

Goal-Steering and Judicial Review

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In the calm yet gummy Swedish debate on the prospects and propriety of judicial review of the constitutionality, or more generally, the legality of decisions of political bodies - a debate in which Bertil Bengtsson ranks among the more temperate opponents to judicial review, at least at the level of practical action - one discerns a broad spectrum of critical views embracing levels of argumentation that span everything from a wing of opposition heavily laden in ideology to a cluster of skeptics whose objections are essentially based on linguistic principles. Each of these factions is opposed by a group of “judicial review” proponents who argue in countervailingly positive terms. At the far end of the ideological wing are those combatants who hold sacred the state governed by the rule of law and the notion of the same, even to the point of considering these to override, in the event of a conflict, the otherwise massively embraced democratic supra-ideology; poised against these “ideologists”, one finds those who reject the very notion that judges or other public officials, by virtue of their education, experience or post, would set straight the public will when manifested in the prescribed manner. Emotionally charged notions embedded in such slogans as “government by lawyers” and “government by the people” are frequent ingredients in the argumentation of the last-mentioned group. Adherents of the other end of the scale, at the ideologically neutral, legally pragmatic or logical-analytical oriented wing, ask, for example, whether legal language is capable of such precision that a comparison between two written norms, manifested in a single decision, is possible within the framework of a technique of argumentation or doctrine of interpretation that is sufficiently “fixed” or “objective” not to force subsequent decision-makers, i.e., appellate judges into making “free” or “subjective” assessments that amount in reality to the exercise of an independent political decision-making function. There can be but little doubt that such an outcome is undesirable, at least within the framework of judicial review.

It is common ground among the many different standpoints within and contributions to the Swedish debate that the topic of “review” relates to *norms* and to the application of norms.

One phenomenon that has in recent years - in the last ten years or so - attracted increasing attention and ever greater practical and outright action-oriented adherence in many societal sectors is that which we now call “deregulation”. Instead of adopting rather detailed rules to govern the conduct of a given activity - it is nearly always a public one - one seeks to achieve the results desired in an increasing number of spheres by means of so-called goal-steering: the decision-making entity, whether it be the Parliament, the Government or a superordinate administrative authority, instead of promulgating *rules* and monitoring their application, sets the *goal* that the activity is to achieve and, thereafter, through some form of assessment - or “evaluation” as it is in vogue to say - notes whether the contemplated result has been achieved.

This development's ideological bases, which will not here be considered at any length, seem to rest on a strong belief in working methods practiced (or at least *thought* to be practiced) in the private sector; on a corresponding distrust in norm-steering as traditionally practiced in public activity in the Western World; and, finally, on hopes that a less regulated mode of action would vitalize activity and spur creative talents among those who had previously sighed under the yoke of normative behaviour steering. The question shortly to be addressed below - necessarily at a very general level - is whether goal-steering opens any possibilities for a *review of the legality of an activity*; how shortcomings in this regard are to be assessed from the perspective of a state governed by the rule of law; and, lastly, whether the analysis can contribute to the fixing of possible limits on the sphere in which goal-steering, as opposed to rule-steering, is acceptable in a society that claims to be founded on the rule of law.

I have attempted in a previous study to describe the goal-steered decisions in relation to the “norm-steered” ones, i.e., those that have henceforth dominated the legal and the legally relevant sphere.¹

As a model example of norm-steered decision-making, it is appropriate to choose the judicial process since it enables us to define goal-steered decision-making with the desired, and even required, clarity and precision.

Even a superficial perusal of the category of “goal-steered decisions” produces however findings that tend to obliterate the sharp line between “norm-steered” and “goal-steered” or, in any case, to relativize the very concept of *goal* (and thereby, alas, to reduce its usefulness in a comparison with *norms* as a basis for an alternative method of steering). Three such observations appear here to be particularly significant. The first concerns the difference between complete goals and partial goals. In a complicated activity, there may very well exist partial goals which are ostensibly *in conflict with remote overall goals*. The generally formulated overall goals - e.g., “expansion on the market with improved profitability” - can seldom provide the necessary guidance. An industrial enterprise may perhaps conduct sizeable activities in a certain place with full knowledge that it is operating at a loss; one can continue to carry out an unprofitable production, since the alternative - lay-offs, conflicts with the local

¹ Strömholm, *Normer och mål - det normbundna beslutfattandets särart*. In Svensk Juristtidning 1976, p. 161 *et seq.* (also reproduced in the author's *Idéer och tillämpningar*, Stockholm Norstedts 1978, pp. 157-175).

