirical world. When the EU-commission criticises Poland for dismantling the rule of law, by changing the rules on the security of judges, is this critique based on the principle that the legislative acts fail the test of being "prospective and clear" as Fuller puts it, or Raz's emphasis on the independence of the judiciary (and if it is Raz's point, in what way does changing rules on retirement conflict with judicial independence?) It could be both, obviously, but it seems far-fetched that the EU-commission would go to battle over revised rules on the retirement ages of judges, or rules on appointment. After all, why shouldn't the Polish parliament change the rules if they see a need for a change of policy.

So, there is something else involved when the EU-commission invokes the the rule of law. Because the rule of law is threatened, in Poland and Hungary, but not because of specific changes made to rules and procedures, but because of the politics behind it all. The EU-commission knows this, of course, but how to address the heart of the matter is another matter. The EU-commission employs the rule of law as a yardstick, a way of taking stock of how well or how poorly something is functioning – and that something is not law but the politics of using law to affect a desired change.

This is another limit of definitional lists; in addition to excluding relevant principles or ways in which rule of law can be understood, lists are binary. The independence of the judiciary is a key value for the EU, and indeed a principle on most lists on the rule of law, but does not allow for nuances, context, and change. Independence of the judiciary can be compromised without changing any regulations if, say, lawmakers in central positions in parliament start criticising how the courts rule. Or Fuller's point that officials must act in congruence with the law might seem self-evident, but does it mean all the laws, all the time - from traffic violations to parliamentary procedures? The litmus test for the rule of law, thus, cannot be checking principles of a list in relation to existing legislation, but how well formal and informal rules are conducive to situations where arbitrary power is effectively minimised.

Rule of law has never been about specific laws or subsections of regulations, but since recorded history dealt with the perennial problem of trying to coordinate relationships between individuals, so that the worst forms of arbitrariness can be avoided. Rule of law serves as a crucial norm enforcement mechanism, a "social psychological link between individual decision-makers on the one hand, and social systems on the other". [16]Aristotle, as mentioned above, talked about how irrational desires and the wild beast of passion made human beings into poor rulers if left to their own devices. Before Aristotle, Thucydides described a situation where the "the strong do what they can, and the weak suffer what they must" in his account of the Peloponnesian war. This is repeated throughout history; unchecked power gives way to brute and repressive force. Or as the British historian Lord Acton phrased it: "power corrupts; and absolute power corrupts absolutely". The conclusion is that power must be controlled, and arbitrary power avoided, because the costs of not doing so is a life that is "solitary, poor, nasty, brutish and short", or as Locke framed it, of being subject

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[16] Tetlock, P. E." (1992) The impact of accountability on judgement and choice: Toward a social contingency model". 25 *Advances in Experimental Social Psychology*.

to someone's "sudden thoughts, or unrestrain'd, and till that moment unknown Wills without having any measures set down which may guide and justify their actions".[17] It is not only philosophers, historians, politicians, and lawyers that have given considerable thought to the rule of law. The same theme is repeatedly narrated in popular culture[18] and thus, from ancient thinkers to modern literature emerges a story about the rule of law that has little to do with lists of any kind, or the tinkering with retirement rules for Polish judges, but that has everything to do with *why* Polish judges are under pressure. It is a story about politics and power and how political power is exercised.

It is a common misconception that this story about the rule of law is mostly about law. There is sometimes a courtesy recognition that other things, such as sociology or economy matter also, but how or in what way is rarely explored further before returning to the legal domain when talking about the rule of law. If rule of law is not mainly, about law and not a legal concept, then what is it about? Well, *politics* mainly. Rule of law is a political concept clad in legal terms or expressed through the institution of law. In his BBC Reith Lectures, Jonathan Sumption explains that there is a vice of some layers that "they talk about law as if it was a self-contained subject, something to be examined like a laboratory specimen in a test tube, but law does not occupy a world of its own". In Sumption's words, law is part of a larger system of public decision-making: "The rest is politics".[19]

Politics is here employed in the common sense of the word, as the science of government, or the art of guiding or influencing government policy. Politics includes formal institutional processes and outcomes, as well as informal ones.[20] Understanding politics in this broad sense, places rule of law as something clearly political because it concerns the rules of the game that can empower or disempower groups and interests within society and can challenge both formal settings and informal understandings.[21] Rule of law "is as much culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes".[22] In her article on Poland and the dismantling of the rule of law, Ewa Letowska, the first Ombudsman for civil and political rights in Poland, describes how rule of law developments in the early 1990s blurred a clearer prediction of the difficulties Poland would face. According to Letowska the habit of lawyers in thinking that it is enough to draft a new law for reality to adapt is a dangerous illusion. When Poland's first post-communist

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[17] Locke, J. (1988) *Two Treatises of Government*. Laslett, P. (ed.) Cambridge University Press, § 137.

