

Anne Ramberg

# The Rule of Law – a Luxury Paradigm in Decline?

## 1 Introduction

This paper is a redacted version of my lecture in connection with the conferment of my Juris Doctorate Honoris Causa at Uppsala University on 28 January 2016. The nature of my address is however not that of an academic lecture. My observations are more reflective of legal philosophy and legal politics.

The rule of law concept does not have a perfect Swedish translation. It remains English in common usage. And for a good reason. The ideas underlying the rule of law concept largely carry a heavy Anglo Saxon ancestry.

Let me briefly recall some aspects of the origins of the concept.

“To think free is big, to think right is bigger”.

This motto, as you know, is placed above the entrance of the Assembly Hall of this great university. It comes from Thomas Thorild, a controversial author and philosopher who lived in the 18<sup>th</sup> Century. He was also an aspiring doctor at law. His thesis dealt with Montesquieu’s work “*De l’esprit des lois*”. Thorild successfully defended his doctoral thesis in the presence of King Gustaf III and with no less than 14 opponents. In contradiction to Montesquieu, his position was that since laws can be tyrannical, freedom was above the laws.

This idea reflects a natural law perspective. It was formulated after the French revolution.

But, already some thousand years ago, philosophers and politicians had discussed the rule of law idea. Among them was Aristotle with his idea about justice.

But some hundred years before that, King Solomon, in the Book of Proverbs, advocates this:

“Speak up for those who cannot speak for themselves, for the rights of all who are destitute. Speak up and judge fairly; defend the rights of the poor and needy”.

And some two thousand years later, the great philosopher Spinoza said: *“Law is the mathematics of freedom”*.

In 2015, we celebrated the fact that a millennium had passed since the creation of the Magna Carta.

As will be recalled, articles 39 and 40 of that instrument provide in relevant part that:

“No free man shall be seized or imprisoned or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land”.

“To no one will we sell, to no one deny or delay right of justice”.

These principles were formulated not because of democratic concerns, but because the Aristocracy of the day sought to reduce the political power of an omnipotent King. The result became a nucleus, on the basis of which subsequent jurists developed rule of law principles into a gradually more refined legal construct. A core principle was the idea of access to justice without royal involvement.

The former Master of the Rolls, the famous Lord Denning, referred to the Magna Carta as:

“the greatest constitutional document of all times – the foundation of the freedom of the individual against arbitrary authority of the despot”.

Further milestones in the development of the rule of law take us to 17<sup>th</sup> Century England. A philosophical expression of the rule of law concept came from a preacher and historian, Thomas Fuller. One of Fuller’s many wise and often quoted sayings was that

“Be you never so high, the law is above you!”

To modern ears, this may not sound very revolutionary. But during the reigns of the Stuart Kings, it was. Two landmark cases illustrate this.

The first is a case from 1607 in the days of King James I called *Prohibitions del Roy*. It arose from the notion that as Courts were seen as the “King’s Courts”, they came under the King’s right to overrule the courts, also in cases where the courts had been given jurisdiction. “Rex is Lex”, the King’s advocates argued. However, the Courts of the King’s Bench and Common Pleas disagreed.

A second landmark case is the *Trial of King Charles I* in 1649. Having permitted his mercenary troops to burn English villages, to pillage property and to commit torture of prisoners, the King was charged in Court for the Crime of Tyranny and other high crimes. The High Court of Justice found the King guilty. As we all know, he was subsequently executed. England, for some time, became a republic. The case formed another important step in the establishment of the rule of law in England. It established that the Sovereign was also under the law.

With the growth of the British Empire, the idea of the rule of law was gradually exported throughout the world. English trained lawyers in the newly liberalised United States adopted the rule of law ideas with great enthusiasm. The *Declaration of Independence* is an important expression of these ideas.

A major event after the horrors of the Second World War was of course the creation of the United Nations and the adoption of the *Universal Declaration of Human Rights*. The international community decided to establish universally applicable norms in order to prevent similar tragedies from occurring in the future. The UN Charter and other conventions were agreed upon. Through the UN, the concept of the rule of law was given a formulation content, which became largely accepted by most countries.

After the Second World War, we saw the Nuremberg Trials and some decades later, the Hague Trials concerning the atrocities of the Balkan War.