powers that be - are viewed as even less desirable. The *time factors* for partial and overall goals can differ so markedly that one can speak of an open conflict at the action level: when and to what extent shall one reduce the resources allocated to a clearly profitable yet soon to be technically obsolete (or at least conventional) production in order to divert these resources to an investment or to developmental work with uncertain profitability but with an orientation towards a future expansion? Lastly, one cannot even present the most refined goal argumentation without considering *factors extraneous to the goal*. Paying regard to the opinion of the outside world, personnel reactions within the organisation as well as other factors are such an important part of virtually every decision-making process in modern Western societies that these reactions nearly mimic norms as decision-steering factors.

Simply put: goal-steered decisions do not take place in a vacuum any more than do their norm-steered counterparts. They are subject to a host of societal demands and claims, which increasingly resemble those which have long applied to norm-steered decisions. In a society where the dividing line between political values, on the one hand, and, on the other hand, those spheres that used to be categorizable as purely “economic”, “technical” - or for that matter “legal” - has become increasingly hazy, a wave of uniform and, perhaps in the long term, regimenting, influences incessantly floods our decision-making sectors. A central component of these societal demands, which apply to *both* decision-making processes - goal-steered and norm-steered - has long been that the decision-making procedure itself resembles, to a greater extent than previously, the decision-making model that are characteristic of political democracy. Representatives of organized groups, who have or claim to have a stake in the decisions, have received a place in the decision-making bodies. This development of the decision-making procedure itself, which clearly influences the very contents of the decision - whether of the goal-steered or norm-steered type - was a highly salient feature of the societal changes that took place in Sweden in the 1960s and 1970s. At the same time, demands have increased in most fields that decisions be based on *knowledge*, a development that has, paradoxically, strengthened the position of the experts. What course this enigmatic development will take and how efforts will be realized to shape decision-making processes, which I have elsewhere summarized as “objective”, along the lines of the “public” model of political democracy is in my view one of the decisive issues for society's outlook and future. At present - in 2000 - the “party-representative” and corporative development has come to a halt and even recoiled. International assessments of the Swedish decision-making framework have certainly contributed to this retrogression; but even notwithstanding that, opposition to the Swedish corporative model had become so strong that the latter ceased to grow and was forced into retreat already a decade ago.

Goal-related decisions, to the same extent as norm-steered decisions, are subject to two laws: that of relative decisional economy and that of relative inertia. Both of these factors appear to militate *for* congruence between the two decision-making processes. When, e.g., a large mechanical industry prepares its purchases of steel for a long product series spanning an extended period of time, it is appropriate that the company's management through studies, investigations,

bidding procedures and negotiations secure optimal deliveries; the goals of the business provide the necessary guidance. But this extensive decision-making apparatus cannot be used when the factory manager has to effect a rapid supplementary purchase of a certain dimension of steel pipe. Such decisions are often guided by routines, internal regulations and internal manuals. Absent such guidance, there will be a standing practice to follow. The further one is from making major choices, the greater the element of *regularity* or even of normative constraint in goal-related decisions as well. The similarity with norm-bound decision-making processes is even more pronounced.

What is required for a routine, originally dictated by purely practical motives and by motives of decisional economy, to be transformed into a legal rule? Are there any clear principles for this rendezvous between goal-steered and norm-bound decisions? What appears certain is that norms are continually being produced by originally unbound, goal-steered decisions that gradually assume the character as routines and then of established procedures.

To use the traditional terminology of jurisprudence: a routinely observed procedure of a certain societal relevance becomes the object of the *opinio necessitatis* of those concerned - the procedure will be perceived as legally mandatory. There exist however spheres remote from the traditional domains of customary law, where a similar transition is under way: tort law's assessments of what constitutes defensible conduct in a given situation has a similar character; even within penal law, legal norms are produced by habitual conduct becoming legally binding. It is there, at the foot of the scale dominated by "strategic" goal decisions, that goal-steered and norm-bound decisions converge.

