PAPER No. 1

THE CRITICAL POINTS OF RULE AS UNDERSTOOD IN THE NORTHERN COUNTRIES

(DENMARK, FINLAND, NORWAY AND SWEDEN)[1].

by

Professor Nils HERLITZ

University of Stockholm

I. INTRODUCTORY REMARKS.

1. "The rule of law" is an Anglosaxon notion, which is of great importance in constitutional life, in legal theory, in public opinion. You may expect to find the same notion in other Western countries, having the same importance, though it may be understood in somewhat varying ways ("the Western rule of law notion"). And I understand that our task is to find out, what is essential and common behind the different forms which this notion has got in different countries.

Now is the Northern countries we use different words when we want to give an expression for fundamental ideas like those behind the words "rule of law". You may hear the expression "rättens herravälde" which comes nearest to "rule of law" (= Herrschaft des Rechts). More often we speak of the "rättsstat"

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1) Iceland also belongs to the Northern countries. Its institutions are not very different from those of the other countries. — Hn = Professor Hanson's memorandum 26 nov. 1956. PM = "Paris Meeting" (4,5 Jan. 1957). Hz = **Herlitz**, Swedish administrative law. The international and comparative law. The international and comparative law quarterly April 1953. Hz Sw = **Herlitz**, Sweden. A modern Democracy on Ancient Foundations (Minneapolis 1939).

2) Traditional is a medieval sentence: "land skall med lag byggas" ("The land should be built by law").

(Reschtsstaat, though this expresssion is rather new in the Northern countries). Very often we use the expression "lagens herravälde" or similar expressions[2]. They are *etymologically* identical with the rule rule of law but may have a somewhat different meaning since "lag" is most often thought of as = Gesetz, loi, though it also may be = Recht, droit). We may often speak of "legalitet", "västerländska râttsideér" (Western ideas of law etc.) and so on[1]. But all these expressions may be used in different meanings, often rather indistinctly, and never as a general principle from which — as in the Anglosaxon countries — conclusions can be derived. In our legal theory and in theory of social sciences no expression plays a role comparable to that of "the rule of law" in the Anglosaxon countries and there is none which appeals to the minds of men in the same way.

Therefore it is difficult to speak of the rule of law "as understood" in our countries. What I can do is to consider the leading principles of our legal systems and our social orders, as expressed in constitutions, legislation and praxis.

But this is a difference in the way of thinking only.

There is in each of our countries a set of principles which *could* as well be expressed by the notion of "the rule of law" and which is a generally recognized and estimated. These principles are not quite the same in all the Northern countries; there are institutions in Sweden which we regard as very important and which an average Swede, who does not know much about much about foreign countries, may regard as indispensable in a "rättsstat" but have no counterpart in the other Northern countries and vice versa. But we have very much in common (as much as for instance England and the United States).

And I do not doubt either that in comparing the Western countries in general we shall be able to establish "Western concepts" (Hn 3:2), a general agreement, so fargoing as to allow us to speak of a "Western rule of law notion." I suppose

1) Very often also "democracy" is used in popular language as meaning nearly everything that is good.

then that it may include less than each country would regard as fundamentally important for itself, less than the English rule of law for instance. Thus I shall also speak of "the rule of law as understood in the Northern countries".

2. In our work in Chicago and later on we must be on our guard against A) resigning before the differences between institutions, legal forms etc. of different countries what is common will above all be found in the realities of social life and in the ideals behind them.

But on the other side: we should not be too ecumenical.

a) We have to define a social and legal type, realized *in our days*. The "rule of law" is in England thought of as something you have in common with old times - back to Magna Charta perhaps. And in Sweden we are inclined to think in the same way ("a modern democracy on ancient foundations"; cf my book). And certainly we have much in common with old days; we shall never forget that. But if you try to set up principles or ideals valid for all times, you can only come to a minimum of no value. Each time has its problems.

b) The social and legal type we have to define has developed in nations which have a given structure. We should not efface the characteristical treats of this type in order to make it correspond to the institutions of countries living under quite other conditions than ours or to make it possible for such countries to accept it immediately. We have to take "a distinction between established civilized societies and other societies" (PM Ae).

