

Irreconcilable Tasks – a New Model for Law-making

Wiweka Warnling-Nerep

1 Introduction

In discussions with colleagues, the conversation has sometimes centred on that which is possibly a new - and worrying trend within law-making, namely that a committee receives a task to effect a report which to the well-informed observer appears fairly hopeless. Therefore the result, that is to say the legislative proposal, is in principle predestined to failure to a greater or lesser extent. From the point when the consultative bodies charged with considering proposed legislation (remissinstans) have sunk their teeth into the measure, the imminent risk is that it is either shelved, or alternatively binned, or that perhaps only a trace of what was originally thought to be far-reaching remains.

It may be that the problem is more profound and has more levels than what I have formulated here. During an interview with Svenska Dagbladet, Professor Bo Rothstein pointed at “the reduced significance of reports” - that nowadays reports are being pushed through within a short space of time (a maximum of two years) and with the objective of “finding proof for that which one would already want to pursue - as a reason for the government’s “disjointed policy” over the past year: Legislative proposals are either withdrawn or otherwise it is announced, even before a new set of rules has come into force, that it shall be subjected to overhaul.¹

For my own part, I will limit myself to two examples within the legal domain of local authorities. The first example concerns the *Local Democracy Committee*'s² proposal on personal penalties against local politicians, which judging by appearances, has been called off or maybe even scraped.³ In the end, it appears that it was difficult to reconcile measures that strengthen local democracy and the “punishment” of local politicians, who are indeed the very

¹ See Frederik Furtenbach, Svenska Dagbladet 10 December 1996 at p. 13 *Dåliga utredningar ger ryckig politik*.

² Lokaldemokratikommittén.

³ See SOU 1993:109, which was followed by the Ministry Publication, Departement serien 1995:27.

ones who exercise this local democracy. The second example concerns the *Committee on Constitutional Protection of Local Government's*⁴ proposal on constitutional amendment. The Swedish Constitution⁵ is to be supplemented with an annotation on local government and on the right to tax.⁶ The time for consideration at the consultative body (remissinstans) expires in January 1997, therefore reactions are in the process of taking shape at the time of writing. It is in any case clear that the committee has had a difficult task, which is noticeable especially by the number of objections in the report. The committee was striving, on the one hand for the securing of principles on local government and on the other hand for the attachment of constitutional value to a tax equalization system, which the committee itself characterises as an encroachment on self-government.

There is much to say about irreconcilable, or difficult to reconcile, legislative tasks. A conceivable possibility is that the task becomes so extensive that it can only be evaluated from a so-called overall perspective, which has its obvious advantages. However the imminent risk appears to be that the task becomes difficult to manoeuvre, in that all too many conflicting factors must be observed, and that the result provokes disapproval: Almost everyone will be dissatisfied although due to different reasons. In that case much time and tax revenue has been used to little or no good.

2 An Increased Liability of Local Politicians

I published the article "Shall Local Politicians be Punished for the Local Government's Insufficient Resources?"⁷ and as a background to this present article, I would like to call to mind the following: In my article I referred to a judgment of the Court of Appeal of Blekinge and Skåne, in which a Development Committee was found in breach of duty according to the Swedish Penal Code (Brottsbalken 20:1) for its refusal to enforce judgments by the County Administrative Court on assistance according to statute on Social Services (Socialtjänstlagen 6§). Irrespective of how the actions of politicians in this case are to be looked upon, there is reason to be worried with regards to this development. I refer not only to the possibilities of individuals who have been granted rights to make claim on such statutory rights in a period of shrinking resources,⁸ but also to the future possibilities of recruiting people for tasks of local government.

An increased personal liability, which may take shape of a sentence or a fine, for local government decision-makers, who are often part-time politicians, may have far-reaching consequences bearing in mind local democracy. In as much as there is no requirement to be a part-time politician, a position of trust which is often carried out for little remuneration and as a personal sacrifice, the problem

⁴ Kommitte om den kommunala självstyrelse grundlagsskydd.

⁵ Regeringsformen (RF).

⁶ See SOU 1996:129.

⁷ See JT 1995-96 Volume 2 p. 592.

⁸ Compare with Wiweka Warnling-Nerep, *Kommuners lag- och domstolstrots*, Stockholm 1995 at p. 95.

of recruitment cannot be ignored. If this does happen, we will probably be forced into a development towards a so-called professional administration, something which up to now has not been regarded as desirable in Sweden, where the participation of laymen has been judged as self-explanatory and of vital importance for the preservation of democracy (compare with the Swedish Constitution - RF 1:1).⁹ In short, who wants to assume this often thankless tasks of carrying out necessary economy measures under the threat of being liable to penalties.