As a hybrid between the typical goal decisions and the purely norm decisions one can perhaps cite decisions which, although concededly based on norms, are based on norms of a particular kind, i.e., norms whose essential content is *not* acquired through specifically stated conditions for one or a few well-defined legal consequences but rather either through a description of a given outcome, which the decision-maker shall seek to bring about through his decision, or else through a generally framed description of an unsatisfactory situation, which the decision-maker shall attempt to eliminate through measures with regard to which he enjoys considerable freedom of choice. Typical examples of the former kind of norms are to be found in plan legislation, in which the authorities are directed to make decisions that create, e.g., "appropriate economic units" (for agricultural purposes) or that oblige an individual to maintain forest or agricultural ground in a specific manner. Examples can be found in the decisions of courts of general jurisdiction, in the field of family law, where it is, e.g., necessary to decide custody matters in a manner that promotes "the child's best interests", and in penal law, where the court is to seek to promote the "correction" of the condemned. Both of the last two examples are of a more traditional kind, however as the prerequisites of the decision - or rather the conditions for a decision-making procedure to be at all undertaken - are rather well defined. Examples of the latter type of norms - those that give decision-makers the right to eliminate unsatisfactory situations - are mainly found in the "general clauses" of civil law, in which both the factual antecedent and the legal consequence are very generally framed, and whose character of goal formulations is highly evident.

The decision-making situation of the legislator is a special one. The intense attention that Swedish and Nordic discourses have devoted to legislative procedure as such and to such elements as statutory language has unearthed the lack, until quite recently, of any deeper analysis of legislation as a specific *decision-making process* with fixed prerequisites, parameters, possibilities and functions. From the standpoint of the judge and the legal scholar, the legislator often appears to be an unfettered decision-maker with practically unlimited freedom of action. A closer examination would however probably reveal that this freedom is much more restrained than is generally thought to be the case. Even disregarding the “organized resistance” to certain reforms from political groups, the legislator is engulfed by considerable obstacles. The legislator does not, any more than does the economic or technical decision-maker, operate in a vacuum. His freedom of action is circumscribed by a rather fine-meshed net of constitutional norms. Ideological notions, which continue to place relatively well-articulated demands on fairness and proportionality, operate to counteract legislation that too one-sidedly attempts to be effective in fulfilling its goal at any price, although it is to be conceded that a resolute legislator in areas that are as central to him as the fiscal looting of politically less potent population segments can clearly go very far in his quest for effectiveness.

Studies within legal sociology point rather clearly to the inefficacy and ineffectiveness of legislation in important respects. Other measures from modern society's arsenal often appear to be more effective means of governing. A minimum of concern for the legal system's coherence and comprehensibility and for its appropriateness for the bodies that are to apply the rules constitute difficult obstacles to legislative innovations, mainly in situations where economic factors militate against concomitant changes or new formations in the state apparatus charged with implementing the new rules. On the whole, legislation appears increasingly as *one* among several governing instruments. The decision-making situation of the holders of political power must, if it is to be analyzed realistically, be seen as a highly complicated process of choice, where the choice between possible legislative solutions emerges relatively late, after one has considered the question whether legislation of a more traditional kind is *at all* the governing means to be employed.

In the instant context - where the main issue is whether and, if so, how a review of legality is at all possible in a societal system marked more by goal-steering than by norm-steering - we must first address how these two types of decision differ from the standpoint of the prospects of judicial review.

The difference should not of course be exaggerated. In simple and clear cases, i.e., those that are attributable to such pedestrian factors as incompetence or poor preparatory reading or to the elementary knowledge or lack of knowledge of the decision-makers, the matter clearly does not entail any major problems. The essential difference between the two types of decisions is obvious but also insignificant. Once one has traversed this low threshold of the elementary and the trivial, review within both categories appears to present such great difficulties - as a rule these are attributable, on the one hand, to the complexity of the various goals and of the various contributing factors, and, on the other, to the complexity of the facts and of the total mass of coalescing norms - that

unequivocal review results are often scarcely achievable. For practical reasons, one is to a great extent compelled to proceed from certain basic assumptions, of which the most important one is perhaps the general presumption of the correctness of the decision. Such an assumption is however little more than well-intentioned frolic, unless it is supported by knowledge of and demands on *the decision-makers' insights, skills and professional ethics*. Surely the only cost-effective and practically reasonable guarantee that the majority of decisions will be "correct" is that one can rely on the decision-makers' loyalty and competence.