[18] The most obvious is Frans Kafka's The Trial but also Karin Boye's Callocain, Arthur Koestler's Midnight at Noon, George Orwell's 1984, Picasso's painting of unchecked cruelty in Guernica, or for that matter, Terry Gilliam's film, Brazil.

[19] Sumption, J. *Law and the decline of politics. The Reith Lectures 2019, Lecture 1: Law's expanding empire*. BBC.

[20] Leftwich, A. (2009) *Bringing Agency Back In: Politics and Human Agency in Building Institutions and States*. Development Leadership Program Research paper 06, p. 13.

[21] Sannerholm, R., Quinn, S. & Rabus, (2016) A. *Responsive and Responsible. Politically Smart Rule of Law Reform in Conflict and Fragile States*. Folke Bernadotte Academy, p. 23.

[22] Stromseth,J. Wippman, D. & Brooks, R. *Can Might Make Rights? Building the Rule of Law After Military Interventions*. Cambridge University Press, p. 310.

constitution was accepted this was by some seen as a watershed moment; Poland was now a rule of law state. Letowska, however, argued that it would take a generation or two before it was possible to talk about the rule of law but that this outlook was seen as pessimistic.[23] Unfortunately she was right in her conclusion. What does Letowska suggest then is needed, apart from institutions of law? The transformation of a soviet view of law, as the sword in the hands of the powerful, to a liberal rule of law state, requires a *societal transformation*, a *change in attitude*, an internalised idea on what rule of law means. Using EU membership as an example Letowska suggests that this means a will and cultural capability to actively work with and within the union on the premises of rule of law.

Assumptions that rule of law is about law, and law must take the lead, writes Martin Krygier, has two core elements: "One is that we are in a position to stipulate in terms that apply generally and often in detail, what institutions, rules and procedures add up to or will deliver the rule of law. The other is that these ingredients are to be found in the activities and products of the formal legal institutions of states".[24] Where lists are the starting point it often leads to emulation of principles, institutions, and practices elsewhere. András Sajo and Renáta Uitz, commenting on the rule of law industry that has emerged - in development, constitutional assistance, peacebuilding and political transitions - strategic advice and money are put into projects of rebuilding or strengthening the rule of law; but sadly "it turns out that institutional solutions associated with the rule of law, no matter how carefully designed or transplanted, do not deliver mechanically the goods commonly associated with constitutionalism and its allies in and by themselves."[25] Sajó and Uitz talk about situations where rule of law is used as a medicinal shot against all kinds of ills - from civil war to authoritarian rule, climate crisis and poverty. A quick glance at constitutional developments in war-torn societies like Afghanistan, Kosovo or Iraq is a reminder of the limits of lists (what must be in place!). The former Prime Minister of Britain, Gordon Brown, famously remarked on the rule of law: "In establishing the rule of law, the first five hundred years are the hardest."[26]

Besides the difficulties of emulating principles and institutions, another limitation of binary lists is that they concentrate on the most symbolic and most measurable "ingredients" to the rule of law. Judicial independence is understood in relation to safety of judges or rules on appointment and removal, other measurable ingredients concern constitutional guarantees against retroactive legislation, or the right to access courts etc. Since the empirical world is far more complex than any definitional list can convey, lists soon turn to checklists when the EU commission tries to assess the policies in a member country, or when the Swedish government formulates instructions to a commission of inquiry. How rule of law is upheld, or undermined, through a particular political culture, or by

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[23] Letowska, E. (2017) "Polen – en rättsstat bryts ner", in Melbourn, A. (ed.) Hoten mot rättsstaten i Europa. Premiss förlag.

[24] Krygier, M. (2019) "What's the Point of the Rule of Law" *Buffalo Law Review*, Vol. 67:3, 743-791, p. 749.

[25] Sajó, A. & Uitz, R. *The Constitution of Freedom: An Introduction to Legal Constitutionalism*. Oxford University Press, p. 310.

[26] World Bank (2017) *World Development Report: Governance and the Law*. P. 14.

competence, identity, and loyalties among civil servants, are less measurable ingredients and a lot harder to emulate.

Instead of emulation Krygier advises, as he has done repeatedly, that a first step should not be a list, but to ask the question of what the point is to the rule of law, to adopt a teleological perspective: "My proposal is this: at the core of the rule of law, understood as a distinctive concept, is and has long and often been a particular concern – namely, the ways power is exercised; and it responds to a specific antipathy – namely the arbitrary exercise of power."[27] Instead of looking for specific rules and regulations to tick boxes on a checklist, a teleological approach allows for an open-ended and problem-oriented inquiry: Where is there a problem of arbitrariness, why does the problem exist, does it merit a response, and what might be the appropriate way to minimise arbitrary power?

4 Challenges to the Rule of Law in Public Administration

In the following, three central areas of rule of law in public administration are discussed. In turn, they deal with *how administrative authorities are governed*, *how civil servants are regulated*, and the *automatization of public decision-making*. All three areas illustrate the limits of lists while they also demonstrate different forms of arbitrariness in public administration.