In my article, I referred to the proposed legislation on being personally liable to penalties. The bill was presented in the (Departementserien 1995:25) "Defiance of Courts and the Law by Local Government"¹⁰ in which the importance of the problem was stated as follows: "Neglecting to intervene against these serious offences may in the long run contribute to the undermining of the public's confidence in the courts and thereby poses a threat to the legal system." I consider that the description is exaggerated, and that above all "defiant" local authorities cannot be viewed from a one-sided perspective, but rather an "overall perspective" should be established, however may coincide with misgivings according to a more fundamental line of argument: It is serious when local authorities start to "revolt" and invoke local government, a concept stated in both the Swedish Constitution and in municipal laws, but not as appreciable in practice.

Against this background, it is worrying that according to information from the ministry, the legislative proposal, which was presented in May 1995, and which provided a development to the Local Democracy Committee's earlier proposal,¹¹ has been shelved. In order to avoid misunderstandings, it should be stated that I am pleased with this step, which seems primarily to provide a concession to common sense. Irrespective of the need for measures, the proposal should not lay down the foundations for legislation.

2.1 *A Review of the Long-drawn out Law-making*

As a memento of this "paralysing" work, the following can be noted.¹² The task of the investigation into the liability of local authorities was to analyse without bias the need for measures against local authorities, which exceed the limits of their competence and which defy the courts' decisions in appeal cases. The investigatory body presented its report, "Local Authority Penalties",¹³ to the government in September 1989. In the report a new sanction, namely *local authority penalties*, was proposed, aimed directly at local authorities with a maximum fine of 10 million Swedish crowns. The criticism of the consultative body¹⁴ responsible for considering the proposal was not merciful. In short,

⁹ Ibid. At p. 26.

¹⁰ Departementserien 1995:27 *Kommunalt domstolstrots och lagtrots*.

¹¹ SOU1993:109.

¹² Concerning the course of events see *op. cit.* Note 9 at p. 50-56 and other sources given in that text.

¹³ *Kommunalbot* (SOU 1986:64).

¹⁴ Remissinstans.

everyone was displeased and due to all possible reasons. However, the proposed penalty was above all seen as constituting a totally *unacceptable* encroachment of local government.

In February 1992, a new investigatory body was appointed, *the Local Democracy Committee*, with the task of analysing the issue of measures in order to strengthen democracy at a local level from an expansive point of view. Within the scope of this task, the committee was assigned the rather unusual duty of completing the work on measures against “defiant” local authorities.¹⁵ It is clear that a legislative proposal on sanctions or other measures against “defiant” local authorities hardly lies in line with a proposal on increased local democracy and freedom.

It was no longer a question of an unprejudiced report. The committee had an obvious starting point, which, outside of the scope of its *main function*, namely proposing steps which would *strengthen local democracy*, was to consider measures, as regards defiance of the courts and the law by local authorities, “which encroach on local government as little as possible.”¹⁶ Therefore the task became in reality very difficult to master. It is likely that it would have been more fruitful to admit that more meaningful measures actually do involve intervention both in local democracy and in the local authorities’ freedom. With a more realistic point of view, the question could have been formulated in terms of how far they were prepared to deviate towards an extended state control of the activities of local authorities.

Moreover, in comparison with the earlier report on the Liability of Local Authorities, the task had been enlarged by the complicated assignment of also finding measures against “defiance,” within the specially regulated domain of local authorities. The background to this was a growing problem with rights, for example statute relating to social assistance so as to provide a “reasonable standard of living”,¹⁷ and instances where the local authorities manifested in different ways their dissatisfaction with state rule, for example in the Court of Appeal cases as mentioned above.¹⁸

In its interim report, the Committee on Local Democracy came to the conclusion that “defiance” could not be tolerated. With regards to local government, it was however recommended that *in the first place* a solution should be chosen that involved the local authorities *themselves* by taking measures against their own defiance.¹⁹ The foremost proposal in the measures was to make arrangements for compulsory legality examinations through the local authorities’ auditors.

Furthermore, it was proposed, as this was seen to be dutiful and fulfilling the task, that rules should be introduced dealing on the one hand with the personal liability of penalties as regards *certain* types of court defiance, and on the other hand penalty aimed at local authorities concerning other narrowly limited types

¹⁵ See Direktiv 1992:12.

¹⁶ See SOU 1993:109 pp. 60-67. See *op. cit.* Note 5 at p. 485.

¹⁷ SoL 6 §.

¹⁸ Regarding this problem see *op. cit.* Note 9 p. 109 and other sources given in that text.

¹⁹ See SOU 1993:109 p. 59. See *op. cit.* Note 9 p. 490-510.

of court defiance.²⁰ In order to fully understand the last-mentioned proposal, which in certain sections stands out as remarkable to say the least, the contradictory nature of instructions given to the committee must be borne into consideration.