The US Supreme Court’s two decisions in *Brown v. Board of Education* in 1954 changed decades of jurisprudence, when it ruled that US state laws denying equal access to education based on race violated the equal protection clause in the 14<sup>th</sup> Amendment. The resignation of President

Richard Nixon in the face of the prospect of a Watergate impeachment trial is also illustrative.

So, on the basis of a gradual international development, the essential features of a rule of law regime can be formulated. It goes beyond the classical conflict between the ruler and his subjects. It also puts strict demands on other aspects of the administration of justice.

The British and US concepts of the rule of law idea find a parallel in the Germanic concept of the *Rechtsstaat*, or 'state-under-law', where the state as an organised entity is conceived to be limited by laws and by fundamental principles of legality, rather than being a purely political organisation empowered to dispense with law if interest of policy so demands.

There are interesting and important differences, as well as similarities, between the concepts of the *Rechtsstaat* and the rule of law. The rule of law concept is regarded to be less connected to the concept of the state. This is a strength for the rule of law concept as globalisation draws legal orders away from states.

The rule of law principles also apply to supranational law, emphasising the requirements of predictability and legal certainty. The rule of law can be seen as a set of qualitative requirements that ought to be present in all legal orders. It goes beyond the normal state power.

An excellent formulation of the rule of law concept was offered by the former Secretary General of the United Nations, Mr. Kofi Annan. He said:

"For the United Nations, the rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to: ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency".

The definition points out that the rule of law should be seen as encompassing a systematic protection of human rights guaranteed by law and conventions. And equally important, it requires that the application of the law must be fair.

The late English judge Lord Bingham formulated the rule of law concept along the same lines. He highlighted eight principles.

1. The state must abide by both domestic and international law.
2. People should only be punished for crimes set out by law.
3. Questions on the infringement of rights should be subject to the application of law, not discretion.
4. The law should be accessible, clear, precise and open to scrutiny.
5. All people should be treated equally.
6. There must be respect for human rights.
7. Courts must be accessible, affordable and cases should be heard without excessive delay.
8. Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide disputes which the parties themselves are unable to resolve.

As will be seen also from these formulations, the rule of law concept is not only seen as imposing formal rules on the legal systems. It also contains an essential substantive element in that it requires a link also to international human rights norms. This link is of fundamental importance.

## 2 The Rule of Law and Democracy

The rule of law relates to the protection of the individual citizen and organisation from the challenges of political power. The individual is in need of this protection whether or not the political power is a result of a democratic system. The fact that in a democratic system the political power stems from the people, it does not justify the conclusion that rule of law is *superfluous* in a democratic society.

History can tell. There are many examples, where, in varying degrees, states within their democratic legal systems, have set aside the moral principles protected by the rule of law. The legislative measures taken after the September 11 disaster illustrate the fact that the democratic systems, as we know them, do not guarantee the respect for rule of law and human rights.

The protection of rights must be achieved by rules, given the status of legally binding norms. The concept of the rule of law is inextricably tied to the belief that law has its own intrinsic value, a value which is greater than that of an instrument devised merely to achieve political goals. This is expressed in the Swedish *Instrument of Government* by two of its most fundamental provisions:

“All public power in Sweden proceeds from the people”.

“Public power is exercised under the law”.

The principles associated with the rule of law must satisfy the individual citizens' natural desire for security within society. Security in this context means that society is organised so that citizens and organisations are able to foresee the legal consequences of their actions. It is not enough for a state to protect property rights, administer justice efficiently and maintain stable laws!

The rule of law requires that a wide spectrum of values are protected. Experience has shown that for these values to be realised, laws must have a certain form and content and must be interpreted and applied according to certain generally accepted principles. Justice and fairness have to marry and walk hand in hand. This is what makes the difference between rule of law and rule by law.

As will be apparent, it is hardly possible for the rule of law concept to be given a simple, all-encompassing and permanent definition. The rule of law deals with, but is not limited to, the structure and administration of the legal system. It is evident that at many different societal levels, situations occur that call for the application of due process and rule of law. And time brings changes that make new demands. Nor is the rule of law concept absolute, in the sense that one country can be taken as a model satisfying all of the rule of law requirements. It is a matter of degree. The rule of law can exist to a lesser or greater extent and may be more fully implemented in some areas than in others.