The Swedish administrative model and the government's prevailing way of governing the authorities have served Sweden well. Over the years, administrative authorities have undergone a series of different policy reforms. Examples of such reforms are marketisation and streamlining of authorities' core activities, corporatization where goals and results occupy a prominent role, and the ongoing project of so-called trust-based governance. The policy reforms aim to influence how authorities are governed and organised, how they cooperate with each other, and which values they should be guided by.[28] The rule of law is of course included in the reform efforts, but without a detailed description of what the term means or how it may need to be strengthened or supported.[29] Significant commissions of inquiries have mainly dealt with the inflow of politics, that is, the architecture of political decision-making and discussions have concerned the design of the electoral system, the chamber system, and the referendum institute.[30] Thus, while there is no shortage of inquiries and reforms regarding administrative authorities, it is an area mainly studied from a democratic perspective. The administration's part in maintaining and protecting

[27] Krygier (2019) p. 760. See also F.A. Hayek, (1994) *The Road to Serfdom* (50 anniversary ed.) p. 159: "power itself has always appeared the arch evil" and that, "the effective limitation of power is the most important problem of social order" and Shklar, J. (1998). *Political thought and political thinkers*. In Hoffman, S. (ed.) pp. 24-25: "[rule of law] really has only one aim, to protect the ruled against the aggression of those who rule."

[28] See, Ehn, P. & Sundström, G. (2020) Förvaltningspolitik i förändring. In Ehn & Sundström (eds.) *Statlig förvaltningspolitik för 2020-talet. En forskningsantologi*. Statskontoret.

[29] Djurberg Malm, K. & Sannerholm, R. (2022) p. 5.

[30] I.e., *Författningsutredningen* and *Grundlagsberedningen*. Ahlbäck Öberg, S. (2020) Förvaltningen, p. 156. In Mattson, I. & Petersson, O. (eds.) *Svensk författningspolitik*. Studentlitteratur.

the rule of law has not received as much attention and the rule of law is not particularly visible in administrative politics.

4.1 How administrative authorities are governed

In Sweden (as in most countries) the executive has the power to rule in most matters of the everyday running of the state - including instructions to administrative authorities. Just how the Swedish executive governs the realm is not subject to sophisticated regulation and Chapter 7 of the Instrument of Government contains only seven paragraphs. Naturally, the government's power is also defined in relation to other areas in the Instrument of Government – i.e., in relation to law making, financial power, or international relations, but the important task of providing instructions to administrative authorities is barely regulated at all. Swedish authorities have a special autonomy and ministerial rule is not allowed. What this means is that decisions that in other countries are made in ministries are taken by administrative authorities in Sweden.[31] The government is not prevented from controlling the authorities in general, only in decisions in individual cases, though it can be difficult to keep apart and while administrative authorities have certain autonomy, they are also duty bound to obey the government.[32]

From a rule of law perspective, there is a vulnerability to this model that can give rise to arbitrariness: active political guidance is both reasonable and legitimate but the question is how much guidance, and under what forms?[33] The possibility of ensuring that political decisions have the intended outcome cannot always be guaranteed and this presents a challenge for the government and affects trust in both the administrative authorities themselves and in the system of autonomous authorities as a whole.[34]

Another aspect of autonomy is that authorities must dare to speak out. Formally, the authorities have a constitutional obligation not to apply a law that conflicts with the constitution. The authority must also "speak with a clear voice".[35] This is not only in situations of legal review but more about having the courage to let the government know when a political goal cannot be achieved.

During the 1980s, significant parts of the administration transitioned to a governance model inspired by the private sector. Similar changes took place in many other countries. The effects were, among other things, a reinforcement of dialogue and contacts between an authority's management and the responsible ministry. For example, it has become the norm that director generals are solely responsible to a ministry instead of a board. The head of an administrative

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[31] Wockelberg, H. (2011) "Finns det något svenskt i förvaltningsmodellen?" In, *Förändringar i svensk statsförvaltning och framtida utmaningar*. Statskontoret.

[32] This is tersely put in the Instrument of Government (in 12 chapter 1 §): "The Chancellor of Justice and other state administrative authorities come under the Government, unless they are authorities under the Riksdag…".

[33] SOU 2007:75. *Att styra staten – regeringens styrning av sin förvaltning*.

[34] See, Nicklasson, B. (2012). "Sweden". In Verhoeast, Koean et al. (eds.) *Government agencies: practices and lessons from 30 countries*. Palgrave Macmillan.

[35] SOU 2007:75, p. 44.

authority is the one who has ongoing contacts with the responsible ministry and embodies "the link between politics and administration".[36] In short, it can be said that the director-general has come to have more power, which means that the government has potentially more influence over the authorities. In this meeting between heads of authorities and the political power, informal structures are created that can be just as important as the formal ones - if not more so.