The committee announced that it was very much hesitant on the whole in applying sanctions against court defiance, especially within a specially regulated domain. Indeed, there is reason to agree with the astonishment, that one of the committee experts, Renström-Törnblom, expressed, namely that the committee declared itself *against* its own proposal. However it is not so remarkable that the committee provided the proposal with this so-called saving clause.

At any rate, it is clearly difficult to raise sufficient enthusiasm for proposed legislation, due to both its technical details and its presentation, when even the mover is critical.

In the subsequent evaluation, which was carried out in the Ministry of Finance, it was maintained that before most of the consultative bodies,²¹ including more or less every local authority, the proposed legislation on penalties was opposed. With regards to other proposals on measures, the reaction was very much mixed. Within the Ministry of Finance, it was stated that at present it was not prepared to make arrangements for legality examinations by auditors.²² What actually remained for further consideration was the proposal on personal liability penalties of local politicians in appeal cases, in spite of the fact that this has also been much criticised by the consultative bodies. However, this proposal was developed further.²³

2.2 *The Completion of the Work*

I will not go into the details of the fragment which remained from the original objectives, however I shall note that the proposed legislation on personal liability penalties in administrative appeal cases, at least from general point of view, is to be regarded as being applicable to the most serious instances of defiance of the courts.²⁴ Whilst evaluating the development in the last few years, it appears that the need for intervention within this domain has been considerably limited; much has happened since the classic Gullspångs case (NJA 1988 p. 26).²⁵

On the contrary, intervention concerning “defiance” against specialist statute stands out as more justifiable, notably in the domain of legislation on rights. However thoughts on such measures were abandoned due to the massive criticism of the consultative bodies.²⁶ It was stated in the Ministry Publication-DS 1995:27 that the introduction of such a system would have to wait until such

²⁰ See SOU 1993:109 p. 10.

²¹ Remissinstanser.

²² See (DS 1995:27) pp. 39 and 40.

²³ See Ds 1995:27.

²⁴ See *op. cit.* Note 9 p. 514.

²⁵ See *op. cit.* Note 9 p. 56 concerning the development as a whole, and p. 75 concerning Gullspång.

²⁶ Remissinstanser.

time that “the relationship on matters of liability between the state and local authorities in reference to social rights has been clarified”.²⁷ Moreover, even the Local Democracy Committee and other consultative bodies pointed at this fact as in this context a fundamental problem.²⁸

At the same time as I agree with this standpoint, I would point out, in reference to section 3.1 below, that it will take a long time before the coveted legislation will be brought about, if we have to wait for an overhaul of the distribution of tasks between the state and local authorities. A conceivable possibility would be that measures that prove to be necessary are implemented within every individual branch of law: Sometimes the “step by step” policy is the only feasible way, even if comprehensive solutions appear more attractive.²⁹ In all likelihood, there even exists conditions in order to bring about rules on a general liability carrying penalties against the local authorities, however in that case the proposal must be drawn up to a reasonable extent with the objective that it *shall* really be carried out.³⁰ This was not the Local Democracy Committee’s ambition, according to what is stated above.

It can be added, as a practical illustration of what has been stated, that as from January 1, 1997, the Swedish Board of Health and Welfare has the authority to resort to injunction orders against county councils and district councils in their capacity of health authorities.³¹ Injunction orders can be used to “remedy the unsatisfactory state of affairs” which influences the “patients’ safety”. It is alleged that the main aim of the new rules, in which the decision for penalties forms part of the law, is to guarantee the “quality of health and medical services”.³² Although I have no objections to the rules, I would still like to warn against the issue of resources, the foremost problem in attaining a “good health service,”³³ which are not increased due to the fact that providers of health services, be they public legal persons or individual elected representatives, are threatened by penalties. The possibility of changing priorities, as already stated in general terms, has its limits.³⁴

3 A Clarification in the Swedish Constitution of Local Government and the Right to Tax

The Committee on Constitutional Protection of Local Government was charged with “analysing the significance of local government and the right to tax and

²⁷ DS 1995:27 p. 41.

²⁸ Concerning the Local Democracy Committee see SOU 1993: 109 p. 137 and SOU1993:90 p. 78. See Ds 1994:103 pp. 90-101 and *op. cit.* Note 9 p. 44 and p. 494.

²⁹ See *op. cit.* Note 9 p. 552.

³⁰ See *op. cit.* Note 9 p. 95.

³¹ 14 § Law on the supervision of health and medical services, Swedish Statute Book (SFS) 1996:786. See Government Bill (Prop.) 1995/96:176 p. 82. Compare with *op. cit.* Note 9 p. 435 as regards the discussion whether injunctions „can or should“ aim at public legal persons.

³² See Government Bill (Prop.) 1995/96:176 p. 91 and p. 46.

³³ Act concerning the protection of health (HSL 2§).