B) We should not be disencouraged when we find that this or that principle is, in this or that country, not maintained without exceptions. During the war I wrote a book called Svensk frihet (Swedish freedom, 1943), where I commented on a number of points where we had deviated from the good way and emphasized that these deviations reminded of principles proclaimed in Hitler's Germany or in Russia. My line of thought was somewhat the same as for instance Hayek's: modern democracy (including modern welfare state) has in itself a germ of despotism. Such warnings

should not, however, be taken too seriously. We should keep in mind that it is a great difference between taking two steps and walking miles. And we have to make allowances for countries where the rule law cannot be applied as rigorously as in other countries. What counts is the general standard.

But at the same time: the dangers should never be neglected. I am always anxious to emphasize the danger of the rule of law being - imperceptibly in the beginning - undermined. The rule of law is nothing static; it is something we have always to defend (at "the critical points") and improve and fight for. Its content has to be changed, when for instance the modern welfare state raises problems which were hitherto unknown (PM Bc). In so far it is after all only a difference of degree between us who boast of having already the rule and those nations we would recommend to adopt it gradually.

3. I understand that it is not my task to present, in this memorandum, my *personal* views on problems which are common to us all. (I have presented such views, in a critical spirit, in an essay on "Rättsstaten" Svensk Tidskrift 1951). I cannot avoid, however, some such remarks. But my main task is to act as a representative of the Northern countries. And as such I have not to describe our systems in so far as they agree with those of other countries. But I have to lay stress on divergencies from general patterns. Such observations may be useful, because they may make the members of the conference pay attention to possibilities they are not aware of before and ponder whether they are — as I believe — compatible with the general idea of a rule of law which we aim at, or not. Intentionally I sometimes overemphasize such "ciritical points".

II. LAW.

1. We speak of "rätt" (cf. German Recht) as well as of "lag" as the fundaments of our societies. I cannot define the terms strictly; they are used in different meanings, and often we speak, vaguely, of "lag och (and) rätt". I think however I should start from the notion "lag" (etymologically = law, but, as to the

sense, nearer to Gesetz and loi). This word has, perhaps, a specific colour in the Northern countries. When we use it, a) our thoughts do not go immediately to the *courts;* the rule of law does not necessarily imply the Justizstaat, the idea of courts which uphold it or make it (though, of course, the courts are a very essential element in our system, see; V, VI). We have not a common law system. We have, certainly, in some fields a judge-made law: for instance our law of Torts and, in the field of administration law, "principes généraux" comparable to those which the conceil d'etat has developed (cf. Hn 10:3, 13:4). But this activity of courts — even if it is very important — is regarded in a way, as subsidiary. b) Nor is the law, primarily, thought of as an expression of the *will of Parliament* (though, of course, the power of Parliament to make laws is, also a very essential point, see: III).

In men's minds the word lag has — especially in Sweden and Finland — got its colour by a long historical development, beginning with the codifications of the Middle Age — by later codifications — onward to our days. An average man will think of "lagen" (the law) as a thick statutes book. I think three features are essential: a) General rules, made without consideration of special cases, special interests, binding upon everybody — "government of laws, not of men", b) These rules are known to everybody, so that everybody can act according to them. c) "Lag" is also traditionally supposed to be in harmony with "rätt" (right, natural justice, cf. IV).

2. Normativism is a fundamental ideal in all the Northern countries. It is true that in some of the countries legal theory accepts in principle leges in casu. And certainly "legislation in appearance general" may "in fact deal with a particular case only" (PM Ag). But such cases are very rare, as regards encroachments on liberty and property. Normativism is also against giving too wide discretionary powers to the administration[1]. In this respect, however, it has not been possible to maintain it everywhere.

1) And to the courts. In criminal law the crime will sometimes — especially in statutes on planning — be described very vaguely.