Olof Petersson, in 1989, called the relationship between the government office and administrative authorities one of "the great mysteries in Swedish public life"[37]. Ehn and Sundström noted in their study from 1997 that informal contacts, a form of dialogue based governance, between heads of authorities and heads of ministries had increased, and that this coincided with a development where fewer detailed regulations and more framework laws.[38] A National Audit Office's report from 1996 pointed to the difficulty of assessing whether the government's contacts with authorities were about clarification, or whether they actually influenced decision-making and handling of individual cases - that is, if they crossed the red line of ministerial rule and infringed on administrative autonomy.[39] Individual ministers must be able to let their views and positions be known to administrative authorities, governance through dialogue cannot replace formal governance tools: laws, regulations, and written instructions.[40] While representatives from administrative authorities highlight the importance of informal contact, they offer the opportunity to quickly obtain information and to present positions and proposals to ministry representatives, informal contacts are not unproblematic from a perspective of arbitrariness. The risk is that political responsibility is diluted when political issues take place in the "interaction between experts, often at a relatively low level far from public transparency".[41] Another risk is that positions of director generals become politicised through informal contacts. The right to appoint director generals is exclusive to the government which also includes the right to change management at any time - under certain conditions. A director general position is regulated in the Public Employment Act and a dismissal can be done with "consideration of the best interests of the authority" but must follow objective grounds.[42]

In recent times, high-profile scandals involving director generals illustrate the risk of politicisation and arbitrariness in the governing of administrative authorities. In 2018, just a few months before the parliamentary elections, the director general at the Social Insurance Agency was removed from her post. The responsible minister stated that there had been several meetings with the director

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[36] Statskontoret. 2016:30. *Myndighetschefernas syn på regeringens styrning*, p. 7.

[37] Petersson, O. (1989). S. 67. *Maktens nätverk. En undersökning av regeringskansliets kontakter.* Carlsson förlag.

[38] Ehn, Peter & Sundström, Göran. (1997). *Samspelet mellan regeringen och förvaltningen*. SOU 1997:15, p. 67.

[39] Riksrevisionsverket (1996:50). *Förvaltningspolitik i förändring*. The issue is also examined in several commission of inquiries, SOU 1983:39; SOU 1985:40 and SOU 2007:75.

[40] SOU 2007:75, p. 131. See also, Regeringskansliet (2014). *Styrning av de statliga myndigheterna och informella kontakter*.

[41] SOU 1997:57 p. 97.

[42] Sannerholm, R. (2020) *Rättsstaten Sverige. Skandaler, kriser, politik*. Timbro förlag, p. 128.

general and that the government had expressed its dissatisfaction with the Social Insurance Agency for how it handled a decrease in the number of sickness benefits. It was later revealed, however, that the existing minutes from the meetings did not contain any kind of criticism - rather the opposite. The whole affair, which led to a vote of no confidence in parliament, shows how arbitrary power can be employed for political self-preservation. In retrospect, it is possible to see both the political risk assessment that was behind the action and the frustration that follows when a situation cannot be controlled.

The other case involving a director general and informal contact through dialogue concerns the Swedish Transport Agency, where the director general decided to depart from specific legal requirements when procuring IT-services for the migration of a large data registry.[43] The legal requirements came from the fact that the registry contained a large bulk of sensitive data involving military, police, and foreign service. The director general took measures to increase safety protection as soon as she understood the seriousness of not following the legal requirements, but the government or the Government Office had not raised any objections to past departures from the law - on the contrary and a key message of the informal meetings that were held seems to have been that the deadline for procuring a new data registry must be met.[44] It is difficult to know in more detail what happened, since meetings between the authority and the Government Office were not recorded, but a combined assessment gives a refined picture of a shared responsibility between the director general and the government.

One effect of the two scandals may be that heads of authorities and others with central roles in the administration are less willing to speak out when it really matters. Going against the government is easier when you have principles and routines that protect you from arbitrary dismissal, or when meetings have an agreed upon protocol. It is a general principle that when the Government Office uses complementary dialogue it should be recorded so that there is transparency regarding important or essential issues.[45] Political colouring and considerations may spread from the management of administrative authorities down to the core of public servants, with the attendant risk that public servants start 'anticipating' - that is, considering a minister's "known or presumed preferences"[46] when making decisions. There is no constitutional bar to the kind of informal governing that took place with the Social Insurance Agency and the Transport Agency, but the Swedish constitution is written for formal methods of governance. It is also unclear to what extent the Government Office understands where to draw the boundaries of informal governance, and it has been suggested in a commission of inquiry that the constitutional educational level is low within the Government Office and at the management of administrative authorities.[47] From a rule of law perspective this is of course worrying.

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[43] For a review see, Ds. 2018:6. *Granskning av Transportstyrelsens upphandling av it-drift.*

[44] Arbetsdomstolen, dom nr. 15/19, mål. Nr A 152/17, s. 95.

[45] Bull & Sterzel (2018) p. 264.

[46] SOU 1997:54, p. 48.