³⁴ See *op. cit.* Note 9 p. 95.

their relationship to constitutional provisions”.³⁵ It was even within the Committee’s mandate to propose “clarifications” and changes in the Swedish Constitution, if it found this necessary. In the directive, it was stated on the one hand, that local government, dating from the last century, has a central position in Sweden and that it provides “an important part of Sweden’s democratic system”. Moreover, it was emphasised that the right to tax is a condition for self-government and an essential basis for the economic independence of local authorities.

Having thus explained *how significant* self-government and the cornerstone of self-government, namely the power to tax, are, the directive proceeded on the other hand, to state what can be said to represent *the real task*, namely the evaluation of the different types of equalization systems of expenses and incomes within the local authorities and the legitimisation of the current system, which has been called into question.

It was thought obvious, that tax equalization within the local authority, whereby tax revenue is transferred from one local authority to another (directly or by means of the Public Treasury), or other measures stated in the directive, such as the stopping of tax or the limitation of expenditure etc., restrict in reality self-government. It could be stated that self-government increases in those local authorities which receive money, but decreases correspondingly in those local authorities which hand over tax revenue. Therefore, from the point of view of self-government, the final result amounts to nothing. It is likely that debate about the constitutionality, or unconstitutionality of such measures continues, however it is important, in all circumstances, to explain what the measures in reality imply, namely limitations on local government by the imposition of conditions. Afterwards, it is possible to determine to what extent and to what purpose, it is considered reasonable to accept such limitations. Clearly there exists a boundary beyond which it is no longer useful to talk about *constitutional local government*, if the local authorities no longer have at their disposal their tax revenue to exercise this power.

Under the heading “The relationship between Local Government and the Swedish Constitution”, the Committee describes eloquently how local government constitutes *a part of democracy*³⁶ and how a reduced scope for local government may lead to the diminished interest in involvement in local policies. According to the Committee, this would “not only undermine local democracy but also weaken the democratic foundation of national policy”.³⁷

There is reason to heed this word of warning, especially when it may be difficult to recruit people into local government.³⁸

The Committee also criticises the shortage of rules in the Swedish Constitution which guarantee the respect of local government as regards law-making in the domain of local authorities. With such rules it would be possible, at best, to ensure that a uniform balance in the interest of democracy is obtained in law-making (p. 199). As a comparison, I would like to refer to the Swedish

³⁵ Directive 1995:111.

³⁶ Compare with the Swedish Constitution (RF 1:1).

³⁷ p. 196.

³⁸ See section 2 above.

Constitution and its demands that legislation on comparative freedoms and rights shall be *inter alia* “acceptable in a democratic society”,³⁹ together with, in that respect, the stated objectives.⁴⁰ Such material protective provisions function as a type of hindrance on Parliament concerning legislation, which limits rights. Corresponding rules as regards local government could at best have the same effect.⁴¹ In this way it might be possible to counteract what the Local Democracy Committee described as an “ambivalence”, which has characterised the relationship between the state and local authorities for the last decade,⁴² and which is obviously aimed at creating apprehensions in relations between the state and local authorities.

Up till now, it has been questioned whether, in reference to the Swedish Constitution,⁴³ local authorities *may* indeed take out tax *for anything else than the management of its own duties*. Nevertheless, this has happened through a number of so-called Robin Hood statutes, most recently by the Act concerning the equalization of contributions in county and district councils (1995:1515) together with the Act concerning the equalization of expenditures in county and district councils.⁴⁴ It is now desired that this uncertainty be eliminated through a new constitutional provisions allowing the imposition by law on local authorities to contribute to the costs of the duties of other local authorities.⁴⁵ Moreover, another “clarification”⁴⁶ has been proposed which is to aim at demonstrating that local government applies with regards to *all local activity* and shall be respected with regards to *all law-making which concerns the local authorities*.

3.1 *An Elucidation of the Meaning of Self-government*

In short, all legislative proposals and reports, which in some way touch upon the relationship between the state and local authorities, refer loosely to principles on local government. At the same time it is not rare that measures are proposed which can hardly be understood other than as an “infringement” of this principle. It appears that local government in reality is most often referred to as a so-called prestige concept, the meaning of which very vague indeed.⁴⁷ In this sense, it is obviously easy to neglect this principle in preference to the fundamental principle of democracy. Even the Committee noticed this precarious relationship: “It is important to point out that a well-developed local and regional democracy implies that local government has a *real meaning*.”

³⁹ See RF 2:12 1 2 st.

⁴⁰ See RF 2:13-14.

⁴¹ See *op. cit.* Note 9 p. 232.

⁴² See SOU 1993:90 p. 280.

⁴³ See *inter alia* RF 1:7.

⁴⁴ See Hans-Heinrich Vogel in FT 1993 pp. 79-98. See *op. cit.* Note 5 pp. 252-261.