But, the concept is not without content and must not be taken to mean just anything, which is good at law. The rule of law endorses legal protection as a means to achieve freedom and peace. The rule of law provides the core of a just society. It is inseparable from human rights, liberty and democracy. It enables individual citizens to enjoy the rights afforded to them by the democratic society. And the rule of law is not only a concern for the individual. Rather, it is there to protect all and to protect society at large.

### 3 Derogation and Proportionality Requirements

Whilst the rule of law concept is closely linked to human rights, the two are not the same. The rights to life, liberty, personal integrity and to freedoms of speech and assembly are some of the universal human rights, which the rule of law is required to guarantee. They must not be set aside, unless for specified and recognised reasons and only to a limited extent.

Hence, there are certain situations, e.g. in cases of extreme threats to a nation, which may permit the temporary setting aside of the human rights and freedoms guaranteed by the UN Declaration. Such derogation, however, must be made within the parameters explicitly permitted under the rule of law and must never be contrary to the purposes and principles of the UN. This, in my opinion, is where the conceptual difference between the human rights and the rule of law principles becomes apparent and comprehensible.

The *European Convention on Human Rights*, as do some other instruments of a similar character, gives also a possibility to derogate from certain human rights if it is “*necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others*”.

So, when a state contemplates to derogate from the citizen's protected rights, a true state of emergency must be at hand. The measure has to be carried out according to rule of law principles; consequently, clear derogation criteria have to be set and observed. The suspension has to be regularly reviewed, and it has to be limited in time. And, very importantly, if a state finds it necessary to enact a new law that infringes upon human rights, such measure must meet the criteria of proportionality. This means that the measure has to be necessary, efficient and proportionate in the strict sense.

So the question then becomes:

What is the current status of the rule of law paradigm? Is it subject to threats, and is it even attacked so as to be justly described as being in decline?

In answering that question, let me turn to some contemporary threats to the rule of law. As we are all constantly reminded, there are many serious challenges to our societies of today. These threats come from different sources and have disparate roots. Terrorism, the refugee and asylum

situation, climate change, economic challenges, technique development, money laundering, corruption and military aspirations are some examples of phenomena that form obvious challenges to society and to the legislator.

Conflicts of interests that are *per se* legitimate frequently pose rule of law problems.

Hence, society's interest in stability, law and order, and security of life and property often conflict with due process; moreover, the legal rights of the individual such as integrity and the freedoms of religion and expression frequently raise difficult balancing issues.

Such conflicts of interest are, in my view, today commonly resolved in favour of the interest of security and societal order, over the rule of law interests. It is apparent to me that derogation from certain human rights has often been expanded beyond permissible borders. Lack of proportionality is a recurring feature.

The rule makers have, to a large extent, gradually transformed themselves from rule of law-protectors to rule of law-attackers. This tendency begs the question: What are the principal mechanisms that trigger this problematic development and how do they affect the rule of law?

## 4 Morality

Morality is obviously a factor that affects the legislator and the rule of law. The concept of the rule of law is expressed in rules, which, from our common experience, have proved to be necessary in a civil and democratic society. This has a clear moral and ethical background. There are many different beliefs and traditions in the world. And there are different views on how such phenomena should be permitted to influence the law and its implementation. Is there a moral responsibility that goes beyond the requirements of the law?

In the European Union, member States are supposed to respect each other's judicial systems. There are, however, vast differences in legal tradition among the EU Member States. Some countries do not have developed traditions in important areas of the law. Some are not entirely used to an independent and non-corrupt judiciary. In matters like criminal legislation, an area that before the Lisbon Treaty was reserved for the national parliaments, this poses a number of problems. The troubling fact is that the rule of law and due process cannot be taken for granted, even in all EU member states. The recent developments in Poland and



Hungary are blunt reminders of a declining, or even conscious neglect, of interest in the rule of law principles. In a system such as the EU, there is an obvious risk that the weakest link becomes the common denominator.

The rule of law requires a judicial system which enjoys public confidence. As to post conflict and postcolonial states, often with developing economies combined with a strong local history and culture, there is of course a need to observe a fair degree of cultural sensitivity.

Nonetheless, there are limits as to how far cultural diversity should be respected in a rule of law context. Permissible limits have to be drawn, of course, so that a society's cultural notions are not allowed to violate fundamental principles of human rights and human dignity. Moral and religious panicking are dangerous powers.