Whilst in many fields the administrative agencies are very severely bound, in other fields, especially those of economic planning, they have got very wide powers — a "critical point". Some scholars have asked whether we are going from the "rättsstat" (Rechtsstaat) to the "förvaltningsstat" (Verwaltungsstaat). The police power has, and must have, a great freedom of action. But there are important limits regarding encroachments on freedom and property. And, as far as I have observed, the police power is nowhere felt as a "critical point". An exception must however be made for Finland, where Communism and quasi-nazi movements raised serious difficulties in the thirties and in the wartime.

Personally I regard normatvism as an important point, making a fundamental difference between the Western countries and the Soviet Union; the Soviet system has, in this respect, followed old Russian traditions.

III. LAW - MAKING.

1. The law-making body is Parliament, a democratic, freely elected Parliament, which debates freely under the control of the general public. It has been asked (Hn 10:2), if we have to "assume the existence of a particular type of legislature acting in a particular manner". I answer: we must assume this type of legislature and this manner of acting. They are nowadays indispensable in a Western rule of law. Certainly law has, formerly, been made otherwise, with good results, also in absolute monarchies (cf Hn 8). And in countries which are not ripe for modern democracy you may establish other good forms of legislation. But then we are outside the framework of the Western rule of law.

2. The Western method of law-making is based on democracy, i.e. equal political rights for the whole population. In this way the law may be regarded as an expression of the will of the people, as formed in a free discussion. I think that this point is essential. But of course democracy is problematical. The presumptions we start from differ very much from the realities. A number of "critcal points" appear. The indifference and passivity of the voters. The predominance of economic interests. The impossibility

for Parliament to penetrate everything; its dependence on the government. The inevitable delegation of power. And so on. In these respects we are all, I think, in the same situation. As to the Northern countries I should like, however, to make two observations which are relevant from this viewpoint. a) The organization of our Parliaments gives them a comparatively good opportunity of judging the questions independently (an effective committee system). b) The influence of capitalism (cf. PM Ad) is not very considerable.

It is a task of vital importance to make the realities correspond as much as possible to the ideals; otherwise the rule of law looses its spirit. The major issue is, I think, that the voters should act and think as independently as possible, and not consider their own interests only, but understand the needs of the community. Now this is very difficult, since the political life has become so complicated and so dominated by interests; personally I think that the spirit we want is in danger, if the states become, even more than they are already, machines for taking and distributing wealth methodically. It must be admitted, however, that modern welfare policy in our countries is not far from having (in connection with economic and technical developments) abolished pauperism; the word proletariat does not correspond to the conditions of to-day. These developments may help many voters to a more independent and active state of mind.

In this connection it is important (cf. Hn 12:2) that as many citizens as possible should be "active", should be familiar with public affairs by taking part in them, in local government and so on. Traditions of such activity are deeply rooted espacially in Sweden and Finland (cf. Hz Sw. p. 88 et seq.).

3. There is a particular critical point in Sweden (and in Finland). Whilst in Denmark and Norway encroachments upon freedom and property can be made only by the authority of a statute made by Parliament (just as in most countries), in Sweden — and to some extent in Finland — there exists a royal (i.e. governmental) prerogative. This peculiarity of the Swedish constitution has raised some difficulties in connection with the European

convention on civic rights where in many cases a "law" (loi) is required. And as a member of Parliament I have advocated an extension of the powers of Parliament. But the importance of the deviation from general patterns should not be overemphasized. a) The scope of the prerogative is nowadays not very wide b) The powers of the government are precarious (as are the law-making powers of Anglosaxon courts). If Parliament wishes, it can, at any moment, take over any topic regulated by royal "legislation". c) If Parliament takes over a topic in principle, it will to a very great extent be necessary to delegate its powers to the government, so that in fact there will be no great difference between the Swedish and the Danish-Norwegian system.

IV. LIMITS OF LAW - MAKING POWER.

1. The law-making power is restricted by catalogues of human rights in Denmark, Finland and Norway. The Swedish constitution has no such catalogue, but guarantees in a very effective way the liberty of the press. It has often been observed, however, that this difference is not deep-going. The freedom of the citizens is scarcely more restricted in Sweden than in the other countries. And I don't think that it is essential for a rule of law that the constitutions should contain stipulations on the citizens' rights. It is the practice that is important. And it is rather uniform in the Northern countries.