[47] SOU 2007:75 p. 131.

4.2 How civil servants are regulated

If how the government rules the realm is tersely regulated, there is far more legislation regarding civil servants, ranging from constitutional demands on objectivity and impartiality to public law labour regulations.[48] Generally, citizens can expect administrative authorities and civil servants to act in a way that is effective, fair and with a high degree of legal certainty, treating each case alike and with similar standards. This does not mean that all is well in the public sector. The Transport Agency's departure from safety legislation, as mentioned above, is one example. Another is the extensive bribery that took place at the National Property Board, which became known in 2017. All organisations, private and public, experience crises and scandals at one point. The main question is to understand why. In the investigation of the Transport Agency it was found that the authority had developed a corporate culture and had lost an administrative law perspective.[49] Similar views emerged in the National Property Board scandal; many employees saw their workplace like a real estate company and not a rule-governed authority.[50] In as early as 1997, a commission of inquiry warned that "valuable things" in the Swedish administrative tradition were about to be lost, especially those associated with the state's core functions. The uniform administration of the past was replaced by specialised and diverse authorities and civil servants, prompting the commission to call for measures to strengthen administrative culture and ethics.[51]

An important aspect for ensuring a public service that is effective, fair and adheres to the rule of law is the possibility to sanction civil servants for errors and omissions. The Swedish liability framework consists of two main parts, criminal liability for official misconduct and disciplinary procedures in the public labour law.[52] These two parts have largely remained unchanged for a long time. In the most recent commission of inquiry, with the remit to express an opinion on whether criminal liability for official misconduct should be expanded, the inquiry suggested that there should be no change at all.[53] Yet there is an arbitrariness in the accountability framework which the inquiry fails to properly recognise. The arbitrariness does not come from a lack of legislation, or particularly unclear rules or demands on civil servants, but because administrative authorities and administrative culture have changed over time, making parts of the responsibility framework out of date.

Before the so-called civil liability reform in 1975, civil servants could be sanctioned for abuse of office, taking bribes or improper rewards, breach of confidentiality or misconduct. These acts of misconduct were largely motivated

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[48] This section draws in part on Sannerholm, R. & Reitan, T. (2022) "Mellan straffrätt, offentligrättslig arbetsrätt och förvaltningspolitik: Tjänstemannaansvaret och statsanställda". *Förvaltningsrättslig tidskrift*, nr 4, 549–573.

[49] Ds 2018:6 pp. 236–237.

[50] Statskontoret 2017:12. *Statens fastighetsverks arbete med en god förvaltningskultur*.

[51] SOU 1997:57 p. 9.

[52] There is also a tortious liability for civil servants, but it is very rarely applied.

[53] See, SOU 2022:2. *En skärpt syn på brott mot journalister och utövare av vissa samhällsnyttiga funktioner*.

by the fact that they would "protect the course of the public service"[54] and strengthen the integrity of the civil service and the administration in general. In particular, the offence of misconduct was far-reaching and could be imposed if someone through negligence, incomprehension or incompetence disregarded what was required of him.[55] A process towards a more contract-based liability system began in the 1970s and from January 1, 1976, the offence of official misconduct was completely abolished, and abuse of office was replaced by abuse of authority and negligent exercise of authority. In the latest reform in 1989 official misconduct was introduced and slightly expanded for those parts of the public sector activities that take place in the exercise of public authority. For acts that are assessed as minor, there is no criminal liability and instead, disciplinary measures through the public labour law can be applied. Public labour law also handles misconduct that occurs outside the exercise of authority, giving administrative authorities as employers a greater role for the liability framework.

While the liability system with criminal and public labour law are thought to harmonise and complement each other, how this plays out in practice is far from clear. To the question of who is affected by the offence of professional misconduct, the answer is that it applies to very few within a limited type of authority or profession. In the commission of inquiry, SOU 2022:2, a review of Supreme Court jurisprudence for the years 2007–2020 shows that all defendants were judges, prosecutors, or police officers. In the courts of appeal for the same period, police officers were defendants in every second case (out of a hundred rulings), followed by judges, prosecutors, and security guards.[56]

Arbitrariness in the liability system stem in part from the fact that it does not include administrative authorities at a general level in relation to criminal law. There is reason to suspect that a difference between for example law enforcement employees and civil servants at other authorities is because of how personal responsibility boards at administrative authorities assess misconduct. Administrative authorities are obliged to report when an official can reasonably be suspected of having committed misconduct of a criminal nature in their employment, but it is unclear how this works in practice. For many authorities the relationship between criminal and public labour law is unclear, and several lack experience of personnel responsibility boards (and some do not have a board at all). The few existing studies on this issue indicate certain application problems, as many authorities do not have experience in dealing with criminal misconduct.[57] Personnel responsibility boards seem to decide in favour of minor misconduct, thus avoiding legal review of several acts. In addition, many authorities try to solve problems in other ways, which can also affect the number of notifications. That administrative agencies employ informal processes before or sometimes outside the disciplinary system was a practice observed already by the Service Responsibility Commission in the early 1980s.[58] Instead of initiating

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[54] SOU 1944:69 p. 400.