The fundamental human rights as described in the UN Declaration, as evident in its title, are universal in nature. Universality is a fundamental feature of human rights. They are not just local business. The essential elements of the rule of law concept is nothing you can pick and choose from at your own discretion. It is not an *a la carte* menu. This concept of universality must be maintained, albeit some political leaders may conveniently advocate for the idea that human rights should be defined locally. This is particularly common in Asia. However, even in democratic societies built on the rule of law, there are vast cultural differences with regard to institution building and structure of the judicial system. However, these differences must all be compatible with fundamental basic norms.

## 5 Supranational Norms

In a globalised world, supranational norms become more and more important. This development reduces the legislative discretion of national states. International law has gained power at the expense of state law, by increasingly transferring normative power to transnational organisations such as the UN and the EU. By necessity, the national margin of appreciation has become more limited. In the Western hemisphere, the law has more and more taken the place of religion and morals as a unifying normative power. This is, of course, especially obvious in secular minded countries. The justice system and public order become the common denominator. The common principles of civilised nations gain more recognition and power. With its different cultural and religious traditions and consequently, also different views on what is good morality

and good ethics, it may however be challenging to maintain unified rule of law principles- even within the EU. And legislation originating from non-domestic sources is at risk of not being a mirror of the moral norms in the local society, but instead as foreign imperatives lacking moral and cultural support among large domestic groups of citizens. To overcome such divides, it is quite necessary to cope with cultural sensitivities to dispel the notion that important rule of law principles emanate from “foreign” sources. It would be foolish to suggest that this is an easy task.

## 6 Terrorism

In recent years, the terror threats have become a very real and recurring phenomena in most corners of the world. Peoples and their leaders are and feel threatened. Such threats naturally may instil deep fears and anxiety. Politicians rightly feel it to be their duty to, quickly and effectively, respond to such threats and deal with such fears. A problem then results from the fact that society’s legislative reaction may be influenced by fear, so as to render the counter measures more dramatic and far reaching than proportionality requires. A proper balance between efficient action and rule of law principles must be observed.

Due to real or perceived terrorist threats, a number of new laws have been introduced with a view to permit secret coercive measures. The Data Retention Directive in Europe and new tools for the police have gained acceptance not only by the legislator, but also by a frightened population. However, as correctly pointed out by the UN High Commissioner for Human Rights, Prince Zeid, when he recently received the Stockholm Human Rights Award 2015:

“Fear is a very bad advisor”.

Initiatives on extended surveillance were taken before September 11. But the terror attacks in New York became a catalyst to drastically increased surveillance, control and, unfortunately, to widespread abuses.

The “war on terror” poses several challenges to the rule of law: Laws that are passed may be disproportionate. They may be too harsh and too intrusive. And laws that were intended to prevent terrorism are subsequently used for an entirely different purpose. Too often, we have seen how new national and international legislation results in serious deroga-

tion from the rule of law, including fundamental human rights principles.

It is of course difficult to strike a proper balance between national security interests and the protection of civil liberties and human rights. The balancing act may be quite delicate. However, the legislator has, in large measure, adopted a strict risk prevention perspective. This is not surprising. But, good intentions in the fight against evil forces always require moderation and balancing against basic societal values. Let me dwell on some topical examples.

The Security Council Resolution on Terrorism following September 11 was adopted on 28 September. This meant a shift in international law. Up to that point, the formation of international law had been the responsibility of the General Assembly. A member state was not bound by a treaty unless it had acceded to it. After September 11, international law has become a task for the Security Council, whose resolutions are binding on all member states. Hence, a Security Council resolution is the supreme legal instrument binding on all UN member states. From a rule of law perspective, it can be questioned whether this is consistent with the ideas behind the UN charter, with regard to the balance of power within the UN and how international law should be prepared and adopted. A recent example of this type of international legislation is the Security Council Resolution on Foreign Terrorist Fighters from 2015.

## 7 Legislation

The US legislative measures adopted in the so-called “war on terror” included the use of torture for interrogation purposes, combined with an illegal detention and interrogation programme. Guantánamo and secret prisons around the world were established. The CIA has apprehended at least 3,000 people and transported them around the world. Some 100 individuals have been kidnapped on EU territory. These individuals have been transferred to secret CIA detention centres. Some of these centres were located in Europe. Several European countries tolerated illegal CIA activities including secret flights. So did Sweden. An example is the handing over, on Swedish soil, of two Egyptian asylum seekers to the CIA.