We expect in principle, that the law should be righteous (rechtfertig); the idea of a natural law is so far asserted. Of course, as always, we end in different opinions as to what is righteous. It is however of interest to observe that the general public takes an apparent interest in "rättsfrågor" (Rechtsfragen), above all perhaps when courts or administrative authorities are thought to have committed errors (cf. Hn 12:2). A number of such affairs in Sweden has proved how deep-rooted (though perhaps sometimes misled) the sense of justice is.

Personal freedom, freedom of association, freedom of opinion — which are essential to a rule of law (cf. PM Ae) — do not present any critical points in the Northern countries. This is

true also as to the treatment of persons suspected or accused of crimes (Hn 11:3, 13:2). Nor have we any difficult problems as to the equal treatment of citizens (cf. Hn 3, PM Ae). The non-retroactivity of statutes — especially in criminal law — is maintained; this is an important point.

On the other side, economic freedom has been curtailed in many respects. Certainly here is a critical point. But there are no specific observations to make about the Northern countries in this respect.

Certainly the situation has changed very much in so far as in the modern welfare state the freedom *from* the state has not the same importance for the citizens as their claims *on* the state: licenses, service, relief, aid, compensation and so on. In these respects it is always difficult to limit effectively the freedom of action of the Parliaments by catalogues of rights; we have to accept what they decide. But here normativism and the principle of equal treatment are of fundamental importance. I also agree with PM Ba that "steps to ensure the equal enforcement of the law" are highly desirable (see V 7).

V. APPLICATION OF LAW.

1. It is of fundamental importance that statutes should be applied honestly, objectively, impartially (also looking after public interests, cf. PM Ba), on the basis of sufficient investigations (cf. Hn 12:1). For this purpose there are in every country different agencies (courts and others) fit for different tasks, deciding at the first stage or after some sort of appeal.

And in cases where courts and other agencies act without being bound by statutes, we must exact that they act in the same way. When Parliament has not been able to form rules, the agencies have to pursue the ideas of normativism by forming, as much as possible, general principles to lead their activity. They have to provide for an equal treatment of the citizens. And they have to respect the objects Parlament had in mind when it gave them their powers (no abuse of powers, no détournement de pouvoir.). When in modern planning and welfare policy the powers of the administra-

tion are steadily growing and the citizens depend more and more on its decisions (cf. IV in fine), the maintenance of these principles become more and more urgent. It they are not upheld, wide powers may be used in an uncontrolable way, for unforseen — and perhaps illegitimate — purposes. There is a danger of an arbitrariness as heavy as formerly the encroachments on freedom.

Generally there is in every country something called ordinary courts and something called administrative (or executive) agencies (or authorities). Between them there is a bewildering complex of agencies under different names: administratve courts, tribunals and so on. I think it is dangerous to understand these three groups as fixed types, recurring with only slight variations in all coutries and to discuss for instance; what should the ordinary courts do, and how should they be organized and work? and: what about administrative tribunals? (PM Bb). We have to accept the fact that the structure and the position of these three sorts of organs are never the same in two countries. There is a very great difference, for instance, between English and American courts or American and German administration. What counts is that you have a security — as good as you need in different situations — for a good application of law (and for acting well where there is no law). You need — more or less — of 2) legal education and legal spirit, 3) independence, 4) "accuracy" (PM Ad), 5) good procedure, 6) public control, 7) right to challenge.

First, however, I think it is important to lay stress upon the value of a strict distribution of powers between different authorities, this being an important element of a Western rule of law. Swedish law goes very far in this direction; amintaining — more than most other countries — a stable distribution of powers also between superior and subordinate administrative agencies.

2. Of course judges should have a *legal education* giving them a judgment on legal questions and skilfulness in investigations. And we reckon that they are imbued with a *legal spirit:* impartiality, honesty, aspiration at going to the bottom with questions of law and questions of fact.