[55] See, Rydberg-Welander, L. (2018) ”När ämbetsmannen blev arbetstagare”. *Förvaltningsrättslig* tidskrift, no 5.

[56] SOU 2022:2 bilaga 4.

[57] Sannerholm & Reitan (2022) p. 562.

[58] See, Ds Ju 1983:7.

a formal case through an authority's personnel responsibility board, the employer tries other measures, such as informal warnings or corrective calls.[59]

Arbitrariness also comes from the fact that the practice of how disciplinary rules in the public labour law are applied is entirely within the realm of administrative authorities. Acts of misconduct are examined at the authority where the civil servant is employed. Decisions in personnel responsibility boards are made by the employer, where the head of the authority is usually the chairman. The authorities themselves can draw up guidelines for what can be tried in the personnel responsibility boards, but the most common offenses concern deviations from routines and incorrect handling, inappropriate behaviour as well as financial irregularities and offenses concerning working hours or equipment. From a rule of law perspective, it can be particularly noted that the guidelines for what can lead to a case before a personnel responsibility board vary between authorities, and the assessment of what actions are to be counted as liable varies between authorities and over time.[60] It is moreover difficult to overview and compare how different boards make their assessments since there is no official collated statistics with easily accessible records.

The Swedish administration has undergone major changes since criminal liability for misconduct was reintroduced in 1989. It is about increased complexity, not least through different control systems and signals, Europeanization, and digitalisation.[61] New forms of leadership and organisation with inspiration from the private sector challenge "valuable things" in the traditional administrative culture. In relation to these changes liability for civil servants has oscillated between a comprehensive set of regulations to a narrow criminal law area with an emphasis on disciplinary sanctions within public labour law. The liability framework is narrow in scope when it comes to criminal law. It affects almost exclusively judicial, police, prosecutorial and prison and probation authorities. The main bulk of civil servants employed at other administrative authorities are thus more affected by disciplinary procedures in the public labour law, though it is difficult to say with precision how they are affected – that is, in what way does disciplinary procedures play a part in regulating behaviour and good administrative culture. When an individual civil servant is held responsible for errors in the service, it also means a claim of responsibility with consequences for the authority where the civil servant works. From a strictly legal point of view the liability framework serves the purpose well, but it is a narrow perspective if the changes in administrative culture and organisation are not included, or if disciplinary procedures are arbitrarily applied. A clear and adapted regulation of civil servant liability, as a preventive protective measure for the administration's integrity, credibility, legitimacy, has not been a prominent focus in recent reforms.

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[59] Statskontoret. 2018. *Myndigheterns personalansvarsnämnder*, p. 23.

[60] Sannerholm & Reitan (2022) p. 567.

[61] See, Jacobsson, B. & Sundström, G. (2006) *Från hemvävd till invävd. Europeiseringen av svensk förvaltning och politik*, and Hysing, E. Olsson, J. (2012) *Tjänstemän i politiken*.

4.3 How the public administration is digitalised

The two previous examples deal with how administrative authorities are governed, and how civil servants are regulated. The third and last example of challenges in the public administration is about the rapid digitalisation and the automatisation of decision-making.[62] Digitalisation of governance and automatization of public decision-making is not unique to Sweden but an ongoing global development. The process of automatization of decision-making naturally involves questions that are legal, but just as important questions are sociolegal and behavioural in nature. The legal questions centre on well-known risks associated with automated decision-making– that is, who is responsible for decisions based on faulty algorithms, or situations where the empirical world clashes with a highly functioning software? How can decisions be challenged? What happens when algorithms make decisions based on incorrect data? Many administrative authorities process a very large number of cases every day. From this perspective automation is necessary for effectiveness and legal certainty and to minimise the risks that comes with human decision-making. It could be said that in some areas of public administration human intelligence is not only redundant but also not even desired.

The discussion in Sweden, but also in other countries, treats automation from a legal technical point of view, a checklist approach rather than ends-based teleological. The legal adaptation to allow for automated decision-making by administrative authorities took place through the 2018 Administrative Procedure Act, which provides a legal basis for automated decision-making.[63] This satisfies the condition of legality, a common and key principle on all rule of law lists while it leaves much else surrounding the rule of law in want. Legality is not that binary as simply allowing or prohibiting certain acts. While the Administrative Procedures Act meets a threshold of legality, the law and the preparatory work do not include suitable safeguards, for example as stipulated in the EU's data protection regulation and in the guidelines from the Article 29 Working Party or the HLEG-AI on trustworthy AI. It is unclear how legal certainty should be upheld in automated decision-making and how privacy and information security can be protected.[64] The preparatory works for the Administrative Procedures Act also completely ignore the issue of accountability when it comes to what body should be seen as responsible, and held accountable, in automated governance: that which designed the algorithm or the public agency using it for decision-making.[65]

There is also a wide difference between systems of automation that will affect legality. In some cases, automated governance is used for easy decisions and

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[62] This section draws in parts on Sannerholm, R. (2022) "Responsibility and Accountability: AI, Governance and the Rule of Law". In Colonna, L. & Greenstein, S. *Law in the Era of Artificial Intelligence*. SJF & IRI.