The US invasion of Iraq was an act against international law. The presidential drone programme leaves many unanswered legal questions. The US assassination programmes in Afghanistan, Yemen and Somalia place people on kill lists, permitting them to be assassinated on direct orders

by the US President. Such actions are not easily reconcilable with international law as we know it.

The US listing of suspected terrorists, often followed by corresponding UN and EU listings, is another example of due process being blatantly disregarded. Early in October 2001, US police authorities sent out lists of terrorist suspects and suspect terrorist financing to police authorities all over the world. The same type of lists were then passed by the US Government to the UN and the EU. Those lists were not scrutinised by the UN or the EU. In reality, they were just rubber stamped. Those lists were and are still, in fact, treated much like a papal encyclical as a fatwa. Sweden has also contributed its share to the setting of this troubling scene. We all remember how the Swedish citizens of Somali origin were treated.

The demands on the leading democracies must be high. This, however, must not shield the fact that many other nations, China and Russia included, are frequent and most serious transgressors of the rule of law.

The political decision process behind the inclusion of individuals in terrorist lists merits special attention. There is an obvious risk that political opposition groups, anti-globalisation movements and civil rights activists may often become included in very widely framed terrorist definitions. Surely, the ANC would have been classified as a terrorist organisation under the EU Frame Decision on Terrorism. It is telling that an explicit exception from the definition was made for the Resistance Movement in the Second World War. However, it is highly uncertain how more modern, but equally legitimate, groups may be treated. The risk that many will be misclassified as terrorists is only too apparent. Several other equally problematic classification issues are at hand.

The quality of terror legislation, both at international and national levels, has clearly not celebrated much triumph of late. A paradigm shift is about to take place.

New coercive measures, extended surveillance and intrusive wiretapping have been introduced. Under these rules, intrusive measures are permitted to be applied even where no crime has been committed or any suspect has been identified. The police is allowed to obtain communication data for intelligence purposes as a preventive measure. This is a new and troubling trend. Under the Swedish Code of Judicial Procedure, as in other procedural sets of rules, a prerequisite for coercive measures is that wiretapping must be linked to a specific individual and a concrete crime.

Under this new legislation, however, the permitted integrity invasion is no longer based on suspicion against a certain individual because of a

presumed link to a specific crime. Instead, it is based on a risk assessment of an individual's possible future involvement in a crime. This model raises several problems. One obvious problem is how to use data obtained by secret intelligence gathering methods, measured against the standard of proof required in court. There is an obvious temptation for society to resolve that dilemma by lowering the standard of proof required in criminal cases.

It is evident that if states introduce coercive actions against groups of citizens instead of individuals based on what is perceived to be hazardous behaviour, this can also be used against political opponents, religious groups or any other group of boisterous citizens. The risk of stigmatising Muslim groups in the fight against terrorism is a very concrete and topical dilemma. We should not forget the McCarthy period after the Second World War.

## 8 Integrity

Increased societal surveillance is a threat to integrity and privacy, in spite of considerable legal protection. Respecting personal integrity is a necessity for the individual to enjoy his or her democratic rights. Without protection of integrity and privacy, an open debate becomes more difficult or even impossible.

One effect of surveillance is that it infringes on the integrity of the individual. It also constitutes an infringement upon the values that integrity is supposed to protect. Personal integrity is a prerequisite for independent and critical thinking. It should be seen as a normative limit for the state's influence over the individual. Infringements of integrity can therefore not be effectively counterbalanced by control. Personal integrity is an individual expression of a societal interest and not an individual interest alone. The current undermining of the integrity protection is, in my view, disquieting.

## 9 Technique

In modern society, there is a risk that the technical imperative tends to become the norm. The legislator wants to do all that the current technique permits the legislator to do. The result is often a shift in application of the law as well as a shift in power. With open ended and imprecise laws, the legislator tends to lose its normative function in favour of the

Executive. Hence, the executive mandate is widened at the expense of the powers of the legislator. The scope of the infringement upon the individual rights can be gradually extended, without the need to change the legislation. This development can have serious rule of law implications.