In the Northern countries we are anxious to have as much

as possible of such qualities within the administration too (as to Swedsh administration cf. Hz Sw p. 56 et seq.) It is a common feature in our countries that we regard a good and lawful administration as a very essential element in the rule of law. We have always (cf. PM Bb) had "a judicial element" within the administration, especially in Sweden. In none of the countries there is such a distance between the courts and the administrative agencies as in the Anglosaxon countries. Men with legal education play a leading role in the administration; they often have a judicial career behind them, and it is not unusual that they go over to the courts. (We have no counterpart to the English organization of the legal profession. Hn 10:4). There is also a rather strong legal spirit within the administration — though in later times it has been weakened, due to the increasing importance of specialized knowledge.

3. The judges should be *independent* of the executive in so far as a) they are not exposed to pressure from its side, b) they are not legally subject to its instructions. In this respect there are no "critical points" in the Northern countries. And "why do we suppose that the judges should be independent"? (Hn 9) I can only answer by referring to the ideas behind the principle of separation of powers.

As to our countries it may be of interest to observe that a) also administrative officers have, legally (Sweden, Norway) in practice, a security of tenure, not much less than the judges. Thus the possibility of being exposed to extralegal pressure is reduced. b) In Sweden administrative officers are also, in questions referring to the rights of the citizens and the application of statutes, as a rule supposed to act in independently of instructions of their superiors, just as judges.

It is certainly important, too, that judges and administrative officers should be independent of private interests. You can never be quite sure. But I can pretend that in our countries the "capitalists" are far from being able to exert a serious pressure.

4. The judges should be independent of the executive in

order that they might act with "*accuracy*", i.e. apply honestly the general rules laid down by Parliament in statutes. Thus independence implies dependence in relation to the legislative body. And this dependence raises problems: duty to resist etc. These problems will be critical, when the Parliaments and their activities are not what they should be (above: III); then the rule of law is in danger. But they have not yet been critical in the Northern countries. — Our courts are more dependent than the Anglosaxon. a) Tehere are only few fields where the judiciary may be said to act as a law-making body (see II 1). b) I believe that the courts of the Northern countries pay more attention to the will of Parliament even if it has not been expressed in the text of a statute and can only be found in the preparatory works.

Generally administrative agencies are not dependent of Parliament in quite the same way as judges, since they have, in principle, to apply the law as understood by the Government. Swedish administrators are in a somewhat different position (above: 3).

5. In a discussion on the rule of law I think the importance of the *procedure* should be emphasized. The procedure before English courts includes elements which may seem — to English people — indispensable in a rule of law but which cannot be included in a general standard. I do not even regard it as essential under all conditions that the procedure should be oral (in our administrative courts it is not). But something like those principles that in England have been given the name of " natural justice" should be regarded as indispensable.

So far about the courts. But to a certain extent it is possible to observe such rules also in other authorities (cf. Hn 11). It is very important for a rule of law that they should be applied in administrative agencies as far possible. In Sweden (Hz VII-IX) and Finland we have old traditions of a semi-judicial procedure within the administration; we are trying to improve it and to make it more uniform. Also in the other Northern countries more and more stress is laid on a good administrative procedure, as an essential part of a rule of law.

To me it seems important that it should not be too difficult to get a decision in a court or in an administrative authority. Is it not a deficiency in the English rule of law, that litigating is so expensive? The administrative way of appeals is highly estimated in Sweden (Hz I, IV); if it does not lead to as good decisions as in an English court, it is cheap and it is frequently used.

6. *Publicity* in the courts (including a right to report and to comment, Hn 11:2) is in my opinion important for many reasons, above all for those mentioned in Hn 11:4. The general public should see (or have an opportunity to see) that justice is done. From the same viewpoint (as also from others) we appreciate the participation of laymen in the work of the courts. To a great extent we have laymen elected for a number of years who get more or less familiar with the legal questions they have to treat and more or less able to form their own judgments.

Publicity, properly speaking, is not possible with in the administration. But when laymen are used in the administration and in what may be called administrative tribunals, this implies in a way that representatives of the general public have an opportunity of controlling the 'bureaucrats": Much more important however is that the availability of public documents in Sweden (to some extent also in Finland) gives an excellent opportunity (above all to the newspapers) to control what is going on in administration (Hz III)[1].