[63] See, *Regeringens proposition 2016/17:180, En modern och rättssäker förvaltning – ny förvaltningslag*. 2017.

[64] See the discussion in SOU 2014:75. *Automatiserade beslut – färre regler ger tydligare reglering*.

[65] Karlsson, R. (2020) "Den digitala statsförvaltningen – rättsliga förutsättningar för automatiserade beslut, profilering och AI." *Förvaltningsrättslig tidskrift*, p. 76.

here the question of legality or accountability deviates little from how it is typically understood. However, when automation is used in situations where the law leaves scope for assessment, evaluation, and discretion, legality and accountability are more difficult to apply. The difficulty comes from the fact that technology in these instances is not simply employed as a tool but to replace human action. While the legislative changes do not account for these nuances and risks of arbitrary use of automation, the legal academic discussion has been more accommodating.

Automation challenge rule of law in public administration, specifically when it comes to accountability. The behavioural science literature on judgement and decision-making reveals several insights to better understand how automatization creates arbitrary situations - not because of the unclear laws but because of how the system is rigged and how it triggers human behaviour. In short, research on judgement and decision-making suggests that the worst form of accountability is the one introduced post-decision – that is, only after a decision has been made is someone informed that he or she is responsible. What typically happens in situations of post-decisional accountability is that the person who is held to account finds it more difficult to divert from earlier courses of action. In other words, a stubborn defence of even faulty decisions. The opposite applies when pre-decisional accountability is introduced, i.e., where someone knows they will be held accountable before they decide. In these situations, a person is less committed to a specific course of action.[66]

Thinking about decisions and accountability in this way, and applying it to automation, indicates several problems. For one thing, the place of accountability shifts whenever technology is employed, and becomes more difficult to identify as technology for dealing with intricate problems becomes more complex. There is a transfer of accountability from a place where we typically find accountability mechanisms in relation to civil servants, to developers, programmers and those procuring technical services for use in the public sector. Similarly, the place of control also changes. If administrative authorities depend on automated systems, then their ability to control – in the sense of understanding, having the ability to monitor and to correct or adjust errors – shifts from authorities to private companies. From a civil servant point of view, you may well find yourself in a situation where you are responsible for a system that is difficult to understand and monitor, producing decisions for which you must rely on the correctness of a previous course of action. This may create a governance situation where large numbers of civil servants are responsible but not actually accountable. The decisions produced by automated systems, that public servants are responsible to supervise, create only a token sense of accountability. From the perspective of individual citizens, civil servants may very well be responsible and accountable for automated decisions. Moreover, there seems to be varying degree of quality competence when it comes to administrative authorities' IT architecture, and uncertainties among agencies on how to deal with ethical and legal aspects of digitalisation and

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[66] Lerner, J. S. & Tetlock, P. E. (2002) "Bridging individual, interpersonal and institutional approaches to judgement and choice: The impact of accountability on cognitive biases". In Schneider, S. & Shanteau, J. (eds.) *Emerging Perspectives in Judgements and Decision Making. Cambridge University Press,* p. 14.

automation.[67] There is another aspect of this too that is often forgotten in the legal discussion on digital governance, namely that a shifting of civil servants is taking place with greater digitalisation. This is a change in culture where civil servants with IT-skills are becoming more influential in the day-to-day work of administrative authorities. Considering the ‘valuable things’ lost already in the public sector, in terms of administrative culture and rule of law, it should be noted that many in the growing professional group of IT-specialists are short-term problem-solvers or external consultants.[68] Public ethics and a public service culture are not necessarily the dominant features of this professional group, which may be motivated by a result-oriented work ethic. Relying on professional groups outside the public sector has proved difficult in terms of maintaining a culture of good governance.[69]

5 Concluding Remarks

The rule of law discussion in Sweden has all the marks of a newly awakened interest, and it is finding its bearings. The ephemeral existence of the rule of law, until very recently, shows itself in how the concept is appreciated, and threats identified. Sweden is catching up to a rule of law vogue by mimicking problems found elsewhere, making them potential problems here. Problems that *are* here are not recognised or else fail to motivate a proper reaction. Politicians, legal professionals, and legal scholars should pay heed to Tolstoy’s insights when thinking about how to protect the rule of law in Sweden - happy families are alike; every unhappy family is unhappy in its own way. Polish or Hungarian problems are not necessarily Swedish rule of law concerns. There are many institutions responsible for assessing or auditing state agencies from an effectiveness or efficiency perspective, but no one assesses administrative authorities from a rule of law perspective to ask what the problems are with arbitrariness and how they should be mitigated? The standard approach to the rule of law, listing principles and institutions and asking what the rule of law *should look like* instead of what it *should achieve*, further propels a narrow and law-dominated perspective. Rule of law lists concentrates on assumed core features or essentials for the rule of law and tend to be all about law, specifically the judiciary. While the judiciary play an important part in upholding the rule of law, it is not necessarily the most important part.