## 10 Sanction Lists

Another phenomenon that has gained increasing popularity in the US, the UN and the EU in recent years is the use of sanction lists. Such lists are decided upon in the same way as the kill list and cause the same problems as the terrorist listings. It is apparent that the inclusion process, from the individual's perspective, raises serious concerns regarding the rule of law. The effects of being included on a sanction list may, similar to the terrorist listing, be quite dramatic for the individual. The remedies in cases of wrongful inclusion are very meagre and inefficient indeed. This is especially obvious with regard to the US listings, which are not confirmed by the EU. An example is the following.

Two days before Christmas Day in 2015, a very well respected Swedish lawyer (now a member of the Council of the Swedish Bar Association) was listed on a US sanction list with regard to Russia and Ukraine. His Russian clients were not much appreciated by the US due to perceived links with Mr. Putin. He was informed about being on the list through the media. As of today, he still has not received any information whatsoever from the US authorities. As a result of the listing, Swedish banks have forced him to leave all corporate board of directors, of which he was a member. Otherwise, the banks would not accept his clients as customers of the bank. There is no suggestion that the lawyer himself is guilty of any wrongdoing or unethical behaviour. The decision to list the lawyer carries no effective right of appeal. As a lawyer and a representative of the Swedish Bar, I find this deeply worrying. And this addresses the absence of a vital element of the rule of law.

## 11 Access to Justice

In order for the rule of law to be efficient, the citizens must have a realistic ability to have their cases heard. Without access to justice, the rule of law becomes merely a nice-to-have concept and ideal. For a right to be meaningful, there has to be a real possibility to seek official redress in case of violation. If the cost for appealing a decision is too high, the state's

decision cannot be effectively challenged. All persons should be assured access to the basic rights of citizenship, and lawyers have a particular duty to assist.

The UN Basic Principles on the Role of Lawyers, adopted 25 years ago, emphasises that lawyers have a vital role to play in upholding the rule of law by informing the public about their rights and duties under the law and in protecting their fundamental freedoms.

It is therefore a major responsibility for each Bar Association and for the individual lawyer to assume the function of a watchdog on behalf of the citizens in order to supervise the government, parliament and other authorities in defence and promotion of the rule of law. Lawyers have a duty to draw the public's attention to threats to the established rule of law principles, whenever such threats emerge. We should ensure that human rights and the rule of law are always given its proper place in the mindset of the legislator. In order to fulfil this duty, lawyers must be guaranteed independence. And, without independent lawyers, there can be, in reality, no independent courts.

The legal profession today faces several threats from legislators, both at the national and the international level. It is noteworthy that currently in Norway, new legislation on lawyers is being drafted proposing that the Bar, when expressing views on judicial/political issues or commenting on new legislation, must express its arguments in a "balanced way".

And, looking at the wider picture, it is obvious that in far too many countries lawyers are prevented from performing their professional duties according to the Basic Principles. The crackdowns on lawyers in China and Turkey are obvious examples of violations of the Principles.

## 12 Asylum Legislation

The rule of law issues arising from the refugee crisis are numerous and prevalent in many countries. The building of fences and introduction of state of emergency legislation to prevent asylum seekers from obtaining shelter are occurrences noted by us all. These measures are fresh examples of how short human memory is and how thin the veneered surface of the rule of law concept can be. Already 500 years ago, the question of protection for the asylum seekers was a burning question in Europe.

In the "Book of Sir Thomas More", Shakespeare describes how More, the Lord Chancellor under Henry VIII, received the task in 1517 to address a hostile London mob. The mobsters demanded that the French

and Italian refugees, who had come to England seeking shelter, should be forced to leave the country. It was claimed that the refugees took jobs and money away from the English. The same argumentation took place a 100 years later, when Shakespeare wrote his play. At that time, it was the Huguenots who fled from religious persecution. More appealed in the “Book of Sir Thomas More” to the enraged crowd. He argued from a humanistic perspective:

Imagine that you see the wretched strangers,  
Their babies at their backs and their poor luggage,  
Plodding to the ports and coasts for transportation.  
As but to banish you, whether would you go?  
What country, by the nature of your error,  
Should give you harbor? Go you to France or Flanders,  
To any German province, to Spain or Portugal,  
Nay, any where that not adheres to England,  
Why, you must needs be strangers. Would you be pleased  
To find a nation of such barbarous temper,  
That, breaking out in hideous violence,  
Would not afford you an abode on earth,  
Whet their detested knives against your throats,  
Spurn you like dogs, ... this is the strangers case;  
And this your mountainish inhumanity.