7. I suppose we all agree that a person who has been in some way injured by an administrative decision should have a right to *challenge* it. This right is, however, generally restricted to legal questions. In Sweden it is a peculiar trait that also questions of discretion may be brought not only before superior administrative authorities but also before administrative courts in cases where they are competent (see: VI 4). I appreciate this arrangement, having observed many cases where, in other countries, courts must decline to take up questions brought before them, which, in my humble opinion, seem to be fit for a judicial decision.

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1) An article on this subject is going to be published in "Public Law".

But an authority may be too benevolent against a private person (cf. PM Ba). In some situations another private person may have locus standi to challenge the decision. In the modern welfare state, where the authorities have, more and more, to take a position towards competing private interests, it is important that locus standi should be given liberally. In Sweden there is some inclination for giving it to organizations which represent the interests of special groups etc. The publicity of documents in Sweden (V 6) is of no little importance in preventing arbitrariness and facilitating a reaction against it. Important are also the personal responsibility of the civil servants (cf. Hz p. 230) and an effective public control. But how far can we go in this control? *Quis custodiet custodes?*

VI. DISTRIBUTION OF POWERS BETWEEN COURTS AND OTHER AUTHORITIES.

Of course the Northern countries have given to the ordinary courts very important tasks, comparable to those of English courts. There are however points which are — or seem to be — "critical".

1. In Norway the courts judge on the constitutionality of statutes and it is not unusual that a statute is overruled. In Denmark and probably in Sweden they have the same power but it has always been used extremely cautiously; in fact never a statute has been overruled. It seems to be a critical point that the constitution is not in the same way protected in Finland. This does not mean, however, that it is not taken seriously. As a matter of fact, the question whether a bill is consistent with the constitution or not is normally very thoroughly examined with the assistance of constitutional experts. Finnish lawyers think that this "preventive control" makes a subsequent control exercised by the courts unnecessary. The sense of legality is very strong in Finland, since the days when it was a Russian dependency and had to defend its legal rights against encroachments.

2. In Denmark and Norway the ordinary courts control he administration, much in the same way as in Anglosaxon countries. Of course the scope of their jurisdiction is often — as in all other

countries — controversial. This cannot however be regarded as a really "critical point". As to Sweden cf. V 7.

3. Sometimes — as in the Anglosaxon countries — statutes make the decisions of administrative agencies, or of bodies comparable to the English "administrative tribunals", final. Whether this is a "critical point" or not depends, in my opinion, on the character of the deciding authorities - they may, for their purposes, be sufficient. The question appears under quite the same aspects as in England and the United States.

4. In Sweden and Finland the administration is, with few exceptions, not under the control of the ordinary courts. Instead you may apply to administrative courts.

This way is in Finland open in the same extension as in Denmark and Norway the way to the ordinary courts (or more); as in these countries you may also challenge acts of the Government. Though the procedure before the High Administrative court in Finland is not oral, I think it coresponds to the requirements of a rule of law.

In so far as you can go to administrative courts, the same may be said about Sweden, at any rate about the Highest Administrative court (there are other bodies which should, perhaps, rather be regarded as "administrative tribunals"). But there is in Sweden really a "critical point". The jurisdiction of the administrative courts is not universal, but regulated by an "enumeration" of topics, so that in a great number of cases decisions of the Government and other authorities are final; never you are allowed to challenge a decision of the Government. I think this is a deficiency, and I have been working for a reform implying a wider control of the administration. But I am anxious not to overstate our weakness. a) I refer to what has been said about the amount of security which the Swedish administration affords (V). Traditionally people have a certain confidence in the administrative authorities, especally, when they judge in the well regulated way of administrative appeals. b) Certainly there is, in point of principle, a great difference between Sweden, where the jurisdiction of the administrative courts is *founded* in statutes, on one

side, England, the United States, Denmark and Norway, on the other, where, on the contrary, a statute is necessary to *restrict* the jurisdiction of the courts. But quantitatively I could not say where the scope of jurisdictional control is wider. I dare say that in the frequent internordic discussions in these topics it is seldom pretended that the rule of law should be less respected in Sweden than in the other countries.