⁴⁵ See RF 13:10.

⁴⁶ See RF 13:1.

⁴⁷ See Holmberg-Stjernquist, *Grundlagarna med tillhörande förffattningar*, Stockholm 1980 p. 41. See *op. cit.* Note 9 p. 226.

Otherwise it is a risk that political decision-making on a local and regional level loses its legitimacy” (p. 189- emphasis added).

According to the proposal, in the initial paragraph of the Constitution 13:1 it should be stated that the local authorities, outside laws and regulations, shall conduct matters ...and on the basis of local government”, moreover “*all* legislation concerning county and district councils shall *attach great importance* to the principle of local government” (emphasis added).

However, the problem is that this requirement on the legislator relates to, according to the above a *very vague concept*. Wit out any clarification of what should be understood with respects to local government , the requirement in reality becomes highly insipid. It is true that the Committee does present a proposal as to the formulation of the meaning of local government (see section 7.1.5), but it is difficult to find real substance to this proposal: The local authority shall *itself govern* with regards to local matters. What these matters are, is decided by law, which is already the case today.⁴⁸ Subsequently, the existence of opposing interests is indicated, from which the Committee draws its conclusions that self-government can never be complete. “Scope varies according to the nature of the matter,” but local government should have a “real meaning” and therefore “carry great weight” in relation to opposing interests (p. 193).

In the legal doctrine, interest, which is not immaterial, has been devoted to the question, central in this context, if it is implied that self-government should exist within the scope of the *specially regulated sector* in the local domain, i.e. a very important scope including a quantity of state duties (statute on social services, health and education etc.), or if self-government refers to the so-called *free sphere*, whereby the local authority itself decides whether resources should be allotted to ice skating rinks, galleries, etc. The general understanding, based on the Constitution, was probably that self-government is not implied within the specially regulated domain, which obviously does not prevent that a line of reasoning be introduced *de lege ferenda* to the effect that self-government should exist even within this domain.⁴⁹

In the Committee’s work the question has received a fairly unfair treatment. In the proposed legislation, it was fairly stated that “great importance should be attached” to all law-making which concerns local authorities. This is seen as a clarifying that both the specially regulated and the optional domain are included and that there is a retreat from the narrower approach on self-government, which according to the above is expressed in the Constitution’s preparatory works (p. 206). The Committee further states that the extent of self-government varies “between different sectors of activity of the local authority”(p. 190). Local government applies “in principle” even to such activity which the local authorities have been instructed to deal with. However the state has generally seen, out of consideration of opposing interests, “greater possibilities to draw up

⁴⁸ See RF8:5.

⁴⁹ See for example Alf Bohlin, *Kommunalrättens grunder*, Stockholm 1994, p. 21. See *op. cit.* Note 5 pp. 226-236 as well as other cited sources. See Dir.1994:87 p. 4, where reference is made to the uncertainty in this respect.

regulations and laws on how the activity should be both pursued and exercised”(p. 191).

In as far as the Committee lays down that local government applies “in principle” even to such activity which the local authorities have been instructed to deal with, at the same time as stating that the state can govern the activity with reference to *opposing interests*, the question should have been posed, *what* self-government in that case *actually involves*. Is it really a manifestation of self-government that the local authority is allowed to make decisions, for example about social aid, when the state by means of statute, court practice and guidelines issued by the Swedish Board of Health and Welfare, govern to such a large extent the decision-making that any scope of action does not really remain? If the state demands are not adopted, the decision-maker in the local forum can be condemned of misconduct, which is illustrated in the unusual Court of Appeal judgments cited in section 2 below. As the Committee on Local Democracy earlier criticised, there exists quite simply an “outermost limit” beyond which it is unreasonable, from the point of view of self-government, that local authorities pursue a certain activity, except for when it is better for the state to pursue it.⁵⁰ It may be that other arguments point towards that the activity should despite all be pursued by the local authorities, but this has nothing to do with self-government.

The Committee should have thought further about what the consequences would actually be from this “dilemma” which is mentioned, namely that the activity undertaken by local authorities is provided, to such a large extent, by such activity which they are “obliged to deal with.” The Committee complains that, within this domain, local government is “emerged in laws” and local authorities “cannot neglect the fulfilment of their obligations on the grounds of lack of resources.”⁵¹ Another possible conclusion, which is perhaps less attractive, is that self-government is “in principle” lacking within this field, i.e. within the majority of local authority activity, the Committee has no intention, as far as it is clear, to propose a real expansion of self-government. By merely maintaining that local government applies to “all” activity, and without changing the conditions for the state’s decisions by other means than declaring that the state attaches “great importance”⁵² to all law-making concerning local authorities, is *of little use*.