Does this suffice to satisfy demands that a state be based on the rule of law? However skeptical one might be about the prospects of - outside the circle of coarse and trivial cases - implementing an objective and an accepted-as-objective comparison between a norm's content and the content of a hierarchically subordinate norm such as it has been applied *in concreto*, it appears clear that this type of comparison differs at the level of principle from that which is employed when fulfilment of the goal is to be "evaluated". There is clearly a radical difference between the norm-steering of the decision-making procedure itself - the road leading to the decision - and the unregulated road leading to the goal to be reached. It is however this very regulation of the procedure which the advocates of "deregulation" wish to abolish.

The next question is whether one can contemplate the establishment of such special - *normative - demands as to the very goal fulfilment itself* that would make some form of legal review possible (parallel to the obvious review based on openly established goal prerequisites). Also in the context of this problem, I wish by way of introduction to refer to a previous work, in which I sought to address the usefulness of the *concept of rationality* in societal governance.² One might think that the gap - the lack of the precision of judgment entailing that goal-steered decision-making procedures to a great extent, all of the above indicated "norm-like" features notwithstanding, appear to elude "judicial review" - could to a greater or lesser extent be filled by such intellectual (and possibly ethical or ethically-toned) claims as can be summarized under the rubric of "rationality". The choice of concept is by no means random.

The treatment of the question requires initial clarifications, since the concept of societal rationality lacks clarity and since there exist several partial rationalities.

"Economic rationality" is one of the earliest concepts to appear among partial rationalities. The relationship between the investment of means and goal fulfilment is by tradition a central area of study for economic science. The inability to measure the underlying considerations in objective terms makes it more difficult to speak of "psychological rationality", "rationality in terms of quality of life" or the like.

The concept of rationality plays a decisive part in an extensive political science research project, which has for some years been conducted in Uppsala under the leadership of Professor Leif Lewin: "Politics as rational action". Although such *linguistic usage* may appear alien, there can be no doubt but that

² Strömholm, *Rationalitet - ett användbart begrepp i den juridiska samhällsstyrningen?* In T. Segerstedt *et al.*, *Rationalitetens gränser*, Stockholm 1987, p. 83 *et seq.*

it is necessary, and possible, to discuss a mode of action's rationality even outside the economic sphere. There exist action scenarios, e.g., political or military, where economic considerations have an impact, but only as *part* of a complicated net of influencing factors. Even in a business's consideration of strategy, there may be overriding reasons to reach results, which in the long term yield e.g., recouped economic rationality at another level.

That a *single* form of rationality, e.g., economic rationality - the optimal relation between goal-fulfilment and investment of means - suffices as an alternative or complement to a traditional normative assessment of decision-making within a particular societal framework appears *a priori* unlikely. It appears, among other things, very likely, that here, in the above-discarded graveyard of normative patterns, for reasons of intellectual history alone, one must expect "stored", superordinate and subordinate partial rationalities of great complexity that have to be weighed against each other.

If - and I believe that this thesis can be accepted without extensive argumentation - *goal rationality* is something that can only be clearly perceptible from afar and from a towering height, whereas rationality in "everyday action", which does after all account for 95% of all decisions, is a) difficult to perceive, trapped as it is in goal conflicts and intersecting demands for rationality, and b) appears to a great extent to coincide with exactly the routine norm-bound action that characterizes public activities and which is so often loudly complained about and which it was necessary to attempt to confront with a demand for rationality, is it not high time already here to call off the attempt and concede that we will come no further?

Let us test this line of reasoning a little further. It seems very likely that another type of rationality - let us call it *means rationality* - can reckon with widespread acceptance in a society with such rather uniform values as today's Sweden. Not much reflection is however needed to grasp that he who accepts a path towards untested *goals* for the mere reason that the *means of getting there* are in some manner rational, acts foolishly. A few years ago, I heard a politician in a high position expatiate with great enthusiasm about the rapidity with which one could use a computer-based identification and search system to trace individuals in a given situation. He dwelled a long time on details and finesses; the question, raised by a listener unfamiliar with the world of politics, as to what the overriding purpose of the search itself might be, first dismayed him and then affronted him.

That "rationality" as a criterion for societal systems, organisations, rule complexes and individual rules appears in the form of complexly interwoven, partially contradictory and partially difficult-to-formulate partial rationalities, each with "open doors" facing various established but no less contradictory and difficult - to - analyze value complexes, is on closer reflection scarcely surprising. One can in the various situations that are operative here replace the concept with any comparable, i.e., generalizable, concept embraced by large groups of reasonable people, - e.g., "fairness" - and one will probably find that the same complications arise with equal or even greater force.