It is difficult not to draw parallels to the situation of today. The mob of today has strengthened its positions in Sweden and in Europe. Today, the mob is in effect the rule maker.

In my view, the legislator stands to risk abandoning the fundamental principles and ideas underpinning, not only the asylum legislation, but also the human rights and in particular, the children’s perspective. The measures taken to prevent asylum seekers from exercising their rights can clearly be questioned from a rule of law and human rights perspective.

## 13 To conclude

Sweden, according to World Justice Index, is ranked third, after Denmark and Norway as one of the best countries in the world, when it comes to respecting the rule of law and human rights. We have independent institutions with people of high integrity, and we have little corrup-



tion. Bribery of judges is unheard of. We should be proud of this. Such a society takes a long time to build.

However, Sweden is not without fault. For instance, we are regularly criticised by the UN and the European Council for having suspects, especially young suspects, detained with restrictions for much too long. We are also criticised for our lack of protection of minority groups and for failure to prosecute hate crimes. There are other shortcomings too. Lack of access to justice for large groups in society is another serious problem. In some countries in Europe, the use of secret witnesses has been introduced. I am glad to note that we, in Sweden, are not quite there yet. But strong voices advocate for the introduction of such ideas. Some also propose tampering with evidential minimum requirements – under the motto that “The end justifies the means”.

I finally attempt to answer the question set out in the title of this paper. Is the rule of law a luxury paradigm in decline? As you will have noted, I do not think that the rule of law is a luxury at all. Luxuries are things that can be dispensed with, if so required. Such is not the case with the rule of law. Instead, it is a cornerstone on which civilised society rests. But is it in decline? My answer in 2016 was yes – and no.

When redacting this paper, originally written in 2016, it is all too apparent that since then the rule of law is in even more dire straits than was the case just two and a half years ago. Little progress has been made. On the contrary, in many countries such as China, Venezuela and Brazil, international norms have become negotiable, the rule of law is being manipulated, human dignity is debased, democracy is abused and justice is denied. In far too many countries, corruption and persecution are ignored, where perpetrators are virtually immune.

In the US, there is a growing trend towards discrimination. The troublesome incidents are plentiful under the current administration. An important step in this deplorable direction was taken by President Trump’s Executive order entitled *Protecting the Nation from Foreign Terrorist Entry into the United States*. The religiously based criteria for admittance of refugees will always be arbitrary and discriminatory in nature. The termination of the *Deferred Action for Childhood Arrivals (DACA)* programme is nothing but inhumane under any reasonable standard. Another example is the decision to ban transgender people from serving in the US military.

The US administration’s daily attacks on journalists and the free press are also deeply worrying. So is the lack of respect for the independence of the judiciary and the rule of law. The President’s remarks referring to

the US District Judge James Robert as a “so-called judge” and the President’s criticism of the US District Judge Gonzalo Curiel for his “Mexican heritage” are reminders of how thin the rule of law surface is, even in a great and powerful nation. In addition, the US has reduced the funding of UN humanitarian causes and announced its withdrawal from the Human Rights Council. The US has also decided to withdraw from the Paris Agreement. In my capacity as the incoming co-chair of the International Bar Association Human Rights Institute, I am proud to note that two letters to the US President have been sent highlighting the severe situation in the US from a rule of law and human rights perspective. This is particularly troubling when it occurs in the world’s largest democracy and, to all born in the aftermath of the Second World War, the historical bulwark against tyranny and oppression.

Adding to this deploring development, the UN Security Council, subjected to the veto rights of the great and the powerful, has utterly failed in its task to uphold peace and security. This seriously harms the credibility of the UN system and does not bode well for the future.

The rule of law is frequently threatened. Attacks come from different directions. Some rest on ignorance and lack of reflection. Others are malign in intent. However, they are both dangerous. I hope that the modern civilised society has reached a degree of sophistication where good forces are and will remain capable of standing their ground. But the struggle is perpetual, and we must all do a bit of soldiering to defend it. So, my answer at this point must be that overall, the rule of law is increasingly in decline.