It is not advisable to send local government in to the so-called optional sector. Nothing prevents the state from tying up a much greater part of the activity of local authorities through constant new obligations, which may be very costly for example child care,⁵³ and thereby reducing, or even eliminating, the economical scope of this optional sphere. This “threatening picture”, which amongst others Riberdahl has propounded and described as the “shrinking cake”,⁵⁴ can hardly be characterised as unwarranted, when around 75% of the local budget, as the

⁵⁰ See SOU 1993:90 p. 78 and p. 137.

⁵¹ See p. 192.

⁵² See RF 13:1.

⁵³ See SoL 14 a-b §§.

⁵⁴ See both *op. cit.* Note 9 p. 29 and p. 97 and Riberdahl, Curt, FT 1993 p. 153.

Committee pointed out, is required for the financing of the specially regulated obligations (pp. 121 and 192).

A possible solution in order to produce some sort of a smartening up would be that the Constitution defines *principles for the distribution of liability between the state and local authorities*; something which the Committee abandoned on grounds of lack of time (p.199). It may be that such a task is difficult to solve, however such an *attempt* could in any case provide an important step in the right direction.⁵⁵ A more obvious attempt to give substance to their own proposals concerns future law-making within the scope of legislation on rights. The Committee stresses that with such legislation it is important that “a clear balance” is maintained between the opposing interests which exist amongst the local authorities’ interest in self-government and the citizens’ interest that certain social rights shall be guaranteed. According to the Committee, the legislation should have in this context “such a logical and to the point wording, so that problems of interpretation are avoided to the greatest possible extent” (p. 199).

The Committee does not propose how this should be implemented tangibly; such a definition did not fall within the framework of the task. Thus, it is necessary to rely on *future legislators* in order to attach such importance to the proposed rules in the Constitution,⁵⁶ so that the expectations of the Committee are fulfilled. However there are no guarantees of this given how the proposal to the constitutional amendment is drawn up. The fact that “great importance is attached” is a weak concept in comparison to, for example, certain requirements in the Constitution,⁵⁷ which it is true to say leave scope for evaluation to a large degree, but which provide at least an ambitious attempt in governing future legislation.⁵⁸ Lennart Hedqvist sheds light on these misgivings in his objection. As Hedqvist states, it is hardly plausible that the laws on rights and obligations, for instance on libraries and free school dinners, an example which has recently been discussed, are stopped by the proposed paragraphs despite the fact that they would encroach on the current free sector (p. 261).

Finally, it can be noticed that the Committee states, as an observation of the fact that the division into different local domains would not be particularly secure, that even within the so-called free sector, the local authority may “feel forced to manage such duties which do not by definition lay within the framework of the free sector”(p. 200). This description of how a local authority may *feel forced* may possibly be correct, however the Committee should have posed the question *where* does this coercion in that case emanate from. In any case it is a completely different coercion to that which is derived from the

⁵⁵ Concerning previous attempts in that direction, therefore not within the framework of the proposed constitutional amendment -see *op. cit.* Note 9 p. 42.

⁵⁶ See RF 13:1.

⁵⁷ See RF 2:12, 2 st and 2:13-14.

⁵⁸ Concerning this method see for example *op. cit.* Note 43. See Ds 1996:33 p. 32 and p. 42 on how RF 2:12 2 st is judged in connection with proposals on the ban of racist symbols etc., which however can be understood as a limitation on the freedom of speech according to the RF 2:1 p 1.

Parliament's legislative power. This type of metaphor is not aimed at shedding light on the problem at issue which is affected.

With regret it can be stated that from the ideas which were found in the proposed legislation in 1994 and 1995 on the acceptance of a more general adjustment to the state of affairs at a local level,⁵⁹ a move which would really have been devoted to promoting local government, not much remains in the current proposal, which claims to aim at clarifying and strengthening self-government.

3.2 *The Relationship between the Right to Tax and Tax Equalization (Sections 13:9-10 of the Swedish Constitution)*

There is a general widespread understanding of the right to tax at the local level as being the cornerstone of self-government: Without the right to tax, self-government is in reality of little meaning. The Committee alleges in its notes on section 13:9 of the Constitution, which corresponds to today's section 1:7 stating that local authorities may withdraw tax in order to conduct "*its* duties" (emphasis added), that measures which limit the power to tax of local authorities constitute "a considerable encroachment in local government" and that therefore it is of great importance that the legislator "shows very clearly his considerations with regards to local government" (p. 254).

The Committee's own proposal, that the local authorities "are allowed to impose that contributions to the expenditure of the obligations of other local authorities are made, if it is instrumental in attaining an equal distribution of resources" (Section 13:10), constitutes however a limitation on self-government, which the Committee partly admits. The Committee submits that a tax equalization system undeniably implies that the scope for local government is reduced in certain district and county councils. "Nevertheless, something which is considered, in the "balance of interests," as tolerable with regards to "the solidarity within this sector and the need to provide all district and county councils with equal economical opportunities"(p. 221).