The comparison with this concept of fairness, which naturally has not been chosen by chance in this context, lends in reality support to two tentative

conclusions of some significance. It is obvious, that if one were to supplant the criterion of “rationality” in many controversial societal decision-making situations with, e.g., the criterion of “fairness”, the possibility of “reviewing” individual measures would be drastically reduced. Many measures in modern public administration simply do not lend themselves in any reasonable way to being measured by the yardstick of “fairness” alone. They are, from any arguably reasonable standpoint of fairness, indifferent. That criterion simply eludes them.

If one were to interpose the touchstone of “fairness” instead of “rationality” in various phases of assessment, it appears highly likely that the prospects of *consensus* diminish rather quickly in a notional auditorium that is fairly representative. This is, perhaps someone might object, scarcely a strong argument that rationality argumentation differs from fairness considerations, since neither of these criteria excludes the other and since fairness standpoints, with their fragmenting effect, intercede or can intercede, however wide the consensus about the rationality of certain measures. That is of course correct, but an affirmative rationality assessment can in itself have a “calming” effect and produce better prerequisites for an objective fairness argumentation.

Lastly, the conclusions that can be drawn from a comparison between rationality and fairness point nevertheless to a third aspect: there are in reality but few alternative criteria to employ. The yardstick of “fairness”, as we have already said, “eludes” much too often all the trivial, everyday decisions that today's societal governance and conflict resolution produce; the yardstick of “effectiveness” is all too coarse and imprecise.

The foregoing does *not* in any way mean that I consider it condemnable to exclude *viewpoints of fairness* in measuring legal solutions and legal rules. But - and this is essential - these viewpoints must be reserved for situations in which it is really reasonable and meaningful to use them. They must not be squeezed in everywhere. Whatever the legal philosophers may say, notions of fairness are such potent and self-evident elements of the presently prevailing societal ideology that it would be unthinkable to set them aside absent compelling reasons. There are probably however three situations in which the concepts of fairness really enter the scene as strong action-influencing factors. They were, incidentally, not unknown to Aristotle... Firstly, one may cite every decision or measure that encompasses a *distribution of benefits* in society. One usually speaks in this context of “allocative” or “distributive” justice. Secondly, there is the case of assessing questions involving two parties to a *transactional relationship* who have obtained roughly equivalent performances from each other (compensatory, or commutative justice). Thirdly, there is a requirement of *just treatment*, i.e., that everyone be treated alike, e.g., when suspected of crime or in the assessment of performance on examinations.

It should be added that fairness in the presently stated sense usually also closely coincides with *rationality* in the choice of means and in the use of means. Uniform decisions in similar cases do after all mostly ensure great economy of effort.

The tentative conclusion that the above considerations have led us to is scarcely unexpected. A decision-making system that is almost completely based

on *goal fulfilment* instead of *norm conformity in regard to the means employed*, is probably in practice - at least in a modern industrial society of the Western variety - much less dissimilar to an orthodox norm-steered system than the terminological dichotomy might lead an observer to believe. Many potent factors are at play in goal-oriented decision-making; they tend to imbue this brand of decision-making with a *de facto* but also with, in many contexts, a formally normative character especially at the lower levels of decision-making.

At the same time, it seems clear that these practical similarities contain no *guarantees* that goal-oriented decision-making generally and thoroughly comports with overriding norm systems such as e.g., the Swedish Constitution. *Comparaison n'est pas raison* - "comparison is not reason", according to an old French lawyers' proverb. *The similarities* between traditional norm application through norm-bound procedures, on the one hand, goal-steered decisions subject to clear demands on rationality, on the other hand, are substantial; within the given societal framework this is no accident. But the similarity *does not suffice* to state that the rational realization of goals is itself "capable" of supplying the criteria needed to meet the normative requirements of legal decision-making. Goal rationality can never render legal conformity superfluous.

At the level of *principle* it is necessary to take special note of those conflict scenarios that implicate the types of fairness notions described above. *More concretely*, it is necessary to examine point-for-point the constitutional rights under the Instrument of Government (the principal constitutional enactment in Swedish law), the Freedom of the Press Ordinance and the 1991 Freedom of Expression Statute. It is clearly out of the question that a "deregulation" in favour of free goal-steered decisions can be allowed to entail a disassembly of the normative protection of these rights. Here, if not elsewhere, the limits must be drawn for the potential deregulation. One sphere where detailed studies appear necessary, is, e.g., the school system, higher education and research - an overgrown and neglected landscape of Swedish legal science.