The greatest threat to the rule of law is arbitrary use of power, this is the common core of the rule of law narrative since recorded history. Courts can control the exercise of power, but after the fact, and correct and redistribute some of the negative effects. And the threat of arbitrary power is not to the courts but

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67 Agency for Digital Government (2019) *Främja den offentliga förvaltningens förmåga att använda AI,* p. 28f.

68 Statskontoret, (2019) *Förvaltningspolitik i förändring – långsiktiga utvecklingstendenser och strategiska utvecklingsbehov*, p. 46. See also, Sannerholm, R. (2022) ”Outsourcing av rättsstaten. Myndigheters användning av konsulttjänster inom juridik”. In Djurberg Malm, K. & Sannerholm, R.

69 Statskontoret (2015) *Att göra eller köpa? Om outsourcing av statlig kärnverksamhet.*

to the vast range of administrative authorities where the rule of law is put to the test, in the thousands of actions and decisions taken daily.

The starting point when talking about public administration in Sweden is that although the rule of law is highly functional, the examples in this essay have something to say about current strengths and future risks.

There are obvious challenges in relation to how the public administration is governed when it comes to informal methods of dialogue, and there is but a terse regulatory framework for how the government should rule the realm. The examples from the Transport Agency and the Social Insurance Agency reveal what shortcomings to expect when dialogue becomes a dominant part of governing administrative agencies, and the ensuing arbitrariness when something goes wrong. The solution is not to regulate more, and, in more detail, this would only serve to constrict effective governance, but to make clearer the importance of rule of law when governing. This speaks to a practice and a culture of governing that should receive greater attention – for instance, in terms of raising the competence among civil servants at the Government Office, and within the management of administrative authorities. For want of better words this has more to do with 'constitutional ethics' than constitutional law. Governing in a way that results in more, not less, arbitrariness, should also (ideally) be a central issue in the democratic process, an issue for voters to consider, and perhaps it will be given time when a stronger rule of law tradition evolves. It is clear however that how the administration is governed cannot be explained through law alone - it is culture, politics, political practices together with law that constitute the "mystery" of public life in Sweden. Thus understood it also suggests that any attempts to impede threats or erosions to the rule of law must also consider culture and politics, simply following checklists of principles and institutions and revising laws, or passing new ones, will fall short of achieving an impact.

In a similar fashion the arbitrariness apparent in the liability framework for civil servants comes from a changing culture within administrative authorities, not a lack of laws or capable institutions to enforce them. In his inquiry of the misconduct among auditor generals at the National Audit Agency, Hans Gunnar Axberger laconically stated, noting first that there was no absence of laws and regulations on proper conduct: "If you can do what you want, there is a risk that you will".[70] That many administrative authorities lack the experience of handling disciplinary proceedings, and are uncertain on how to assess misconduct, leading to a willingness to adopt "softer" and informal measures leaves too much discretion in the hands of individual authorities. The unstable civil liability framework also means that citizens cannot expect a uniform practice when interacting with administrative authorities, which might gradually erode the historically high institutional trust that has characterised the public sector in Sweden.

The digitalisation of public life, and in particular automating decision-making, carries the same narrative of threats to the rule of law. While legality is ensured for automated decision-making, it represents more box-ticking than a careful assessment of how and under what conditions arbitrary power can become greater because of automation. Digitalisation, moreover, reinforces

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[70] Axberger, H-G., (2016) *2015 års riksrevisorers förändringsarbete m.m.*, p. 139.

some aspects of the change that the public administration has undergone, such as a specialisation of civil servant roles, a closer resemblance of private sector organisation, and greater reliance on experts and outside consultants. While this may be what the digitalisation of administrative agencies requires, it might not be what the rule of law needs.

If there is a ‘frontline’ of the rule of law it is not found in the courts but in the more mundane offices of administrative authorities, in the everyday bulk decisions, and in the internal practices and culture among civil servants. While there is not a long tradition of talking about rule of law in Sweden it has worked very well despite this. The reason is to be found in a tradition of values and public ethos. Values and public ethos are the “other” or “something” components that make the rule of law work, independent of rules and regulations, and are often taken for granted or assumed as a constant. The recent scandals involving administrative agencies, of which some have been mentioned in this essay, the unclear application of civil servants’ liability, and the rapid digitalisation shifting the foundations of the public administration, each represent challenges to the rule of law. Taken together these challenges constitute a serious risk of eroding the rule of law to a point where it becomes difficult to repair.

The Play