What should be observed is how the Committee justifies the proposed legislation, which at first appears praiseworthy, by referring to the demands which presented that self-government shall not only be given a formal but also a real content. However, this is a fairly astounding conclusion, namely that the present tax equalization system should provide an answer to these desires (p. 191). Such a line of reasoning barely provides a serious treatment of those who made the proposals, which include the Swedish Association of Local Authorities,⁶⁰ even if tax equalization is devoted to allowing "equal economic opportunities in order to pursue meaningful activities within the framework of self-government on a national level." (p. 191).

By reason of this, the Committee points out in addition a very illustrative way of how the principle of local government can be used for one's own purposes and thereby links up with the fundamental problem as stated above, namely the absence of a definition of self-government. The desire of a more equal distribution between the local authorities of, for example, the burden of social

⁵⁹ See prop 1994/95:150 Bill 7 p. 73 and p. 74. Compare with *op. cit.* Note 5 p. 35 and p. 42.

⁶⁰ See *op. cit.* Note 9 p. 226.

assistance can simply not be equated with the question on self-government, at least not in a credible way. The fact that tax revenue is taken away from the “rich” local authorities implies that *their* opportunities are worsened. This fact does not change simply because *other* local authorities profit in this respect.

However the Committee establishes an argument of more obvious value which concerns the principle of local government, namely that a model, with a “national-local base tax”, whereby the right to tax would in principle be limited to the right to impose tax only for the financing of the so-called optional activity of local authorities, would constitute an “undermining” of self-government and therefore would be too far-reaching in order to be tolerated (p. 218). This evaluation appears to be correct, especially with consideration to the above, namely that this domain, which presently accounts for approximately 15-20% of the local authorities’ budgets, may in reality be reduced to nothing. As the Committee explains, the local authorities would in that situation change into “national government services” functioning on a local level. This would be devastating bearing into consideration that which by way of introduction was stated about the value of local government.

Nevertheless, the proposal for section 13:10 is satisfactory in as far as it gives a certain support to those who have called into question the constitutionality of the present tax equalization system. However, it should be observed that the Committee pronounced that the constitutionality should already have been analysed by the Swedish Law Council, which is charged with this task, in its “final judgment” (initially the Council came to the opposite conclusion), and the “standpoint of Parliament” (p. 221). However, on one point the Commission appears to be vague, concerning the legitimacy of the current system: According to section 1:7 of the Constitution, a local authority is allowed to withdraw tax in order to “carry out *its* duties” and in section 2:1 of the Local Authorities Act⁶¹ it is implied that the local authority is in charge of the duties connected to “the scope of the local authority or its inhabitants.”

To take out tax revenue for *other* local authorities or its inhabitants undeniably represents a stretching to the extreme of the content of the two rules. If, as has been proposed, it was stated in the Constitution that a local authority through law “may be bound” to contribute to matters outside of their own local authority, the competence of the local authorities, as the Committee protested, would certainly be extended (p. 220). Accordingly, in that way the hesitation on constitutional grounds, which otherwise would remain, is removed. It can be added that method of “extending” competence is well-known.⁶² Nevertheless the difference that can be noted is that these “small laws” have arisen to give the local authorities increased powers in order to take such measures which it would otherwise not be competent to take, and which it would *like* to implement.⁶³ Tax equalization among the local authorities lies on a totally different level.

Finally there is reason to observe the Committee’s account of how the drawing up of limits between permissible and impermissible limitations respectively shall in fact take place. An overall evaluation is required and

⁶¹ KomL.

⁶² See for example the Act concerning the assistance of foreign students (1962:638).

⁶³ See *op. cit.* Note p. 114.

according to the Committee, it is a question of balancing how big an intervention can be made before the Constitution is infringed. The Committee adds that this balancing must be based partly on *political considerations* and this result should vary depending upon the opposing interests against which a limitation on the right to tax should be weighed (p. 222, emphasis added). The account appears realistic, however illustrates at the same time the element of discretion built into the Constitution: The current majority in Parliament decides which encroachments into self-government shall be permitted.

3.3 A Few General Reflections about the Proposed Legislation

It must be said that the Committee has succeeded in what can be most closely characterised as its real task, namely the preparation of the way for a stabile and constitutionally “acceptable” system for tax and income equalization between the local authorities. The present question-mark concerning the constitutionality of forcing certain local authorities to give its local tax revenue in order to contribute to the expenses of totally different local authorities is set aside quite simply by changing the Constitution.

The question on what is an acceptable encroachment on the local authorities’ right to tax and on self-government, together with the question on “governments unable to leave things alone,” which Camilla Sköld and Peter Eriksson stated in their objections, will really be able to contribute to the “undermining of the foundation of democracy itself (p. 266), will surely be the subject of discussion, both in and out of Parliament. Constitutional laws are obviously not a product of “divine inspiration”, however much consideration is required in order to carry out such a comprehensive constitutional amendment as is currently proposed.

The time for consideration at the consultative body expires in 15 January, 1997 and I do not anticipate their standpoint, nevertheless judging from the number of objections in the report an intensive debate can be envisaged, in which in my opinion the political considerations will in all likelihood dominate over the legal ones. What is of particular concern to all the local authorities, which are generally assumed to have an interest in that self-government receives a real content, preferably protected by the Constitution, is the following remark: “God preserve us for friends, for our enemies we do ourselves.” Through the Committee on the Constitutional Protection of Local Government, we have obtained self-government, with full constitutional protection, which is applicable to law-making concerning local authorities. However, the real significance of this may become quite simply marginal if the legislator so decides.

4 Final Remarks

In addition to the misgivings, which initially arose about the more or less paralysing legislative tasks, there is reason to warn that the law which may possibly come about, will be deficient. The former Justice of the Supreme Court, Bertil Bengtsson once wrote aptly about “politically controversial legislation,

where the legislator defies the Constitution or in any case deliberately comes close to the edge of the precipice.”⁶⁴

The provisions in section 11:14 of the Constitution concerning the examination of laws is obviously aimed at providing some sort of a protection in such circumstances. Public institutions must forbear from applying a law, if it is “manifestly” unconstitutional. However professor emeritus Håkan’s statement, in a totally different context, that a legal provision may not necessarily be constitutional just because it is not manifestly unconstitutional, is thought-provoking and is worth repeating.⁶⁵ The actual possibilities of bringing about an examination of a law’s unconstitutionality can therefore be very limited.

Finally, there is reason to observe another detail which the Committee dwelled upon. The Committee reminded of the existence of the European Convention on Local Government which Sweden ratified in 1989. The question on whether Sweden can be considered as fulfilling its commitments, according to the convention, may be subject to discussion, however it must be considered as being much more difficult to judge than it is shown in the report (p. 167).

Nevertheless in this context, one factor shall be pointed to, namely that the description of the prevailing relationships, which was given in the government bill, at the time of the acceptance of the convention, that the local authorities right to tax “is protected by the Constitution and “in principle unlimited.” This explanation now sounds quite hollow, when the majority of Sweden’s local authorities are not in fact allowed to raise local taxes, at least not unless the corresponding amount disappears by lowering national contributions, and moreover other local authorities must pay in a constantly growing share of their tax in order to be forwarded to “poor” local authorities.

In addition, there is a highly interesting question whether people in Sweden shall be considered as having a *satisfactory legal protection* by local government (Article 11). It is true that the Committee claims that the possibility of a new hearing of the case would provide such a protection, if a decision of a public authority affects a local authority in such a way as to be considered as an infringement of these lawful rights. This fact should be called into question. The possibility of having a new hearing of the case was not regarded as providing an adequate protection according to the European Convention on Human Rights, which resulted in the passing of statute on the examination of rights,⁶⁶ after Sweden was found in breach of those rights at several occasions.⁶⁷ The right to judicial review is quite simply inadequate from a European perspective.

Another thought-provoking method, which Vellinge Local Authority has used, in order to examine the legality of equalization charges, is to submit claims against the state on the basis of the requirement to render accounts. In its claims the local authority, which had stated that it would not accept a deduction of tax revenue, asked that around 42 million crowns be accounted for and paid out to it. The district court of Malmö decided as late as November 1996 that it

⁶⁴ See Bertil Bengtsson, *Svensk Jurist Tidning* 1989 p. 671.

⁶⁵ See Strömberg, Håkan, *Normgivningsmakten enligt 1974 års regeringsform*, 2:a uppl, Lund 1989, p. 89. See *op. cit.* Note 9 p. 122 and p. 259.

⁶⁶ See SFS 1989:205.

⁶⁷ See *op. cit.* Note 5 p. 241 and p. 320.

disapproved of the state's objections of court obstacles and therefore held that the local authority's claim should be heard in the civil courts. According to the Attorney-General's objections, this question, which was examined by the government, could not be subjected to judicial review.

The question on whether a civil court, or possibly an administrative court or indeed any court at all, has the competence to examine this issue has once again aroused interest. Courts are compelled to solve the problem gradually as the possibility of refusing to give judgment (*deni de justice*) on the grounds of uncertainty as to who has competence, does not exist.⁶⁸

On the other hand, the legislator considers that he is able to bind his time and follow the development in order to judge whether something should be done.⁶⁹

⁶⁸ See for example the decision by Jönköping's Court of Appeal on 15 August 1996 Case 2443-1996.

⁶⁹ See Warnling-Nerep and Vogel, FT 1996 p. 220.